**International Punishment, Expression, and Atrocity Prevention**
Geoff Dancy

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## 1. The Prevention Question

Does punishment by international courts prevent atrocity? International legal scholars have conveyed renewed interest in this question, despite previous calls to just get over it and move on.[1] In recent edited volumes,[2] journal special issues,[3] and online fora,[4] experts ponder whether international criminal law, most specifically the actions of the International Criminal Court (ICC), can do anything at all to stymie mass violence. Perspectives diverge. Some theorize that international criminal law at least partly deters atrocity,[5] some argue that it is highly unlikely to deter any atrocity whatsoever,[6] and yet others argue that it might in fact have an *anti*-deterrent effect, actually increasing violence rather than stopping it.[7] One recent polemic featured a dispute over whether the ICC could be analogized to a slice of risk-reducing Swiss cheese.[8] Indeed, where

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[1] Padraig McAuliffe, 'Suspended Disbelief: The Curious Endurance of the Deterrence Rationale in International Criminal Law' (2012) 10 NZ J Pub & Intl L 227.
[2] Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law* (Cambridge University Press 2020); Joanna Nicholson, *Strengthening the Validity of International Criminal Tribunals* (Brill Nijhoff 2018).
[3] MP Broache and others, 'The International Criminal Court at 25' (2023) 22 JHR 1; Shai Dothan, Jakob v H Holtermann and Astrid Kjeldgaard-Pedersen, 'Foreword' (2021) 19 JICJ 855.
[4] See 'The Prevention Question' (*ICC Forum,* Oct 2011) <https://iccforum.com/prevention> accessed 12 July 12 2023.
[5] Michael J Gilligan, 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime' (2006) 60 Intl Org 935; Jakob v H Holtermann, 'A "Slice of Cheese"—a Deterrence-Based Argument for the International Criminal Court' (2010) 11 HRR 289.
[6] Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity' (2013) 7 IJTJ 434; Mark Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007); Julian Ku and Jide Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?' (2006) 84 Wash ULQ 777.
[7] Frédéric Mégret, 'The Anti-Deterrence Hypothesis: What If International Criminal Justice Encouraged Crime?' (2021) 19 JICJ 859.
[8] Shai Dothan, 'The ICC Is NOT a Slice of Cheese' (2021) 19 JICJ 877; Jakob v H Holtermann, 'In Defence of a Metaphor: A Reply to Shai Dothan's Critique of Applying the Swiss Cheese Model on Deterrence to the International Criminal Court' (2021) 19 JICJ 893.

legal commenters seem to converge is over the need for theoretical abstractions like these, given the extreme difficulty, perhaps even futility, of attempting to resolve their disagreements with evidence.

It is quite normal to read articles or volumes on international criminal law and prevention that altogether avoid concrete examples, let alone systematic empirical analysis.[9] It may be that this terrain is so littered with 'endless unprovabilities and incommensurabilities' that assessing evidence would be a fool's errand.[10] Yet to accept this resigned position is to relegate discussion of the social function of international criminal law to the realm of faith; one either believes it serves a purpose or believes it does not, and then argues accordingly. Surely, this is not the best way forward.

In this chapter, I hope to demonstrate why it is remains useful to rigorously test theories linking international courts to atrocity prevention. Thirty years removed from the inception of the ad hoc tribunals, and 25 years from the adoption of the Rome Statute, the global community now possesses a wealth of data from which to draw inferences about the effects of international criminal law. In what follows, I develop and evaluate an empirical theory of international punishment. Specifically, I construct cross-national regression models which find that extensiveness of punishment by international courts, measured both by the number and length of sentences imposed on convicted nationals of a country, is associated with less atrocity-level violence over time.

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[9] For one impressive exception, see Linda Carter and Jennifer Schense (eds), *Exploring the Boundaries of the Deterrence Effect of the International Criminal Tribunal for Rwanda* (Torkel Opsahl Academic EPublisher 2017).
[10] Drumbl, Mark A. "We're Exhausting Ourselves, Let's Get Busy Instead A Comment on the Contributions by Jakob v.H. Holtermann, Mordechai Kremnitzer and Daniela Demko." In *Why Punish Perpetrators of Mass Atrocities?: Purposes of Punishment in International Criminal Law*, edited by Florian Jeßberger and Julia Geneuss. Cambridge: Cambridge University Press, 2020, 211.

Though this chapter contains a statistical presentation, it is not driven by data, but by the theoretical aim of articulating an expressivist theory of international punishment. Doing so requires that one maintain a clear distinction between three concepts: prevention, deterrence, and expression. As I explain in Section 3, prevention of atrocity constitutes the main goal of international courts, while deterrence (raising the cost of crime) and expression (communicating norms) represent two separate mechanisms for achieving that goal. I theorize in Section 4 that while certain parts of the international criminal process could play a deterrent function, the act of sentencing culpable individuals is primarily an expressivist practice. After laying out this argument, Section 5 assesses whether it is plausible that the current system of international criminal justice prevents atrocity by deterring or by expressing. Ultimately, I find that while international courts quite possibly prevent violence in some *specific* situations through deterrence, they *generally* prevent violence through expression of norms.

## 2. What We Know

The primary objective for international criminal law is to alter violent political behavior. This is a consequentialist justification of ICL, and it is far more convincing than the deonotological, retributivist justification. After all, as Hannah Arendt persuasively explained, it is not really possible to offer just deserts to those responsible for countless deaths, uninhibited degradation, or wonton destruction.[11] These evils are too radical for any individual punishment to serve as a proportional or 'appropriate' response. Therefore, the purpose of punishing genocide and crimes against humanity is not—and ought not to be—the infliction of deserved suffering onto

[11] She wrote: 'It is therefore quite significant… that men are unable to forgive what they cannot punish and that they are unable to punish what has turned out to be unforgivable. Hannah Arendt, *The Human Condition* (University of Chicago Press 1958) 241.

perpetrators of mass violence. Instead, the main aim should be to render shockingly violent conduct less prevalent in the future.

For at least two decades, interdisciplinary scholars have assessed the ability of international criminal institutions to alter behaviour. Given that post-Nuremberg ICL was reborn in the context of ethno-national conflicts, the first wave of research examined the impact of international courts on patterns of civil war. Initially, peace practitioners challenged the ad hoc International Tribunal for the former Yugoslavia (ICTY) for standing in the way of a resolution to the Balkan Wars, noting a tension between peace negotiation and the pursuit of justice.[12] These findings travelled to analysis of the ICC in the early 2000s, which became entangled in civil war states as soon as it opened for operations. Case analysts argued that the Court is ill-suited to compel an end to ongoing wars,[13] though in certain situations, ICC actions may induce violent actors to begin bargaining.[14] More recent cross-national political science lends support to these inferences, finding that, by increasing the risk of prosecution,[15] undermining the prospects for successful negotiated settlement,[16] or limiting exile options for leaders who 'presided over atrocity crimes,' the expansion of international criminal justice prolongs certain wars or increases conflict recidivism.[17] On whether the growth of international criminal justice lowers the likelihood of *future* civil war

[12] Anonymous, 'Human Rights in Peace Negotiations' (1996) 18 HRQ 249; Jennifer L Balint, 'The Place of Law in Addressing Internal Regime Conflicts' (1996) 59 LCP 103.

[13] Adam Branch, 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21 Ethics & Intl Aff 179; Kenneth Rodman, 'Darfur and the Limits of Legal Deterrence' (2008) 30 HRQ 529; David Mendeloff, 'Punish or Persuade? The Compellence Logic of International Criminal Court Intervention in Cases of Ongoing Civilian Violence' (2018) 20 Intl Stud Rev 395.

