



UNC  
SCHOOL OF LAW

## NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

---

Volume 40 | Number 3

Article 3

---

Spring 2015

# Deterring War Crimes

Shai Dothan

Follow this and additional works at: <http://scholarship.law.unc.edu/ncilj>

---

### Recommended Citation

Shai Dothan, *Deterring War Crimes*, 40 N.C. J. INT'L L. & COM. REG. 739 (2014).

Available at: <http://scholarship.law.unc.edu/ncilj/vol40/iss3/3>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of International Law and Commercial Regulation by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact [law\\_repository@unc.edu](mailto:law_repository@unc.edu).

---

# Deterring War Crimes

## **Cover Page Footnote**

International Law; Commercial Law; Law

## DETECTING WAR CRIMES

*Shai Dothan*<sup>†</sup>

I.	Introduction .....	740
II.	The International Criminal Court .....	741
III.	The Rule That Promotes Better Deterrence .....	745
	A. The Theory.....	745
	B. The Effects of the Rule on a Wide Distribution of Officers .....	755
IV.	If the ICC Can Detect Sham Trials.....	759
V.	Normative Solutions .....	764
	A. Changing the Rome Statute In the Future.....	764
	B. Changing Doctrine by the ICC's Judgments .....	765
	C. A Two Tiered Treaty System.....	767
	D. Using Judicial Discretion to Distinguish Between States .....	769
VI.	Conclusion.....	770

---

† Senior Researcher, Tel Aviv University, at the Global Trust Research Project Directed by Professor Eyal Benvenisti and Funded by an ERC Advanced Grant. Adjunct Professor, Hebrew University of Jerusalem Faculty of Law. PhD, LLM, LLB, Tel Aviv University Faculty of Law. I wish to thank Kai Ambos, Patrick Barry, Eyal Benvenisti, Lisa Bernstein, Iris Canor, Jianlin Chen, Rishad Chowdhury, Olga Frishman, Michael D. Gilbert, Tom Ginsburg, Alon Harel, Simon Hentrei, William Hubbard, Guy Hyman, Neli Ilcheva, Adi Leibovitch, James T. Lindgren, Barak Medina, Tal Mimran, Robin Mordfin, Gilad Noam, Ariel Porat, Moran Sadeh, Yuval Shany, Yahli Shereshevsky and Uri Weiss for many helpful conversations and comments. I thank seminar participants at the Hebrew University Law School, the Bar-Ilan University Law School, the Second Annual Workshop on International and Comparative Law at Washington University School of Law, the Workshop "The Exercise of Public Authority by International Institutions" at Tel Aviv University Faculty of Law, the European Association of Law and Economics 2012 annual meeting, the Canadian Law and Economics Association 2012 annual meeting, the Midwestern Law and Economics Association 2012 annual meeting, the University of Chicago Legal Scholarship Workshop, the Northwestern University Legal Scholarship Workshop, and the Israeli Law and Economics Association 2012 annual meeting. I gratefully acknowledge the financial support of the Research Group on Effective International Adjudication directed by Professor Yuval Shany and funded by a European Research Council Starting Grant for Frontier Research.

## I. Introduction

The International Criminal Court (ICC) was created by the Rome Statute<sup>1</sup> to prosecute and adjudicate alleged violations of the Statute, such as war crimes and crimes against humanity.<sup>2</sup> The ICC applies a jurisdictional rule known as the rule of complementarity.<sup>3</sup> Under this rule, the ICC may not prosecute a case that is prosecuted by a state.<sup>4</sup> This jurisdictional rule is a marked departure from that of other international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), that have adopted a so-called rule of primacy that enables them to prosecute cases even if they are investigated or prosecuted by a state.<sup>5</sup> Complementarity was adopted because the drafters of the statute thought that it would create better incentives for states to prosecute crimes in their own national courts and thereby increase deterrence.<sup>6</sup> Complementarity, however, allows states to prevent prosecution in the ICC by trying their officers in sham trials that may lead to false acquittals or light sentences, decreasing the deterrent impact of the rule.<sup>7</sup> Although the Rome Statute allows the ICC to expose trials as shams and apply its jurisdiction, doing so is often impossible.<sup>8</sup> This paper evaluates the impact of complementarity on deterring war crimes committed by a country's army officers. It suggests that deterrence is driven not only by the proportion of rule-of-law states and corrupt states, as the prior literature suggested, but also, and even more importantly, by the likelihood that the ICC itself

---

<sup>1</sup> Rome Statute of the International Criminal Court, art. 1, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>2</sup> *Id.* at arts. 4–8.

<sup>3</sup> Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AMER. J. INT'L L. 394, 405 (1999).

<sup>4</sup> *Id.* at 405.

<sup>5</sup> *See id.* at 405.

<sup>6</sup> *See id.*

<sup>7</sup> *See* Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* 53–55 (2008).

<sup>8</sup> *See* Rome Statute, *supra* note 1, at art. 17; *see also* Mark S. Ellis, *The International Criminal Court and its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 237 (2002) (describing the criteria that goes into determining the admissibility of a case).

will prosecute officers.<sup>9</sup> The theory is simple: when the probability of prosecution by the ICC is too low to deter officers, officers in rule-of-law states would be deterred only when the state has an incentive to prosecute its officers under a complementarity system. Officers in corrupt states would not be deterred under complementarity or under primacy because the rule of complementarity's objective—namely, inducing states to take responsibility for the prosecution of war crimes—would be defeated by the corrupt states' use of sham trials. In contrast, when the probability of prosecution is sufficiently high, officers in rule-of-law states will be deterred both under complementarity and under primacy because their states will prosecute them legitimately, and they can expect a high probability of prosecution by the ICC. Officers in corrupt states will be deterred only under primacy, which prevents their states from shielding them from ICC prosecution via sham trials. This suggests that, if (as the drafters of the Rome Statute envisioned) the probability of ICC prosecution increases over time, the probability of prosecution could reach a point where primacy will better deter officers from committing war crimes than complementarity.

Part II briefly describes the ICC and the Rome Statute. Part III discusses the conditions under which complementarity can lead to better deterrence than primacy. Part IV analyzes the preferable rule conditioned on the ICC's ability or inability to detect sham trials. Part V suggests different normative solutions intended to maximize deterrence. Part VI concludes.

## II. The International Criminal Court

The ICC is an independent, permanent, treaty-based, international court located at The Hague in the Netherlands.<sup>10</sup> It began operating on July 1, 2002,<sup>11</sup> and is the first permanent

---

<sup>9</sup> See Dunoff & Trachtman, *supra* note 3, at 404–05.

<sup>10</sup> Although the ICC cooperates with the United Nations, it is an independent judicial institution. See International Criminal Court Assembly of State Parties Res. 1, Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 3d Sess., at arts. 2–3 (Oct. 4, 2010), available at [http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf).

<sup>11</sup> The Rome Statute was adopted by 120 states in July 1998 and was entered into force on July 1, 2002, after its ratification by 60 states. See *About the Court*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/Pages/default.aspx](http://www.icc-cpi.int/en_menus/icc/Pages/default.aspx) (follow "About the Court")

international court to have jurisdiction to prosecute individuals who have engaged in the most severe international crimes, including genocide, crimes against humanity, and war crimes.<sup>12</sup> Today, 122 states are parties to the Rome Statute (state parties).<sup>13</sup> These include highly developed western democracies, as well as developing states.<sup>14</sup> The ICC may exercise jurisdiction over crimes that were allegedly committed in the territory, or by a national of a state party.<sup>15</sup> It can also exercise jurisdiction over crimes committed in a non-party state if that state accepted its jurisdiction regarding a specific situation, or if the Security Council refers the situation to it.<sup>16</sup>

The ICC's independent prosecutor may initiate investigations on her own accord.<sup>17</sup> In addition, state parties and the Security

---

hyperlink) (last visited Oct. 15, 2014). Additionally, the ICC may only prosecute crimes committed after the Rome Statute entered into force. See Rome Statute, *supra* note 1, at arts. 11, 24.

<sup>12</sup> The crimes under the ICC's jurisdiction are listed in Article 5 of the Rome Statute. It states that the ICC's jurisdiction "shall be limited to the most serious crimes of concern to the international community as a whole." Rome Statute, *supra* note 1, at art. 5(1). The court has jurisdiction over the four following crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. *Id.*, at art. 5(1)(a)–(d). The first three crimes are defined under Articles 6–8. Article 5, however, states that the court will only exercise jurisdiction over the crime of aggression once a provision defining aggression and setting the conditions for its prosecution is adopted in an amendment to the Statute. *Id.* at art. 5(2). On June 11, 2010, Resolution RC/Res.6 was adopted by a plenary meeting, which adopted a definition of the crime of aggression. The ICC will be able to exercise jurisdiction over this crime only if (1) thirty states accept the amendment and (2) the state parties decide to amend the Rome Statute after January 1, 2017, in the regular amendment process, which requires a two thirds majority of state parties. *Id.* at art. 121; see Amendments to the Rome Statute of the International Criminal Court, Res. RC/Res.6, Jun. 11, 2010, available at, <https://treaties.un.org/doc/Publication/CN/2010/CN.651.2010-Eng.pdf>.

