

2006

## Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?

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### Recommended Citation

Julian Ku and Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777 (2006).

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# Washington University Law Review

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VOLUME 84

NUMBER 4

2006

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## **DO INTERNATIONAL CRIMINAL TRIBUNALS DETER OR EXACERBATE HUMANITARIAN ATROCITIES?**

**JULIAN KU\***  
**JIDE NZELIBE\*\***

*Contemporary justifications for international criminal tribunals (ICTs), especially the permanent International Criminal Court, often stress the role of such tribunals in deterring future humanitarian atrocities. But hardly any academic commentary has attempted to explore in depth this deterrence rationale. This essay utilizes economic models of deterrence to analyze whether a potential perpetrator of humanitarian atrocities would likely be deterred by the risk of future prosecution by an ICT. According to the economic theory of deterrence, two factors—certainty and severity of punishment—are central to the reduction of crime after taking into account a particular individual's preference for risk. In the context of a possible ICT prosecution, isolating the pool of individuals likely to commit humanitarian atrocities is difficult but not insurmountable. Given that international tribunals are not likely to have independent police powers in the foreseeable future, the*

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*actors most likely to face prosecution are individuals in weak states who have failed politically. In other words, the likely pool will be composed of individuals in weak states who have been forced from political power by local or foreign forces. Examining evidence concerning the fates of failed coup plotters and dictators in Africa—a group that represents a pool of likely perpetrators of atrocities—we show that the probability that this pool of individuals will be subject to a range of other legal and extra-legal sanctions is quite high. Moreover, the severity of the sanctions these individuals are likely to face—death, life imprisonment, and torture—is also likely to be higher than those imposed by an ICT. Thus, prosecution by an ICT will often serve as a weaker substitute, rather than a complement, to pre-existing sanctions. In one situation, however, the threat of ICT prosecution is likely to complement other possible sanctions and serve as a deterrent—where the perpetrator is unlikely to be subject to other sanctions because he is considered to be politically indispensable. But in such circumstances, the ex ante benefits of deterrence from ICT prosecution will likely be outweighed by the ex post harms of prosecuting a spoiler—an individual whose prosecution is likely to generate local political instability. In other words, the prospect of prosecution by an ICT may sometimes exacerbate the risks of humanitarian atrocities. Finally, prosecution by an ICT may also exacerbate conflicts through a political opportunism effect in which local politicians will have an incentive to free-ride off ICT efforts and turn a blind eye to the kinds of institutional reforms that are more likely to prevent future atrocities.*

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## I. INTRODUCTION

In the wake of humanitarian atrocities in the former Yugoslavia, Uganda, Rwanda, Sierra Leone, and Sudan, international criminal tribunals (ICTs), including the permanent International Criminal Court (ICC), have become a regular fixture of the international legal scene. Indeed, the establishment of the ICC in 2000 was considered a milestone by many international lawyers, with the *New York Times* calling it “the biggest change in international law in decades.”<sup>1</sup> For the most part, contemporary justifications for these tribunals stress their potential to deter future humanitarian atrocities. The emerging consensus in human rights circles is that international criminal tribunals are necessary to address what former prosecutor Louise Arbour of the International Criminal Tribunal for Yugoslavia (ICTY) has called “the entrenched culture of impunity” where “the enforcement of humanitarian law is the exception and not the rule.”<sup>2</sup> More importantly, the member states that created these new tribunals have not minced words about what they expect these entities to achieve. For instance, the Security Council Resolution that established the ICTY boldly proclaims that the purpose of that tribunal is “to put an end to [international atrocities] and to take effective measures to bring to justice the persons who are responsible for them.”<sup>3</sup>

But is such widespread optimism about the deterrence potential of ICTs warranted? For instance, is there any credible evidence that there is an

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1. Barbara Crossette, *U.S. Gains a Compromise on War Crimes Tribunal*, N.Y. TIMES, June 30, 2000, at A6.

2. Louise Arbour, *The Prosecution of International Crimes: Prospects and Pitfalls*, 1 WASH. U. J.L. & POL’Y 13, 23 (1999).

3. S.C. Res. 827, at 1, U.N. Doc. S/RES/827 (May 25, 1993), available at <http://www.un.org/Docs/scres/1993/scres93.htm> (follow link for “Resolution 827”).

“underlying culture of impunity” in which perpetrators of genocidal violence routinely face little or no prospect of sanctions? More importantly, how do we know that the pool of individuals likely to commit such atrocities will be meaningfully deterred by the threat of an ICT prosecution? Finally, is it possible that ICT prosecutions could exacerbate the risk of humanitarian atrocities in weak or failing states by reducing the incentives of political spoilers to participate in peace processes?

Despite the salience of these questions, hardly any academic commentary has explored in depth the merits of the deterrence justification for ICTs. More often, the deterrence claim is simply asserted or rejected without much empirical or theoretical analysis.<sup>4</sup> As far as we know, this Article represents one of the first comprehensive efforts to address these questions by applying an economic model of deterrence to a set of empirical data reflecting likely targets of ICT prosecutions.<sup>5</sup>

We argue that, for both legal and political reasons, ICT prosecutions will be directed almost exclusively at individuals engaged in civil conflict within weak or failing states. Focusing on the fates of failed coup plotters in Africa—a pool of individuals who are likely to commit humanitarian atrocities in weak or failed states—we show that there is a significant likelihood that these individuals would face sanctions that are both more certain and severe than any sanction that would be meted out by an ICT. Thus, in many circumstances, an ICT prosecution will serve as a weaker substitute, rather than a complement, to preexisting sanctions against likely ICT targets.

Furthermore, contrary to the culture of impunity thesis, we suggest that offenders commit more atrocities in weak states because they have more *opportunities* to do so, and not because they have a greater *inclination* to commit such atrocities. Because of norms of political accountability and strong state institutions, potential offenders in more mature states face significant constraints on their ability to mobilize violent groups and engage in large-scale humanitarian atrocities. Thus, the higher frequency

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4. Indeed, Mark Drumbl faults both the realist skeptics and optimists for the lack of empirical support for their respective positions on the deterrent value of ICTs. See Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 548 (2005) (“My sense, however, is that th[e] [realist] scholarship is driven more by ideology than by empiricism. In the end, it is as blindly un-nurturing as the celebration of international criminal justice institutions is blindly nurturing.”).

5. One notable recent exception is Michael J. Gilligan, *Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime*, 60 INT’L ORG. 935 (2006) (using game theoretic model to suggest that international criminal tribunals might deter leaders from committing atrocities at the margin). However, Gilligan’s model is theoretical and avoids reaching any empirical conclusions.

of humanitarian atrocities in weak or failed states may be due to the lack of credible institutions and mechanisms within those states that can constrain likely perpetrators of such atrocities. In other words, dictators or rebels in weak states may commit more atrocities not because they do not have to fear any sanctions, but because they have more occasions to engage in such heinous acts. But the deterrence rationale for ICTs fails to distinguish fundamentally between those “push” factors that motivate individuals to commit atrocities from those “pull” factors that make such atrocities possible.

In fact, in certain circumstances, we argue, ICTs might actually exacerbate humanitarian atrocities by prosecuting individuals whose political cooperation is critical to successful peace negotiations in weak or failed states. In such states, political bargains among the elites—including belligerents and spoilers—are often necessary for democratic consolidation and political stability. But since ICT prosecutions are likely to target those individuals whose cooperation is often necessary for political stability, the prosecutions are likely to undermine such bargains or make such bargains unlikely in the first place. Moreover, greater enforcement by an ICT may cause more instability through a perverse political opportunism effect. In other words, since politicians in weak states have an incentive to use ICT prosecutions to accomplish domestic political goals that have little to do with promoting international justice, the formation of an ICT may encourage such politicians to under-invest in domestic institutions or mechanisms that will constrain future genocidal violence.

We wish to add one important caveat to our analysis. This Article does not claim that deterrence is the only plausible justification for ICTs. Indeed, proponents of ICTs have pointed to other worthwhile systemic goals such as the reinforcement of rule of law norms and the need to “honor and redeem the suffering of the individual victim(s).”<sup>6</sup> We do not take any position here as to whether ICTs can successfully accomplish these other goals. Even recognizing these other possible rationales for ICTs, however, many judges and commentators have argued that deterrence should be the primary objective of a criminal enforcement

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6. Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2544 n.22 (1991) (quotations omitted); see also Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2:2 INT'L CRIM. L. REV. 93, 118–20 (2002) (focusing on expressivist rationale for ICTs); Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 543 (2003) (observing that ICTs combine a retributive and deterrent approach).

system.<sup>7</sup> Moreover, many prominent international legal academics, as well as the ICTs themselves, have emphatically proclaimed deterrence as a significant justification for the creation of ICTs.<sup>8</sup>

We also do not engage the burgeoning literature criticizing the efficacy of the ICC because it has not gained the cooperation of powerful countries like the United States.<sup>9</sup> While acknowledging that power politics will sometimes play a critical role in the efficacy of international institutions,<sup>10</sup>

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7. See 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 517, 520–21 (Robert Campbell ed., Thoemmes Continuum 4th ed. 2002) (1879); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 219 (6th ed. 2003); 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 2.1, at 103 (2d ed. 1986). Indeed, the United States Supreme Court has also declared deterrence and retribution to be the key objectives of criminal punishment. See *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997); *Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767, 794 (1994) (O'Connor, J., dissenting) (“Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that it serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitive objective.”); see also *Warren v. U.S. Parole Comm'n*, 659 F.2d 183, 188 (D.C. Cir. 1981) (observing that “the core purpose of the criminal law” is “to regulate behavior by threatening unpleasant consequences should an individual commit a harmful act”).

8. See Overview of the Rome Statute of the International Court (1998–1999), <http://www.un.org/law/icc/general/overview.htm> (describing “effective deterrence [as] a primary objective of those working to establish the international criminal court”) (last visited Nov. 30, 2006); see also MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 218–19 (1997) (emphasizing deterrence role of ICTs); M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 410 (2000) (“The pursuit of justice and accountability, it is believed, fulfills fundamental human values, helps achieve peace and reconciliation, and contributes to the prevention and deterrence of future conflicts.”). Richard Goldstone, the former Chief Prosecutor at the ICTY, has also stressed the potential deterrence effect of ICTs:

If people in leadership positions know there's an international court out there, that there's an international prosecutor, and that the international community is going to act as an international police force, I just cannot believe that they aren't going to think twice as to the consequences. Until now, they haven't had to. There's been no enforcement mechanism at all.

Michael P. Scharf, *The Prosecutor v. Dusko Tadic, An Appraisal of the First International War Crimes Tribunal since Nuremberg*, 60 ALB. L. REV. 861, 868 (1997) (quoting Goldstone).

9. See Diane Marie Amann & M.N.S. Sellers, *The United States and the International Criminal Court*, 50 AM. J. COMP. L. 381 (2002); John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 LAW & CONTEMP. PROBS. 167 (2001); Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 93 (2003); Michael Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156 (2001); Ruth Wedgwood, *Fiddling in Rome*, 77 FOREIGN AFFAIRS 20 (1998). Jenia Iontcheva Turner has also argued that the lack of support for the ICC from key players such as the United States suggests that a less centralized approach to criminal enforcement might be appropriate. See Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1 (2005). Posner and Yoo have argued that the United States withdrawal from the ICC reflects the unwillingness of the United States to be subject to an entity it could not control. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 67–70 (2005). For a comprehensive discussion of the United States approach to the ICC negotiations during the Clinton Administration, see David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47 (2002).

10. For a perspective that argues that the United States resistance to the Treaty of Rome does not reflect deep moral or analytical concerns but is mostly motivated by politics, see Mariano-Florentino

our critique of the role of international criminal tribunals is much broader and more fundamental. We contend that even when there is support for ICTs by powerful countries like the United States, it is still very likely that ICTs will play a marginal, if not counterproductive, role in deterring humanitarian atrocities in the weak or failing states where such atrocities are most likely to be committed.

This paper proceeds as follows. Part II briefly summarizes the main theoretical and empirical assumptions about the capacity of ICTs to deter humanitarian atrocities. We argue that most of these assumptions are dubious, or at a minimum, highly debatable, especially because these assumptions rarely take into account the fact that ICT prosecutions are usually limited to weak or failed states. Part III develops a framework based on the economic model of deterrence to examine the probable deterrent effects of an ICT. Part IV then applies that deterrence model to data on the fates of failed coup plotters in Africa—a pool of individuals likely to be subject to prosecution by an ICT. Contrary to the conventional wisdom, this data suggests that the coup plotters in Africa are not likely to be deterred from committing humanitarian atrocities by the prospect of prosecution by ICTs. Indeed, these individuals are already subject to the risk of a range of sanctions that are usually both much more severe and certain than any sanction that could be meted out by an ICT. Part V sketches briefly an alternative explanation for recurring humanitarian atrocities in weak or failed states that has been overlooked by proponents of ICTs: the *opportunity* rather than the *willingness* or *motive* to commit such atrocities. Part VI explores some of the perverse consequences of prosecution by ICTs, many of which are rooted in the fallible institutional structures and insecurities of regimes in weak or failed states.

## II. DECONSTRUCTING THE DETERRENCE ARGUMENTS FOR ICTS

The last two decades have witnessed an unprecedented proliferation of international criminal tribunals empowered to punish individuals for violations of international crimes. One of the primary justifications for ICT prosecutions of individuals who commit humanitarian atrocities is that such prosecutions will promote reconciliation and deter future actors from committing such atrocities.<sup>11</sup> The importance of this rationale to the

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Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597 (2003).

11. See, e.g., David J. Scheffer, *War Crimes and Crimes Against Humanity*, 11 PACE INT'L L. REV. 319, 328 (1999) (“As instruments of deterrence, the tribunals are formidable partners that cannot



pro-ICT movement is highlighted by wide academic support for permanent as opposed to ad hoc international criminal tribunals. Unlike ad hoc ICTs, supporters of ICTs have argued that a permanent International Criminal Court will be more likely to deter future humanitarian atrocities.

### A. *The Rise of International Criminal Tribunals*

The idea of establishing international criminal tribunals to punish war crimes and humanitarian atrocities dates back to at least the end of World War I, when the victorious Allies agreed to hold international war crimes trials for Germany's defeated emperor Wilhelm II as well as other alleged German war criminals.<sup>12</sup> Although this plan was eventually thwarted by Holland's refusal to surrender the exiled Kaiser and by Germany's post-war resistance, the idea that serious international atrocities require an international as opposed to a domestic criminal process was first established during this period.<sup>13</sup>

At the end of World War II, the victorious Allies resolved to improve upon their earlier efforts by establishing international trials for German and Japanese war criminals. The most famous of these international trials was held in Nuremberg, Germany. U.S. Supreme Court Justice Robert Jackson served as one of the chief prosecutors, and the judges hailed from the Allied victors. For many international law scholars, the Nuremberg trials established crucial precedents for the recognition and enforcement of international law norms against serious war crimes and atrocities like genocide by international, rather than domestic, tribunals.<sup>14</sup>

The success of Nuremberg loomed large during the Balkan wars of the 1990s when Europe faced its first major armed conflict since the end of World War II. Drawing on the Nuremberg example and responding to pressure from international human rights organizations, the United Nations Security Council agreed in 1993 to create that organization's first

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be lightly ignored in the future.”).

12. See Treaty of Peace with Germany art. 227, June 28, 1919 (Treaty of Versailles), available at <http://history.sandiego.edu/gen/text/versaillestreaty/vercontents.html> (agreeing to publicly “arraign [Kaiser] for a supreme offence against international morality and the sanctity of treaties” before international court with judges from America, Britain, France, Italy, and Japan); see also *id.* art. 228 (requiring surrender of any other Germans who had “committed acts in violation of the laws and customs of war”). For a general discussion of these trials, see GARY A. BASS, *STAYING THE HAND OF VENGEANCE* 75–105 (2000).

