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Robert Cryer*

1. Introduction

In the recent past two decades, international criminal law has been tasked with many (indeed, too may) roles. In addition to retributivist aims, it has been asked to satisfy victims' demands for catharsis, write history, and perhaps most prominently, deter international crimes.[1] It is questionable whether it can fulfill them all. [2] For example, many international criminal lawyers are dubious of the ability of courts to write history.[3] Happily, the ability of international criminal law to fulfil many of these goals need not concern us for the purpose of this chapter. Here we are looking at two of the most relevant justifications given for international criminal processes for the question of the extent to which prosecutions can assist in increasing compliance with international humanitarian law (IHL). This piece will concentrate therefore on deterrence, and denunciation/education. These two are linked, but not uncontroversial.

Prior to that, however, certain limitations of international criminal law in relation to ensuring compliance with IHL have to be identified. The most important of these is that only one of the four 'core' international crimes (aggression, genocide, crimes against and war crimes) has a direct relationship with IHL. That is the law of war crimes. Although the term is often used in a loose sense to mean international crimes more generally, war crimes *stricto sensu* are a criminalized sub set of violations of IHL.[4] Therefore some of the norms contained in the law of war crimes are in fact somewhat narrower than those of humanitarian law,[5] and indeed some IHL norms are not appropriate for criminalization, and therefore the two are not identical.[6] Therefore prosecutions for war crimes can never be considered a means of ensuring compliance with all of IHL for the simple reason that such prosecutions cannot be for the full panoply of IHL rights and responsibilities.

Secondly, speaking specifically to the African context, Africa is (although it may be trite to say it) a large and diverse continent. Darfur province in Sudan alone, for example, is the size of France. North Africa, in particular the Arabic States (Libya, Egypt) are culturally, politically, and economically far removed from many sub-Saharan States. East and West Africa are not, in and of themselves readily analogisable. Indeed even States that are

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* Birmingham Law School. This piece builds, and expands upon ideas contained in a piece published in (2014) 44 *Israel Yearbook on Human Rights*.

[1] See R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure* (Cambridge: CUP, 3rd ed., 2014) Chapter 2.

[2] M. Damaška, 'What is the point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, at 331.

[3] See, e.g. R. Wilson, *Writing History in International Criminal Tribunals* (Cambridge: CUP, 2011).

[4] See generally R. Cryer, 'Individual Liability in International Law' in T.L.H. McCormack and R. Livoja (eds.) *Research Handbook on The Law of Armed Conflict* (London: Routledge, forthcoming 2014).

[5] See, e.g. R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: CUP, 2005) pp.262-284.

[6] See e.g. M. Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY' (2001) 12 *European Journal of International Law* 531.

reasonably close together, such as Uganda and Sudan are very different places, and the reaction to international criminal law and its institutions are not the same.[7] Furthermore, the political systems in different African States include military dictatorships (Egypt), democracies (South Africa), authoritarian regimes (Rwanda, Zimbabwe), all of which have different levels of stability. Libya, for example is deeply unstable, Rwanda, on the other hand is stable. Leading on from this, it is also the case that some countries are practically ungoverned by their central authorities (parts of the DRC spring to mind), whilst others are fully governed spaces.[8] Hence it is important when speaking of Africa not to speak in an omnibus fashion that ignores these significant differences, therefore this contribution will at least attempt to contextualize its remarks.

Finally, as Olivier Bangerter has said elsewhere in this volume 'better respect for international humanitarian law is primarily the result of inside action and no one can respect international humanitarian law in the stead of parties to a conflict. Outsiders such as political actors, humanitarian players, non-governmental organizations, the media or academics can only have an indirect effect on respect for international humanitarian law'.[9] This is also the case for international criminal law, and it ought to be remembered other mechanisms are also available to increase respect for IHL. The role of the International Committee of the Red Cross is one that immediately springs to mind.[10] These initial caveats noted, it is time to discuss the possibilities of prosecution in this regard.

2. Deterrence in international criminal law

Deterrence is one of the most well-known aims of the criminal law, indeed Gerhard Werle considers it to be probably the most important of the aims of international criminal justice, certainly more so than retribution.[11] Deterrence is usually said to have two parts, special and general deterrence. The former is individually focused, in that specific offender is intended to be dissuaded from undertaking the prohibited behavior owing to their fear of being subject to the relevant punishment. As Dierde Golash has put it '[t]he threat of deterrent punishment seeks to operate on the will of the individual offender at the moment of temptation to commit the crime'.[12] We will return to this issue presently.