<sup>13</sup> See *The States Parties to the Rome Statute*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/asp/Pages/asp\\_home.aspx](http://www.icc-cpi.int/en_menus/asp/Pages/asp_home.aspx) (follow "State Parties to the Rome Statute" hyperlink) (last visited Oct. 15, 2014).

<sup>14</sup> See *id.* Several states signed the Rome Statute but did not ratify it and are thus not state parties to the Statute. Notably, the United States signed the treaty but communicated its intention not to ratify the treaty and not to become a state party. See also Rome Statute, *supra* note 1, at *Declarations and Reservations* (containing the various objections made by signatories).

<sup>15</sup> Rome Statute, *supra* note 1, at art. 12.

<sup>16</sup> *Id.* at arts. 12–13.

<sup>17</sup> *Id.* at art. 15.

Council may refer situations to the prosecutor for investigation.<sup>18</sup> When the prosecutor determines that there is a reasonable basis to proceed with the investigation, she must seek authorization to continue from a pre-trial chamber of the ICC.<sup>19</sup> The pre-trial chamber has the authority to issue arrest warrants and pre-trial summons.<sup>20</sup> After the accused appears before the ICC, the pre-trial chamber holds a hearing to confirm the charges against him; a similar hearing can be held in the absence of the accused if he fled or waived his right to be present.<sup>21</sup> Once the charges are confirmed, a trial is held in front of a three-judge trial chamber that decides whether to convict or acquit.<sup>22</sup> Although trial chambers are encouraged to attempt to reach unanimous decisions, a simple majority can reach a binding verdict.<sup>23</sup> If a person is convicted, he may be subject to a penalty of up to thirty years imprisonment or a penalty of life imprisonment, if justified by the extreme gravity of the crime and the individual circumstances.<sup>24</sup> The prosecutor and the convicted individual each have the right to appeal the judgment to an appeals chamber composed of the

---

<sup>18</sup> *Id.* at arts. 13–15. The prosecutor can be informed of crimes by communications. See *Preliminary Examinations*, INT’L CRIM. CT., [http://www.icc-cpi.int/EN\\_Menus/ICC/Pages/default.aspx](http://www.icc-cpi.int/EN_Menus/ICC/Pages/default.aspx) (follow “Structure of the Court” hyperlink; then follow “Office of the Prosecutor” hyperlink; then follow “Preliminary Examinations” hyperlink) (last visited Oct. 15, 2014). Thousands of such communications were submitted with a majority of those communications coming from individuals in the US, UK, Germany, Russia and France. *Id.* When the prosecutor receives a communication, she shall not initiate an investigation unless she finds a reasonable basis to proceed. *Id.* When the prosecutor receives a referral, she shall initiate a prosecution unless she finds no reasonable basis to proceed according to article 53 to the Rome Statute. *Id.* Therefore the default procedure is different depending on whether there is a communication or a referral. *Id.*

<sup>19</sup> Rome Statute, *supra* note 1, at art. 15(3)–(4).

<sup>20</sup> *Id.* at art. 58.

<sup>21</sup> *Id.* at art. 61.

<sup>22</sup> *Id.* at art. 39.

<sup>23</sup> The court will issue a reasoned, written single decision, in case there is no unanimity the decision will contain the views of the majority and the minority. See *id.* at art. 74.

<sup>24</sup> *Id.* at art. 77, para. 1. According to Article 77, paragraph 2 of the Rome Statute, the court can order, in addition to imprisonment, a fine or a forfeiture of assets derived from the crime. Rome Statute, *supra* note 1, at art. 77, para. 2. According to the Rome Statute, when the person has served two thirds of the sentence, or 25 years in the case of life imprisonment, the court shall review the sentence, and may decide to reduce it due to the cooperation of the person with the court or a clear and significant change of circumstances. *Id.* at art. 110.

president of the ICC and four other members of the appeals division.<sup>25</sup>

Many procedures were put in place to ensure the independence of the prosecutor and the judges in the ICC from pressures of state parties.<sup>26</sup> So far, the ICC has convicted only two people,<sup>27</sup> has

---

<sup>25</sup> *Id. supra* note 1, at arts. 39, 81-85.

<sup>26</sup> For instance, no two judges may be nationals of the same state. *Id.* at art. 36, para. 7. Also, the judges should represent the main legal systems of the world and afford an equitable geographic representation. Rome Statute, *supra* note 1, at art. 36, para. 8. The judges are independent and may not engage in any activity that can jeopardize their independence. *Id.* at art. 40. There shall be eighteen judges in the ICC, unless the assembly of state parties decides to increase this number. *Id.* at art. 36, para. 1. The judges are elected by a secret ballot at a meeting of the assembly of state parties. *Id.* at art. 36, para. 6(a). The judges elected will be those that receive most of the votes and at least two thirds of the votes of state parties that voted. *Id.* For each election, every state can submit a candidate, who must be a national of a state party, although not necessarily of that state. *Id.* at art. 36, para. 4(b). Besides the first election or judges elected to fill a vacancy, judges shall hold office for nine years and are not eligible for re-election. *Id.* at art. 36, para. 9(b). The prosecutor shall be elected by secret ballot by an absolute majority of the members of the assembly of state parties. *Id.* at art. 42, para. 4. A deputy prosecutor shall be elected in a similar way from a list of three candidates submitted by the prosecutor. Rome Statute, *supra* note 1, at art. 42, para. 4. Unless elected for a shorter time, the prosecutor and deputy prosecutor shall hold office for nine years and shall not be eligible for re-election. *Id.* The prosecutor and the deputy prosecutor shall not engage in any activity that might jeopardize their independence and will be disqualified from addressing any case in the court where their impartiality may be doubted. *Id.* at art. 42, para. 7. The ICC is funded by contributions from the State Parties, the amounts of which are assessed according to an agreed upon scale, similar to the one used by the United Nations for its regular budget, with the necessary adjustments. *Id.* at art. 115(a). It can also receive funds from the United Nations, if they are approved by the General Assembly, particularly due to expenses incurred due to referrals from the Security Council. *Id.* at art. 115(b). The ICC can also obtain voluntary contributions from different entities such as governments, international organizations, individuals or corporations. *Id.* at art. 116. Christian Wenaweser, the president of the Assembly of State Parties of the International Criminal Court, claimed in an interview that despite the high costs of investigations generated by referrals from the Security Council, the State Parties of the ICC currently bear the entire financial burden for these situations. See José Domingo Guariglia, *Q&A: Budget Woes Could Hamper ICC Investigations*, INTERPRESS SERVICE (Jul. 25, 2011), <http://www.ipsnews.net/2011/07/qa-budget-woes-could-hamper-icc-investigations/>. The ten State Parties that are the largest contributors to the ICC's budget are: Japan, Germany, the United Kingdom, France, Italy, Canada, Spain, Mexico, the Republic of Korea and Australia. See *id.* The ICC's budget for the year 2011 was 103,607,900 Euro. See I.C.C. Res. ICC-ASP/9/Res.4, available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-9-Res.4-ENG.pdf).

<sup>27</sup> The only two persons convicted were Thomas Lubanga Dyilo and Germain Katanga. Lubanga was convicted on March 14, 2012, for committing the war crimes of conscripting and enlisting children under the age of 15 and using them to participate

summoned or issued arrest warrants against thirty-six people,<sup>28</sup> and has investigated only eight situations, all of them in African countries.<sup>29</sup> Therefore, it is difficult to reach firm conclusions about the nature of the ICC's decision making and its deterrent effect, based on its short history. However, it is possible to theorize about the deterrent effects of different jurisdictional rules based on standard assumptions about the incentives of states and army officers, as this paper does.

### III. The Rule That Promotes Better Deterrence

#### A. The Theory

Before the deterrent effects of complementarity and primacy are analyzed, it is useful to highlight their differences. Under complementarity, an international court may not prosecute an officer if 1) he is currently being investigated or prosecuted legitimately by a state, 2) the state decided not to prosecute after it legitimately investigated him,<sup>30</sup> or 3) a national court decided the case legitimately.<sup>31</sup> If, however, the state did not investigate the

actively in hostilities. On July 10, 2012, Lubanga was sentenced to fourteen years of imprisonment. See *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, (Mar. 14, 2012), [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx). On March 7, 2014, Katanga was convicted of a crime against humanity and four counts of war crimes committed during an attack on a village, and he was sentenced to 12 years of imprisonment on May 23, 2014. See *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07 (Mar. 7, 2014), [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200107/Pages/democratic%20republic%20of%20the%20congo.aspx).

<sup>28</sup> See *All Cases*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx/](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/cases/Pages/cases%20index.aspx/) (last visited Aug. 10, 2014).

<sup>29</sup> Four investigations were initiated by self-referrals, situations in which the state invited the court to prosecute crimes committed in its own territory, specifically, Uganda, the Democratic Republic of Congo, the Central African Republic and Mali. See *Situations and Cases*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/pages/situations%20and%20cases.aspx) (last visited Aug. 10, 2014). Two were initiated by Security Council referrals in Darfur, Sudan and in Libyan Arab Jamahiriya. See *id.* Investigation into the situation in Kenya was initiated by the prosecutor of the ICC himself. See *id.* The prosecutor opened an investigation into the situation in Côte d'Ivoire following an acceptance of jurisdiction by this state that is not a party to the Rome Statute. See *id.*

<sup>30</sup> Rome Statute, *supra* note 1, at art. 17(a-b).

