



INTERNATIONAL
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A Practical Guide for Evaluating the Deterrent Effect of International and National Judicial Proceedings on Atrocity Crimes

$$\begin{array}{l} \text{actual threat of} \\ \text{accountability} \\ + \\ \text{perception of threat} \\ \text{of accountability} \\ \hline = \\ \text{deterrence} \end{array}$$

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Published by:

International Nuremberg Principles Academy
Bärenschanzstraße 72
90429 Nuremberg, Germany
www.nurembergacademy.org

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ISBN: 978-3-9818913-4-8

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Photo: Eskemar, shutterstock.de

Cover design and text layout by Martin Küchle Kommunikationsdesign

Printed in Germany by Druckwerk UG

1. Executive Summary

This report summarizes a project that was conducted, as a follow-up project, by the International Nuremberg Principles Academy (Nuremberg Academy) throughout 2018 and 2019. The project sourced its inspiration from the original research question (*have the international criminal tribunals deterred commission of atrocity crimes?*) and set its objective towards abstracting information from the project and consequently the project publication, further with a goal of presenting a practical guide for the intended audiences in a simpler, more practice-oriented tool. As a result, the goal of the follow up project was to determine whether it would be feasible to develop a practical guide assessing or evaluating the deterrent effect of international and national judicial proceedings on atrocity crimes, and if so, what would this guide look like.

The project was limited to the findings and recommendations of the edited book publication, *Two Steps Forward, One Steps Back: The Deterrent Effect of International Criminal Tribunals*, edited by Jennifer Schense and Linda Carter. This practical guide came to fruition by conducting further analysis of the studies, conclusions and recommendations, and by extracting useful information addressing the project question. Bearing in mind the focus of the project, as well as the Nuremberg Academy Series, especially its aim for innovative application of international criminal law, the project builds on this premise, and has focused on creating a practical tool, for practitioners and targeted audiences, when looking into the question of deterrence.

The project concludes by creating the practical guide which addresses:

- Importance of the subject matter
- Definitions adopted: including deterrence and prevention
- Components of a formula for deterrence
- Key issues underlying deterrence efforts

The guide is also explaining the adopted methodology for the project in very brief terms, and provides examples and conclusions from the field studies.

Last but not least, this guide concludes with a checklist for deterrence studies.

The goal of this project was to further hands-on practical application of the methodology and findings with respect to the Nuremberg Academy's project focusing on preventing further atrocity crimes through deterrence. To this end, the checklist is not proposed to be an exhaustive or even complete guide. It is meant to start the discussion on deterring atrocity crimes, and in the wider scope of the Nuremberg Academy's work, advance discussions towards strengthening rule of law, by supporting worldwide enforcement of international criminal law, furthering knowledge, and building capacities at the national level to investigate and prosecute these crimes.

The target group is equally practitioners as well as academics and researchers.

The practical guide is relevant for experts interested in studying or further undertaking research into (potential) deterrent effect in the context of criminal law.

It is, in particular, the work, expertise and dedication of Professor Linda Carter and Jennifer Schense to this subject matter that has helped the development, implementation and finalization of this project. Both experts have not only contributed with their valuable time and expertise but also provided support through sharing ideas while aiming at constant improvement and usability of this tool.

The publication of this guide concludes the current studies that the International Nuremberg Principles Academy is undertaking on the deterrence effect of the international criminal courts and tribunals. The guide has been developed to be used as a stand-alone tool, and to be used without any further advice on its usage from the Nuremberg Academy or other experts. The Nuremberg Academy however welcomes feedback on this project, and engagement with relevant stakeholders in addressing or exploring the relevant and related questions further.

List of Abbreviations

DRC	Democratic Republic of the Congo
ICC	International Criminal Court
ICL	International criminal law
ICTY	The 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 (referred to in short as International Criminal Tribunal for the former Yugoslavia)
ICTR	The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (referred to in short as International Criminal Tribunal for Rwanda)
NGOs	Non-governmental organizations
Rome Statute	UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), adopted during the Rome conference on 17 July 1998, entered into force on 1 July 2002
Rome conference	United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998
SCSL	Special Court for Sierra Leone
UN	United Nations

2. Overview of the Practical Guide

2.1 Introduction



In 2017, the Nuremberg Academy published, as a first print of the Nuremberg Academy Series, a book entitled *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals* (“Two Steps Forward”),¹ that examines whether international criminal tribunals can deter atrocity crimes. The crimes included genocide, war crimes and crimes against humanity.² The Nuremberg Academy engaged legal researchers with in-depth knowledge of the situation countries and of the relevant tribunals. The volume aimed to build on a common methodology to gain a better understanding of how deterrence functions in practice. The study thus bridged the academic, practitioner and policymaking worlds to achieve a holistic approach. The book analyzed ten situations, six of which are International Criminal Court (ICC) situations. The other four situations were countries with cases before the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL).

Seeking to advance discussions on deterrence, the book offers a new comparative perspective on the issue while following a tailored methodology towards answering the core question: how can international criminal tribunals and others assist in global, cooperative efforts to deter core atrocity crimes?

The ten country case studies, as seen in the map, were Serbia and Kosovo (ICTY); Rwanda (ICTR); Sierra Leone (SCSL); and the ICC situations, the Democratic Republic of the Congo (DRC), Uganda, Kenya, Darfur (Sudan), Côte d’Ivoire and Mali.

In making concrete recommendations from the case studies, *Two Steps Forward* posed the questions:

- Can deterrence be planned for, and achieved?
- Can deterrence that is achieved be extended, even made permanent? If so, how?
- Can deterrence that is achieved be measured, quantitatively or qualitatively?

For the most part, the researchers found that any deterrent effect achieved in the studied cases was often short-term and ephemeral, although there were some promising notes on a long-term effect. None of the participants in the studies included in *Two Steps Forward* saw international justice or other international intervention as having provided a perfect solution. But many of them did acknowledge that their situations could have been much worse without it. International justice is only one piece of the puzzle, and

¹ The book is available through the Nuremberg Principles Academy’s website at: <https://www.nurembergacademy.org/publications/nuremberg-academy-series/> or through Torkel Opsahl Academic EPublisher at: <http://www.toaep.org/nas-pdf/1-carter-schense>.