General prevention, on the other hand, addresses the punishment of the individual offender to society more generally, in that the punishment of the individual is *pour l'example des autres.* I.e. that having seen that engaging in that conduct leads to punishment, they will come to the conclusion that they ought not engage in that conduct either, for fear of the same treatment,

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[7] See on this S.M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan* (Cambridge: CUP, 2013).
[8] See Kreiger, 'Introduction' in this work, ??
[9] O. Bangerter, 'Comment-Persuading Armed Groups to Better Respect International Humanitarian Law' in this Volume ??.
[10] S. Ratner. 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion and the Laws of War' (2011) 22 *European Journal of International Law* 459. On human rights bodies see Dominik Steiger's contribution to this Volume ??
[11] G. Werle, *Principles of International Criminal Law* (Cambridge: T.M.C. Asser Press, 2nd ed., 2010) pp.34-35.
[12] D. Golash, 'The Justification of Punishment in the International Context' in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy* (Cambridge: CUP, 2010) 201-223, at 211.

or a more general sense that the law ought to be followed as that is the appropriate thing to do[13] (or in Razian terms, create an idea that the rules themselves are second order reasons for action).[14] The latter is the more attractive idea from the point of view of a liberal criminal justice system, in that the former raises the rather uncomfortable spectre of the treatment of the body of the condemned and the spectacle of the scaffold described by Michel Foucault in *Discipline and Punish*.[15]

It is likely for this reason that the ICTY has empahsised the rule of law rationale:

> During times of armed conflict, all persons must now be more aware of the obligations upon them in relation to fellow combatants and protected persons, particularly civilians. Thus, it is hoped that the Tribunal and other international courts are bringing about the development of a culture of *respect* for the rule of law and not simply the *fear* of the consequences of breaking the law, and thereby deterring the commission of crimes.[16]

Retributivists, on the other hand do not think that this is ever acceptable, as it treats the punished person as a means to an end. This is particularly offensive to Kantians.[17] The ICTY's response, that deterrence, as a result, ought not to be given undue prominence in a sentence,[18] is not a complete response to such claims, as any additional sentence on this ground is unwarranted to retributivists.

These critiques aside, foundational documents of international criminal law enshrine deterrence, so for example the Genocide Convention is, in its full title, the Convention on the Prevention and Punishment of the Crime of Genocide clearly links the role of prosecution and prevention. The same can be said about the 1984 UN Convention Against Torture.[19] Security Council Resolution 827, which set up the ICTY (and which Resolution 955 which set up the ICTR repeated, essentially verbatim) spoke clearly of the role of deterrence, saying that it was:

> Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,…Convinced that in the particular circumstances of the former Yugoslavia the establishment as an ad hoc measure by the Council of an international tribunal and the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the restoration and maintenance of peace,…[and]…Believing that the establishment of an international tribunal and the prosecution of persons responsible for the above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed.[20]

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[13] This is sometimes called positive general deterrence.
[14] J. Raz, *Practical Reason and Norms* (Princeton: Princeton UP, 1990) pp.39-40.
[15] M. Foucault, (A. Sheridan Trans.), *Discipline and Punish and the Birth of the Prison* (New York: Vintage, 2nd ed., 1995) Chapters 1-2.
[16] *Prosecutor* v *Momir Nikolić* Sentencing Judgment, IT-02-60-1/S, 2 December 2003 para 89.
[17] See generally Cryer, Friman, Robinson and Wilmshurst, *Introduction*, above note 1, p.32.
[18] *Nikolić*, above note 16, para 90.
[19] On both see J. Mendez, 'Justice and Prevention' in C. Stahn and M. El-Zeidy (eds.), *The international Criminal Court and Complementarity* (Cambridge: CUP, 2011) 33-51, at 34.
[20] Security Council Resolution 827 (1993), preamble.

The Rome Statute also foregrounds general and specific deterrence.[21] For example, paragraph 5 of the preamble states that the parties are '[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'. Chambers of the ICC have also relied on deterrence to reach various (not always consistent) conclusions about what where the ICC should concentrate its energies.[22] Indeed, the Appeals Chamber went as far as to determine that deterrence is the 'cornerstone' of the ICC.[23] This goes too far, the ICC is set various goals by the Rome Statute, some deontological, some utilitarian, and the Statue does not set a hierarchy between them.[24] That said, there is no doubt that, rightly or wrongly, deterrence is an important goal that the drafters of the Rome Statute set for the ICC.

2.1 Critiques of Deterrence

In addition to the philosophical difficulties mentioned above, there have been more practical critiques of the reliance of many international criminal lawyers on deterrence-based rationales. The two main ones are that deterrence –based rationales do not reflect the conditions under which international crimes are committed. The second, which is linked to a response to the first, is that the empirical basis for any deterrent function is missing, or indeed, points to a contrary conclusion.

