The ICC and the Prevention of Atrocities

Criminological Perspectives

Tom Buitelaar

Abstract

One of the founding principles of the International Criminal Court (ICC) is the prevention of mass atrocities by punishing those most responsible for them. This paper builds on the literature that has both hailed and critiqued the prospects of the ICC's ability to deter future atrocities, adding insights from criminology and psychology to enhance understanding of the capacity of the ICC's deterrent capabilities and more carefully scrutinize the exact workings of this process. After establishing an analytical framework, the paper applies this framework to the ICC. The main findings are that, although the ICC can constructively contribute to a normative shift toward accountability and a change in international rules of legitimacy, its prospects for the direct and meaningful deterrence of future atrocities are slim. The current practice of relying on the ICC as a crisis management tool is therefore both unwise and unfair.

Keywords | Deterrence, International Criminal Court (ICC), criminology

The Hague Institute for Global Justice

WORKING PAPER 8
April 2015

The ICC and the Prevention of Atrocities

Criminological Perspectives

Tom Buitelaar

About the Author

Tom Buitelaar is a research assistant in the President's Office of The Hague Institute for Global Justice. He also conducts projects for the Global Governance and Conflict Prevention Programs. During his studies, he specialized in international criminal justice.

Acklowedgements

The author would like to thank Dr. Eamon Aloyo, Professor Mark Drumbl, Erin Jackson, Annelein Koot, Dr. Malini Laxminarayan, and Dr. Peter Malcontent for valuable feedback on earlier versions of this paper. Any omissions or mistakes that remain are the sole responsibility of the author.

http://www.TheHagueInstituteforGlobalJustice.org/working-paper-8

About The Hague Institute for Global Justice

The Hague Institute for Global Justice is an independent, nonpartisan institution established to undertake interdisciplinary policy-relevant research, develop practitioner tools, and convene experts and policymakers to facilitate knowledge sharing. Through this work the Institute aims to contribute to, and further strengthen, the global framework for preventing and resolving conflict and promoting international peace.

The Hague Institute for Global Justice
Sophialaan 10
2514 JR The Hague
The Netherlands

t +31 (0)70 30 28 130
e info@TheHagueInstitute.org
w TheHagueInstitute.org
t @HagueInstitute

About The Hague Institute Working Paper Series

The aim of the Hague Institute working papers series is to provide an outlet for authors to make original, rigorous, and policy-relevant research available publically. Each Hague Institute working paper is peer-reviewed by at least two experts, one internal to and one external to the Hague Institute.

Disclaimer

Introduction

In the preamble to the Rome Statute of 1998, which led to the establishment of the International Criminal Court (ICC) on July 1, 2002, the signatories declared that they were "determined to put an end to impunity for the perpetrators of [the most serious] crimes and thus to contribute to the prevention of such crimes."[1] The statement reflects the hope of international criminal justice supporters that this permanent, potentially universal Court would deter future atrocities.[2] This hope has permeated justifications of and discussions on the ICC. Many of those who work with the ICC assume that punishing offenders can prevent crimes, a belief shared by many human rights organizations and NGOs.[3] For example, the Coalition for the International Criminal Court recently asked the Ukrainian government to ratify the Rome Statute in order to "deter grave crimes."[4] In 2014, a push by the United States government to refer the civil war in Syria to the ICC through a Security Council resolution – asserting a need to help end the atrocities – saw a significant mobilization of NGO support.[5] For the Court itself, its assumed deterrent capabilities are an essential element of its legitimization. Indeed, it was an important factor leading to its foundation and is "the central utilitarian argument in support" of it that "gives [it] its distinctive rationale."[6]

It is clear from the very recent past that some of these hopes have gone unmet. Thirteen years after it first started operations, the ICC still faces a host of dictators, rebel groups, and other malignant people who frequently break the laws it was meant to uphold. A few examples from 2014 are illustrative. Syria is witnessing ongoing mass human rights violations by both government troops and rebels in its four year-old civil war.[7] The Central African Republic is

[1] "Rome Statute of the International Criminal Court," July 17, 1998, http://legal.un.org/icc/statute/romefra.htm; In fact, all founding documents of the international tribunals established so far stress the belief in the deterrent effect of legal sanctions. See: James Meernik, "Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects," *International Criminal Law Review* 13, no. 1 (2013): 175.

[2] David L. Bosco, "The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?," *Michigan State University College of Law Journal of International Law* 19, no. 2 (2011): 172–175; For example, see: Kofi Annan, "Report of the Secretary-General on the Work of the Organization" (United Nations, 1998), para. 122, UN Document A/53/1, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/251/09/IMG/N9825109.pdf?OpenElement. In this article, the term "atrocities" is used to refer to crimes that fall under the ICC's jurisdiction, namely crimes against humanity, war crimes, and genocide.

[3] Bosco, "Byproduct or Conscious Goal?," 197; Christopher W. Mullins and Dawn L. Rothe, "The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment," *International Criminal Law Review* 10, no. 5 (2010): 771–772; For example, the Prosecutor of the ICC, Fatou Bensouda, clearly expressed this belief in a speech to a Seminar of the Institute for Security Studies. See: Fatou Bensouda, "Keynote Address: Setting the Record Straight: The ICC's New Prosecutor Responds to African Concerns" (Institute for Security Studies Seminar, Pretoria, South Africa, 2012), http://www.issafrica.org/uploads/10Oct2012ICCKeyNoteAddress.

[4] Coalition for the International Criminal Court, "Ukraine: Deter Grave Crimes by Joining ICC," *#GlobalJustice*, February 20, 2015, https://ciccglobaljustice.wordpress.com/2015/02/20/ukraine-deter-grave-crimes-by-joining-icc/.

[5] For example, see: Kristyan Benedict, "The Countries That Support Referring Syria to the International Criminal Court - and Some Absent 'Friends,'" *Amnesty International*, September 20, 2013, http://www.amnesty.org.uk/blogs/campaigns/syria-icc-international-criminal-court; Philippe Sands, "Referring Syria to the International Criminal Court Is a Justified Gamble," *The Guardian*, January 16, 2013, http://www.theguardian.com/commentisfree/2013/jan/16/syria-international-criminal-court-justified-gamble.

[6] Georghios M. Pikis, *The Rome Statute for the International Criminal Court. Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments* (Leiden: Martinus Nijhoff, 2010), 13; Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism," *Human Rights Quarterly* 31, no. 3 (August 2009): 628; Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?," *Washington University Law Review* 84, no. 4 (2006): 789.

[7] Office of the High Commissioner for Human Rights, "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic" (United Nations, February 5, 2015), UN Document A/HRC/28/69, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx.

once again experiencing massive human rights violations.[8] And Boko Haram is on a carnage in Nigeria, where government troops have themselves been accused of atrocities.[9] Of course, the ICC was never meant to deter each and every possible violator, but these events raise the question of why the ICC's activities have not contributed significantly to preventing of these atrocities, which all occurred well after the ICC's first prosecutions.

Prima facie, the belief that the ICC can deter future crimes might seem harmless. One could argue that the ICC is only to *contribute* to deterrence and not be solely responsible for it.[10] If the Court saves at least some lives, it will still have an aggregate positive effect for affected populations. But the problem is that the ICC – and international criminal justice more widely – is sometimes used as a relatively 'cheap' instrument to substitute for more robust interventions, such as military action.[11] For instance, the UN Security Council was criticized because it appeared to use the ICC in Sudan as an alternative to more serious involvement.[12] In such circumstances, and despite its positive contributions in other aspects, the Court is seen to have failed because supporters inflate hopes and expectations about the Court's usefulness as a conflict management tool. This is all the more problematic because the short-term failure of justice to deliver an end to hostilities might decrease perceptions about the independent value of justice in the long term.[13] Because of these important policy implications, it is of great relevance to assess the claims made by Court supporters that threats of legal sanctions can deter future atrocities.

