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Johan David Michels

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KEEPING DEALERS OFF THE DOCKET: THE PERILS OF PROSECUTING SERIOUS DRUG-RELATED OFFENCES AT THE INTERNATIONAL CRIMINAL COURT

*Johan David Michels**

I. INTRODUCTION	449
II. MALUM IN SE	451
III. LEGITIMATELY UNWILLING TO PROSECUTE.....	454
IV. INEFFECTIVE MEASURE.....	457
V. CONCLUSION.....	459

I. INTRODUCTION

At present, “illegal drugs comprise an estimated nearly ten percent of world trade” and “exceed car production as a proportion of the global economy.”¹ The U.N. Office on Drugs and Crime estimates that there are approximately two hundred million illegal drug users, worldwide.² In response, many States are fighting the trade in illicit substances.³ The United States alone spends some forty billion dollars each year trying to eliminate the supply of drugs. It arrests 1.5 million of its citizens each year for drug offences and imprisons half a million of them.⁴

Some are now calling for the International Criminal Court (ICC) to

* *Johan David Michels is an Assistant Legal Officer with Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia and has an LLM in International Criminal Law from the University of Amsterdam.* The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

1. See Ashley Day Drummond, *Peru: Coca, Cocaine and the International Regime Against Drugs*, 14 L. & BUS. REV. AM. 107, 108-09 (2008).

2. U.N. Office on Drugs & Crime, 2006 World Drug Report at 33, U.N. Sales No. E.06.XI.10 (2006), available at <http://www.unodc.org/unodc/en/data-and-analysis/WDR-2006.html>.

3. Cf. *How to Stop the Drug Wars*, ECONOMIST, Mar. 7, 2009, at 15 (explaining that the rising rate of cocaine use is “not for want of effort.”).

4. *Id.*

join the fray.⁵ The original draft of the Rome Statute included jurisdiction over drug-related offences, but delegates could not agree on a definition.⁶ The offences were not included in the final draft.⁷ However, the delegates at the 1998 Rome Conference adopted Resolution E, recommending that a future Review Conference reconsider the inclusion of terrorist crimes and drug trafficking crimes.⁸

In June 2010, the ICC's Assembly of States-Parties will convene to discuss amendments to the Rome Statute.⁹ They are likely to reconsider the extension of the ICC's subject matter jurisdiction to cover serious drug-related offences.¹⁰ The proposed extended jurisdiction would probably be limited to those offences that constitute exceptionally serious crimes of international concern, such as large-scale drug production and trafficking, by criminal organizations, across national boundaries.¹¹ Thus, jurisdiction would not cover possession for personal use.¹²

The present status of drug-related offences under international criminal law is unclear. On the one hand, they are absent from the Nuremberg Charter, the Tokyo Charter, and the Statutes of the *ad hoc*

5. See generally Molly McConville, Note, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 93 (2000) (explaining that the original Statute does not include jurisdiction over crimes involving the traffic or illicit drugs but that a compromise was reached recommending that terrorism and drug trafficking be added at a future review conference in 2010).

6. *Id.* at 93.

7. *Id.* For a contrasting view and general information on the ICC's rejection of drug trafficking offenses in the Rome Statute, see Anne H. Geraghty, *Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems*, 16 FLA. J. INT'L L. 371 (2004).

8. Coalition for the International Criminal Court: Proposal of the Netherlands on the Inclusion of the Crime of Terrorism in the Rome Statute, <http://www.iccnw.org/?mod=resolutione> (last visited Oct. 28, 2009).

9. Rome Statute of the International Criminal Court, art. 123, ¶ 1, 37 I.L.M. 1002 (1998) [hereinafter Rome Statute]; see also Coalition for the International Criminal Court: Review Conference of the Rome Statute, <http://www.iccnw.org/?mod=review> (last visited Oct. 28, 2009) (explaining that the first Review Conference meets between May 31, 2010 and June 11, 2010 in Kampala, Uganda; and distinguishing Review conferences from the annual Assembly of States Parties).

10. See Coalition for the International Criminal Court: Review Conference of the Rome Statute, *supra* note 9.

11. See William C. Gilmore, *The Proposed International Criminal Court: Recent Developments*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 263, 271-76 (1995); see also *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, art. 20, U.N. Doc. A/49/10 (1994), reprinted in [1994] 2 Y.B. INT'L L. COMM'N 38, A/CN.4/SER.A/1994/Add.1 (Part II).