2.1.1. Deterrence, rationality and international crimes/criminals

Turning first to the idea of rationality which, as mentioned above, is key to individual deterrence, one of the most sophisticated commentators on deterrence in international criminal law, Mark Drumbl, has expressed the difficulty as follows: 'because deterrence's assumption of a certain degree of perpetrator rationality, which is grounded in liberalism's treatment of the ordinary common criminal, seems particularly ill fitting for those who perpetrate atrocity.'[25]

It is true that there is little rationality to be expected of drugged child soldiers, for example, however, what needs to be remembered is that although war crimes will, sadly, almost inevitably be committed in armed conflicts, for the most part, they can be limited though proper command, which international criminal law not only encourages, but punishes certain

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[21] H. Olásolo, *The Role of the International Criminal Court in Preventing Atrocity Crimes through Timely Intervention* (The Hague: Eleven, 2011) p.11. The negotiations for the Statute focused heavily on this rationale see J. Klabbers, 'Just Revenge? The Deterrence Argument in International Criminal Law' (2001) 12 *Finnish Yearbook of International Law* 249, at 251.

[22] *Situation in the Democratic Republic of Congo*, Decision on The Prosecutor's Application for Warrants Of Arrest Article 58, ICC-01/04-01/07, 10 February 2006, para 55. *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled 'Decision on The Prosecutor's Application for Warrants Of Arrest Article 58', ICC 01/04, 13 July 2006, paras 73-75.

[23] *Ibid*.

[24] See e.g. M. Bergsmo and O. Triffterer, 'Preamble' in O. Triffterer (ed.), *Commentary on the Rome Statute* (Oxford: Hart, 2nd ed., 2008) 1-14, at 10-11.

[25] M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: CUP, 2007) p.171.

failures to exercise.[26] In this respect, it is important to note that although its norms are applicable to all, international criminal law, in particular international criminal prosecutions, tend to focus on those in leadership positions, and leaders tend to operate in a more autonomous fashion.[27] One of the reasons international criminal law has doctrines such as command responsibility, joint criminal enterprise and co-perpetration, is to ensure that those who lead, direct, or permit such offences are responsible for them.[28] Leaders, in contrast to some of those in the lower ranks, are more likely to be rational actors, with a view to longer-term consequences. As von Holderstein Holtermann has said:

> Political and military leaders are generally placed in circumstances where their contribution plays a decisive role as events unfold. Even though they surely cannot perform mass atrocities single-handedly, their actions as leaders are undoubtedly necessary in order for them to take place.…and there are several good reasons to suppose that, in contrast to foot soldiers, these leaders can, in the right circumstances, be deterred by the threat of punishment, i.e. that they are instrumentally rational in the sense desired.[29]

There are those, however, who disagree about political leaders, Jan Klabbers, for example has argued that we cannot apply the cost-benefit analysis that is assumed to be made by deterrence, based rationales simply does not apply to human rights violators who 'will act for political reasons, hoping, nay, expecting, that history will prove him or her right.'[30] This may apply to the ends sought, but that does not exclude the possibility of affecting the means adopted to those ends.

Others argue that, particularly in the context of 'new wars' featuring 'militias, paramilitaries, gangs and loosely organized rebel groups instead of organized militias as the main actors, [and] economic motivations and mindless ethnic hatred had replaced national interests or ideological visions as the driving forces of these conflicts'.[31] This means, according to the proponents of such a view, that the rational calculation that forms the basis theories of deterrence is missing in such contexts.[32] Others add that, with respect to non-State armed groups in particular, the absence of reciprocity (in the sense of belligerent privilege),[33] and a

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[26] P. Rowe, Military Misconduct during International Armed Operations: 'Bad Apples' or Systemic Failure? (2008) 12 *Journal of Conflict Security Law* 165.

[27] *Ibid*., p.216.

[28] See R. Cryer 'Prosecuting the Leaders: Promises, Politics and Pragmatics' (2009) 1 *Göttingen Journal of International Law* 45at 55ff.

[29] J. von Holderstein Holtermann, 'A Slice of Cheese-A Deterrence Argument in Favour of the International Criminal Court' 11 (2010) *Human Rights Review*, 289, at 306. This assertion is controverted by J.F. Alexander, 'The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact' (2009) 54 *Villanova Law Review* 1, at 3, but he accepts that his skepticism is not based on a firm empirical base.

[30] Klabbers, above note 21, p.253.

[31] Nicholas Lamp, 'Conceptions of War and Paradigms of Compliance: The 'New War' Challenge to International Humanitarian Law' (2011) 16 *Journal of Conflict and Security Law* 225, at 227, although he does not necessarily agree with such a view.

[32] F. Harhoff, Sense and Sensibility in Sentencing-Taking Stock of International Criminal Punishment", in O. Engdahl and P. Wrange (eds), *Law at War: The Law as it Was and the Law as it Should Be: Lieber Amoricum Ove Bring* (Leiden: Nijhoff, 2008) 121-140, at 127.