Criminology, as a discipline studying criminal – or deviant – behaviour, is well placed to assess the impact of ICC legal sanction threats on potential criminals. It is surprising therefore that the ICC has not always given much weight to the findings of criminology.[14] Nor have criminologists in general devoted much time to the study of atrocities; one assessment from 2008 claimed the discipline was in "a state of denial" about the importance of studying state crime.[15] Although various scholarly contributions have since then applied criminological insights on legal deterrence to the ICC, the topic remains an understudied one and could use a more thorough, and in some cases more nuanced, approach.[16]

---

[8] Amnesty International, *The State of the World's Human Rights: Report 2014/2015* (London: Amnesty International, 2015), 99–102.
[9] Human Rights Watch, "West Africa: Regional Boko Haram Offensive," February 11, 2015, http://www.hrw.org/news/2015/02/11/west-africa-regional-boko-haram-offensive.
[10] This is also the point that Akhavan makes in: Payam Akhavan, "The Rise, and Fall, and Rise, of International Criminal Justice," *Journal of International Criminal Justice* 11 (2013): 527–36.
[11] Leslie Vinjamuri, "Deterrence, Democracy, and the Pursuit of International Justice," *Ethics and International Affairs* 24, no. 2 (2010): 205.
[12] Kenneth A. Rodman, "Darfur and the Limits of Legal Deterrence," *Human Rights Quarterly* 30, no. 3 (2008): 530.
[13] Philipp Kastner, "Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations," *Journal of International Criminal Justice* 12, no. 3 (July 1, 2014): 479.
[14] Mullins and Rothe, "The Ability," 772.
[15] Roeloef Haveman and Alette Smeulers, "Criminology in a State of Denial - Towards a Criminology of International Crimes: Supranational Criminology," in *Supranational Criminology: Towards a Criminology of International Crimes*, ed. Alette Smeulers and Roeloef Haveman (Berlin: Springer, 2008), 4; See also: Mullins and Rothe, "The Ability," 772.
[16] Christopher W. Mullins, David Kauzlarich, and Dawn Rothe, "The International Criminal Court and the Control of State Crime: Prospects and Problems," *Critical Criminology* 12, no. 3 (November 2004): 285–308; Dawn L. Rothe and Christopher W. Mullins, *Symbolic Gestures and the Generation of International Social Control: The International Criminal Court* (Plymouth, UK: Lexington Books, 2006); Christopher W. Mullins and Dawn Rothe, *Blood, Power, and Bedlam: Violations of International Criminal Law in Post-Colonial Africa* (New York: Peter Lang, 2008); Christopher Mullins and Dawn Rothe, "Beyond the Juristic Orientation of International Criminal Justice: The Relevance of Criminological Insight to International Criminal Law and Its Control A Commentary," *International Criminal Law Review* 10, no. 1 (January 2010): 97–110; Mullins and Rothe, "The Ability"; Dawn L. Rothe, "Shedding the Blanket of Immunity: A Commentary on the Global Principle of Ending Impunity, Realpolitik, and Legal Precedent," *Crime, Law and Social Change* 53, no. 4 (May

The aim of this paper is therefore to offer a more comprehensive overview of relevant factors for the ICC's deterrence potential, focusing on the offender's decision-making process. Building on previous criminological studies into the ICC's deterrent effect, this paper will expand the analysis, incorporating insights from (social) psychology and political science, to offer additional perspectives and come to a more nuanced conclusion, thus refining understanding of the ICC's potential for deterrence. I add insights on perceptual deterrence theory, the experiential effect, risk sensitivity, and a refined understanding of the place of extralegal sanctions. To this end, I present the most relevant factors in section I and then apply them to study the potential for ICC deterrence. The paper concludes that the prospects for legal deterrence by the ICC are limited, but that some hope for the prevention of atrocities by the ICC through more indirect means is warranted.

1. Insights from criminology

In this section, I scrutinize criminological findings particularly relevant to the analysis of the potential deterrent impact of the ICC. First, I discuss the deterrence perspective, which provides the basis for the general assumption that criminal justice systems are able to stop (potential) offenders by threatening them with prosecution. Second, I discuss the influence of extralegal sanction threats on the criminal decision-making process, with a particular focus on the context of mass atrocities.

1.1 Deterrence theory

The assumption that the ICC can deter future atrocities by prosecuting and punishing those responsible for previous atrocities has its roots in national theories on legal deterrence. Taking a utilitarian approach to offending, going back to the theories of Beccaria, Bentham, and Feuerbach, it assumes that the decision to commit a crime is based on some sort of cost-benefit calculation.[17] A potential offender will commit a crime only when he considers the expected benefits to be greater than the expected costs.[18] By sufficiently increasing these expected costs, a legal sanction threat can therefore deter crime.[19]

This core assumption can be broken down into two sub-assumptions. The first is that individuals make decisions based on a rational cost-benefit calculation. The second is that punishment by the legal system (such as fines, prison sentences, and capital punishment) can influence this cost-benefit analysis. As shown in the following section, the evidence to reassess some important elements of these assumptions is considerable.

2010): 397–412; Dawn L. Rothe and Victoria E. Collins, "The International Criminal Court: A Pipe Dream to End Impunity?," *International Criminal Law Review* 13 (2013): 191–206.

[17] Cesare Beccaria, *On Crimes and Punishments*, trans. David Young (Cambridge, MA: Hackett Publishing Company, 1986); Jeremy Bentham, *The Principles of Morals and Legislation* (Amherst: Prometheus Books, 1988); Paul Johann Anselm von Feuerbach, *Revision der Grundsätze und Grundbegriffe des positive peinlichen Rechts I.* (Erfurt: Henningsche Buchhandlung, 1799).

[18] Anna Bonanno, "The Economic Analysis of Offender's Choice: Old and New Insights," *Rivista Internazionale Di Scienze Economiche E Commerciali* 53, no. 2 (2006): 196–198; J. Robert Lilly, Francis T. Cullen, and Richard A. Ball, *Criminological Theory: Context and Consequences*, 5th Edition (Thousand Oaks, CA: Sage Publications, 2011), 20–22; Raymond Paternoster, "How Much Do We Really Know About Criminal Deterrence?," *The Journal of Criminal Law and Criminology* 100, no. 3 (2010): 770–772.

[19] Bonanno, "Economic Analysis," 197; Paternoster, "Criminal Deterrence," 783.

1.1.1 Humans as rational decision-makers

In recent decades, rational choice theory, deriving from neoclassical economics, has made its way a large number of scientific disciplines.[20] At the same time, a "widely held skepticism" remains as to its accuracy and comprehensiveness.[21] Neoclassical economics would see a choice as rational when the person making that choice has consciously considered all the costs and benefits and then decided what is best for him in an objective manner, adhering to basic rules of logic and probability theory and remaining uninfluenced by immaterial factors such emotions or mode of presentation.[22] According to Richard Thaler and Cass Sunstein, however, to meet these requirements, one would have to "think like Albert Einstein, store as much memory as IBM's Big Blue, and exercise the willpower of Mahatma Gandhi."[23] Most individuals do not qualify for this. Instead, a considerable amount of social psychological research has shown that most choices are both flawed and biased, rather than the result of any neoclassical decision-making process.[24] Computational difficulties, heuristics ("mental rules of thumb"), emotions, and individual differences significantly impair or shortcut rational decision-making processes [25]

As an alternative, rational choice scholars have proposed models of *bounded rationality*, or i*nstrumental rationality*.[26] These assert that human behavior is still goal-driven and attempts to achieve desirable outcomes, while avoiding undesirable ones.[27] Human behavior certainly does respond to incentives and disincentives, though in different ways and not always how we expect them to.[28] These observations put in perspective the assumption that people should be seen as guided by predictable, rational decision-making processes. To some extent, this also explains why some potential offenders do not respond in the expected way to the threat of international legal sanctions. They are not necessarily making their decisions based on the cost-benefit calculi that the deterrence perspective expects them to do.

---

[20] Lilly, Cullen, and Ball, *Context and Consequences*, 344.
[21] Clemens Kroneberg and Frank Kalter, "Rational Choice Theory and Empirical Research: Methodological and Theoretical Contributions in Europe," *Annual Review of Sociology* 38, no. 1 (August 11, 2012): 74.
[22] Eldar Shafir and Robyn A. LeBoeuf, "Rationality," *Annual Review of Psychology* 53 (2002): 492–493.
[23] Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (New Haven; London: Yale University Press, 2008), 6.
[24] Ibid., 7–8.
[25] On computational difficulties, see: Shafir and LeBoeuf, "Rationality," 492–493; for a compelling overview of heuristics, see: Daniel Kahneman, *Thinking, Fast and Slow* (London: Penguin Books Ltd., 2012); on emotions: Jeffrey A. Bouffard, "The Influence of Emotion on Rational Decision Making in Sexual Aggression," *Journal of Criminal Justice* 30 (2002): 121–34; Rainer Greifeneder, Herbert Bless, and Michel Tuan Pham, "When Do People Rely on Affective and Cognitive Feelings in Judgment? A Review," *Personal and Social Psychology Review* 15, no. 2 (2011): 107–41; George Loewenstein, "Out of Control: Visceral Influences on Behavior," *Organizational Behavior and Human Decision Processes* 65, no. 3 (March 1996): 272–92; on individual differences, see: Daniel S. Nagin, "Enduring Individual Differences and Rational Choice Theories of Crime," *Law and Society Review* 27, no. 3 (1993): 467–96; Greg Pogarsky, "Deterrence and Individual Differences Among Convicted Offenders," *Journal of Quantitative Criminology* 23 (2007): 59–74.
[26] Kroneberg and Kalter, "Rational Choice Theory and Empirical Research," 86.
[27] Jakob von Holderstein Holtermann, "A 'Slice of Cheese'—a Deterrence-Based Argument for the International Criminal Court," *Human Rights Review* 11 (2010): 295; Greg Pogarsky, "Deterrence and Decision Making: Research Questions and Theoretical Refinements," in *Handbook on Crime and Deviance*, ed. Marvin D. Krohn, Alan J. Lizotte, and Gina Penly Hall, Handbooks of Sociology and Social Research (New York, NY: Springer New York, 2009), 241.
[28] Paternoster, "Criminal Deterrence," 819. On a side note: the human brain is always seeking to explain the events that occur and the things that we do. Therefore, we tend to rationalize them and seek explanations that justify our actions. However, this "retrospective rationality" does not mean that the decisions that preceded these actions were always based on a rational decision making process. They "are not necessarily reflective of [the] thought process in situ". See: Bruce A. Jacobs, "Deterrence and Deterrability," *Criminology* 48, no. 2 (2010): 424.