² The approach in the Guide could easily be adapted to consider the impact of international and national judicial proceedings on other serious crimes, such as terrorism, human trafficking, drug trafficking, and money laundering.

frequently not the most important one, but it is one that may help to focus international attention on your situation and that may help to put useful tools at your disposal.

Drawing from the case studies, assessments were further made about ways in which to enhance a deterrent effect from international prosecutions of atrocity crimes. These points included: reducing actual and perceived selectivity of prosecutions that were viewed as unfair; increasing outreach to affected populations to better communicate information about the choice of prosecutions and the meaning of court decisions; creating a network for greater cooperation and coordination of international and national efforts; building national capacity to increase accountability through a larger number of prosecutions; and focusing on long-term, rather than short-term deterrence goals.

The purposes of this guide are to explain the key concepts, components and issues underlying deterrence efforts, to describe the methodology used in the case studies in the book, and to provide a checklist for conducting a deterrence study. In drawing from the common lessons and themes of the book, the guide aims to support anyone who wants to deter serious crimes or who wants to monitor or study the efforts to do so. Whether you are engaged in deterrent action within your own national system or internationally, or whether you are just interested in the subject as an academic or scholar, this practical guide may be useful in determining how the deterrent impact of your actions or study can be intensified.

2.2 Who will the Guide assist?

First, this practical guide is intended for actors with the capacity to potentially deter serious crimes directly. Such actors are likely to include political and military officials; prosecutors, law enforcement officials and other actors within criminal justice systems; and other relevant actors and experts engaged in policy-making.

Second, this practical guide will assist actors with the capacity to monitor deterrent action taken by others, in particular academics and university programs that support them; technical experts in the policy-making and monitoring arenas, including at think tanks or at non-governmental organizations (NGOs); students; and journalists.

The actions of both direct impact and monitoring actors are ideally symbiotic. Those with the capacity to take action to deter crimes create examples that academics and others can study. In turn, such studies can help inform policymakers and others on how to refine the steps they take, and can encourage them to continue by showing them the impact and relevance of their work.

One challenge identified in *Two Steps Forward* is that the impact achieved from deterrent actions can take a long time to manifest. Maintaining deterrent action and studying deterrent action over the long-term both represent serious but important challenges to address. Documentation on the part of both direct impact and monitoring actors will be essential to maintain the chain of reliable knowledge over the years.

If you are intending to either take action to try to deter crimes, or to study such actions, you will want to give thought both to how you will document these efforts, and to who else can aid you in this task. Early partnerships between actors and monitors can lay the groundwork for more effective documentation.

2.3 Why does this subject matter?

The general understanding of deterrence is that, while challenging to establish and maintain, it is important as a goal because achieving deterrence means that the impact and harm from the commission of crimes is avoided. Deterrence of atrocity crimes benefits national and international communities.

States may even have an obligation to deter serious crimes. This might arise from varying sources, including domestic criminal law and treaty-based obligations from human rights and international humanitarian law. Moreover, the universal nature of prohibiting commission of core crimes as listed within the Rome Statute of the International Criminal Court also creates obligations. The concept of deterring crimes should be understood with the broader principle of peace as envisaged both in the first two articles of the United Nations Charter, and the Preamble of the Rome Statute.

However, as can be observed from past conflicts, any successful deterrent effort depends on more than just a sense of legal obligation. It requires work from the state organs and involved stakeholders towards understanding what helps in deterring crimes and what are the most effective resources that can be implemented towards advancing the deterrence and preventive strategies in their broader national or regional goals.

2.4 How will the Guide assist you?

This guide is designed to provide a basic background in deterrence on both conceptual and practical levels, a methodology for designing a deterrence study, and a checklist for implementing a case study. Section 3 provides important background information on definitions of types of deterrence; a formula for the components of deterrence; and four significant underlying issues in deterrence efforts. Building on Section 3's explanatory background, Section 4 then describes a methodology involving the collection of quantitative and qualitative data, and the evaluation of key assessment points based on the information collected. Utilizing the background concepts and the methodology, the final part, Section 5, provides a checklist to assist in designing and conducting a deterrence study.

3. Background in deterrence: Definitions, components and underlying issues

a. Deterrence and prevention

Deterrence draws on the concept that people weigh potential gains against potential costs of their planned behavior before deciding what to do. Where the benefit exceeds the cost, the action—in this case, the crime—is engaged in. Law is intended to tip the balance for criminal acts towards cost, and so to deter their commission. Prevention is a broader concept that includes deterrence and other measures to avert criminal activity.

The word deter originated in the period of 1570-1580, from the Latin word *deterere*, to prevent or to hinder, the equivalent of to frighten (hence the link between deterrence and terror; and the link in French to *de*, meaning from, and *terror*, meaning terror, as in to flee from terror.) By comparison, the term prevention originates from the period 1375 to 1425, drawing from the Latin word *praeventus*, past participle of *praevenire*, to anticipate what is to come. The modern French word, *prevenir*, to foresee and/or to forewarn, has similar roots. Often when it comes to discussing crimes, the terms prevention and deterrence are used and considered interchangeable synonyms; this is arguably incorrect. Their origins make clear that there are fundamental differences between them. At the risk of oversimplification, prevention is oriented around hope; that through forewarning, society may close off as a moral option the risk of crimes being committed, and build on that foundation a better version of itself. Deterrence is oriented around fear, and specifically around instilling fear of punishment in potential perpetrators.

Although prevention is a valuable undertaking for any society, a comprehensive prevention study would be a massive task. Because deterrence is an important goal in itself and a significant part of broader preventative efforts, the case studies in *Two Steps Forward* and this guide are focused exclusively on deterrence efforts.

