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Article

A Hierarchy of the Goals of International Criminal Courts

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Abstract

This Article represents the first attempt to systematically assess and compare the goals of international criminal courts to one another. To compare them, it focuses on their expected value. This is the value of the benefit that would occur if the goal were to be achieved, multiplied by the likelihood that it will be achieved. This approach allows for goals of differing value and likelihood of achievement to be compared to one another. The goal with the highest expected value is the goal that is most important and that international criminal courts should prioritize.

This Article demonstrates that it is possible to establish a hierarchy of the goals of international criminal courts. Moreover, it finds that the most important goal is the prevention of violations of international criminal law. This is perhaps surprising given that many scholars appear to have concluded that prevention is not achievable. Nevertheless, preventing violations would have enormous value. Perhaps more importantly, recent empirical research strongly suggests that courts can prevent violations. The result is that prevention is moderately likely to occur and has an extremely high value when it does occur. As such, it has a higher expected value than any of the other goals commonly attributed to international tribunals including retribution, establishing the historical record, providing closure for victims, or fostering post-conflict

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reconciliation. Accordingly, international criminal courts should make preventing violations their priority.

I. INTRODUCTION

Nearly ten years ago, Professor Damaška realized that there is a significant lacuna in discussions about the goals of international criminal courts: while there is a great deal of literature about particular goals, there has been no attempt to establish a hierarchy of those goals.[1] As a result, much of the literature operates in a vacuum. While many scholars have argued that a particular goal, considered on its own, is the most important, there has been virtually no discussion of the value of each goal relative to the others. As this Article demonstrates, there is much that can be learned about the goals of international criminal courts by considering all of them simultaneously and comparing them to one another.

First, having an established hierarchy of those goals brings clarity to an important theoretical question. The extensive literature about the goals of international criminal courts demonstrates their importance.[2] Given their importance, it is somewhat surprising that nobody has tried to articulate a formal hierarchy of those goals. By establishing such a hierarchy, this Article represents a significant contribution to our knowledge about international criminal tribunals.

Second, having an established hierarchy will benefit both international courts and the states that fund them. Courts have limited resources and cannot pursue all of the goals that have been set for them.[3] Placing those goals in a hierarchy will allow courts to focus their resources on the goals that will yield the most value. This should lead, in time, to courts being more successful in achieving their goals. Ultimately, this will also benefit those states that fund international criminal courts.[4]

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1. *See* Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHICAGO-KENT L. REV. 329, 331 (2008) ("The list of goals proclaimed by international criminal courts and their affiliates is very long."); Minna Schrag, *Lessons Learned from the ICTY Experience*, 2 J. INT'L CRIM. J. 427, 428 (2004) ("A long list of purposes has been ascribed to the ICTY and the ICC, and other similar tribunals . . . .").

2. The breadth of the literature about the goals of international criminal courts can be seen by looking at the sources cited during the initial discussion of those goals. *See infra* Section III.

3. *See infra* Section III.

4. *See* Stuart Ford, *What Investigative Resources Does the International*

This Article represents the first attempt to systematically assess and compare the goals of international criminal courts to one another. To compare them, it focuses on their expected value. This is the value of the benefit that would occur if the goal were to be achieved multiplied by the likelihood that it will be achieved.[5] This approach allows for goals of differing value and likelihood of achievement to be compared to one another. The goal with the highest expected value is the goal that is most important and that international criminal courts should prioritize.[6]

This Article demonstrates that it is possible to establish a hierarchy of the goals of international criminal law.[7] Moreover, it argues that the most important goal in the hierarchy is the prevention of violations of international criminal law.[8] This may be surprising given that many scholars appear to have concluded in recent years that prevention is unachievable.[9] Nevertheless, it is clear that preventing violations would have enormous value.[10] Perhaps more importantly, recent empirical research strongly suggests that courts can prevent violations.[11] The result is that prevention is moderately likely to occur and has an extremely high value when it does occur. As such it has a higher expected value than any of the other goals commonly attributed to international tribunals including retribution, establishing the historical record, providing closure for victims, or fostering post-conflict reconciliation.[12] Accordingly, international criminal courts should make preventing violations their priority.

The Article proceeds as follows. Section II describes the outputs of international criminal courts. Section III discusses the most-commonly articulated goals that states, scholars and commentators have urged courts to pursue. The methodology for this Article is presented in Section IV. Section V evaluates each of the goals of international tribunals for both how often the goal

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Criminal Court Need to Succeed?: A Gravity-Based Approach, 16 WASH. U. GLOBAL STUD. L. REV. 1, 70 (2017) (arguing that states have a vested interest in the success of the courts they fund and that court success benefits funding states).

5. *See infra* Section IV.
6. *Id.*
7. *See infra* Section VI.
8. *See infra Table 3.*
9. *See infra* Section V.H.2.
10. *See infra* Section V.H.8–13.
11. *See infra* Section V.H.4–7.
12. *See infra* Section VI.

is likely to be achieved and what the benefit the goal would confer if it were achieved. These factors are used to determine the expected value of each goal. Section VI presents the results of the assessments in Section V and turns them into a formal hierarchy of the goals of international criminal courts. This Article's conclusions and some recommendations for future research appear in Section VII.

II. THE OUTPUT OF INTERNATIONAL CRIMINAL COURTS

The principal work of international criminal tribunals is to determine the guilt or innocence of individuals accused of violating international criminal law.[13] They do this by conducting trials.[14] The trials are thus their most important output.[15] But if the trials (and subsequent incarceration of those

13. *See* Shahram Dana, *Turning Point for International Justice?*, *in* XI ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 962, 972 (Andre Klip & Goran Sluiter eds., 2007) ("The primary function of the international criminal tribunal is to determine the criminal responsibility and punishment of those individuals found guilty of the crimes under its jurisdiction."); O-Gon Kwon, *The Challenge of An International Criminal Trial as Seen from the Bench*, 5 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 360, 373 (2007) ("The task of determining guilt or innocence must take precedence over other, not strictly judicial, considerations."); Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 534 (2008) (arguing that "the main function of trials is to determine individual culpability and to assess appropriate punishment through a fair process.").

14. U.N. Secretary-General, ¶ 20, U.N. Doc A/C.5/52/4 (Oct. 21, 1997) ("[Chambers] performs the fundamental core activity of the Tribunal, that is, the trial and determination of guilt or innocence of persons responsible for serious violations of international humanitarian law within the territory of the former Yugoslavia."); Adrian Fulford, *The Reflections of a Trial Judge*, 22 CRIMINAL L.F. 215, 216 (2011) ("We are first, foremost and last a criminal court: our core business is to process criminal trials. All the rest, and I hasten to add some of the rest is very important indeed (such as our deterrent potential, reparations to victims and outreach), is secondary to the Court's obligation to investigate, arrest and try alleged criminals.").

15. The trials are the outputs of the ICC's process because they are the direct result of the ICC's operations. *See* Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AMERICAN J. INT'L L. 225, 248 (2012). They should not be confused with the outcomes of the court, which would be the effects of its outputs on the external state of the world. *Id.* This distinction between outputs and outcomes is very important. *See infra* Section III (arguing that states would not pay for international tribunals solely to generate their direct outputs and that such courts are unsustainable unless they can also achieve certain outcomes in the external world).

found guilty) were all that such tribunals accomplished, it is unlikely that the international community would continue to fund them. This is true for three reasons: trials are very rare, very expensive, and very complex.

First, trials at international criminal courts are extremely rare. Over the course of about twenty years, the International Criminal Tribunal for the former Yugoslavia (ICTY) indicted 161 people, but has tried only 98.[16] The International Criminal Tribunal for Rwanda (ICTR), the next largest international tribunal, indicted ninety-one people, but has only tried seventy-five.[17] The Special Court for Sierra Leone (SCSL) originally indicted thirteen individuals, but only brought ten of them to a trial.[18] The Extraordinary Chambers in the Courts of Cambodia (ECCC) charged eight people, but has only tried three.[19] In the

16. *See* Infographic: ICTY Facts & Figures, International Criminal Tribunal for the Former Yugoslavia, http://www.icty.org/en/content/infographic-icty-facts-figures (showing that the ICTY has sentenced eighty individuals and acquitted eighteen more). Of course, that figure does not completely describe the ICTY's workload. There are ongoing proceedings against another twelve individuals, thirteen individuals have been transferred to domestic jurisdictions for trial, and proceedings were terminated against another thirty-six individuals. *Id.* Even if you include all of these people, however, the ICTY only indicted 161 individuals.

17. *See* The ICTR in Brief, International Criminal tribunal for the Former Yugoslavia, http://unictr.unmict.org/en/tribunal (showing that the ICTR has indicted ninety-one people, of whom sixty-one were convicted and sentenced, fourteen were acquitted, and the remaining individuals either died, are still fugitives, or had their cases referred to national jurisdictions).

18. *See* Special Court for Sierra Leone, http://www.rscsl.org/ (noting that "[i]n March 2003 the Prosecutor brought the first of 13 indictments against leaders of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC), and the Civil Defence Forces (CDF), and then-Liberian President Charles Taylor. Ten persons were brought to trial. Two others died, one of them before proceedings could commence (RUF Leader Foday Sankoh) and one outside the jurisdiction of the Court (RUF Battlefield Commander Sam Bockarie). A third, (AFRC Chairman Johnny Paul Koroma), fled Sierra Leone shortly before he was indicted. While some evidence suggests that Koroma is dead, it is not considered conclusive and he is therefore officially considered to be at large.").

19. The ECCC initially charged five former members of the Khmer Rouge, but one of them subsequently died and another was ruled unfit to stand trial. *See* Christoph Sperfeldt, *From the Margins of Internationalized Criminal Justice: Lessons Learned at the Extraordinary Chambers in the Courts of Cambodia*, 11 J. INT'L CRIM. JUST. 1111, 1113 (2013). In 2009, the Co-Prosecutors requested the initiation of investigations into five additional suspects in what came to be known as Case 003 and Case 004. *See* ECCC, Case 003, http://www.eccc.gov.kh/en/case/topic/286. One individual was subsequently charged in connection with Case 003. *Id.* Two individuals were charged in connection with Case 004. *See* ECCC, Case 004, http://www.eccc.gov.

thirteen years since the International Criminal Court (ICC) was established, the ICC has issued arrest warrants for forty people, of which, twelve have either been tried or are in the midst of a trial.[20] The result is that only about 300 individuals have been indicted by international criminal courts since the mid-1990s. Slightly less than 200 of them have had their guilt adjudicated.

Domestic jurisdictions adjudicate far more criminal cases than international tribunals can ever hope to. For example, there are more than 20 million new criminal cases opened each year in the United States.[21] The courts in England and Wales[22] open approximately 1.7 million new criminal cases each year.[23] Each year, the Canadian courts complete about 400,000 criminal cases[24] and more than 700,000 new criminal cases are initiated in Australia.[25]

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kh/en/case/topic/98. As a result, the ECCC eventually charged eight people, but only three people were actually tried. Kang Guek Eav alias Duch was tried and convicted in Case 001. *See* ECCC, Case 001, http://www.eccc.gov.kh/en/case/topic/1. Nuon Chea and Khieu Samphan were tried and convicted in Case 002/01. *See* ECCC, Case 002, http://www.eccc.gov.kh/en/case/topic/2. Trials have not begun in Case 003 or Case 004. *See* ECCC, Case 003, http://www.eccc.gov.kh/en/case/topic/286; ECCC, Case 004, http://www.eccc.gov.kh/en/case/topic/98.

20. *See List of people indicted in the International Criminal Court*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_people_indicted_in_the_International_Criminal_Court (last vistited Jan. 8, 2018). Of the rest, charges have been withdrawn against a number of them, some have died, and the remainder are fugitives. *Id.*

21. *See* R. LAFOUNTAIN, R. SCHAUFFLER, S. STRICKLAND, S. GIBSON, & A. MASON, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS (National Center for State Courts 2011), at 20 (indicating that in 2009 there were more than 20 million new criminal cases filed in state courts in the United States).

22. The crown courts and magistrates' courts represent the main criminal courts. *See* Ministry of Justice, Criminal court statistics quarterly, England and Wales, October to December 2015, dated March 31, 2016, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/512100/bulletin.pdf.

23. The magistrates' courts receive approximately 400,000 criminal cases per quarter, while the crown courts—which hear more serious cases—receive approximately 30,000 cases per quarter. *Id.* at fig. 1 (Magistrates' courts caseload) and fig. 2 (Crown courts caseload). Scotland and Northern Ireland have their own separate criminal court systems and report their caseloads separately.

24. *See* Ashley Maxwell, *Adult Criminal Court Statistics in Canada 2013/2014*, Statistics Canada, Sept. 28, 2015, http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14226-eng.htm. The number of completed criminal cases in Canada has fluctuated between 360,000 and 410,000 for the last decade. *See id.* at Chart 1.

25. *See* AUSTRALIAN INSTITUTE OF CRIMINOLOGY, AUSTRALIAN CRIME: FACTS & FIGURES 2014 59, (2014), http://aic.gov.au/media_library/publications/

Second, trials at international tribunals are very expensive.[26] All told, international criminal courts spent more than $6 billion between 1993 and 2015.[27] This amounts to almost $30 million dollars spent per individual tried. Most domestic trials cost far less.[28]

Third, international trials are extremely complex. For example, the average trial at the ICTY took 171 trial days to complete, and involved the testimony of 121 witnesses and the entry into evidence of more than 2,000 exhibits.[29] Trials at other international criminal courts have a similar level of complexity.[30] Domestic criminal trials, on the other hand, take much less time. In fact, the majority of criminal trials heard in federal district courts in the United States take less than one trial day to complete.[31] And less than one half of one percent of federal criminal trials took more than twenty days to complete.[32]

The reality of spending more than $6 billion to try about 200 individuals has led to claims that international criminal tribunals are too slow, too expensive, and too inefficient.[33] I have shown elsewhere that the conventional wisdom regarding the

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facts/2014/facts_and_figures_2014.pdf.

26. *See* Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 3-4 (2014) [hereinafter Ford, *Complexity and Efficiency*]. The ICTY will cost more than $2.7 billion between 1993 and 2017. *Id.* at 36. The ICTR is expected to cost about $1.75 billion over roughly the same period. *See also* Stuart Ford, *How Leadership in International Criminal Law is Shifting from the United States to Europe and Asia: An Analysis of Spending on and Contributions to International Criminal Courts*, 55 ST. LOUIS U. L.J. 953, 973 (2011) [hereinafter Ford, *How Leadership is Shifting*]. The International Criminal Court (ICC) has cost at least $1.6 billion since 2002. *Id.*at 961.

27. *Id.* at 960.

28. Data on the costs of domestic criminal trials is extremely hard to come by. *See* Ford, *Complexity and Efficiency*, *supra* note 26, at 45 (noting the difficulty of finding data on domestic criminal systems). Nevertheless, murder trials in the United States seem to usually cost hundreds of thousands of dollars. *Id.* at 53–55 (discussing the costs of murder trials in North Carolina, Maryland and Kansas). It seems safe to assume that most criminal trials cost less than the typical murder trial.

29. *See* Ford, *Complexity and Efficiency*, *supra* note 26, at Table 2.

30. *Id.* at 31–32.

31. *Id.* at 32–33.

32. *Id.* at 33.

33. *See, e.g.*, Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 543 (2004) (arguing that there is a "pervasive" dissatisfaction among states with international criminal tribunals and a "perception" that their cost is not justified by the small number and lengthy nature of the trials that take place).

efficiency of international criminal tribunals is wrong,[34] but it is true that trials at international tribunals are very expensive and very rare. Indeed, if the only thing that international courts accomplished was to try a handful of very expensive cases, with no other effect on the world beyond the incarceration of the accused if he or she was found guilty, it is unlikely that the international community would continue to establish and fund them.

At first, this claim may seem strange given that states manifestly do establish and fund international criminal courts and their main work consists of trying individuals accused of serious violations of international criminal law.[35] But states expect courts to accomplish far more than just trying a handful of individuals—no matter how deserving those individuals are of punishment. Indeed, states attach a relatively low value to the determination of guilt or innocence and the imposition of an appropriate sentence. Rather, states fund international tribunals primarily because of the other goals they hope them to accomplish.[36]

There is a critical difference between a court's outputs (the work it performs) and its outcomes (the impact of its work on the world).[37] States do not fund international courts so that those courts can produce particular outputs.[38] Rather, they fund courts because they believe the courts will lead to particular outcomes in the external world.[39] Trials are the principal output of international criminal courts,[40] but states would not fund such courts solely to conduct trials if those trials did not have some larger impact on the world.

For example, Ralph Zacklin[41] argued that states became dissatisfied with the ad hoc tribunals because their costs were

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34. *See generally* Ford, *Complexity and Efficiency*, *supra* note 26.

35. *Understanding the International Criminal Court*, ICC at 1, https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf.

36. *See* Shany, *supra* note 15, at 230.

37. *See supra* note 15 (explaining the difference between outputs and outcomes).

38. *Cf.* Shany, *supra* note 15, at 249 ("From a goal-based perspective, outputs are mere instruments or means to attain social outcomes, and thus represent a less important object of study than outcomes.").

39. *See* Shany, *supra* note 15, at 230 (arguing that courts are viewed as effective when they achieve their desired outcomes).

40. *See supra* text accompanying notes 13–15.

41. Ralph Zacklin was Assistant Secretary-General for Legal Affairs at the United Nations and played a key role in development of the ad hoc tribunals. *See* Zacklin, *supra* note 33.

far greater than their tangible accomplishments[42] and that the courts represented an approach that was "no longer politically or financially viable."[43] Zacklin's argument assumes that states decide whether to support courts by weighing the costs of international tribunals against the benefit to be derived from their impact on the world. And, indeed, it is widely accepted that states are rational actors who make decisions on whether to create or become members of international organizations based on a calculation of the costs and benefits of membership.[44] Ultimately, Zacklin concluded that states would not continue to fund international criminal courts solely to conduct slow, expensive trials unless they could show some impact on the external world.[45]

That does not mean that states will not found or become members of international criminal courts. Indeed, since Zacklin's article was written, 124 states have become members of the International Criminal Court.[46] So, it is clear that states are still willing to both found and join international tribunals. However, states will not do so solely so that courts can adjudicate the guilt or innocence of a handful of accused; the expense must be justified by something beyond just carrying out trials.[47]

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42. *See id.* at 543 (arguing that most states felt the cost of the courts "is not wholly justified" because of the inability of the courts to fulfill their purpose of "bringing to justice those responsible for the most serious crimes in a timely and expeditious manner.").