13. See BASS, *supra* note 12, at 104–05.

14. See, e.g., Ruti Teitel, *Transitional Justice: Postwar Legacies*, 27 *CARDOZO L. REV.* 1615, 1615 (2006) (“Nuremberg established the principle of individual criminal accountability for human rights violations perpetrated against civilians in wartime: that certain crimes are so heinous that they violate the ‘law of nations’ and may be prosecuted anywhere.”).

international tribunal empowered to punish individuals for war crimes and humanitarian atrocities.<sup>15</sup> The establishment of this tribunal, known as the ICTY, was followed in 1996 by the establishment of a second international criminal tribunal to punish perpetrators of atrocities during the 1994 Rwandan civil war. Similar tribunals were also set up to punish atrocities in Sierra Leone and Cambodia.<sup>16</sup>

All of these tribunals are ad hoc tribunals with limited jurisdiction, usually confined to atrocities arising out of a particular conflict, and whose mandates will eventually expire.<sup>17</sup> In 2002, however, a number of countries agreed to establish a permanent International Criminal Court (ICC) with broad jurisdiction over atrocities occurring in the territory of any state party to the ICC treaty.<sup>18</sup> Nearly one hundred countries have signed and ratified the ICC statute.<sup>19</sup>

Despite their differences, all international criminal tribunals share some important characteristics. Importantly, all of the ICTs are avowedly *international* rather than national institutions. Created by international agreement or the action of an international institution like the U.N. Security Council, the ICTs are purposely staffed by nationals who take an oath of “independence” and who are not responsible to their home countries.<sup>20</sup>

For both legal and political reasons, any ICT prosecutions in the foreseeable future will be targeted almost exclusively at offenders in weak or failed states.<sup>21</sup> All existing ad hoc ICTs, for instance, require U.N.

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15. S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993), available at <http://www.un.org/Docs/scres/1993/scres93.htm> (follow link for “Resolution 808”). For a detailed overview of the establishment and operation of the ICTY, including the personal dynamics of the prosecutors who staffed the court, see JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNAL* (2003).

16. Both the Sierra Leone and Cambodia tribunals are different in that they are “hybrid” tribunals mixing local, national judges with international ones. The ICTY and ICTR are purely international tribunals without any judges or prosecutors from the countries involved in the conflicts. For a defense of these hybrid tribunals, see Turner, *supra* note 9.

17. See, e.g., S.C. Res. 1503, para. 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003), available at [http://www.un.org/Docs/sc/unscl\\_resolutions03.html](http://www.un.org/Docs/sc/unscl_resolutions03.html) (follow link for “Security Council resolution 1503”) (calling “on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010” and amending authorizing statutes to do so).

18. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

19. See International Criminal Court, Assembly of States Parties, <http://www.icc-cpi.int/asp/statesparties.html> (for list of states parties to Rome Statute).

20. Rome Statute, *supra* note 18, art. 40.

21. Weak and failed states are generally defined as states that cannot deliver basic political “goods” like security, education, health services, or economic opportunity. See Robert I. Rotberg, *The New Nature of Nation-State Failure*, 25 WASH. Q., Summer 2002, at 85–87.

Security Council resolutions to authorize prosecution of crimes and all have been targeted toward weak or failed states like Rwanda or Yugoslavia. Understandably, there have been no serious proposals for establishing ad hoc ICTs to investigate or prosecute potential offenses by strong veto-wielding states like Russia or the United States because of the necessity of a Security Council resolution. Similarly, the legal mandate of the ICC is limited to “the most serious crimes of international concern” including genocide, crimes against humanity, war crimes, and crimes of aggression—offenses that are more likely to occur in weak or dysfunctional states.<sup>22</sup> Moreover, the ICC’s jurisdiction extends only to the territories or nationals of states that have acceded to the Rome Statute.<sup>23</sup> Finally, the ICC can only exercise jurisdiction if a state party is “unwilling or unable” to genuinely carry out an investigation or prosecution of a potential offense.<sup>24</sup>

The combined effect of these legal limitations is that mature states, especially those with powerful militaries which might otherwise be exposed to ICC prosecution, can avoid the reach of the ICC simply by refusing to join the ICC Statute. Indeed, some of the most militarily powerful and populous countries in the world (China, Russia, Turkey, Indonesia, India, Pakistan, Israel, and the United States) have either refused to sign or refused to ratify the ICC Statute.<sup>25</sup> The United States has gone farther and signed a number of “Article 98” agreements requiring states that are party to the ICC to grant immunity to U.S. troops operating in those states.<sup>26</sup> Even powerful states that have joined the ICC, like Australia, the United Kingdom, and France, are somewhat protected from

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22. Rome Statute, *supra* note 18, art. 5.

23. *Id.* art. 13.

24. *Id.* art. 17(1) (directing ICC to refuse to admit cases where “[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution” or where “[t]he case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute”).

25. See International Criminal Court, *supra* note 19. See also CENTRAL INTELLIGENCE AGENCY WORLD FACTBOOK, <http://www.cia.gov/cia/publications/factbook/index.html> (last visited Nov. 30, 2006) (the United States, China, India, Turkey, and Israel all rank in the top twenty military powers, ranked by military expenditures). As Goldsmith argues, strong states like the United States that have large overseas military commitments are highly unlikely to join the ICC unless that institution is subject to political control through the Security Council. Goldsmith, *supra* note 9.

26. The United States appears to have signed nearly 100 such agreements. See Richard Boucher, Spokesman, U.S. Dep’t of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), <http://www.state.gov/r/pa/prs/ps/2005/45573.htm> (announcing signing of 100th agreement); see generally Rachel Harkavy, *Picking Our Battles: A Strategy for the United States in the Wake of Mexico’s Becoming a State Party to the International Criminal Court*, 40 GA. L. REV. 915, 919 n.10 (2006).

ICC prosecutions because those states are likely to satisfy the ICC's international due process standards for investigating and prosecuting potential offenders on a domestic level.<sup>27</sup>

### *B. International Criminal Justice and Deterrence*

Despite these limitations, the creation of the ICC and the continued work of the ad hoc tribunals represent a huge victory for supporters of a system of international criminal justice. Legal academics have been some of the most vocal and prominent advocates for creating and supporting ICTs. Most of the academic literature has eschewed normative justifications for ICTs and focused on improving the institutional design of ICTs to ensure their effectiveness.<sup>28</sup> To the extent academic supporters have bothered to offer justifications for the creation and support of ICTs in general, and the ICC in particular, they almost always claim that ICTs can deter or prevent future humanitarian atrocities.<sup>29</sup>

The deterrence rationale for ICTs usually takes the form of a generalized argument in favor of justice for perpetrators of humanitarian atrocities and in opposition to impunity and realpolitik. This rationale assumes not only that ICTs provide retribution for victims of war crimes and atrocities by punishing perpetrators, but that the very pursuit of justice can also prevent future atrocities. As one of the leading advocates for ICTs explains, “[t]he pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts.”<sup>30</sup> The millions of victims of humanitarian atrocities provide “grim testament to the failure of the international community to . . . prevent aggression and enforce international

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27. Rome Statute, *supra* note 18, art. 17(2) (directing ICC to consider “principles of due process recognized by international law” when determining whether state is unable or unwilling to prosecute). Consensus on exactly how to apply these principles was missing at the original conference establishing the court. See John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41 (Roy S. Lee ed., 1999).

28. See Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633 (2003); Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005).

29. Some academics have recognized the problems with assuming an ICT can deter atrocities, although most do so only in the context of proposals to increase the use and powers of ICTs so as to increase the likelihood of deterrence. See, e.g., Diane Marie Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities*, THIRD WORLD LEGAL STUDIES 169, 174 (2000–2003); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002).

30. M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191, 192 (2003).

humanitarian law.”<sup>31</sup> Indeed, former ICTY judge Antonio Cassese suggests that the failed efforts to punish the perpetrators of the Armenian genocide “gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later.”<sup>32</sup>

This broad notion that justice will deter future atrocities (or that failing to provide justice will encourage future ones) is reflected in the preamble to the statute creating the International Criminal Court. That statute, which has been signed and ratified by nearly 171 countries, declares that the ICC is “[d]etermined to put an end to impunity for the perpetrators . . . and thus to contribute to the *prevention* of [serious international] crimes.”<sup>33</sup>

Elaborations of the relationship between ICT justice and deterrence take two forms. First, some advocates have suggested that ICTs are uniquely positioned to prevent atrocities in the long term by fostering conditions for the emergence of a political culture where such atrocities are no longer acceptable. As Payam Akhavan, a former legal advisor to the ICTY has explained, ICT prosecutions can establish “unconscious inhibitions against crime” or a “condition of habitual lawfulness”<sup>34</sup> in a society where such atrocities were previously accepted.

Second, and more commonly, ICT supporters have argued that ICTs will have immediate deterrence effects as long as they are designed properly and provided adequate authority and resources. Deterrence of atrocities will occur when ICTs can achieve the same frequency and consistency in the prosecution of international crimes as domestic legal systems achieve in the prosecution of domestic crimes. Deterrence thus requires further support for ICTs and superior institutional design. Professor Meron’s formulation is indicative of this view: “Instead of despairing over the prospects of deterrence, the international community should enhance the probability of punishment by encouraging prosecutions before the national courts, especially of third states, by making ad hoc Tribunals effective, and by establishing a vigorous, standing international criminal court.”<sup>35</sup>

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31. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 384 (2000).

32. See Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998).

33. Rome Statute, *supra* note 18, Preamble (emphasis added).

34. Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 16 (2001) (quoting Johannes Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949, 951 (1966)).

35. Theodor Meron, *From Nuremberg to the Hague*, 149 MIL. L. REV. 107, 110–11 (1995).

Indeed, a 2005 diplomatic dispute over the U.N. Security Council's referral of Sudan to the new International Criminal Court demonstrates the central importance of deterrence to supporters of ICTs. The United States initially opposed a referral of Sudan to the ICC, and advocated instead for the creation of an ad hoc tribunal on the model of the ICTR—the tribunal used in Rwanda.<sup>36</sup> Thus, at least publicly, the United States favored an international criminal prosecution of atrocities committed in Sudan. The only dispute was over which type of ICT to use: ad hoc or permanent.<sup>37</sup>

Despite the United States' support for active prosecution of Sudanese war criminals, leading non-governmental organizations and ICT advocates sharply criticized the United States' opposition to an ICC referral. While conceding that ad hoc ICTs could prosecute and punish perpetrators in Sudan, they argued that such ad hoc ICTs could not *deter* future atrocities.<sup>38</sup> Unlike a permanent ICC, the ad hoc ICTs are only created after a particular set of atrocities occurs and with a necessarily limited jurisdiction. A permanent ICC prosecution would not only punish individuals in Sudan, but also *deter* future atrocities in places other than Sudan.<sup>39</sup> The Sudan ICC referral flap highlights the importance of deterrence to ICT supporters. If the ICTs were justified on purely retributive grounds irrespective of deterrence effects, then the pre-ICC system of selective ad hoc ICTs would be equally attractive as the ICC. It is deterrence, however, that gives the ICC its distinctive rationale.

All versions of the ICT deterrence rationale rely on some version of the “culture of impunity” thesis. This is the assumption that ICTs can deter future atrocities by ending a culture where offenders escape sanctions for committing humanitarian atrocities. By subjecting such offenders to the credible threat of an ad hoc ICT or ICC prosecution, such a culture of impunity would slowly be undermined. Realizing that an ICT prosecution is possible, offenders would be more likely to refrain from committing

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36. See Warren Hoge, *U.S. Lobbies U.N. on Darfur and International Court*, N.Y. TIMES, Jan. 29, 2005, at A8.

37. For a description of the U.S. government's official position, see Richard Boucher, Spokesman, U.S. Dep't of State, Daily Press Briefing (Feb. 1, 2005), <http://www.state.gov/r/pa/prs/dpb/2005/41453.htm>. The United States eventually relented and abstained from a vote referring Sudan to the ICC.

38. See, e.g., Nicholas Kristof, *Why Should We Shield the Killers?*, N.Y. TIMES, Feb. 2, 2005, at A21 (quoting Kenneth Roth, spokesman for Human Rights Watch, who stated “[t]he I.C.C. could start tomorrow saving lives . . . [but w]ith the [ad hoc] tribunal route, you're talking about another year of killing”).

39. See *id.*; see also Samantha Power, *Court of First Resort*, N.Y. TIMES, Feb. 10, 2005, at A23 (arguing that permanent court is more effective than ad hoc court).

atrocities.<sup>40</sup> As Elizabeth Kiss puts it, “just as wounds fester when they are not exposed to the open air, so unacknowledged injustice can poison societies and produce the cycles of distrust, hatred, and violence that we have witnessed in many parts of the world.”<sup>41</sup>

### C. Evaluating the Deterrence Effect of ICTs

Although deterrence of future humanitarian atrocities is plainly an important justification for establishing ICTs, the problem of deterrence has been addressed almost exclusively in the context of scholarship analyzing the institutional design and effectiveness of ICTs.<sup>42</sup> Most of the scholarship tends to analyze, often from a very normative point of view, whether ICTs are effective in bringing justice to war-torn communities and deterring future perpetrators of atrocities, given certain institutional design features.<sup>43</sup> For instance, Professor David Wippman argues that specific institutional limitations of the ICC, such as the requirement of a Security Council referral if a state does not assent to jurisdiction, make it unlikely that the ICC will be able to prosecute the perpetrators of atrocities in many internal conflicts.<sup>44</sup> But there is almost no scholarship attempting to analyze whether, as an empirical matter, ICTs are likely to have, or actually have had, any deterrence effect on perpetrators of humanitarian atrocities.<sup>45</sup>

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40. Some evidence for this thesis is offered by anecdotes, such as this one from leading ICT advocate Samantha Power:

Skeptics say that international courts will never deter determined warlords. Musa Hilal, the coordinator of the deadly Janjaweed militia in Darfur, gave me a very different impression when I met with him soon after the Bush administration had named him as a potential suspect. He had left Darfur and was living in Khartoum, courting journalists in the hopes of improving his reputation. Almost as soon as I sat down with him, he began his defense. Like his victims, he had only one place on his mind. “I do not belong at the Hague,” he said.

Power, *supra* note 39.

41. Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Retroactive Justice*, in TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 68, 71–72 (Robert I. Rotberg & Dennis Thompson eds., 2000).

42. See, e.g., Sadat & Carden, *supra* note 31, at 384.

43. See Jose E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2079–80 (1998) (doubting the effectiveness of deterrence in context of mass violence); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1254–55 (2000) (doubting the deterrence value of the ICTY and the ICTR for crimes against humanity).

44. See Rome Statute, *supra* note 18, art. 13 (authorizing jurisdiction of ICC only in cases referred by a member of the ICC or by a referral from the U.N. Security Council).

45. The only exceptions to this dearth of scholarship are found in the international relations literature. See Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573 (2002); Jack Snyder & Leslie

One possible reason for the dearth of empirical studies on the deterrence effect of ICTs is that such studies are not possible. For instance, some commentators have argued that debates about deterrence in the ICT context are misplaced because there is no way to prove empirically that any particular ICT prosecution deters crime.<sup>46</sup> While these commentators are correct to suggest that proof of a perpetrator's state of mind will often prove difficult if not impossible to measure, it is not clear that such proof is at all necessary to measure the likelihood of deterrence.

An alternative approach would be to measure the correlation between the prosecution of certain crimes and the change in the levels of such crimes, an approach that is commonly used in empirical assessments of the prosecution of domestic crimes.<sup>47</sup> Furthermore, one can employ a risk assessment approach to measure the empirical probability that a perpetrator will be deterred by a particular sanction, given the existence of preexisting informal or formal sanctions, as we do in this paper. This approach tries to assess the current risks associated with the commission of certain crimes and asks whether future deterrence measures alter those risks.

Given the importance of the deterrence rationale for supporters of ICTs, the lack of any empirical inquiry into this rationale in existing ICT scholarship is deeply unsatisfying. To the extent that ICTs continue to play a key role in international relations, the empirical question can no longer remain unaddressed. In the next two sections, we offer a model for measuring the deterrence effects of ICTs and an empirical study designed to test this model.

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Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 5 (Winter 2003–2004); see also Miklos Biro et al., *Attitudes Toward Justice and Social Reconstruction in Bosnia and Herzegovina and Croatia*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY, 183, 192–95 (Eric Stover & Harvey M. Weinstein eds., 2004) (reporting on surveys of post-war Balkan populations about ICTs).

46. David Scheffer, *Should the United States Join the International Criminal Court*, 9 U.C. DAVIS J. INT'L L. & POL'Y 45, 51 (2002). Scheffer states:

[W]hen you have a permanent international court standing, I think there will be a possible deterrence effect. For people to say there will be no deterrence at all is as factually unprovable as to say there will be deterrence. You can't prove that. How do you prove that? How do you prove the state of mind of a perpetrator of these crimes . . . ?

*Id.*; see also LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 51 (2002) ("Certainly, it is hoped, although not empirically demonstrable, that erecting a system of international criminal justice . . . will prevent the reoccurrence of abuses and assist in repairing the havoc wreaked upon society thereby.").