[14] Payam Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism' (2009) 31 HRQ 624; Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace* (Oxford University Press 2016).

[15] Alyssa K Prorok, 'The (In)Compatibility of Peace and Justice? The International Criminal Court and Civil Conflict Termination' (2017) 71 Intl Org 213.

[16] Allard Duursma, 'Pursuing Justice, Obstructing Peace: The Impact of ICC Arrest Warrants on Resolving Civil Wars' (2020) 20 Conflict, Security & Development 335.

[17] Daniel Krcmaric, 'Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice' (2018) 62 AJPS 486.

onset, evidence is scant. Elsewhere I showed that newly initiated intrastate conflicts are increasingly concentrated in the group of states that fall outside ICC jurisdiction.[18] This pattern still seems to hold. ICC States Parties experience far fewer challenges from new fighting groups, and they also are home to fewer recurrences of old conflicts.[19] Nevertheless, because intrastate conflict termination and future conflict onset are very complex phenomena, with a multitude of contributing factors, these patterns should be subjected to a great deal more scrutiny.

The interplay between ICC intervention and conflict resolution warrants further in-depth explanation, but it may be unfair to judge international courts on whether they can end war and promote long-term peace. It is true that the Security Council resolutions establishing the ad hoc tribunals in the former Yugoslavia and Rwanda drew a linkage between ethnic cleansing, genocide, and threats 'to international peace and security.'[20] Moreover, the Rome Statute recognises that 'unimaginable atrocities' 'threaten the peace, security and well-being of the world.'[21] However, the primary and oft-announced objective of these institutions is not to build peace directly, but to end acts of mass violence, which may indirectly benefit peace in the future.

In a second strand of research over the last decade, social scientists have begun to unpack the complex relationship between international criminal justice and patterns in atrocity-level violence. First, it appears that the act of ratifying the Rome Statute, which 'sends an important signal to a government's adversaries as well as the broader public,' is associated with less repressive violence

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[18] Geoff Dancy, 'Searching for Deterrence at the International Criminal Court' (2017) 17 Int CLR 625.
[19] This is true by raw totals or by percentages. State Parties saw 71 new conflicts between 1998 and 2020. This means that 3.3% of all country-years under the jurisdiction of the ICC witnessed a new intrastate violent challenge. Non-Party States were home to 136 new conflicts, which is equivalent to a new conflict in 6.1% of all country-years that fall outside of the jurisdiction of the ICC. These figures are calculated using data from Uppsala Conflict Data Project (UCDP). L Harbom, E Melander and P Wallensteen, 'Dyadic Dimensions of Armed Conflict, 1946--2007' (2008) 45 JPR 697.
[20] UN Security Council Resolution 827 S/RES/827 (1993), UN Security Council Resolution 955 S/RES/955 (1994).
[21] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010*)*, 17 July 1998.

on average in a country.[22] Second, ICC actions—including the initiation of preliminary examinations, investigations, and proceedings—have noticeable effects. Hyeran Jo and Beth Simmons identified a substantially reduced risk of grave acts of violence by government and rebel groups following direct involvement of the ICC in a situation.[23] In follow-up research, they argue that ICC preliminary examinations, like the one carried out in Colombia, generate 'social and extra-legal pressure' that leads to positive behavioral change.[24]

Other work has nuanced these broader patterns, finding that the ICC's impacts vary by timing, target and context. First, in terms of timing, examining daily trends in conflict, Courtney Hillebrecht discovered that when the ICC issued statements and arrest warrants in Libya, there was an immediate effect: 'actors on the ground took note and improved their human rights practices.'[25] Using the same database to measure violent episodes, however, James Meernik found that lethal repression of human rights protests have increased over time in several of the states under ICC investigation.[26] Second, with regard to target, McCallister turns up evidence that the ICC might deter atrocities committed in African civil wars, but only those committed by rebel forces, who so far have been more vulnerable to arrest.[27] Examining state forces specifically, Broache and Kore locate a possible *anti*-deterrent effect of the ICC: 'interventions may exacerbate, rather than

[22] Beth A Simmons and Allison Danner, 'Credible Commitments and the International Criminal Court' (2010) 64 Intl Org 225, 234; Benjamin J Appel, 'In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?' (2018) 62 J Conflict Resol 3.
[23] Hyeran Jo and Beth Simmons, 'Can the International Criminal Court Deter Atrocity?' (2016) 70 Intl Org 443. See also Jacqueline R McAllister, 'Casting a Shadow over War Zones? Hard Truths about the ICC's Efforts to Deter Wartime Atrocities' (2023) 22 JHR 94.
[24] Hyeran Jo, Beth A Simmons and Mitchell Radtke, 'Conflict Actors and the International Criminal Court in Colombia' (2021) 19 JICJ959.
[25] Courtney Hillebrecht, 'The Deterrent Effects of the International Criminal Court: Evidence from Libya' (2016) 42 Intl Interactions 616, 632.
[26] James D Meernik, *International Tribunals and Human Security* (Rowman & Littlefield 2016) 97.
[27] McAllister (n 23).

ameliorate, sexual violence by government forces'.[28] Finally, in terms of context, research shows that patterns in violence are potentially sensitive to different stages of ICC involvement. In the Democratic Republic of Congo, rebel leader Thomas Lubanga's conviction in 2012 was accompanied by a ramping up of child recruitment and atrocity, while Bosco Ntaganda's surrender in 2013 was associated with a decline in violence.[29] In Kenya, commitment to the Rome Statute had little discernible effect on state agent behaviour, but when the ICC initiated an investigation, followed later by proceedings, violent repression and killing declined.[30]

The ICC is not the whole story. A third set of findings pertain to the overall deterrent effects of ad hoc and hybrid courts in the states over which they exercise jurisdiction. While it is commonly noted that the existence of the ICTY did not prevent atrocities like the Srebrenica massacre in the immediate aftermath of its establishment, it did come to play a more diffuse deterrent and socially educative role over time, especially following the fall of Milosevic in 2000.[31] One very thorough piece of research also finds that the effect of the ICTY on wartime atrocity was linked to the nature of militant groups; those that had liberal constituencies and centralized structures were more likely to respond to the threat of prosecution.[32] With regard to the ad hoc International Criminal Tribunal for Rwanda (ICTR), some argue based on survey and interview evidence that the tribunal 'achieved some degree of deterrence and other goals of criminal justice,' or at the very least it is

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[28] It should be noted that there is no overarching theoretical explanation in the article for why this anti-deterrent effect obtains. MP Broache and Juhi Kore, 'Can the International Criminal Court Prevent Sexual Violence in Armed Conflict?' (2023) 22 JHR 78, 86.

[29] Michael Broache, 'Irrelevance, Instigation and Prevention: The Mixed Effects of International Criminal Court Prosecutions on Atrocities in the CNDP/M23 Case' (2016) 10 IJTJ 388.

[30] Yvonne M Dutton and Tessa Alleblas, 'Unpacking the Deterrent Effect of the International Criminal Court: Lessons From Kenya' (2017) 91 St. John's LR 105.

[31] Diane F Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Institute 2010); Jennifer Schense, 'Assessing Deterrence and the Implications for the International Criminal Court' in Linda Carter and Jennifer Schense (eds), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (Torkel Opsahl Academic EPublisher 2017).