1.1.2 Legal punishment deters future offenders

The second assumption of the deterrence perspective is that the threat of legal punishment can be a significant disincentive to those who consider committing a crime. Deterrence is achieved when the potential offender perceives the disincentive of the legal sanction threat to be so strong that it outweighs the incentives of the crime under consideration.[29] Deterrence scholars have identified three characteristics of the potential punishment that are important in this context: the punishment's certainty, severity, and celerity (swiftness), which all are thought to have an inverse relation to crime. Thus, the line of reasoning goes, when legal sanction threats are more certain, more severe, and/or more swift, fewer crimes will be committed.[30]

Despite the intuitive appeal for this line of reasoning, strong empirical does not exist. Research on the relationship between the objective properties of punishment and crime rates has delivered extremely mixed results.[31] This can be explained to some extent by the observation that it is not the objective properties of the legal sanction threat that matter, but rather how the potential criminal perceives them. Criminologists have shown that the objective properties of punishment rarely correlate with the way these properties are perceived: people generally do a poor job of assessing the chance of being apprehended, the severity of punishment they may receive, or the swiftness with which the punishment might arrive.[32] Perceptual deterrence theorists therefore emphasize the importance of focusing on the perceived properties of legal sanction threats. Their research has delivered some evidence for a deterrent effect of the perceived certainty of legal sanctions, though even this effect has been judged to be "modest to negligible."[33] Evidence exists then, for an effect of certainty, but significant correlations between the perceived severity and celerity of the legal sanction and the willingness to offend are rarely found.[34]

Another part of the explanation lies in the importance of individual differences as determinants of behavior: different individuals respond to legal sanction threats in different ways.[35] Economic analyses of offender's choice have usually disregarded the influence of personal differences on offender decision making.[36] Criminologists have shown, however, that some offenders are more 'deterrable' than others. Deterrability "refers to the offender's capacity and/or willingness" to respond to sanction threats.[37] Pogarsky identifies three categories of offenders that can be placed along a hypothetical continuum: acute conformists, deterrable offenders, and incorrigibles.[38] Acute conformists do not need to be deterred because they are controlled by personal norms and extralegal influences, whereas incorrigibles cannot be deterred, because of either an unwavering commitment to crime or some sort of psychopathological reason. In between are the deterrable offenders, who are

[29] Bonanno, "Economic Analysis," 197; Paternoster, "Criminal Deterrence," 782–787.
[30] Robert Apel, "Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence," *Journal of Quantitative Criminology* 29, no. 1 (March 2013): 69; Paternoster, "Criminal Deterrence," 782–787; Pogarsky, "Deterrence and Decision Making," 241.
[31] Paternoster, "Criminal Deterrence," 818.
[32] Gary Kleck et al., "The Missing Link in General Deterrence Research," *Criminology* 43, no. 3 (2005): 642–650, 653.
[33] Lilly, Cullen, and Ball, *Context and Consequences*, 347.
[34] Daniel S. Nagin and Greg Pogarsky, "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats Into a Model of General Deterrence: Theory and Evidence," *Criminology* 39, no. 4 (2001): 883. However, for one of the few studies claiming an impact of severity, see: Silvia M. Mendes and Michael D. McDonald, "Putting Severity of Punishment Back in the Deterrence Package," *Policy Studies Journal* 29, no. 4 (2001): 588–610.
[35] Nagin, "Individual Differences and Rational Choice Theories," 467–473; Nagin and Pogarsky, "A Model of General Deterrence," 866.
[36] Bonanno, "Economic Analysis," 194.
[37] Jacobs, "Deterrence and Deterrability," 417.
[38] Greg Pogarsky, "Identifying 'Deterrable' Offenders: Implications for Research on Deterrence," *Justice Quarterly* 19, no. 3 (September 2002): 433.

responsive to sanction threats because they are "neither strongly committed to crime nor unwaveringly conformist."[39] In this view, then, legal sanction threats will have an effect on only some individuals, which might explain why the evidence for deterrence among the general population is limited. A similar argument, which first Cronin-Furman and then Jo and Simmons advance, emphasizes the importance of motivations to assess the impact of legal sanction threats on potential offenders. Whereas Cronin-Furman looks at the effect of "overriding interests," Jo and Simmons differentiate potential offenders by whether they seek legitimacy.[40]

Another important way in which individuals differ in their deterrability is what is known as *risk sensitivity*, the extent to which an offender is aware of the risk of being caught and takes measures to minimize it.[41] Individuals who score high on risk sensitivity would fall squarely into the category of deterrable offenders, because they are willing to commit crimes and make instrumental calculations about its modalities. However, the paradox is that they are actually among the most difficult to deter. This is because they decrease the perceived certainty of the legal sanction by constantly employing new tactics, changing their targets, minimizing evidence, or avoiding areas that are frequently patrolled by law enforcement agencies to avoid detection or apprehension. In the context of mass atrocities, perpetrators further often use processes of *juridical othering* (claiming that the perpetrators are from another group) and use proxies or rogue agent scenarios to maintain plausible deniability.[42]

Last, criminologists have shown that offenders learn from experiences with the criminal justice system, both their own and those of their peers. Potential offenders update their perception of the chance of being caught for a certain crime by looking at the number of times they or one of their peers got away with it relative to the times they did not. This effect has been dubbed the *experiential effect*.[43]

In short, the criminal justice system has a limited capability to deter crimes. The empirical evidence is weak and the perceptions of legal sanction threats are not always a sufficient disincentive. This has led a recent reviewer of the deterrence literature to conclude that the criminal justice system might not be the best way to prevent crime: the gains of crime are often immediate, whereas legal costs are usually "uncertain [and] far in the future".[44] In contrast, extralegal sanctions are in many cases more effective in guiding behavior. I therefore discuss the ways in which these extralegal sanction threats influence the decision to commit crimes in the following section.

1.2 Extralegal sanction threats

[39] Nagin, "Individual Differences and Rational Choice Theories," 471.
[40] Kate Cronin-Furman, "Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity," *International Journal of Transitional Justice* 7, no. 3 (November 1, 2013): 442; Hyeran Jo and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?," *SSRN Paper*, December 18, 2014, 7, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552820.
[41] Jacobs, "Deterrence and Deterrability," 422–423.
[42] Ruth Jamieson and Kieran McEvoy, "State Crime by Proxy and Juridical Othering," *British Journal of Criminology* 45 (2005): 504–27; Mullins and Rothe, "Beyond the Juristic Orientation of International Criminal Justice," 108–110; Alex Alvarez, "Militias and Genocide," *War Crimes, Genocide & Crimes Against Humanity* 2, no. 1 (2006): 17–21.
[43] Julie Horney and Ineke Haen Marshall, "Risk Perceptions Among Serious Offenders: The Role of Crime and Punishment," *Criminology* 30, no. 4 (1992): 575–577, 587–590.
[44] Paternoster, "Criminal Deterrence," 821.

Essentially, extralegal sanctions are all the negative consequences of behaviour that fall outside of the scope of the legal system.[45] They are usually grouped into two categories: social censure and self-disapproval. Social censure can take the form of social isolation, loss of interpersonal contacts, or a lowering of community respect, but also more violent forms, such as corporal punishment or even death.[46] Self-disapproval comes when an act elicits a negative feeling, such as shame, within the person. More specifically, self-disapproval is defined as "the personal dissonance from having violated an internalized behavioural norm."[47] It is important to note that extralegal sanction threats do not necessarily prevent crime. Both the group norm and the internalized norm can either reject violence or promote it.[48] Therefore, though in some social circles murdering someone leads to extreme social censure and self-disapproval, in others – such as street gangs, terrorist organizations, and, as shown later, genocidal situations – it does not.