<sup>31</sup> *Id.* at art. 20, para. 3 (stating that the ICC may not hear a case that was decided

officer at all, or if it conducted a sham investigation, prosecution or trial, the ICC may prosecute the officer.<sup>32</sup> Under primacy, an international court has the authority to formally request that the state defer to its own jurisdiction if an officer is being investigated or prosecuted by the state, even if the national court is trying him.<sup>33</sup> Furthermore, the international court is prohibited from prosecuting the officer only if a state held a legitimate trial.<sup>34</sup>

---

by another court in an independent and impartial trial that was not calculated to prevent the decision from reaching the ICC).

<sup>32</sup> The ICC may declare that an investigation, prosecution, or trial was a sham if it finds the state unwilling or unable to prosecute the suspected officer. The ICC will deem a state unwilling to prosecute if the state's actions were meant to shield the officer from ICC jurisdiction, if there has been an unjustified delay in the proceedings, or if the proceedings were not conducted independently and impartially in a way intended to bring the officer to justice. The ICC will find a state unable to carry out the prosecution, if it does not have a judicial system that is able to legitimately adjudicate. *Id.* at art. 17; see also Mark S. Ellis, *The International Criminal Court and its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 235-39 (2002) (defining "inability" or "unwillingness to prosecute" and analyzing the ways to determine them).

<sup>33</sup> See International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 9 (Sept. 2009), [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf) [hereinafter ICTY Statute]. Even if a rule of primacy is adopted, the ICC prosecutor may theoretically be more likely to prosecute cases that did not lead to national proceedings in order to prevent violations from being completely ignored. On the other hand, the prosecutor may theoretically be more likely to intervene if national proceedings started, since those proceedings expose information that makes it easier for the ICC to prosecute it. Neither of these conflicting possibilities will not be discussed in this paper.

<sup>34</sup> According the ICTY Statute, the ICTY will prosecute a person after a trial by the national court was completed only if the act of which he was accused was characterized as an ordinary crime (as opposed to an international crime), if the national proceedings were not impartial or independent, designed to shield the accused from international criminal responsibility, or if the case was not diligently prosecuted. *See id.* at art.10, para. 2. If it decides to exercise jurisdiction, the ICTY will take into account penalties that were served for the same crimes following the national court decision. *See id.* at art. 10, para. 3. The Rome Statute, by comparison, does not demand that the person would be convicted of an international crime, and not of an ordinary crime, in order to prevent the ICC from hearing the case. *See Rome Statute, supra* note 1, at art. 20, para. 3. Heller shows that previous drafts of the Rome Statute included a provision that allowed the ICC to exercise jurisdiction if the crime that was decided by the national court was an ordinary crime, but the final version of the Rome Statute does not include such a provision. *See Kevin Jon Heller, A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 85, 93 (2012). Heller also shows that prosecuting crimes as international crimes is particularly difficult, especially for developing states, because of

It is possible to examine which jurisdictional rule, complementarity or primacy, better deters officers of states under the ICC's jurisdiction from committing crimes contrary to the Rome Statute.<sup>35</sup> States under the ICC's jurisdiction may be involved in wars or armed conflicts. In some cases, officers of the state may commit crimes contrary to the Rome Statute in an effort to either reduce the risk to themselves or their soldiers, or to increase the likelihood of fulfilling their military objectives.<sup>36</sup> Such crimes may include: willful killing, torture, and taking of hostages.<sup>37</sup>

It may be politically difficult for the state to prosecute officers who commit war crimes, since such prosecution may damage the morale of the domestic public and generate public opposition. On the other hand, the state may benefit from prosecuting its officers, as such prosecution can potentially improve military discipline,

---

the need to legislate incorporating legislation. *Id.* at 94-95. It is also difficult because international crimes are harder to prove and to investigate. *Id.* at 100-03. The requirement of conviction as an international crime therefore presents another significant obstacle to preventing admissibility to the ICTY. Heller recommends that judgments of national courts should prevent prosecution in the ICC if their sentence is as severe as the expected sentence in the ICC. If the person is not tried for the same conduct, this may raise problems with the rules set in Article 20(3) to the Rome Statute. Heller suggests that as a matter of policy even such a national sentence should delay the surrender of persons to the ICC until they served their national sentence. *See id.* at 130.

<sup>35</sup> Deterrence is a primary objective of constructing the ICC. *See* THE INTERNATIONAL COURT: CHALLENGES TO ACHIEVING JUSTICE AND ACCOUNTABILITY IN THE 21ST CENTURY 13 (Mark S. Ellis & Richard J. Goldstone eds. 2008). There are serious doubts, however, about the ability of international tribunals to deter crimes, and many believe that deterrence works only in the very long term. *See* Frederic Megret, *Why Would States Want to Join the ICC? A Theoretical Exploration Based on the Legal Nature of Complementarity*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY 1, 19 n.18 (Jann K. Kleffner & Gerben Kor eds., 2006); *see also* Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777, 783 (2006) (arguing that under some conditions prosecutions by international criminal tribunals can fail to deter criminals and may actually lead to the commission of more severe crimes). There may be other purposes of the ICC that are not discussed in this paper. Those purposes may include: a just retribution of criminals, an expressive educational function, and improving international cooperation. This paper only investigates the rule that maximizes deterrence generally and does not consider the importance of deterring specific kinds of crimes more than others.

<sup>36</sup> *See, e.g., Katanga*, Case. No. ICC-01/04-01/07 (prosecuting Katanga for carrying out military objectives by leading a resistance force to attack civilian populations).

<sup>37</sup> Such war crimes are forbidden. Rome Statute, *supra* note 1, at art. 8.

promote the chances of peace and increase the legitimacy of the state in world public opinion. In some cases, the benefits to the state from prosecuting a crime that was already committed outweigh the costs, regardless of the possibility of ICC prosecution. In those cases, the state would prosecute the crimes regardless of the jurisdictional rule adopted by the ICC. In other cases, the costs of prosecuting a crime that was already committed outweigh the benefits. In those cases, the jurisdictional rule adopted by the ICC may affect the decision of the state whether to prosecute, and consequently, whether the state's officers are deterred.<sup>38</sup>

It is useful to divide the states under the ICC's jurisdiction to two types: rule of law states and corrupt states.<sup>39</sup> Rule of law

---

<sup>38</sup> The state may not want to deter some of the crimes that it has an interest in not prosecuting once they were committed. Those crimes may actually aid the state in achieving its military objectives. If such crimes are deterred by the ICC, this damages the state's interest, which may indicate the state received some other benefit that gave it the incentive to join the ICC in the first place. Some of the crimes that the state has an interest in not prosecuting once they are committed, however, are crimes the state wants to deter. The state would be better off if the crimes were not committed in the first place, because the crime damages the state's international reputation or the chances for peace. Some states cannot commit by themselves to prosecuting this type of crimes because once the crimes were committed the state has an interest not to prosecute them. Such states can use the ICC as a mechanism of commitment, of tying their own hands. The ICC can give the state an incentive to prosecute the crime even after it was committed, in order to avoid a decision by the ICC that can damage its reputation. Because the ICC commits the state to prosecute the crime officers will be deterred from committing this crime in the first place and thus serve the state's interest. See Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 *Int'l Org.* 225, 234 (2010) (arguing that states join the ICC in order to commit credibly not to use atrocities in civil wars; this commitment signals the government's decision not to use unlimited violence and may result in a reduction of violence by opponents of the government); Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 *Chi. J. Int'l L.* 499, 506 (2009). (claiming that the findings of Simmons and Danner that the ICC is joined primarily by autocracies that are involved in wars and by peaceful democracies can also be explained by the fact that states join the ICC in order to ensure prosecution of rebels or opponents and not only as an attempt of the state to tie the hands of its own officers; the principle of complementarity allows the state a way to avoid prosecution by the ICC, which reduces the threat on government officials, and makes the argument that the ICC is meant especially to deter rebels more likely).

<sup>39</sup> Simmons and Danner define democracies as rule of law states that are committed both to a legitimate trial and investigation when an investigation is initiated, and to the investigation of every crime. See Simmons & Danner, *supra* note 38, at 238. In these democracies, internal measures of accountability prevent all crimes regardless of the ICC. See *id.* They define nondemocracies as either corrupt states or rule of law states that need the ICC to commit to domestically investigate crimes. They show that both

states have well-functioning judicial systems. If their police and prosecution investigate an officer, they will usually investigate and prosecute him legitimately and their national courts will usually conduct legitimate trials.<sup>40</sup> In those rule of law states that investigate every crime committed by their officers, the ICC's jurisdictional rule will not affect deterrence since officers will always be deterred by the threat of national prosecution. In those rule of law states where the executive may decide not to initiate an investigation at all into a crime that was committed by the state's officers, the ICC's jurisdictional rule may affect the executive's decision whether to investigate or not. In corrupt states, the judiciary may depend on the executive in ways that compromise its impartiality.<sup>41</sup> Political pressures can compel the judiciary to conduct sham trials to suit varying political interests.<sup>42</sup> If an officer is subject to a sham trial, the trial may be unnecessarily delayed, the officer may be falsely acquitted, or he may receive a very light sentence.<sup>43</sup> In those instances, the officer will not be deterred from committing the crime.