[32] Jacqueline R McAllister, 'Deterring Wartime Atrocities: Hard Lessons from the Yugoslav Tribunal' (2020) 44 Intl Security 84.

perceived as having done so.[33] The same may be said of the Special Court for Sierra Leone, which despite its many limitations, became ingrained in the public consciousness; the phrase 'I'll take you to the Special Court' came into frequent use among aggrieved citizens in local disputes.[34]

This transitions into a fourth and final strand of research, which examines hard-to-predict social, legal, and political effects of international courts. In terms of negative externalities, it is possible that the ICTY, through the publicity of the trials, gave perpetrators like Radovan Karadžić and Vojislav Šešelj a platform for ginning up support, which ultimately led to the formation of a 'war criminal cult.'[35] Similarly, the ICC investigation in Kenya provided alleged international criminals Uhuru Kenyatta and William Ruto an opportunity to campaign against 'foreign intervention,' which helped propel them to victory in Kenya's 2013 presidential election.[36] Yet there are also positive externalities from international court involvement. Florencia Montal and I uncovered evidence that ICC-OTP investigations catalyse pro-reform legal campaigns that result in more domestic human rights prosecutions.[37] And in another surprising discovery, I found that ICC-OTP investigations in a country are associated with spikes in internet searches for 'human rights,' strongly suggesting that the Court's involvement raises the domestic profile of human rights issues.[38] Though it is difficult at the moment to say on balance whether international legal interventions have a net positive or negative effect, one can with near-certainty conclude at this

[33] Mackline Ingabire, 'Exploring the Boundaries of the Deterrence Effect of the International Criminal Tribunal for Rwanda' in Linda Carter and Jennifer Schense (eds), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (Torkel Opsahl Academic EPublisher 2017) 137.
[34] Eleanor Thompson, 'Can an International Criminal Tribunal with a Limited Mandate Deter Atrocities? Lessons from the Special Court for Sierra Leone' in Linda Carter and Jennifer Schense (eds), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (Torkel Opsahl Academic EPublisher 2017) 224.
[35] Izabela Steflja, 'The Production of the War Criminal Cult: Radovan Karadžić and Vojislav Šešelj at The Hague' (2018) 46 Nationalities Papers 52.
[36] Susanne D Mueller, 'Kenya and the International Criminal Court (ICC): Politics, the Election and the Law' (2014) 8 J Eastern African Stud 25.
[37] Geoff Dancy and Florencia Montal, 'Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions' (2017) 111 AJIL 689.
[38] Geoff Dancy, 'The Hidden Impact of the ICC: An Innovative Assessment Using Google Data' (2021) 34 LJIL 729.

point that the ICC and other international courts are focal institutions that command attention, which may redound to larger impacts.

Extreme skeptics of the Court might think all of this research amounts to unconvincing social science gobbledygook. And they may reasonably argue that it strains logic to presume any powerful leader would care at all about international courts. As such, they may be inclined to agree with this succinct criticism:

> A weak and distant court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity. Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed?[39]

Of course, this statement was penned in 2001 by John Bolton, who at the time was the derisively anti-multilateralist Assistant Secretary of State for International Organization Affairs for the Bush Administration. Bolton's cynicism toward international criminal justice resonated with Henry Kissinger. In the same year, the former US Secretary of State published a piece in *Foreign Affairs* attacking the principle of universal jurisdiction for inviting a 'tyranny of judges' that might amount to a 'dictatorship of the virtuous.'[40] It is quite likely that Kissinger's motivation was to defend the legacy of his friend Augusto Pinochet, who at the time was on trial for the 'caravan of death' case in Chile.[41] This raises the question: if Bolton and Kissinger were not at all afraid of international criminal justice, why did they bother to campaign against it?

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[39] John R Bolton, 'The Risks and Weaknesses of The International Criminal Court from America's Perspective' (2001) 64 LCP 167, 176.
[40] Henry A Kissinger, 'The Pitfalls of Universal Jurisdiction' (2001) 80 Foreign Aff 86, 86.
[41] See the introduction to Christopher Hitchens, *The Trial of Henry Kissinger* (Penguin Random House Canada 2012).

The truth is that powerful leaders are concerned with the doings of international courts, whether or not observers think that concern is rational, or warranted. In addition to the above research that shows relationships between the activities of the ICC, ad hoc tribunals, and hybrid tribunals, on the one hand, and large-scale changes in conduct, on the other hand—there are numerous anecdotal examples of violent leaders who worry over the ICC. In Afghanistan, Afghan warlord Abdul Rashid Dostum called a meeting of his ninety mujahadeen commanders in 2002 to explain to them that they may in the future be prosecuted at the ICC for their actions.[42] In Uganda, being sent to the Hague has since 2004 'weigh[ed] heavily on [Joseph] Kony's mind'.[43] In 2015, Sri Lanka's Mahinda Rajapaksa, who had recently lost a presidential election, repeatedly spoke in public against the ICC, perhaps betraying a fear that he might one day face trial for crimes committed in the final war against the Tamil Tigers.[44] In 2019, the foreign minister of Israel confirmed that President Netanyahu avoided demolishing a Bedouin village called Khan al-Ahmar over apprehension that it might initiate further intervention by ICC Prosecutor Fatou Bensouda.[45] And for the last two decades, the specter of ICC prosecution has repeatedly appeared in Australian parliamentary debate, particularly in reference to whether the country's nationals might be targeted for enforcing heavy-handed refugee policies.[46]

[42] David Bosco, 'The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?' (2010) 19 Mich St U College of LJ Intl L 163, 164.
[43] David Bosco, *Rough Justice: The International Criminal Court's Battle to Fix the World, One Prosecution at a Time* (Oxford University Press 2014) 128.
[44] Abdul Ruff, 'Sri Lanka's Rajapaksa Headed for War Crimes Tribunal?' (*Asia* Sentinel, 26 October 2015) <http://www.asiasentinel.com/politics/sri-lanka-rajapaksa-war-crimes-tribunal/> accessed 17 June 2016.
[45] Alexander Fulbright, 'FM: Razing of Bedouin Hamlet Delayed over Fears It Would Be 'Last Straw' for ICC' (*Times of* Israel, 22 December 2019) <https://www.timesofisrael.com/fm-razing-of-bedouin-hamlet-delayed-over-fears-it-would-be-last-straw-for-icc/> accessed 16 October 2023.
[46] Natalie Hodgson, 'Exploring the International Criminal Court's Deterrent Potential: A Case Study of Australian Politics' (2021) 19 JICJ 913.

Taken together, this suggestive micro-level evidence corroborates macro-level research. Leaders often pay close attention to international courts, and several engage in strategic interactions with court organs. However, there are still many things that we do not know. First, and most relevant to our purposes here, what is the effect of international criminal penality itself? Very little research to date has focused on the impact of convictions and sentences, preferring instead to analyze how court actions - like starting a preliminary examination, opening an investigation, or issuing an arrest warrant - affect conduct. Second, if the ICC and other international courts at times lead to a decline in atrocity-level violence, what exactly is the causal mechanism? The lion's share of previous research lumps together notions of deterrence and prevention, which stands in the way of clear explanation. In what follows, I will attempt to address both of these issues by developing and testing an expressivist theory of sentencing and atrocity prevention.