12. Gilmore, *supra* note 11, at 273.

Tribunals.¹³ On the other hand, there is ample state practice of the prosecution of drug-related offences. Moreover, the 1988 U.N. Convention against Illicit Traffic provides some evidence of *opinio juris sive necessitatis*, by obligating each Party to criminalize a list of drug related offences in domestic law.¹⁴

Finding a basis in customary law, rather than creating a new crime by treaty, strengthens the legitimacy of prosecutions.¹⁵ However, the ICC's States-Parties are not bound by customary international law. The ICC is a treaty-based institution, and the current Rome Statute created new law, in addition to codifying existing customary law, when it went into force.¹⁶ Further, creating a new crime in the Rome Statute is less problematic from a *nullum crimen sine lege* perspective, because the ICC does not operate *ex post facto*.¹⁷

Nevertheless, this Essay argues against the inclusion of serious drug-related offences within the ICC's subject-matter jurisdiction. Firstly, the conduct does not violate internationally recognized human rights. Secondly, States may legitimately strive to legalize the trade in currently prohibited drugs. Thirdly, the extension of ICC jurisdiction may be less effective in combating the international drug trade than others have argued.

II. MALUM IN SE

The ICC's jurisdiction should not be extended to cover drug-related offences because international criminal law should be restricted to conduct that violates internationally recognized human rights. Damaška argues that international criminal justice "presupposes that acts which it threatens with punishment are contrary to existing and reasonably clear

13. Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, The Government of the United States of America, The Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal pt. II, art. 6, concluded Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946, T.I.A.S. 1589; Statute for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia arts. 2-5, May 25, 1993, 32 I.L.M. 1159; ICTR Statute, S.C. Res. 955, arts. 2-4, U.N. DOC. S/RES/955 (Nov. 8, 1994); Rome Statute, *supra* note 9, art. 5.

14. Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Nov. 25-Dec. 20, 1998, Vienna, Austria, *Final Act*, art. 3, U.N. DOC. E/CONF.82/14 (Dec. 20, 1988).

15. See generally Theodor Meron, *Defining Aggression for the ICC*, 25 SUFFOLK TRANSNAT'L L. REV. 1, 11-12 (2001) (arguing the same with regard to the crime of aggression).

16. See ALEXANDER ZAHAR & GÖRAN SLUITER, INTERNATIONAL CRIMINAL LAW 87 (2008).

17. *Id.*

moral fundamentals, or, alternatively, they flout agreements on basic protections.”¹⁸ Where “such moral fundamentals or agreements do not exist, or are not yet capable of authoritative determination, then the ground on which international criminal justice rests, collapses.”¹⁹

So far, international criminal law has concerned itself with the most serious crimes of concern to the whole international community.²⁰ The Preamble of the Rome Statute speaks of the victims of unimaginable atrocities that deeply shock the conscience of humanity.²¹ The crimes currently within the ICC’s jurisdiction are war crimes, crimes against humanity and genocide.²² These crimes constitute gross violations of internationally recognized human rights, such as the rights to life, liberty, property and the right to be free from torture. Such crimes may be considered *malum in se*—they are legally as well as morally wrong and would stand for evil whether legally permissible or not.²³

By contrast, serious drug-related offences such as trafficking and production do not directly infringe on human rights. Instead, international drug trafficking transactions are essentially cross-border exchanges of goods that, in and of themselves, do not harm the participants and do not affect third parties. Similarly, drug production, in itself, is a process involving agriculture and chemistry. Thus, drug-related offences resemble *malum prohibitum* crimes, because the wrongfulness of the act derives solely from the violation of a statutory rule.²⁴ The conduct is not morally reprehensible in itself, but is forbidden by governments for policy reasons.

It could be countered that serious drug-related offences go hand in hand with serious violations of human rights. Firstly, the international drug trade is violent. Drug trafficking is closely linked to other violent offences, such as murder.²⁵ For instance, in Mexico, from 2006 to early 2009, some 10,000 people died in drug-related violence; 6,268 of these

18. Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 347 (2008).