The threat of extralegal sanctions can have a significant impact on people's behavior. It can be a strong disincentive and in this way significantly guide the decisions people make. The threat of extralegal sanctions has been shown to play a much larger role in deterring the general population from criminal conduct than the threat of legal sanctions does.[49] Crucially, there is some evidence to indicate that the effects of extralegal sanction threats vis-à-vis legal ones are increased when the rule of law or the trust in and legitimacy of formal sanctioning mechanisms is generally low.[50] Because sanctioning institutions not perceived as legitimate are not seen as a proper restriction of behavior, extralegal sanctioning mechanisms for controlling crime become even more important. When the rule of law is not in place, social disapproval and moral norms need to be relied on to deter potential offenders. Further undermining the already limited deterrent effect of criminal justice systems in such contexts is that they are often characterized by a lack of effectiveness in the apprehension of perpetrators, which results in a lower certainty of legal sanctions.[51] As shown in section 2, serious international crimes often take place in exactly such contexts.

The norms legal institutions espouse can also interact with extralegal norms. Prosecuting and punishing those responsible for unacceptable behavior can signal the values of a broader community.[52] Consistent punishment for specific acts may furthermore change a potential offender's perceptions of what behavior his peers deem acceptable.[53] Although consistent effects are far from certain, legal institutions can therefore strengthen individual and group norms against violence by changing the normative context in which potential offenders operate. Sikkink has termed this effect "the justice cascade."[54]

In conclusion, when studying the potential of the ICC to effectively deter future crimes, it is important to understand the effects of extralegal influences on the decision making process vis-à-vis the influence of the criminal justice system. In the following section, I discuss the implications of these findings for the deterrence of future offenders by the ICC.

---

[45] Ibid., 781.
[46] Kirk R. Williams and Richard Hawkins, "Perceptional Research on General Deterrence: A Critical Review," *Law and Society Review* 20, no. 4 (1986): 558.
[47] Nagin and Pogarsky, "A Model of General Deterrence," 869.
[48] Clemens Kroneberg, Isolde Heintze, and Guido Mehlkop, "The Interplay of Moral Norms and Instrumental Incentives in Crime Causation," *Criminology* 48, no. 1 (2010): 264–269.
[49] Paternoster, "Criminal Deterrence," 817.
[50] Charles R. Tittle, Ekaterina V. Botchkovar, and Olena Antonaccio, "Criminal Contemplation, National Context, and Deterrence," *Journal of Quantitative Criminology* 27, no. 2 (June 2011): 238–244.
[51] Such contexts have no rule of law and are characterized by a 'culture of impunity'.
[52] Dan M. Kahan, "Social Influence, Social Meaning, and Deterrence," *Virginia Law Review* 83 (1997): 349–95.
[53] Williams and Hawkins, "A Critical Review," 558–561.
[54] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York: W.W. Norton, 2011).

2. What does this mean for the ICC? Applying findings of criminology to the practicalities of international criminal law

The hope that the ICC can deter future atrocities is, as noted, an important and perhaps the central utilitarian element of its justification. In addition, both referring states and the international community have seen in the ICC a way to avoid mass atrocities and bring peace to a country. It seems fair to say, however, that these hopes and expectations have gone largely unmet. To more comprehensively study the reasons for this, I use the findings presented in section I to the specific characteristics of the ICC's legal sanction threat.

2.1 Deterrence theory

The first assumption of deterrence theory is that the criminal decision-making process is rational. Several scholars have doubted that perpetrators of ICC crimes are really engaging in rational cost-benefit analyses.[55] Mark Drumbl asks whether "genocidal fanatics, industrialized into well-oiled machineries of death, make cost-benefit analyses prior to beginning work."[56] The brutality and sheer horror of some crimes might indeed prompt these arguments. Certainly, several factors shortcut rational considerations in situations of group violence, such as inebriation or intoxication, obedience to authority, visceral factors, and a plethora of other social psychological factors that is too exhaustive to fully mention here.[57] Still, seeing all perpetrators as genocidal fanatics would be incorrect. Looking at the mass participation in genocides, James Waller comes to the conclusion that it is statistically and diagnostically impossible that they all had a psychological deficiency that explains their acts.[58] Additionally, one review of the political science literature on political violence finds a consensus that violence is not the result of ancient hatreds or essentially irrational, but instead the result of a "deliberate strategy of belligerent groups."[59]

It is useful to consider the factors that influence on-the-ground perpetrators of atrocities as different from those affecting the planners and organizers.[60] Like other international courts before it, the ICC has the mandate to prosecute those most responsible for serious

[55] Mark A. Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007), 171; Martin Mennecke, "Punishing Genocidaires: A Deterrent Effect or Not?," *Human Rights Review* 8, no. 4 (July 2007): 319–339; Rothe and Collins, "A Pipe Dream," 194–195; David Wippman, "Atrocities, Deterrence, and the Limits of International Justice," *Fordham International Law Journal* 23, no. 2 (1999): 476.
[56] Drumbl, *Atrocity, Punishment and International Law*, 171.
[57] On intoxication: Mullins and Rothe, "The Ability," 783; and, on obedience: Stanley Milgram, *Obedience to Authority: An Experimental View* (New York: Harper & Row, 1974); For overviews, see: Frank Neubacher, "How Can It Happen That Horrendous State Crimes Are Perpetrated? An Overview of Criminological Theories," *Journal of International Criminal Justice* 4 (2006): 787–99; Alette Smeulers and Fred Grünfeld, *International Crimes and Other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook*, International and Comparative Criminal Law Series 32 (Leiden: Martinus Nijhoff, 2011), 203–241; Ervin Staub, *The Roots of Evil: The Origins of Genocide and Other Group Violence* (New York: Cambridge University Press, 1989), 13–34; James Waller, *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing* (Oxford: Oxford University Press, 2002).
[58] Waller, *Becoming Evil*, 69.
[59] Benjamin A. Valentino, "Why We Kill: The Political Science of Political Violence against Civilians," *Annual Review of Political Science* 17, no. 1 (2014): 91. This does not necessarily mean that these acts are the result of rational calculations of costs and benefits, only that they are not only the result of impulsive or fundamentally irrational behavior.
[60] Mullins and Rothe, "The Ability," 774–775.

international crimes, which in international criminal law has usually meant those who ordered, organized, or planned them. The extent of planning and organization that goes into most genocidal activities seems to preclude an explanation solely focused on the irrationality of the senior leadership. Most of the behaviour is clearly goal-oriented and serves some sort of purpose to them. If the potential perpetrator can be influenced by incentives and disincentives, credible ICC legal sanction threats could theoretically be an effective disincentive.

To deter a potential offender, the disincentive of legal sanction threats needs to counter the incentives of the crime. Atrocities can offer what perpetrators see as important benefits. Problematically, these expected benefits are often more effective in guiding behavior because they are, for the potential offenders, more clearly present than the distant threat of arrest or prosecution.[61] The following categories can be discerned. First, leaders of groups that commit atrocities usually allow or order the crimes to gain power or maintain it.[62] Unscrupulous leaders know that the creation of a shared enemy and directing violence against it can increase group cohesion. This often means that when leaders are threatened by international prosecution, the alternatives are either to surrender and be sentenced, or to continue the violence through which they maintain their hold on power.[63] It is not surprising that most leaders choose the latter. Similarly, Cronin-Furman, studying the motives of potential offenders, emphasizes that the individual's perception of the necessity of the crime moderates the ICC's deterrent effect, resulting in different outcomes per individual.[64] Second, hatred and prejudice can play an important role. Often, those who engage in mass atrocities are supported by an ideology (or at least a belief) that is based on feelings of some sort of (ethnic) superiority.[65] In such ideologies, members of the out-group – the other racial, tribal, ethnic, political, or religious group – are dehumanized and their murder or abuse is justified and encouraged. Fulfilling the goals of these ideologies can be an important incentive. Third, incentives for atrocities can also be more banal. Some order or participate in atrocities for material gain or personal satisfaction, or sometimes even perceived self-defence.[66] It is important to not lose sight of the powerful incentives that potential offenders can have while studying the effect of the potential disincentive the ICC can deliver.