43. *Id.* at 545. *See also* Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L.J. 323, 24 (2009) (arguing that the "conventional wisdom among policymakers, practitioners and commentators," both academic and popular, was that prosecutions at international criminal courts have been far too slow to justify their expense).

44. *See* Kenneth W. Abbott & Duncan Snidal, *Why States Act through Formal International Organizations*, 42 J. OF CONFLICT RESOL. 3, 6 (1998) ("We assume, for simplicity, that states are the principal actors in world politics and that they use IOs to create social orderings appropriate to their pursuit of shared goals . . . .We start with the pursuit of efficiency and employ the logic of transaction costs economics and rational choice . . . ."); Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 62 (2001) ("Our basic presumption, grounded in the broad tradition of rational-choice analysis, is that *states use international institutions to further their own goals, and they design institutions accordingly.*") (emphasis in original).

45. *See* Zacklin, *supra* note 33, at 545.

46. ICC, *Joining the International Criminal Court Why does it matter?* https://www.icc-cpi.int/iccdocs/PIDS/publications/Universality_Eng.pdf ("124 states are parties to the Rome Statute.").

47. *See* Margaret M. deGuzman, *Choosing to Prosecute: Expressive*

III. THE GOALS OF INTERNATIONAL CRIMINAL COURTS

The goals of international criminal courts are much broader than simply conducting trials, and it is achievement of these goals that motivates states to join a court.[48] Professor Shany has argued that this is essentially how all international organizations operate. Their outputs are the means by which their goals are achieved,[49] but ultimately, it is the achievement of those goals that matters, not the particular outputs themselves. And indeed, all international criminal courts are premised on the idea that conducting trials has some effect on the world beyond just determining the guilt or innocence of the accused.[50]

For example, the Rome Statute of the ICC argues that it will "contribute to the prevention of" serious violations of international criminal law.[51] It also establishes a goal of "put[ting] an end to impunity."[52] Other international tribunals have been given similar goals. For example, the United Nations Security Council asserted that the ICTY would contribute to ending widespread violations of international law and that it would "contribute to the restoration and maintenance of peace."[53] It made similar claims when it created the ICTR.[54]

These are not the only goals that have been attributed to international criminal courts.[55] Over the last twenty years,

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Selection at the International Criminal Court, 33 MICH. J. INT'L L. 265, 269-70, 276 (2012) (arguing that retribution alone cannot justify the ICC's work suggesting that states are not fundamentally retributivists and that they are not willing to pay for international trials if their only purpose is to punish the guilty).

48. *Cf.* Shany, *supra* note 15, at 230 (arguing that the effectiveness of international courts should be measured by whether they achieve their goals rather than by whether they produce a particular output).

49. *Id.*

50. *Cf. id.* at 248 (defining the outcome of an international court as the effect of its outputs on the external state of the world).

51. Rome Statute of the International Criminal Court, pmbl., July 17, 1998, 37 I.L.M. 1002, 993 U.N.T.S. 3 [hereinafter Rome Statute].

52. *Id.*

53. *See* S.C. Res. 808 (Feb 22, 1993).

54. *See* S.C. Res. 955 (Nov. 8, 1994) (arguing that the ICTR could contribute to putting an end to crimes, be an effective measure to bring to justice those persons responsible for them, ensure that crimes were effective redressed, and "contribute to the process of national reconciliation and to the restoration and maintenance of peace").

55. This Article will often use the terminology of goals rather than

courts, states, and commentators have identified many potential goals for international tribunals.[56] The most commonly-articulated goals are:

- preventing violations of international criminal law;[57]
- ending impunity for past violations;[58]
- maintaining or restoring international peace and security;[59]

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outcomes to describe the effect of tribunals on the world because this is how most of the literature frames the issue. But it is worth noting that the two terms are largely synonymous. *Compare supra* note 15 (defining outcomes as the effects of a court's work on the external world) *with* OXFORD UNIVERSITY PRESS, NEW OXFORD AM. DICTIONARY (Angus Stevenson & Christine A. Lindberg eds., 3d ed. 2010) (defining a goal as "the object of a person's ambition or effort; an aim or desired result").

56. *See* Damaška, *supra* note 1, at 331 ("The list of goals proclaimed by international criminal courts and their affiliates is very long."); *see also* Schrag, *supra* note 1, at 428 ("A long list of purposes has been ascribed to the ICTY and the ICC, and other similar tribunals . . . .").

57. *See supra* Section III (noting that the Preamble to the Rome Statute explicitly identifies prevention as one of the goals of the ICC). *See also* deGuzman *supra* note 47 at 306–08 (noting that deterrence is "frequently invoked" as a justification for the work of international tribunals); Justin Levitt, *Developments in the Law: International Criminal Law – II: The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1961 (2001) ("The specific aim of prosecution that tribunal affiliates recite most frequently is the prevention of future violations of international humanitarian law.").

58. *See supra* Section III (noting that the Rome Statute explicitly identifies ending impunity and ensuring effective prosecution as one of the goals of the ICC). *See also* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. J. INT'L L. 53, 68-73 (2008) (arguing that the ICC can help end impunity by encouraging domestic systems to undertake prosecutions of international crimes); *id.* at 107 ("The International Criminal Court's core mission is to end impunity for the most serious international crimes."); Schrag, *supra* note 1, at 428 (noting that international courts are supposed to "end impunity for violations, especially for senior political and military leaders").

59. *See supra* text accompanying notes 53–54. *See also* Turner, *supra* note 13, at 537–39; Payam Akhavan, *Beyond Impunity: Can International Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7 (2001) (arguing that the indictment and prosecution of "leaders with criminal dispositions and a vested interest in conflict makes a positive contribution to post-conflict peace building"); Rauxloh, *supra* note 60, at 739 ("The most important function of international criminal justice is the restoration of peace.").

- establishing a reliable historical record;[60]
- providing closure or redress for victims;[61]
- expressing condemnation of crimes that are abhorrent;[62]
- fostering post-conflict reconciliation;[63]
- developing international criminal law;[64] and
- assigning responsibility for wrongs and punishing the guilty (i.e., retribution).[65]

These are not all of the goals that have been attributed to

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60. *See* Damaška, *supra* note 1, at 331. *See also* Janine Natalya Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 EUR. J. INT'L L. 415, 425 (2009) (arguing that the ICTY "considers one of its primary purposes to be the creation of a historical record"); Regina E. Rauxloh, *Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining*, 10 INT'L CRIM. L. REV. 739, 740 (2010) (arguing that establishing "a historical record of the roots and the development of the violence is one of the main functions of all international criminal courts"); Turner, *supra* note 13, at 539–41.

61. *See* Damaška, *supra* note 1, at 333–34 ("An attempt to restore the dignity of victims and to provide them, or their families, with a forum in which to express their suffering is, of course, an ennobling humanitarian impulse."); Schrag, *supra* note 1, at 428 (noting that international courts are supposed to be able to "bring repose to victims" and "provide a safe forum for victims to tell their stories"); Turner, *supra* note 13, at 542–43.

62. *See* Damaška, *supra* note 1, at 339 (describing the "didactic objective of improving respect for human rights by expressing outrage for their violation"); de Guzman, *supra* note 47, at 312–19 (arguing that the ICC should use its prosecutions to express condemnation of wrongdoing). *See also* Schrag, *supra* note 1, at 428 (arguing that the goals of international tribunals include "public education in general" as well as "illuminat[ing] explanations about what caused the violations and illustrat[ing] particular patterns of conduct").

63. *See* Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VANDERBILT J. TRANSNAT'L L. 405, 463–75 (2012) (arguing that international criminal courts can foster post-conflict reconciliation); de Guzman, *supra* note 47, at 311, Levitt, *supra* note 57, at 1970–71.

64. *See* Schrag, *supra* note 1, at 428 (noting that one purpose attributed to international tribunals is to "develop and expand the application and interpretation of international law and norms").

65. *See* Damaška, *supra* note 1, at 331; de Guzman, *supra* note 47, at 301–05; Levitt, *supra* note 57, at 1969.

international tribunals,[66] but they are the most common.

As others, including Professor Damaška, have noted, this list of goals is long and unwieldy.[67] Moreover, some of the goals may contradict one another.[68] For example, the goal of ending impunity for past violations may be in tension with the goal of maintaining peace.[69] Similarly, there may be tension between the desire to create an accurate historical record and the court's focus on determining the guilt of the accused.[70] The large number of goals, as well as their possible inconsistency, has led to pessimism about whether courts can achieve all of them.[71]

Professor Damaška realized that another problem is that there is no generally accepted hierarchy of the goals.[72] This is a serious problem because, without any agreement on relative importance, courts cannot know which goals to prioritize. Given that some of the goals may be in tension with each other[73] and that international tribunals have limited resources with which to work,[74] they cannot be expected to maximize their

66. Minna Schrag, for example, lists fifteen separate goals in her article about the ICTY. *See* Schrag, *supra* note 1, at 428.

67. *See* Damaška, *supra* note 1, at 331 ("It does not require much pause to realize that the task of fulfilling all of these self-imposed demands is truly gargantuan.").

68. *See* Schrag, *supra* note 1, at 428–29 ("The experience of the ICTY has shown that there is inherent tension among some of [the court's] goals . . . .").

69. *See* Damaška, *supra* note 1, at 331–32. *See also* Schrag, *supra* note 1, at 429 (noting that some early critics of the ICTY argued that its attempts to investigate violations were making it harder to achieve peace in the Balkans).

70. *See* Damaška, *supra* note 1, at 332–33. *See also* Turner, *supra* note 13, at 534 (noting that some theorists have argued that determining guilt or innocence is the only appropriate goal of international tribunals and that other goals, "such as the establishment of a thorough historical record or full public reckoning with the actions of a previous regime, are to be left in the background"); *id.* at 540–41 (noting the tension between establishing an accurate historical record and the trial's focus on determining the guilt or innocence of the accused).

71. *See generally* Damaška, *supra* note 1 (arguing that international criminal courts are unlikely to be able to achieve their many goals). *See, e.g.*, de Guzman, *supra* note 47, at 301–09 (arguing that the ICC will have difficulty achieving the goals of retribution and deterrence).

72. *See* Damaška, *supra* note 1, at 339 ("Managing tensions among the goals, and dealing with the courts' limitations in attaining some of them, would be greatly facilitated if a set of priorities existed based on an understanding of the relative weights of competing goals."). *See also* Schrag, *supra* note 1, at 428 (noting that there is a "lack of consensus" about which of the goals should be given priority).

73. *See supra* text accompanying notes 68–70.

74. *See* Burke-White, *supra* note 58, at 53–54 (noting the contrast between the high expectations of the ICC and the reality that the ICC has limited

contributions to all of the goals simultaneously.[75] Rather, if they are to have an impact on the world, they must focus their resources where they will do the most good. Thus, having an accepted hierarchy among the goals would permit courts to make decisions about how to allocate their resources so as to maximize their effect on the most important goals.[76] This Article seeks to guide courts in their decision-making by demonstrating that there is a discernable hierarchy and that some goals should be given priority over others.[77]

IV. METHODOLOGY

Producing a hierarchy of the goals of international criminal courts requires a methodology. While there are a number of different methodologies that could be used to create such a hierarchy, this Article will use the expected value of the various goals to rank them. The expected value of a particular goal is defined as the value of the benefit that would occur if that goal were achieved multiplied by the likelihood that the benefit will occur. This permits the benefit of achieving different goals to be discounted by the likelihood that such goals will actually be achieved. Thus, a goal with a modest actual benefit but a high likelihood of achievement might have a higher expected value than a goal that had a high actual benefit (if that goal were achieved) but which was extremely unlikely to occur. Using this methodology, the goal that yields the greatest expected value is the most important goal and the one that international tribunals should strive to achieve.

This Article will not, however, calculate an exact expected value for any of the possible goals of international criminal tribunals. There is too much uncertainty about both how likely it is that particular goals can be achieved as well as what

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resources and modest capabilities); *id.* at 64–67.

75. *See* deGuzman, *supra* note 47, at 301 (noting that the "resource limitations" of international tribunals require them to make decisions about which cases to prosecute but that to do so they must first be able to identify which goals are most important).

76. *See* Damaška, *supra* note 1, at 339; deGuzman, *supra* note 47, at 267 (noting that "the international community has provided the [ICC] virtually no guidance about what goals it should seek" and that the lack of priorities represents a "serious challenge" for the court).

77. *See* Damaška, *supra* note 1, at 344 (arguing that, even if it is not possible to formally rank all the goals of international criminal courts, it would still be advantageous to identify the most important one).

benefits would occur if the goal was achieved to assign specific values to the different goals. Instead, this Article will categorize whether the likelihood of achieving a particular goal is likely, moderately likely, unlikely, or extremely unlikely. Similarly, the benefit of achieving a particular goal (assuming it can be attained) will be categorized as low, moderate, high, or extremely high. Each goal can then be placed in a matrix that allows its expected value to be assessed against the other goals.[78] *Table 1* (below) represents such a matrix.

***Table 1*: Expected Value of Goals**

Value if benefit occurs					
	Extremely High				
	High				
	Moderate				
	Low				
		Extremely Unlikely	Unlikely	Moderately Likely	Likely
		Likelihood of benefit occurring			

Goals that appear in the bottom left corner of the matrix have both an extremely low likelihood of occurring and a low value when they do occur. They will have the lowest expected value. Goals that appear in the upper right corner of the matrix are both likely to occur and have an extremely high value when they do occur. They will have the highest expected value.

The process of categorizing the likelihood of achieving a particular goal and the benefit that would accrue if that goal were achieved will be done based on: 1) inferences drawn from the theory underpinning each of the goals; and 2) the existing literature about the achievement of those goals. Quantitative data will be incorporated where available, but much of the

78. This is analogous to a risk matrix, which is a tool used to manage risks in organizational settings. *See* Louis Anthony Cox, Jr., *What's Wrong with Risk Matrices?*, 28 RISK ANALYSIS 497, 497–98 (2008).

analysis will be qualitative rather than quantitative because there have been few empirical studies of the goals of international criminal courts.

While there are other approaches one could use to evaluate the relative importance of the goals of international criminal courts, a methodology focused on expected value was chosen because it is consistent with how states make decisions about whether to support such courts. States are rational actors who weigh the expected benefits of membership when deciding whether to join and support international courts.[79] States are also the most important stakeholders because without their political and financial support international criminal courts could not function.[80] Thus, identifying and pursuing the goal with the greatest expected value maximizes the likelihood that states will continue to support international tribunals.

The goals that are most important to states would also result in enormous public welfare gains if they could be achieved.[81] While states value these gains, the principal beneficiaries would be individuals. So, while this Article focuses on which goals states value, most of the benefits would accrue to society as a whole.

The term "goal" is central to this Article and it is important to note the difference between a goal and a mechanism for achieving that goal. A goal is a particular aim or desired result.[82] In contrast, a mechanism is a process by which something—in this Article, a particular goal—is brought about.[83] Many of the "goals" that have been advanced by scholars are not really goals at all. Rather, they are mechanisms by which some other goal is to be achieved. For example, scholars have argued that courts should express condemnation of abhorrent acts,[84] but this "goal"

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79. *See supra* Section III.

80. *See* deGuzman, *supra* note 47, at 268 (noting that without the support of states, the ICC would have "no funding, no defendants to prosecute, and no evidence with which to conduct prosecutions").

81. *See infra* Section V.H.

82. OXFORD UNIVERSITY PRESS, *supra* note 55 (defining a goal as "the object of a person's ambition or effort; an aim or desired result").

83. *Id.* (defining mechanism as "a natural or established process by which something takes place or is brought about").

84. *See* Damaška, *supra* note 1, at 339 (describing the "didactic objective of improving respect for human rights by expressing outrage for their violation"); de Guzman, *supra* note 47, at 312–19 (arguing that the ICC should use its prosecutions to express condemnation of wrongdoing). *See also* Schrag, *supra* note 1, at 428 (arguing that the goals of international tribunals include "public education in general" as well as "illuminat[ing] explanations about what caused

is not usually meant as an end in itself. Instead, the expressive condemnation of morally abhorrent conduct is intended to help establish and strengthen norms that will result in compliance with international law.[85] In effect, expressive condemnation is a mechanism by which courts can prevent violations of international criminal law.

This distinction between goals and mechanisms is very important for calculating the expected value of the goals of international criminal courts. To the extent that one of the goals discussed in this Article is principally a mechanism to achieve some other goal, it often has a low expected value. This is because it has little value as an end in itself, even though it might be a useful mechanism for achieving some other goal. To use the example above, if expressing condemnation of morally abhorrent acts is really a mechanism for preventing violations,[86] then the value of any violations that are prevented is part of the value of achieving the goal of prevention. Thus, expressing condemnation would increase the expected value of prevention if it increased the likelihood of prevention, but it would not increase its own expected value. The expected value of expressing condemnation is limited to the value that condemnation has as an end in itself. This would be the value it would have if it had no other effect on the world—its intrinsic value.

V. ASSESSING THE EXPECTED VALUE OF THE GOALS OF INTERNATIONAL CRIMINAL COURTS

This Section will provide the information necessary to evaluate the expected value of the nine goals of international criminal tribunals identified above in Section III. Each subsection below will lay out the theory underpinning one of those goals, then use that theory as well as the existing literature to assess both the likelihood that the goal can be achieved and the benefit that would occur if the goal were achieved. The subsections have been arranged roughly in order from the goal most likely to be achieved to the goal least likely to be achieved.

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the violations and illustrat[ing] particular patterns of conduct").

85. *See infra* Section V.D.3.

86. *See supra* Section IV.7.