## 3. Prevention, Deterrence, & Expression

### *3.1 Prevention through deterrence*

Deterrence is often cited as a goal of international courts. The first annual report of the ICTY states outright that 'the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts.'[47] A number of state delegations at the Rome Conference directly mentioned the importance of deterrence in preventing international crimes.[48] Former President of the ICC Sang Hyon-Song claimed in 2013 that the value of the Court was not the 'in punishment

[47] Antonio Cassese, *First Annual Report of the ICTY*, A/49/342 and S/1994/1007 (1994) 12.
[48] *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, A/CONF.183/13 (Vol. II), 15 June–17 July 1998.

of past acts, but in the deterrence of future crimes'. And the ICC Office of the Prosecutor made direct reference to the aim of deterrence in its 2019-2021 Strategic Plan.[49]

In point of fact, though, deterrence is not explicitly written into international court mandates. The statutes of the ICTY and ICTR do not use the term, nor does the Rome Statute of the ICC. The ad hoc statutes express a determination to 'put an end to' crime, which could be interpreted as either a desire to deter or prevent.[50] The Rome Statue uses the same 'put an end to' phraseology, but more clearly links it to prevention: States Parties are 'determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the *prevention* of such crime'.[51] Clarity on this point is necessary because it is best practice to assess courts on whether they have accomplished their stated goals.[52] Strictly speaking, deterrence is not one of these goals. Prevention is.

Of course, deterrence and prevention are related, but disentangling these concepts is difficult. First, appeal to 'deterrence' by policymakers and practitioners seldom results from a calculated and theoretically informed choice. In part, it is inertial: deterrence is a signature term in the patois of criminal justice. Invoking the term in policy briefs or speech acts reflects the basic desire to stop unsavoury or unapproved behaviour through legal prohibition. But it seems that many practitioners use the word deterrence when they might mean prevention. The two terms are routinely treated as interchangeable, or substitutable.

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[49] OTP, *Strategic Plan 2019-2021*, available online at https://www.icc-cpi.int/news/strategic-plan-2019-2021 (visited 10 October 2023) 22. Curiously, deterrence was not mentioned in OTP's *Strategic Plan 2023-2025.*
[50] UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993; UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994.
[51] Rome Statute (n 21) 1. Emphasis mine.
[52] Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP Oxford 2014).

Second, deterrence and prevention are related, though not the same. On the one hand, deterrence means 'omission of a criminal act because of the fear of sanctions or punishment'.[53] The foundation of deterrence theory is the assumption of rational actors.[55] It presumes that would-be criminals, including repeat offenders, carefully tabulate the costs and benefits of engaging in prohibited behavior. By increasing the probability and severity of punishment, or by inspiring a population-wide fear of sanction, criminal justice systems can reduce the risk that utility-maximizing outlaws will choose to break the rules.[56] Prevention, on the other hand, is broader. It attempts to 'change the entire social environment' in which crimes are committed.[57] In the domestic sphere, prevention can include a range of interventions that are meant to address both the distal and proximal causes of crime, like removal of lead paint, child lunch provision, school anti-bullying programmes, neighbourhood watch and at-risk community engagement, and felon rehabilitation and reintegration programmes. The spectrum of preventive mechanisms is wide, and unlike deterrence, it extends beyond courts and policing alone. Nevertheless, if criminal courts effectively raise the costs of breaking the law, then they would most certainly contribute to crime control. In that sense, one could say that deterrence is a *mechanism* of prevention.

Third, confusing the issue more, both deterrence and prevention have three types. With regard to the former,

1. *Specific deterrence* aims to disincentivize re-offending by those already punished;
2. *Targeted deterrence* aims to hinder criminal activity in high-risk groups; and

[53] Raymond Paternoster, 'How Much Do We Really Know About Criminal Deterrence?' (2010) 100 J.Crim.L.& Criminology 765, 766.
[55] David M Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction* (Routledge 2009)
[56] Dancy (n 18).
[57] Schense (n 31) 27.

3. *General deterrence* aims to stop crime among any future offenders in the entire population.[59]

With regard to the latter:

1. *Primary prevention* roots out criminogenic conditions present in the entire society;
2. *Secondary prevention* targets susceptible groups in problematic situations; and
3. *Tertiary prevention* focuses its attention on hindering recidivism by known offenders.[60]

For the sake of parsimony, I offer a framework in Table 1 that matches the three aims of deterrence to the three levels of crime prevention. Specific deterrence would contribute to tertiary prevention both by incapacitating dangerous criminals and by reducing the tendency toward recidivism in the population of all known lawbreakers. Targeted deterrence, by diverting members of at-risk groups away from a seductive life of crime, would serve a secondary prevention function. And general deterrence, by instilling fear in the rest of he population, would play a primary preventive role. At the primary level, justice has a universal impact on society. Everyone knows about prison, and everyone wants to avoid it.

*Table 1. Matching prevention levels to deterrence types*

| Prevention level | Deterrence type |
|---|---|
| Primary prevention | General |
| Secondary prevention | Targeted |
| Tertiary prevention | Specific |

[59] Schense, Jennifer, and Linda Carter. "Introduction." In *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, edited by Linda Carter and Jennifer Schense, 1–12. Brussels, Belgium: Torkel Opsahl Academic EPublisher, 2017.
[60] Holterman (n 5) 907.

Fourth, while all deterrence is prevention, not all prevention is deterrence. Deterrence is not the *only* mechanism through which courts engage in crime prevention. Another mechanism is the expression of norms. This lesson may be obvious, but it is often forgotten or ignored, in part because 'criminological theorizing has been dominated by rational choice explanations that overemphasize the extent to which offending is independent, freely chosen action'.[61] This reflects the over-reliance on economic accounts of human behaviour.[62] Sociological theories offer an alternative, positing that criminal offenders are 'radically subjective' actors who respond to social cues and seek 'psychic rewards'.[63] Any interventions which manage to authoritatively disavow wrongdoing, to symbolize the non-acquiescence of the community, or to vindicate the principles of law can prevent crime.[64] They do so by socialising individuals into norm-compliant behaviour. Many extralegal crime prevention tactics might also condemn deviance and engage in norm socialisation, but when courts themselves affirm social norms, they are serving an expressive function.

### *3.2. Prevention through expression*

Expressivist theories of criminal law hold that punishment is symbolically meaningful, and impactful.'[65] By sending messages of condemnation, courts serve as an instrument of 'didactic legality.'[66] In this way, the expressivist aim of teaching society what is wrong exhibits 'strong

[61] Richard T Wright and Scott H Decker, *Armed Robbers in Action: Stickups and Street Culture* (Northeastern 1997) 120.
[62] Gordon Tullock, 'Does Punishment Deter Crime?' (1974) 26 Pub Interest 103.
[63] Kennedy (n 55) 16.
[64] Joel Feinberg, 'The Expressivist Function of Punishment' in Joel Feinberg and Jules Coleman (eds), *Philosophy of Law, 6th Ed.* (Wadsworth 2000).
[65] Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press 2020) 324.
[66] Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press 2001) 3.

synergies with prevention, which seeks to reinforce crime control.'[67] In short, courts transmit normative signals that change behavior. Importantly, this communicative mechanism linking courts to crime prevention is separate and irreducible to deterrence.