[33] i.e. immunity from criminal consequences for belligerent acts in accordance with IHL. On this see M. Cherif Bassiouni, 'The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors' (2008) 98 *Journal of Criminal Law and Criminology* 711, at 718; René Provost, 'Asymmetrical Reciprocity and Compliance With the Laws of War' in Benjamin Perrin (ed.), *Modern Wars: Armed Groups, Private Militaries, Humanitarian Organizations, and the Law* (Vancouver: University of British Columbia Press, 2012)

sense of ownership of IHL[34] provide further disincentives to comply, which further undermines any calculations such groups may make.

There are a number of responses that can be given to some such claims.[35] To begin, there is an empirical response, as Sandesh Sivakumaran has shown, in fact rebel groups are not always as disorganized as they are often portrayed, and they frequently do have codes of conduct.[36] The image of armed groups as entirely unorganized is one that it not entirely borne out in practice. The second is to question about what these suggestions implicitly consider to be different about African conflicts and their protagonists. Nicholas Lamp asserts that in the context of mass international crimes, such as former Yugoslavia and Rwanda crimes moral inversions may occur, that lead to international crimes.[37] Similarly Golash, looking at the sociological factors surrounding international crimes avers that

> Mass atrocities often occur under a reign of terror by a despotic government or ruthless factions such as the LRA….Those who voluntarily participate in these crimes find themselves in situations in which the social pressure not to harm (some) others has suddenly been removed or, indeed, has been turned into its opposite pressure from either peers or authorities to target despised others..[hence]..It is not realistic to think that the threat of punishment by an international body can counter the psychological, situational and social pressures that induce individuals to engage in atrocities.[38]

It is important in these situations, though to take into account that in Africa, as in other conflicts, these moral inversions are not the outcome of immediate irrationality, but the culmination of processes of rational, albeit deeply unpleasant calculations on the part of leaders.[39] As Susan Power, drawing upon the empirical research of Alison des Forges has argued, 'people who play a role in mass killings and rapes are often doing so for the first time…individuals who have never killed before are deciding how far to go. Often as they make these decisions, they are looking left, and looking right, and gauging the consequences'.[40]

In the context of Africa, in particular, the frequent invocation of this new war paradigm often has a ring of very old fashioned, colonial views of Africa and Africans as irrational, with all that entails. To take one example,[41] Errol Mendes, a scholar who has undertaken work in the Office of the Prosecutor of the ICC, has taken a view that the ICC should have no truck with the Lord's Resistance Army, on the basis that

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17-42; Sophie Rendeau, 'The Pragmatic Role of Reciprocity: Promoting Respect for International Humanitarian Law among Non-State Armed Groups' in *ibid*., 43-72.

[34] Sandesh Sivakumaran, 'The Ownership of International Humanitarian Law: Non-State Armed Groups and the Formation and Enforcement of IHL Rules' in Perrin *ibid*., 87-101.

[35] The last two remain deeply problematic from the point of view of ensuring compliance with IHL.

[36] S. Sivakumaran, *The Law of non-International Armed Conflict* (Oxford: OUP, 2012) pp.170-80.

[37] Lamp, above note 31, at 255. To give him his due, Lamp does not claim that this is inevitable, or limited to Africa, indeed his examples are not drawn primarily from Africa.

[38] Golsan, 'Justification' above note 12, at 211-212, 215.

[39] P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? (2001) 95 *American Journal of International Law*.7 at 7.

[40] S. Power, 'Stopping Genocide and Securing "Justice": Learning by Doing' (2002) 69 *Social Research* 1093, at 1101.

[41] It ought to be said that neither Drumbl or Wipmann could be accused of making such simplistic assumptions.

> Kony…claims that he is instructed in spiritual and military matters by holy spirits and is tasked with fighting evil by promoting the Ten Commandments of the Old Testament. He obviously has not learned that those Commandments include children honouring their parents and not committing murder. This mental incongruence must be kept in mind when one thinks about whether someone with the mental and psychological makeup of Kony can ever be a reliable peace partner to even begin to start a discussion on peace and justice.[42]

The question of whether or not the ICC should take anything said by Joseph Kony as reliable is a fair one, but the manner in which it is parlayed by Mendes, as one of mental capacity is unhelpful. Often, even groups stigmatized as fanatical and driven by religious zeal rather than sober reflection act on rational grounds. The most prominent example of this is the Lord´s Resistance Army in Uganda. The LRA is often described in terms of religious fervor, however, when it came to issues of international criminal justice, is demands, for amnesty, and for the withdrawal of indictments, were clearly the outcome of rational calculation. Indeed, as was the decision to engage in peace negotiations after the indictments came. His actions, as with those of the Lord's Resistance Army, awful though they may be, ought not to simply be cast aside as pathological. The decisions of the senior members of the LRA may be, although deeply immoral, rational when the context is taken into account, as has been shown by Reed Wood in his contribution to this volume (although his view is that short interests prevail with such groups, the point here is that the group makes rational calculations).[43]