47. See Samuel Cameron, *The Economics of Crime Deterrence: A Survey of Theory and Evidence*, 41 KYKLOS 301 (1988); Steven D. Levitt, *Why Do Increased Arrest Rates Appear to Reduce Crime: Deterrence, Incapacitation, or Measurement Error?* 36 ECON. INQUIRY 353 (1998).



### III. ECONOMIC MODELS OF CRIME: THE LOGIC OF DETERRENCE

A theory for how deterrence prevents crime is developed most thoroughly in economics literature. According to that literature, the two key elements contributing to the reduction of crime are the certainty and the severity of punishment.<sup>48</sup> In a public enforcement model, certainty captures the overall likelihood that a criminal will be punished for his misdeeds; it is an element that combines the probability of arrest with the probability that the criminal will be convicted after arrest. Severity of punishment refers to the consequences of increasing the punitive quality of the punishment, such as extending the length of a prison term or substituting the death penalty for imprisonment. Overall, the theoretical model suggests that whether or not a criminal will commit an act depends on his view of the possibility of a sanction; he will only commit a crime when the expected benefits exceed the expected sanction.

The relative weight of severity versus that of certainty in deterring crime has been the source of much debate in the economics literature of crime.<sup>49</sup> For the purposes of this paper, we need not engage that debate; it suffices that both severity and certainty play a role in deterring crime. Moreover, as Tullock has observed, this question may not necessarily be relevant:

Suppose a potential criminal has a choice between two punishment systems: One gives each person who commits burglary a one-in-100 chance of serving one year in prison; in the other there is a one-in-1,000 chance of serving ten years. It is not obvious to me that burglars would be very differently affected by these two punishment systems.<sup>50</sup>

In any event, the formal thrust of much of the literature is to determine whether the sanction is set at a high enough level to optimize deterrence after balancing the social costs of the activity against the costs of enforcement.

The theoretical logic that underpins the economic model of deterrence is both compelling and seductive. However, it is subject to two key

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48. See generally Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

49. See, e.g., Becker, *supra* note 48, at 172; S. Decker & C.W. Kohfield, *Certainty, Severity, and the Probability of Crime: A Logistic Analysis*, 19 POL'Y STUD. J. 2 (1990); Sylvia Mendes & M.D. McDonald, *Putting Severity Back in the Deterrence Package*, 29 POL'Y STUD. J. 588 (2001).

50. Gordon Tullock, *Does Punishment Deter Crime*, 36 PUB. INT. 103, 107 (1974) (citations omitted).

qualifications. First, the model must account for an individual criminal's preference for risk.<sup>51</sup> All else being equal, the stronger the preference for risk, the more severe the sanction has to be for it to be effective. Under certain circumstances, individual preferences for certain benefits of crime can be so strong that the risk of sanctions has little or no deterrent effect. For instance, Margalioth and Blumkin use the example of the suicide terrorist to illustrate one group for whom sanctions will have no deterrence effect.<sup>52</sup> They argue that since the suicide terrorist is willing to make the ultimate sacrifice in carrying out his criminal enterprise, only incapacitation can serve the goal of minimizing suicide terrorist threats.<sup>53</sup>

Second, the general deterrence model must account for the availability of extra-legal or informal sanctions. These often refer to informal self-help sanctions such as shame, victim retaliation, or other vigilante actions.<sup>54</sup> For instance, in their study of drug robberies, Jacobs et al. show that those who rob drug dealers face significant risks of grave informal sanctions; since the drug dealers cannot report the crime to the authorities, they have strong incentives to retaliate.<sup>55</sup> If both informal and formal sanctions exist for a particular offense or legal violation, however, there is a risk that the deterrent effect of the formal sanction will be discounted by a rational offender.<sup>56</sup> In other words, any criminal justice system that imposes a weaker sanction than preexisting formal or informal alternatives is less likely to produce a credible deterrent bite.

According to this view, a preexisting informal or formal sanction may serve as a substitute for other formal sanctions because it may also exhibit

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51. As Becker observed in his original deterrence model, the deterrence force of sanctions depends on the individual's attitude towards risk. See Becker, *supra* note 48, at 178–79.

52. See Yoram Margalioth & Tomer Blumkin, *Targeting the Majority: Redesigning Racial Profiling*, 24 YALE L. & POL'Y REV. 317.

53. For a discussion of such informal threats, see Bruce Jacobs et al., *Managing Retaliation: Drug Robbery and Informal Sanction Threats*, 38 CRIMINOLOGY 171 (2000).

54. See *id.* at 172–74.

55. See *id.* at 189.

56. Sometimes, the combined range of informal and formal sanctions for a particular crime may be too high and thus result in over-deterrence. For some discussion of this phenomenon, see Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1745 (2005). Indeed, some scholars have suggested that in a case where the legal sanction provides the optimal level of deterrence for the relevant offense, then any resulting nonlegal sanctions should be deducted from the legal sanctions. See Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages*, 30 J. LEGAL STUD. 401 (2001). But where the underlying crime produces no countervailing social benefit, such as genocide, mass rape, or murder, there is no real concern of over-deterrence. In such situations, there is no amount of the targeted crime that would be socially desirable.

similar,<sup>57</sup> if not more significant, deterrence effects.<sup>58</sup> Indeed, certain scholars have argued that private deterrence efforts might actually represent a more efficient alternative to public enforcement for fighting certain kinds of criminal offenses, such as cybercrimes.<sup>59</sup> In any event, a simple example illustrates how informal sanctions can substitute for public enforcement efforts. Suppose a criminal has a 40% chance of getting arrested when he commits a burglary and then a 50% chance of getting convicted after getting arrested. Furthermore, suppose that if convicted this same criminal will definitely serve a one-year sentence. Accordingly, this criminal's expected formal sanction for committing burglary will be equal to a 20% chance of serving a one-year sentence—or less than three months. But if we also suppose that the same burglar also faces a 50% chance of being subject to self-help retaliation by victims, this informal sanction by the victims may simply overwhelm or displace the effect of the formal sanction. In other words, the informal sanction may serve as a stronger substitute for the formal sanction because it is likely to be both more certain and severe. Thus, if we observe an individual committing a burglary in this scenario, we may safely assume that the individual is not likely to be easily deterred given the plausible range of the probabilities and severities of sanctions.

Of course, our analysis does not suggest that a risk-loving individual will be completely insensitive to the prospect of cumulative criminal sanctions. Indeed, it is safe to assume that additional sanctions might have some effect on a rational offender's calculus. But if the additional sanctions are likely to be both less severe and less certain than preexisting sanctions, then any further deterrent effect is likely to be marginal. Take, for instance, the ongoing debates in the law and economics literature about whether the death penalty actually deters homicides.<sup>60</sup> Certain commentators have argued that if the prospect of being subject to the death

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57. In economic parlance, substitutes refer to goods that compete with each other, while complements refer to goods that go together. See WALTER NICHOLSON, *INTERMEDIATE MICROECONOMICS AND ITS APPLICATION* 98 (4th ed. 1987).

58. See POSNER, *supra* note 7, § 22.1 (suggesting that public and private forms of crime prevention efforts could be substitutes); see also Bruce Benson & Brent Mast, *Privately Produced General Deterrence*, 44 J.L. & ECON. 725, 727 (2001); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 343 (1984) (“[P]ublic enforcement and private prevention are alternative means of reducing crime and . . . there is an inverse relationship between them.”).

59. See, e.g., Neal K. Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1077–80 (2001).

60. For a survey of the literature, see John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005).

penalty is significantly low and if the punishment itself does not affect the life expectancy of death row inmates, then it might not have much of a deterrent effect.<sup>61</sup>

For instance, Katz, Levitt, and Shustorovich show that as of 1997, only 2% of those on death row were actually executed, and even for this small group there was a significant time-lag between sentencing and execution.<sup>62</sup> Comparing the relative frequency of prison death rates to the fates of those on death row, they surmise that prison conditions are likely to have a greater deterrent effect than capital punishment.<sup>63</sup> More importantly, given the empirically low probability of ever being subject to the death penalty, they conclude that is unlikely that the “the fear of execution would be a driving force in a rational criminal’s calculus.”<sup>64</sup> In other words, they suggest that the cumulative effect of capital punishment is likely to exercise only a marginal deterrent effect on a pool of offenders who already face a significantly higher risk of dying because of prison conditions. To be sure, by using this example we do not intend to endorse any empirical result in the ongoing debates about the deterrent effects of the death penalty. What is important is that examining the scope of preexisting sanctions provides a promising methodological approach for understanding the deterrent effect of additional sanctions in general.

One might argue that even if formal sanctions serve as imperfect substitutes for informal sanctions, a society may still prefer to maintain formal sanctions for expressive reasons. Regardless of the individual deterrence effects of the formal sanction, we may still want to criminalize certain activities in order to communicate to possible future offenders that the society devalues such actions.<sup>65</sup> In this picture, the expressive function of criminalizing the action may have a secondary deterrence value as a form of public norm that discloses what a society is unwilling to tolerate as acceptable social behavior. Some commentators have suggested that the

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61. See Lawrence Katz et al., *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318 (2003).

62. See *id.* at 319–20.

63. See *id.* at 320.

64. *Id.*

65. Stephanos Bibas & Richard Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 123 (2004) (“Offenders, victims, and society interpret the failure to punish to mean that the crime is not really wrong and that the offender is free to keep doing it.”); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1407–35 (2005) (demonstrating that perceived legitimacy and enforcement of certain laws can affect how individuals perceive the legitimacy of other aspects of the legal system); see Dan M. Kahan, *What do Alternative Sanctions Mean*, 63 U. CHI. L. REV. 591, 593 (1996) (observing that the goal of criminal punishment goes beyond inflicting harm on specific individuals but also includes signifying the society’s moral condemnation of an action).

prosecution of humanitarian abusers by ICTs can also serve an expressive function in communities afflicted by communal atrocities.<sup>66</sup>

But when a formal law criminalizes a certain activity, its expressive function might still be very limited if existing informal or alternative sanctions are severe enough. Indeed, the expressive function of a formal sanction might become progressively diluted once there is a hierarchy of alternative communities that also sanction the relevant activity. Consider the following example. Suppose that a certain close-knit criminal gang sanctions the stealing of drugs from other gang members with the penalty of death. Suppose further that the relevant jurisdiction where the gang members live decides to also sanction the stealing of drugs and makes it punishable by a four-year maximum jail sentence. Would this latter sanction have an expressive value to gang members that trumps the expressive value of the sanction meted out by the gang leaders? Probably not. Indeed, to the extent gang members may tend to identify more closely with the gang than with the broader community, the expressive or educative function of the formal sanction may be trivial or non-existent.

Of course, if the relevant alternative community that does the sanctioning is even more well-defined than a local gang, for example a nation-state within the international community of states, then additional sanctions by the international community are likely to have even less of an expressive or educative social value. As José Alvarez demonstrates with respect to the Rwandan ad hoc tribunal, most victims preferred local adjudicatory measures to ICTR prosecutions for the simple reason that local tribunals were more likely to be responsive to victims' preferences regarding issues of procedural and substantive justice.<sup>67</sup>

Consequently, the relationship between formal and informal sanctions underscores the need to examine the tradeoffs that occur when one chooses among alternative enforcers. As Bruce Jacobs et al. have observed, “[W]hy should offenders elect to reduce their chance of getting arrested [by law enforcement] at the cost of increasing their odds of being killed [by victims]?”<sup>68</sup> From a criminal policy perspective, the idea that certain informal sanctions can displace the effect of formally imposed sanctions should alert governments that investing their limited resources in

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66. See Diane Marie Amann, *supra* note 6, at 118; see also Drumbl, *supra* note 4, at 592–95.

67. See José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 *YALE J. INT'L L.* 365, 410–12 (1999) (“[I]nternational tribunals are accountable to, and respond most readily to, international lawyers’ jurisprudential and other agendas and only incidentally to the needs of victims of mass atrocity.”).

68. Bruce Jacobs et al., *supra* note 53, at 172.

mechanisms that increase incapacitation of offenders may be more effective than trying to influence the incentives of a category of criminals who are not easily deterred.

#### IV. THE EVIDENCE OF THE FATES OF AFRICAN COUP PLOTTERS: DEBUNKING THE CULTURE OF IMPUNITY THESIS

As discussed in Part I, the deterrence rationale for ICTs assumes that there is a “culture of impunity” in weak states. As Sadat puts it, “One of the primary obstacles to establishing the rule of law . . . has been the culture of impunity that has prevailed to date. Genocidal leaders flaunt their crimes openly, unconcerned about international reaction, which they suspect will range from willful blindness . . . to diplomatic censure . . . .”<sup>69</sup> Commentators often argue that this purported culture of impunity tends to exacerbate long-standing cleavages in vulnerable societies and makes lasting peace arrangements impossible.<sup>70</sup>

At first glance, it does seem that many of the perpetrators of the worst kinds of humanitarian atrocities go unpunished. After all, anecdotes abound of indicted human rights abusers in the former Yugoslavia who are at large and roam freely through the Serbian countryside.<sup>71</sup> But looks, especially first glances, can be deceiving. To begin, these anecdotes do not adequately capture the fates of potential perpetrators who were incapacitated before they could do any significant harm to their victims. The quick glance also does not capture the true risks and fates of those perpetrators who do succeed in their quest to inflict atrocities. For every Mladic who seems to escape any formal sanction, there are probably dozens, if not hundreds, of other perpetrators of atrocities whose fates are less fortunate. In other words, none of the existing anecdotes necessarily support the presupposition that an underlying culture of impunity exists in weak states. More importantly, to the extent that some perpetrators of atrocities do evade punishment, it is not clear how one can evaluate claims that ICTs will effectively address any shortcomings or gaps among preexisting sanctions in weak states.

The economic model of crime deterrence offers one promising framework for evaluating the deterrence effects of ICTs. As noted above,

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69. SADAT, *supra* note 46, at 49.

70. *See* Kiss, *supra* note 41.

71. *See, e.g.*, Carla Del Ponte, Prosecutor of the Int'l Criminal Tribunal for the Former Yugoslavia, Address to the Security Council (Nov. 23, 2004), <http://www.un.org/icty/pressreal/2004/p917-e.htm> (describing nearly twenty fugitives named in Security Council resolutions or ICTY indictments who remained at large).

the model suggests that deterrence of potential perpetrators will depend upon the severity and certainty of punishment by ICTs, the individual risk preferences of potential perpetrators, and the likelihood of other preexisting sanctions.<sup>72</sup> The “severity and certainty” factors support the claims of scholars that ICT deterrence will only be improved by bolstering ICT resources and increasing the frequency of ICT prosecutions. But any attempt to apply the economic model of deterrence to ICTs must confront the likelihood that preexisting informal and formal sanctions might render negligible any additional deterrent effect of ICT prosecutions. In this Part, we report on data gathered on a set of individuals who represent likely targets of ICT prosecutions—coup plotters in Africa during the post independence period. This data suggests that the strong likelihood that a perpetrator of humanitarian atrocities will be subject to a range of severe and certain preexisting sanctions significantly reduces any expected deterrence effect of ICT prosecutions.

#### A. *The Methodology*

The relatively few ICT prosecutions and even fewer ICT trials make it difficult to generalize about the certainty and severity of ICT punishment. But the procedural and political constraints that ICTs face make it unlikely that they will be the primary vehicles for the prosecution of humanitarian atrocities. For instance, under the Rome Statute, the ICC can only prosecute claims when the authorities in the affected state are unwilling or unable to do so.<sup>73</sup> Furthermore, since the ICC and the ad hoc ICTs lack any independent enforcement power, they will also have to depend on the goodwill of member states to hunt down and prosecute suspects.<sup>74</sup> Finally, the severity of ICT punishments will likely be constrained by the prohibition of capital punishment in all ICT systems.<sup>75</sup> While the small sample of ICT prosecutions makes it difficult to generalize at this stage

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72. See discussion in Part III.

73. Rome Statute, *supra* note 18, art. 17(1)(a) (requiring ICC Prosecutor to deem inadmissible any case “being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution”).

74. See Goldsmith, *supra* note 9 (arguing that United States non-participation undermines ICT enforcement).

75. See, e.g., Rome Statute, *supra* note 18, art. 77(1)(b) (allowing maximum penalty of life imprisonment “when justified by the extreme gravity of the crime”); Statute of the Tribunal for the Former Yugoslavia, art. 24(1) (May 25, 1993) (amended Feb. 28, 2006), *available at* <http://www.un.org/icty/legaldoc-e/basic/statut/statute-feb06-e.pdf> (penalties “limited to imprisonment”); Statute for the International Tribunal for Rwanda, art. 23 (Nov. 8, 1994), *available at* <http://69.94.11.53/ENGLISH/basicdocs/statute.html> (penalties limited to imprisonment).

about the likely severity of future ICT sanctions, it is safe to assume that such sanctions will be limited to prison sentences or property forfeiture.<sup>76</sup>

One aspect of the deterrence model, however, can be tested empirically over a broad set of data. One can assess the deterrence effect of ICTs in part by reviewing the likelihood that an ICT target would be subject to alternative sanctions. Even if the certainty of ICT punishments is assumed to be quite robust, the comparatively greater certainty of other preexisting sanctions might undermine the deterrence effect of ICTs. Similarly, if the severity of preexisting sanctions is likely to be greater than the severity of ICT punishments, this too would reduce or eliminate any deterrence effect of ICTs.