One of the major contentions of ICL skeptics is that genocide, crimes against humanity, and war crimes are collective enterprises heavily conditioned by socio-political norms and institutions. Leaders of militant and extremist groups are risk-acceptant individuals who know the danger of relying on mass violence to maintain power, yet they choose this strategy nonetheless. And their rank-and-file followers must be recruited, indoctrinated, and trained into a morally inverted environment where killing is rewarded. As such, it is unlikely that the principals or agents of atrocity are rational individualists who respond directly to fear of sanction from international courts. Ergo, the argument goes, we should not expect violent soldiers, rebels, or terrorists convinced of the moral righteousness of their cause suddenly to defect or dissent after the announcement of an ICC arrest warrant.[68] This makes perfect sense. However, dismantling the rationalist case for international deterrence does not altogether defeat the consequentialist justification for ICL. The reason is this: it is still possible that international courts prevent atrocity crime, not by spreading fear of sanction, but by clearly identifying and stigmatizing unsconscionable acts, and thus affirming global norms.[69]

One could argue that the expressive effects of courts, like their deterrent effects, also operate at three different levels. At the level of *specific expression,* courts denounce certain behaviours and condemn wrongdoers to hard punishment, addressing deviants as 'moral agents… continuing

[67] Stahn (n 65) 334.
[68] Immi Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 13 EJIL 561.
[69] William Schabas, 'Sentencing by International Tribunals: A Human Rights Approach' (1997) 7 Duke J. Comp. & Int'l L. 461

dialogue with the criminal through which the law aims to guide his conduct by appealing to relevant reasons'.[70] Yet punishment not only sends a message to the convicted criminal, but also reaches an outside audience as a speech act articulated by a judge. In this way, courts 'also communicate to the public at large'.[71] If the message is received by other at-risk groups, we might call this *targeted expression*. If it reaches the entire population, we might call it *general expression.* International courts, though high-profile symbolic communication, could invert the social cues available to individual war criminals or alter the 'normative universe' that condones agents of atrocity for their brutality. This would make them an agent of general atrocity prevention through expression. In Table 2, I map these levels of expression onto the framework developed above.

*Table 2. Adding the expressive mechanism to the prevention framework*

| **Prevention level** | **Deterrence type** | **Expression type** |
|---|---|---|
| Primary prevention | General | General |
| Secondary prevention | Targeted | Targeted |
| Tertiary prevention | Specific | Specific |

Some penological theorists might contend that the socialising function of courts is not entirely consequentialist. That is, stigmatising deviant behaviour is alone a meaningful action, irrespective of the outcomes.[72] However, it is highly doubtful that defenders of criminal justice would choose to communicate the rule of law if they knew with absolute certainty that doing so results in more deviance and crime. No, expressivism, like its deterrence counterpart, is ultimately a

[70] RA Duff, *Trials & Punishments* (Cambridge University Press 1986) 238.
[71] Duff (n 70) 236. See also Stahn (n 65) 338.
[72] For a discussion, see Cass R. Sunstein, 'On the Expressive Function of Law' (1996) 144 U.Pa.L.Rev 2021

consequentialist rationale for punishment. It is best conceived as a casual mechanism, in our case, that might link international punishment to atrocity prevention.[73]

Expression can theoretically operate in the absence of deterrence. It is perfectly possible that international courts prevent crime through denouncement and norm affirmation, whether or not they raise the perceived costs of violence. Theorists should take seriously the critique that international criminals do not behave as *homo economicus*. Those acculturated into grave violence are quite possibly even more sensitive to social cues than everyday criminals; their actions are driven by obedience and adherence to in-group norms.[74] When targeting these actors, it could very well be that the expressive function of international courts is far more powerful than the rationalist deterrent function; the lawyers and judges of the ICL community are outside voices who remind their violent interlocutors that monstrous killing and destruction is a denial of our shared humanity and dignity. This is a message that genocidal groups are unaccustomed to receiving. Perhaps this is why Robert Sloane contends that 'ICL's ability to contribute to the lofty objectives ascribed to it depends far more on enhancing its value as authoritative expression than on ill-fated efforts to find the 'right' punishment'.[75]

The question is, how can we know whether courts in fact exert an impact through expression, or alternatively, through deterrence? It could be that both mechanisms are simultaneously active, in which case we would get something like Jo and Simmons' blended notion of 'social deterrence'.[76] However, in what remains, I reason that we can leverage different indicators of international court

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[73] In endorsing this formulation, I recognize I am embracing what Sander refers to as 'instrumental expressivism.' Sander B, 'The Expressive Turn of International Criminal Justice: A Field in Search of Meaning' (2019) 32 Leiden JIL. 851, 853

[74] Alette Smeulers, *Perpetrators of Mass Atrocities: Terribly and Terrifyingly Normal?* (Taylor & Francis 2023)

[75] Robert D Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 Stanford JIL 39, 43.

[76] Jo and Simmons (n 23).

activity to test the separate operation of these two distinct mechanisms. Specifically, I theorise that sentences are a measure of courts' expression, while prior elements of the criminal process like the establishment of jurisdiction and trial initiation are best conceived as measures of deterrence. I then design statistical models that attempt to capture the impacts of deterrent and expressive properties of international courts on atrocity prevention at the tertiary (country), secondary (regional), and primary (global) levels.

## 4. Sentencing as an Expressive Practice

Most research on international punishment examines whether sentencing practices have an appropriate and justified rationale,[77] whether sentencing decisions are consistent,[78] and whether exogenous factors help determine the sentences that judges hand down.[79] There is very little empirical research on the impact of sentences themselves. In one study of the former Yugoslavia, King and Meernik find that the essential factor behind deterrence is "certainty of apprehension": in countries under ICTY jurisdiction, the number of yearly ICTY sentences is associated with observable declines in human rights violations.[80] However, this research is the exception. What is generally lacking in ICL research is a theory of impact that focuses specifically on the causal

[77] Drumbl (n 6). See also Mirko Bagaric and John Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework' (2006) 6 ICLR 191.
[78] Silvia D'ascoli, *Sentencing in International Criminal Law The Approach of the Two Ad Hoc Tribunals and Future Perspectives for the International Criminal Court* (Hart Publishing 2011); Barbora Holá, Catrien Bijleveld and Alette Smeulers, 'Consistency of International Sentencing: ICTY and ICTR Case Study' (2012) 9 EJC 539; James Meernik, 'Sentencing Rationales and Judicial Decision Making at the International Criminal Tribunals' (2011) 92 SSQ 588.
[79] Kimi King, James Meernik and Geoff Dancy, 'Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National and International Factors' (2005) 86 SSQ 683.
[80] Kimi L King and James D Meernik, 'Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia: Balancing International and Local Interests While Doing Justice' in Bert Swart, Alexander Zahar and Göran Sluiter (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (1st edn, Oxford University Press 2011) 44.

importance of criminal sentencing by international courts. Why do judges bother assigning prison sentences to atrocity criminals? How might sentences *qua* sentences change behavior?

A criminal sentence is the 'term of imprisonment or probation imposed on a convicted defendant for criminal wrongdoing.' Sentencing, though, is a practice, or a 'competent performance.'[81] It is the meaningful act of assigning a period of punishment at the end of a legal judgment. Sentencing follows a chain of reasoning wherein rules are applied to the facts of a case to reach a conviction, or a determination of criminal responsibility for alleged crimes. At international courts, the assignment of a specific term of imprisonment involves a consideration of applicable sentencing provisions in the statute, as well as general principles—which include common practice, gravity of the crime, and other aggravating or mitigating circumstances. The final sentence is revealed as a number of years indicating the duration of the period of confinement. This figure is critical. The number of years a criminal convict receives transmits information on the extent of their lawbreaking, and simultaneously signals the extent of the court's reprobation. In this sense, the final sentence is an indicator both of how egregious an individual's conduct was *and* how serious international society is about punishing that type of conduct.