If you are hoping to deter serious crimes, a first question to ask yourself is whom specifically you are hoping to deter, as deterrence takes a number of forms:

Form of deterrence	What it is intended to do
Specific deterrence	To deter one person from further criminal activity through prosecution of that individual
General deterrence	To deter all members of society from criminal activity through the prosecution of one or more individuals
Restrictive or partial deterrence	To limit, if not end, an individual's criminal activity through prosecution of that individual
Targeted deterrence	To deter the criminal activity of specific individuals or categories of individuals through prosecution of a member of that category
Social deterrence	To take action other than a prosecution that deters criminal activity. (The levers of social pressure represent the most diverse category of action)

b. Deterrence in relation to other goals

The form of deterrence you pursue may depend on what other goals you are trying to achieve. The most generally accepted goals of criminal law, relevant to other areas of deterrence, are:

Retribution	Reconciliation
Promotion of due process	Promotion of the rule of law generally
Encouragement of national proceedings under the rubric of positive complementarity (in particular in relation to the ICC)	Promotion of international law generally and any relevant international tribunal as appropriate
Recognition of the interests of the victims	Maintenance of international peace and security
Truth-telling and establishment of an historical record	Individual and general deterrence or prevention

Deterrence as a goal should be the first among equals. If deterrence can be achieved, it would render the other goals moot, as they address the impact of crimes, once committed. At the same time, deterrence is a component in achieving broader goals, such as promoting rule of law, peace and security, and general prevention. While consideration of the goals of criminal law or other social action may seem more esoteric, or more a field for academics than practitioners, it is not uncommon for those acting in the public domain to have to explain the goals they are seeking to fulfill and why. Understanding the importance of deterrence in the context of other goals may aid in building public support and understanding for your efforts.

Two Steps Forward applied the following formula for deterrence:

Actual threat of accountability	+	Perception of threat of accountability	=	Deterrence
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Not only must there be accountability in fact, but also the public must perceive a threat of punishment. This formula arises from general deterrence theory, and each country researcher for *Two Steps Forward* examined whether it applied or was relevant for their particular situation. It was the general consensus that the formula did apply.

a. Actual threat of accountability

Actual threat is generated according to deterrence theory by the *certainty*, *severity* and *speed* of investigations and prosecutions, with certainty being the most impactful. In other words, the likelihood of punishment is more important than how quickly that punishment arrives or how severe it is.

b. Perception of threat of accountability

The perception of the threat of punishment must outweigh the perception of potential benefits of committing a serious crime. There must be a criminal justice or some other mechanism in place or the strong possibility of establishing one to prosecute

or effectively pressure individuals concerned when they are making their risk analysis, and these individuals must be aware and believe they could be prosecuted or effectively pressured. Deterrence is thus dependent upon an actual threat of accountability coupled with the perception of the threat being present.

3.3 Key issues underlying deterrence efforts

In addition to core definitions and the basic formula for deterrence, the *Two Steps Forward* studies found four key issues that pervade the design and analysis of a deterrence study. They are: 1) perception; 2) propaganda; 3) outreach; and 4) legitimacy. Each is discussed below to explain the importance to your efforts.

a. Perception

Two Steps Forward focuses in particular on the importance of *perception*, or the way in which something is regarded, understood, or interpreted. Perception is relevant first to understanding the decisions that perpetrators, victims, bystanders, and others take. If perpetrators, for example, think that the crimes they commit will get them in serious trouble, they may reconsider their choices. This is a fundamental tenet of rational actor theory. If in the long-term, perpetrators do not actually face punishment, their perception that they are immune will likewise affect their choices.

Understanding firsthand how perpetrators, victims, bystanders, and others perceive their roles and the impact of unfolding situations where crimes are being committed, or may continue to be committed, means that, as much as possible, you should engage with members of these groups directly either in gathering data for your study, or in identifying individuals and groups whose actions must be swayed in order to deter crimes. Relying on second or third-hand information will only get you so far. It also means understanding that the motivations of such actors will evolve, including in reaction to any intervention that you may make. Monitoring reactions to any steps you take will help to guide you in modifying those steps as you go. And it is important to keep in mind that you, as an actor, are also guided by your perceptions. Documenting your actions and the reactions to them, to the extent that you can, is essential, as is maintaining access to reliable advisers who can help you to understand ongoing developments and against whom you can test your own perceptions for reliability.

Two Steps Forward identified the following factors as significant in affecting the perceptions of perpetrators and victims. It is not intended as an exclusive or definitive list, but constitutes a good starting point.

Factors in the table below are divided into two categories, those that arise from the actions of international tribunals or other prosecutorial and criminal law authorities, and those that arise from other relevant actors. There is interplay between these categories as well but they are presented in two columns for ease of consideration.

3.2 Components of a formula for deterrence

Court or prosecution-based factors	Social deterrence-based factors
1. The impact of the tribunal's location, in particular whether situated in-country or elsewhere	1. The impact of the use of propaganda
2. The impact of the limits of the tribunal's jurisdiction (temporal, subject matter and personal)	2. The impact of the truth-telling capacity of trials
3. The impact of any appropriate and effective outreach undertaken	3. The impact of successful trials on strengthening the national judiciary
4. The impact of the speed and number of indictments	4. The impact of group dynamics, in particular amongst perpetrator groups, on the behavior of individual perpetrators or suspects
5. The impact of successfully concluded cases and convicted and sentenced individuals	5. The impact of the role of elites in the society concerned, whether they mitigate or magnify the impact of trials or other actions undertaken to deter crimes
6. The impact of the length of sentences handed down	6. The impact of cross-situation influences, in particular regional influences of situations in other countries
7. The impact of enforcement, if effectively undertaken	7. The impact of other political and social norms on the perception of justice
8. The impact of prosecutorial strategy	8. The impact of a culture of impunity on justice measures
9. The impact of the perceived legitimacy of the tribunal or prosecutorial or criminal law authority concerned	9. The impact of the level of awareness of steps undertaken to promote deterrence
10. The impact of sufficient or insufficient resources	10. The impact of the legitimacy and perceptions of legitimacy of steps undertaken to deter crimes
11. The impact of convicted persons expressions of genuine remorse	11. The impact of the existence and strength of national institutions
	12. The impact of the role of the international community

The above factors may result in an infinite number of possibilities, but you should be able to narrow them down fairly quickly, based on the unique circumstances you face. The greatest challenge lies elsewhere, in the fact that not only is each situation (and indeed each moment in time in each situation) unique, it is constantly dynamic as the factors interact. You must be similarly agile as the factors you face in trying to increase your deterrent impact may likewise shift in importance and in relationship to each other, even in response to your own actions to try to deter crimes.

b. Propaganda

One challenge to perceptions and their reliability will be propaganda. Propaganda has been compared to a virus (infectious agent) and in the modern world, it is ubiquitous, ever evolving, and sometimes very hard to identify.