A. RETRIBUTION

At least one of the goals of international tribunals is likely to occur each time there is a trial—that of retribution. The principal purpose of a trial is, after all, to determine whether the accused is guilty.[87] If guilt is established, the court must impose an appropriate punishment,[88] which is determined by the gravity of the crimes and the individual circumstances of the convicted person.[89] This is a well-established way to determine the appropriate retribution.[90] Thus, trials at international tribunals are likely to accomplish the goal of assigning responsibility for serious violations of international criminal law and punishing those found guilty.[91] Of course, it is not guaranteed that trials can effectively assign responsibility or provide adequate retribution,[92] but it appears that courts are more likely to achieve this goal than any of the other potential goals.[93] Consequently, it is likely that this goal can be achieved in most trials.

Having assessed the likelihood that retribution can be achieved in any particular trial, the next step is to determine the value of the benefit that occurs when it is achieved. Retribution is often alleged to be one of the most important goals of domestic criminal law,[94] and the staff of international tribunals often view it as a primary goal of their work.[95] States, however, assign it a

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87. *See supra* text accompanying notes 13–15.

88. *See, e.g.*, Rome Statute, *supra* note 51, art. 77 (noting that punishments for a conviction can include imprisonment, fines and the forfeiture of property).

89. *See, e.g.*, *id.* art. 78(1).

90. *See* deGuzman, *supra* note 47, at 301 (noting that the appropriate retribution is determined by the seriousness of the harm caused by the crime and the culpability of the defendant).

91. *See* Levitt, *supra* note 57, at 1969.

92. *See* deGuzman, *supra* note 47, at 302 (noting that many "scholars who have studied the question" have expressed doubts about the ICC's ability to serve retributive ends). *See also* Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 684-5 (2007) (arguing that sentences at international criminal courts are too lenient given the magnitude of the wrongs); Levitt, *supra* note 57, at 1970 (noting that certain practices, like the use of plea bargains, can undermine retributive aims and that the punishments that international courts can give seem "inadequate" for effective retribution given the "moral magnitude" of the crimes).

93. *See infra* Section VI.

94. *See* deGuzman, *supra* note 47, at 280 (noting that the most commonly-articulated purposes of domestic prosecutions are deterrence and retribution).

95. *Id.*, at n. 69 (noting that five current and former chief prosecutors at international tribunals expressed the view that retribution was a primary goal

low value,[96] and retribution alone cannot justify spending on international courts.[97]

B. ESTABLISHING AN ACCURATE HISTORICAL RECORD

The next goal to consider—establishing an accurate historical record—is also closely related to the trial. After all, it is primarily through the trial that the court determines the guilt or innocence of the accused. This is done through the presentation of evidence.[98] To convict the accused, the evidence must be sufficient to demonstrate beyond a reasonable doubt that the accused committed the crimes.[99] Thus, a conviction should be supported by evidence that is strong enough to withstand scrutiny.[100] Moreover, the end result of the trial is a formal record, which is meant to be "complete" and "accurately reflect[] the proceedings."[101] This could serve as the basis for an accurate historical record.[102] There are a number of reasons to believe that the expected value of this goal is quite low, however. First, establishing an accurate historical record is difficult and therefore achievement of this goal is only moderately likely. More importantly, however, the value of achieving this goal as an end in itself is low.

There are many impediments to a court's ability to create an accurate historical record. For one thing, the need to establish a historical record is sometimes at odds with the primary purpose of the trial, which is to determine whether the accused is

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of such courts).

96. *See id.* at 303. *See also supra* notes 36–43 and accompanying text.

97. *See supra* text accompanying notes 46–47.

98. *See supra* text accompanying notes 29–30 (noting that trials at international criminal courts often involve hundreds of witnesses and thousands of exhibits).

99. *See, e.g.*, Rome Statute, *supra* note 51, art. 66(3).

100. *See* Rauxloh, *supra* note 60, at 744 ("The limits of evidential and procedural rules confer legitimacy and credibility to the outcome. An independent court establishes facts through a public trial where each element needs to be proven beyond a reasonable doubt.").

101. *See* Rome Statute, *supra* note 51, art. 64(10).

102. *See* Levitt, *supra* note 57, at 1973 (noting that many "tribunal affiliates" claimed that international trials could "establish a truthful public record of past injustices"); Turner, *supra* note 13, at 539 (noting that prominent academics and judges have argued that the establishment of a historical record is one of the most important contributions of international trials).

guilty.[103] Straying too far from this central question could undermine the accused's right to a fair trial.[104] For example, a prosecutor that tries to introduce evidence that helps establish the historical record but is not necessary to support the charges is likely to face a challenge that the evidence is irrelevant or prejudicial.[105] Thus due process considerations limit the court's ability to create an accurate historical record.[106]

In addition, courts are not an ideal mechanism for creating a historical record. Judges are not trained historians, nor are the other court personnel.[107] Moreover, the adversarial process is not necessarily conducive to ascertaining historical truth.[108] Thus, even if they wished to create an accurate historical record, courts are not well suited for that task.[109]

The historical record can also be undermined by the use of plea bargains. In many cases, plea deals involve the dropping of many of the charges, which results in the record being silent with regard to those charges.[110] But even for charges that result

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103. Damaška, *supra* note 1, at 336 (noting that courts are required to focus on legally relevant information and must thus sometimes forego exploring matters that would be "important to a full historical account"); *See* Turner, *supra* note 13, at 534;

104. Damaška, *supra* note 1, at 334. *See* Turner, *supra* note 13, at 540-41.

105. *See* Rauxloh, *supra* note 60, at 743 (noting that "all evidence has to be related to the relevant charges against the individual defendant" and that this may prevent evidence about the context or background of the crimes from being admitted). *See also* Turner, *supra* note 13, at 571–72 (noting that prosecutors often attempt to introduce evidence that may provide a more complete historical record but that is not necessary to support the charges and that defense attorneys strenuously object to the introduction of such evidence). *But see* Rauxloh, *supra* note 60, at 743 (noting that some international crimes contain elements which require the prosecution to prove background information like the existence of an armed conflict or an attack upon the civilian population).

106. *See, e.g.*, Rome Statute, *supra* note 51, art. 64(2) (imposing on the Trial Chamber an obligation to ensure that the trial is "fair and expeditious and is conducted with full respect for the rights of the accused"); *See also id.* art. 67 (describing the rights of the accused).

107. *See* Rauxloh, *supra* note 60, at 742.

108. *See* Damaška, *supra* note 1, at 337–38.

109. *Id.* at 336 (noting that the requirements of a trial require an immediate decision which cannot be modified or improved later if further evidence comes to light, which makes courts ill-suited to the creation of a historical record). *See also id.* at 340–41 (noting that the ICTY's attempt to use the Milošević trial to "produce a record of events accompanying the disintegration of Yugoslavia" overwhelmed the court).

110. *See* Clark, *supra* note 60, at 427–28 (noting that charge bargaining, where charges are dropped in return for a guilty plea, has the undesirable effect of preventing evidence about those charges from being included in the record); Rauxloh, *supra* note 60, at 753 (same).

in convictions, plea deals usually result in a sparse factual record.[111] Thus, the use of plea bargains will usually lower the likelihood of creating an accurate historical record.[112]

Another problem is that the record created by international criminal trials is almost always incomplete. International tribunals cannot prosecute every wrong that occurred in a given situation.[113] Prosecutors try to choose cases so that they are representative of the overall criminality that occurred, but it is almost always just a subset of that criminality.[114] The record may also be limited by temporal, geographic, or other limitations on the court's jurisdiction.[115] As a result, even in the best case, the record created by such courts is partial.[116]

A number of academics have tried to evaluate the likelihood of courts establishing an accurate historical record. Their conclusions suggest that establishing an accurate (although partial) record is difficult but can in certain circumstances be achieved. For example, Professor Damaška argues that the ability of courts to create an accurate historical record is "rather modest" and that the "best that can be expected of them is to provide fragmentary material as a scaffolding for subsequent historical research."[117] Professor Rauxloh acknowledges that the history created by courts is necessarily incomplete but argues that the experience of the International Military Tribunal at

111. *See* Clark, *supra* note 60, at 426–27 (noting that the record produced as a result of a guilty plea is less complete and detailed than would be established during a trial); Rauxloh, *supra* note 60, at 752 (same); Turner, *supra* note 13, at 540 (noting the reluctance of some judges to accept plea bargains because they "only establish the bare factual allegations").

112. *But see* Clark, *supra* note 60, at 424 (noting that in some cases guilty pleas have provided evidence about events that were otherwise unknown and thus did contribute to the establishment of the historical record).

113. *See* Michael Humphrey, *International Intervention, justice and national reconciliation: the role of the ICTY and ICTR in Bosnia and Rwanda*, 2 J. HUMAN RTS. 495, 498–99 (2003) ("The sheer number of offences makes the prosecution of every offence impossible.").

114. *See* Ford, *Complexity and Efficiency*, *supra* note 26, at 64 (noting that international courts have tended to use a philosophy of representative charging where "the goal is to charge the accused with a representative selection of crimes that accurately conveys the scope of the accused's criminality"); Stuart Ford, *The Complexity of International Criminal Trials is Necessary*, 48 GEO. WASH. INT'L L. REV. 151, 192–93 (2015) (describing representative charging).

115. *See* Rauxloh, *supra* note 60, at 742–43.

116. *See* Levitt, *supra* note 57, at 1973; Rauxloh, *supra* note 60, at 743 (noting that "only a small minority of crimes committed in a conflict will be brought to justice and made part of the historic record of the court").

117. *See* Damaška, *supra* note 1, at 338.

Nuremberg shows that international courts can sometimes establish an accurate historical record.[118] My own research indicates that the ICTY may have begun the process of establishing a widely-accepted account of the conflict in the former Yugoslavia.[119]

Ultimately, it appears that it is only moderately likely that courts can effectively create an accurate historical record. On the one hand, trials create a record of the events necessary to prove the criminal responsibility of the accused. On the other hand, court personnel are not historians, due process limitations prevent the court from straying too far from the facts necessary to establish the accused's guilt, and the use of representative charging undercuts the record-setting function.

The second component of the expected value calculation is estimating the value of creating an accurate historical record (assuming it can be achieved). The value of a historical record is low because its main value appears to be a means to achieve some other goal. For example, I have argued that establishing a historical record can play a role in fostering post-conflict reconciliation.[120] Others who have written about this subject have made similar arguments.[121] To the extent that establishing a record is pursued as a mechanism to achieve some other goal, however, the expected benefits that stem from achieving that other goal cannot be attributed to the record. The expected value of the record-setting function is the value of that function as an end in itself.

Having an accurate historical record undoubtedly has some intrinsic value,[122] but it is striking that most of the arguments about the record-setting function focus on it as a mechanism for achieving some other goal. It is rarely called for as an end in

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118. *See* Rauxloh, *supra* note 60, at 744. *See also* Ford, *supra* note 63, at 468–70 (noting the success of the IMT).

119. *See* Ford, *supra* note 63, at 470–71.

120. *Id.* at 463–75.

121. *See* Damaška, *supra* note 56, at 335 (arguing that "truth telling about the past is a necessary precondition for reconciliation and avoidance of future conflicts"); Rauxloh, *supra* note 60, at 740 (arguing that establishing the historical record is an important component of post-conflict reconciliation because "[o]nly when the truth is established can reconciliation begin"); Turner, *supra* note 13, at 540 (noting that the establishment of a historical record has been promoted as a means to maintain peace after conflict and prevent future violations).

122. *See* Levitt, *supra* note 57, at 1973 (noting an accurate historical record would preserve important facts that might "otherwise be lost through an intentional purge or the inevitable amnesia of time").

itself. This strongly suggests that the intrinsic benefit that flows from achieving it is low.

C. PROVIDING CLOSURE OR REDRESS FOR VICTIMS

It is sometimes argued that international trials can provide either closure or redress for victims of serious crimes.[123] This can occur in several ways. One way is through the process of a public trial and verdict. This process may provide closure for victims and their communities by formally and publicly acknowledging the harm they have suffered.[124] If the defendant pleads guilty and provides a meaningful and sincere acknowledgement of fault, this may also provide closure for some victims.[125] In theory, the trial can also result in some form of restitution or reparations for victims.[126]

Another way that trials may provide closure for victims is by providing opportunities to testify. Permitting people to tell their story can be therapeutic for some witnesses.[127] More recently, the ICC has permitted victims to take on roles beyond that of witness.[128] For example, victims can make

123. *See* Damaška, *supra* note 1, at 333–34 (noting that providing victims and their families "a forum in which to express their suffering" is a useful goal); deGuzman, *supra* note 47, at 312 ("[P]rosecutions may well help to restore some victims, offenders, and communities under some circumstances."); Turner, *supra* note 13, at 542 (noting that international trials are "said to serve survivors of the crimes by helping them and their communities achieve a sense of closure").

124. *See* Humphrey, *supra* note 113, at 500 ("Society is 'healed' through the prosecution and punishment of the perpetrator . . . ."); Charles P. Trumbull IV, *The Victims of Participation in International Criminal Proceedings*, 29 MICH. J. INT'L L. 777, 802–03 (2008).

125. *See* Clark, *supra* note 60, at 428–29. *But see id.* at 429–31 (noting that guilty pleas are often accompanied by sentence reductions and that such reductions can anger victims who may feel that the accused has not been sufficiently punished).

126. *See, e.g.*, Rome Statute, *supra* note 51, art. 75(1) ("The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.").

127. *See* Levitt, *supra* note 57, at 1970–71 (arguing that individual victims can benefit from having a "safe forum to have their stories formally heard and acknowledged"); Trumbull, *supra* note 124, at 802 (noting that advocates claim that the "simple act of testifying . . . can be therapeutic."); Turner, *supra* note 13, at 542 (noting that trials can provide closure by "providing a forum for victims to tell their stories and have the wrongs done to them formally acknowledged").

128. *See generally* Marian Pena, *Victim Participation at the International Criminal Court: Achievements Made and Challenges Ahead*, 16 ILSA J. INT'L &

"representations" to the court when the Prosecutor seeks to open an investigation,[129] and victims can have their "views and concerns" formally considered by the court during the trial.[130] These innovations provide further opportunities for victims to participate in the process in ways that may provide closure for them.[131]

Thus, it appears possible that international criminal trials can provide redress or closure for victims. The expected value of this goal, however, is likely to be low for two reasons. First, providing closure or redress is difficult and achieving this goal is unlikely for any particular victim. Second, even when it is achieved, the actions of states suggest that it has a low value.

To begin with, while participation in the trial as either a witness or party may provide some benefits, this is not the typical outcome for victims of serious international crimes. The biggest obstacle to participation is that international courts rarely try every possible crime.[132] This means that the charged crimes are likely to cover the victimization of only a small fraction of the total number of victims. The vast majority of victims will have no part to play because the crimes that affected them are not part of the trial.[133]

Even if the particular crime that victimized them is part of the prosecution, there is still no guarantee that victims will receive either closure or redress. First, victims' avenues for participation are limited. The average investigation at the ICC involves allegations of more than a thousand murders, hundreds to thousands of rapes, thousands of serious injuries, and hundreds of thousands of instances of forcible displacement.[134]

COMP. L. 497 (2010); Christine Van den Wyngaert, *Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge*, 44 CASE W. RES. J. INT'L L. 475, 490–91 (2011).

129. *See* Rome Statute, *supra* note 51, art. 15(3).

130. *See id.* art. 68(3) ("Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court . . . .").

131. *See* Pena, *supra* note 128, at 500–01.

132. *See supra* text accompanying notes 113–114.

133. *See* Humphrey, *supra* note 113, at 499 ("The practical problems of time, expense and the volume of evidence required to prosecute all offences means that neither all perpetrators can be prosecuted nor all victims compensated."); Van den Wyngaert, *supra* note 128, at 491–92 (noting that "[v]ictims of uncharged crimes in situations that are before the court will not be able to participate").

134. *See* Ford, *supra*, note 4, at Section III(B). *See also* Trumbull, *supra* note

Yet, evidence about large-scale victimization is usually presented through a small number of victim-witnesses supplemented by the testimony of forensic and demographic experts.[135] The Office of the Prosecutor at the ICC anticipates that it will present only fifty to sixty witnesses during a typical case.[136] As a result, the vast majority of victims will not be able to participate as witnesses, even if the particular crime that victimized them is prosecuted.

Moreover, while there is some evidence that testifying can be therapeutic for some victims,[137] this is not a given. First of all, the trial is not designed as a means to provide closure for witnesses.[138] While judges try to protect witnesses,[139] they also are bound to provide due process to the accused.[140] This often means that witnesses are subjected to aggressive cross-examinations by defense counsel.[141] There is the possibility that this experience will re-traumatize the witnesses rather than help them heal.[142] Testifying may also subject victims to other

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124, at 811 ("Crimes falling within the ICC's jurisdiction may involve hundreds of thousands of victims . . . .").

135. *See* Ford, *The Complexity of International Criminal Trials is Necessary*, *supra* note 114, at 165 (noting that while the testimony of victims is used in international trials, not every victim will testify and in cases where there are large numbers of victims, much of the evidence related to the victims is provided in summary form by forensic and demographic experts).

136. *See* Ford, *supra* note 4.

137. *See* Turner, *supra* note 13, at 542 (noting that the ICTY claimed that its witnesses found that the opportunity to testify "brought them great relief"); Van den Wyngaert, *supra* note 128, at 477 (arguing that "many courageous victims" were "very keen to come to come and testify and tell their stories").

138. *See* Levitt, *supra* note 57, at 1972 (noting that the tribunals' procedures are designed to "suit the requirements of legal proof" rather than ensuring the witness' psychological well-being).

139. *See, e.g.*, Rome Statute, *supra* note 51, art. 68(1) ("The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity, and privacy of victims and witnesses."). *See also* Andrew Trotter, *Witness Intimidation in International Trials: Balancing the Need for Protection Against the Rights of the Accused*, 44 GEO. WASH. INT'L L. REV. 521, 531–36 (describing witness protection measures employed by international courts).

140. *See* Rome Statute, *supra* note 51, art. 68(1) (noting that victim and witness protection measures "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial").