In addition to legal reasoning, international sentencing judgments normally contain a rationale. This second element is represented by explicit statements that justify the goals or the purpose of imposing penalties, which Sergey Vasiliev refers to as the 'punishment teleology'.[82] In *Krstić,* for instance, the ICTY Trial Chamber wrote that the 'practice of the Tribunal…reflects two objectives of a sentence: the need to punish an individual for the crimes committed and the need to deter other

[81] Emanuel Adler and Vincent Pouliot, 'International Practices' (2011) 3 Int'l Theory 1, 4.
[82] Sergey Vasiliev, 'Punishment Rationales in International Criminal Jurisprudence' in Florian Jeßberger and Julia Geneuss (eds), *Why Punish Perpetrators of Mass Atrocities?: Purposes of Punishment in International Criminal Law* (Cambridge University Press 2020) 50.

individuals from committing similar crimes'.[83] In the ICC's *Katanga* judgment, Trial Chamber II offered the following extended rationale:

> '…the role of the sentence is two-fold: on the one hand, punishment, or the expression of society's condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering caused to the victims; and, on the other hand, deterrence, the aim of which is to deflect those planning to commit similar crimes from their purpose.'[84]

Justifications like these vary by court and by trial chamber, but the tendency is for judges to impute the goals of retribution and deterrence into their work,[85] though they at times also point to the importance of criminal stigmatisation and developing a culture of rule of law.[86] Regardless, the presence of a written sentencing rationale itself is direct evidence of courts' didacticism. These statements are intended to educate the audience, whoever it is, on the nature and symbolic content of criminal punishment.

Each of these sentencing elements—assignment of the term of imprisonment and the justifying rationale—serves a communicative function. The act of sentencing is a hortatory practice that publicly broadcasts the extent and purpose of social reprobation. Indeed, 'norm projection' evidently flows through the 'book-length treatises being written as the judgments' at international courts.[87] The fact that these judgments are also spoken adds an additional layer of public performance. This aspect was on display in the courtroom suicide of Bosnian Croat Slobodan Praljak. When, on 29 November 2017, the ICTY Appeal Chamber affirmed his 20-year sentence, Praljak swallowed cyanide. After notifying the judges that he 'just drank poison,' the former

[83] *Krstić,*[2001] IT-98–33-T 9 [693]
[84] *Katanga* [2014] ICC-01/04-01/07-3484-tENG [38]
[85] See, e.g., *Kayishema and Ruzindana* [2001], ICTR-95-1-T
[86] *Erdemović* (Erdemović I Sentencing Judgment) [1998], IT-96-22-T [64]; *Obrenović* [2003], IT-02-60/2-S [51].
[87] May L, *Aggression and Crimes Against Peace* (Cambridge University Press 2008) 334. See also Aloisi R and Meernik J, *Judgment Day: Judicial Decision Making at the International Criminal Tribunals* (Cambridge University Press 2017)

general announced: ‘I am not a war criminal. I oppose this conviction’.[88] This was a tragic and embarrassing affair for the ICTY. However, that Praljak timed his suicide to directly follow the confirmation of his lengthy term of punishment is telling. It shows that sentencing is a dramatic affair with high stakes. Praljak chose the most charged, public moment of the trial to reject the Court’s condemnation and symbolically protest it with his own death. This suicide was a social act.

Recognizing the overall ‘performativity of judicial discourse,’ Vasiliev reaches the conclusion that ‘expressivism can best explain what international criminal jurisdictions are doing when they punish’.[89] One may further extrapolate that the more courts punish, the more they express. And following this logic to its end, one might conclude the gradual accumulation of sentences is the best measure we possess of the collected expressive output of international criminal law.

**5. Does Expression Prevent Atrocity?**

Thus far, I have argued that deterrence and expression are two causal mechanisms that potentially link international criminal justice to the three levels of atrocity prevention, and I have theorised that sentencing is the primary way in which courts serve an expressive function. I will now turn to the question of whether international courts in fact prevent atrocity through deterrence or expression.

First, it is necessary to preempt an objection. Is it possible that sentences simultaneously contribute both to the perceived ‘cost’ of crime *and* communicate social norms? If so, does that mean that one cannot treat sentences as purely an indicator of legal expressivism? This is a fair point.

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[88] ‘Bosnian Croat War Criminal Praljak Killed Himself with Cyanide’ *Reuters* (*Reuters,* 1 December 2017) <https://www.reuters.com/article/uk-warcrimes-bosnia-idUKKBN1DV4JE> accessed 24 October 2023.
[89] Vasiliev (n 82) 76.

However, current criminological research suggest that the severity of punishment does little to contribute to deterrence; it simply has not been shown to factor into the calculations of offenders.[90] This fact has even been acknowledged by judges at the ICC, who wrote in *Katanga* that 'it is not so much the severity of the sentence that should prevail as its inevitability'.[91] What *does* possibly deter is the increased likelihood of prosecution, and perhaps even the swiftness with which the justice system operates.

International justice is anything but swift. By the time that courts issue convictions and render sentencing judgments, potential future offenders would have already witnessed the establishment of court jurisdiction, the issuances of arrest warrants, the apprehension of suspects and the beginning of trial proceedings. These features of the criminal process are the ones most likely to factor into a rational actor's decision-making, and thereby act as a deterrent. But trials take years to unfold, and sentences only come at the end. Therefore, it is doubtful that the act of sentencing contributes much to regularly updated perceptions of the likelihood of sanction. In the former Yugoslavia, atrocity criminals like Mladić, Karadžić, and others started to fret about the ICTY once arrest operations became more common, which was around 1997.[92] Convictions, though, did not really start to roll in until the mid 2000s. By the time punishment was handed down, the ICTY had already proven itself more than willing to forcibly apprehend suspects, to target big fish like Milošević and to put major architects of ethnic cleansing in the dock at The Hague. It would be a stretch to argue that ICTY prison sentences added much to the perceived cost of

[90] Daniel S Nagin, 'Criminal Deterrence Research at the Outset of the Twenty-First Century' (1998) 23 Crime and Justice: A Review of Research 1; Daniel S Nagin, 'Deterrence: A Review of the Evidence by a Criminologist for Economists' (2013) 5 Annual Rev Econ 83.
[91] Katanga (n 84) [38].
[92] This year marks the beginning of the multi-national Operational Amber Star. Julian Borger, *The Butcher's Trail: How the Search for Balkan War Criminals Became the World's Most Successful Manhunt* (Other Press 2016).

sanction during the main conflict period. When they arrived years after, their function would have been mainly expressive, not deterrent. For these reasons, I test whether international courts have an expressive impact by separating sentences from other primarily deterrent elements of ICL.

*5.1 Models*

As discussed in Section II, amassing evidence suggests that the ICC, ad hoc, and hybrid tribunals have measurable preventive effects. But we do not yet have a good understanding of how or why. What part of the international criminal process is responsible for prevention? If the deterrence mechanism is most impactful, then we should observe a relationship between factors that raise the probability of prosecution and declining atrocity-level violence—because these are the features of the criminal process that increase the potential 'cost' of committing these egregious crimes. If the expressive mechanism is most impactful, then we should observe a relationship between sentencing by interntional courts and declining atrocity-level violence, because sentencing is the most salient communicative part of the trial.