19. *Id.*

20. *See, e.g.*, Rome Statute, *supra* note 9, pmb. (“Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”).

21. *Id.*

22. *Id.* arts. 6, 7, & 8.

23. *See* GEORGE FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 78 (1998) (describing *malum in se*).

24. *See id.* at 77-78 (describing *malum prohibitum*).

25. McConville, *supra* note 5, at 75-77; Anne H. Geraghty, *Universal Jurisdiction and Drug Trafficking: A Tool for Fighting One of the World’s Most Pervasive Problems*, 16 FLA. J. INT’L L. 371, at 375 (2004).

deaths occurred in a single year.²⁶

However, the violent nature of the drug trade is not inherent to the buying or selling of drugs. Rather, it is linked to the product's prohibition. Organized crime can be viewed as a rational response to the demand for illicit goods and services.²⁷ Thus, when the United States prohibited alcohol, organized criminals turned to its distribution.²⁸ Such dealing in illicit goods will be violent, if only because illicit contracts are not enforceable in court.²⁹ So, the ordinary ultimate forum of conflict resolution for regular businesses is unavailable to drug traffickers. In sum, the drug trade is violent because it has been criminalized. As a result, it cannot be considered morally wrong, whether legally permissible or not, on the basis of the accompanying violence.

Secondly, the drug trade's profits are often put to harmful use. Drug traffickers use their profits to corrupt officials, as well as to fund terrorists, rogue regimes, or political insurgents.³⁰ However, the drug traders' high profits are arguably the effect of prohibition, rather than of the substances themselves. The price of an illegal substance is determined by the costs of distribution, not of production.³¹ Organized crime is aided by the *crime tariff*: making a product for which there is an inelastic demand illegal, effectively secures a monopoly-like profit to the entrepreneur who is willing to break the law.³² For example, the increase in value of cocaine from coca field to consumer is more than a hundredfold.³³

These high profit margins in the supply of illicit goods facilitate the corruption of public officials and law enforcement officers.³⁴ The same applies to the funding of terrorism, et cetera.³⁵ The drug trade is not evil merely because it is profitable and its profits are spent to the detriment of public goods. In any event, the trade is so profitable because its products have been made illicit. For these reasons, it cannot be considered morally wrong, whether legally permissible or not, based on the spending of those profits.

26. *Dealing With Drugs: On the Trail of the Traffickers*, ECONOMIST, Mar. 5, 2009.

27. See Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613, 616 (1994).

28. *Id.* at 622-24.

29. *Id.* at 618.

30. See Geraghty, *supra* note 25, at 376.

31. *How to Stop the Drug Wars*, *supra* note 3.

32. See Demleitner, *supra* note 27, at 617.

33. *Failed States and Failed Policies: How to Stop the Drug Wars*, *supra* note 3; JOS SILVIS, ENFORCING DRUG LAWS IN THE NETHERLANDS, IN: BETWEEN PROHIBITION AND LEGALIZATION 41, 48 (Ed Leeuw & Ineke Haen Marshall ed., 1994).

34. Demleitner, *supra* note 27, at 619.

35. See Geraghty, *supra* note 25, at 376.

Lastly, it could be argued that drug trafficking and production facilitate drug consumption. The repeated physical consumption of the illicit substances is physically harmful,³⁶ as well as (physically or mentally) addictive. Moreover, where drug addiction leads to unsustainable lifestyles, addicts may turn to theft to finance their addictions.³⁷ Yet, this argument again illustrates the teleological reasoning behind criminalizing the drug trade. The trade in itself does not harm anyone, but it may lead to consumption, which can. To prevent consumption, States criminalize production and trade.

In sum, serious drug-related offences, such as production and trafficking, are not *malum in se*: they are not morally wrong, whether legally permissible or not. Drug trafficking or production itself does not infringe on human rights, although drug traffickers and producers may. As a result, the conduct cannot meet the criterion of violation of fundamental humanitarian principles, or giving outrage to the conscience of mankind, required for the status of an international crime.³⁸ Therefore, such offences should not be included in the ICC's jurisdiction.

III. LEGITIMATELY UNWILLING TO PROSECUTE

Under the Rome Statute, a case is admissible before the Court if it is not being investigated by the State, or where State authorities are unwilling to genuinely carry out the investigation or prosecution.³⁹ This approach is sensible with regards to conduct that violates fundamental humanitarian principles.