The concept of propaganda originally came from a religious context, from the 1622 *Congregatio de propaganda fide* (*Congregation for propagating the faith*), established by Catholic Pope Gregory XV as a means of furthering Catholic missionary activity. The word originally comes from the Latin *propagare*, meaning, “to propagate.” In the beginning of the 19th century, propaganda took on the meaning of ideas or information of questionable accuracy as a means of advancing a cause.

Propaganda attempts to disrupt the transmission of reliable knowledge; in this case, it is intended to prevent understanding or belief that crimes have taken or could take place. It allows people to reject as false, true events that seem morally implausible or impossible, or otherwise that the listener finds unacceptable.

Propaganda draws on elements of truth, in particular historical facts or events. It cannot always be called outright lies. The goal in invoking these facts is to create a false or, perhaps more accurately, an alternate, reality. For example, a particular group is characterized to represent a threat to others, which then is used to justify crimes against them.

Knowledge or reasonable belief that serious crimes have taken place is essential for deterrence. The enemy of knowledge is anonymity of perpetrators, protection from the systems within which they work, and the use of propaganda to cover up, deny or distract attention from crimes committed.

You may face all of these challenges in your work, but the most insidious is propaganda because it forces you to question what you know to be true, or whether there is a knowable truth at all.

c. Outreach

Outreach, broadly speaking, is an effort on the part of a prosecutor or other actor to reach out to those they intend to benefit (e.g. victims, their communities).

The goal is to explain what actions are taken and why, and to gauge the resulting reactions, positive or negative. These reactions may help you adjust your efforts to have the greatest desired effect.

Outreach is one tool at your disposal to address propaganda, and to address misinformation that others may spread about your work or about the situation at hand. Effective outreach means being aware of the misinformation that has been circulated and why. It means learning how much your intended audience knows, and what obstacles may exist to their learning more (language, education, access

to internet or other communally shared sources of information, political agendas of others in the public square, etc.), and then addressing those obstacles to the best of your ability.

Two Steps Forward addressed a factor unique to international criminal tribunals: they have often held their trials at great physical distance from the scene of the crime. The volume concluded that in situ trials are often more impactful than those conducted at a distance in large part because communication about those trials is easier to do when the trials take place within the communities that experienced the crimes being prosecuted. The resources necessary to address the obstacles are more readily at hand within those communities as well (e.g. access to translators and writers in the most commonly read languages, knowledge of how information is most commonly transmitted, access to victim communities and audience participants at open trials, access to local journalists and policy-makers, etc.).

International prosecutors and policy-makers have been at risk of minimizing the importance of outreach, or of not understanding how it can most effectively be undertaken, as reflected in critique and analysis around the early establishment and functioning of the ad hoc international tribunals in particular, where outreach was initially viewed as an afterthought, poorly funded and not integrated into the main work of the tribunals. *Two Steps Forward* also examines the relative focus or lack of focus on outreach as an element affecting the deterrent impact of the ICC and the other international criminal tribunals.

Outreach efforts are important and must be a **two-way street**.

On the one hand, they must project information and updates to your intended audiences about the steps you have taken to deter crimes. But, on the other hand, they must also allow for effective communication back to you about how these efforts have been received, and about how your perceived or actual failures might best be remedied. Deterrence is a moving target and any achieved effect can vanish if you do not monitor it and adjust your efforts as you go.

d. Legitimacy

The study further found that another crucial aspect to deterrence is legitimacy. If you seek to deter crimes, you must ask yourself: will your efforts be perceived as legitimate? The term, legitimate, from the latin *legitimus*, arises in part from the idea of something being exactly as purposed, in accordance with law or with established legal forms and requirements, or otherwise conforming to recognized principles or accepted rules and standards.

The ability of a court to deter crimes is highly dependent on it being perceived as legitimate, which includes proving that it is not subject to political influence,

but rather is fair and unbiased and acting based purely on the law, in order to earn the trust and respect of the societies at large they intend to serve. Likewise, the law only works as a deterrent if criminals know the laws, and ideally, accept them as legitimate limits on their behavior.

Legitimacy, or what has also been described as lack of selectivity or politicization, is truly in the eye of the beholder. Some may for example perceive actions against members of their own group as inherently unfair while those against members of opposing groups as always justified. While such views may be objectively flawed, they will affect the perceived legitimacy of deterrence efforts regardless. They must therefore be addressed.

Amongst other factors that may affect the perceived legitimacy of a deterrent effort:

- Obvious reliance on the political support of only some States or political bodies or figures;
- The timing of a series of actions, including sequencing of cases, which may create the perception that only one side to a conflict is subject to the law;
- Conversely, the perception that moral equivalence is pursued for its own benefit and not for justified reasons;
- The perception that deterrent efforts interfere with the law enforcement actions of others, such as national trials or measures of social deterrence;
- Too few actions which suggest that only a handful of people may be targeted or that they may be targeted in an arbitrary way;
- Lengthy or seemingly unjustifiable delays in taking action, such as over-long trials;
- Avoidance of targeting politically powerful or sensitive people with deterrent action;
- Conversely, avoidance of targeting direct perpetrators in favor of targeting higher-level officials.

It is fair to point out that a number of the factors above are in opposition to each other. Just remember that deterrent action means maintaining a delicate balance along the way, with an open ear and outreach approach that at least is aware of how the intended recipients of that action understand and accept or reject the approach to deterrence she or he has taken. It is unfortunate that you may end up in “damned if you do, damned if you don’t” situations, where there is no easy solution to avoiding perceptions of selectivity from at least some categories of potential respondents. But awareness of and sensitivity to the charge of selectivity is at least a good place to start.