Capturing those parts of the international legal interventions likely to be perceived as costly requires attention to process. Establishment of international criminal jurisdiction, intitiation of active investigations, issuance of arrest warrants, and the onset of proceedings likely increase assessments of crime's costliness in escalatory fashion. As this process advances, would-be offenders should become progressively more worried—and thus more deterred from committing illegal acts. Because it is a permanent international institution, ICC involvement in a situation follows a sequence that can be disaggregated. Each state voluntarily becomes a party to the Rome Statute, and then, if a grave situation arises in that state, it can be referred to the ICC. The Office

of the Prosecutor (OTP) can then initiate a preliminary examination. If approved by the Pre-Trial Chamber, the Prosecutor may proceed to an investigation. Only after that can arrest warrants be issued and proceedings be initiated. It is feasible that each step in this process exerts a deterrent effect on atrocity criminals. If actors know the country in which they operate is a States Party, they may have some sense that their actions fall under the jurisdiction of the ICC, as in the example from Section II of Afghan fighter Abdul Rashid Dostum. If the OTP makes an effort to get involved directly, through a preliminary examination, then violent actors may take notice that the chances for an eventual investigation are higher. And once an investigation begins and arrest warrants are issued, the probability of sanction increases even more.

To mesure all of these unique elements of the ICC process, I used data collected by the Transitional Justice Evaluation Tools (TJET) Project.[93] I first created variables that measure whether a state has ratified the Rome Statute (ICC-PARTY), whether the OTP has started a preliminary examination targeting a situation in that state (OTP-PRELIM), and whether the OTP has moved forward with an investigation into that situation (OTP-INVEST). For ad hoc and hybrid international tribunals, jurisdiction need not be triggered, and involvement in a case is collapsed into a single-step process. Because they have primary jurisdiction, rather than complementary jurisdiction, the act of establishment itself raises the probability of prosecution in one fell swoop, rather than a process that rachets up over time. For this reason, I created a measure that simply indicates whether an ad hoc or hybrid tribunal has active jurisdiction over a country in any given year (ADHOC-HYB). In addition to these four indicators of deterrence, I generate only one more: logged cumulative total of trials that international courts have started for a country's nationals over time (PROCEEDINGS). To measure this variable, I count how many international trial

[93] Data and information on this project are available at www.transitionaljusticedata.org

proceedings begin in any given country-year, and I sum them over the entire panel. ICC prosecutions are combined with ad hoc and hybrid prosecutions, and trials are matched to countries by the nationality of the accused.

Capturing the expressive element of international criminals prosecutions requires adding only one additional indicator, though it was the most difficult to produce. SENTENCES measures how extensive international punishment of atrocity crimes has been over time. It is based on a scale created by TJET to measure variation in the term of imprisonment assigned to those convicted by international courts. The scale ranges from 0-6 (See Table 3). Every convicted individual is assigned a value on this scale based on the length of time to which they are sentenced. To create a cumulative indicator, I added the scaled values for every convicted individual by country-year and then summed them over each country panel. The first indicator of its kind, this measure tells us how thoroughlly nationals of any country have been punished by international courts for their crimes. For the expression hypothesis to receive support, there must be an observed negative relationship between cumulative sentences and atrocity-level violence.

*Table 3. TJET Sentencing Scale*

| **Scale** | **Sentencing Time** |
|---|---|
| 1 | Less than 1 year |
| 2 | 1 – 3 years |
| 3 | 4 – 9 years |
| 4 | 10 – 19 years |
| 5 | 20 or more years |
| 6 | Life imprisonment |

The outcome of interest for this analysis is the number of lives taken by incidents of atrocity. I analyse yearly lives in any country claimed by acts of one-sided violence (OSV), which refers to

'the use of armed force by the government of a state or by a formally organized group against civilians which results in at least 25 deaths'.[94] Uppsala Conflict Data Project's database on OSV contains the most fine-grained information available on intentional killings, which references massacre-level violence that is a regular element of genocide, crimes against humanity, and war crimes. The data set includes a high, low and best estimate of how many civilians lives were taken in any given incident. I use the best estimate as the dependent variable.

The model design thus far allows us to examine the in-country impacts of international criminal justice. This is akin to the tertiary level of prevention, wherein legal interventions aim to exert a specific deterrent or expressive effect that stops already-violent groups from committing more acts of mass violence. But international criminal law is meant to reach a wider audience too. Judges hope the punishments they mete out send a message to the 'world in general' that there is 'no impunity' for 'crimes against international humanitarian law'.[95]As the ICTY Trial Chamber wrote in *Erdemović*, 'one of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole'.[96] To prevent atrocity elsewhere, the deterrent and expressive signals sent by international courts would have to radiate beyond the specific country whose nationals are currently subject to the deployment of ICL.

I conceptualise the secondary level of prevention as that which targets other at-risk situations in the region, and the primary level of prevention as that which aims to produce a general effect in global society as a whole. One can model these broader deterrent and expressive impacts of

[94] Kristine Eck and Lisa Hultman, 'Violence Against Civilians in War' (2007) 44 Journal of Peace Research 233, 235.
[95] *Kupreškić et al.* [2000] IT-95-16-T [848].
[96] Erdemović (n 86) [64]

international courts by simply aggregating the above measures to the regional and global levels. For example, one may hypothesize that the ICTR has a broader deterrent effect on all Burundian, Congolese, Rwandan, and Uganda nationals fighting in the conflicts of the Great Lakes area. One way of capturing this effect is to assign each of these countries values of PROCEEDINGS and SENTENCES that amount to the number of trials and the extent of punishment throughout the entire continent of Africa. To assess primary prevention, I assign values to every country-year of all total international PROCEEDINGS and SENTENCES that have taken place up to that point in world time. That means Haiti, for instance, receives the same values on PROCEEDINGS and SENTENCES as Bosnia, despite the fact that no international court has produced convictions for nationals in Haiti, nor in the Americas region as a whole.

For the secondary prevention model, I include variables that reflect the regional experience of international courts in the five major regions of the world: Africa, the Americas, Asia, Oceania, and Europe. For this model, ICC-PARTY reflects the number of States Parties to the Rome Statute in any given region and year; OTP-PRELIM and OTP-INVEST counts how many preliminary examinations and investigations occur in any region-year, and ADHOC-HYB is how many ad hoc and hybrid tribunals were operating in the region-year. PROCEEDINGS references the sum total of international prosecutions that have taken place in the region over time, and SENTENCES is the scaled extent of international punishment accumulated over time by region. The primary prevention model follows all of the same rules for the variable construction, except that the variables are aggregated to the world-year level.

Of course, there are country-level characteristics that likely affect the propensity for groups to commit atrocity. I account for this by including a sort of control for each country, called a fixed

effects parameter, and I also incorporate a few key confounding variables. The first is whether the country is engaged in an ONGOING CONFLICT.[97] If there is an active intrastate violent conflict underway, it significantly increases the opportunity for atrocities to occur. To control for domestic rule of law, legal rights protections, and democracy, I include a LIBERAL DEMOCRACY index measure produced by Varieties of Democracy.[98] And finally, I include controls for GDP PER CAPITA and POPULATION.[99]

The sample for the three statistical models presented in Table 4 includes all countries between 1989 and 2020. The choice to start in 1989 allows us to capture the entire post-Cold War period, including a few years before the ad hoc tribunals were established. However, the analyzed sample excludes one single outlier country-year from the analysis: Rwanda in 1994. Because the number of civilians killed in the Rwanda genocide exceeds by a factor of 20 lives lost from other episodes of one-sided violence, including this country-year, causes problems. Incorporating Rwanda-1994 into the models had the effect of artificially showing the effect of international court intervention to be massively positive—given that ICTR intervention occurred directly following the deadliest spell of the genocide. To avoid drastically skewing the results, the outlier is excluded from the sample.