However, drug-related offences do not violate human rights, but are prohibited for policy reasons. As a result, governments may also opt not to prohibit such offences, if they find compelling policy reasons not to. Thus, complementary ICC jurisdiction is inappropriate with regard to serious drug-related offences, because governments may legitimately choose not to prosecute them.

States can take one of three general approaches on drugs.⁴⁰ Firstly, a punitive, prohibitive approach focuses on prosecuting and punishing those who use, possess or sell illicit drugs.⁴¹ This approach is consistent

36. *Id.* at 374.

37. SILVIS, *supra* note 34, at 50.

38. Adriaan Bos, Representative of the Kingdom of the Netherlands to the International Law Commission on October 26 1994, in: William C. Gilmore, The Proposed International Criminal Court: Recent Developments, 5 *TRANSNAT'L L. & CONTEMP. PROBS.* 263, 271 (1995).

39. Rome Statute, *supra* note 9, art. 17.

40. Melissa T. Aoyagi, *Beyond Punitive Prohibition: Liberalizing the Dialogue of International Drug Policy*, 37 *N.Y.U.J. INT'L L. & POL.* 555, 560-71 (2005).

41. See *id.* at 560.

with ICC complementary jurisdiction.

Secondly, a harm minimization approach focuses on mitigating the harms caused by drugs.⁴² According to Greenwald, there has been a tenfold increase in the availability of harm-reduction measures across the EU in the past ten years.⁴³

Harm-minimization can include decriminalization of possession for personal use, which removes drug-related conduct from criminal law, but maintains non-criminal sanctions.⁴⁴ For example, in 2001, Portugal decriminalized the drug possession for personal use of all drugs.⁴⁵ Another example is the Netherlands, where official criminalization has given way to the Prosecutor's guidelines, which emphasize non-enforcement of crimes concerning cannabis possession, use and dealing in coffee shops.⁴⁶

A policy of decriminalization may reduce the harms caused by the consumption of drugs. For instance, in Portugal post-decriminalization drug usage rates and drug-related pathologies have decreased dramatically.⁴⁷ Decriminalization appears to have offered the Portuguese government enhanced opportunities to offer treatment to its citizens.⁴⁸

However, decriminalization cannot reduce the harms of violence and corruption that accompany the drug trade itself. These are linked to the illicit nature of the product; the trade in which remains illegal, even if possession for personal use is decriminalized.⁴⁹ Harm-minimization approaches would generally be compatible with ICC complementary jurisdiction, which will cover serious drug-related offences only. Even where possession has been decriminalized, drug trafficking or production continues to be a criminal offence.⁵⁰

Thirdly, a legalization approach entails no legal prohibitions of any kind for drug manufacturing, sale, possession or use.⁵¹ "There is a serious debate over whether decriminalization of the drug trade would solve many of the world's drug problems."⁵²

"[L]egalization of a product eliminates organized crime if the good

42. See *id.* at 572. See also *Failed States and Failed Policies: How to Stop the Drug Wars*, *supra* note 3.

43. Glen Greenwald, *Drug Decriminalization in Portugal*, Cato Institute Policy Analysis (2009), available at www.cato.org/pubs/wtpapers/greenwald_whitepaper.pdf.

44. *Id.* at 2.

45. *Id.* at 1-2.

46. SILVIS, *supra* note 33, at 48.

47. Greenwald, *supra* note 43, at 1.

48. *Id.*

49. *Id.* at 1-2; SILVIS, *supra* note 33, at 47-49.

50. Greenwald, *supra* note 43, at 1-2; SILVIS, *supra* note 33, at 47.

51. Aoyagi, *supra* note 40, at 571; Greenwald, *supra* note 43, at 2.

52. Geraghty, *supra* note 25, at 386-87.

offered legally is equal or superior to that provided by the criminal organization.”⁵³ Thus, in the United States, after the repeal of prohibition laws, alcohol became readily available legally and the organized criminal supply of alcohol practically disappeared.⁵⁴ In theory, pharmacists would be in a position to supply uncontaminated drugs, taking over from organized crime.⁵⁵