4. A Methodology to collect and assess deterrence data

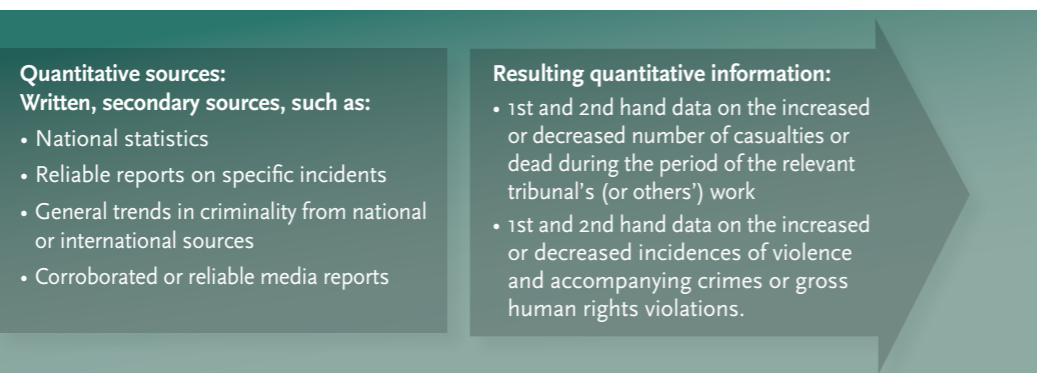
Section 3 provided a background on the meaning of deterrence, the need for both actual and perceived deterrence, and the impact of underlying issues, such as the significance of perception, recognition of problems with propaganda in achieving deterrence, the crucial need for outreach, and the importance of legitimacy of the judicial process. Taking into account this background knowledge and concerns, Section 4 discusses the methodology that the researchers in *Two Steps Forward* designed to study deterrence. The methodology includes both a process to collect data and key assessment areas to determine how best to improve a deterrent effect. Collection of data will be described in the first subsection; assessment points will be identified in the second subsection; and a final subsection will provide examples of the applied methodology from a few of the case studies in *Two Steps Forward*.

Preliminarily, it is important to note that one of the most difficult challenges in measuring actual performance is the problem of correlation—to what degree specific actions can be linked to specific consequences—the case study researchers generally agreed that at least some facts could point to a likely connection between actions taken and a deterrent effect. In most cases, the picture was mixed, but the data pointing away from a deterrent effect should not obscure data that points towards it (or vice versa). In each case, all the data must be kept in mind as you endeavor to improve the deterrent effect of your actions, keeping in mind as well that there is no perfect correlation. Examining data in this framework, therefore, should prove to be a useful, although incomplete, tool. Taking into consideration the difficulties of correlation, *Two Steps Forward* emphasized and relied upon both firsthand data of a *quantitative* (relating to statistics) and a *qualitative* (relating to perceptions) nature, gathered from those who actually experienced the effect of the work of international tribunals, with a particular emphasis on the qualitative data.

a. Quantitative data

Quantitative data is essential to collect because one cannot begin to discuss a potential deterrent effect without first knowing whether crimes are increasing or decreasing. Beyond this basic fact, though, it is generally acknowledged that drawing a direct correlation between prosecutions or other deterrent actions and a numerical decline in criminality will always be troublesome because there are too many interrelated variables in causing changes in criminal activity.

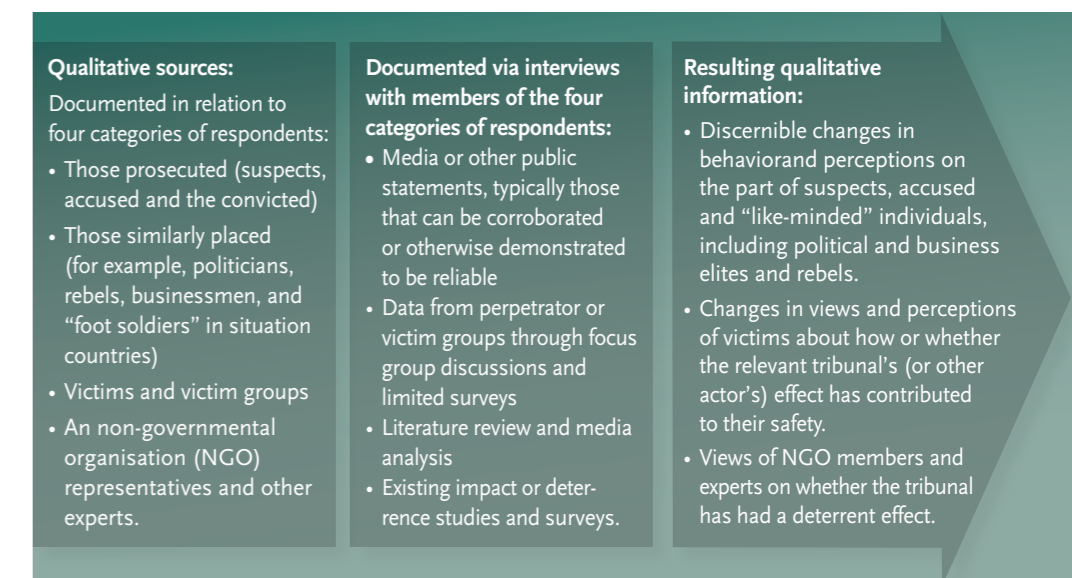
The following diagram indicates the types of quantitative data that can be gathered and the types of information that can be gained from the data.



b. Qualitative data

Because quantitative data can only describe facts and trends without an actual correlation with deterrence, qualitative data is paramount as trials or other deterrent actions do not take place in a vacuum, but in a social environment that results from the interaction of numerous political, social, economic, cultural, and legal factors. A qualitative approach allows the researcher to explore the totality of a situation, using a case study approach to generate small but focused samples of data that illuminate how subjects interact with and affect the world around them. It is a difficult task, as each interaction is akin to a stone thrown in a pond; multiple and ongoing interactions create multiple, overlapping ripples, until it becomes impossible to see the point of first impact or to attribute specific reactions to a single point of entry. But the better these interactions can be understood, the more the action to be taken, including investigations and prosecutions, can be tailored to have its greatest impact.

The following diagram indicates the types of qualitative data that can be obtained from firsthand and secondhand sources and the information that can be derived from the data.



4.2 Points for assessment

Once quantitative and qualitative data are collected, they can be evaluated for consistent patterns, trends, and insights that will help shape further governmental and societal efforts at deterrence of atrocity crimes.