A fairly recent strain in political science literature seems to counter the skepticism about deterrence that criminology elicits. An important representative recent example is a 2014 study by Hyeran Jo and Beth Simmons.[67] They present empirical data to argue for a

[61] According to the availability heuristic, such easily retrievable pieces of information have a disproportionate effect on a decision making process. See: Amos Tversky and Daniel Kahneman, "Availability: A Heuristic for Judging Frequency and Probability," *Cognitive Psychology* 5, no. 2 (1973): 207–32.
[62] Rodman, "Darfur and the Limits of Legal Deterrence," 530–532; Jack Snyder, *From Voting to Violence: Democratization and Nationalist Conflict* (London: W.W. Norton, 2000), 45–91; Wippman, "Atrocities, Deterrence," 479.
[63] Indeed, Ku and Nzelibe stress that most of those who order atrocities often face death when they fail to hold on to power. Thus, the disincentive that the ICC delivers to stop committing atrocities, is far weaker than the disincentive of abandoning power, which possibly results in death. See: Ku and Nzelibe, "Deter or Exacerbate."
[64] Cronin-Furman, "Managing Expectations," 454.
[65] Alex Alvarez, "Destructive Beliefs: Genocide and the Role of Ideology," in *Supranational Criminology: Towards a Criminology of International Crimes*, ed. Alette Smeulers and Roelof Haveman (Antwerp: Intersentia, 2008), 215.
[66] In fact, Straus and Verwimp argue that the perpetrators of the 1994 genocide in Rwanda were primarily driven by such incentives. Although this research has focused more on the lower and middle-level perpetrators, its points are probably relevant across cases and for a broader category of perpetrators. See: Scott Straus, *The Order of Genocide: Race, Power and War in Rwanda* (Ithaca, NY: Cornell University Press, 2008); Philip Verwimp, *Peasants in Power: The Political Economy of Development and Genocide in Rwanda* (Dordrecht; New York: Springer, 2013).
[67] Jo and Simmons, "Can the International Criminal Court Deter Atrocity?"

significant impact of both prosecutorial and social deterrence factors on the number of civilians killed. Although some of their claims are addressed in further detail below, it is worth considering the following. First, their study scrutinizes the impact of the ICC on violence levels within civil war-affected countries, not the micro-level dynamics of deterrence (what an individual's reaction is likely to be), which are the focus of this study. Second, as they acknowledge, the correlations they observe are relatively weak, especially for rebel groups. The evidence that the ICC deters future perpetrators is thus far from definitive. Third, much of the correlation is negated when assessed in combination with other relevant policy interventions. Although variables such as regime type are controlled for, the ICC's actions rarely happen in a vacuum. Fully quantifying the complex dynamics of violence – especially those in which mass atrocities are related to long-standing ethnic conflicts – would require a far more comprehensive study, looking at a whole range of factors such as economic development, past abuses, and social inequality, to name but a few. Accordingly, although Jo and Simmons (and the strand in political science they represent) make a praiseworthy contribution to the debate, they do not necessarily contradict the claims made here. The focus of their study is different and the implications of their conclusions are limited.

To resume, I noted that the most important characteristic of a legal sanction threat is its perceived certainty. Some studies using criminological knowledge to study the ICC have identified the small certainty of its legal sanction threat as a core explanation of why it does not effectively deter.[68] Although the certainty of prosecution for those who commit atrocities has increased, the ICC has encountered a number of problems with sufficiently increasing the certainty of legal sanctions. The Court has indicted twenty-nine individuals, seventeen of whom are currently in detention, but has convicted only one.[69] Although the ICC has also encouraged domestic trials under positive complementarity procedures, that most perpetrators are not prosecuted has left what Clark calls an impunity gap.[70] To be fair, these results are mostly due to built-in weaknesses and outside the Court's responsibility. The ICC has a limited capacity, which allows it to manage only two to three cases per year.[71] In addition the ICC, by conscious design, does not have its own police force and relies fully reliant on the cooperation of states for the apprehension of suspects it does prosecute.[72] Neither does the ICC have a "supranational enforcement capacity to command state compliance."[73] States have not always assisted in apprehending ICC suspects. In some cases, states are simply unable to apprehend rebel leaders. In others, sitting heads of state have been able to avoid prosecution because external actors do not want to intervene for geostrategic, economic, or political reasons.[74] For example, Omar al-Bashir, the president of Sudan indicted by the ICC in 2008 for alleged crimes in Darfur, has long been able to travel widely in Africa. The international community is not willing to intervene militarily to secure his arrest. As Akhavan notes, in

[68] Mullins and Rothe, "The Ability," 776–781.
[69] International Criminal Court, "All Cases" (International Criminal Court, February 21, 2015), http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx.
[70] On positive complementarity, see: Sarah Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: Cambridge University Press, 2014); and, on the impunity gap, see: Janine Natalya Clark, "Peace, Justice and the International Criminal Court," *Journal of International Criminal Justice* 9 (2011): 535.
[71] Akhavan, "Rise, and Fall, and Rise," 531.
[72] Christine H. Chung, "The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress and Need," *Case Western Reserve Journal of International Law* 40, no. 1/2 (2008): 239.
[73] Kenneth A. Rodman, "Pacting the Law Within Politics. Lessons from the International Criminal Court's First Investigations" (paper presented at the Facing the Past: International Conference on the Effectiveness of Remedies for Grave Historical Injustices, Utrecht, the Netherlands: University of Utrecht, May 27, 2010), 2.
[74] Darren Hawkins, "Power and Interests at the International Criminal Court," *SAIS Review* 28, no. 2 (2008): 111; Meernik, "Justice, Power and Peace," 187.

these critical moments, "the balance is still firmly on the side of political expedience and submission to power rather than to justice."[75]

A third factor limiting the certainty of arrest is that the ICC must deal with alternative modes of transitional justice. Proponents of restorative justice argue that traditional justice mechanisms (f.e. *mato oput* in Uganda, *gacaca* in Rwanda) and truth commissions are more effective in promoting reconciliation and designing effective paths to sustainable peace.[76] What is problematic for the ICC is that these mechanisms may lead to amnesties or grant alternative punishments, circumventing (international) criminal trials.[77] Questions over the offering of amnesties have sparked intense debates about whether to prioritize peace or justice. Some argue that judicial proceedings can exacerbate conflict and that justice should not be prioritized over peace.[78] Others maintain that amnesties offer perverse incentives and that there can be no peace without justice.[79] The peace versus justice debate intensified in 2007 when Ugandan rebel leader Joseph Kony refused to sign a peace deal because the ICC did not revoke his arrest warrant.[80] Such questions remain relevant today. Peace negotiations in Ukraine and Syria have seen hotly contested debates over whether amnesties should be accepted as part of a peace deal. It is not the intention here to delve too deeply into this debate, but it seems clear that offering amnesties as part of a transitional justice deal would undermine the certainty of legal sanctions, thus limiting the deterrent impact of the ICC. Ending the culture of impunity will be difficult if offenders get away with their crimes by using amnesties as a bargaining chip for ending atrocities.

Importantly though, raising the objective chance of being arrested for ICC crimes is not necessarily enough to increase the chances for deterrence. The perception of the certainty of the punishment must also be raised. Every indictment unfailingly resulting in an arrest, would of course influence the perception of certainty. But because such a situation is not realistic in the short term, the Court can raise perceptions by clearly signaling its intentions to those who are considering ICC crimes.[81] Such a strategy seems to have been responsible for claims of (provisional) success in Colombia and during the 2013 Kenya elections.[82] In Colombia, the

[75] Akhavan, "Disincentive to Peace?," 652.
[76] See, for example: Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston, MA: Beacon Press, 1998), 86–90; Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2004): 6.
[77] Jakob von Holderstein Holtermann, "The End of 'the End of Impunity'? The International Criminal Court and the Challenge from Truth Commissions," *Res Publica* 16 (2010): 210.
[78] Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21, no. 2 (Summer 2007): 179–98; Jack Goldsmith and Stephen D. Krasner, "The Limits of Idealism," *Daedalus* 132, no. 1 (2003): 47–63; Ku and Nzelibe, "Deter or Exacerbate"; Lucy Hovil and Joanna R. Quinn, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, Refugee Law Project Working Paper (Kampala: Refugee Law Project, July 2005), http://refugeelawproject.org/files/working_papers/RLP.WP17.pdf; Snyder and Vinjamuri, "Trials and Errors."
[79] Manisuli Ssenyonjo, "Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court," *Journal of Conflict & Security Law* 10, no. 3 (2005): 405–34.
[80] Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006), 72–95; Lydia Apori Nkansah, "International Criminal Justice in Africa: Some Emerging Dynamics," *Journal of Politics and Law* 4, no. 2 (September 2011): 79; Joanna R. Quinn, "Getting to Peace? Negotiating with the LRA in Northern Uganda," *Human Rights Review* 10, no. 1 (March 2009): 65.
[81] Bosco recommends that the ICC's Outreach-section is used in a more conscious way to prevent crime. See: Bosco, "Byproduct or Conscious Goal?," 195–197.
[82] See: David Cantor and Par Engstrom, *In the Shadow of the ICC: Colombia and International Criminal Justice*, Report of the Expert Conference Examining the Nature and Dynamics of the Role of the International Criminal Court in the Ongoing Investigation and Prosecution of Atrocious Crimes Committed in Colombia, Organized in London, 26-29 May 2011 (London: Human Rights Consortium, University of London, 2011), http://www.academia.edu/1383204/In_the_Shadow_of_the_ICC_Colombia_and_International_Criminal_Justic

ICC delivered targeted communications to key parties in the civil war to emphasize the possibility of an OTP investigation. This seems to have catalyzed right-wing paramilitary groups to demobilize and left-wing guerilla groups to encourage damage-limitation measures.[83] In Kenya, the ICC messaged that it was monitoring the 2013 elections for the commission of ICC crimes, allegedly contributing to the prevention of these crimes. The Colombian and Kenyan cases, if true, illustrate that the objective certainty of the sanction threat are less important than the potential perpetrator's perception of it.