An empirical study which evaluates the likelihood and severity of preexisting informal and formal sanctions could test the extent of this substitution effect. Such a study would not resolve conclusively the question of the certainty of ICT prosecutions, but it might make such a determination unnecessary. Even if there is a significant probability of an ICT prosecution for every category of humanitarian atrocities (a highly unlikely and generous assumption), it might nonetheless be swamped by the greater deterrence effect of preexisting formal and informal sanctions.

#### *B. The Data: Isolating Likely Humanitarian Offenders*

The first task in assessing the deterrence effect of ICTs is to isolate the group of individuals most likely to be prosecuted by ICTs. To do so, we review data gathered on the fates of African coup participants for the period 1955–2003. This information was collected in part from a data set on coup events in Africa put together by Patrick McGowan.<sup>77</sup> McGowan's data set covers all military coups d'état, failed coups, and reported coup plots for all independent African states from January 1956 through December 2003. We built upon McGowan's database by assembling an expanded data set that examines the fates of the coup participants in each category of coup events. We gathered most of our information from a variety of news sources, including the following: archives on the *Lexis-Nexis* news service, descriptive data files from McGowan's event file, online newspaper sources like the *New York Times*, and John Wiseman's *Political Leaders in Black Africa: A Biographical African Dictionary of*

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76. See, e.g., Rome Statute, *supra* note 18, art. 77(2) (allowing property forfeiture as penalty).

77. Patrick J. McGowan, Intervention Event File (2003) (on file with authors).



*the Major Politicians Since Independence*.<sup>78</sup> Where multiple coup participants were involved in a single event and were subject to different fates, we coded the outcome by listing the most severe fate faced by any of the coup participants. Where we were unable to verify an authoritative news account of the fate of a coup participant, we simply listed the fate of the coup participant as unknown.

Ideally, to examine the probability that African humanitarian offenders are likely to face preexisting sanctions, we would want information on the fates of participants in every civil war, insurrection, coup event, and violent suppression of political opposition that has occurred in Africa since independence of the various African states. Unfortunately, given the complex and messy nature of most armed insurrections and violent suppressions, a comprehensive account of such events does not exist. One of the benefits of using the fates of African coup participants is that it codes all known attempts to overthrow a regime in Africa, even if those attempts ultimately failed. But the data are likely to omit a certain number of potential humanitarian offenders, such as those African leaders who attempt to use violence to suppress the political opposition of those individuals whose ultimate ambition is not to overthrow or change the regime in power. As many of those who seek to suppress political resistance by brute force in Africa have come into power by means of a coup d'état, this omission should not bias the information presented here in any significant way. That is, since the data gives an overall picture of the fates of all African coup participants, it necessarily subsumes the fates of those coup participants who subsequently attempted to suppress the political opposition. But even if the pool of coup participants does not overlap significantly with humanitarian offenders, we have no reason to think that the fates faced by coup participants are going to be significantly different from those faced by humanitarian offenders.

In any event, the data set we have assembled offers a rich source of descriptive empirical evidence on preexisting sanctions likely to be faced by ICT defendants. This is because a large proportion of ICT prosecutions seek to punish individuals engaged in civil or intra-national conflict.<sup>79</sup> Indeed, all of the ad hoc U.N. ICTs have been set up to prosecute war crimes occurring within a single state during a time of civil war. These wars have inevitably been characterized by power struggles among rival

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78. JOHN A. WISEMAN, *POLITICAL LEADERS IN BLACK AFRICA: BIOGRAPHICAL DICTIONARY OF MAJOR POLITICIANS SINCE INDEPENDENCE* (1991).

79. See, e.g., S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (Rwanda); S.C. Res. 808, U.N. Doc. S/RES/808 (Feb. 22, 1993) (Yugo.).

groups seeking political power in weak states. Humanitarian atrocities, especially those ordered by individuals at the highest level of government, almost always occur in the context of a power struggle between ethnic groups or rival factions.<sup>80</sup> More importantly, such atrocities almost always occur in a “weak state” that is unable or unwilling to prosecute such offenders.<sup>81</sup>

Coup events in Africa follow a similar fact pattern. African coups often occur in weak states characterized by unstable political systems and substantial internal ethnic conflict.<sup>82</sup> Moreover, African coup plotters tend to employ significant violence to achieve their political objectives. Once they are successfully ensconced in power, the former coup plotters themselves often become afraid of being removed by force and are likely to employ oppressive measures to silence any real or imagined political opponents.

Given Africa’s propensity for coups d’etat and civil wars,<sup>83</sup> it is not surprising then that all of the existing ICC cases are located in Africa (Sudan, Uganda, and the Democratic Republic of Congo), and that two of the United Nations’ four ad hoc tribunals are set up to prosecute humanitarian atrocities that have occurred in Africa (Rwanda and Sierra Leone). In all of these cases, the humanitarian atrocities were ordered or permitted by either incumbent officials seeking to put down a civil rebellion or by rebels seeking to oust the existing government.<sup>84</sup>

African coup participants, including coup opponents, thus provide a grim but potentially illustrative data set for exploring the incentives facing

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80. The two ad hoc U.N. ICTs were set up to prosecute crimes in two such states: the former Yugoslavia and Rwanda. The wars in both Yugoslavia and Rwanda arose out of conflicts between different religious and ethnic groups, as opposed to ideological or other divisions. See SCHARF, *BALKAN JUSTICE*, *supra* note 8, at 21–37; GERARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 229–30 (1995).

81. For instance, all states that have been subject to ICT prosecutions (Yugoslavia, Rwanda, Congo, Sudan, Cambodia, Liberia, and Sierra Leone) rank in the top twenty of the “Failed States Index” published by the Fund for Peace and *Foreign Policy* magazine. The index rates countries on twelve factors including criminalization of the state, progressive deterioration of public services, and widespread violation of human rights. See Foreign Policy & The Fund for Peace, *The Failed State Index*, FOREIGN POLICY, May/June 2006, available at [http://www.foreignpolicy.com/story/cms.php?story\\_id=3420](http://www.foreignpolicy.com/story/cms.php?story_id=3420).

82. See *id.*

83. Studies of conflict patterns across the world suggest that Africa is the region most prone to civil conflict. See Paul Collier & Anke Hoefler, *On the Incidence of Civil War in Africa*, 46 J. CONFLICT RES. 13, 13 (2002). Similarly, other studies show that Africa is the most coup-prone region of the world. See Patrick J. McGowan, *African Military Coups D’Etat, 1956–2001: Frequency, Trends, and Distribution*, 41 J. MOD. AFR. STUD. 339, 341 (2003).

84. See RAY TARAS & RAJAT GANGULY, *UNDERSTANDING ETHNIC CONFLICT: THE INTERNATIONAL DIMENSION* 225–46 (1998).

likely targets of future ICT prosecutions. For the foreseeable future, it is likely that most ICT prosecutions, both of the ad hoc and permanent variety, will involve defendants who sought to achieve political change or consolidation through violent means in weak or failed states.

### C. Findings

As noted above, to know whether ICT prosecutions will make a difference we need to look at the likely fates of African coup participants absent ICT intervention—a group that is likely to include targets of ICT prosecutions. From such a look, it is not self-evident that ICT prosecutions will make any difference.

Consider first the fates of those who venture into national politics in Africa, not just those who seek to overthrow or change existing governments through violence. As Wiseman observes, of the 485 individuals who became political leaders in Africa prior to 1991, an astonishing 59.4% suffered unfortunate fates directly linked to their political activities.<sup>85</sup> Indeed, of Wiseman's entire database of African leaders, 17.7% were killed, and another 41.6% either suffered imprisonment or exile or both. Put differently, more than one-half of all African leaders since independence through 1991 have been killed, imprisoned, or exiled.<sup>86</sup> Thus, from a rationalist perspective it would seem that only individuals with a taste for personal danger and high risk would tend to seek political office in Africa.

Obviously, generalizations about the risks of seeking political office in Africa are subject to some important qualifications. For instance, countries as varied as South Africa, Botswana, Mauritius, Senegal, and Namibia have all exhibited historically high levels of political stability and economic growth and seem to be largely immune to the leadership risks described above. But for most sub-Saharan African states, peaceful transitions from political office appear to be the exception rather than the norm. Indeed, most coups d'état in the world today take place in Africa.<sup>87</sup> However, as Table 1 indicates, the outcomes of African coups d'état are subject to considerable variation across countries, and a significant proportion of such coups end in failure.

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85. John Wiseman, *Leadership and Personal Danger in African Politics*, 31 J. MOD. AFR. STUD. 657, 659 (1993).

86. *Id.* at 658–59.

87. See McGowan, *supra* note 83, at 341.

TABLE 1: INCIDENCE OF VARIOUS AFRICAN COUP EVENTS, 1955–2003<sup>88</sup>

Country	Total Events	Failed Coups (Proportions in parentheses)	Coup Plots (Proportions in parentheses)	Successful Coups (Proportions in parentheses)
Angola	1	1 (1.00)	0 (.00)	0 (.00)
Benin	15	3 (.20)	6 (.40)	6 (.40)
Burkina Faso	14	1 (.07)	7 (.50)	6 (.43)
Burundi	14	7 (.50)	2 (.14)	5 (.36)
Cameroon	2	1 (.50)	1 (.50)	0 (.00)
Cent. Afr. Rep.	12	5 (.42)	3 (.25)	4 (.33)
Chad	9	5 (.56)	1 (.11)	3 (.33)
Comoros	10	6 (.60)	1 (.10)	3 (.30)
Congo	11	5 (.45)	4 (.36)	2 (.18)
Congo (DRC)	11	1 (.09)	7 (.64)	3 (.27)
Côte d'Ivoire	8	3 (.38)	4 (.50)	1 (.13)
Djibouti	1	1 (1.00)	0 (.00)	0 (.00)
Eq. Guinea	7	3 (.43)	3 (.43)	1 (.14)
Ethiopia	11	2 (.18)	5 (.45)	4 (.36)
Gabon	4	1 (.25)	3 (.75)	0 (.00)
Gambia	5	2 (.40)	1 (.20)	2 (.40)
Ghana	22	6 (.27)	11 (.50)	5 (.23)
Guinea	12	2 (.17)	9 (.75)	1 (.08)
Guinea-Bissau	10	2 (.20)	5 (.50)	3 (.30)
Kenya	3	1 (.33)	2 (.67)	0 (.00)
Lesotho	6	1 (.17)	1 (.17)	4 (.67)
Liberia	15	3 (.20)	11 (.73)	1 (.07)
Madagascar	4	2 (.50)	1 (.25)	1 (.25)
Malawi	3	0 (.00)	3 (1.00)	0 (.00)
Mali	7	0 (.00)	5 (.71)	2 (.29)
Mauritania	10	2 (.20)	5 (.50)	3 (.30)
Mozambique	2	1 (.50)	1 (.50)	0 (.00)
Niger	6	2 (.33)	1 (.17)	3 (.50)
Nigeria	12	2 (.17)	4 (.33)	6 (.50)
Rwanda	2	0 (.00)	1 (.50)	1 (.50)
São Tomé & Príncipe	2	0 (.00)	1 (.50)	1 (.50)
Senegal	1	1 (1.00)	0 (.00)	0 (.00)
Seychelles	1	0 (.00)	0 (.00)	1 (1.00)

88. Using McGowan's terminology, a successful coup refers to a forceful overthrow of a present government; failed coups are such efforts that fail; coup plots are when the government announces that it has discovered a conspiracy to overthrow the government. *See id.* at 339–44.

Country	Total Events	Failed Coups (Proportions in parentheses)	Coup Plots (Proportions in parentheses)	Successful Coups (Proportions in parentheses)
Sierra Leone	17	7 (.41)	5 (.29)	5 (.29)
Somalia	6	2 (.33)	3 (.50)	1 (.17)
South Africa	1	0 (.00)	1 (1.00)	0 (.00)
Sudan	32	11 (.34)	17 (.53)	4 (.13)
Swaziland	3	1 (.33)	1 (.33)	1 (.33)
Tanzania	3	1 (.33)	2 (.67)	0 (.00)
Togo	11	6 (.55)	3 (.27)	2 (.18)
Uganda	17	8 (.47)	5 (.29)	4 (.24)
Zambia	4	3 (.75)	1 (.25)	0 (.00)
Zimbabwe	1	1 (1.00)	0 (.00)	0 (.00)
Total	348	112 (.32)	147 (.42)	89 (.26)

A close look at the fates of these coup participants suggests that trying to seek political change in Africa through violence is an extremely dangerous activity. For instance, of all coup participants in Africa during the relevant period, including those who were successful, 28% were executed or otherwise murdered, 22% were exiled or imprisoned, and 16% were arrested without any clear outcomes. Of course, failure often entails even more dire consequences for coup participants. As Table 2 below indicates, 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.

TABLE 2: FATES OF AFRICAN COUP PARTICIPANTS, 1955–2003

Coup Events	Total Number of Actors	Executed/ Murdered/ Died in Prison	Imprisoned	Exiled/ Tried in Absentia	Arrested	Fired/ Demoted	No Information
Failed Coups	279	.35	.22	.05	.16	.02	.08
Coup Plots	370	.32	.24	.03	.21	.05	.09
Successful Coups	136	.01	0	0	0	0	0

Coup Events	Total Number of Actors	Executed/ Murdered/ Died in Prison	Imprisoned	Exiled/ Tried in Absentia	Arrested	Fired/ Demoted	No Information
All Coup Events	785	.28	.19	.03	.16	.03	.07

If we isolate the most coup-prone countries in Africa, the fates of coup participants are much worse. A breakdown of the data among those African countries that have witnessed eleven or more coups d'etat, as in Table 3, suggests that the probability that coup participants will be killed or imprisoned is still significant in the African states most accustomed to coups d'etat.

TABLE 3: FATES OF COUP PARTICIPANTS IN THE MOST COUP-PRONE AFRICAN STATES (AFRICAN STATES WITH ELEVEN OR MORE COUP EVENTS, 1955–2003)

Countries	Executed/ Murdered/ Died in Prison (Failed Coups)	Imprisoned (Failed Coups)	Executed/ Murdered/ Died in Prison (Coup Plots)	Imprisoned (Coup Plots)	Executed/ Murdered/ Died in Prison (All events)	Imprisoned (All events)
Benin	.17	.17	.07	.71	.08	.41
Burkina Faso	.00	.00	.67	.07	.39	.04
Burundi	.05	.50	.75	.00	.13	.33
Cent. Afr. Rep.	.30	.30	.20	.00	.21	.16
Congo	.54	.23	.22	.22	.35	.19
Congo (DRC)	1.00	.00	.71	.18	.57	.13
Ethiopia	1.00	.00	.69	.00	.69	.00
Ghana	.31	.04	.37	.27	.29	.16
Guinea	.78	.11	.06	.06	.31	.08
Liberia	.22	.22	.39	.26	.35	.24
Nigeria	.67	.17	.73	.28	.50	.18
Sierra Leone	.44	.00	.00	.31	.17	.09
Sudan	.42	.00	.00	.32	.20	.14
Togo	.36	.00	.00	.00	.23	.00
Uganda	.30	.10	.72	.00	.38	.04
Total	.40	.13	.38	.22	.31	.15

Note that this data understates to a significant degree the full risks associated with participating in African coups d'état. The data only focuses on what happens to coup participants at the time they seek to obtain power. But even after successfully obtaining power, African coup participants are subject to a wide range of risks. Indeed, a considerable number of successful African coup participants have been assassinated or killed in coup plots after obtaining power, including: Aguiyi Ironsi and Murtala Muhammed in Nigeria, Samuel Doe in Liberia, Macias Nguema in Equatorial Guinea, and Thomas Sankara in Burkina Faso.<sup>89</sup>

Beyond the significant risks of death faced by African coup participants, the dangers they face when imprisoned are likely to be different from those faced by offenders subject to prosecution by ICTs. As various human rights groups have documented, African prisons are notoriously overcrowded, under-funded, and prone to significant riots and outbreaks of disease.<sup>90</sup> Moreover, political prisoners in Africa are often subject to a wide range of degrading and inhumane treatment—such as torture, physical abuse, and public humiliation—treatment that one is unlikely to encounter in prison facilities administered by ICTs.<sup>91</sup>

More generally, political regimes in Africa are likely to have more flexibility than ICTs in tailoring sanctions in response to disfavored humanitarian offenses. ICTs are limited by their mandate to administering prison sentences, which some economists have conjectured might be less efficient in deterring crimes than certain forms of corporal punishment.<sup>92</sup> But African regimes, especially of the non-democratic variety, can elect to use a mix of corporal and non-corporal sanctions to attain the optimal amount of deterrence against potential humanitarian offenders. Of course, as a normative matter, many alternative sanctions might be legally or morally problematic. As a practical matter, however, such considerations do not seem to constrain the choices of many African politicians.