The assessment will be dependent upon your unique situation, including the types of crimes, the actors to deter, the culture of the society, the nature of a conflict if the crimes arose during one, the strength of national institutions, and types of judicial proceedings involved. As a general matter, however, the *Two Steps Forward* case studies found that it is worthwhile, at a minimum, to evaluate the following:

- a. Whether the quantitative data indicates that atrocity crimes have decreased at selected points in time, such as before or after prosecutions commenced. If atrocity crimes have decreased, it is an indicator (although not correlative) of an impact of the judicial proceedings. If atrocity crimes have increased, it may be an indicator of the ineffectiveness of the judicial proceedings. Because it is doubtful that an actual correlation between a prosecution and decreased (or increased) crimes can be developed, it is also important to identify other factors at work in the situation, such as the perceived legitimacy of the courts and the extent of outreach on the judicial proceedings.
- b. Whether there is actual or perceived selectivity in prosecutions that impacts the legitimacy of the process. If there is actual selectivity, such as only prosecuting one side of a conflict, or if there is a perception of unfairness in the selectivity, deterrence is likely to be minimal.
- c. Whether there is adequate outreach to raise awareness and understanding of the judicial proceedings. If the affected population is unaware or has a limited understanding of the prosecutions and the judicial decisions, any deterrent effect will be diminished.
- d. Whether there is sufficient cooperation and coordination amongst institutions and actors who are seeking to deter serious crimes. If the judicial proceedings are supported by actions and communications from other governmental institutions, there is likely to be a greater deterrent effect. In contrast, if a national government is at odds with international or national prosecutions of atrocity crimes, there is less likely to be a perceived deterrent impact.
- e. Whether national capacity to prosecute atrocity crimes is adequate to promote certainty in particular, but also speed and severity of punishment. International courts can only handle a small fraction of cases, usually only the highest-level military and political leaders. Greater accountability, and perceived deterrence, can be achieved if national prosecutions are also conducted. Consequently, national capacity is essential as part of a deterrence evaluation.
- f. Whether long-term goals can be identified that would involve multiple institutions within the society, such as courts, legislatures, and education, to improve the cultural norms of accountability for serious crimes. The qualitative data is likely to reveal fissures within a society, either culturally or institutionally, or both. An assessment of the interface of judicial proceedings with other institutionalized parts of the society can lead to reforms that will increase the recognition and understanding of accountability for atrocity crimes. A multiple-prong approach to instilling cultural norms that reject atrocity crimes can be a strong component of deterrence.

4.3 Examples of deterrence findings from *Two Steps Forward*

Although the findings of *Two Steps Forward* cannot be summarized in full in this guide, the following examples are intended to give you an idea of the information gathered and the findings in several of the case studies from *Two Steps Forward*. While your situation will not be identical to any of those identified here, the descriptions will provide examples of how the deterrence study methodology was applied and analyzed.

For more complete information on each study, we refer the guide's readers to the book itself for further details.

a. Serbia and Kosovo

- ◀ Pointing away from deterrence: The worst atrocities in the former Yugoslavia happened despite the ICTY's existence.
- ▶ However, pointing towards potential deterrence: The decrease in incidences of violence and casualties in Kosovo after the May 1999 ICTY indictment of Slobodan Milošević could potentially be correlated with both the ICTY's actions as well as with the NATO military intervention. Also pointing towards a deterrent effect, Kosovo respondents believed generally that "if the tribunal did not exist, the situation would have been worse, as the perpetrators would not be sentenced by anyone" since there "would not be any other court or body that would try these cases".

b. Darfur

- ◀ Pointing away from deterrence: In Darfur, the government of Sudan engaged in repeated efforts to cover up crimes, and crimes continued to be committed, long after the ICC's engagement in the situation.
- ▶ Pointing towards deterrence: Darfur statistics show a drop-off in incidents and fatalities in early 2005, around the time of the Darfur referral to the ICC, but this seeming correlation does not necessarily mean that the ICC deterred crimes. Respondents in the Darfur situation nevertheless believed that the scale of violations would have been greater had the ICC not intervened.

c. Rwanda

- ◀ Pointing away from deterrence: It is unclear if either the ICTR or national processes were viewed as having a deterrent effect. For example, expressing their view of national processes, five respondents in Nyarugenge central prison informed the author: "We confessed of our crimes, provided information implicating others, asked for forgiveness and even some [three] of us testified in the ICTR as prosecution witnesses. Well, this had no impact on the sentences handed to us, most of us are serving life sentences".

A similar situation seemed to be shaping up in Burundi, under ICC preliminary examination. The Rwanda chapter in *Two Steps Forward* touches on the situation, citing a respondent from the Ministry of Justice, who added from his or her perspective: “The incidents currently happening in Burundi are an indicator that the Great Lakes region did not learn from the events in Rwanda.”

- ▶ Pointing towards deterrence: In the view of respondents, in particular victims, the certainty of apprehension and prosecution of high profile perpetrators by the ICTR is shown to have achieved deterrence. A Ministry of Justice respondent described the unique contribution of the ICTR as “the identification of suspects who were abroad, gathering information related to the offences that they were suspected to have committed, and an increase of the number of international arrest warrants sent by ICTR to other foreign countries where those suspects were hidden”, a category of suspects less readily available for national proceedings.

The chapter goes on to demonstrate that the ICTR’s impact cannot be examined in isolation from the extensive efforts undertaken by Rwandan authorities to investigate and prosecute the authors of the genocide through national proceedings, both in formal courts and in gacaca trials. As respondents in the prison focus group discussion noted on the impact of national proceedings: “Gacaca trials took place in cells, sectors and villages of perpetrators where perpetrators were living and this is a humbling experience that no one wants”. Correlation between the ICTR’s impact and deterrence cannot be undertaken without reference to these other factors.

d. Mali

- ◀ Pointing away from deterrence: In the Mali situation, failure of the ICC to secure convictions in its other cases or to secure arrests for outstanding warrants were cited as proof of the inability of the Court to deter crimes, amongst other things.
- ▶ Pointing towards deterrence: However, the Mali chapter notes that the former ICC judge from Mali had cited the impact of ICC activities in other situations as scaring the Burundi president, Pierre Nkurunziza, into not engaging in criminal activity, although the Burundi president later withdrew Burundi from the ICC.

5. Conclusion

Two Steps Forward, as well as previous studies, have recognized that the full effect of international criminal courts cannot be realized immediately. Deterrence is a long-term goal that may take generations to become part of the fabric of a people and a country. Additionally, other steps, such as incorporating international norms into domestic laws, and developing national institutions meant to promote accountability and deterrence, similarly may have their greatest effect over the long-term. Towards this end, it is important to consider how best to monitor deterrent efforts and their effects over the long-term, and how to document and share your efforts with others to try to ensure greater deterrence in the future.