This is not the only example. In relation to Sierra Leone, Foday Sankoh wanted money, Charles Taylor wanted money and power, and Colonel Gadaffi wanted a West-African fiefdom. These are not the aims of the blindly irrational or nihilistic. They may not be laudable goals, but they are understandable ones, and they went about them in a manner which at one level, was rational. Finally, the African Union reaction to various aspects of the ICC´s practice in indicting people, that they will fight to the end rather than face prosecution, is a clear example of the acceptance of the rationality of the behavior of the various actors, and therefore the critics of the possibility of application of deterrence, on the basis that the protagonists are not rational, seems to be at least overstated. High-ranking leaders are rarely completely irrational.[44] Nor are they stupid. That sort of leader does not last long.

To take matters further on this, it is the case that even within the international criminal tribunals an image of the African Warlord who is the definitional 'Other', has been constructed. It is possible that the Special Court for Sierra Leone, and perhaps other international (or internationalized) Tribunals have fallen victim to this simplistic stereotype. For example, Gerhard Anders has shown that in that Court, the prosecution has frequently fallen into a narrative of Africa as being the 'dark continent' of 19th Century myth.[45] Similarly M. Kamari Clarke has argued that representations of defendants before the international tribunals involve constructions of 'African warlords' that are Western constructs

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[42] E. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Cheltenham: Edward Elgar, 2011) p.97.

[43] R.M. Wood, Rational Motives for Civilian Targeting in Civil War' in this Volume ??

[44] S. Roach, 'Justice of the Peace? Future Challenges and Prospects for a Cosmopolitan Court' in Stephen Roach (ed.), *Governance, Order and the International Criminal Court* (Oxford: OUP, 2009) 225-234, at 226-229.

[45] G. Anders, 'Testifying About 'Uncivilized Events: Problematic Representations of Africa in the Trial Against Charles Taylor' (2011) 24 *Leiden Journal of International Law* 937.

rather than accurate representations of reality, and that such representations (in her terms 'spectacles') are examples of crass stereotypes that undermine to some extent international criminal law, and fail to accurately reflect modern Africa.[46]

Such stereotypes ought to not to be used by those discussing international criminal law. Indeed, to be fair, two of the most forthright critics of the deterrence rationale in international criminal law, Julian Ku and Jide Nzilibe has made arguments in the specific context of African conflicts, precisely on the basis of rational calculation of the actors involved. Their argument is that the threat of ICC prosecution will not deter those who are engaged in possible international crimes to the extent to which informal or extra-legal sanctions will.[47] In part this is because, of the African leaders of coups that they evaluated, many were killed, exiled, or arrested.

The argument is flawed for various reasons. The first is that although it is purportedly empirical, as with much law and economic scholarship, it relies on assumed interests rather than proof of them.[48] In their piece the authors presume what the interests, motivations and intentions of the coupists were, there is no hint that any of the relevant actors were actually asked about what their motivations were. Second, as others have commented, their assumption is that evidence about coup plotters are probative of those who commit international crimes more generally, and the commission of atrocities are a necessary part of African conflicts, neither of which can be taken for granted.[49] Nonetheless Ku and Nzilibe do at least seem to accept is that there is rationality to the decisions made by such actors, a matter all too often overlooked by others. It is not the intention of this chapter to say that every decision in every conflict in Africa is characterized by rationality, any more than it is in any area of the world. But what can be seen is that the groups engaged in such activities (or at least their leadership) often do so on the basis of rational calculations. And where rational calculations are entered into there is at least room for the possibility for the fear of prosecution (hence deterrence) to enter the balance.

Lastly in this regard, in a detailed study of the actions of the governments of Uganda and Sudan with respect to the ICC and complementarity (on which, more later), Sarah Nouwen has found that those governments have engaged in a detailed a cost-benefit analysis that interestingly comports with the rational decision making capacity of governments, even those that are alleged to have committed international crimes (particularly in the case of Sudan).[50] Henceforth the argument of an absence of rationality, this critique is not convincing, or at least not universally valid.