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89. See Wiseman, *supra* note 85, at 659.

90. See, e.g., Alex Last, *The Notorious Jails of Nigeria*, BBC Africa News Service, Apr. 7, 2006, available at <http://news.bbc.co.uk/2/hi/africa/4880592.stm>; Human Rights Watch Prison Project, *Prisons in Africa*, <http://www.hrw.org/advocacy/prisons/africa.htm> (last visited Nov. 30, 2006).

91. See Human Rights Watch Prison Project, *supra* note 90 (describing typical treatment of political prisoners in Africa). For how ICT prisons treat prisoners, see Rome Statute, *supra* note 18, art. 106 (“The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court and shall be consistent with widely accepted international treaty standards governing treatment of prisoners.”). For a discussion of the international system for incarcerating prisoners, see Dirk van Zyl Smit, *International Imprisonment*, 54 INT’L & COMP. L.Q. 357, 357–58 (2005).

92. See Abraham L. Wickelgren, *Justifying Imprisonment: On the Optimality of Excessively Costly Punishment*, 5 AM. L. & ECON. REV. 377 (2003).

*D. Implications for the Deterrence Effect of ICT Prosecutions*

The data above reflects the extent to which a pool of likely perpetrators of humanitarian atrocities face preexisting sanctions for their activities. Contrary to the conventional wisdom that such perpetrators operate in a culture of impunity, we have shown that those in Africa routinely face sanctions which are likely to be more severe and certain than any meted out by any existing or future ICT. Indeed, more often than not, the individuals who self-select into efforts to effect political change in Africa are killed or imprisoned.

In other words, our study suggests that perpetrators of humanitarian atrocities are going to be high-risk individuals who are not likely to be significantly deterred by the prospect of further prosecution by ICTs. Because coup participants in Africa, a representative sample of potential humanitarian offenders, appear to discount significantly the risks that they might get killed or tortured for their activities, they are also likely to discount the risks of ICT prosecutions.

Furthermore, there is no evidence that the fates of coup participants improve when we focus on the most coup-prone African states. Indeed, the data in Table 3 suggest the opposite—that the probability of death or imprisonment tends to be higher in the more coup-prone African states. One would expect that if coup participants were responsive to punitive sanctions, there would be a drop-off in the number of coups planned in those African states where the risks of death and imprisonment were acutely high. Indeed, in the coup-prone Democratic Republic of Congo (DRC), a country commonly singled out by human rights activists as emblematic of a culture of impunity and one of the first states to be targeted for atrocity investigations by the ICC, a staggering 57% of all coup participants were executed and another 13% were imprisoned. If we narrow the Congolese evidence to coup plots, then 71% of the participants were executed; for failed coups, 100% of participants were executed.

The significance of these findings becomes more pronounced when we compare them to domestically available data on the probability that one would be caught and convicted for a serious violent crime. Take, for instance, the data from the Federal Bureau of Investigation (FBI) and the Department of Justice (DOJ) on clearance rates—the percentage of known crimes for which there is an arrest and charge—and conviction rates for violent crimes in the United States. The FBI data suggest that enforcement authorities clear about 49% of all violent offenses, while the DOJ's data



suggests that the conviction rate for such offenses is about 88%.<sup>93</sup> Thus, a fair estimate of the probability that an individual will get caught and convicted for a violent crime in the United States is about 43%. Of course, since not all violent crimes are reported, this data probably significantly overstates the probability of being caught and convicted.<sup>94</sup>

There has been no comparable study of the probability of being caught and punished by an ICT for committing a humanitarian atrocity. There is little reason to believe, however, that ICTs will be able to achieve anything close to the levels of punishment achieved domestically.<sup>95</sup> For instance, the International Tribunal for Rwanda (ICTR) has tried only twenty-six individuals in its seven-year existence (at a cost of \$1 billion) and has only twenty-six trials underway.<sup>96</sup> Only twenty additional individuals have been indicted, and the tribunal estimates that it may complete sixty-five to seventy trials by the time its mandate expires in 2008.<sup>97</sup> Comparing this number of trials to the huge number of potential offenders (in Rwanda, the government itself at one point claimed 130,000 offenders),<sup>98</sup> one surmises that the ICTR might eventually prosecute approximately 0.005% of the pool of the likely humanitarian offenders in the Rwandan civil war—a figure that makes it highly unlikely that the ICTR will exert even a marginal deterrent effect on future humanitarian offenders.<sup>99</sup>

These numbers make it easier to assess whether adding a new range of sanctions against African coup participants is likely to make any meaningful difference. In many respects, the United States data on the clearance and arrest rates for violent crimes paints a fairly pessimistic

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93. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS CRIME IN THE UNITED STATES 1998 (1998); U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 402 (1998). The rate of prosecution for certain types of crimes may also be substantially less. A 1988 statistical survey concluded that suspects were arrested in only three million of about thirty-four million serious crimes in the United States in 1986. A.B.A. SPECIAL COMMITTEE ON CRIMINAL JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE IN CRISIS 4–5 (1988).

94. For instance, Levitt estimates that victims only report 38% of crimes committed, which means that the conviction rates are probably not quite correct. See Levitt, *supra* note 47, at 369.

95. The Nuremberg Tribunal, for instance, is estimated to have prosecuted no more than 3.5% of all suspected German war criminals. See Amann, *supra* note 29.

96. President of International Criminal Tribunal for Rwanda, *Completion Strategy of International Tribunal for Rwanda, Letter of December 5, 2005, addressed to the President of the Security Council*, U.N. Doc. S/2005/782 (Dec. 14, 2005), available at <http://69.94.11.53/ENGLISH/completionstrat/s-2005-782e.pdf>.

97. *Id.*

98. Helena Cobban, *International Courts*, FOREIGN POL'Y, Mar./Apr. 2006, at 22, 26.

99. It is possible that all of this data suggests that deterrence is unlikely for even domestic criminal law systems. For our purposes, however, it is enough to demonstrate that the likelihood of deterrence is substantially less in the case of international criminal systems.

picture of what we might expect of ICTs. Given that African coup participants face comparably higher sanctions than violent criminals in the United States, one might safely conjecture that the coup participants are likely to engage in their activities no matter how large the expected ICT sanction might be. Put differently, if it turns out that the expected benefit of participating in coup activities or engaging in humanitarian atrocities is high enough, we may safely conclude that African coup participants will consider the risk factors outlined above and discount them.

Anecdotal evidence of contemporary indicted humanitarian offenders supports the claim that the individuals who select into these kind of activities are likely to be very difficult to deter. Take, for instance, the case of Charles Taylor, the former president of Liberia who has been labeled one of the most egregious humanitarian offenders in recent memory.<sup>100</sup> Taylor first gained notoriety when as a minister in the Liberian government he stole funds from the regime of Samuel Doe—then one of the most brutal despots in West Africa. He fled to the United States, was arrested by the FBI, and then escaped American federal custody while awaiting extradition. He then fled to the Libyan desert where he commanded a crew of rebels who subsequently managed to force Doe out of power in Liberia. Taylor's regime immediately became embroiled in a massive civil war which lasted over seven years. In 2003, at the height of the civil war and as rebel forces were encroaching upon the Liberian capital, Taylor intervened simultaneously in two civil wars in neighboring Sierra Leone and Guinea.<sup>101</sup> Indeed, his current indictment is for atrocities he and his troops committed during the civil war in Sierra Leone.<sup>102</sup> Regardless of what one thinks of Taylor as a moral agent, he was clearly an individual who courted significant and dangerous risks in his political life. In sum, he was a prime political opportunist who seemed nearly undeterrable in his quest to amass rents from public office.

Of course, none of this data conclusively resolves the question of whether humanitarian offenders in Africa or elsewhere will always be difficult to deter. The lack of any hard evidence on how humanitarian

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100. See, e.g., Donna Bryson, *Case Strikes a Blow Against African Despotism*, FORT WORTH STAR-TELEGRAM, Apr. 2, 2006, at A21 (describing Taylor as being "accused of greed and savagery extraordinary even for a continent that has known some of the worst tyrants of modern times"); David Wallechinsky, *The World's Ten Worst Dictators*, PARADE MAG., Feb. 16, 2003, available at [http://www.parade.com/articles/editions/2003/edition\\_02-16-2003/Dictators](http://www.parade.com/articles/editions/2003/edition_02-16-2003/Dictators).

101. For background on Liberia's civil war, see U.S. Dep't of State, Background Note: Liberia (Sept. 2006), <http://www.state.gov/r/pa/ei/bgn/6618.htm>.

102. *Prosecutor v. Charles Taylor*, Case No. SCSL-2003-01-I, Amended Indictment (Mar. 17, 2006), available at <http://www.sc-sl.org/Documents/SCSL-03-01-I-75.pdf>.

offenders actually respond to ICT prosecutions suggests that our findings should be treated with caution. First, the data we provide here is descriptive and does not purport to show that coup participants or humanitarian offenders will never respond to threats of ICT prosecution. Second, our project does not purport to use any econometric methods that might show the lack of correlation between ICT prosecutions and the commission of humanitarian offenses. Thus, it remains possible that in the future, scholars who have the benefit of a more detailed set of prosecution data could demonstrate a robust link between ICT prosecutions and deterrence.

Finally, our analysis is limited in that the data here focuses more generally on the risks to individuals trying to achieve political change in Africa by force of arms, rather than on the more specific risks faced by individuals engaging in humanitarian atrocities. To be sure, many coup events that take place in Africa are not necessarily accompanied by efforts by the coup participants to commit atrocities. But it seems that the risks faced by those individuals who try to achieve political change or maintain political power by force will necessarily subsume the risks faced by many of those individuals who attempt to attain similar objectives by committing large scale humanitarian atrocities. The overlap in the data will not, of course, be perfect because there will be those who commit atrocities without seeking to overthrow the existing political regime. Nonetheless, given the inherent limitations in trying to select a subset of likely humanitarian offenders that is divorced from objective accounts of efforts to overthrow governments, we believe that coup participants represent a second-best proxy for likely humanitarian offenders. Moreover, there is no strong theoretical reason to assume a priori that humanitarian offenders in Africa are going to face systematically lower sanction risks than coup participants.

With these caveats in mind, it is worth noting that the evidence we have gathered so far is in considerable tension with the supposition of ICT proponents that there is an underlying culture of impunity within which humanitarian offenders act. In the decades since most African states became independent, coups and civil wars have multiplied, resulting in fairly severe consequences for a majority of the participants. If we acknowledge the severity and certainty of the range of sanctions faced by these participants, then the deterrent effects of further prosecutions by ICTs are likely to be insignificant. Moreover, because of the selection bias in the data—the probable underreporting of the dismal fates of coup participants because of the exclusion from the data of what subsequently

happened to successful coup plotters—it is likely that the preexisting sanctions are even more severe than the data we have presented indicates.

#### V. OPPORTUNITIES VERSUS WILLINGNESS TO COMMIT ATROCITIES

Given that the expected level of sanctions associated with committing atrocities is high, why is there a relative concentration of humanitarian atrocities in weak states, especially in Africa? After all, the economic model of deterrence suggests that informal and formal sanctions ought to deter potential coup participants or warlords from engaging in humanitarian atrocities. We do not attempt to offer a definitive answer to this question, although we offer one possible explanation based on the distinction between the *willingness* and the *opportunity* to commit atrocities. Individuals in mature states tend to commit fewer atrocities than individuals in weak states, but not because they fear formal sanctions. Rather, fewer atrocities are committed because there are fewer occasions for individuals in mature states to do so.

According to this view, the ability of more mature states to withstand significant outbreaks of humanitarian atrocities rests largely on the presence of strong institutions that provide law and order, a free and effective press, and political participation.<sup>103</sup> As political scientists have argued, stable institutions in mature democracies usually ensure that political leaders will be accountable to their domestic constituencies; in turn, such accountability makes war between such regimes<sup>104</sup> and coup plots within such regimes<sup>105</sup> less likely. These same institutional features may also make acts of humanitarian atrocities less likely in mature states.<sup>106</sup> Indeed, the presence of a robust civil society and civil institutions

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103. Admittedly, the last two factors are probably more characteristic of mature democracies than of mature states generally. But with the possible exception of China, mature democracies define most of the strongest states in existence today.

104. See, e.g., BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE* (1995); Bruce Bueno de Mesquita, *An Institutional Explanation of the Democratic Peace*, 93 AM. POL. SCI. REV. 791 (1999).

105. D.A. HIBBS, *MASS POLITICAL VIOLENCE: A CROSS NATIONAL ANALYSIS* 102 (1973) (“Weakly institutionalized societies . . . are far more likely than those with highly developed institutions to suffer . . . political interventions by the military.”).

106. Take, for instance, the logic of suicide terrorism in more mature states. All else being equal, a suicide terrorist might prefer to inflict the greatest number of casualties on citizens when he selects a target. What prevents the suicide terrorist from realizing his goal is obviously not deterrence, but the fact that he lacks the opportunity to carry out his criminal enterprise on such a grand scale. He might be willing to make the ultimate sacrifice and give his life, but he might often find his efforts thwarted by the existence of a sophisticated security apparatus. In other words, because the military and enforcement capacities in mature states completely dwarf the resources of most prospective entrepreneurs of mass violence, it is less likely that such entrepreneurs will ever be able to carry out their enterprise to fruition. In his excellent study of the strategy of suicide terrorists, Pape argues that

increases the chance that citizens will resist even minor attempts to mobilize groups that will engage in humanitarian atrocities.<sup>107</sup>

By contrast, weak and unstable states—in which most contemporary humanitarian atrocities take place—often lack the basic institutional structures needed to facilitate the rule of law and governmental control. As various political scientists have pointed out, regimes in weak states tend to suffer from widespread corruption, lack the ability to guarantee law and order throughout their territory, and usually cannot fulfill their international obligations.<sup>108</sup> Even when they do attempt to exert their authority, regimes in weak states are often prone to doing so in an incompetent, arbitrary, and officious manner; thus, political scientists have taken to labeling such states “weak leviathans.”<sup>109</sup> Finally, the militaries or security forces in weak states are often plagued by organizational ineffectiveness, corruption, and lack of resources.<sup>110</sup>

Significantly, the inability of militaries or police forces in many weak states to guarantee basic security means that such states are often susceptible to violent attacks from fringe or disgruntled elements. For instance, in Chad, Liberia, Sierra Leone, and Sudan, the failure of successive regimes to manage their territories has spawned a series of rebellions in those states.<sup>111</sup> Although many of these rebel groups are disorganized and lack many of the characteristics of a modern fighting

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the best way to constrain suicide terrorists is to “reduce [their] confidence in their ability to carry out such attacks on the target society.” Robert A. Pape, *The Strategic Logic of Suicide Terrorism*, 97 AM. POL. SCI. REV. 343, 344 (2003). Of course, Pape’s recommendations assume that the relevant society would have both the resources and political might to influence the terrorist’s confidence.

107. See HIBBS, *supra* note 105.

108. See ROBERT JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS AND THE THIRD WORLD (1990); Jeffrey Herbst, *Responding to State Failure in Africa*, 21 INT’L SEC., Winter 1996-1997, at 120, 120.

109. See Jeffrey Herbst, *War and the State in Africa* 14 INT’L SEC. 117, 125 (1990) (citing Thomas M. Callaghy, *The State and the Development of Capitalism in Africa: Theoretical, Historical, and Comparative Reflections*, in THE PRECARIOUS BALANCE: STATE AND SOCIETY IN AFRICA 82 (Donald Rothchild & Naomi Chazan eds., 1988)).