Moreover, governments could tax and regulate the drug trade, using the funds raised, combined with the money saved on law-enforcement, to educate the public about the risks of drugs and to treat addiction.⁵⁶ Instead of a blanket prohibition, such taxes could reflect the differing degrees of harmfulness and addictiveness between different drugs.⁵⁷ Constraints on the drug trade could also be achieved through taxation,⁵⁸ or by exclusion of groups of consumers (such as children under 18).⁵⁹ However, a black market may be expected to offer cheaper (untaxed) drugs, as well as supply drugs to excluded groups.⁶⁰

Yet such a black market will still be considerably smaller than today’s market.⁶¹ It is also likely to have far lower profit margins,⁶² in part because it will have to compete with the legitimate drugs on offer. A reduction in the organized criminal trade of drugs should entail less trade-related violence. Moreover, the lowered profits will give criminals less resources to bribe officials or to fund terrorist organizations. Thus, a legalization approach may be able to reduce the harms, identified above, caused by the drug trade. Although an initial increase in drug use may be expected as drugs will become more safely, cheaply and easily available,⁶³ legalization may also be expected to have the same positive effects on the harms caused by drug use as decriminalization has had, by offering enhanced opportunities for treatment.

A legalization approach would be incompatible with complementary ICC jurisdiction. ICC prosecutions would conflict with a legalization policy, as well as potentially run into *nullum crimen sine lege* problems, as the conduct would not be criminal under national law. Legalization is not necessarily the *best* option, but it is a *legitimate* option that States

53. Demleitner, *supra* note 27, at 617.

54. *Id.*

55. *Id.* at 641.

56. *How to Stop the Drug Wars*, *supra* note 3.

57. *Id.*

58. See Marie-Andree Bertrand, *Creation of an International Anti-Prohibitionist League in the Field of Drugs*, 18 HOFSTRA L. REV. 881, 882 (1990).

59. *How to Stop the Drug Wars*, *supra* note 3.

60. Demleitner, *supra* note 27, at 642 (arguing that any governmental restrictions will create a black market).

61. *Id.* at 642-43.

62. *Id.*

63. *How to Stop the Drug Wars*, *supra* note 3.

should be free to exercise. Put simply, a government may be *legitimately* unwilling to prosecute drug-related offences. The same cannot be said for war crimes, crimes against humanity or genocide, because those crimes are *malum in se*. Extending ICC jurisdiction over a *malum prohibitum* crime forces States to adopt a particular policy towards the conduct. This is unacceptable where several different legitimate policies have been shown to exist.

It could be countered that a legalization approach is impossible at present, because it would violate the 1988 U.N. Convention.⁶⁴ However, as legalization is arguably a legitimate policy, the prohibition mandated by the 1988 U.N. Convention may be a mistake and it would be unfortunate to extend such a mistake to the ICC. Moreover, a violation of the 1988 U.N. Convention does not entail the serious consequences for State policy and sovereignty that ICC complementary jurisdiction over serious drug-related offences would.

IV. INEFFECTIVE MEASURE

In the present system of national prosecutions, sophisticated drug traffickers can take advantage of national differences, by basing operations in countries that are unwilling or unable to prosecute them.⁶⁵ McConville argues that the ICC could alleviate this problem, by providing an alternative forum for prosecution.⁶⁶ Additionally, international prosecution may be efficient, where the facts and evidence are spread across national borders.⁶⁷ The resulting increased probability that drug offenders will be effectively prosecuted can have a deterrent effect.⁶⁸

However, these beneficial effects of ICC prosecutions are exaggerated. It should be noted that the current extensive efforts have not quelled the drug trade. Arguably, the U.S. War on Drugs-efforts are largely ineffective.⁶⁹ Despite continued and substantial efforts, large amounts of drugs are being smuggled into the United States and the drugs offered are increasingly potent.⁷⁰ Further, there appears to be no correlation between the harshness of drug laws and the incidence of drug-taking: “[C]itizens living under tough regimes (notably America

64. See U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) art. 3.

65. McConville, *supra* note 5, at 81; Geraghty, *supra* note 25, at 371, 382.

66. McConville, *supra* note 5, at 81.

67. *Id.* at 95.