2.1.2. The empirical base

This leads us to the empirical response to the critics of deterrence. Scholars and practitioners have frequently that there has been a deterrent effect that can be traced back to the existence

[46] M.K. Clarke, The Rule of Law Through Its Economics of Appearances: The Making of the African Warlord' (2011) 18 *Indiana Journal of Global Legal Studies* 7.
[47] J. Ku and J. Nzilibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities' (2006) 84 *Washington University Law Review* 777.
[48] See R. Cryer, 'The Limits of Objective Interests' (2006) 82 *International Affairs* 183.
[49] See Alexander, 'International Criminal Court' above note 29, at 48-49. As he notes (at 49), to be fair to Ku and Nzilibe, they are aware of the empirical limitations of their study.
[50] Nouwen, *Complementarity*, above note 7, pp.367ff.

of international criminal tribunals. So, for example, a number of scholars have asserted that the deterrent function of international criminal trials has been key to their importance.[51] It is , nonetheless, a frequently made criticism of deterrence-based justifications of punishment that empirically, it is very difficult, both at the domestic, but particularly at the international level, to show that the threat of punishment has a deterrent effect. As Immi Tallgren put it: 'It is not easy to estimate how likely the preventive effect of the international system is. There are no grounds to exclude the possibility of such an effect. Neither is there evidence in its favor.'[52] Even though, as Samantha Power has said, showing deterrence involves proving a negative, and is therefore difficult, or perhaps impossible, to do[53] that has not stopped critics of the deterrence rationale from adopting an empirical critique of deterrence in international criminal law.

In the past, the absence of enforcement of international criminal law, and the small number of offenders that international criminal tribunals have prosecuted, has been said, with no little justification, to have undermined the goal of deterrence, as people do not think that they are likely to be punished.[54] Indeed, even where there have been such tribunals, some have questioned whether there was any deterrent effect that is attributable their existence. This critique has specifically been made with respect to the ICTY, in particular when the existence of that tribunal did not serve to prevent the Srebrenica massacre in 1995. This was, in the eyes of the heart and soul of the ICTY at the time, Antonio Cassese, amongst the darkest days in the Tribunal's history.[55] On the other hand, as David Wippman notes there is some anecdotal evidence that there was some level of deterrence in that conflict that can be placed at the door of the ICTY.[56] Beyond this, as Power has explained, in spite of the difficulties, many critics may be looking in the wrong places for evidence:

> You cannot look for deterrence from institutions that only gained enforcement capacity *after* the atrocities had been carried out. If you were going to measure the impact of the Hague Tribunal-if social scientists were to figure out a formula for measuring prevention and deterrence-the place to apply that formula would not be Bosnia, not Kosovo.[57]

Such arguments are echoed, and amplified by James Alexander, who, adding the multifactorial nature of decision making in conflict situations, has said

> Can policy makers, deliberating upon their countries' relationship with the ICC come to firm conclusions serve as about whether the ICC may be expected to serve as a net benefit or a net liability to the cause of preventing humanitarian atrocities? The short answer is no…the simple reality [is] that a rather large assortment of variables must be dealt with. Some of these variables, based as they are on historically novel

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[51] See e.g. Mendez, 'Justice' above note 19, at 50.
[52] Immi Tallgren, 'The Sense and Sensibility of International Criminal Law' (2002) 13 *European Journal of International Law* 561, at 569.
[53] Power, 'Stopping' above note, at 1100.
[54] See T. Farer, 'Restraining the Barbarians: Can International Law Help?' (2000) 22 *Human Rights Quarterly* 90, at 92–93.
[55] J.H.H. Weiler, 'Editorial: Nino in His Own Words' (2011) 22 *European Journal of International Law* 931, at 943.
[56] D. Wippman, 'Atrocities, Deterrence and the Limits of International Justice' (1999) *Fordham International Law Journal* 473, at 475.
[57] *Ibid*.

> characteristics of the ICC, are at present truly imponderable, having the potential to swamp the effects of the other variables in play.[58]

There has also been some more systematic work in this area now. In particular, Kathryn Sikkink has undertaken a large empirical study, based on trials around the world, and statistical analysis of human rights practices in countries that had what she describes as "human rights "trials (and those did not) and the level of repression seen in later years there. On the basis of that study, she asserts that there is a deterrent function that accompanies criminal prosecutions of international crimes that can be statistically shown.[59]

Furthermore, recent anecdotal evidence from members of the UN Office of Political Affairs from on the ground is very much that the words 'the Hague' have a considerable chilling effect on actors in Africa, particularly, given the focus of the ICC, to which we will return, on rebels, but now also on government officials.[60] Furthermore, the reaction of many African leaders to the indictment of Omar al-Bashir and Muammar Gadaffi, which has been to call for the suspension of such indictments in the interests of international peace and security certainly implies that the threat of prosecution is now being taken very seriously.[61] Leaders do not generally waste their time and political capital fulminating against trifling matters. Similarly, Fatou Bensouda, the (then) deputy Prosecutor of the ICC, has asserted that the ICC's activities have had 'an impact' in various countries in Africa.[62]

Probably the most detailed evaluation of the ICC's practice in this regard has come from Juan Méndez, who was the Secretary-General's Special adviser to the Secretary-General on the Prevention of Genocide, and remains one of the leading advocates for prosecutions as a means of prevention/deterrence. His first examples are the DRC, the Central African Republic, Kenya, Northern Uganda, and Sudan. In all of these instances Mendez asserts that threats of ICC action led to the exclusion of amnesties at the domestic level, and that 'since the ICC became operational, conflict managers have learned that impunity and blanket amnesties are no longer in their toolkit'.[63]