The problems related to certainty of prosecution that the ICC is point to the relevance of the experiential effect. The information potential offenders receive from their and their peers' experiences with international criminal justice, will generally suggest minimal chances of being prosecuted or apprehended. Although the ICC has made progress in countering the culture of impunity, the world is still rife with leaders who commit atrocities and get away with it. Recent developments have exacerbated these effects. In December 2014, the ICC Prosecutor publicly dropped her case against Kenyan President Uhuru Kenyatta because the government actively countered her attempts to garner enough evidence to build a case.[84] She also suspended prosecutorial activities against al-Bashir, citing a lack of international support.[85] Potential offenders may feel that they will be rewarded with a moratorium on their prosecution when they obstruct the ICC for long enough. Al-Bashir and Kenyatta certainly felt vindicated and claimed a victory over the Court.[86]

Although the experiential effect now seems to lead to decreased perceptions of certainty, that it will eventually contribute to the ICC's deterrent effect in a positive way seems likely. Justice and accountability are increasingly becoming part of the discourse. International and internal pressures make it more difficult for negotiators to strike peace deals that do not address these issues in some way.[87] The combination of positive complementarity and international criminal trials could mean that potential offenders will look around them, see that their peers who commit ICC crimes are prosecuted, and therefore increase their perceived costs of offending.

However, experience has shown that many of the potential offenders are highly risk sensitive in the sense that they recognize the risk of prosecution and take measures to limit this risk, which limits the perceived certainty. Examples abound of perpetrators trying to minimize their detection or apprehension risk by adapting their tactics, complicating the collection of evidence, avoiding high-risk areas, or using proxies. Joseph Kony, although reportedly at first "afraid" of the Court, did not stop his crimes but instead intensified his efforts to conceal his presence and evade capture.[88] Kony has managed to stay out of the hands of the Court for almost ten years despite intense efforts by pursuing Ugandan, Congolese, UN, and other forces to apprehend him. Al-Bashir used the Janjaweed militias as proxies to target civilians in Darfur and has only traveled to countries that will not extradite him.[89] The Kenyan

e; Susanne D. Mueller, "Kenya and the International Criminal Court (ICC): Politics, the Election and the Law," *Journal of Eastern African Studies* 8, no. 1 (2014): 25–42.

[83] Cantor and Engstrom, *In the Shadow of the ICC*, 10.

[84] Owen Bowcott, "ICC Drops Murder and Rape Charges against Kenyan President," *The Guardian*, December 5, 2014, http://www.theguardian.com/world/2014/dec/05/crimes-humanity-charges-kenya-president-dropped-uhuru-kenyatta.

[85] "Sudan President Bashir Hails 'Victory' over ICC Charges," *BBC News*, December 13, 2014, http://www.bbc.com/news/world-africa-30467167.

[86] Bowcott, "ICC Drops Murder and Rape Charges against Kenyan President"; "Sudan President Bashir Hails 'Victory' over ICC Charges."

[87] Kastner, "Armed Conflicts and Referrals to the International Criminal Court," 484–489.

[88] Matthew Green, *The Wizard of the Nile: The Hunt for Africa's Most Wanted* (London: Portobello Books, 2008), 232.

[89] Rodman, "Darfur and the Limits of Legal Deterrence," 560.

government actively countered ICC efforts to collect evidence. Although their risk sensitivity puts these offenders in the category of deterrables, they are in fact among the most difficult to deter because they believe in their ability to elude law enforcement agencies. All in all, the deterrent impact of ICC sanctions seems to be limited, both in theory and in practice.

2.2 Extralegal sanctions

As explained earlier, extralegal sanction threats usually play a more important role in the decision-making process than legal sanction threats. Furthermore, the reliance on extralegal sanction threats for crime prevention is increased in situations where the legitimacy of sanctioning institutions is generally perceived to be low and the rule of law is lacking. Interestingly, serious international crimes usually take place in exactly such contexts. Genocidal situations are often characterized by an 'inversion of morality', in which the murder, torture, and other cruel treatments of the victims is both accepted and encouraged. The crime is legitimized by telling the perpetrators that the victims "deserve to die," that they are not human beings or that the killing is needed to serve some sort of higher purpose, such as the fulfilment of ideological goals.[90] In these social contexts rule of law and trust in the formal sanctioning institutions are almost nonexistent.

In this context of inverted moral norms, self-disapproval and particularly social censure do not come into play when the potential offender commits a crime, but rather when he does not. The deviant behavior is not participation in criminal behavior, but rather a refusal to do so. Given the impact of extralegal sanction threats on the decision-making process, one could say that the potential offender is deterred from *not* committing the crime. Senior leadership figures might fear that they would lose power or social standing, or face disapproval by their peers when they do not further their ideological goals or allow their subordinates to commit atrocities.

Some scholars have argued that the ICC can counter these negative norms by challenging them. Those who advocate for an "expressionist" role for international criminal tribunals maintain that the Court should communicate clear normative messages to the world population about the norms that everyone should adhere to.[91] If this is done consistently, these norms can be integrated into people's value sets, effectively creating self-regulating communities. If a person has not internalized the norms, the ICC also has potential for what Jo and Simmons call social deterrence: because the ICC is a global court, it has a "broader ability to mobilize extralegal pressures" and "shapes social expectations about what constitutes justice more broadly."[92] Indeed, their empirical analysis finds support for a "conditional impact" of the ICC's social deterrence effects for the number of civilians some

[90] Dawn L. Rothe and Victoria E. Collins, "The International Criminal Court: A Pipe Dream to End Impunity?," *International Criminal Law Review* 13 (2013): 196. For a case study on the effect of group norms on the willingness to commit genocide in Rwanda, see: Ravi Bhavnani, "Ethnic Norms and Interethnic Violence: Accounting for Mass Participation in the Rwandan Genocide," *Journal of Peace Research* 43, no. 6 (November 2006): 651–69. For interesting, somewhat opposing, studies into the effect of group norms on the willingness to participate in the Holocaust, see: Christopher R. Browning, *Ordinary Men: Police Battalion 101 and the Final Solution in Poland* (New York: Harper Collins, 1992); Daniel J. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (London: Vintage, 1997).

[91] Marlies Glasius, "Too Much Law, Not Enough Justice? The Dominant Role of the Legal Discourse in Transitional Justice" (Making Peace and Justice: Images, Histories, Memories, Ottone, Utrecht, the Netherlands, 2013); Robert D. Sloane, "The Expressive Capacity of International Punishment: The Limits of National Law Analogy and the Potential of International Criminal Law," *Stanford Journal of International Law* 43 (2007): 39–94.

[92] Jo and Simmons, "Can the International Criminal Court Deter Atrocity?," 16.

governments kill and for rebel groups that seek legitimacy.[93] As Kastner points out, the ICC's potential lies in reshaping the social norms, and contributing to ending atrocities by creating a positive peace. Or, as Kastner concludes "This emerging normatization in the form of process-related and not primarily outcome-based commitments is considerable, and we can expect it to have positive effects on the peaceful resolution of armed conflicts."[94]

Conclusion

With this paper, I intended to take a more comprehensive approach, focusing on the potential offender's decision-making process, to assess the reasons behind the ICC's problems with deterring atrocities. As has been shown above, the potential for the ICC to deter future atrocities is limited. From a criminological perspective, it faces obstacles in ensuring the certainty of its legal sanctions and needs to counter extralegal sanction threats that sometimes encourage criminal behaviour. At the same time, however, it can contribute to the prevention of atrocities by focusing on the long-term, transformative process that can lead to the internalization of norms and the creation of self-regulating communities.

Assessing the Court's effectiveness by studying its deterrent impact on ongoing conflicts is both unwise and unfair. Legal sanction threats are not appropriate for this role, nor does the Court have a strong enough mandate or institutional powers to amend the problems it faces. Because most of these problems are built-in, its structural shortcomings can be countered only by a transformation of the world community from one guided by Realpolitik to another guided by the imperatives of the protection of innocent civilians. Sadly, Akhavan's assertion that the balance is firmly on the side of power, instead of justice, still seems to ring true in 2015. While the world waits for such a transformation, there is little reason to hope that the ICC will be able to generate strong enough legal sanction threats to directly and meaningfully deter future atrocities.

As mentioned, hopes that the ICC can deter atrocities are sometimes problematic because they can preclude wider and more effective international engagement. Some states, furthermore, refer situations to the ICC in the hope of an immediate and measurable impact. Such parties pin unrealistic hopes on the ICC. It would therefore be wise for the ICC, and for NGOs and the international community in general, to "manage expectations."[95] Adjusting its rhetoric to instead point to the useful longer term contributions the ICC *can* deliver to the world, reduces the risk that the Court is set up to fail by expectations it cannot deliver on.