Complementarity gives states an incentive to investigate their own officers.<sup>44</sup> This incentive arises because if a state does not investigate its officers, then the ICC may assume jurisdiction and prosecute the officers, which will damage the state's reputation.<sup>45</sup> If the state investigates its officers, the ICC will not be able to

---

democracies with no recent history of civil war and nondemocracies, with recent civil war experiences have increased chances of joining the ICC. *See id.* at 240. This suggests that both types of states discussed in this paper (rule of law states and corrupt states) are currently under the ICC jurisdiction.

<sup>40</sup> Even rule of law states may conduct sham investigations, prosecutions or trials in some rare cases. The likelihood of sham proceedings in rule of law states is small enough, however, that if an officer knows he will be investigated this will deter him from committing the crime. Corrupt states may sometimes conduct legitimate trials but the likelihood that their trials will be a sham is so high that officers will not be deterred even if they know their state will investigate them.

<sup>41</sup> *See* Simmons & Danner, *supra* note 38, at 237.

<sup>42</sup> *See* Kleffner, *supra* note 7, at 54

<sup>43</sup> *See id.* at 48–55.

<sup>44</sup> *See id.* at 320 (arguing that under complementarity, as opposed to primacy, the ICC must find that the state is unable or unwilling to prosecute its officers before it exercises jurisdiction and that a declaration of unwillingness to prosecute may have an added negative reputational effect on the state, besides the finding of violation itself which gives the state an additional incentive to prosecute under complementarity).

<sup>45</sup> *Id.*

assume jurisdiction unless it proves that the investigation was a sham.<sup>46</sup> Under complementarity, rule of law states will therefore investigate their officers. Rule of law states that begin an investigation of their officers will conduct a legitimate investigation and prosecution. A national court will try the officers and will issue appropriate punishments. Officers will therefore be deterred from committing crimes.<sup>47</sup> Even if the officer is not investigated, prosecuted, or tried by his own state, he may still face prosecution by the ICC.<sup>48</sup> Under primacy, however, the state may lack an incentive to investigate or prosecute its own officers because these actions will not prevent prosecution by the ICC.<sup>49</sup> Thus, only the prospect of prosecution by the ICC can deter officers, and if the probability of prosecution by the ICC is too low, those officers will not be deterred.<sup>50</sup> Therefore, in rule of

---

<sup>46</sup> See Ellis, *supra* note 32.

<sup>47</sup> This analysis applies if the state is able to prosecute every officer that it has an interest in prosecuting, unlike the ICC that is able to prosecute only a limited number of officers. This is usually true because the state has better information and better resources to address crimes committed by its own nationals than the ICC.

<sup>48</sup> Once the ICC starts to investigate a situation, only an investigation by the state of the same person regarding the same conduct can prevent the ICC from prosecuting him. See *infra* note 57. The probability of prosecution by the ICC may actually be higher under complementarity, since this rule gives all states an incentive to prosecute their own officers and thus frees resources for the ICC which can increase the probability of prosecution elsewhere.

<sup>49</sup> Even under primacy, if a trial is concluded for an international crime, this will prevent the ICC from assuming jurisdiction over the case. See Heller, *supra* note 35. This may theoretically give states an interest to conclude the trial more quickly under primacy. This possibility is not discussed here since it will be much more difficult to conclude a trial, especially for an international crime, before the ICC can assume jurisdiction compared to starting an investigation or prosecution that is enough to prevent ICC prosecution under complementarity. If a state can consider the behavior of future officers and change its behavior accordingly, by credibly committing to prosecute officers even when it goes against its interest to do so, this analysis may change. Under these conditions, situations may occur when a state may actually have a greater incentive to prosecute under primacy in order to deter future officers from committing crimes because under primacy, future officers that commit crimes will be prosecuted by the ICC and the state will not be able to prevent this by prosecuting them itself, as it can do under complementarity.

<sup>50</sup> In theory, officers may face a trial by foreign courts under Universal Jurisdiction. Universal Jurisdiction allows any state to prosecute the core international crimes such as crimes against humanity and war crimes, even without any territorial or national link of the state to the crime itself. See Maximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AM. J. INT'L L. 1, 1 (2011). Many crimes that can be prosecuted under

law states, complementarity leads to either better, or equal, deterrence compared with primacy.

In corrupt states, complementarity gives the state an incentive to prosecute its officers, but officers may be tried in sham trials, and will therefore not be deterred. Sham trials will shield the officers from the ICC and prevent the ICC from deterring the officers. The ICC is theoretically allowed to expose national trials as shams and to exercise jurisdiction despite those trials.<sup>51</sup> If sham trials can always be exposed, complementarity clearly deters more officers since no state will use sham trials. In practice, however, it is often impossible to expose sham trials, both because the ICC will need to acquire hidden information to prove the trial is a sham and because exposing the trial as a sham brands the state as a cheater and may lead to harsh resistance to the ICC.<sup>52</sup> This

---

Universal Jurisdiction are also covered by the ICC's jurisdiction. Prosecution of foreign nationals under Universal Jurisdiction, however, was shown to be very unlikely when the state of nationality opposes it. *See id.* at 9. Langer shows that most of the defendants tried under Universal Jurisdiction were not defended by their state of nationality, and the international community broadly agreed to their prosecution. *See id.* Of the thirty-two defendants brought to trial under Universal Jurisdiction worldwide, twenty-four have been from Rwanda, former Yugoslavia, and Nazi Germany. *See id.* Even officers whose prosecution would not raise political resistance by their states are very unlikely to face conviction and severe punishment by the tool of Universal Jurisdiction. *See id.* at 47–48. They will, therefore, probably not be deterred by the prospect of such prosecution. *See id.* According to Article 20(2) to the Rome Statute, no person shall be tried by another court for a crime for which he was acquitted or convicted by the ICC. Rome Statute, *supra* note 1, at art. 20(2). Similarly, according to Article 10(1) of the ICTY Statute, a national court cannot retry a person tried by the ICTY. Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 10(1), U.N. SCOR, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY]. Therefore, a trial before the ICC can theoretically prevent a trial before another court under Universal Jurisdiction. Supporters of the ICC raised the argument that joining its jurisdiction should not be feared because prosecution by the ICC may actually prove preferable to prosecution by a foreign court under Universal Jurisdiction. *See Is a UN International Criminal Court in the US National Interest?: Hearing before the Subcomm. on International Operations of the Committee on Foreign Relations*, 105th Cong. 76–79 (1998) (statement submitted by Richard Dicker of Human Rights Watch). As Universal Jurisdiction trials are very unlikely, this fact will also probably not affect the behavior of states and their officers.

<sup>51</sup> *See* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 9, *supra* note 32.

<sup>52</sup> *See* ICC, Office of the Prosecutor, *Informal Expert Paper: The Principle of Complementarity in Practice*, at 14, ICC Doc. ICC-01/04-01/07-1008-AnxA (Mar. 30, 2003).

article's analysis thus proceeds on the assumption that sham trials cannot regularly be exposed. Later in part IV other assumptions are explored. Under primacy, the state may lack an incentive to investigate or prosecute its officers and even if it does investigate or prosecute, the ICC will still be able to assume jurisdiction. The officers in the state may be deterred by the possibility of prosecution by the ICC if it is likely enough. In corrupt states, primacy therefore leads to either better or equal deterrence compared with complementarity.

The analysis above suggests that complementarity leads to better deterrence in rule of law states and primacy leads to better deterrence in corrupt states.<sup>53</sup> Under the ICC's jurisdiction, however, there are both rule of law states and corrupt states, and the same jurisdictional rule applies to both types of states.<sup>54</sup>

Consideration of the probability of prosecution by the ICC, however, would lead to a better rule. The probability of prosecution of guilty officers by the ICC is limited, because the resources of the ICC are finite.<sup>55</sup> However, the paper starts from the assumption that the ICC is unlikely to convict innocent officers, either maliciously or by mistake. This article assumes that officers are rational actors and would commit crimes only if the probability of conviction multiplied by the punishment is higher than the utility gained from the crime.<sup>56</sup> All officers are assumed to gain the same utility from committing crimes such that a low probability of prosecution by the ICC would not be enough to deter them, but a high probability of prosecution would be a sufficient deterrent. This article asserts that even a low probability of prosecution by the ICC is enough to make a state investigate its officers under complementarity, because that state could prosecute its officer at a relatively low cost and avoid prosecution by the ICC, which would cause the state significant reputational

---

<sup>53</sup> See Dunoff & Trachtman, *supra* note 3, at 405. Maybe the reason for adopting the rule of primacy in the ICTY was that it faced mainly corrupt judiciaries, creating a constant fear of sham trials. Alternatively, it is possible that the reason for adopting primacy in the ICTY is not the fear of losing deterrence, but rather the fear of a trial in which the officers will receive a judgment that is biased against them and is therefore excessively severe. See *id.*

<sup>54</sup> See Simmons & Danner, *supra* note 38, at 238.

<sup>55</sup> See Informal Expert Paper, *supra* note 52, at 14.