This is interesting, and may be true (although the alleged offer made to Colonel Gadaffi to leave and go into exile may speak against this) but, it has to be said, most of the examples do not prove the point that any deterrent effect can be placed at the door of the ICC. It may be, in the long run, that the continued deligitimation of amnesties and (which perhaps is not the same thing) ending impunity leads to deterrence, but that is a thin thread to hold up international criminal justice. A more positive spin may be put on aspects of this, that it does not seem that ICC activity had a negative effect on peace negotiations,[64] but that is not really the concern of this piece.

One exception to the questionable relevance of these examples may be Kenya, here considerable international engagement in relation to investigation and prosecution of those

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[58] Alexander, 'International Criminal Court' above note 29, at 42.
[59] K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: Norton, 2011) Chapter 6.
[60] Personal communication to author, August 2011.
[61] R. Cryer, 'Selectivity in International Criminal Law' in F. Domb (ed.), *Building Peace in Post-Conflict Situations* (London: BIICL, 2012) 153-191, at 183-189
[62] B. Schiff, 'The ICC's Potential for Doing Bad When Pursuing Good; (2012) 26 *Ethics and International Affairs* 73, at 78.
[63] Méndez, 'Justice' above note 19, at 40-46, 40.
[64] *Ibid*., p.45-46.

responsible for post-election violence in 2007 led the President and Prime Minister to commit, in 2009, to prevent violence in the next election cycle.[65] The 2013 was, by some distance, the most peaceful in Kenyan history, although ICC oversight is probably only one factor here (although that itself is a significant development).

Looking to circumstances in which the ICC has not actually taken (judicial) action, Méndez may be similarly speaking to the wrong point when he notes that ICC's oversight in the situation in Columbia arguably influenced the Columbian Constitutional Court in overturning an amnesty law,[66] and that in Guinea calls for accountability in relation to crimes committed in Conkary in 2009 led the government to cooperate with the Court and invite it to visit there.[67] Both may be heartening, but neither of these instances speak directly to deterrence *per se*. Equally, at least in one situation, Méndez is probably on stronger ground. In relation to the Côte d'Ivoirean conflict in 2004, Méndez refers to a hugely tense situation, when over a weekend flashpoint, the media was filled with hate speech. Following his public intervention noting the possibility of ICC investigations, calm returned. Méndez claims that 'the prospect of an ICC prosecution of those wo used hate speech to instigate and incite the commission of international crimes was carefully analysed by persons in authority and their legal advisors….the incident is [thus] sufficient anecdotal evidence that the threat of prosecution in some cases can stay the hand of the perpetrators of mass atrocities'.[68]

This is important, but, in addition to the fact that the other evidence he brings is far from perfect, there are two other aspects that need to be dealt with before we can accept such assertions at face value. The first of these is that, as Méndez makes clear, his second set of pieces of evidence are related to the assumed catalytic effect of the regime of complementarity enshrined in the Rome Statute of the ICC.[69] The general assumption underlying that principle is that, given the idea that complementarity, which allows the ICC to take action if the relevant State (usually the *locus* delicti) is shown to be unwilling or unable to do so, this will prompt such States into taking action leading to prosecutions themselves.[70]

However, such an assumption has recently been the subject of a significant empirical critique from Sarah Nouwen.[71] Nouwen questions the unproved causal pathway between the (implicit) assumptions behind the assertions that complementarity will cause domestic action (prosecutions) which should then pay into deterrence.[72] On the basis of detailed studies of Uganda and Sudan, Nouwen has found that '[n]otably, the one and only effect that is directly relevant for an invocation of complementarity before the Court, namely, the initiation of genuine domestic investigations and prosecutions of crimes within the ICC's jurisdiction, is for the most part yet to occur in Uganda and Sudan'.[73] As Nouwen notes, though, her study is of two States, and does not claim to be a systematic study of all of the effects complementarity has throughout all possible situations.[74] In both of the studies Nouwen

[65] *Ibid*., at 40-41.
[66] *Ibid*., at 47-48.
[67] *Ibid*., at 48-49.
[68] *Ibid.*, at 47.
[69] The relevant section of his chapter is called 'Complementarity and Deterrence'
[70] On the principle generally see, amongst a huge literature, J. Kleffner, *Complementarity in the Rome Statute and National Jurisdictions* (Oxford: OUP, 2008), Stahn and El-Zeidy, *Complementarity*, above note.
[71] Nouwen, *Complementarity*, above note 7.
[72] *Ibid*., pp.24-25.
[73] *Ibid*., p.10.
[74] *Ibid*., p.31.

undertakes, there is a relatively strong central government, which is more than capable of identifying, weighing, and acting upon its interests. What remains to be done is to undertake a study of the calculations that complementarity does (or does not) inspire in other actors, particularly where there is limited governmental capacity. In those situations, absent action by non-State actors,[75] external governance mechanisms, such as the ICC, may be the only drivers for compliance with IHL.