68. *Id.*

69. Demleitner, *supra* note 27, at 633; Bertrand, *supra* note 58, at 885.

but also Britian) take more drugs, not fewer.”⁷¹

ICC jurisdiction would be a questionable addition to the anti-drug warrior’s weaponry. Firstly, the drug trade is flexible, so traffickers may simply base themselves in non-States-Parties, out of reach of the ICC’s jurisdiction. Although the Security Council can refer cases from non-States-Parties to the ICC, this process is likely to prove too slow and cumbersome to keep up with the highly mobile traders.

Secondly, given the scale of the drug trade, the ICC would not be able to host the number of cases needed to effectively hamper it. Instead, it would have to focus on a small number of high-ranking cases. Like a regular business enterprise, organized crime exists as an institution, independent of its individual leaders.⁷² The removal of high-ranking individuals will temporarily slow business, but cannot permanently destroy it.⁷³ The distinctive feature of organized crime is not its individual traffickers, but the illicit nature of its product.⁷⁴

Thirdly, the market for illicit drugs is likely to react to international criminalization by adjusting prices. Effective international prosecutions will reduce the supply of drugs available on the market. Given a reduced supply, *ceteris paribus*, the price of illicit substances will rise. As a result, the potential profits from selling the substances rise too. Thus, the incentive to trade is increased, offsetting the increased risk of prosecution. Moreover, when additional suppliers, attracted by the high profits, enter the market, they will increase supply, which will depress the price.

This problem will persist, as long as there are suppliers willing to take higher risks for increased profits, and consumers willing to (temporarily) pay increased prices. The demand from persons addicted to drugs is likely to be relatively price inelastic, although some leisure consumers may opt to seek their thrills elsewhere. In sum, the drug trade is subject to market forces and simple deterrence-based arguments fail to address these complications.

Additionally, it is argued that ICC jurisdiction may be effective in prosecuting serious drug-related offences, because many national prosecutions are hampered by the corruption of officials.⁷⁵ The ICC is to provide a neutral, unbiased forum with international judges of high moral character, impartiality and integrity.⁷⁶

However, the large profit margins in the supply of illicit goods facilitate the corruption of public officials and law enforcement

71. *How to Stop the Drug Wars*, *supra* note 3.

72. Demleitner, *supra* note 27, at 617.

73. *Id.*

74. *Id.*

75. McConville, *supra* note 5, at 83-84.

officers.⁷⁷ It is estimated that such drug-related corruption is present in virtually every country in the world.⁷⁸ There is no reason to assume that ICC judges, prosecutors and registry staff will be less susceptible to drug traffickers' bribes than their domestic counterparts. As a result, instead of the ICC effectively hampering the international drug trade, the extension of its jurisdiction to drug-related offences may end up contaminating the ICC.

Lastly, some suggest that jurisdiction over drug trafficking may give the ICC a chance to build a strong reputation in its early years of development.⁷⁹ Yet putting drug traffickers on the ICC's docket as a means to the end of bolstering the court as an institution raises ethical questions. Moreover, prosecuting drug offences may even damage the ICC's reputation. Demleitner argues that the U.S. War on Drugs-effort has caused the public to lose confidence in the criminal justice system, because of its many failures and its waste of resources in a battle of dubious moral character.⁸⁰ Similarly, Bertrand claims that drug prohibition has damaged the credibility and integrity of penal systems, because of the obvious failure to control, as well as the arbitrary nature of the targeted drugs.⁸¹

V. CONCLUSION

In conclusion, the ICC's jurisdiction should not be extended to serious drug-related offences. Firstly, the conduct in question does not violate internationally recognized human rights. Moreover, extending ICC jurisdiction over the *malum prohibitum* offences forces States to adopt a particular policy towards the conduct, which is unacceptable, because States may legitimately strive to legalize the trade in substances that are currently illicit. Extended jurisdiction would be incompatible with this legitimate State policy. In addition, extending ICC jurisdiction would likely be a less effective measure than proponents have argued. Finally, the extended jurisdiction may damage the ICC as an institution, by introducing possible corruption, as well as by harming its reputation.

77. Demleitner, *supra* note 27, at 619.

78. McConville, *supra* note 5, at 77.

79. *Id.* at 97.

80. Demleitner, *supra* note 27, at 633.

81. Bertrand, *supra* note 58, at 888.