141. *See* Humphrey, *supra* note 113, at 499 (arguing that the trials represent a "legal re-enactment of violence" and that participation by victims essentially asks them to "re-victimize themselves" by re-enacting their trauma); Turner, *supra* note 13, at 568–69 (noting that defense attorneys at international trials feel an obligation to engage in aggressive cross-examination of witnesses, even if this might re-traumatize the witness).

142. *See* Damaška, *supra* note 1, at 342 (noting that the need to permit

risks and several victim-witnesses have been intimidated, threatened, or killed because of their testimony.[143] Taken together, it seems quite unlikely that any particular victim will achieve closure by testifying at an international trial.

Unlike most of its predecessors, the ICC provides opportunities for victims to participate as more than just witnesses.[144] This means that more victims can participate than would otherwise be able to do so if victims were limited to being witnesses. This participation has limits, however. For one thing, victim participation cannot conflict with the accused's right to a fair trial.[145] This tension between the rights of the accused and victim participation limits the extent to which victims can meaningfully participate in the process.[146]

The sheer number of victims in international trials also limits their ability to meaningfully participate.[147] At the ICC, the large number of victims means that they have been grouped together in victims' groups, which limits the ability of individual victims to meaningfully participate.[148] Moreover, the victims'

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vigorous cross-examination is necessary for a fair trial but runs the risk of traumatizing victims who testify); Turner, *supra* note 13, at 542 (noting concerns that testifying can re-traumatize some victims). *But see* Van den Wyngaert, *supra* note 128, at 477 (arguing that, in practice, cross-examination of victims "although difficult at times" was "controlled by presiding judges" to protect victims).

143. *See* Trotter, *supra* note 139, at 522–25 (describing numerous incidents of witness intimidation at international courts). *See also* Levitt, *supra* note 57, at 1972 (noting that testifying has sometimes threatened the physical safety of witnesses).

144. *See, e.g.*, Rome Statute, *supra* note 51, art. 68(3).

145. *See id.* (noting that victim participation shall not be "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial").

146. *See* Damaška, *supra* note 1, at 342 (noting that permitting victims to take on larger responsibilities beyond just offering testimony, for example by allowing them to make legal arguments or question witnesses, could undermine parts of the trial); deGuzman, *supra* note 47, at 311–12 (noting that "allowing victims to participate in the determination of guilt" may violate the defendants' rights to a fair trial); Pena, *supra* note 128, at 510 (noting defense concerns that victims participation could undermine the right to a fair trial); Turner, *supra* note 13, at 542–43 (noting that victim participation in trials, particularly when it is extensive, may violate the rights of the accused to a fair and speedy trial); Van den Wyngaert, *supra* note 128, at 488 (noting the difficulty of balancing the accused's rights against the rights of victims).

147. *See* Trumbull, *supra* note 124, at 806–07 (noting that the large numbers of potential victims undermines many of the potential benefits of participation).

148. *See* Pena, *supra* note 128, at 514 (noting that, in practice, "one lawyer normally represents a group of participating victims"); Van den Wyngaert, *supra* note 128, at 483 (noting that the number of victims who have requested participation combined with the time-consuming nature of dealing with those

"views" are presented through "legal representatives" rather than by the victims themselves.[149] This placement of a legal representative between the victims and the court limits the ability of victims to achieve closure.[150] Even with these limitations, victim participation consumes a great deal of the ICC's time and slows down the trials.[151] It seems unlikely that more meaningful participation for victims is feasible. There are thus reasons to doubt that victims, even when they are permitted to participate as parties, are likely to achieve closure as a result of that participation.

Reparations are also not likely to be available to victims. First of all, most victims will not be entitled to reparations because their victimization is not part of the charged crimes.[152] Even assuming that a victim is eligible to participate in the trial, reparations are very unlikely. While reparations for individual victims are theoretically possible,[153] in practice, courts simply do not have the resources to provide reparations themselves and

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requests means that the court may be compelled to require victims to participate in groups rather than individually).

149. *See* Rome Statute, *supra* note 51, art. 68(3); Pena, *supra* note 128, at 514 (noting that while "the Statute does not demand that victims act through a lawyer, that is unavoidable in practice"); Van den Wyngaert, *supra* note 128, at 480 (noting that "it is theoretically possible for victims to appear individually" but that this is "totally impractical" due to the large number of victims and that victims are "in all cases" represented by lawyers).

150. *See* Van den Wyngaert, *supra* note 128, at 489 ("Victims who expect to find a forum where they could personally and publicly express their grief and thus have a platform to expose their feelings will probably be disappointed. In mass trials, victims are necessarily represented by common legal representatives, and consequently victims will not be able to appear in person."). *See also* Pena, *supra* note 128, at 515 (noting that lack of funding and resources for legal representatives have undermined the ability of victims to meaningfully participate); Van den Wyngaert, supra note 128, at 489 (noting that the large numbers of victims together under common legal representatives combined with the large distances between the court and the victims may make it difficult for them to feel any meaningful sense of control over their own participation).

151. Pena, *supra* note 128, at 509 (noting fears that "large numbers of victims applying to participate could destabilize the proceedings"); Trumbull, *supra* note 124, at 811–16; Van den Wyngaert, *supra* note 128, at 481–83 (noting that the judges must rule individually on many aspects of victim participation and that this "inevitably delays" the proceedings). It is also a very slow and cumbersome process for the victims themselves. *See* Pena, *supra* note 128, at 511–12 (noting that some victims have had to wait two years for the court to rule on their applications to become participants).

152. *See* Van den Wyngaert, *supra* note 128, at 492 ("Only victims of crimes charged that lead to a conviction will be able to claim reparations."). *See also supra* text accompanying notes 132–133.

153. *See supra* text accompanying note 126.

the accused are usually indigent.[154] The reality is that reparations are likely to be purely symbolic.[155] In addition, courts may not be capable of adjudicating claims for reparations from large numbers of victims, even if resources were available.[156] Thus, there is little likelihood that victims will receive reparations.

For various reasons, it seems unlikely that most victims of serious international crimes can experience closure or receive redress as a result of international trials. The biggest obstacle to achieving closure is the selective nature of charging at international trials. Most victims will not be able to participate in the process at all simply because the crime that victimized them will not be part of the trial. They cannot be witnesses, they cannot participate as victims, they cannot receive reparations, and the verdict will not address their suffering.

The next step in assigning an expected value to this goal is to assess the value of achieving the goal. The Rome Statute provides for a Trust Fund for Victims.[157] The purpose of the Trust Fund is to collect money "for the benefit of victims" and their families.[158] Contributions to the Trust Fund are voluntary[159] and states contribute slightly less than $6 million per year.[160] It seems reasonable to treat this as the value that

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154. *See infra* Section VI.

155. Van den Wyngaert, *supra* note 128, at 491 ("Reparations for victims risks being more symbolic than real.").

156. *Id.* at 487 ("Imagine for a moment what might happen if, after the criminal trial has been completed, the Trial Chamber would still have to rule on each individual claim for reparations. If the extent of the harm suffered and the causal link with the crimes has to be proved on an individual basis, there is a good chance that the length of the reparations proceedings could exceed the duration of the criminal trial itself.").

157. *See* Rome Statute, *supra* note 51, art. 79(1).

158. *Id.*

159. *See* The Trust Fund for Victims, Strategic Plan 2014-2017 – Summary, at 2 (2014), http://www.trustfundforvictims.org/sites/default/files/media_library/documents/pdf/TFV%20Brochure%20ASP%202014%20FINAL.pdf (noting that the Trust Fund uses "voluntary contributions from donors" to provide "assistance to victims and their families in ICC situations through programmes of physical rehabilitation, material support, and psychological rehabilitation").

160. After a slow start, the Trust Fund is now receiving approximately €5 million per year in donations. *See* Trust Fund for Victims, Programme Progress Report 2015: Assistance & Reparations at 56 (2015), http://www.trustfundforvictims.org/sites/default/files/media_library/documents/FinalTFVPPR2015.pdf (showing total donations over time). This corresponds to less than $6 million per year at current exchange rates. On March 11, 2016, the exchange rate was 1.1180 dollar to the euro. *See* Board of Governors of the Federal Reserve System,

states assign to providing redress for victims because this is how much they are willing to voluntarily spend on this goal.[161] Thus, the actions of states strongly suggest that they assign a low value to providing closure and redress for victims of serious international crimes.[162] Ultimately, achieving closure is unlikely and provides a low value even when it is achieved.

D. EXPRESSING CONDEMNATION

International criminal courts are often urged to use their trials and the resulting verdicts to express condemnation of morally abhorrent conduct.[163] Some scholars frame this goal as one of educating the public about the court, the law, and the atrocities that have been committed.[164] Despite this slight difference in framing, these are very similar goals and will be treated together in this Article. The idea is that through their trials and verdicts, courts can express condemnation for acts that are universally recognized as unconscionable.[165] International criminal courts are alleged to be in a good position to express this condemnation because their high profile gives them a global audience.[166] Thus, their trials promote global norms of conduct, even though those trials are small in number.[167] Many scholars argue that this educative or

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Foreign Exchange Rates, http://www.federalreserve.gov/releases/h10/hist/dat00_eu.htm.

161. The ICC also spends about $10 million per year on victim-related tasks. *See* Van den Wyngaert, *supra* note 128, at 480. But the majority of this is spent on salaries of personnel. Very little of it actually goes to victims.

162. *See* deGuzman, *supra* note 47, at 312 (suggesting that providing redress for victims can serve as only a partial justification for international courts).

163. *See* Damaška, *supra* note 1, at 339 (describing the "didactic objective of improving respect for human rights by expressing outrage for their violation"); deGuzman, *supra* note 47, at 312–19 (arguing that the ICC should use its prosecutions to express condemnation of wrongdoing).

164. *See* Schrag, *supra* note 1, at 428 (arguing that the goals of international tribunals include "public education in general" as well as "illuminat[ing] explanations about what caused the violations and illustrat[ing] particular patterns of conduct").

165. *See* deGuzman, *supra* note 47, at 316 (arguing that the extreme gravity of international crimes makes them worthy of expressive condemnation by international courts).

166. *Id.* (arguing that the ICC's global scope makes it a good platform for expressing condemnation of serious violations and the expression of shared norms).

167. *Id.* at 315 (suggesting that international courts can "effectively promote important moral norms" through illustrative prosecutions even if the total

expressive function of trials is one of their most important features.[168]

Upon closer examination, however, it becomes clear that expressing condemnation is not an end in itself, but a mechanism to achieve a different goal. Expressing condemnation of unconscionable conduct probably has some intrinsic value, but that intrinsic value is not very large. As noted above, states do not assign a high value to retribution as an end in itself.[169] If they do not place great value on actually punishing wrongful conduct, it does not seem very likely that they simultaneously attach great value to simply expressing condemnation of wrongful conduct. And, indeed, most of those who have written about the expressive function of courts acknowledge that its primary value is as a mechanism to achieve a different goal—prevention.

Professor deGuzman argues that the trials and verdicts can be used by courts as a means of altering social norms about acceptable conduct.[170] She claims that this will eventually lead to the prevention of future crimes as the norm comes to be more widely accepted.[171] Justin Levitt echoes this argument and claims that tribunals engage in "moral education" about the norms of international law primarily as a means of "long-term prevention" of violations.[172] Professor Damaška makes a similar argument.[173] Payam Akhavan talks about how "[p]ublicly vindicating human rights norms . . . may help to prevent future atrocities through the power of moral example to transform behavior."[174] As these examples show, expressing condemnation is primarily a mechanism for the prevention of international crimes rather than an end in itself. This means that the value of succeeding in preventing violations by utilizing this mechanism

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number of prosecutions is low).

168. *See id.* at 270 (arguing that "the ICC's focus should be on expressing global norms"); *id.* at 301 (arguing that "the ICC's primary objective in making selection decision should be to express global norms"); Schrag, *supra* note 1, at 428–29 (arguing that the "didactic function" should be among the most important goals of international tribunals).

169. *See supra* Section III.

170. *See* deGuzman, *supra* note 47, at 313.

171. *Id.* ("Norm expression through criminal law can function as a form of prevention – discouraging crime by entrenching values . . . .").

172. *See* Levitt, *supra* note 57, at 1966.

173. *See* Damaška, *supra* note 1, at 345 (arguing that tribunals should seek to persuade people to comply with international criminal law by stigmatizing violations).

174. *See* Akhavan, *supra* note 59, at 10. *See also id.* at 12–13.

accrues to the prevention goal. The intrinsic value of achieving this goal is low.

For purposes of calculating an expected value of expressing condemnation, it is also necessary to estimate how often the goal can be accomplished. While there is little empirical evidence on this point, it seems reasonable to assume that the verdicts are reasonably successful in expressing condemnation of abhorrent conduct. After all, the trials are often high-profile events that attract considerable press coverage.[175] The verdicts, moreover, provide extensive documentation of wrongdoing which has been tested through an adversarial process.[176] And by their very nature guilty verdicts and sentences convey condemnation.[177] Thus it seems reasonable to assume that courts are moderately likely to achieve this goal.

E. DEVELOPING INTERNATIONAL CRIMINAL LAW

Another goal attributed to international tribunals is to develop international criminal law.[178] When the ad hoc tribunals were created in the early 1990s, there were many gaps in the law that would apply.[179] The courts quickly set about trying to fill those gaps by developing new law.[180] The most famous example of this was the ICTY's embrace of joint criminal enterprise. In the *Tadić* decision, the newly-created ICTY created a theory of liability that permitted it to find the defendant guilty for participating with others in a common plan

175. *See supra* text accompanying note 166.

176. *See supra* text accompanying notes 98–102.

177. *See* Stuart Ford, *The Complexity of International Criminal Trials is Necessary*, *supra* note 114, at 185–86 (noting that one of the purposes of convicting someone of a crime is to publicly condemn that person as a wrongdoer and punish them).

178. *See* Schrag, *supra* note 1, at 428 (noting that one purpose attributed to international tribunals is to "develop and expand the application and interpretation of international law and norms").

179. *See* Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L L. 543, 547 (2010) (noting that at the time the ICTY and ICTR statutes were created, there were many gaps in both the substantive and procedural law that had to be filled by the courts themselves).

180. *See* Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VANDERBILT L. REV. 1, 25–33 (2006) (noting that the ICTY's early decisions adopted an expansive understanding of international criminal law).

to achieve a criminal outcome.[181] While the court claimed that joint criminal enterprise liability already existed in international law,[182] this position has generally been rejected.[183] Instead, the court essentially created a new mode of liability.[184] Joint criminal enterprise went on to become a widely-used theory of liability at the ICTY.[185] In this sense, the ICTY was successful in developing new international criminal law.[186] Nor is it the only example of an international court developing new law.[187] Indeed, it can probably be said that courts have been fairly successful at it.[188] Thus, it is moderately likely that courts can achieve this goal, but the reactions of states suggest that this is a goal they accord little value.

To begin with, there are doubts about whether it is wise for courts to be in the business of developing new law.[189] For example, the theory of joint criminal enterprise has been

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181. *See* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 104–10 (2005) (describing the development of joint criminal enterprise at the ICTY).

182. *Id.* at 105 (noting that the Appeals Chamber argued that it was simply applying existing customary international law).

183. *Id.* at 110–12 (arguing that the WWII-era cases that the ICTY allegedly relied upon do not provide support for the extremely broad doctrine the ICTY adopted).

184. *Id.* at 103–04 (concluding that joint criminal enterprise "has largely been created by the judges and prosecutors of the Yugoslav Tribunal").

185. *Id.* at 107–08.

186. On the other hand, other courts, most notably the ICTR, did not broadly adopt joint criminal enterprise. *See* Danner & Martinez, *supra* note 181, at n.135 (noting that joint criminal enterprise was rarely used at the ICTR).

187. *Id.* at 133–34 (noting that the ICTR and ICTY developed international law through their decisions by expanding the definitions of rape and torture).

188. *See* Grover, *supra* note 179, at 547 (noting that the ad hoc tribunals "put flesh on the bones of modern international criminal law").

189. *See* Beth van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119 (2008) (noting that it may be quite dangerous to allow international courts free rein to develop international criminal law and that courts that do engage in such development have tended not to respect the principle of *nullum crimen sine lege*); Danner & Martinez, *supra* note 181, at 142–43 (noting that when presented with opportunities to develop substantive international law, "international judges have almost invariably elected the most expansive interpretation" permitted and have "not seriously grappled with the question of how to define limits" on their new doctrines); Danner, *supra* note 180, at 44–49 (noting arguments both for and against tribunal lawmaking); Schrag, *supra* note 1, at 431 (suggesting that the desire to develop international criminal law is sometimes at odds with the necessity to prove guilt in particular cases and that placing too much emphasis on legal theory can be counter-productive).

severely criticized by scholars as both unsupported by the existing precedent and unfair to defendants.[190] More importantly, however, states assign a low value to having courts develop new international law. This can be seen most clearly at the ICC. First, unlike the somewhat loose constitutive documents of the ad hoc tribunals, the Rome Statute is very detailed.[191] This was done because states wanted to "list crimes within the Court's jurisdiction exhaustively and in as detailed and clear manner as possible so that states and their agents could know with reasonable certainty" their obligations under the Statute.[192] Permitting judges to develop new international law would be at odds with the drafters' desire to know with certainty what is prohibited.

Moreover, the Rome Statute contains an explicit provision that limits the ability of the court to develop new international law. Article 22(2) states that "[t]he definition of a crime shall be strictly construed and shall not be extended by analogy."[193] This provision was inserted to make it difficult for the ICC to create new law through judicial decisions and to rein in the perceived excesses of the ad hoc tribunals.[194] States wanted to make sure

190. *See supra* text accompanying notes 180–184 (noting that joint criminal enterprise was largely a creation of the ICTY); Danner & Martinez, *supra* note 181, at 134–36 (arguing that the creation of joint criminal enterprise by the ICTY was problematic because it attenuates the connection between an individual's culpability for their own actions and their guilt); Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 114–23 (2007) (describing criticisms of joint criminal enterprise); Steven Powles, *Joint Criminal Liability: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606 (2004) (criticizing the use of joint criminal enterprise as a mode of liability at the ICTY).