<sup>56</sup> For a presentation of this model see A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45, 47-48 (2000).

damage.<sup>57</sup> If the probability of prosecution by the ICC is extremely low, states may not have an incentive to prosecute their officers even under complementarity, since they would know that the ICC would be unlikely to prosecute their officers. This possibility is not addressed in this article.<sup>58</sup>

If the probability of prosecution by the ICC is low, under complementarity, rule of law states will prosecute their officers legitimately and their officers will be deterred. Under primacy, rule of law states will not prosecute their officers. Officers will face only a low probability of prosecution by the ICC and will not be deterred. Under complementarity, corrupt states will try their officers in sham trials and shield them from prosecution by the

---

<sup>57</sup> In fact, if the probability of prosecution by the ICC is low, the reputational damage for the state may be even higher than in the case of a high probability of prosecution, since if only a few violations are prosecuted by the ICC, the salience of each of them in the world public opinion may be higher, which will lead to a greater reputational damage. Under the assumption that the marginal cost of prosecuting officers, both by the ICC and by the state, is decreasing, the state may be even more inclined to prosecute under the rule of complementarity if more of its officers are committing crimes. The higher the number of officers committing crimes, the greater the probability that the ICC prosecutor will decide to investigate the situation. Once the ICC starts to investigate the situation, it may prosecute many of the officers involved in crimes because the cost of each prosecution is lower than the first one. At the same time, the state's costs of prosecution may decrease after it prosecutes the first several officers, because internal political opposition to the prosecution will not continue to rise significantly if more officers are prosecuted. Therefore, the more officers there are that are committing crimes, the greater the state's incentive to prosecute all of them, under complementarity, in order to prevent the ICC from prosecuting all of its officers. Furthermore, when the ICC prosecutor makes a decision to initiate an investigation she considers generally the prosecution of similar cases by the national legal system in order to decide whether to admit the case despite the principle of complementarity. When a decision regarding the admissibility of individual cases is made, however, only proceedings against the same person and substantially the same conduct can prevent the ICC from exercising jurisdiction under complementarity. This gives the state an added incentive to prosecute officers under complementarity in the hope of preventing ICC from investigating the situation. See Judgment on the appeal of the Republic of Kenya against the decision of Pre-trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute," *Situation in the Republic of Kenya (Muthaura, Kenyatta, and Ali)* (ICC-01/09-02/11 OA), Appeals Chamber, 30 August 2011 [hereinafter Kenya Judgment] § 38-39.

<sup>58</sup> Several states, including the United States, refused to ratify the Rome Statute despite strong international and internal pressures. This indicates that even in the ICC's incipient years states feared that it would prosecute their officers at likelihood high enough to affect their behavior. See Rome Statute, *supra* note 1, at *Declarations and Reservations*.

ICC, their officers will not be deterred. Under primacy, corrupt states will not prosecute their officers. Officers will face only a low probability of prosecution by the ICC and will not be deterred. Therefore, when the probability of prosecution is low, complementarity will deter officers in rule of law states that will not be deterred under primacy. Officers in corrupt states will not be deterred under complementarity or under primacy.

If the probability of prosecution is high, under complementarity, rule of law states will prosecute and try their officers legitimately and their officers will be deterred. Under primacy, rule of law states will not prosecute their officers. The officers will face a high probability of prosecution by the ICC and will be deterred. Under complementarity, corrupt states will try their officers in sham trials and shield them from prosecution by the ICC, and the officers will not be deterred. Under primacy, corrupt states will not prosecute their officers (and even if they will prosecute some officers this will not prevent the ICC from exercising jurisdiction). In this instance, officers will be subject to a high probability of prosecution by the ICC and will be deterred. Therefore, when the probability of prosecution by the ICC is high, in rule of law states, officers will be deterred regardless of the rule chosen; in corrupt states, officers that were not deterred under complementarity, will be deterred under primacy.

Table 1 summarizes the results of this sub-part:

*Table 1: The Preferable Jurisdictional Rule under Different Conditions*

	Low probability of prosecution	High probability of prosecution
Rule of law states (Sham trials impossible)	Officers will be deterred only under complementarity	Officers will be deterred under both rules
Corrupt states (Sham trials possible)	Officers will not be deterred under any rule	Officers will be deterred only under primacy

As can be seen from this table and from the analysis above, when the probability of prosecution is low, complementarity leads to better deterrence regardless of the possibility of sham trials

within the states under the ICC's jurisdiction. When the probability of prosecution is high, primacy leads to better deterrence regardless of the type of states under the ICC's jurisdiction. This result has significant normative implications discussed in part VI.

*B. The Effects of the Rule on a Wide Distribution of Officers*

The effects on deterrence mentioned in Table 1 apply only to the officer whose gain from committing the crime is precisely equal to the critical level for which a high probability of prosecution is enough to deter him and a low probability of prosecution is not enough to deter him. Different officers, however, sometimes have different gains from crimes. Officers that expect a high gain from the crime will not be deterred even by a high probability of prosecution. Officers that expect a low gain from the crime will be deterred, even under a low probability of prosecution. This means, for instance, that in the upper right rubric of Table 1 (sham trials impossible and high probability of prosecution) there will still be officers committing crimes. As an example, if an officer is about to face a certain and painful death on the battlefield unless he commits a crime, he will probably not be deterred even if the probability of prosecution by the ICC is high, and he cannot be shielded from the ICC's jurisdiction.

When the gains from committing crimes differ significantly among officers, the increased deterrence of some officers, achieved by shifting to another jurisdictional rule, may come at the cost of lowering the deterrence of other officers. If all officers have the same gains from committing crimes, such a shift between jurisdictional rules might have occurred without lowering the deterrence of any officer. As an example, if all officers have the same gains from committing crimes and the probability of prosecution is high, then shifting from complementarity to primacy will always increase deterrence. Officers in corrupt states will be deterred only under primacy and not under complementarity. Officers in rule of law states will be deterred under both rules. However, some officers in rule of law states may have a higher gain than others from the crime. These officers may be deterred under complementarity, which leads to a certain legitimate punishment, but not under primacy, which leads to a high probability of punishment.

The ICC can assign different penalties depending on the

circumstances.<sup>59</sup> More severe crimes, or crimes that involve a higher expected gain for the officer, may call for a greater penalty.<sup>60</sup> By adjusting the penalty to the type of crime, the differences in the incentives of officers could be minimized and the results reached in the last sub-part could be applicable to all officers. The officer's gains from the crime may be unobservable, however, leading to cases in which the ICC is unable to match a deterring penalty to the officer. Even if the individual utility function of the officer is known, the ICC may not be able to change the penalty accordingly. The ICC may have to maintain coherence with previous judgments in other cases or properly serve the other purposes of criminal law besides maximizing deterrence, such as a just retribution or the expressive function of the penalty. Another problem faced by the ICC is that it deals with extremely severe crimes, such as war crimes, that can result in many years of imprisonment.<sup>61</sup> Officers that are still not deterred by these penalties must expect a high gain from committing the crime. The ICC cannot increase the penalty beyond the maximum possible, life imprisonment, to outweigh the officer's expected gain.<sup>62</sup> The wider the differences between the officers' gains from committing crimes and the lower the ability of the ICC to match penalties to each officer's gain from the crime, the less applicable the conclusions of the last sub-part will be.

Besides differences in the expected gain from the crime, officers may differ from each other in the utility loss they suffer from punishment. For instance, some officers will suffer a greater utility loss than others from imprisonment. Different officers may be risk averse, risk neutral, or risk preferring regarding imprisonment.<sup>63</sup> Officers may also be irrational.<sup>64</sup> The analysis in this paper is based on a cost-benefit calculation undertaken by

---

<sup>59</sup> See *Rome Statute*, *supra* note 1, at art. 78.

<sup>60</sup> See *id.* at art. 77.

<sup>61</sup> See *About the Court*, *supra* note 11 (indicating the cases the court prosecutes include war crimes and crimes against humanity).

<sup>62</sup> See *Rome Statute*, *supra* note 1, at art. 77(1).

<sup>63</sup> See Polinsky & Shavell, *supra* note 56 at 47.

<sup>64</sup> See James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 *VILL. L. REV.* 1, 16–19 (2009) (discussing the possibility that officers subject to the ICC's jurisdiction may be particularly irrational).

rational officers. However, if officers are systematically biased,<sup>65</sup> then their behavior may not correspond with this analysis.

It is important to stress that officers may behave rationally in accordance with this analysis even if they are unaware of this cost-benefit calculation. Individual officers will probably not be aware of the probability of prosecution by the ICC. They may not know whether the ICC applies complementarity or primacy and whether they serve a corrupt or a rule of law state. Lawyers, however, often advise the senior officers in charge of setting rules of engagement.<sup>66</sup> These senior officers learn from their lawyers about the factors mentioned above, and have a personal and professional interest to ensure that the soldiers and officers under their command will not be prosecuted for war crimes, or at least will not suffer severe penalties.<sup>67</sup> The senior officers shape the behavior of the officers under their command with their instructions and orders, in ways that direct their behavior to concur with the rational calculations presented in this paper. For example, under complementarity, a senior officer in a corrupt state may set more lenient rules of engagement than an officer in a rule of law state, because he knows his subordinates can be protected by sham trials and will not be convicted for severe crimes by the national legal system. Furthermore, while low-level officers may not be aware of the legal rules that determine their chances of being

---

<sup>65</sup> The growing field of behavioral law and economics investigates biases that may affect irrational officers. Although people, and especially international criminals, may be irrational, in order to justify forsaking the model based on rationality in favor of a more nuanced model of criminal behavior, however, individuals must consistently digress from rationality in a certain direction. Even if individuals do not always act rationally, but their behavior is spread randomly around the pattern of rational behavior, then a model that assumes rationality will have the best predictive power of all possible models. Only if criminals present a certain consistent bias will an alternative model that takes this bias into account lead to better predictions. If models have biases that cut both ways, they cannot help to construct a more fruitful model of human behavior. *See generally* Alan Schwartz, *The Rationality Assumption in Consumer Law* (unpublished draft on file with author).