*Table 4. Fixed-effects regression models of international trials and atrocity prevention*

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[97] Shawn Davies, Therése Pettersson and Magnus Öberg, 'Organized Violence 1989–2022, and the Return of Conflict between States' (2023) 60 JPR 691.

[98] Daniel Pemstein and others, *The V-Dem Measurement Model: Latent Variable Analysis for Cross-National and Cross-Temporal Expert-Coded Data* (Varieties of Democracy Institute 2022).

[99] Christopher Fariss and others, 'Latent Estimates of Historic Gross Domestic Product, GDP per Capita, Surplus Domestic Product, and Population Data Version 1' <https://dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/FALCGS> accessed 26 October 2023.

| | Tertiary Prevention (Country Level) | Secondary Prevention (Region Level) | Primary Prevention (Global Level) |
|---|---|---|---|
| Dependent Variable: CIVILIAN DEATHS FROM ONE-SIDED VIOLENCE | | | |
| ICC-PARTY | -29.72 | -0.424 | 1.012 |
| | (22.48) | (1.184) | (0.654) |
| OTP-PRELIM | 46.82 | 5.920 | 3.492 |
| | (57.28) | (8.552) | (7.236) |
| OTP-INVEST | -370.0*** | -8.380* | 2.002 |
| | (74.56) | (4.637) | (7.558) |
| ADHOC-HYBRID | 165.4** | 13.66 | -4.919 |
| | (77.52) | (9.056) | (7.335) |
| PROCEEDINGS | -109.2** | 25.71 | 64.79*** |
| | (49.28) | (16.62) | (18.65) |
| SENTENCES | -64.99** | -26.88** | -57.56*** |
| | (28.21) | (12.73) | (16.28) |
| ONGOING CONFLICT | 256.9*** | 258.0*** | 256.6*** |
| | (28.84) | (28.50) | (28.49) |
| LIBERAL DEMOCRACY | 82.15 | -74.66 | -138.5 |
| | (91.31) | (91.12) | (91.22) |
| GDP PER CAPITA | 4.948 | -16.10 | -15.30 |
| | (29.98) | (34.74) | (36.08) |
| POPULATION | 9.705 | 30.55 | -73.78 |
| | (47.29) | (64.13) | (59.11) |
| Constant | -60.27 | -129.5 | 557.6 |
| | (300.5) | (426.4) | (400.3) |
| Observations | 5409 | 5409 | 5409 |
| Prob > F | 0.00 | 0.00 | 0.00 |

***p < .01 **p < .05 *p < .10. Fixed effects country parameter included

*5.2 Results*

The results from these three statistical models are fascinating. First, ongoing conflicts are across the board associated with much more lethal acts of one-sided violence. This shows that the models perform to expectation, and represent a process that is intuitive. More war, more atrocity.

Second, by and large, hypotheses linking international criminal process and punishment to tertiary prevention are supported. While ratification of the Rome Statute and OTP preliminary examinations are unrelated to acts of one-sided violence, the onset of an OTP investigation is associated with an enormous drop in civilian killings. The coefficient indicates that around 370 fewer people are killed in country-years under investigation. This is seven times the mean number of civilians killed in any given country and year in the entire sample. In contrast, the mere presence of an ad hoc or hybrid tribunal is associated with *more* atrocity-level violence. This resonates with the widespread criticism that the ICTY was unable to deter the horrific Srebernica massacre and other atrocities, such as in Kosovo. However, once international courts move to trial proceedings for a country's nationals, there is again a significant decline in atrocity. This suggests a specific deterrent effect. But also present is a specific expressive effect, evidenced by the fact that criminal sentences are statistically significant and negative, meaning that they are correlated with fewer deaths on average. In sum, these findings show that international courts contribute to tertiary prevention through specific deterrence *and* specific expression.

Third, at the region level, all of the deterrence variables fade into irrelevance, statistically and substantively. The ICC and ad hoc variables are insignificant in the secondary prevention model, including the number of trial proceedings that have taken place. However, what remains statistically significant and associated with fewer civilian killings is criminal sentences. While the magnitude is modest, one could still conclude that the more extensively that atrocity criminals from a region have been punished, the less extreme atrocity-level violence will be in any given country in that region. So, if international courts provide for secondary atrocity prevention, it is through targeted expression, not targeted deterrence.

Fourth, the relationships at the regional level all scale up to the global level. There is no general deterrent effect that accrues to international court jurisdiction, involvement, or proceedings over time. If anything, the rising number of global trials is associated with increased severity of atrocity-level violence. That said, the evidence on display is consistent with a general *expressive* effect; with more extensive sentencing over time, there has been fewer civilian lives taken by one sided violence.

Table 5 presents all of the findings in simplified format. One can see that the deterrence record of international criminal justice is inconsistent. Though factors like ICC investigation and total number of trial proceedings are associated with less violence at the country level, meaning that they might possibly change the cost calculations of specific actors considering atrocity, there does not appear to be a targeted or general deterrence effect. However, consistent through all models - at the country, regional, and global levels – is the impact of sentences. The expressivism of international courts appears to travel beyond specific context. Punishment sends a far-reaching message.

*Table 5. Summarized findings*

| Prevention level | Deterrence type | Expression type |
|---|---|---|
| Primary prevention (global) | General (-) | General (+) |
| Secondary prevention (regional) | Targeted (··) | Targeted (+) |
| Tertiary prevention (country) | Specific (+) | Specific (+) |

*(+) positive relationship; (-) negative relationship; (··) no relationship*

## 6. Conclusion

Does punishment by international courts prevent atrocity? The evidence presented in this chapter suggests the answer is yes. While some features of international criminal interventions might deter

violence in specific situations, punishment through incarceration has an expressive effect that reverberates throughout global society. Despite the transparent presentation of theory and data, some readers will be disinclined to believe this expressivist account. Perhaps they do not think sentencing in international courts, in the words of judges at the ICTY, successfully stigmatises 'criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole'. Or perhaps they are generally suspicious of attempts to gauge the plausibility of the expressivist theory of punishment using statistical data on atrocity-level violence.

Skepticism is good. No one should believe this or any empirical research on its face. However, this chapter offers some findings that might be difficult to dismiss. For one, the positive impact of ICC investigations is in line with study after study that suggests OTP involvement in a situation deters atrocity,[100] but also has other beneficial outcomes like raising the salience of human rights issues,[101] catalysing domestic legal mobilisation,[102] and generally activating the Court's socio-pedagogical role.[103] That this is repeatedly confirmed in various strands of research means that it is difficult to explain away. Second, measures of the extensiveness of criminal sentences are correlated with atrocity prevention at the primary, secondary, and tertiary levels - while the occurrence of trials proceedings is not. Even if one does not trust statistics, this calls out for an explanation. How could it possibly be that cumulative sentences are correlated with fewer civilian deaths, while cumulative trials are not? The only way to make sense of this finding is to realise that there is an ineffable quality to criminal sentencing that is not reducible to the trial process. My conjecture is that the hidden but active ingredient is performance. The act of judging is hortatory

[100] Jo and Simmons (n 23).
[101] Dancy (n 38).
[102] Dancy and Montal (n 37).
[103] Mirjan Damaška, 'What Is the Point of International Criminal Justice?' (2008) 83 Chicago-Kent LR 329.

and dramatic, and criminal sentences transmit information on the extent of the international community's reprobation for certain crimes. As these messages accumulate over time, they gradually alter the social universe that tacitly condones genocide and crimes against humanity. The result is modest declines in the extremity of violence. In short, when it comes to atrocity prevention, punishment makes a noticeable difference.