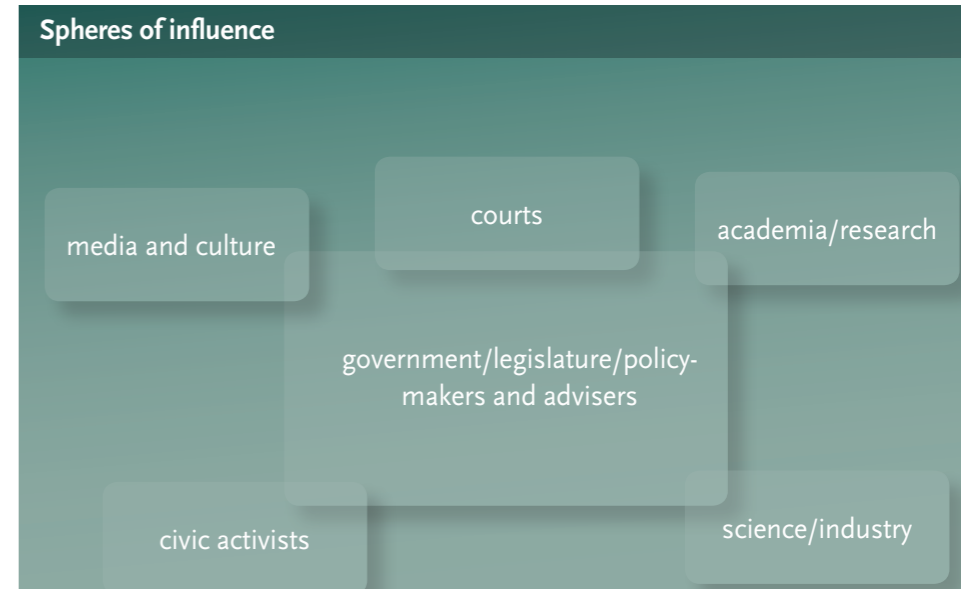
The following checklist is intended to assist you in establishing a methodology for gathering data and an outline for assessment of the information collected.

Checklist for study of deterrence

The following categories are intended in particular to help structure future studies of deterrent actions taken either by or through international courts or through other institutions or actors.

Actors working towards deterrence

Who is working to promote deterrence? Those looking to promote or monitor deterrence should consider that almost anyone active in the public sphere in one form or another may potentially have deterrent influence through their actions. The spheres of influence below are therefore meant to be illustrative but not comprehensive. They overlap in their activities and influence, and influence each other as well.



Checklist of actors potentially working towards deterrence:

- Prosecutors/courts
- Government representatives, parliamentarians, policy-makers
- Media members and cultural influencers
- Civic activists
- Science and industry members
- Academics, researchers, and students
- Lawyers
- Others
- Identify factors of importance, including selectivity factors:
 - Identify the political, religious, ethnic, or other relevant affiliation of such potential actors in order to track reactions based on affiliation or opposition
 - Note the level of the potential actor and their relation to other relevant actors
 - Note the preference of each potential actor for certain types of action, including criminal law versus socially deterrent actions

Persons or groups to deter

Who and what is the subject of your study attempting to deter? Is it a specific individual, a specific category of individuals (targeted deterrence) or the entire society (general deterrence)? What crimes are you specifically intending to deter?

Checklist of persons or groups to deter:

- Identify the category or individuals to be deterred
- Identify crimes that you (or the subject of your study) want to deter

Venue

In what venue is the subject of your study acting to achieve a deterrent effect? What courts or other institutions are you intending to monitor for their deterrent effect? What prosecutorial and other factors do you want to identify as part of this process?

Checklist of venues and their impact:

- Identify the specific court where action is being taken, and its level (national, regional, international)
- Identify other relevant venues for action or monitoring (national parliament or similar assemblies at the local level, other fora for dialogue including industrial or scientific exchanges, publications and other media, including television and film, etc.)

- Identify factors of importance, including selectivity factors:
 - Identify the political, religious, ethnic, or other relevant affiliation of the accused or the intended object of deterrent action in order to track reactions based on affiliation or opposition
 - Note the level of the accused or the intended group—high-level, middle, low-level actors
 - Note the certainty of prosecution or other deterrent action, the length of time between the alleged act and the deterrent action, and the sentence (or acquittal or other penalty) imposed

Outreach

Given the significance of outreach in achieving deterrence, identify the components of outreach in your study.

Checklist of targets of outreach:

- Constituencies: identify who are the intended audiences for outreach (victims, civil society, policy-makers, experts, others) and how best to maintain contact with them
- Content: make a record of the content of the outreach messages, and make outreach and ways to respond to outreach easily, publicly accessible
- Method: Identify and track the method(s) of outreach, such as written materials, films, community meetings, radio broadcasts, as it may require adjustment along the way
- Feedback: Note whether the outreach is a one-way communication or whether it is a two-way dialogue with the relevant constituencies

Quantitative assessment

Although it is difficult to do quantitative assessment of deterrence, it is possible to identify statistics and data that are relevant to the study of deterrence.

Checklist of quantitative data for collection:

- Numbers of casualties at selected points in time, for instance before any prosecutions or other deterrent actions, after such actions, after 2–3 years, after 5–10 years, or other points of significance in the context
- Numbers of incidences of violence or gross human rights violations at selected points in time as with casualties

Qualitative assessment

Qualitative assessment is the key component to the study and monitoring of deterrence. This approach can be tailored to the specific context at issue. General categories of information are listed below.