191. *See* Bruce Broomball, *Article 22: Nullum crimen sine lege*, in OTTO TRIFFTERER ED., COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2d ed. 2008) at 714 (noting that the Rome Statute was the result of "a move towards the vision . . . of a Court the subject-matter jurisdiction of which is exhaustively defined in its constitutive instrument"); Grover, *supra* note 179, at 552–53 (noting that the Rome Statute contains vastly more detail about the crimes and the procedure than the statutes of the ICTY and ICTR).

192. *See id.* at 552. *See also* Broomhall, *supra* note 191, at 714.

193. *See* Rome Statute, *supra* note 51, art. 22(2).

194. *See* Grover, *supra* note 179, at 553 (noting that "[t]he perceived liberal interpretive reasoning of the *ad hoc* tribunals was a motivating factor" in the adoption of Article 22(2) of the Rome Statute); Broomhall, *supra* note 191, at 725 ("[I]t was the apparently perceived willingness of the ICTY to engage in liberal reasoning-by-analogy that contributed, in part, to the adoption of article 22 para. 2.").

that if new international law was to be developed that they would have control over the process through amendments to the Rome Statute.[195]

The Rome Statute's strict approach to the principle of legality shows that the states responsible for creating the ICC did not want its judges to develop new international law. This strongly suggests that states believe the value of having courts develop new international law is low. Thus, while courts have been moderately successful in developing new international law in the past, the value of achieving this goal is low.

F. FOSTERING POST-CONFLICT RECONCILIATION

It is often argued that the work of international criminal courts can foster post-conflict reconciliation.[196] There are a number of theories about how this might work. According to one theory, ethnic, religious, and national divisions are at the heart of many modern conflicts.[197] These conflicts leave the opposing sides deeply suspicious and hostile towards the other side.[198] It is common for each side to view themselves as victims of unwarranted aggression by the other side.[199] These feelings of victimization and grievance make it harder to achieve a durable peace and make it more likely that there will be more violence in the future.[200] By establishing a credible record of what actually took place, courts can help break down inaccurate narratives about the conflict.[201] In turn, this can help the parties

195. *See id.* at 724 ("The rule of strict construction aims to protect the person subject to investigation or prosecution by ensuring that the potential infringement of their liberty is subject only to legislatively and not to judicially defined crimes . . . ."); *id.* at 716 (noting that Article 22 embodies the premise that "the law-maker is responsible for making the law clear and ascertainable, while the judiciary is obliged to refrain in principle from penalizing conduct not made criminal by the legislator"); Grover, *supra* note 179, at 554 (noting that the Rome Statute adopts a strict approach to the principle of legality so as to limit the ability of judges to create new law while simultaneously "ensur[ing] respect for the law-making role of the legislature").

196. *See* deGuzman, *supra* note 47, at 311, Ford, *supra* note 63, at 463–75 (arguing that international criminal courts can foster post-conflict reconciliation); Levitt, *supra* note 57, at 1970–71.

197. Ford, *supra* note 63, at 459.

198. *Id.* at 460–61.

199. *Id.*

200. *Id.* at 465–66.

201. *Id.* at 466–71.

reconcile and reduce the risk of further violations.[202] There are other ways courts might be able to foster post-conflict reconciliation. For example, courts may be able to decrease the likelihood of future violations by providing an alternative to revenge as a means for resolving grievances.[203]

Achieving post-conflict reconciliation is far from certain, however. One problem is that inaccurate internal narratives about the conflict are difficult to break down.[204] Another problem is that breaking down self-serving narratives may be a prerequisite for reconciliation but it does not guarantee it. Successful reconciliation still depends on the concerted efforts of many other actors in society.[205] Nevertheless, it may be possible for courts to promote reconciliation, even if the process is slow.[206] Ultimately, it seems only moderately likely that courts can successfully foster post-conflict reconciliation in any particular conflict.

Having discussed the likelihood that this goal can be achieved, the next step is trying to put a value on achieving it. It is important to note, however, that this "goal" is usually framed as a mechanism to either restore peace or prevent future violations.[207] Rarely is it framed as an end in itself. Nevertheless, helping post-conflict societies reconcile does have intrinsic value. There is evidence that helping societies to

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202. *Id.* at 471.

203. *See* Akhavan, *supra* note 59, at 24–25 ("Channeling the desire for vengeance into legal process, even with the imprisonment of thousands, bought time until circumstances improved and mitigated the severity of retaliatory abuses."); Levitt, *supra* note 57, at 1970–71 ("Alternatively prosecutions may serve as vehicles for public catharsis . . . and a society may need a sustained and ritualized event to channel the grieving process."); Turner, *supra* note 13, at 537 (arguing that international trials can help to end violence by offering an alternative to revenge as a means of providing retribution for past wrongs).

204. *See* Ford, *supra* note 63, at 466–68 (noting the difficulty of breaking down self-serving narratives about conflict). *See also* Levitt, *supra* note 57, at 1971 ("[T]he tribunals' adversarial processes may also deepen local divides. Their client communities . . . may see tribunal activities through the polarized lenses of their ethnic groups . . . .").

205. *See* Ford, *supra* note 63, at 476 (suggesting other actors throughout society can help alter internal narratives).

206. *Id.* at 468–71 (arguing that the IMT contributed to changes in German attitudes towards WWII).

207. *See supra* text accompanying notes 202–203. *See also* Clark, *supra* note 60, at 420 (noting that reconciliation was viewed by the ICTY as a means to maintain peace in the former Yugoslavia); *id.* at 421; deGuzman, *supra* note 47, at 311 ("[R]estorative justice is about prevention of future crimes."); *id.* at 311 (noting that post-conflict reconciliation is often a mechanism to enhance long-term peace and security).

reconcile alleviates some of the trauma associated with the violence of the past and improves the psychological health of those who can forgive.[208] Of course, the evidence also suggests that how reconciliation occurs is also important and that some mechanisms for achieving reconciliation may cause harm.[209] Nevertheless, successful reconciliation within society is likely to be associated with improved psychological health, which has value.

Placing a value on this improvement is difficult, however. One way to think about its value is to compare it with the value of closure for victims. Fostering post-conflict reconciliation seems conceptually similar to the goal of providing closure that is discussed above.[210] The major difference is that post-conflict reconciliation covers the entire society, rather than just the victims, and thus potentially has a broader reach. Nevertheless, the goal of reconciling members of society appears to be quite similar to the goal of providing closure to victims in that it seeks to use a judicial process to help people come to terms with what happened during the conflict.

The discussion above in Section V.C. argued that closure as a goal has a relatively low value. When viewed as a goal in itself, rather than as a mechanism to achieve prevention, it seems likely that fostering post-conflict reconciliation has a similar value. Thus, like closure, post-conflict reconciliation will be assigned a low value. Accordingly, this goal is moderately likely for courts to achieve and when it is achieved has a low value.

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208. *See* Jacobus Cilliers et al., *Reconciling After Civil Conflict Increases Social Capital but Decreases Individual Well-Being*, 352 SCIENCE 787, 787–88 (2016).

209. *Id.* at 787–88 (noting that while reconciliation achieved through long-term counseling appears to generally improve psychological health, reconciliation that occurs as a result of targeted reconciliation efforts may actually lower psychological health); *id.* at 791 (noting that individuals who went through a targeted reconciliation process actually had worse psychological health after the process).

210. For example, a number of scholars have treated victim participation in the trials as an aspect of post-conflict reconciliation. *See* Pena, *supra* note 128, at 501 ("[H]aving victims to participate in the trials allows them to experience justice and can lay the foundation for reconciliation in the communities."); Trumbull, *supra* note 124, at 778 ("[P]articipation will . . . contribute to the reconciliation process . . . .").

G. ENDING IMPUNITY

Another goal often attributed to international tribunals is to end impunity.[211] This goal appears explicitly in the Preamble to the Rome Statute, which says that the ICC was created, in part, to "put an end to impunity for the perpetrators" of the most serious crimes.[212] Thus, international courts are supposed to strive to ensure that serious violations of international criminal law are followed by "effective prosecution" such that violations do not go unpunished.[213] Ending impunity thus means ensuring that everybody who commits an international crime is effectively prosecuted. Unfortunately, success in achieving this goal is not wholly within the court's control. Even assuming that an international court is successful in detaining and trying all of the individuals it indicts,[214] there will still be a very large impunity gap because international tribunals have extremely limited capacity,[215] but serious violations of international criminal law are almost always carried out by large hierarchical groups working together.[216] International courts cannot try all of the perpetrators. In practice, courts have tended to focus on

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211. *See supra* text accompanying note 58. *See also* Humphrey, *supra* note 113, at 498 (" The principal goal of prosecutions in international criminal tribunals has been to challenge impunity . . . ."); Van den Wyngaert, *supra* note 128, at 495 ("[B]asic purpose of the ICC . . . is to fight impunity.").

212. Rome Statute, *supra* note 51, pmbl.

213. *Id.* ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured . . . .").

214. This is probably an unrealistic assumption. *See* Yvonne M. Dutton, *Enforcing the Rome Statute: Evidence of (Non) Compliance from Kenya*, 26 IND. INT'L & COMP. L. REV. 1, 12–13 (2016); Stuart Ford, *The ICC and the Security Council: How Much Support is There for Ending Impunity?*, 26 IND. INT'L & COMP. L. REV. 33, 62–63 (2016) [hereinafter Ford, *The ICC and the Security Council*] (arguing that ICC is relatively weak compared to states and the lack of state support has made it difficult for the court to succeed); Burke-White, *supra* note 58; Ford, *Complexity and Efficiency*, *supra* note 26 at 38.

215. *See, e.g.*, Burke-White, *supra* note 58, at 54.

216. *See* Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 159-60 (2007) (noting that international criminal violations are usually the result of the collective actions of many individuals working towards the same ends); Cassese, *supra* note 190, at 110 ("[I]nternational crimes . . . tend to be expression of collective criminality, in that they are perpetrated by groups of individuals, military details, paramilitary units or government officials acting in unison or in pursuance of a policy."); Stuart Ford, *Fairness and Politics at the ICTY: Evidence from the Indictments*, 39 N.C. J. INT'L L. & COMM. REG. 45, 65–68 (2013).

indicting and prosecuting senior leaders and those most responsible.[217] One consequence of these limits is that the vast majority of low-level perpetrators are unlikely to be tried before an international court.[218] This creates a serious impunity gap.[219]

One way in which international courts help bridge this gap is by supporting national prosecutions.[220] For example, the ICTY provided training and support to national prosecutions in the former Yugoslavia.[221] In addition, it transferred some cases to national courts and provided national prosecutors with dossiers compiled by the ICTY on individuals the ICTY did not have the capacity to prosecute.[222] The ICTR fostered cooperation with the Rwandan justice system, helping with local investigations and bringing Rwandan officials to Arusha to attend ICTR proceedings.[223] The ICC, on the other hand, does not have the resources or the mandate to develop capacity amongst its member states.[224] As such, it will not directly train prosecutors

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217. *See* Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 1, Jan. 16 2002, 2178 U.N.T.S. 145 ("There is hereby established a Special Court for Sierra Leone to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law . . . committed in the territory of Sierra Leone . . . ."); Akhavan, *supra* note 59, at 26 ("The ICRTR is not intended to substitute for the Rwandese judicial system, but to serve as a jurisdiction with limited resources focusing on the arrest and prosecution of the most senior accused."); Ford, *supra* note 216, at 71–73 (noting that the ICTY initially indicted a number of low-ranking perpetrators but was pressured by the Security Council to focus on those most responsible for the violence, which in practice meant senior leaders).

218. *See* Rauxloh, *supra* note 60, at 743 (noting that because of limited resources and a focus on those most responsible for serious crimes, a number of lower-level perpetrators are not even investigated).

219. *See* Burke-White, *supra* note 58, at 74 ("An impunity gap arises where an international forum prosecutes only those most responsible for international crimes, leaving lesser offenders a degree of impunity.").

220. *See* Levitt, *supra* note 57, at 1974 ("[T]ribunal affiliates look to prosecutions as a means to catalyze future prosecutions . . . may similarly spark companion national prosecutions.").

221. *See* Clark, *supra* note 60, at 423 ("The ICTY's outreach department is now primarily focused on capacity-building work, that is to say on developing the capacity of local courts in the former Yugoslavia to prosecute war crimes.").

222. *See* Ford, *supra* note 26, at 35–36 (noting that the ICTY transferred seven cases to domestic courts in the former Yugoslavia as well as seventeen dossiers containing evidence of crimes for which an ICTY indictment was never confirmed).

223. *See* Akhavan, *supra* note 59, at 26.

224. *See* Morten Bergsmo et al., *Complementarity after Kampala: Capacity Building and the ICC's Legal Tools*, 2 GOETTINGEN J. INT'L L. 791, 798, 802 (2010) (noting that there is broad agreement that the court should not directly

or fund domestic investigations.[225] It may assist in other ways, however. For example, the ICC can provide information it collects during its investigations to national systems and it can help catalyze assistance from other actors, including other states, international organizations and civil society groups.[226] In addition, the ICC has contributed to a project called the Legal Tools Project to systematize and publicize documents relevant to international criminal law. This project is intended to make available the tools necessary for the practice of international criminal law in domestic jurisdictions.[227]

The ICC may be able to promote domestic prosecutions in other ways as well. First, the ICC may simply be able to persuade states to undertake prosecutions.[228] Second, the structure of the Rome Statute provides incentives for domestic prosecutions.[229] Thus, the ICC may be able to help end impunity without taking on the cases itself or directly supporting national prosecutions.

Calculating an expected value for ending impunity requires assessing both the likelihood that international tribunals can end impunity and the benefit that would accrue if that goal could be accomplished. The likelihood of ending impunity will be assessed first. The most direct way that international courts

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engage in domestic capacity building but that capacity building should be undertaken by states, international organizations and civil society); Burke-White, *supra* note 61, at 84–85 (noting that the ICC does not have the capacity to engage in resource-intensive attempts to build domestic judicial capacity).

225. Elizabeth B. Ludwin King, *Big Fish, Small Ponds: International Crimes in National Courts*, 90 IND. L. J. 829, 841–42 (2015).

226. *Id.* at n.90.

227. *See* Bergsmo et al., *supra* note 224, at 804–07.

228. *Id.* at 796 (noting that encouragement and persuasion can be effective in promoting domestic prosecutions); Burke-White, *supra* note 58, at 55.

229. Article 17 of the Rome Statute deprives the ICC of jurisdiction over a case if a state is making a genuine attempt to prosecute it. *See* Rome Statute, *supra* note 51, art. 17. As a result, states can prevent the ICC from exercising jurisdiction by undertaking their own investigations and prosecutions. This incentivizes states to carry out domestic prosecutions as a way to preempt ICC prosecutions. *See* Bergsmo et al., *supra* note 229, at 795 ("States may feel 'forced'to investigate or prosecute cases involving core international crimes so as to avoid any intrusion by the ICC into situations involving their nationals or their territory."); Burke-White, *supra* note 61, at 69–70 (noting that an ICC investigation imposes significant reputational and sovereignty costs on states and that states can avoid these costs by undertaking genuine investigations and prosecutions). *But see* Burke-White, *supra* note 61, at 62–63 (arguing that in some circumstances the ICC actually may decrease the likelihood of costly or politically sensitive prosecutions in national systems by permitting states to transfer responsibility for those cases to the ICC).

contribute to this goal is through arresting and trying those individuals they indict. But, international courts have not been completely successful in obtaining custody over and trying even the small number of individuals they indict. While the ICTY managed to eventually obtain custody over most of its indictees,[230] it was not easy.[231] The ICTR has been less successful – there are still eight fugitives from the ICTR.[232]

For various reasons,[233] the ICC has also had difficulty in obtaining custody over the individuals it has indicted.[234] For example, senior Sudanese government officials have successfully evaded the ICC's arrest warrants.[235] Similarly, Joseph Kony, the leader of the Lord's Resistance Army has successfully avoided arrest.[236] The Prosecutor has also been forced to drop charges against senior Kenyan politicians due to their alleged manipulation and intimidation of witnesses.[237] As this discussion shows, it is doubtful whether international courts can completely end impunity even for senior leaders.

It is also very doubtful that international courts can successfully promote the domestic prosecutions necessary to close the impunity gap at the national level. First, many states

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230. *See Key Figures of the Cases*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/en/cases/key-figures-cases (last visited Aug. 2, 2016) (showing that of the 161 individuals indicted by the ICTY, the vast majority eventually appeared before the court and were tried). A small number of indictees died before they could be tried and the indictments were withdrawn against another twenty, but there are no more fugitives from the ICTY. *Id.*

231. ICTY indictees, like Radovan Karadzic and Ratko Mladic, successfully evaded the court for years. Ratko Mladic was initially indicted in 1995 but was not arrested until 2011. *See Case Information Sheet for Ratko Mladic,* INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf. Radovan Karadzic was indicted in 1995 but not arrested until 2008. *See Case Information Sheet for Radovan Karadzic*, INT'L CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf.

232. *See Key Figures of the Cases*, UNITED NATIONS MECHANISM FOR INT'L CRIM. TRIBUNALS, http://unictr.unmict.org/en/cases/key-figures-cases (last visited Sept. 20, 2016).

233. *See* Ford, *The ICC and the Security Council*, *supra* note 214 (arguing that ICC is relatively weak compared to states and the lack of state support has made it difficult for the court to succeed).

234. *See* Burke-White, *supra* note 58.

235. *See* Ford, *The ICC and the Security Council*, *supra* note 214, at 38.

236. A warrant for his arrest was issued in 2005, but as of October 2016 he was still a fugitive. *See Case Information Sheet for Joseph Kony and Vincent Otti*, INT'L CRIM. CT., https://www.icc-cpi.int/uganda/kony.