110. As Decalo has written, “[M]any African militaries bear little resemblance to a modern complex organizational model and are instead a coterie of armed camps owing primary clientelist allegiance to a handful of mutually competitive officers of different ranks seething with a variety of corporate, ethnic, and personal grievances.” SAMUEL DECALO, COUPS AND ARMY RULE IN AFRICA: STUDIES IN MILITARY STYLE 14–15 (1976).

111. For some general background on these countries’ difficulties, see The CIA World Factbook entries. Chad, <https://www.cia.gov/cia/publications/factbook/geos/cd.html> (describing flawed constitutional elections and subsequent rebellion); Liberia, <https://www.cia.gov/cia/publications/factbook/geos/li.html> (describing fourteen years of intermittent fighting following fall of Samuel Doe’s government in 1990); Sierra Leone, <https://www.cia.gov/cia/publications/factbook/geos/sl.html> (describing civil war lasting from 1991 to 2002); Sudan, <https://www.cia.gov/cia/publications/factbook/geos/su.html> (describing civil war lasting from 1983 to present).

force, African military forces have often proven incapable of constraining them. As Herbst has observed, “[V]ery few African armies have won outright victories against rebels or have been able to change the military facts on the ground so that insurgents have to sue for peace.”<sup>112</sup>

The shortcomings of African militaries imply that whole communities are routinely subject to the arbitrary whims of military-type groups that have displaced the state’s authority in a region. Once these groups have consolidated their power, they usually seek to strip the communities under their control of any remnants of central state authority, such as the power to tax or enforce order. In Africa, the most vicious of these groups usually take the form of warlord armies or criminal syndicates; the Revolutionary United Front (RUF) in Sierra Leone and the Lord’s Resistance Army (LRA) in Uganda are notorious examples.<sup>113</sup> Regardless of their objectives, these groups tend to deploy brutal tactics to sanction detractors or to consolidate power. For instance, the LRA has often used mutilation, child abduction, and sex slavery to create a climate of fear and intimidation among the Acholi communities of northern Uganda.<sup>114</sup> As Vinci has observed, the fear factor has served the LRA well by enabling a relatively tiny group that lacks any modern military equipment to hold a sixty-thousand-man Ugandan army at bay.<sup>115</sup>

Beyond weak militaries, African states often lack the robust civil society structures that help regimes constructively channel dissent and political demands. As Huntington has suggested, when rising public expectations in a weak state surpass the ability of political institutions to manage such expectations, the end result is usually the kind of chaotic political environment that is ripe for coup plots and civil unrest.<sup>116</sup> In this kind of setting, citizens are less able to resist violent attempts by insurgents and other groups to undermine the state’s authority. More significantly, the state itself may decide to shortchange its citizens and engage in the same kind of predatory activity associated with the rebel groups. For instance, military forces from Zimbabwe, Rwanda, and

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112. Jeffrey Herbst, *African Militaries and Rebellion: The Political Economy of Threat and Combat Effectiveness*, 41 J. PEACE RES. 357, 358 (2004).

113. For some background discussion on the rise of the warlord-led Revolutionary United Front group in Sierra Leone, see Jeremy I. Levitt, *Illegal Peace? An Inquiry Into Power-Sharing with Warlords and Rebels in Africa*, 27 MICH. J. INT’L L. 495, 511–14 (2006). For a briefer discussion of the rise of the Lord’s Resistance Army and its classification as a warlord group, see Anthony Vinci, *The Strategic Use of Fear by the Lord’s Resistance Army*, 16 SMALL WARS AND INSURGENCIES 360, 363 (2005).

114. See Vinci, *supra* note 113, at 370.

115. See *id.* at 374.

116. See SAMUEL P. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* (1968).

Uganda all attempted to take over the lucrative trade in diamonds, gold, and copper during the Congolese civil war.<sup>117</sup> Similarly, Charles Taylor's regime in Liberia systematically plundered that country's diamond resources as well as the natural resources of neighboring Sierra Leone.<sup>118</sup>

These structural conditions allowing for atrocities are often non-existent or trivial in more mature states. Thus, in judging whether a strategy for reducing humanitarian atrocities might work, it is important to understand whether the domestic institutional environment makes atrocities more likely in the first place. If the institutional ability to incapacitate humanitarian abusers varies across countries, then we would expect the level of atrocities to depend on country-specific institutional arrangements unrelated to the willingness of individual perpetrators to commit atrocities.

Thus, even though the evidence on the fates of African coup plotters in Part III suggests strongly that acquiring political power by force in Africa is fraught with significant risks, a majority of the coup plots and civil wars in the world today still take place in Africa.<sup>119</sup> The reason for this apparent paradox is that fragile domestic institutions tend to make the environment ripe for humanitarian atrocities regardless of the motivations of the perpetrators. In other words, rather than attributing to weak African states a culture of impunity where perpetrators of atrocities go unpunished, it is more likely that these states possess an enabling environment where atrocities can easily be committed regardless of whether the perpetrators are punished or fear punishment. It should therefore come as no surprise that the worst humanitarian atrocities in Africa usually occur in the most fragile and vulnerable states on the continent—Sierra Leone, Sudan, Congo, Central African Republic, and Liberia.<sup>120</sup>

Our theoretical framework does not suggest that all states that lack strong civil or military institutions will be equally prone to humanitarian atrocities. Regimes in weak states that have successfully consolidated their authority by co-opting their political opponents and significant sections of civil society may be less prone to humanitarian atrocities than regimes that

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117. See Seth A. Malamut, *A Band-aid on a Machete Wound: The Failures of the Kimberley Process and Diamond-Caused Bloodshed in the Democratic Republic of the Congo*, 29 SUFFOLK TRANSNAT'L L. REV. 25, 29–30 (2005) (describing role of diamonds and other natural resources in civil wars involving Congo).

118. See Tracey Michelle Price, *The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate*, 12 MINN. J. GLOBAL TRADE 1, 12 (2003) (describing diamonds as target of rebels during Sierra Leone civil war).

119. See McGowan, *supra* note 83, at 341.

120. See Foreign Policy & The Fund for Peace, *supra* note 81, at 50.

have failed to do so. For instance, this is likely the case in Côte d'Ivoire under the regime of Félix Houphouët-Boigny. Although Côte d'Ivoire was always a weak state, Houphouët was able to use a combination of extensive patronage networks, a forced one-party system, and a sheer cult of personality to create a relatively stable regime that lasted over thirty years.<sup>121</sup> Upon his death, however, the state's institutional vulnerabilities were exposed, and Côte d'Ivoire quickly descended into a bitter and tumultuous civil war.<sup>122</sup> Thus, it is possible in weak states for a strong and autocratic regime to adopt leadership strategies that make less likely the kinds of political crisis that lead to humanitarian atrocities. In Table 4 below, we classify states into categories according to the risks of their being subject to humanitarian atrocities. According to our hypothesis, we would expect most humanitarian atrocities to occur in states in the lower left quadrant. States in the upper quadrants—most advanced democracies—will have very little reason to adopt domestic enforcement strategies to counter humanitarian atrocities because the institutional conditions that make such atrocities likely will probably be nonexistent.

TABLE 4  
RISK THAT STATES WILL BE PRONE TO HUMANITARIAN ATROCITIES

		Efforts to Avoid Atrocities	
		Minimal	Significantly High
Degree of Atrocities Risk	Minimal	Humanitarian atrocities are almost non-existent because of strong institutions, political transparency, and political accountability. Example: most industrialized western democracies.	No governments should be found in this category. Given the presence of strong institutions, there is no need to adopt strategies that reduce the kind of intense political crisis that would lead to atrocities.

121. Howard W. French, *Les Faux Complots d'Houphouët-Boigny* [*The Fake Plots of Houphouët-Boigny*], FOREIGN POL'Y, Spring 1999, 114, 115–19.

122. *Id.*



	Significantly High	Atrocities are very likely because of the lack of strong institutions and political accountability. Moreover, governments are not adopting strategies that make political crisis unlikely. Examples: Côte d'Ivoire after Houphouët-Boigny, Congo (DRC) since independence, Liberia under Doe and Taylor.	Atrocities are relatively rare. Although states in this category lack strong institutions, they have adopted regime-specific strategies like patronage or rent-dispensation networks that make political crisis unlikely. Example: Côte d'Ivoire under Houphouët-Boigny.
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The current deterrence-based justifications for ICTs, however, mostly ignore this distinction between the opportunity and the willingness to commit atrocities. But if there is no significant difference between the willingness factor in mature and weak states, then it makes much more sense to focus on incapacitation rather than the type of deterrence strategies favored by ICT proponents. At this stage, we have insufficient information regarding the relative weight of these factors. But the preliminary evidence does suggest that each state's institutional capacity circumscribes the choices available to potential perpetrators of human rights atrocities.

## VI. UNINTENDED CONSEQUENCES OF ICT PROSECUTIONS

Even though some academic commentators have expressed reservations about the deterrent effect of ICTs, they are usually willing to accord to ICTs other positive spillover effects, such as transmitting norms of justice, promoting reconciliation between warring groups, and giving victims the opportunity to tell their stories.<sup>123</sup> We do not contest the

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123. For instance, Theodor Meron suggests that the hopes of ICT proponents are not only deterrence, but also that "the individualization and decollectivization of guilt . . . would help bring about peace and reconciliation." Theodor Meron, *Answering for War Crimes: Lesson from the Balkans*, 76 FOREIGN AFF. 2, 6 (1997). While acknowledging that the direct deterrence value of ICTs is debatable, some proponents of ICTs nonetheless argue that the ICTs' role in the development of a jurisprudence of the laws of war may have a deterrent effect on future perpetrators of atrocities. See Allison Danner & Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 148 (2005) ("There is more hope, however, that the well-established law of war, which is enforced through international as well as domestic mechanisms, may, in fact, restrain professional militaries from engaging in (or tacitly condoning) large-scale war crimes.").

possibility that ICTs can have beneficial effects other than deterrence, although we do believe that no causal relationship between ICT prosecutions and these other beneficial effects has been demonstrated. For instance, despite the fact that the ICTY has been in existence for over ten years, it has yet to win significant acceptance among Serbs who largely view it as playing a politically biased role in the Balkan disputes.<sup>124</sup>

On the other hand, causal logic and some contrary empirical evidence suggest that ICTs may sometimes exacerbate humanitarian atrocities.<sup>125</sup> Indeed, we argue that on balance, ICT prosecutions in the context of ongoing military disputes in weak states are likely to be counterproductive because any marginal deterrent benefits of such prosecutions are likely to be outweighed by their exacerbating effects. We focus on two factors that might cause ICTs to deepen cleavages in weak states: the prosecution of politically indispensable individuals and political opportunism effects.

#### *A. The Prosecution of Politically Indispensable Individuals*

In discourse about how to resolve humanitarian atrocities, international lawyers and political proponents of ICTs often elevate the primacy of legal over political solutions.<sup>126</sup> As E.H. Carr once noted, this legalist impulse is partly motivated by the belief that by “establish[ing] the rule of law . . . we shall transfer our differences from the turbulent political atmosphere of self-interest to the purer, serener air of impartial justice.”<sup>127</sup> But there are a number of reasons to believe that in the context of weak states facing intense internal turmoil, prosecuting high-profile figures may actually

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124. See Sanja Kutnjak Ivković & John Hagan, *The Politics of Punishment and the Siege of Sarajevo: Toward a Conflict Theory of Perceived International (In)justice*, 40 LAW & SOC'Y REV. 369, 380–88 (2006) (observing declining support for the ICTY by Serbian survey-respondents who increasingly believe that international judges on the ICTY are politically biased); Alissa J. Rubin & Zoran Cirić, *Milosevic's Death Kindles Old Tensions*, L.A. TIMES, Mar. 12, 2006, at A11 (“The combination of Milosevic’s death, which many Serbs believe was caused by the tribunal, either through neglect or murder, and a sense that the tribunal treated Serbs unjustly, will make it more difficult for the Serbian government to transfer Mladic to The Hague.”).

125. For a brief and more general discussion of the unintended consequences of using international courts to enforce compliance, see Karen Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN & PAC. STUD. 51, 73 (2004); see also Lawrence Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832 (2002).

126. Norms of international accountability are an offshoot of global liberalism, which, as some commentators have pointed out, is evident in the growing legalization of international relations. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2001).

127. E.H. CARR, *THE TWENTY YEARS' CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* 170 (1946).

deepen a humanitarian crisis by making political settlements more difficult. More specifically, to the extent that ICT prosecutions or indictments take place before military conflicts in weak states are decisively resolved, they are more likely to derail or hinder successful peace mediations.

One key distinction between weak and mature states underscores some of the unintended consequences of ICT prosecutions. In stable, well-established political systems, enforcement agencies can target and prosecute politically well-connected individuals with relatively little fear of facing reprisals or undermining state institutions. In weak states on the brink of collapse, however, viable institutions are often a luxury and well-connected individual political players tend to become crucial players in efforts to consolidate authority and reestablish political stability.<sup>128</sup> Moreover, when weak states are embroiled in massive civil wars, belligerents or state actors who are participating in humanitarian atrocities are less likely to have an incentive to sue for peace if they know they will be subject to subsequent prosecution for their activities. Of course, one could argue that such actors might have an incentive to avoid engaging in humanitarian atrocities in the first place if they know they are likely to face subsequent international prosecution. But such an outcome is unlikely for two reasons. First, as discussed earlier, these potential humanitarian offenders are already subject to a range of more severe preexisting sanctions that they seem to discount significantly. Second, the positive payoff of committing humanitarian atrocities might be significant enough to a rational offender that he will have very little incentive to factor in the remote possibility of an international prosecution.

In any event, scholars of comparative politics largely agree that bargains among political elites—including oppositional belligerents—are critical to consolidating democratic transitions and fostering institution building in weak states. As Przeworski argues, “If a peaceful transition is to be possible, the first problem to be solved is how to institutionalize uncertainty without threatening the interests of those who can still reverse the process.”<sup>129</sup> Throughout Latin America, Europe, and Africa, such elite pacts have proven successful in diffusing the resistance of prior

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128. See Stephen J. Stedman, *Spoiler Problems in Peace Processes*, 22 INT’L SEC. 5, 5 (1997) (defining spoilers as “leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it”).

129. Adam Przeworski, *Some Problems in the Study of Transition to Democracy*, in TRANSITIONS FROM AUTHORITARIAN RULE: PROSPECTS FOR DEMOCRACY 60 (Guillermo O’Donnell, Phillippe C. Schmitter, & Laurence Whitehead eds., 1986).

authoritarian regimes to reform and preventing large-scale political upheaval.<sup>130</sup> For instance, elite pacts proved crucial in brokering transition arrangements in South Africa, Chile, and Argentina.

In South Africa, the pact expressly included an interim provision that allowed the second-place party (the apartheid-era Nationalist Party) to nominate the deputy president.<sup>131</sup> The pact also set up a program for former leaders of the apartheid regime who might have been complicit in committing racial atrocities to apply for amnesty.<sup>132</sup> To the leaders of the African National Congress, the choice to forego prosecutions against the former leaders of apartheid was considered critical for a peaceful and workable transition. As Thabo Mbeki, then Deputy President of South Africa, observed, “Had there been a threat of a Nuremberg-style trial over members of the apartheid security establishment we would have never undergone peaceful change.”<sup>133</sup>

By targeting well-connected political individuals in weak states who have allegedly committed atrocities, ICT prosecutions are likely to undermine constructive political bargains for peace or even make such bargains unlikely in the first place. Indeed, to date, almost all the current efforts by the ICC to investigate and prosecute war crimes risk destabilizing ongoing peace processes or undermining preexisting political bargains that granted amnesties to alleged war criminals. For instance, two of the inaugural investigations undertaken by the ICC in Uganda and Congo have been met with widespread criticism and condemnation from key participants in ongoing peace mediations.

### 1. Uganda

At first blush, the almost twenty-year-old Ugandan civil war looked like an ideal test case for the ICC. Since 1986, Joseph Kony and his Lord Resistance Army (LRA) had engaged in a quixotic and messianic quest to

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130. For a broad discussion of elite pacts during transitions, see Terry Lynn Karl, *Dilemmas of Democratization in Latin America*, 23 *COMP. POL.* 9 (1990); Alfred Stepan, *Paths toward Redemocratization: Theoretical and Comparative Considerations*, in *TRANSITIONS FROM AUTHORITARIAN RULE*, *supra* note 129, at 64.

131. See Christopher A. Ford, *Challenges and Dilemmas of Racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action*, 43 *UCLA L. REV.* 1953, 1960–61 (1996) (describing provision of the interim constitution which allowed any party receiving more than twenty percent of the vote to name a deputy president, enabling F.W. de Klerk to retain an important position in the government).