Checklist of qualitative data for collection

- Categories of interviewees
 - Perpetrators
 - Political and military officials, including oppositional, political, and military groups
 - Victims
 - Civil society—NGOs, academics, and other interested groups
- Potential approaches to interviewees: Sampling methods
 - Direct interviews with individuals or groups
 - Review of media statements of individuals in the categories above
 - Other—if other sources will be used, identify those at the outset so that consistency can be maintained in subsequent studies
 - Timing: set out a plan for the timing of gathering information, with a particular focus on considering short-term and long-term potential deterrent effects

Evaluation

Each context and situation will be different, but in general, the following areas are recurring themes:

Checklist of evaluative questions

- Selectivity of action: Can actual or perceived selectivity be addressed so as to improve greater fairness, inspire greater awareness and impact of deterrent action?
- Outreach: Can communications with constituencies be improved in location, content, and feedback, to raise awareness and to calibrate deterrent efforts to accommodate genuine concerns and issues?
- Cooperation and coordination: Are there ways in which to improve the cooperation and coordination amongst institutions and actors who are seeking to deter serious crimes?
- National capacity: Can national capacity be increased and improved to handle more deterrent action that promotes certainty in particular, but also speed and severity?
- Long-term goals: What long-term goals can be identified that would involve multiple institutions within the society, such as courts, legislatures, and education, to improve the cultural norms of accountability for serious crimes?

In short, all actors can promote deterrence of serious crimes; the moral as well as legal obligation is to continue to test and push the limits of their abilities to do so, singly and in concert. The cost of failure is too great to give up.

International Nuremberg Principles Academy

The **International Nuremberg Principles Academy (Nuremberg Academy)** is a non-profit foundation dedicated to the promotion of international criminal law and related human rights. It was established by the Federal Republic of Germany, the Free State of Bavaria, and the City of Nuremberg in 2014.

The Nuremberg Academy is located in Nuremberg, the birthplace of modern international criminal law, where the Nuremberg trials against the major war criminals were held by the International Military Tribunal from 1945 to 1949. For the first time in history, an international tribunal was authorized to hold leading representatives of a state personally accountable for crimes under international law. The foundation carries forward the legacy of the Nuremberg trials and the “Nuremberg Principles”, principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal. The International Law Commission, a body of experts established to help develop and codify international law since 1947, was entrusted to formulate these principles, which was finalized in 1950.

Conscious of this historic heritage, the Nuremberg Academy supports the fight against impunity for universally recognized international core crimes: genocide, crimes against humanity, war crimes, and the crime of aggression. Its main fields of activity include providing a forum for dialogue by convening conferences and expert meetings, conducting interdisciplinary and applied research, engaging in specialized capacity building for practitioners of international criminal law, and human rights education. Dedicated to supporting the worldwide enforcement of international criminal law, the Nuremberg Academy promotes the Nuremberg Principles and the rule of law with a vision of sustainable peace through justice, furthering knowledge, and building capacities of those involved in the judicial process in relation to these crimes.

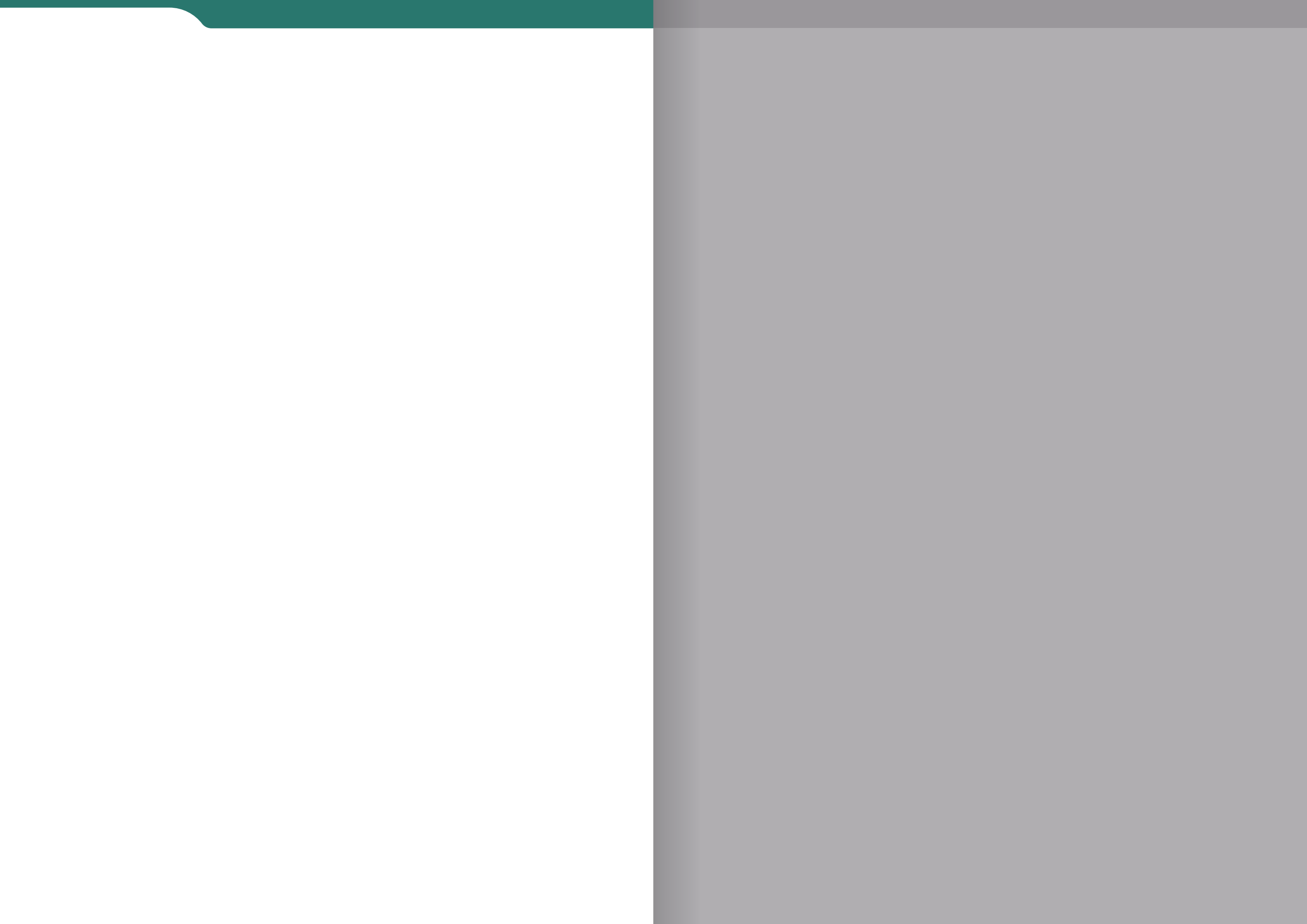
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ISBN: 978-3-9818913-4-8



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