[93] Ibid., 39.
[94] Kastner, "Armed Conflicts and Referrals to the International Criminal Court," 490.
[95] Cronin-Furman, "Managing Expectations."

Works cited

Akhavan, Payam. "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism." *Human Rights Quarterly* 31, no. 3 (August 2009): 624–54.

———. "The Rise, and Fall, and Rise, of International Criminal Justice." *Journal of International Criminal Justice* 11 (2013): 527–36.

Allen, Tim. *Trial Justice: The International Criminal Court and the Lord's Resistance Army*. London: Zed Books, 2006.

Alvarez, Alex. "Destructive Beliefs: Genocide and the Role of Ideology." In *Supranational Criminology: Towards a Criminology of International Crimes*, edited by Alette Smeulers and Roelof Haveman, 213–31. Antwerp: Intersentia, 2008.

———. "Militias and Genocide." *War Crimes, Genocide & Crimes Against Humanity* 2, no. 1 (2006): 1–33.

Amnesty International. *The State of the World's Human Rights: Report 2014/2015*. London: Amnesty International, 2015.

Annan, Kofi. "Report of the Secretary-General on the Work of the Organization." United Nations, 1998. UN Document A/53/1. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N98/251/09/IMG/N9825109.pdf?OpenElement.

Apel, Robert. "Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence." *Journal of Quantitative Criminology* 29, no. 1 (March 2013): 67–101.

Beccaria, Cesare. *On Crimes and Punishments*. Translated by David Young. Cambridge, MA: Hackett Publishing Company, 1986.

Benedict, Kristyan. "The Countries That Support Referring Syria to the International Criminal Court - and Some Absent 'Friends.'" *Amnesty International*, September 20, 2013. http://www.amnesty.org.uk/blogs/campaigns/syria-icc-international-criminal-court.

Bensouda, Fatou. "Keynote Address: Setting the Record Straight: The ICC's New Prosecutor Responds to African Concerns." Pretoria, South Africa, 2012. http://www.issafrica.org/uploads/10Oct2012ICCKeyNoteAddress.

Bentham, Jeremy. *The Principles of Morals and Legislation*. Amherst: Prometheus Books, 1988.

Bhavnani, Ravi. "Ethnic Norms and Interethnic Violence: Accounting for Mass Participation in the Rwandan Genocide." *Journal of Peace Research* 43, no. 6 (November 2006): 651–69.

Bonanno, Anna. "The Economic Analysis of Offender's Choice: Old and New Insights." *Rivista Internazionale Di Scienze Economiche E Commerciali* 53, no. 2 (2006): 193–224.

Bosco, David L. "The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?" *Michigan State University College of Law Journal of International Law* 19, no. 2 (2011): 163–200.

Bouffard, Jeffrey A. "The Influence of Emotion on Rational Decision Making in Sexual Aggression." *Journal of Criminal Justice* 30 (2002): 121–34.

Bowcott, Owen. "ICC Drops Murder and Rape Charges against Kenyan President." *The Guardian*, December 5, 2014. http://www.theguardian.com/world/2014/dec/05/crimes-humanity-charges-kenya-president-dropped-uhuru-kenyatta.

Branch, Adam. "Uganda's Civil War and the Politics of ICC Intervention." *Ethics and International Affairs* 21, no. 2 (Summer 2007): 179–98.

Browning, Christopher R. *Ordinary Men: Police Battalion 101 and the Final Solution in Poland*. New York: Harper Collins, 1992.

Cantor, David, and Par Engstrom. *In the Shadow of the ICC: Colombia and International Criminal Justice*. Report of the Expert Conference Examining the Nature and Dynamics of the Role of the International Criminal Court in the Ongoing Investigation and Prosecution of Atrocious Crimes Committed in Colombia, Organized in London, 26-29 May 2011. London: Human Rights Consortium, University of London, 2011. http://www.academia.edu/1383204/In_the_Shadow_of_the_ICC_Colombia_and_International_Criminal_Justice.

Chung, Christine H. "The Punishment and Prevention of Genocide: The International Criminal Court as a Benchmark of Progress and Need." *Case Western Reserve Journal of International Law* 40, no. 1/2 (2008): 227–42.

Clark, Janine Natalya. "Peace, Justice and the International Criminal Court." *Journal of International Criminal Justice* 9 (2011): 521–45.

Coalition for the International Criminal Court. "Ukraine: Deter Grave Crimes by Joining ICC." *#GlobalJustice*, February 20, 2015. https://ciccglobaljustice.wordpress.com/2015/02/20/ukraine-deter-grave-crimes-by-joining-icc/.

Cronin-Furman, Kate. "Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity." *International Journal of Transitional Justice* 7, no. 3 (November 1, 2013): 434–54.

Drumbl, Mark A. *Atrocity, Punishment and International Law*. Cambridge: Cambridge University Press, 2007.

Glasius, Marlies. "Too Much Law, Not Enough Justice? The Dominant Role of the Legal Discourse in Transitional Justice." Ottone, Utrecht, the Netherlands, 2013.

Goldhagen, Daniel J. *Hitler's Willing Executioners: Ordinary Germans and the Holocaust*. London: Vintage, 1997.

Goldsmith, Jack, and Stephen D. Krasner. "The Limits of Idealism." *Daedalus* 132, no. 1 (2003): 47–63.

Green, Matthew. *The Wizard of the Nile: The Hunt for Africa's Most Wanted*. London: Portobello Books, 2008.

Greifeneder, Rainer, Herbert Bless, and Michel Tuan Pham. "When Do People Rely on Affective and Cognitive Feelings in Judgment? A Review." *Personal and Social Psychology Review* 15, no. 2 (2011): 107–41.

Haveman, Roeloef, and Alette Smeulers. "Criminology in a State of Denial - Towards a Criminology of International Crimes: Supranational Criminology." In *Supranational Criminology: Towards a Criminology of International Crimes*, edited by Alette Smeulers and Roeloef Haveman, 3–26. Berlin: Springer, 2008.

Hawkins, Darren. "Power and Interests at the International Criminal Court." *SAIS Review* 28, no. 2 (2008): 107–19.

Holderstein Holtermann, Jakob von. "A 'Slice of Cheese'—a Deterrence-Based Argument for the International Criminal Court." *Human Rights Review* 11 (2010): 289–315.

———. "The End of 'the End of Impunity'? The International Criminal Court and the Challenge from Truth Commissions." *Res Publica* 16 (2010): 209–25.

Horney, Julie, and Ineke Haen Marshall. "Risk Perceptions Among Serious Offenders: The Role of Crime and Punishment." *Criminology* 30, no. 4 (1992): 575–94.

Hovil, Lucy, and Joanna R. Quinn. *Peace First, Justice Later: Traditional Justice in Northern Uganda*. Refugee Law Project Working Paper. Kampala: Refugee Law Project, July 2005. http://refugeelawproject.org/files/working_papers/RLP.WP17.pdf.

Human Rights Watch. "West Africa: Regional Boko Haram Offensive," February 11, 2015. http://www.hrw.org/news/2015/02/11/west-africa-regional-boko-haram-offensive.