<sup>66</sup> *See* Amichai Cohen, *Legal Operational Advice in the Israeli Defense Forces: The International Law Department and the Changing Nature of International Humanitarian Law*, 26 *CONN. J. INT'L L.* 367, 398 (2011) (arguing that operational legal advisors help to internalize the norms of international humanitarian law in modern armies).

<sup>67</sup> *See id.* at 398–402 (discussing the development of the roles and duties of lawyers in advising soldiers in the Israeli Defense Forces).

prosecuted,<sup>68</sup> they may form reasonable estimates of these chances by reading newspapers, talking to each other, or learning from their instructors during military training. Officers may not know the overall probability of prosecution by the ICC, but they will certainly hear if a soldier from their unit, and even from their army, stands trial at the ICC. Accordingly, they will change their behavior to avoid a similar fate. Once several officers change their behavior, their colleagues will follow these new practices even if these colleagues are unaware of the reasons for this change.

This section suggests that the ICC may change the penalty according to the expected utility of the crime. If the ICC is able to adjust penalties, it may also be able to implement penalties based on the probability of prosecution in order to maximize deterrence. If penalties are increased infinitely and officers weigh the gain from a crime against the punishment multiplied by the probability of the punishment, primacy will lead to complete deterrence even with a low probability of prosecution. Penalties, however, cannot be increased infinitely. They are capped by the maximum penalty allowed by the Rome Statute.<sup>69</sup> Changing penalties relative to the probability of prosecution also raises the problem of trying to be consistent with previous judgments. In addition, it is difficult to manipulate the penalty due to other considerations of the ICC. The ICC is more capable of assigning a different penalty to a different crime than assigning a different penalty conditioned on the probability of prosecution. It is a basic tenet of criminal law that the severity of punishment is relative to the severity of the committed crime. Crimes that are more severe often lead to a greater advantage to the violator. In these instances, a higher penalty for more severe crimes both promotes deterrence and concurs with the consideration of retribution. For example, if taking a person hostage leads to military gain, taking a hundred hostages will probably lead to a greater gain. It seems completely reasonable to punish the taking of a hundred hostages, a more severe crime, with a higher penalty than the taking of one hostage—both on grounds of deterrence and for reasons of

---

<sup>68</sup> Cf. Polinsky & Shavell, *supra* note 56, at 68 (discussing how individuals often have only estimates or subjective knowledge and likely do not know the actual probability and magnitude of sanctions).

<sup>69</sup> See Rome Statute, *supra* note 1, at art. 77 (containing the possible penalties imposable under the statute, with life imprisonment being the maximum penalty).

retribution. Conversely, increasing penalties based on the court's overall probability of prosecution could potentially lead to inconsistent decisions and to decisions that are unjustifiable under other theories of criminal law.<sup>70</sup>

#### IV. If the ICC Can Detect Sham Trials

Sham investigations can result in decisions not to prosecute guilty officers, perpetual delays, false acquittals, or inappropriate penalties. If the ICC cannot expose trials or investigations as shams, then corrupt states will conduct sham investigations and trials, as long as those proceedings are less costly than the reputational cost of having their officers prosecuted before the ICC multiplied by the probability of such prosecution. Rule of law states will not use sham trials to shield their officers because of the quality of their own legal system. The ICC may be unable to detect sham trials for two reasons: the high information costs needed to review the quality of a state's legal system and the cost of antagonizing states and national courts by reviewing national trials and investigations.<sup>71</sup> If the ICC reviews trials or investigations by the state's judicial system, it impinges on the state's sovereignty, which may reduce support for the ICC. Such review may lead states to react against the ICC by, for instance, cutting its budget, criticizing it, exiting the treaty regime, or withholding ratification.<sup>72</sup>

Nevertheless, in certain instances, the ICC may be able to review national investigations or trials and expose them as fraudulent. A trial could be considered a sham for two possible reasons—either because a state's national legal system is unable to prosecute the offenses or because it is unwilling to do so. If a state's national legal system is truly unable to carry out the

---

<sup>70</sup> Cf. Polinsky & Shavell, *supra* note 56, at 65 (discussing how settlements are more common as the severity of the penalty increases and how such settlements may produce undesirable results, such as being “not as well tailored as would be true of court-determined sanctions”).

<sup>71</sup> See *id.* at 1270–71.

<sup>72</sup> See Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 656–668 (2005) (analyzing the mechanisms states can use to constrain the behavior of international courts); see also Jacob Katz Cogan, *Competition and Control in International Adjudication*, 48 VA. J. INT'L L. 411, 420–426 (2008) (providing additional information on the mechanisms states can use to exercise control over international courts).

prosecution and the trial, adopting complementarity will not help to ensure prosecution since the state cannot prosecute adequately.<sup>73</sup> It is also possible however, that the state's judicial system is able to pursue the case adequately, but the state is unwilling to adequately prosecute. For instance, the state may wish to pressure its judiciary into conducting a sham trial with the hope of shielding officers from the ICC. In such cases, the threat of declaring the state as unwilling to prosecute the officers, and therefore allowing the ICC to assume jurisdiction under complementarity, may give the state an incentive to conduct a legitimate trial.

If the ICC were consistently able to expose sham trials, complementarity would increase the incentives of states that can prosecute to investigate and prosecute guilty officers legitimately. This is true for two reasons: first, because a legitimate investigation and prosecution is the only way to prevent a decision by the ICC that a state's officers committed crimes—a decision that will damage the state's reputation. Second, only by a legitimate investigation and prosecution can that state prevent a declaration that it is unwilling to prosecute its officers genuinely. Such a declaration can, by itself, damage the state's reputation.<sup>74</sup>

If the ICC exposes all sham trials, corrupt states and rule of law states alike will not use sham trials. In this case, if the probability of prosecution by the ICC is low, complementarity will lead to better deterrence of officers than will primacy. Under complementarity, even with a low probability of prosecution, states will have an incentive to prosecute and will always do so legitimately and deter their officers. Under primacy, officers will not be deterred because the probability of prosecution is too low to deter them and the states will not prosecute them. If the probability of prosecution by the ICC is high, officers will be deterred either under primacy (because of the prospect of prosecution by the ICC) or under complementarity (because of the prospect of prosecution by their national courts, prosecution that will always be legitimate). Even if the probability of prosecution is high, however, complementarity may be superior for other reasons not discussed in this paper. For instance, complementarity allocates the task of processing most cases to the national judicial

---

<sup>73</sup> See Kleffner, *supra* note 7, at 321.

<sup>74</sup> *Id.* at 320.

systems, and thus lowers the burden on the ICC, while strengthening the ability of national courts to act within their own jurisdictions.<sup>75</sup> If there is a credible threat by the ICC that all sham trials will be exposed, then the actual costs of exposing sham trials will not be borne by the ICC, since states will avoid using sham trials in order to avoid the reputational damage caused by the exposure of a trial as a sham. The ICC can threaten to expose all sham trials, however, only when exposing sham trials is feasible in terms of acquiring the necessary information and politically practicability.

It is possible, and even likely, that the ICC can expose some sham trials. Such investigations, however, would be costly for the ICC, in terms of time, resources, and the ICC's support by the states. If the ICC were better financed and better respected, it may be better able to expose sham trials. Those factors, however, are likely to cast an effect not only on the ICC's ability to expose sham trials but also on its ability to prosecute crimes. If this is the case, then an ineffective ICC will have a low probability of prosecution and be unable to expose sham trials, while an effective ICC will have a high probability of prosecution and be able to expose sham trials. Under these conditions, complementarity leads to better, or at least equal, deterrence than primacy regardless of the ICC's effectiveness. If the ICC is ineffective in corrupt states, officers will not be deterred regardless of the rule chosen. However, in rule of law states that will not attempt sham trials because of the constraints of their own legal systems, complementarity will give the states an incentive to prosecute and will therefore lead to better deterrence of officers. If the ICC is effective, officers will be deterred regardless of the rule and of the type of the state. If complementarity is adopted, corrupt states will try their officers in legitimate trials because they fear exposure by the ICC. If they attempt a sham trial or fail to prosecute, the ICC will also assume jurisdiction so officers will always be deterred. In rule of law states, officers will be deterred because the state will prosecute them legitimately. If primacy is adopted, both types of states will not prosecute their officers, but officers will be deterred by the high probability of prosecution by the ICC.