132. See Kiss, *supra* note 41, at 77.

133. Alex Boraine, *Truth and Reconciliation in South Africa: The Third Way*, in *TRUTH V. JUSTICE*, *supra* note 41, at 143.

gain control of northern Uganda through a series of well-publicized rapes, child abductions, mutilations, and mass murders. Kony, who has claimed that he is on a biblical mission from God to take over Uganda, has been blamed for the forced abduction of more than 30,000 children. In 1994, Betty Bigombe—then a cabinet minister in the Ugandan government—initiated a peace process with an eye toward bringing both the key LRA leaders and the Ugandan government to the table. A vital component of the process was a broad-based amnesty program for LRA leaders that the Ugandan government had passed into law in 2000.<sup>134</sup> By summer 2005, over 15,000 former combatants, including thousands of LRA rebels, had taken advantage of the amnesty program.<sup>135</sup> Although there was some significant progress in the negotiations, especially in the late 1990s, sporadic fighting between the Ugandan government and the LRA continued. In December 2003, Ugandan President Museveni decided to refer the LRA case to the newly established ICC; in July 2004, Luis Moreno Ocampo—the lead ICC prosecutor—announced he was starting his investigation into the conflict.

Despite some initial praise of the ICC's investigations by international nongovernmental organizations (NGOs), Bigombe—the lead peace negotiator in the conflict—and most of the local groups participating in the negotiations in northern Uganda have been unambiguous in condemning the ICC for jeopardizing the peace process.<sup>136</sup> Of particular concern to Bigombe were the warrants that the ICC had been threatening to issue since 2004 for the arrest of Kony and four other leaders of the LRA.<sup>137</sup> Just before the warrants were finally issued in the fall of 2005, Bigombe had managed to achieve some key breakthroughs in the negotiations and had sought to obtain explicit offers of amnesty from the Ugandan government for Kony and other key LRA leaders. These amnesty offers were no longer options after the ICC issued its warrants. For Bigombe, the ICC's decision to issue the warrants imperiled the chances of any further peaceful negotiations with the LRA.

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134. See Amnesty Act, 2000 (Uganda), available at [http://www.c-r.org/our-work/accord/northern-uganda/documents/2000\\_Jan\\_The\\_Amnesty\\_Act.doc](http://www.c-r.org/our-work/accord/northern-uganda/documents/2000_Jan_The_Amnesty_Act.doc). The Amnesty Act targets “any Ugandan who has at any time since the 26<sup>th</sup> day of January, 1986 engaged in or is engaging in war or armed rebellion against the Republic of Uganda.” *Id.* § 3(1).

135. See Manisuli Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, 10 J. CONFLICT & SECURITY L. 405, 421 (2005).

136. See Reuters, *Uganda Aide Criticizes Court over Warrants*, N.Y. TIMES, Oct. 9, 2005, at Section 1; see also Bamaturaki Musinguzi, *Amnesty Group Rejects ICC Trial of Kony Rebels*, THE EAST AFRICAN (Nairobi), Feb. 16, 2004, available at 2004 WLNR 7085420.

137. See Musinguzi, *supra* note 136.

In addition to Bigombe, almost all the important northern Ugandan groups involved in the peace process have been critical of the ICC's role. For instance, Bryan Higgs, Ugandan Program Development Officer for Conciliation, has argued that the ICC "committed a terrible blunder" by initiating a process that promises "in the end [that] neither justice nor peace will be delivered."<sup>138</sup> Bishop Ochola, the vice chair of the Acholi Religious Leaders Peace Initiative (ARLPI)—the most prominent NGO representing LRA victims—told a journalist, "This kind of approach will destroy all efforts for peace . . . If we follow the ICC in branding LRA criminals, [this war] won't stop."<sup>139</sup> Father Rodriguez—another prominent leader of the ARLPI—was even more direct in his criticism: "The issuing of . . . international arrest warrants would practically close once and for all the path to peaceful negotiation as a means to end this long war . . ."<sup>140</sup> Even key foreign participants in the peace process, such as Bishop Tutu of South Africa and Britain's U.N. Ambassador Emyr Jones Parry, have acknowledged that the ICC's role in Uganda has probably worsened the prospects for any peaceful resolution to the nearly twenty-year conflict.<sup>141</sup>

The problematic role of the ICC was highlighted by President Museveni's dramatic peace offer to Kony and the LRA in the spring of 2006. Although Museveni promised a peace deal if Kony and the LRA agreed to disarm by July, the ICC initially demanded that the Ugandan government turn Kony over to the ICC consistent with its ICC commitments.<sup>142</sup> This impasse prompted Kony to insist that the ICC drop its charges against him and other LRA leaders as a condition for any future peace negotiations.<sup>143</sup> Indeed, he initially refused to personally attend any peace talks, probably due to fear of being arrested. Under persistent pressure from the Ugandan government, the ICC apparently agreed to rescind the arrest warrants against the LRA leaders.<sup>144</sup> Ostensibly, the Ugandan government concluded that since the ICC lacked the military or

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138. *Id.*

139. See Adam Branch, *International Justice, Local Injustice: The International Criminal Court in Northern Uganda*, DISSENT, Summer 2004, at 22, 24.

140. See *id.*

141. See Josephine Volqvartz, *ICC Under Fire over Uganda Probe*, CNN, Feb. 23, 2005, available at <http://www.globalpolicy.org/intljustice/icc/2005/0223iccfire.htm>.

142. See *Uganda 'Must Arrest' LRA Leader*, BBC News, May 18, 2006, available at <http://news.bbc.co.uk/1/hi/world/africa/4992896.stm>.

143. See Frank Nyakairu, *Drop Charges Against Me, Kony Tells World Court*, THE DAILY MONITOR, May 25, 2006, available at [http://www.kas.de/proj/home/pub/8412/year-2006/document\\_id-8503/index.html](http://www.kas.de/proj/home/pub/8412/year-2006/document_id-8503/index.html).

144. See Charles Kazooba & Jumah Senyonga, *ICC Willing to Lift Kony Indictment, Says Uganda*, THE NEW TIMES (Kigali), Aug. 4, 2006, available at [http://www.publicinternationallaw.org/warcrimeswatch/archives/wcpw\\_vol01issue13.html](http://www.publicinternationallaw.org/warcrimeswatch/archives/wcpw_vol01issue13.html).

enforcement resources to back up its arrest warrants, it was futile for the government to rely on an ICC prosecution as a political strategy for subduing the LRA. As one high-level Ugandan official bluntly put it: “We approached an international peace keeping force to arrest Kony and his commanders but they said it was not their concern and did not have the mandate. . . . That is why we decided to opt for peace talks with the LRA.”<sup>145</sup> In any event, the LRA leaders eventually agreed to a unilateral ceasefire, presumably with the understanding that they would be granted immunity from prosecution.<sup>146</sup> Whether or not the ceasefire will eventually lead to a comprehensive peace agreement in this longstanding conflict remains to be seen.<sup>147</sup> Nonetheless, the Ugandan government seems to have concluded that the initial decision to seek an ICC referral did not increase the government’s chance of a military victory over the LRA, but instead made the prospects of a successful peace settlement less likely.

## 2. Congo

A similar scenario has played out with the ICC efforts to intervene in the civil war in Congo.<sup>148</sup> After Laurent Kabila deposed the dictator Mobutu Sese-Seko in 1997, Congo descended into a brutal and costly civil war in which 3.8 million people died, and in which almost the same number of people were displaced from their homes. In January 2001, Laurent Kabila was assassinated and replaced by his son Joseph—a thirty-two-year-old soldier with hardly any political experience. In late 2002, South African President Thabo Mbeki managed to broker a peace agreement in Pretoria that detailed the terms of a transitional government and established a Truth and Reconciliation Committee. Under the terms of the agreement, Joseph Kabila would be the president but would share authority with four vice presidents from the major rebel groups. Moreover, the peace agreement brought an end to the foreign intervention in the conflict by Uganda, Zimbabwe, Rwanda, and Angola. The agreement did

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145. *See id.*

146. *See* Reuters, *World Briefing Africa: Uganda: Rebels Declare A Cease-Fire*, N.Y. TIMES, Aug. 5, 2006, at A2.

147. Indeed, most recently, the LRA rebels appear to have walked out of the peace negotiations over disagreements about whether the Ugandan government should also declare a ceasefire. *See* Reuters, *Uganda: Rebels Pull Out Of Talks*, N.Y. TIMES, Aug. 10, 2006, at A8.

148. For a detailed discussion of the ICC’s investigation in the Congolese civil war, see William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT’L L. 557 (2005).

not end all hostilities, however, and in April 2004 Kabila sought a referral to the ICC. Although the investigation by the ICC into the Congolese civil war has not proceeded as far as in the Ugandan case, there are some concerns that the ongoing investigation may undermine the fragile peace of the 2002 agreement. In particular, since any subsequent warrants are likely to target the rebel leaders who are now members of the coalitional government, these leaders may now have very few incentives to keep up their end of the bargain.<sup>149</sup> Indeed, some observers believe that one of Kabila's motivations for seeking the ICC referral was to neutralize his chief political rivals; his rivals happen to be those most likely to be targets of any ICC investigation.<sup>150</sup> Consequently, the ICC's current investigation risks undermining the fragile peace agreement that has kept the coalitional government together. Louis Michel, the foreign minister of Belgium and one of the key participants in the peace process, has actually expressed concern that the ICC's investigation could "run[] the risk of causing the [peace] process to implode."<sup>151</sup>

### 3. *Sierra Leone and Liberia*

Efforts by other ICTs to prosecute or indict political "spoilers" have also provoked backlash or warnings from peace mediators in other conflicts. For instance, the Special Court for Sierra Leone—a mixed tribunal established by the United Nations and the Sierra Leone government—issued an indictment in March 2003 to arrest Charles Taylor, the then dictator of Liberia, for his role in humanitarian atrocities committed during the Sierra Leone civil war. Instead of being arrested, however, Taylor voluntarily resigned in August 2003 and gave himself up to Nigerian troops in exchange for amnesty and exile to Nigeria. Despite calls by the Special Court for Sierra Leone for Nigeria to surrender Taylor, and pressure from the United States, Nigeria pointedly refused to hand over Taylor.

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149. *See id.* at 565 ("Kabila is unlikely to be the subject of any ICC investigation, yet two of his potential electoral opponents—Vice Presidents Jean Pierre Bemba of the MLC and Azarias Ruberwa of the RCD—are among those most likely to be the subject of any early investigation.")

150. *See id.* ("Kabila's chief political rivals . . . could well find themselves the targets of international investigations, in turn strengthening Kabila's political hand in the transitional government and forthcoming elections.")

151. Pascal Kambale & Anna Rotman, *The International Criminal Court and Congo: Examining the Possibilities*, CRIMES OF WAR PROJECT, Oct. 2004 (quoting Foreign Minister Louis Michel), available at [http://www.crimesofwar.org/africa-mag/afr\\_05\\_kambale.html](http://www.crimesofwar.org/africa-mag/afr_05_kambale.html).



The Nigerian government's success in pressuring Taylor to resign and accept asylum underscores the weakness of international tribunals when dealing with contemporary conflicts that involve uneven distributions of political power. At the time the Sierra Leone tribunal originally issued its indictments, Taylor was the Liberian head of state and still commanded substantial allegiance from Liberian government troops and paramilitary units throughout the country. If the Nigerian government had not granted Taylor asylum, he would have likely remained in power and exacerbated the humanitarian crisis in both Liberia and the Sierra Leone. Moreover, even if the West African troops could have forced Taylor out of power involuntarily, the whole process to remove him could have resulted in significantly more casualties as Taylor would have had every incentive to fight to the end. By contrast, the special tribunal had no power to enforce its arrest warrant against Taylor, nor did any of the tribunal's sponsors—the United Nations or Sierra Leone—appear willing or able to apprehend him by force. But for the West African governments whose troops bore a significant brunt of the casualties in the Liberian civil war, ending the conflict peacefully was the primary priority. In this respect, the tribunal's narrow focus on justice against perpetrators of humanitarian atrocities seemed misplaced to the West African mediators. When the indictment by the tribunal was originally announced, the Organization of West African States proclaimed that the special tribunal's actions had “put a damper on the negotiations” at the stage when Taylor seemed most amenable to ending the conflict.<sup>152</sup>

The Nigerian government eventually agreed to hand Taylor over to the newly elected Liberian government; however, it refused to hand Taylor over to the Special Court for Sierra Leone. But even after a widely acclaimed and peaceful election process in late 2005, the newly elected Liberian President Ellen Johnson-Sirleaf announced that prosecuting Taylor was not a priority for her administration and that she had no interest in asking Nigeria to end his asylum.<sup>153</sup> Like the ICC's role in the Ugandan civil war, the irony of the special tribunal's quest to prosecute Taylor is that two of the groups that were probably most victimized by Taylor's brutal reign—Liberian citizens and West African peacekeepers—have both expressed an interest in not pursuing justice. Later, under pressure from the United States, Johnson-Sirleaf reluctantly agreed to

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152. See Virginie Ladisch, *Liberian President Indicted for War Crimes*, CRIMES OF WAR PROJECT, June 16, 2003, available at <http://www.crimesofwar.org/onnews/news-liberian.html>.

153. See Taylor 'Not Priority' for Liberia, BBC News Service, Jan. 27, 2006, <http://news.bbc.co.uk/go/pr/fr/-/2/hi/africa/4655186.stm>.

request Taylor's surrender. Nigeria complied, but Johnson-Sirleaf's reluctance to prosecute Taylor was so great that Taylor was immediately transferred to a helicopter that flew him to the custody of the Special Court for Sierra Leone.<sup>154</sup>

In yet another interesting twist to this ongoing saga, the Special Court for Sierra Leone recently decided that it could no longer afford to try Taylor for war crimes because the spectacle of a trial could undermine the fragile peace agreement that ended the Sierra Leone civil war.<sup>155</sup> The Dutch government has since agreed to host Taylor's formal trial at a special ICC courtroom at the Hague, but only if another country commits to hosting Taylor's prison term if he eventually gets convicted.<sup>156</sup>

The Liberian experience illustrates that in the wake of transitions from harsh non-democratic regimes, the political clout of former political actors may constrain the choices of the new government. But that constraint is not insurmountable; if the government feels strong and secure enough, it may decide to expend its political capital and prosecute members of the old guard. In other circumstances, however, the government may wisely conclude that arresting and prosecuting spoilers is likely to undermine the transition process. Beyond the domestic government's decision to avoid prosecution, outside mediators or intervenors like Nigeria also have to take into account the tradeoffs that may exist between peace and justice in the transition process. Since the Nigerian government promised to give Taylor asylum in exchange for immunity, it was bound—on grounds of political prudence—to keep its agreement. Had the Nigerian government violated its commitment, it could have diminished the credibility of amnesty offers and made it less likely that future perpetrators of atrocities would be willing to leave power voluntarily.

Recently, some commentators have suggested that even when asylum is an option the ICC is likely to deter humanitarian offenders. For instance, Gilligan has argued that because some dictators might sometimes prefer to surrender to the ICC than stay in power, the ICC will lower the value of committing atrocities even when asylum is an available alternative.<sup>157</sup> The problem with this analysis is that it assumes that countries that agree to provide asylum to dictators are going to be largely indifferent to the

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154. *Id.*

155. See Lydia Polgreen & Marlisse Simons, *Sierra Leone Asks to Move Liberian's Trial*, N.Y. TIMES, Mar. 31, 2006, at A7.

156. See Marlisse Simons, *Former Liberian President in The Hague for Trial*, N.Y. TIMES, June 21, 2006, at A6.

157. See Gilligan, *supra* note 5, at 943.

existence of indictments. But if the countries that are likely to be safe havens for dictators are unable to commit credibly to asylum bargains because of international pressure, the ICC will tend to weaken the value of asylum bargains in the first place.