International Criminal Court. “All Cases.” International Criminal Court, February 21, 2015. http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx.
Jacobs, Bruce A. “Deterrence and Deterrability.” *Criminology* 48, no. 2 (2010): 417–41.
Jamieson, Ruth, and Kieran McEvoy. “State Crime by Proxy and Juridical Othering.” *British Journal of Criminology* 45 (2005): 504–27.
Jo, Hyeran, and Beth A. Simmons. “Can the International Criminal Court Deter Atrocity?” *SSRN Paper*, December 18, 2014. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552820.
Kahan, Dan M. “Social Influence, Social Meaning, and Deterrence.” *Virginia Law Review* 83 (1997): 349–95.
Kahneman, Daniel. *Thinking, Fast and Slow*. London: Penguin Books Ltd., 2012.
Kastner, Philipp. “Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations.” *Journal of International Criminal Justice* 12, no. 3 (July 1, 2014): 471–90.
Kleck, Gary, Brion Sever, Spencer Li, and Marc Gertz. “The Missing Link in General Deterrence Research.” *Criminology* 43, no. 3 (2005): 623–60.
Kroneberg, Clemens, Isolde Heintze, and Guido Mehlkop. “The Interplay of Moral Norms and Instrumental Incentives in Crime Causation.” *Criminology* 48, no. 1 (2010): 259–94.
Kroneberg, Clemens, and Frank Kalter. “Rational Choice Theory and Empirical Research: Methodological and Theoretical Contributions in Europe.” *Annual Review of Sociology* 38, no. 1 (August 11, 2012): 73–92.
Ku, Julian, and Jide Nzelibe. “Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?” *Washington University Law Review* 84, no. 4 (2006): 777–833.
Lilly, J. Robert, Francis T. Cullen, and Richard A. Ball. *Criminological Theory: Context and Consequences*. 5th Edition. Thousand Oaks, CA: Sage Publications, 2011.
Loewenstein, George. “Out of Control: Visceral Influences on Behavior.” *Organizational Behavior and Human Decision Processes* 65, no. 3 (March 1996): 272–92.
Meernik, James. “Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects.” *International Criminal Law Review* 13, no. 1 (2013): 169–90.
Mendes, Silvia M., and Michael D. McDonald. “Putting Severity of Punishment Back in the Deterrence Package.” *Policy Studies Journal* 29, no. 4 (2001): 588–610.
Mennecke, Martin. “Punishing Genocidaires: A Deterrent Effect or Not?” *Human Rights Review* 8, no. 4 (July 2007): 319–39.
Milgram, Stanley. *Obedience to Authority: An Experimental View*. New York: Harper & Row, 1974.
Minow, Martha. *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*. Boston, MA: Beacon Press, 1998.
Mueller, Susanne D. “Kenya and the International Criminal Court (ICC): Politics, the Election and the Law.” *Journal of Eastern African Studies* 8, no. 1 (2014): 25–42.
Mullins, Christopher, and Dawn Rothe. “Beyond the Juristic Orientation of International Criminal Justice: The Relevance of Criminological Insight to International Criminal Law and Its Control A Commentary.” *International Criminal Law Review* 10, no. 1 (January 2010): 97–110.
Mullins, Christopher W., David Kauzlarich, and Dawn Rothe. “The International Criminal Court and the Control of State Crime: Prospects and Problems.” *Critical Criminology* 12, no. 3 (November 2004): 285–308.
Mullins, Christopher W., and Dawn Rothe. *Blood, Power, and Bedlam: Violations of International Criminal Law in Post-Colonial Africa*. New York: Peter Lang, 2008.

Mullins, Christopher W., and Dawn L. Rothe. "The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment." *International Criminal Law Review* 10, no. 5 (2010): 771–86.
Nagin, Daniel S. "Enduring Individual Differences and Rational Choice Theories of Crime." *Law and Society Review* 27, no. 3 (1993): 467–96.
Nagin, Daniel S., and Greg Pogarsky. "Integrating Celerity, Impulsivity, and Extralegal Sanction Threats Into a Model of General Deterrence: Theory and Evidence." *Criminology* 39, no. 4 (2001): 865–92.
Neubacher, Frank. "How Can It Happen That Horrendous State Crimes Are Perpetrated? An Overview of Criminological Theories." *Journal of International Criminal Justice* 4 (2006): 787–99.
Nkansah, Lydia Apori. "International Criminal Justice in Africa: Some Emerging Dynamics." *Journal of Politics and Law* 4, no. 2 (September 2011): 74–84.
Nouwen, Sarah. *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*. Cambridge: Cambridge University Press, 2014.
Office of the High Commissioner for Human Rights. "Report of the Independent International Commission of Inquiry on the Syrian Arab Republic." United Nations, February 5, 2015. UN Document A/HRC/28/69. http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Pages/ListReports.aspx.
Paternoster, Raymond. "How Much Do We Really Know About Criminal Deterrence?" *The Journal of Criminal Law and Criminology* 100, no. 3 (2010): 765–823.
Pikis, Georghios M. *The Rome Statute for the International Criminal Court. Analysis of the Statute, the Rules of Procedure and Evidence, the Regulations of the Court and Supplementary Instruments*. Leiden: Martinus Nijhoff, 2010.
Pogarsky, Greg. "Deterrence and Decision Making: Research Questions and Theoretical Refinements." In *Handbook on Crime and Deviance*, edited by Marvin D. Krohn, Alan J. Lizotte, and Gina Penly Hall, 241–58. Handbooks of Sociology and Social Research. New York, NY: Springer New York, 2009.
———. "Deterrence and Individual Differences Among Convicted Offenders." *Journal of Quantitative Criminology* 23 (2007): 59–74.
———. "Identifying 'Deterrable' Offenders: Implications for Research on Deterrence." *Justice Quarterly* 19, no. 3 (September 2002): 431–52.
Quinn, Joanna R. "Getting to Peace? Negotiating with the LRA in Northern Uganda." *Human Rights Review* 10, no. 1 (March 2009): 55–71.
Rodman, Kenneth A. "Darfur and the Limits of Legal Deterrence." *Human Rights Quarterly* 30, no. 3 (2008): 529–60.
———. "Pacting the Law within Politics. Lessons from the International Criminal Court's First Investigations." Utrecht, the Netherlands: University of Utrecht, 2010.
"Rome Statute of the International Criminal Court," July 17, 1998. http://legal.un.org/icc/statute/romefra.htm.
Rothe, Dawn L. "Shedding the Blanket of Immunity: A Commentary on the Global Principle of Ending Impunity, Realpolitik, and Legal Precedent." *Crime, Law and Social Change* 53, no. 4 (May 2010): 397–412.
Rothe, Dawn L., and Victoria E. Collins. "The International Criminal Court: A Pipe Dream to End Impunity?" *International Criminal Law Review* 13 (2013): 191–206.
Rothe, Dawn L., and Christopher W. Mullins. *Symbolic Gestures and the Generation of International Social Control: The International Criminal Court*. Plymouth, UK: Lexington Books, 2006.
Sands, Philippe. "Referring Syria to the International Criminal Court Is a Justified Gamble." *The Guardian*, January 16, 2013.

http://www.theguardian.com/commentisfree/2013/jan/16/syria-international-criminal-court-justified-gamble.
Shafir, Eldar, and Robyn A. LeBoeuf. "Rationality." *Annual Review of Psychology* 53 (2002): 491–517.
Sikkink, Kathryn. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: W.W. Norton, 2011.
Sloane, Robert D. "The Expressive Capacity of International Punishment: The Limits of National Law Analogy and the Potential of International Criminal Law." *Stanford Journal of International Law* 43 (2007): 39–94.
Smeulers, Alette, and Fred Grünfeld. *International Crimes and Other Gross Human Rights Violations: A Multi- and Interdisciplinary Textbook*. International and Comparative Criminal Law Series 32. Leiden: Martinus Nijhoff, 2011.
Snyder, Jack. *From Voting to Violence: Democratization and Nationalist Conflict*. London: W.W. Norton, 2000.
Snyder, Jack, and Leslie Vinjamuri. "Trials and Errors: Principle and Pragmatism in Strategies of International Justice." *International Security* 28, no. 3 (2004): 5–44.
Ssenyonjo, Manisuli. "Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court." *Journal of Conflict & Security Law* 10, no. 3 (2005): 405–34.
Staub, Ervin. *The Roots of Evil: The Origins of Genocide and Other Group Violence*. New York: Cambridge University Press, 1989.
Straus, Scott. *The Order of Genocide: Race, Power and War in Rwanda*. Ithaca, NY: Cornell University Press, 2008.
"Sudan President Bashir Hails 'Victory' over ICC Charges." *BBC News*, December 13, 2014. http://www.bbc.com/news/world-africa-30467167.
Thaler, Richard H., and Cass R. Sunstein. *Nudge: Improving Decisions About Health, Wealth, and Happiness*. New Haven; London: Yale University Press, 2008.
Tittle, Charles R., Ekaterina V. Botchkovar, and Olena Antonaccio. "Criminal Contemplation, National Context, and Deterrence." *Journal of Quantitative Criminology* 27, no. 2 (June 2011): 225–49.
Tversky, Amos, and Daniel Kahneman. "Availability: A Heuristic for Judging Frequency and Probability." *Cognitive Psychology* 5, no. 2 (1973): 207–32.
Valentino, Benjamin A. "Why We Kill: The Political Science of Political Violence against Civilians." *Annual Review of Political Science* 17, no. 1 (2014): 89–103.
Verwimp, Philip. *Peasants in Power: The Political Economy of Development and Genocide in Rwanda*. Dordrecht; New York: Springer, 2013.
Vinjamuri, Leslie. "Deterrence, Democracy, and the Pursuit of International Justice." *Ethics and International Affairs* 24, no. 2 (2010): 191–211.
Von Feuerbach, Paul Johann Anselm. *Revision der Grundsätze und Grundbegriffe des positive peinlichen Rechts I.* Erfurt: Henningsche Buchhandlung, 1799.
Waller, James. *Becoming Evil: How Ordinary People Commit Genocide and Mass Killing*. Oxford: Oxford University Press, 2002.
Williams, Kirk R., and Richard Hawkins. "Perceptional Research on General Deterrence: A Critical Review." *Law and Society Review* 20, no. 4 (1986): 545–72.
Wippman, David. "Atrocities, Deterrence, and the Limits of International Justice." *Fordham International Law Journal* 23, no. 2 (1999): 473–88.