237. *See* Dutton, *supra* note 214, at 12–13 (2016).

lack the necessary legislation to investigate and prosecute violations of international law.[238] Second, many states lack the capacity to undertake domestic prosecutions.[239] They often do not have the necessary infrastructure, the necessary funding, or a qualified judiciary.[240] This problem is compounded by the large number of cases that states would have to undertake to investigate and prosecute all of the potential defendants.[241] Third, state support for domestic prosecutions is not a given. In situations where the perpetrator groups are part of the government, the local authorities will often frustrate or oppose prosecutions rather than support them.[242] Even if national prosecutions are undertaken, there is a risk that impunity will continue if the prosecutions are designed primarily to prevent ICC involvement rather than to ensure that justice is served.[243] Thus, there are good reasons to doubt that international criminal courts can promote the necessary domestic prosecutions to close the impunity gap.

Nevertheless, there is some evidence that domestic prosecutions that have been spurred by international criminal courts. [244] For example, the work of the ICTY and ICTR appears to have triggered some domestic prosecutions of individuals involved in international crimes committed in Rwanda and the Balkans.[245] The government of the Democratic Republic of Congo (DRC) began a series of domestic prosecutions of war crimes and crimes against humanity in response to the ICC's initiation of a preliminary examination.[246] On the other hand,

238. *See* Bergsmo et al., *supra* note 229, at 801; Elizabeth B. Ludwin King, *Big Fish, Small Ponds: International Crimes in National Courts*, 90 IND. L. J. 829, 838–39 (2015).

239. *See* Bergsmo et al., *supra* note 224, at 801–02; Burke-White, *supra* note 58, at 92.

240. *See* Bergsmo et al., *supra* note 224, at 801–02; King, *supra* note 238, at 837–38.

241. *See* Bergsmo et al., *supra* note 224, at 801–02.

242. *See* Dutton, *supra* note 214, at 24–29 (arguing that Kenya obstructed the investigation of senior government officials); Ford, *The ICC and the Security Council*, *supra* note 214, at 38.

243. *See* Burke-White, *supra* note 58, at 91.

244. *See* Levitt, *supra* note 57, at 1974 (arguing that international prosecutions appear to have catalyzed an increase in domestic prosecutions).

245. *See* Akhavan, *supra* note 59, at 27 (noting that the work of the ICTY and ICTR led several states to prosecute Yugoslav or Rwandan perpetrators even when no international indictments had been issued); Burke-White, *supra* note 58, at 63.

246. *See* Burke-White, *supra* note 58, at 106.

there has also been criticism of the "marginal influence" international criminal tribunals have had on domestic prosecutions.[247] Ultimately, it seems unlikely that international courts can end impunity.[248] They have not been able to end impunity for the senior leaders that have been the focus of their efforts.[249] They are even less likely to be able to end impunity for the vastly more numerous lower-level perpetrators.

The next step is to calculate the benefit that would result from ending impunity. This goal is functionally similar to the retribution goal but on a larger scale. After all, one of the main purposes of ending impunity is to ensure that perpetrators are identified and appropriately punished for their wrongful conduct.[250] This is essentially retribution writ large. Rather than just trying a few leaders, if courts can end impunity, then all of the perpetrators—and there could be hundreds or thousands of them—will receive appropriate retribution. This suggests that ending impunity, if it could be achieved, would have a higher value than retribution. On the other hand, retribution has a low value to states.[251] This suggests that ending impunity, as an end in itself, has only a moderate value. It may be morally appropriate to punish wrongdoers, but states will not pay huge sums to achieve a just punishment.

Rather, there is considerable evidence that states primarily view ending impunity as a means to prevent violations.[252] This can be seen most clearly in the Preamble to the Rome Statute, which says the ICC is intended "to put an end to impunity for the perpetrators of [the most serious] crimes and thus contribute to the prevention of such crimes."[253] Others theorize that ending

247. *Id.* at 96–97. *See also* Dutton, *supra* note 214, at 23–24 (noting that ICC involvement in Kenya did not lead to domestic prosecutions of crimes associated with the post-election violence in 2008); King, *supra* note 238, at 844–45 (noting that the ICC's interest in post-election violence in Kenya led the Kenyan government to take some initial steps to implement domestic prosecutions but that the prosecutions never occurred).

248. *But see* Levitt, *supra* note 57, at 1974 (arguing that, out of all their goals, tribunals are most likely to achieve the goal of ending impunity).

249. *See supra* text accompanying notes 230–237.

250. *See* Humphrey, *supra* note 117, at 498 ("The principal goal of prosecutions in international criminal tribunals has been to challenge impunity by bringing . . . perpetrators under the scrutiny of the law.").

251. *See supra* text accompanying notes 94–97.

252. *See e.g.*, Burke-White, *supra* note 58, at 60 (noting various statements by politicians claiming that ending impunity will either prevent violations of international criminal law or prevent conflicts).

253. Rome Statute, *supra* note 51, pmbl.

impunity is a mechanism to maintain or restore peace after a conflict.[254]

Ultimately, it is unlikely that international tribunals truly have the ability to end impunity through their work.[255] More importantly, the intrinsic value of ending impunity is moderate.[256] Its main value is as a mechanism to prevent violations.[257]

H. PREVENTING VIOLATIONS OF INTERNATIONAL CRIMINAL LAW

It is often argued that international criminal courts can prevent violations of international criminal law.[258] For example, the Rome Statute argues that the ICC will "contribute to the prevention of" violations.[259] There is less agreement, however, about how prevention works. Some argue that prevention will occur by deterring potential wrongdoers.[260] According to this theory, people will not commit violations if the expected adverse consequences arising from the violation exceed the expected benefit.[261] By punishing violations, courts can increase the expected costs of violations so that they exceed the expected benefits and thereby deter future violations.[262] Others argue that by expressing condemnation for morally reprehensible acts, courts may be able to change norms about the commission of violations and thereby reduce violations.[263] Another theory is that by taking actions which foster post-conflict reconciliation, courts can reduce the hostility and suspicion which can lead to

254. *See* Humphrey, *supra* note 113, at 496.

255. *See supra* text accompanying notes 248–249.

256. *See supra* text accompanying note 251–252.

257. *See supra* text accompanying notes 253.

258. *See* deGuzman, *supra* note 47, at 280 (noting that prevention is often presented as a primary goal of international courts). *But see* Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443, 445–46 (2016) (listing commentators who have argued that the ICC cannot prevent violations).

259. Rome Statute, *supra* note 51, pmbl.

260. *See* Damaška, *supra* note 47, at 339 ("In the adolescence of ad hoc tribunals, the cardinal importance of general deterrence was frequently invoked."); *id.* at 344.

261. *See* Jo & Simmons, *supra* note 258, at 447–48. *See also* deGuzman, *supra* note 47, at 306–07 (discussing the theory of deterrence).

262. *See* Jo & Simmons, *supra* note 258, at 447–48.

263. *See supra* text accompanying notes 170–174.

outbreaks of violence.[264]

In addition to a number of different theories about how prevention might work, there is also considerable debate about whether any of the existing theories are viable.[265] Thus, while deterrence has been advanced as a mechanism for preventing violations,[266] there is also doubt about whether deterrence can work in the context of international criminal law.[267] Some of the other theories about prevention have also been criticized as unworkable.[268] There is even some concern that international prosecutions might cause more violations by encouraging the individuals responsible for the violence to cling to power.[269] As a result, the theory related to prevention is extremely muddled. There is little agreement among international criminal law scholars about how prevention works or whether any of the commonly-articulated mechanisms are likely to prevent crimes.

Even in the absence of a sound theoretical basis, however, there have been attempts to identify situations where international courts have prevented crimes.[270] The best example

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264. *See supra* text accompanying notes 197–203, 207.

265. *See, e.g.*, deGuzman, *supra* note 47, at 270 (noting that the question of whether international courts can deter crimes is "highly contested").

266. *See* Akhavan, *supra* note 59, at 12 (arguing that the political elites who cause mass violence are more likely to engage in some sort of "rational cost-benefit calculation" than those who carry it out and are thus susceptible to deterrence through indictment, prosecution and stigmatization); deGuzman, *supra* note 57, at 308 (suggesting that, despite the debate about whether deterrence works for international crimes, deterrence can provide a partial justification for international courts).

267. *See* Akhavan, *supra* note 59, at 10 ("Once mass violence has erupted, threats of punishment can do little to achieve immediate deterrence."); Damaška, *supra* note 1, at 344–45 (arguing that deterrence is unlikely to work for international crimes because the perpetrators are not rational actors and because there is a very low likelihood of punishment); deGuzman, *supra* note 47, at 307–08 (noting that many commentators are skeptical of the ability of international courts to deter criminal behavior for various reasons).

268. *See* Damaška, *supra* note 1, at 346 (noting that some commentators have argued that persuasion will be futile in fostering compliance with international law).

269. Courtney Hillebrecht, *The Deterrent Effect of the International Criminal Court: Evidence from Libya*, 42 INT'L INTERACTIONS 616, 617 (2016) ("Worst of all, however, what if the ICC has a perverse effect on the protection of human rights? If perpetrators of human rights abuse expect that they will be held accountable tomorrow, will they fight harder and dirtier today?"); *id.* at 627; Damaška, *supra* note 1, at 331–33 (noting that indictments of senior leaders may actually exacerbate conflicts as those leaders "hold tenaciously to the reins of power" so as to avoid being sent to an international court for trial).

270. *See* Burke-White, *supra* note 58, at 74 ("Some extant qualitative research studies suggest for example, that certain ICC indictees were concerned

of this approach is by Professor Akhavan.[271] He concluded that the ICC's interventions in Uganda, Côte d'Ivoire, and Darfur did not make those situations worse and, in fact, appeared to prevent some violence.[272] On the other hand, commentators have noted that the indictment by the ICTY of senior leaders in the former Yugoslavia did not prevent those same individuals from sparking a new conflict in Kosovo in 1999.[273] Ultimately, qualitative arguments are not likely to persuade those who are convinced that international courts cannot prevent violence. To convince the many doubters,[274] a more systematic approach is required.

Unlike most of the goals assessed in this Article, the question of whether international courts can prevent atrocities has been studied empirically.[275] For example, Professor Hillebrecht has studied the effect of the initiation of an ICC investigation on the situation in Libya.[276] Her study looked at the effect of various actions taken by the ICC on the number of

about the prospect of ICC prosecution years before their indictment or arrest.") ("Paramilitaries have reportedly cited the Court's potential prosecution as part of their reasoning for relinquishing power."); deGuzman, *supra* note 47, at 308 (noting one instance in which the threat of ICC action appears to have deterred "hate speech that threatened to spark genocide"); Dutton, *supra* note 214, at 19–22 (arguing that the ICC's indictments of senior Kenyan leaders following post-election violence in 2008 led those same leaders to use much less combative rhetoric during the next election and ultimately led to much more peaceful elections in 2013). *See also* Jo & Simmons, *supra* note 258, at 450 (noting several instances of human rights violators expressing concern about the possibility of an ICC indictment).

271. *See* Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM RIGHTS Q. 624, 625 (2009) (using case studies of indictments for leaders in Côte d'Ivoire, Uganda, and Sudan, Professor Akhavan argues that the ICC deters violence by raising the potential cost of it, rather than creating perverse incentives for leaders who have been indicted to continue committing human rights abuses to avoid arrest).

272. *Id.* at 636–52.

273. *See* Damaška, *supra* note 1, at 339 (noting that hope for deterrence faded as the ad hoc tribunals appeared unable to prevent violations); Levitt, *supra* note 57, at 1965 (noting that both Serbian and Kosovar forces engaged in violations of international criminal law in Kosovo in 1999 and that the ICTY was not able to prevent those violations despite having indicted numerous individuals for violations of international criminal law in the Balkans).

274. *See* Jo & Simmons, *supra* note 258, at 446 (listing scholars who have argued that the ICC cannot prevent violations).

275. *See* Hillebrecht, *supra* note 269; Jo & Simmons, *supra* note 258; James Meernik, *The International Criminal Court and the Deterrence of Human Rights Atrocities*, 17 CIVIL WARS 318 (2015).

276. *See* Hillebrecht, *supra* note 269.

civilians killed per day in Libya by pro-government forces.[277] She found that civilian casualties decreased after the ICC took action in Libya and concluded that "the ICC can, in fact, serve as a deterrent of violence against civilians, particularly government-sponsored civilian casualties, during ongoing conflict."[278] There are some caveats[279] and the preventive effect she found is "modest."[280] Nevertheless, Professor Hillebrecht did find evidence that ICC intervention in Libya reduced the number of civilian casualties.[281]

Professor Meernik has taken a slightly different approach to studying the effect of the ICC. He looked at the question of whether joining the ICC lowered the likelihood that a country would experience human rights violations.[282] While the factor in his model with the largest impact on violence was a country's commitment to the rule of law—countries with a strong commitment to the rule of law were much less likely to experience human rights violations—he found that a country's commitment to the ICC was also a significant factor.[283] Countries that exhibited a strong commitment to the ICC had less violence than countries with a similar commitment to the rule of law but less commitment to the ICC.[284] Professor Meernik also found that states with a strong commitment to the ICC were less likely to be the subject of ICC investigations.[285] Ultimately, he concluded that his findings "support" the conclusion "that the ICC can exercise a deterrent impact."[286]

Professors Jo and Simmons have also assessed the preventive effect of the ICC. In their study, they focused on

277. *Id.* at 628–29.

278. *Id.* at 632.

279. For example, Professor Hillebrecht notes that the ICC in Libya acted with the support of both NATO and the Security Council and that the result might not be the same if the ICC were acting alone. *Id.* at 737–38.

280. *Id.* at 632.

281. *Id.* at 637.

282. *See* Meernik, *supra* note 275.

283. *Id.* at 331–33. *See also id.* at Tables 1, 2 & 3 (finding that ICC support had a statistically significant effect on the extent of human rights abuses).

284. *Id.* at 333 ("States that demonstrate further commitment to the ICC by enacting domestic legislation that provides for national prosecution of international crimes; by ratifying the Agreement on Privileges and Immunities for the ICC; and by refraining from concluding a bilateral immunity agreement with the United States are more likely to have better human rights records and be involved in less internal violence.").

285. *Id.* at 334–35.

286. *Id.* at 333.

whether various actions reduced the level of civilian casualties during civil wars.[287] They found that ICC ratification was associated with a nearly fifty percent decrease in the rate at which government forces killed civilians.[288] They also found that as the number of prosecutorial acts by the ICC increased (e.g., opening of preliminary examinations, opening of formal investigations, and issuance of arrest warrants) the number of civilian deaths attributable to the government decreased.[289] The incorporation of a state's ICC obligations into domestic law was also associated with a decrease in civilian deaths caused by governments.[290] These effects persisted even after controlling for numerous other factors that might affect civilian deaths.[291] In contrast, Professors Jo and Simmons found less effect on rebel groups.[292] Ultimately, they conclude that there is "strong evidence of a reduction in intentional civilian killing by government actors" as a result of the ICC.[293]

The results of these empirical studies are surprisingly consistent. Although they used different methods, and looked at different data sets, they all found that ICC intervention was associated with a decrease in violence. While these studies cannot definitively prove that the ICC was the cause of the decrease in violence, the results are still persuasive evidence of such an effect.

The magnitude of the effect, however, is uncertain. Professor Hillebrecht found that the ICC's investigation in Libya only "modest[ly]" reduced violence against civilians.[294] On the other hand, Professors Jo and Simmons found a nearly fifty percent reduction in civilians killed by government forces as a result of the ICC.[295] More data will be necessary to pin down the

287. Jo & Simmons, *supra* note 258, at Table 1.

288. *Id.* at 461.

289. *Id.*

290. *Id.* at 463.

291. *Id.* at 466 ("The evidence of the ICC's ability to deter is based on rigorous controls for many underlying conditions that could plausibly contribute both to ratification and reduced civilian killing, such as changing regime type, quality of the rule of law, government-rebel reciprocity regarding civilians, even changing experiences and preference with respect to peace and justice.").

292. Rebel groups did not appear to be affected by ICC ratification or the incorporation of ICC obligations into domestic legal systems. The number of civilian deaths caused by rebels did decrease as the number of ICC actions increased, but the effect was smaller than for government forces. *Id.* at 469–70.

293. *Id.* at 469.

294. *See* Hillebrecht, *supra* note 269, at 632.

295. *See* Jo & Simmons, *supra* note 258, at 461.

magnitude of the ICC's effect. While it is unclear how much the ICC reduces violence, it is clear that it does not completely eliminate it. This suggests that while significant violence will be prevented, many acts of violence will still occur. Thus for purposes of this Article, the likelihood of the ICC preventing any particular potential act of violence is rated as unlikely.

Having estimated the likelihood of preventing violations of international criminal law, the next step is to try to estimate the benefit that would accrue if violations could be prevented. Serious violations of international criminal law have a number of hallmarks. They usually occur during or are associated with armed conflicts.[296] They are typically carried out by hierarchically-organized groups working together,[297] and the victims are usually civilians, often women and children.[298] The most common crimes consist of rapes and murders, the infliction of torture and other inhumane acts, the wholesale destruction of homes, businesses and public infrastructure, and the forcible displacement of hundreds of thousands of people from their homes.[299] They are often carried out with exceptional cruelty.[300] These crimes have enormous costs and consequences for both the victims and societies in which they occur.

We know that being a victim of a crime can have serious consequences for the individual.[301] These effects can include shock and loss of trust in society, guilt at having been the victim of a crime, temporary or permanent incapacity stemming from physical injuries, financial losses, psychological changes, including fear, anger and depression, and social effects that change an individual's lifestyle.[302] Many of these effects can also be felt by the families, friends, and colleagues of the victim.[303]

While the vast majority of crime victims will feel some emotional effect of the crime,[304] victims of violence and sexual assault are more likely to be affected by the crime than victims of non-violent crimes and it is more likely that the effects will

296. *See* Ford, *supra* note 4, at Section II(C).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *See* Joanna Shapland and Matthew Hall, *What Do We Know About the Effect of Crime on Victims?*, 14 INT'L R. OF VICTIMOLOGY 175, 178–79 (2007).

302. *Id.*

303. *Id.*at 179.

304. *Id.* at 181 (noting that more than eighty percent of crime victims report being emotionally affected by the crime).

persist over the long term.[305] Thus, violent crimes tend to have a larger impact than other kinds of crime. And, of course, the widespread commission of violent crimes is the hallmark of violations of international criminal law.