---

<sup>75</sup> Complementarity can also give states an incentive to make their national criminal legislation compatible with the provisions of the Rome Statute and thus make national proceedings prevent the ICC from assuming jurisdiction. *See id.* at 332–38.

Complementarity will therefore lead to similar deterrence as primacy for an effective ICC. However, complementarity will lead to efficiency and will promote cooperation with national courts.

Primacy may lead to better deterrence compared with complementarity only if the ICC can expose only some of the sham trials. Additionally, the reputational damage caused to the state from exposure of a sham trial multiplied by the probability of exposure must be low enough that corrupt states will still use sham trials. In that case, there may be lower deterrence under complementarity, because under complementarity corrupt states will use sham trials to shield their officers from the ICC.

It is possible that the ICC has a limited set of resources, both in terms of judicial time and the goodwill of states. If the ICC were to expose a sham trial, the investigation would require more resources than a typical prosecution. The ICC has to decide how to use its resources, either to prosecute cases that were not prosecuted by the states or to expose sham trials used for shielding guilty parties. If the ICC doesn't have any motive other than improving deterrence of crimes in the present,<sup>76</sup> then it will choose the optimal mix of actions—prosecuting new cases and exposing sham trials available under the rule chosen. Therefore, from an organizational perspective, it is important to choose the rule that will lead to the best optimal mix of actions.

Under complementarity, the ICC will spend some of its resources on exposing sham trials. Officers will be deterred if the probability of prosecution by the ICC is high enough to motivate states to prosecute (the cost to the state of prosecuting the officer domestically is lower than the reputational damage caused to the state by conviction of the officer by the ICC multiplied by the probability of such conviction), and at the same time, the probability of exposing sham trials is high enough to motivate

---

<sup>76</sup> Even if the ICC's only purpose is to maximize deterrence in the maximum number of cases, and even if the ICC will remain completely true to its purpose, it may act strategically to improve its ability to deter crimes in the future, even if this means losing deterrence in the present. If the ICC uses such a long term strategy, it may, for instance, avoid antagonizing states that can control its future budget or whose cooperation it seeks, by refraining from prosecuting their officers. This will damage deterrence in some cases but will allow the court to increase its resources and to better deter violations in the future. Adopting the assumption of a long-term strategy by the ICC, however, will complicate the analysis unnecessarily.

states to conduct legitimate trials (the marginal benefit the state earns from holding a sham trial, instead of holding a legitimate trial, must be lower than the damage caused to the state by exposure of a sham trial multiplied by the probability of such exposure). Under primacy, the ICC will spend all of its resources prosecuting officers, since states are unlikely to prosecute their own officers at all in cases in which it runs against their internal interests to do so. Under this rule, the only thing that can deter officers is the prospect of trial by the ICC. Officers will only be deterred if the probability of prosecution by the ICC is high.

The amount of resources needed to achieve deterrence under both rules depends on the types of states that are under the ICC's jurisdiction. If there are only rule of law states under the ICC's jurisdiction, the cost of exposing sham trials is zero, since none will be attempted. Therefore, under complementarity, the court needs only to reach a low probability of prosecution to achieve deterrence of officers. Conversely, in order to deter officers under primacy, the ICC must have a high probability of prosecution. If there are only corrupt states under the ICC's jurisdiction, or if corrupt states form a significant portion of the states under the ICC's jurisdiction, then only the threat of exposure of the trial as a sham by the ICC can prevent the corrupt states from using sham trials. It is unclear if deterrence is more likely under primacy, when the ICC needs to reach a high probability of prosecution, or under complementarity, when the ICC needs to reach both a probability of prosecution that gives states an incentive to prosecute and a probability of exposure that gives the state an incentive not to use sham trials. The result will depend on the numbers of corrupt states and rule of law states under the ICC's jurisdiction and the numbers of potential criminals in these states as well as the costs of prosecuting cases and the costs of exposing sham trials. Results will also depend on the reputational sanction the state expects from having its officers prosecuted at the ICC, and the reputational sanction the state expects from the exposure of sham trials conducted by its national court.<sup>77</sup> Therefore, if the

---

<sup>77</sup> Further considerations can also change the result. For instance, states may be able to affect the probability of prosecution by the ICC by hiding evidence or by preventing media coverage. The willingness of states to engage in behavior that lowers the probability of prosecution may correlate with their willingness to use sham trials. Therefore, if the ICC deals with corrupt states that are also very good at hiding information, making prosecution by the ICC difficult, the ICC may save costs by

ICC is able to expose sham trials, but doing so is costly and lowers the court's ability to prosecute new cases, then the preferred legal rule is unknown.

## V. Normative Solutions

Assuming that the ICC cannot detect sham trials and that the probability of ICC prosecution is low, and assuming all officers gain the same utility from crimes, it follows that officers in rule of law states will be deterred under complementarity and not under primacy, while officers in corrupt states will not be deterred under either rule.<sup>78</sup> If the probability of prosecution by the ICC is high, officers in rule of law states will be deterred under both rules, while officers in corrupt states will be deterred under primacy and not under complementarity. This part seeks to build on these insights and suggest normative solutions to maximize the deterrence of officers from committing crimes contrary to the Rome Statute.

### A. *Changing the Rome Statute In the Future*

The Rome Statute can be amended and the jurisdictional rule can be adapted to changing conditions. Seven years after its entry into force, any state party may propose amendments to the Rome

---

adopting a rule of primacy and obviating the need to expose sham trials. At the same time, the ICC may incur even greater costs in order to maintain a high probability of prosecution, which is necessary to deter officers under the rule of primacy.

The ICC may be able to expose sham trials but err in some of its decisions, viewing sham trials as legitimate, or legitimate trials as shams. After a trial is completed under a rule of primacy, the ICC can still expose this trial as a sham. *See Heller, supra* note 35. Both rule of law states and corrupt states will conduct trials of some officers for internal reasons regardless of the jurisdictional rule adopted, but a rule of complementarity gives corrupt states an interest to conduct sham trials when, under a rule of primacy, they would not conduct a trial at all. Rule of law states will also conduct legitimate trials under complementarity where under a rule of primacy they will not conduct a trial. A greater number of sham trials make the ICC more likely to treat a legitimate trial as a sham because it is more suspicious of all trials. This argument draws on Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: a Game Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 431 (2000) (showing that without the right to silence, more guilty suspects will choose to give a false exculpatory statement, which will make judges discount all uncorroborated exculpatory statements, including those made by innocent suspects). Increasing the number of trials, and sham trials especially, may also make the ICC more likely not to expose sham trials as a sham simply because it has fewer available resources to expose all sham trials.

<sup>78</sup> *See supra* Part III A.

Statute.<sup>79</sup> Then, the Assembly of State Parties can consider the amendment and accept it with a two-thirds majority.<sup>80</sup> An amendment shall enter into force for all state parties one year after seven-eighths of the state parties deposit instruments of ratification or acceptance.<sup>81</sup>

The drafters of the Rome Statute rightly adopted complementarity since the ICC is expected to have a low probability of prosecution in the first years of its existence. In the future, if the state parties observe that there is a high probability of prosecution by the ICC, they may amend the statute and replace complementarity with primacy. This strategy will maximize deterrence. Amending the Rome Statute may be difficult, however, especially if some state parties object to it.<sup>82</sup>

### *B. Changing Doctrine by the ICC's Judgments*

The basic jurisdictional rule applied by the ICC is determined by the Rome Statute.<sup>83</sup> Amendment of the statute can be politically difficult and may be hindered by the interests of the state parties.<sup>84</sup> Nevertheless, the ICC may be able to use its judicial discretion to shape the jurisdictional rule it applies by changing the interpretation of the jurisdictional rule set in the statute. The rule of complementarity is not clear-cut and precise. It prevents the ICC from assuming jurisdiction only if the case is investigated or prosecuted or if it was investigated and the state decided not to prosecute. Complementarity also allows the ICC to assume jurisdiction when the state is "unwilling or unable genuinely to carry out the investigation or prosecution."<sup>85</sup> This test uses vague and ambiguous language that allows the ICC substantial judicial discretion. The ICC can use its discretion to shape complementarity in order to maximize deterrence. For instance, if the probability of prosecution increases over the years,

---

<sup>79</sup> Rome Statute, *supra* note 1, at art. 121.

<sup>80</sup> *Id.*

<sup>81</sup> This does not include amendments that deal with purely institutional issues, *id.* at art. 122, or with the definition of crimes, *id.* at art. 121 § 5.

<sup>82</sup> See Ginsburg, *supra* note 70, at 661 (discussing the difficulty and political nature of the amendment process in international agreements).

<sup>83</sup> Rome Statute, *supra* note 1, at art. 1.

<sup>84</sup> See Ginsburg, *supra* note 70, at 661.

<sup>85</sup> Rome Statute, *supra* note 1, at art. 17 §1(a).

the ICC can employ an increasingly stringent standard when it determines the legitimacy of state-initiated investigations or prosecutions that could prevent the ICC from assuming jurisdiction. This will allow the ICC to shift by methods of interpretation from complementarity to a rule that, in effect, resembles primacy.