In sum, the notion that seeking justice through international tribunals facilitates peace-building in weak states is often misguided. As a post-conflict reconstruction tactic, prosecutions by international tribunals may actually create stumbling blocks for more politically realistic alternatives to address past grievances, including amnesty, exile, or lustration.<sup>158</sup>

Of course, we are not suggesting that ICT investigations will always jeopardize efforts to seek a peaceful resolution to an ongoing humanitarian crisis. For instance, in circumstances where peace has been forcibly imposed on the belligerents and the ICT investigations enjoy substantial local support, investigations may prove to be a salutary mechanism for holding the worst humanitarian offenders accountable. Indeed, one of the circumstances that made the Nuremberg trials a practical option after the end of World War II was the existence of a clear military victory and the commitment by the Allied forces to occupy Germany until peace was established. But these preconditions do not necessarily exist elsewhere, especially among weak states where the extent of military victories is usually ambiguous and the commitment by occupying powers to stay the course is generally weak. In other words, if a government in a weak state simply lacks the capacity to subdue a belligerent by force, then threatening the belligerent with an international criminal prosecution—as the ICC is currently doing in the Ugandan civil war—is likely to be misguided and counterproductive. After all, if the Ugandan army could apprehend or kill the leaders of the LRA on its own, it would have every incentive to do so even without the intervention of the ICC. As Snyder and Vinjamuri have suggested elsewhere, “[a]ttempting to implement universal standards of criminal justice in the absence of . . . political and institutional preconditions risks weakening norms of justice by revealing their ineffectiveness and hindering necessary political bargaining.”<sup>159</sup>

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158. Lustration is a sanction that involves banning perpetrators from holding public office. See Michael P. Sharf, *From the Exile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339, 346 (2006).

159. See Jack Snyder & Leslie Vinjamuri, *Trial and Error: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 6 (2004); see also Tonya Putnam, *Human Rights and Sustainable Peace*, in ENDING CIVIL WARS: THE IMPLEMENTATION OF PEACE AGREEMENTS 237 (Stephen John Stedman et al. eds., 2002) (“The heart of the problem is the apparent failure of many international human rights organizations . . . to recognize that effective promotion and protection of human rights in postconflict settings requires different tactics than those typically applied

### *B. Political Opportunism Effects*

Proponents of ICTs often argue that ICT prosecutions will spur beneficial institutional reform in weak states.<sup>160</sup> In this section, we suggest that the opposite is more likely true: ICT prosecutions will often cause politicians in weak states to under-invest in the kinds of institutional reforms necessary to avoid humanitarian atrocities in the first place. If local politicians believe that they can use ICT investigations to demonize political opponents or use them to scapegoat others for their own failures to deal effectively with humanitarian abuses in their communities, they may elect to turn a blind eye to the hard political decisions that will reduce the risks that a budding civil war will escalate into a humanitarian crisis. Thus, an ICT regime that is designed to insure against humanitarian atrocities may inadvertently promote the kind of imprudent risk-taking behavior that worsens such atrocities.

Various commentators have recently observed that political regimes in weak states will often embrace the rhetoric of international justice norms for narrow political objectives that have very little to do with promoting justice and meaningful institutional reform.<sup>161</sup> Furthermore, the notion that politicians exploit external assistance efforts to avoid making hard but necessary institutional reform choices is a common theme in the literature on African political economy. For instance, Uvin has shown how the increase in foreign assistance after the Rwandan genocide allowed the ruling regime to continue to sidestep critical reform measures and disregard the interests of its citizens.<sup>162</sup> De Waal has also shown that distributions from famine relief in East Africa were often used strategically by politicians to shield poor governance and weather political

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to human rights abuses occurring in stable societies with established governments.”).

160. See, e.g., Burke-White, *supra* note 148, at 568–70 (arguing that the complementarity regime of the ICC serves as a catalyst for domestic institutional reform in societies facing humanitarian atrocities); Jamie Mayerfeld, *The Mutual Dependence of External and Internal Justice: The Democratic Achievement of the International Criminal Court*, 12 FINNISH Y.B. INT’L L. 71, 107 (2001) (suggesting that the ICC will interact with domestic legal systems in a positive way and thereby “transform political culture”). One variation of this argument claims that states that participate in human rights regimes like ICTs are likely to become acculturated to human rights norms through mimicry. See Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003).

161. See, e.g., Jelena Subotić, *Hijacked Justice: Domestic Appropriation of International Norms* (Human Rights & Human Welfare, Working Paper No. 28, 2005), available at [www.du.edu/gsis/hrhw/working/2005/28-subotic-2005.pdf](http://www.du.edu/gsis/hrhw/working/2005/28-subotic-2005.pdf) (last visited Aug. 11, 2006) (describing how states tend to adopt transitional justice norms for reasons contrary to the original transitional justice project).

162. PETER UVIN, *AIDING VIOLENCE: THE DEVELOPMENT ENTERPRISE IN RWANDA* (1998).

resistance from disaffected groups.<sup>163</sup> Analogously, commentators have examined how the prospect of International Monetary Fund (IMF) bail-out efforts often encourages politicians to ignore structural adjustment commitments and engage in shortsighted fiscal policies in order to sustain short-term political gains.<sup>164</sup> Finally, and more importantly, Reno has documented how the Ugandan government has exploited creditor anxieties about growing disorder in weak states to suspend necessary institutional reform.<sup>165</sup>

Of course, if ICTs were able to intervene and provide corrective justice in every instance where an otherwise viable domestic alternative might have been an option, this political opportunism dynamic might not influence the level of humanitarian crimes. In practice, however, the decisions by ICTs to investigate atrocities are subject to a whole range of political and resource-related constraints. First, since the ICTs lack any enforcement powers of their own, they must rely on member states to apprehend suspects.<sup>166</sup> But as Goldsmith observes, “Nations do not lightly expend national blood and treasure to stop human rights abusers in other nations.”<sup>167</sup> Indeed, the failure of the international community to provide the ICC with any military or police support to capture Kony after he was indicted for his role in the Ugandan crisis reflects the inability of ICTs to pick up the slack for dysfunctional institutions in weak states. Second, given that politicians in weak states will often have an incentive to use ICT referrals strategically to delegitimize political opponents, nothing insures that any ICT referral will generate positive spillover effects for domestic institutions.

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163. ALEX DE WAAL, *FAMINE CRIMES: POLITICS AND THE DISASTER RELIEF INDUSTRY IN AFRICA* (1997).

164. See Timothy Lane & Steven Phillips, *Does IMF Financing Result in Moral Hazard?* (IMF, Working Paper WP/00/168, 2000), available at <http://www.imf.org/external/pubs/ft/wp/2000/wp00168.pdf>; Report of the International Financial Institutions Advisory Commission (2000), <http://www.house.gov/jec/imf/meltzer.htm> (“The importance of the moral hazard problem cannot be overstated. The powerful root of moral hazard lies in the IMF’s encouragement, or lenders’ perception of its encouragement, of short-term, foreign currency loans to developing countries, particularly where the domestic banking and financial infrastructure is weak.”).

165. See William Reno, *Uganda’s Politics of War and Debt Relief*, 9 *REV. INT’L POL. ECON.* 415, 427 (2002).

166. See Iontcheva Turner, *supra* note 9, at 3–15 (2005) (describing the limitations on the ICC’s ability to prosecute without the assistance of national authorities). Indeed, even proponents of international courts have argued that centralization of authority in international courts, including the possession of independent enforcement powers, is not only politically infeasible, but also normatively unattractive. See *id.* at 16–21; see also Jenny S. Martinez, *Towards an International Judicial System*, 56 *STAN. L. REV.* 429, 434 (2003).

167. Goldsmith, *supra* note 9, at 93.

Simply put, ICTs will often enable politicians in weak states to escape accountability and avoid making hard policy decisions in the context of a crisis—exactly the opposite of what would be socially optimal for domestic institutional reform. In the context of African humanitarian crises or civil wars, this perverse dynamic also depends on the fact that African governments may often have an incentive to encourage corrupt and unprofessional military behavior. For instance, it probably should come as no surprise that the Ugandan government has fared so terribly against a poorly organized adversary that is led by a high-school dropout and former altar boy who claims to be “possessed by spirits, including a Sudanese, Chinese, American, and a former minister of Ida Amin.”<sup>168</sup> Indeed, much of the carnage in the Ugandan civil war can be traced largely to the pervasive corruption and disorganization of the Ugandan military.<sup>169</sup> As one NGO group involved in the conflict has observed, “the Ugandan military has failed to protect civilian populations not only from the LRA but also from its own troops, who have come in some cases to be the major source of insecurity . . . .”<sup>170</sup> But the Ugandan military’s disabilities are not obviously accidental; there is now a general consensus that the Ugandan army’s forays into the Congolese civil war in the late 1990s were motivated by President Museveni’s desire to extract mineral resources and defend diamond and gold mines that his generals operated for personal gain.<sup>171</sup> In other instances, the plundered goods from Congo were used to supplement Ugandan state coffers; financial data from the Ugandan government show that Ugandan gold exports rose from less than \$13 million in 1994-1995 to \$110 million in 1996-1997.<sup>172</sup>

The incentive for insecure African regimes to corrupt their militaries by outsourcing revenue collection underscores the perverse logic of initiating ICT prosecutions amidst ongoing military disputes. According to this logic, Ugandan President Museveni’s decision to seek an ICC referral in 2003 might be no more than a poorly disguised attempt to cloak his foundering military campaign against the LRA with international legitimacy. Indeed, Article 17 of the Rome Statue provides that the ICC

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168. Vinci, *supra* note 113, at 365.

169. See Ssenyonjo, *supra* note 135, at 431–32 (observing that according to the Ugandan government one of the main reasons for the persistence of the conflict with the LRA is the corruption and drunkenness of Ugandan soldiers).

170. See Kevin J. Kelley, *Crisis Group Urges Action to End LRA War*, EAST AFRICAN (Nairobi), Jan. 17, 2006, available at 2006 WLNR 924222.

171. See Ola Olsson & Heather Congdon Fors, *Congo: The Prize of Predation*, 41 J. PEACE RES. 321, 325–26 (2005); Reno, *supra* note 165.

172. See Reno, *supra* note 165, at 424.

will step in only where the domestic legal system involved is unwilling or unable to prosecute.<sup>173</sup> But Uganda's institutional problems in prosecuting LRA leaders have more to do with its military than its courts; there is very little evidence that the Ugandan courts would be institutionally incapable of prosecuting Kony if he were captured. Thus, a more plausible explanation for the Ugandan referral to the ICC is that Museveni hopes that the ICC's warrants against the LRA leaders will renew international support for his regime and increase the chance of an outright military victory over the LRA. Moreover, given the contemporary political problems he is facing, including his widely condemned but successful effort to win a third term in office,<sup>174</sup> Museveni likely believes that any effort to seek a peaceful compromise with the LRA will jeopardize his political future. But why, one might ask, should the ICC provide Museveni with an opportunity to free ride on the coattails of an international legal regime that is ostensibly designed to encourage governmental accountability?

Beyond the Ugandan experience, there is ample evidence that regimes in weak states welcome ICT prosecutions only when those prosecutions support the regime's narrow political prerogatives. Often, these prerogatives are at odds with the holistic diffusion of international norms of justice purportedly embraced by ICTs. In Rwanda, the ruling Tutsi regime has selectively embraced the ICTR's prosecution of its Hutu political opponents but has balked at cooperating with the tribunal's efforts to investigate and prosecute Tutsi individuals.<sup>175</sup> In Congo, almost every likely target of the ICC's investigation turned out to be one of Kabila's powerful political opponents.<sup>176</sup> In Yugoslavia, the Croatian government actively supported the ICTY's efforts to investigate and prosecute Serbians accused of war crimes, but promptly suspended its support once the first Croatians were indicted.<sup>177</sup> Thus, in case after case, regimes in weak states seem to be reluctant to support ICT investigations when regime supporters are likely targets. Conversely, these same regimes

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173. Rome Statute, *supra* note 18, art. 17.

174. See Ssenyonjo, *supra* note 135, at 432 (observing that rebellion in Uganda is likely to continue unless the government changes its policy of silencing opposition voices and avoids focusing on amending the Ugandan constitution in order to entrench Museveni in power for a third term).

175. See Alvarez, *supra* note 67, at 413.

176. Burke-White, *supra* note 148, at 565.

177. See Victor Peskin & Mieczyslaw P. Boduszynski, *Croatia's Moments of Truth: The Domestic Politics of State Cooperation with the International Criminal Tribunal for the Former Yugoslavia* (Berkeley Program in Soviet & Post-Soviet Stud., Working Paper Series, 2003), available at [https://Socrates.berkeley.edu/~bsp/publications/2003\\_01-pesk.pdf](https://Socrates.berkeley.edu/~bsp/publications/2003_01-pesk.pdf).

seem eager to embrace ICT investigations when the likely targets are their political opponents. Therefore, to the extent that ICT investigations are used selectively to vindicate the political objectives of the ruling regime, such investigations will likely undermine rather than promote the dual goals of promoting transitional justice and facilitating institutional reform.

Ultimately, it seems reasonable to conclude that the primary obligation to prevent humanitarian atrocities rests with the state in which the atrocities take place, and by extension, its rulers. If a regime decides to trade corrective institutional reform for corrupt rent-seeking opportunities, however, it is not clear why the ICC should intervene and provide political cover to that regime when a crisis unfolds. To outside observers, having the ICC help the leaders of Uganda and Congo consolidate their authority by hunting down alleged war criminals may seem like a small price to pay for achieving international justice. But the victims of these conflicts likely have very different visions of the relationship between the ICC and their governments. Perhaps that is why most of the representatives of the LRA victims in northern Uganda, as well as the mediators in that conflict, have accused the ICC of turning a blind eye to their concerns in that region's crisis.<sup>178</sup>

## VII. CONCLUSION

We live in a golden age of international criminal tribunals. Between the creation of the permanent International Criminal Court and the continued reliance on ad hoc ICTs created by the U.N. Security Council, the world has never before witnessed the frequency of independent international criminal prosecutions that is occurring today. Nonetheless, the empirical and theoretical assumptions that underpin the deterrence rationale for these ICTs remain dubious or highly debatable. Supporters of ICTs generally assume that a pervasive "culture of impunity" exists in certain states and that by ending such a culture, ICT prosecutions will eventually deter future atrocities.

This Article challenges this "culture of impunity" thesis as well as the assumption that ICTs deter future humanitarian atrocities. We apply an economic model of deterrence to analyze the incentives facing likely targets of ICT prosecutions—coup participants involved in civil conflicts within weak states. Such a data set is particularly relevant because for both legal and political reasons ICT prosecutions will almost exclusively target

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178. See *supra* text accompanying notes 136–38.



those committing atrocities in conflicts occurring within weak or failed states.

Our model and data suggest that any deterrence effect of ICT prosecutions, whether ad hoc or via the permanent ICC, is likely to be marginal given the existence of a range of preexisting sanctions in weak states. Potential ICT targets, who are the only individuals likely to be deterred by the threat of an ICT prosecution, already face a substantial likelihood of informal sanctions (such as death, imprisonment, and torture) of greater severity and certainty than any sanction likely to be meted out by an ICT. Given the very low likelihood of actually facing an ICT prosecution, and the significant constraints ICTs face in administering sanctions, we believe ICT prosecutions will be unlikely to have any meaningful deterrence effect.

Furthermore, we suggest that the high incidence of humanitarian atrocities in weak states might have more to do with the offenders' opportunities to commit atrocities rather than their willingness to do so. These opportunities typically arise in weak or failed states because such states usually lack the institutional ability to incapacitate potential humanitarian offenders. In other words, developing an effective framework for addressing humanitarian atrocities might have less to do with initiating international prosecutions, and more to do with building robust domestic institutions in weak states that can successfully channel political participation and dispute resolution.

We also suggest that ICT prosecutions might not only fail to deter humanitarian offenders, but might actually exacerbate atrocities. First, ICT prosecutions that are initiated outside of a state's domestic processes might demand the removal and arrest of politically indispensable figures prior to the resolution of a civil conflict. As a number of current conflicts in Africa already demonstrate, even initiating an international prosecution might fatally undermine the prospects of peace negotiations. Second, the growing ICT institutional framework might distort the incentives of leaders in weak states to engage in the kinds of constructive reform efforts that will thwart future humanitarian atrocities. In other words, rather than invest in building domestic institutions that can incapacitate domestic offenders, leaders of such states will often seek to use the threat of an ICT prosecution to achieve narrow political objectives that will often be inconsistent with the norm-promotion goals of ICTs.

Of course, our analysis should be treated with some caution because there have been too few ICT prosecutions to perform the kinds of econometric tests that would generate systematic empirical results. But even if it seems early to make concrete empirical generalizations about the

effects of ICT prosecutions, we might still be able to make plausible inferences about the likelihood of deterrence given the availability of alternative sanctions. In essence, although the empirical evidence presented here is largely exploratory and descriptive, it suggests reasons to be wary of the deterrence promise of ICTs. Should the international community completely abandon ICTs in favor of purely political or local approaches to combating humanitarian atrocities? We do not presume to answer that question. What we do know is that it is dangerously naïve to ignore the possibility that ICTs might not only lack any significant deterrence benefits, but might actually exacerbate conflicts in weak states.