Most studies of the effect of crime on victims take place in countries that are at peace. Nevertheless, the small amount of research on the effect of crimes committed during conflicts supports the conclusion that victims of conflict-related violent crimes are highly likely to suffer severely.[306] Indeed, even those who are "only" subjected to forced displacement nonetheless suffer significant harm.[307]

Above and beyond the direct effects on the victims and their friends and families, crime can also have very serious economic costs for society as a whole.[308] The most common direct costs of crime are for medical care, property loss, and costs associated with the criminal justice system.[309] Indirect costs can include things like loss of productivity.[310] Unsurprisingly, physical violence, particularly murder, appears to generate the largest societal costs compared to other forms of crime.[311] In developed countries, where most of the research is conducted, the economic costs of crime run into the billions of dollars per year.[312]

While most of the research on the costs of crime has focused on the kinds of crimes that are most common in domestic systems, there have also been some studies of the economic effects of mass atrocities on society. That research shows that serious violations of international criminal law have enormous costs. For example, the economic cost of the conflict in Darfur is estimated to be tens of billions of dollars.[313] A study of the cost

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305. *Id.* at 196–97.

306. *Id.* at 199–200.

307. *See, e.g.*, James M. Shultz et al., *Internally Displaced "Victims of Armed Conflict" in Colombia: The Trajectory and Trauma Signature of Forced Migration*, 16 CURRENT PSYCHIATRY REPORTS, at 4 (2014) ("IDPs [internally displaced persons] experience extraordinary adversities, overt danger, and psychological distress throughout all phases along the trajectory of displacement, leading to chronic elevation of risks for victimization, physical ailments, and mental disorders.").

308. *See also* Nyantara Wickramasekera et al., *Cost of Crime: A Systematic Review*, 43 J. CRIM. JUST. 218 (2015).

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *See* Hamid E. Ali, *Estimate of the Economic Cost of Armed Conflict: A Case Study from Darfur*, 24 DEF. & PEACE ECON. 503 (2012).

of the Rwandan genocide argued that Rwandan GDP would have been twenty-five to thirty percent higher if the genocide had not taken place.[314] These findings are consistent with a body of research that has found that widespread violence within a society has very significant economic consequences.[315]

In short, the cost of the crimes associated with the kinds of conflicts where international criminal courts become involved are enormous and can easily be in the tens to hundreds of billions of dollars.[316] This suggests that preventing those crimes would have an extremely high value because it would avoid those costs. For this reason, this Article assigns the prevention of serious violations of international criminal law an extremely high value.

I. MAINTAINING OR RESTORING INTERNATIONAL PEACE AND SECURITY

International criminal courts are sometimes tasked with maintaining or restoring international peace and security.[317] This goal appears to be the one that is most divorced from the actual work of courts because no modern international criminal court has had jurisdiction over the crime of aggression, although that is set to change in July 2018 when the ICC will be permitted to exercise jurisdiction over aggression.[318] This means that no

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314. *See* Humberto Lopez & Quentin Wodon, *The Economic Impact of Armed Conflict in Rwanda*, 14 J. AFR. ECON. 586 (2005). *See also* Pieter Serneels & Marjike Verpoorten, *The Impact of Armed Conflict on Economic Performance: Evidence from Rwanda*, 59 J. OF CONFLICT RESOL. 555 (2015) (finding that the areas in Rwanda that had the worst violence also had the poorest subsequent economic performance).

315. *See* Sanjeev Gupta et al., *Fiscal Consequences of Armed Conflict and Terrorism in Low and Middle-Income Countries* (Fiscal Affairs Department, IMF Working Paper No. 02/142, 2002); *see also* Alberto Abadie & Javier Gardeazabal, *The Economic Costs of Conflict: A Case Study of the Basque Country*, 93 AM. ECON. REV. 113 (2003); Anke Hoeffler & Marta Reynal-Querol, *Measuring the Costs of Conflict* (March 2003); Stergios Skaperdas, *The costs of organized violence: a review of the evidence*, 12 ECON. GOVERNANCE 1 (2011); Nicholas Staines, *Economic Performance Over the Conflict Cycle* (IMF Working Paper WP/04/95, 2004).

316. For example, one study concluded that the average cost of a civil war was somewhere between $60 and $250 billion. *See* Paul Collier et al., The Security Challenge in Post-Conflict Countries 19–20 (April 2008).

317. *See supra* Section III (explaining the goals of international criminal courts).

318. *See* Rome Statute, *supra* note 51, art. 15 *bis* (establishing jurisdiction over the crime of aggression); Dapo Akande, *The International Criminal Court*

court has been able to punish a party that wrongfully started an armed conflict. As a result, there was little likelihood that international courts could deter the initiation of conflicts, at least in the sense that deterrence is usually used in domestic criminal law.[319] Nevertheless, there are some theories about how international criminal tribunals can help restore and maintain peace and security even in the absence of jurisdiction over the crime of aggression. One theory is that by indicting and convicting the architects of the violence for other violations of international criminal law, courts may be able to remove the individuals most likely to spark a new armed conflict.[320] Even if a court cannot directly remove the architects of violence from power, an indictment may isolate them and weaken their grip on power.[321] Another theory posits that by fostering post-conflict reconciliation, courts can defuse the hostility and suspicion that might lead to later conflicts.[322] On the other hand, there has been a concern that criminal indictments could exacerbate conflict by causing the participants to resist peace.[323] Luckily, there is little evidence that intervention by courts makes conflicts worse.[324]

Gets Jurisdiction over the Crime of Aggression, EJIL:TALK! (Dec. 15, 2017), https://www.ejiltalk.org/the-international-criminal-court-gets-jurisdiction-over-the-crime-of-aggression/ (noting that the Assembly of State Parties passed a resolution permitting the ICC to exercise jurisdiction over the crime of aggression beginning in July 2018).

319. Deterrence theory requires that the act be subject to some sort of penalty for its commission. If the act cannot be prosecuted, then courts cannot deter it.

320. *See* Turner, *supra* note 13, at 538 (arguing that by removing the architects of the violence from the scene through incarceration courts can lower the chance of future violence); *see also* Akhavan, *supra* note 59, at 7 ("The removal of leaders with criminal dispositions and a vested interest in conflict makes a positive contribution to post-conflict peace building.").

321. *See* Akhavan, *supra* note 59, at 7 (arguing that, even if indicted leaders are not immediately apprehended and prosecuted, the stigma of an indictment and exclusion from the international community can undermine those leaders' grip on power and make further violations more costly and thus less attractive).

322. *See supra* text accompanying notes 196–203, 207 (arguing that international criminal courts can foster post-conflict reconciliation).

323. *See* Damaška, *supra* note 1, at 331 (noting that indictments of senior leaders may actually exacerbate conflicts as those leaders "hold tenaciously to the reins of power" so as to avoid being sent to an international court for trial); deGuzman, *supra* note 47, at 272 (noting that there was criticism of the ICC's indictment of President Bashir of Sudan on the grounds that it would make it harder to achieve peace in Darfur).

324. *See supra* text accompanying notes 275–295 (examining the empirical evidence of the ICC's effects on conflict and finding that there is good evidence that the ICC reduces violence rather than exacerbates it).

There have been various attempts to demonstrate that courts can (or cannot) prevent conflicts. For example, Professor Akhavan argues that the ICTY helped to de-legitimize Slobodan Milošević[325] and that the ICTR helped prevent Hutu extremists from returning to power.[326] On the other side, several commentators have noted that the ICTY's intervention in the Balkans did not prevent the conflict in Kosovo in 1999.[327] More recently, the ICC has had little luck ending the conflict in Darfur despite indicting President Bashir.[328] In the end, the evidence that courts can prevent conflicts before they begin or end them after they have begun is weak.[329] Indeed, in general, we do not know how to predict when conflicts will occur or how to prevent them when they do occur.[330] Ultimately, the theoretical underpinnings of this goal are lacking,[331] and there is little evidence that international courts have been able to prevent conflicts.[332] Consequently, it is unlikely that international criminal courts can prevent conflicts from occurring.[333]

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325. Akhavan, *supra* note 59, at 9 ("[T]he work of the ICTY . . . has permitted the ascendancy of more moderate political forces backing multiethnic coexistence and nonviolent democratic process . . . helped to delegitimize Milošević's leadership . . . .").

326. Akhavan, *supra* note 59, at 9 (arguing that the ICTR's indictments prevented the "rehabilitat[ion] of Hutu extremists").

327. *See* Levitt, *supra* note 57, at 1965–66 (noting that the establishment of the ICTY did not prevent Serbian and Kosovar forces from starting a conflict in Kosova in 1999); Schrag, *supra* note 1, at 429 (noting that conflict in the former Yugoslavia continued for a year and a half after the ICTY was established and that the ICTY was criticized for being incompatible with peace).

328. *See* Ford, *The ICC and the Security* Council, *supra* note 214, at 37–38 (2016) (noting that the conflict in Darfur has continued on for over ten years and that the Sudanese government considers it a notable achievement to have frustrated the ICC's attempts to arrest Sudanese government officials).

329. *See generally* Hillebrecht, *supra* note 269 (finding that the ICC was able to reduce the violence in Libya but it was unable to prevent it or end it).

330. *See* Peter Rudolf, *Evidence-Informed Prevention of Civil Wars and Mass Atrocities*, 51 INT'L SPECTATOR 86 (2016) (discussing the difficulty of preventing political violence).

331. *See supra* text accompanying notes 318–319 (noting that this goal is the most divorced from the actual work of the tribunals).

332. *See supra* text accompanying notes 327–330.

333. This conclusion may eventually have to be revisited. Now that the ICC has jurisdiction over the crime of aggression, it may be in a better position to prevent conflicts from occurring by threatening prosecution. But, there are still a number of jurisdictional limitations that may make aggression prosecutions quite rare. *See* Rome Statute, *supra* note 51, arts. 15 *bis,* 15 *ter.* If the ICC rarely brings cases, the deterrent effect may be small. *See* Hillebrecht, *supra* note 269, at 624 (arguing that deterrence is largely a function of the "likelihood of accountability"). It may take a decade or more (and several aggression

Having addressed the likelihood that this goal can be achieved, the next step is to assess what value achieving the goal would have. This will be done by comparing its value to the value of preventing violations. Restoring or maintaining international peace and security is often listed as a separate goal from that of preventing violations of international law, but in practice they are aimed at achieving similar effects. The main purpose of preventing violations of international criminal law is to stop the violence against civilians that is associated with armed conflicts.[334] Restoring or maintaining peace would have a similar effect by preventing the conflict that leads to the violence.[335] In short, both appear to be directed largely at preventing the

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prosecutions) before we can draw any conclusions about whether having jurisdiction over aggression makes it easier for the ICC to prevent or end conflicts.

334. The focus on violence associated with armed conflicts is technically inaccurate because genocide and crimes against humanity can occur outside an armed conflict. *See* Rome Statute, *supra* note 51, arts. 6–7 (describing the legal elements of genocide and crimes against humanity; neither requires the existence of an armed conflict as a jurisdictional requirement). However, in practice, genocide and crimes against humanity often occur alongside armed conflicts. Two of the nine current ICC investigations involves a possibility of genocide and both occurred in the context of an armed conflict. *See* Ford, *supra* note 4, at Table 1. Of the eight situations the ICC is currently investigating that involve crimes against humanity, six took place during an armed conflict. *Id.* Thus, most violations of international criminal law are associated with conflicts even if that is not a legal requirement of crimes against humanity or genocide. As a result, it is fair to say that international criminal courts are primarily interested in stopping the violence associated with armed conflicts, even though they can (and occasionally do) have jurisdiction over violence that occurs outside of an armed conflict.

335. Again, this is slightly inaccurate because crimes against humanity and genocide are prohibited by international criminal law but can occur outside of an armed conflict. *See* Rome Statute, *supra* note 51, arts. 6–7; Ford, *supra* note 4, at Table 1. Thus preventing armed conflicts would not necessarily prevent all violations of international criminal law. Nevertheless, crimes against humanity and genocide would likely constitute a threat to international peace and security even when such crimes are not committed during an armed conflict. For example, when the United Nations Security Council referred the situation in Libya to the ICC, it found that there were "widespread and systematic attacks currently taking place in the Libyan Arab Jamahiriya against the civilian population [that] may amount to crimes against humanity" but it did not conclude that there was on ongoing armed conflict. *See* S.C. Res. 1970 (Feb. 26, 2011). However, the Security Council suggested that the attacks were a threat to international peace and security and used its enforcement powers under Chapter VII of the United Nations Charter to refer the matter to the ICC and impose an arms embargo. *Id.* Consequently, this article will assume that achieving the peace and security goal would include preventing all violations of international criminal law even if they do not take place during an armed conflict.

violence that accompanies armed conflicts.[336] The question then becomes, is the goal of preserving international peace and security actually different from the goal of prevention? The answer is that there are some differences, but they are relatively small and those differences may disappear completely in the future.

Modern international criminal courts have had jurisdiction over three crimes: war crimes, crimes against humanity and genocide.[337] Much of the violence that occurs during armed conflicts would be prevented by compliance with these laws, but not all of it. Some types of violence are permitted during an armed conflict. For example, combatants are permitted to target and kill other combatants during conflicts.[338] They are also permitted to attack and destroy military objectives.[339] In some limited circumstances, they are even permitted to cause civilian casualties and damage civilian objects.[340] In effect, there is some violence that occurs during armed conflicts that is neither a war crime, a crime against humanity, nor genocide. Mainly, this harm is directed towards participating combatants and military objects. Such harm would be eliminated by maintaining or restoring international peace and security but would not be prevented simply by compliance with the law covering war crimes, crimes against humanity, and genocide. This suggests that the value of achieving the goal of maintaining peace is higher than the value of achieving the goal of preventing

336. As noted above, this is slightly inaccurate because violations of international criminal law can occur outside of an armed conflict. *See supra* note 334. Most violations, however, do occur in connection with an armed conflict. *Id.* Moreover, most violations that occur outside of armed conflicts will constitute threats to international peace and security. *See supra* note 335. As a result, if the goal of maintaining international peace and security is achieved, this will also mean that violations of international criminal law that do not occur during a conflict are prevented. For this reason, the statement in the text above may be slightly inaccurate, but it is not inaccurate in a way that matters for the argument advanced here.

337. *See, e.g.*, Rome Statute, *supra* note 51, art. 5(1).

338. GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 46 (2d ed. 2016).

339. *Id.* at 506.

340. Civilians can never be deliberately targeted, but some civilian casualties are permitted as a side effect of a legitimate attack on a military objective, so long as the expected civilian casualties are proportional to the military advantage to be gained from the attack on the military objective. Similarly, while civilian objects are entitled to a presumption of immunity from attack, if civilian objects are used for military purposes, then they may legitimately be attacked. *Id.* at 293.

violations of international criminal law because more harm would be prevented.

Its value may not be much higher, however. The amount of additional value that preventing conflicts would produce over preventing violations of international criminal law depends largely on the ratio of civilian to combatant deaths during conflict. If combatants represent the majority of conflict-related deaths then preventing conflicts would have considerably more value than just preventing violations of international criminal law. If, on the other hand, civilian deaths constituted the vast majority of conflict-related deaths, then the added value of preventing combatant deaths might not be very large. It is hard, however, to be certain of the ratio of combatant to civilian deaths. While many sources suggest that ninety percent of the dead in modern conflicts are civilians, it is doubtful the ratio of combatant to civilian deaths is that high.[341] Nevertheless, it does appear that civilian deaths are significantly more numerous than combatant deaths in most modern conflicts.[342] Thus, the additional value provided by preventing combatant deaths may be relatively small compared to the value provided by preventing civilian deaths because there are significantly fewer combatant deaths.

This conclusion is complicated somewhat by plans for the ICC to assume jurisdiction over the crime of aggression in July 2018.[343] When this occurs, the ICC will have the authority to prosecute individuals for causing armed conflicts.[344] At that point, the goal of preventing violations of international criminal law will include the goal of preventing conflicts. The addition of aggression to the ICC's jurisdiction will have the effect of

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341. *See* Adam Roberts, *Lives and Statistics: Are 90% of War Victims Civilians?*, 52 SURVIVAL 115 (2010) (arguing that the ninety percent statistic is not supported by reliable data).

342. *See id.* at 126 (acknowledging that a number of recent conflicts in Africa appear to have had high civilian to combatant death ratios and that these conflicts may be "typical of the post-Cold War world"). *See also* Valerie Epps, *Civilian Casualties in Modern Warfare: The Death of the Collateral Damage Rule*, 41 GA. J. INT'L & COMP. L. 307, 329 (2013) ("Nonetheless, it seems more than fair to conclude that since the turn of the twentieth century, civilian deaths have outnumbered military deaths in nearly all wars.").

343. *See supra* note 318.

344. *See* Rome Statute, *supra* note 51, art. 8 *bis* ("'[A]ct of aggression' means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State . . . . Any of the following acts . . . shall . . . qualify as an act of aggression: The invasion or attack by the armed forces of a State of the territory of another State . . . .").

rendering the goal of preventing violations of international criminal law virtually co-extensive with the goal of maintaining international peace and security.

Leaving aside for now the effect of granting the ICC jurisdiction over aggression,[345] it appears the value of achieving the goal of maintaining and restoring peace and security has a modestly higher value than the goal of preventing violations of international criminal law. Given that prevention was given an extremely high value, achieving the goal of maintaining or restoring international peace and security will also be assigned an extremely high value. This means that this goal is extremely unlikely to occur but also extremely valuable when it does occur.

VI. A HIERARCHY OF THE GOALS OF INTERNATIONAL CRIMINAL COURTS

It is now possible to fill in the expected value matrix. The completed matrix is presented as *Table 2* below. It contains the likelihood that each goal will be achieved and the value that would occur if the goal was achieved. At some level, the results are not surprising. The goals that are easiest to achieve have low values, while some of the harder to achieve goals have higher values. In essence, there is no low-hanging fruit. The goals that are worth the most are not easy to achieve.