It could be difficult for the ICC to expose an investigation or prosecution as a sham because information about the quality of the investigation or prosecution may be unavailable, or a state might be resistant to a ruling that its legal system is not functioning legitimately. The ICC can minimize these difficulties by determining that the state's actions did not qualify as an investigation because it failed to meet certain standards, and thereby avoid branding investigations as shams. The ICC can set clear requirements for any state action to qualify as an investigation for the sake of preventing the ICC from assuming jurisdiction under complementarity. For example, in a recent decision, the Appeals Chamber of the ICC ruled that only taking steps, such as "interviewing witnesses or suspects, collecting documentary evidence, or carrying out forensic analyses" to ascertain whether the suspect is responsible for the same conduct alleged before the ICC can qualify as an investigation.<sup>86</sup> If the state is only prepared to take these steps, or if it takes them against other suspects, this will not constitute an investigation. The ICC states clearly that the decision regarding the existence of an investigation is separate and distinct from the decision about whether an existing investigation is legitimate.<sup>87</sup> The ICC followed this doctrine in a decision issued on December 7, 2012, regarding the case against Saif Al-Islam Gaddafi.<sup>88</sup> In this decision, the ICC ruled that the state bears the burden to prove it is conducting an investigation.<sup>89</sup> The ICC went on to demand information about the intricate details of the proceedings in Libya, the investigations conducted, and Libyan law.<sup>90</sup> When the ICC

---

<sup>86</sup> See Kenya Judgment, *supra* note 57, at 3.

<sup>87</sup> See *id.* at 15.

<sup>88</sup> See Prosecutor v. Saif Al-Islam Gaddafi & Abdullah Al-Senussi, Case No. ICC-01/11-01/11, Pre-Trial Chamber I Decision Requesting Further Submissions on Issues Related to the Admissibility of the Case Against Saif Al-Islam Gaddafi, 5–6 (Dec. 7, 2012).

<sup>89</sup> *Id.* at 5.

<sup>90</sup> *Id.* at 7–19.

sets a high threshold for any investigation that can prevent it from taking the case, it not only prevents sham trials that can fail to deter officers, it also prevents trials that can damage the basic due process rights of the accused, as was probably the ICC's concern in the case of Gaddafi. Future decisions can further clarify the guidelines for what constitutes an investigation. Clear guidelines can help thwart accusations of bias and also lower the information costs needed to determine if an investigation took place. If the probability of prosecution increases in the future, the ICC can issue increasingly stringent standards. This will move the jurisdictional rule closer to primacy.

### *C. A Two Tiered Treaty System*

There is a possibility that different rules can apply to different states at the same time. Instead of drafting just one treaty that applies to all states, the states can agree to adopt a separate protocol that some states can decide to opt into. While the basic treaty can apply complementarity, the separate protocol can apply primacy on the states that choose to join it. If proper incentives are given to each state to choose the protocol that maximizes deterrence within it, overall deterrence will be maximized.

In order to maximize deterrence, rule of law states must be motivated to join only the basic treaty with complementarity, while corrupt states must be motivated to join the protocol that applies primacy. If the main treaty and the protocol are identical in every respect besides the jurisdictional rule, states will opt into the treaty that applies the jurisdictional rule that suits their interests. If the reason states decide to join the ICC's jurisdiction is to enhance their commitment not to commit crimes,<sup>91</sup> states will opt into the treaty that maximizes deterrence of their officers. If rule of law states cannot commit without the ICC to investigate all crimes committed by their officers, they will adopt only the complementarity treaty and their officers will be deterred. Corrupt states will opt into the primacy protocol, and if the probability of prosecution is high, their officers will be deterred.

If states do not join the ICC's jurisdiction primarily to enhance their commitment not to commit crimes, states will not deliberately try to maximize deterrence by opting into the proper protocol. If corrupt states and rule of law states have different

---

<sup>91</sup> See Simmons & Danner, *supra* note 38, at 234.

interests, however, the different protocols could be structured so as to give each type of state the incentive to join the protocol that maximizes deterrence within it. For instance, corrupt states may also be states with bad human rights practices. Such states, according to some scholars, gain a more favorable reputation by joining human rights regimes.<sup>92</sup> In that case, the separate protocol adopting primacy can be presented as a different and more stringent treaty regime. This will give corrupt states with bad practices a greater incentive to ratify this protocol and gain a better reputation as a result.<sup>93</sup> Since primacy infringes more on the state's sovereignty than does complementarity, it is easy to present the primacy protocol as an additional and more stringent treaty obligation even without any other substantial differences between the protocols. Alternatively, the separate protocol that adopts primacy can deliberately include other provisions that are more beneficial for corrupt states than for rule of law states. These other provisions may deal with other issues besides the jurisdictional rules, and they can be bundled together with the primacy rule in order to give corrupt states an incentive to opt into the protocol.

The ICC can start with the two tiered system when the probability of prosecution is low and try to give the states the incentive to sort themselves out into the proper protocol that maximizes deterrence for their officers—a complementarity protocol for rule of law states and a primacy protocol for corrupt states. If the probability of prosecution later becomes high, and some corrupt states fail to join the primacy protocol, it may be beneficial to amend the Rome Statute and apply primacy to all state parties. It may be easier to change the Rome Statute into one unitary system that adopts primacy if a separate primacy protocol was adopted previously and joined by many states. As more states join the separate primacy protocol, there will be increased pressure on other states to join this protocol, or to agree to amend the Rome Statute and apply primacy to all states.

---

<sup>92</sup> See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 510-11 (2005).

<sup>93</sup> If mostly corrupt states join the primacy protocol, however, states may fear that their accession to the protocol signals that they are corrupt states. If states wish to avoid being signaled out as corrupt states, this may affect their behavior and make them less willing to join the primacy protocol. The phrasing of the protocol must try to counter this effect by stressing the commitment of the states that ratify it to protecting human rights and to ending impunity for international crimes.

*D. Using Judicial Discretion to Distinguish Between States*

The above analysis applies only if the ICC is unable to distinguish between corrupt states and rule of law states or is unable to treat them differently. If the ICC is able to identify the types of states and shift resources to the prosecution of crimes in certain types of states, it may reach different probabilities of prosecution in different types of states. The ICC may, for instance, achieve a high probability of prosecution in corrupt states and a low probability of prosecution in rule of law states. Under these conditions, if complementarity is adopted, officers will not be deterred in the corrupt states because they can be shielded from the ICC by national sham trials. If primacy is adopted, officers will not be deterred in rule of law states because they will not be prosecuted by their own states, and the probability of their prosecution by the ICC will be low. Alternatively, the ICC may achieve a high probability of prosecution in rule of law states and a low probability of prosecution in corrupt states. In that case, if complementarity is adopted, officers will not be deterred in the corrupt states because they will be shielded by sham trials. If primacy is adopted, officers in corrupt states will not be deterred because they face a low probability of prosecution by the ICC. Therefore, applying a different probability of prosecution to rule of law states and to corrupt states cannot ensure deterrence across all states.

The ICC may be able to distinguish between the types of states and apply different jurisdictional rules to each type by methods of interpretation. The ICC can theoretically apply complementarity and demand only minimal national investigations in order to prevent it from assuming jurisdiction from rule of law states and apply a much more stringent standard to investigations conducted in corrupt states. In that case, deterrence will be maximized, since the ICC will, in effect, employ complementarity on rule of law states and a rule similar to primacy on corrupt states. The application of different jurisdictional rules to different types of states, however, can seriously damage the ICC's impartial image. If the ICC openly applies different rules to different states, it will be faced with resistance from the states that are damaged by this differentiation, and the ICC's legitimacy will be jeopardized. To avoid allegations of bias, the ICC will have to use ambiguous legal reasoning that can hide its true motives, but such reasoning could also damage its legitimacy by lowering the predictability and the

persuasiveness of the ICC's judgments.

## **VI. Conclusion**

This article investigates which jurisdictional rule—complementarity or primacy—can maximize deterrence of officers from committing the crimes listed in the Rome Statute. The article suggests that the type of states under the ICC's jurisdiction, as well as the probability of the prosecution by the ICC, can determine which rule maximizes deterrence. The article also offers several normative solutions that try to maximize deterrence by the ICC through matching different rules to different conditions. Even if the ICC's purpose is only to improve deterrence, however, maximizing deterrence of certain types of crimes, or of crimes committed in certain types of states, may be viewed as more important than deterring other crimes. This may lead to different normative recommendations. The ICC may also be forced to act strategically to ensure its effectiveness over time and in doing so may have to compromise deterrence in certain cases. As an example, the ICC can favor states that can damage its budget or prestige and refrain from prosecuting their officers. A more complex program for institutional design of the ICC will have to take into account possible strategic behavior by the ICC, as well as the possibility that the ICC will follow other motivations that are inconsistent with its purpose. Another important consideration is the effect that the adopted jurisdictional rule will have on states' decisions to join the ICC's jurisdiction by ratifying the Rome Statute. These issues are not discussed in this paper. Furthermore, deterrence of any kind may not even be the most important purpose of the ICC. Other possible purposes may include retribution—justly penalizing war criminals, an expressive educational function, or paving the way for future international cooperation. All of these purposes involve different normative considerations that are not discussed in this paper. The normative solutions offered in this paper should affect the choice of the jurisdictional rules for the ICC only to the extent that maximizing deterrence is viewed as an important purpose of the ICC.