There is only one goal that international criminal courts are likely to achieve in most trials—retribution.[346] This is to be expected because assigning responsibility for violations of the law and punishing the guilty is fundamentally what courts are designed to do. Thus, it is not surprising that they are better at accomplishing this than their other goals, which are all less closely connected to the day-to-day work of courts. Unfortunately, the evidence indicates that states do not attach a particularly high value to this goal, and it seems unlikely that international criminal courts would continue to be created and funded if this was the only thing they accomplished. Therefore, retribution cannot be the principal goal of such courts, even though it is the most immediate result of the work of those courts.

345. *See supra* note 333 (noting that it may take a decade or more before any firm conclusions about the effect of granting the ICC jurisdiction over aggression can be drawn).

346. *See supra* Section V.A.

***Table 2*: Expected Value of Goals**					
Value if benefit occurs	Extremely High	*Maintaining or restoring peace*	*Preventing violations*		
	High				
	Moderate		*Ending impunity*		
	Low		*Closure for victims*	*Establishing a historical record* *Expressing condemnation* *Developing international law* *Fostering reconciliation*	*Retribution*
		Extremely Unlikely	Unlikely	Moderately Likely	Likely
		Likelihood of benefit occurring			

Next come four goals that courts are only moderately likely to achieve in any particular situation: 1) establishing an accurate historical record; 2) expressing condemnation of morally abhorrent conduct; 3) developing international criminal law; and 4) fostering post-conflict reconciliation. Each of them has been assigned a low value (even assuming they can be achieved). At first glance, this may seem surprising. Three of these goals, establishing the record, expressing condemnation, and fostering reconciliation, have been advocated as important goals of international criminal courts by at least some commentators.[347]

While it is true that these have been described as important

347. *See supra* text accompany notes 121, 163–164, 207–208. Developing international criminal law, on the other hand, has rarely been described as a principal goal of international courts. *See* sources cited *supra* note 189. Moreover, it is fairly clear that states are opposed to courts taking on this duty and would prefer to do the development themselves so that they can control its direction. See sources cited *supra* note 191. Assigning it a low value is probably not controversial.

goals of courts, it is more accurate to describe them as mechanisms by which other (more valuable) goals may be achieved. There is undoubtedly some intrinsic value in establishing what occurred, in expressing condemnation, and helping societies reconcile after conflict, but the value of these as ends in themselves is not high. Rather, these "goals" are usually advanced as a means to accomplish something else. Expressing condemnation is usually advocated as a means to establish global norms of conduct in the hope that this will prevent violations of international criminal law.[348] Similarly, establishing an accurate historical record is argued to be a means to foster post-conflict reconciliation,[349] which itself is often offered as a means to prevent future violations.[350] In short, these three "goals" are best thought of as mechanisms by which future violations of international criminal law may be prevented. As a result, they have low intrinsic value.

Next is ending impunity.[351] It seems unlikely that international criminal courts can end impunity. They cannot even end impunity for the senior leaders that they are designed to investigate and prosecute, and they are poorly positioned to end impunity for the vastly larger number of lower-ranking perpetrators who actually carry out the atrocities. Moreover, even if it could be achieved, this goal has only a moderate value. It is essentially retribution on a grander scale, but states have shown little interest in retribution as an end in itself. Rather, ending impunity is usually advocated as a means to prevent future violations.

Providing closure to victims has an even lower expected value than ending impunity.[352] First, international criminal courts are not able to provide closure for the vast majority of victims. International tribunals charge only a small subset of the crimes that have been committed in any given situation. Thus, most victims will be excluded from the court's work because the crimes that victimized them will not be prosecuted. Moreover, states' contributions to the Trust Fund for Victims suggest they place a low value on providing closure and redress for victims.

348. *See supra* Section V.D.
349. *See supra* Section V.B.
350. *See supra* Section V.F.
351. *See supra* Section V.G.
352. *See supra* Section V.C.

This leaves two goals to discuss: preventing violations and maintaining or restoring peace and security. While these goals are conceptually distinct, in practice, they are aimed at accomplishing something quite similar: both are aimed at minimizing the violence associated with conflict.[353] Maintaining or restoring peace and security has a slightly higher value than prevention when it occurs because it would prevent more harm, but it is also less likely to occur. As a result it has a lower expected value than prevention. Both goals, if they could be achieved, would prevent enormous harm from occurring.

Qualitative and theoretical assessments of whether courts can prevent violations have resulted in intense disagreements about whether this goal can be achieved.[354] Of all the goals discussed in this Article, however, only this one has been studied empirically. Perhaps surprisingly in light of the dispute in the theoretical literature, all of the empirical studies have found that the ICC reduced violations, sometimes by significant amounts. Given the enormous value of preventing violations, finding that the ICC does reduce violations means that this goal has a very high expected value.

Table 2 provides important information about the hierarchy of the goals of international criminal courts. Retribution should be higher in the hierarchy than establishing an accurate historical record, expressing condemnation of morally abhorrent conduct, developing international criminal law, or fostering post-conflict reconciliation because it has a similar value when achieved but is more likely to be achieved. Similarly, providing closure for victims should come behind all of these goals because it is even less likely to occur but has a similar value when it does occur. Preventing violations has a higher expected value than maintaining or restoring peace because they both have extremely high values when they occur but prevention is more likely to occur. Ending impunity has a higher expected value than providing closure to victims because it occurs at about the same rate but has a greater benefit when it does occur. By the same logic, it has less value than prevention because it has a much lower benefit when it does occur, even though it occurs at about the same rate.

This certainly helps explain the relationships between the goals, but it is not enough on its own to create a complete

353. *See supra* Section V.I.
354. *See supra* Section V.H.

hierarchy. The main problem is that *Table 2* does not dictate how to rank the expected value of retribution against prevention. Once the relationship between these two goals is established, the rest of the list falls into place.

There are several different arguments that lead to the conclusion that prevention should be highest in the hierarchy. First, retribution cannot be the principal purpose of international criminal courts because states assign it a low value, yet they continue to join and fund such courts.[355] This suggests that they believe courts achieve some other goal, but retribution has a higher expected value than most of the other candidates, including developing international criminal law, expressing condemnation, record-setting, post-conflict reconciliation, and providing closure. This only leaves three other possibilities: prevention, maintaining peace and security, and ending impunity. Prevention has the highest expected value of these three goals, which strongly suggests this is the real reason states join and support international tribunals. And indeed, the Rome Statute expressly identifies prevention as a key goal of the ICC.[356]

Second, it is striking that many of the "goals" of international criminal courts that have been advanced by scholars and commentators are better thought of as mechanisms to prevent violations. Expressing condemnation, establishing a historical record, fostering post-conflict reconciliation, and ending impunity have all been advanced as ways to prevent violations.[357] This implies that prevention is the most important goal of international criminal courts.

Third, while prevention is less likely to occur than retribution, it is not that much less likely. The empirical studies of prevention all suggest that the ICC has somewhere between a modest and a significant impact on the violence associated with mass atrocities. We do not know the exact likelihood that it will reduce violence because there have been a limited number of empirical studies of prevention and they do not agree on the size of the reduction, but a conservative assumption is that it is something like an order of magnitude less likely to occur than retribution.[358] Since expected value is the product of the

355. *See supra* Sections II and V.A.

356. *See supra* text accompanying note 259.

357. *See supra* Section V.H.

358. In fact, it may be considerably more likely to occur than this. At least

likelihood of occurrence and the benefit that would occur if the goal were achieved, then prevention will have more expected value than retribution if its benefit is greater than an order of magnitude larger than the benefit from retribution.[359] There is good reason to believe that the benefit that would be realized from prevention is several orders of magnitude greater than the benefit that would be realized from retribution.

Preventing the widespread violence associated with serious violations of international criminal law has a value that runs into the tens to hundreds of billion dollars of value per conflict.[360] And this is only the part of the value that can be easily measured—the direct economic costs of violence. There are also substantial intangible costs like the pain and suffering of the victims, which are hard to measure but are also avoided if violence is prevented. In contrast, the expected value of retribution is probably less than the annual budget of the ICC, which is about $130 million per year.[361] In other words, the benefits of prevention outweigh the benefits of retribution by several orders of magnitude. Thus, even though retribution is more likely to occur, it has a significantly lower expected value than prevention.

Finally, prevention's preeminence over retribution can be seen by imagining two different worlds. In the first world, serious violations of international criminal law occur, and international courts and domestic courts combine to fairly adjudicate those violations. The trials have the effect of providing appropriate retribution for all those responsible (thus leaving no impunity gap). They also establish an accurate historical record, provide an opportunity for closure to the victims, express condemnation of those same crimes, and foster post-conflict reconciliation. Finally, the court's decisions

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one study found a reduction in violence of nearly fifty perent under some circumstances. *See supra* text accompanying notes 287–288.

359. This assumes, as argued above, that prevention is at most an order of magnitude less likely to occur than retribution.

360. *See supra* Section V.H.

361. In 2016, the ICC had a budget of 139 million Euros. *See* Assembly of State Parties, Proposed Programme Budget for 2017 of the International Criminal Court, Doc. ICC-ASP/15/10, at Table 1 (Aug. 17, 2016). The exchange rate on Dec. 30, 2016, was 1.05 dollars per Euro. *See Foreign Exchange Rates – H.10*, BOARD OF GOVERNORS OF THE FED. RES. SYS., https://www.federal reserve.gov/releases/h10/hist/dat00_eu.htm (last visited Nov. 6, 2017). The ICC's budget was thus $132 million in 2016. *Id.*

contribute to the further development of international criminal law. This is a world in which essentially almost all of the hoped-for results of international tribunals except for prevention occur. In other words, except for preventing violations, this is close to the best-case scenario for such courts. This first world is an unlikely outcome,[362] but that is not the point.

Now imagine a second world which is identical to the first world except that the violations of international criminal law that were adjudicated in the first world did not take place because the work of an international court prevented them from occurring. None of the other consequences present in the first world would occur. There would be no trials, no assigning of responsibility, no establishment of the historical record, and no post-conflict reconciliation. There would be no closure for victims, no condemnation of the crimes, and no development of international law. There would, however, be prevention of the violations in the first place. This would undoubtedly be the better of the two worlds.

Serious violations of international criminal law cause massive harm. The victims suffer severe physical, psychological and economic harm, so do their friends, neighbors and co-workers. There are also enormous economic costs for society as a whole. Moreover, international courts can do little to mitigate the effects of violations. Their principal job is to determine whether the accused is guilty.[363] They have little authority to remedy the consequences of the accused's actions.[364] In this regard, the ICC is something of an outlier because it has a mandate to try to provide reparations to victims.[365] It is, however, essentially an unfunded mandate.[366] In theory, the ICC

362. *See Table 2* (noting that many of these goals are only moderately likely or unlikely to occur). *See also supra* text accompanying notes 67–71 (noting the tension between the various goals and the expected difficulty of achieving all of them).

363. *See supra* Section II.

364. *See* Adrian Giovanni, *The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?*, 2 J. INT'L L. & INT'L REL. 25, 26 (2005) (noting that the ICC was the first international court to be given the power to provide reparations to victims).

365. *Id. See also* Rome Statute, *supra* note 51, art. 75 (laying out the court's authority to order perpetrators to provide "restitution, compensation, and rehabilitation" to victims); *id.* art. 79 (establishing a trust fund for the benefit of victims).

366. *See* deGuzman, *supra* note 47, at 312 ("[T]he ICC does not have the resources or proximity to local populations to make significant direct contributions to restoring victims or communities that have suffered mass

can order convicted perpetrators to pay for reparations to their victims, but most defendants claim indigence.[367] Thus, whatever the theoretical benefits of reparations, they cannot hope to mitigate the economic costs of serious violations of international criminal law.[368] The available evidence suggests that trials are not particularly good at remedying the non-economic consequences of crime either.[369]

The resulting situation is one in which the costs of international criminal law violations are enormous both for society and for individuals within society, but the outputs that courts produce (trials) have little likelihood of ameliorating those harms after they have occurred. This suggests that prevention has a vastly higher actual value when it occurs than all of the other goals attributed to international tribunals put together. Or, to go back to our thought experiment, the world in which the crimes are never committed is a better world than the one in which they were committed but a court successfully adjudicated them, assigned responsibility, provided closure for victims, established the historical record, and fostered post-conflict reconciliation. As the old saying goes: an ounce of prevention is worth a pound of cure.[370]

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violence."); Van den Wyngaert, *supra* note 128, at 490–91 ("[T]he resources available for reparations will probably not allow the Court to meet the expectations of all victims. . . . Reparations for victims risk being more symbolic than real.").

367. *See* Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims' Reparations*, 29 T. JEFFERSON L. REV. 189, 195–197 (2007); Van den Wyngaert, *supra* note 128, at 490 ("[M[ost accused have arrived in the Court's Detention Centre penniless.").

368. *See* deGuzman, *supra* note 47, at 312 ("[T]he very limited amount of reparations the Court [ICC] can provide to a small number of victims hardly offers a convincing justification for its work."); Van den Wyngaert, *supra* note 128, at 490 ("[T]he Fund [Trust Fund] has very limited resources, by far insufficient to provide anything more than nominal sums to individual victims.").

369. *See* Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 SOC. JUST. RES. 313, 319 (2002) (finding that two-thirds of the crime victims in their study felt that the trial of the perpetrator had a negative impact on them). *See also* Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victims' Mental Health*, 23 J. TRAUMATIC STRESS 182 (2010) (reviewing research on whether criminal justice involvement is beneficial or detrimental for crime victims and finding the results to be mixed).

370. *Cf.* Daniel Kiel, *An Ounce of Prevention is Worth a Pound of Cure: Reframing the Debate About Law School Affirmative Action*, 88 DENV. L. REV. 791, 791 n.3 (2011) (attributing the saying "an ounce of prevention is worth a pound of cure" to Benjamin Franklin).

For these reasons, prevention has a significantly higher expected value than retribution. In fact, prevention has the highest expected value of any of the goals and goes first in the hierarchy. Maintaining and restoring international peace and security comes next, as it has only a slightly lower expected value than prevention.[371] Next is retribution. After retribution comes record-setting, post-conflict reconciliation, expressing condemnation, and developing international law. These four goals have approximately equal expected value and are thus tied for fourth place in the hierarchy.[372] Although there is some uncertainty about its proper placement,[373] ending impunity has also been placed amongst the goals tied for fourth place. Finally, providing closure for victims comes fifth.[374] The hierarchy is presented below in *Table 3*.

***Table 3*: Hierarchy of the Goals of International Criminal Courts**	
1.	Preventing violations of international criminal law
2.	Maintaining or restoring peace and security
3.	Retribution
4.	Establishing an accurate historical record Expressing condemnation of morally abhorrent conduct Fostering post-conflict reconciliation Developing international criminal law Ending impunity
5.	Providing closure for victims

VII. CONCLUSIONS

There are many goals that international criminal courts have been urged to achieve, but they do not have the resources to pursue them all simultaneously. Consequently, having a recognized hierarchy amongst them would help courts focus their limited resources where it matters most. But despite recognition that the lack of a hierarchy has hindered courts, until now, there have been no attempts to establish a formal

371. *See supra* Section V.I.

372. *See Table 2.*

373. Theoretically, ending impunity could also come before or after the goals that are tied for fourth place. Each of those placements would be consistent with its location in the expected value matrix. *See Table 2.*

374. *See Table 2.*

hierarchy amongst the goals of international criminal courts.

This Article is the first attempt to create a hierarchy of the goals of international criminal law. It is unlikely that it will be last word on this issue. Some scholars may disagree with the ordering of specific goals. Others may propose different methodologies for assessing the relative merits of the different goals. But it is clear that much can be learned from the process of trying to create such a hierarchy rather than simply considering each goal in isolation. If others will take up the question of how to assess the goals of international criminal courts, it may be possible to reach a consensus on the appropriate hierarchy. This would have enormous benefits for international courts as they could use this information to focus their limited resources where they will do the most good.

This Article has also identified an important distinction between goals and mechanisms that should be central to any later discussion of the goals of international criminal courts. Many of the goals that have been advocated by scholars turn out, upon closer inspection, to be mechanisms for the achievement of some other goal. This is understandable when one focuses on one goal at a time, but when all the goals are considered simultaneously, the distinction between a goal and a mechanism becomes very important. Once the goals that are primarily mechanisms for the achievement of some other more important goal (record-setting, post-conflict reconciliation, expressing condemnation, and ending impunity) are stripped away, we end up with five goals that appear to function largely as goals: retribution, developing international law, closure for victims, maintaining peace and security, and prevention.

Prevention is at the top of the hierarchy because it has both an extremely high value when it does occur and we now have good evidence that courts can prevent violations. This means that courts should make prevention their primary focus. Unfortunately, this does not tell us what courts should actually do; we do not yet know how courts prevent violations, although there are many theories.[375] The question of what mechanisms are best to prevent violations is an extremely important one and further work is necessary. Having provided evidence that international criminal courts can prevent violations, the next step for empiricists is to look at ways to test the various

375. *See supra* Section V.H (describing various theories about how international courts can prevent violations of international criminal law).

prevention mechanisms that have been advanced. If the mechanisms that best prevent violations can be identified, then courts will know how to achieve their primary goal. Still, knowing which goals are most important is a significant achievement. Before courts can decide how best to achieve their goals, they need to know which goals they should aim to achieve.

Some goals do not seem like good choices for courts to pursue. In particular, seeking closure for victims, despite its popularity with many civil society groups, seems to offer little in the way of expected value. Courts are unlikely to achieve closure for most victims and even when it is achieved, it probably has modest value for most victims. Yet, courts and civil society groups devote considerable resources to this goal. The results of this Article suggest that those resources would be better utilized elsewhere.

Instead, courts should focus on prevention as their primary goal.[376] We now know that courts can prevent at least some of the violence associated with international crimes and that prevention has enormous benefits for both individuals and societies. Accordingly, courts should devote their resources to preventing violations of international criminal law.

376. Maintaining or restoring peace comes in a close second. Currently, maintaining or restoring peace is conceptually distinct from preventing violations of international criminal law, but when the ICC begins to exercise its new jurisdiction over aggression the differences with prevention will mostly disappear. At that point, they will essentially be the same goal.