The second issue that needs to be dealt with 'head on' is the counter-argument to the examples that have been given above, which is that, even if they are accurate, they are anecdotal, and can therefore not make the case for deterrence. The most sustained critique of deterrence based arguments has been made by Pádraig McAuliffe.[76] McAuliffe is deeply skeptical of what he sees as the messianic pretensions of international criminal lawyers, whom he sees as being basing a naïve faith in international criminal law around human rights ideology, and being invested in a project of developing international criminal law.[77]

From this position he argues that international criminal lawyers who support deterrence-based rationales are wedded to individual sentimental stories,[78] to say that

> [t]hese anecdotes may add something significant to our understanding of the restraining impact of international criminal law. Even if in-depth, small scale studies do not have universal applicability, they may impact beneficially on policy-making as 'plausibility probes' suggesting that a generated hypothesis should be tested in a wider selection of countries…However, deterrence-based advocacy is less modest. It instead relies on these anecdotes to establish the overall credibility of deterrence. In doing so, it betrays the main shortcoming of single case analyses, namely that inferences drawn from them may not be applicable beyond the context in which the research takes place.[79]

This is a strongly made (and worded) argument, but there are considerable grounds for skepticism about the skepticism. The first is that it relies on a rather monolithic view of international criminal lawyers. It may be true that some international criminal lawyers may argue in the manner that McAuliffe suggests (or that they can be caricatured as such) but international criminal lawyers, including those with sympathy for deterrence as a rationale belong to a broader proverbial church.[80] It is notable that McAuliffe, for example does not provide a reference for his assertion, and only later mentions one speech by the President of the ICC that supports it. This is therefore something of a straw-man argument, and indeed he also cites Theodor Meron as accepting that the evidence is 'anecdotal and uncertain.'[81] Most

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[75] On which see, e.g. Z. Mamphilly, 'Insurgent Governance in the Democratic Republic of Congo'; J. Willms, 'Courts of Armed Groups-A Tool for the Implementation of International Humanitarian Law'; D. Fleck, 'Comment-Perspectives on Courts Established by Armed Opposition Groups'; S. Sivakumaran, 'Implementing Humanitarian Norms Through Non-State Armed Groups'; and H. Krieger, 'Conclusion: Where States Fail, Non-State Actors Rise? Inducing Compliance with International Humanitarian Law' in this Volume.

[76] P. McAuliffe, 'Suspended Belief? The Curious Endurance of the Deterrence Rationale in International Criminal Law' (2012) 10 *New Zealand Journal of Public International Law* 227.

[77] *Ibid*., at 240-246.

[78] *Ibid*., at 255-256.

[79] *Ibid*., at 258-259.

[80] Although on human rights influences see also D. Robinson, 'The Identity Crisis of international Criminal Law' (2008) 21 *Leiden Journal of International Law* 925.

[81] McAuliffe, 'Enduring' above note 76, at 259, citing T. Meron, 'War Crimes Law Comes of Age' (1998) 92 *American Journal of International Law* 462, at 463.

international criminal lawyers would not go further. What perhaps can be said is that the number of pieces of anecdotal evidence are stacking up, and although they do not make a comprehensive case, the more evidence there is, the stronger the case becomes that there can be a contribution to deterrence from international criminal prosecutions. It is true that there are huge epistemological problems with determining what causes (and therefore what may prevent) international crimes, as the decisions to undertake such conduct depends on many factors,[82] but this cuts both ways. Furthermore, it is almost certainly the case that a comprehensive study of all conflicts on this basis would simply be impossible, therefore the best is the enemy of the good here.

A more philosophical response is given by Jakob von Holderstein Holtermann, who argues that whatever the problems of determining the extent to which punishment deters crime, such difficulties do not answer the question of whether or not criminal courts ought to be set up. This is because such difficulties do not make the case against deterrence arguments, they simply show the fact that we have to work on incomplete information, and therefore it becomes a question of what is more plausible. On different, but related grounds, he asserts that the burden of proof is on those who deny the deterrent value of prosecution to show that this is the case.[83] His reason for doing so is that 'human beings are by and large instrumentally rational actors', and thus intuitively, the fear of prosecution ought to have an effect on behavior.[84] He has a point.

2.2. Conditions for deterrence

Whatever level of empirical evidence is required, few, if any, would argue that deterrence can be even contributed to without certain conditions being fulfilled. Méndez, for example, has argued that there are, in essence, two major criteria for deterrence, these are certainty of application of the law, and the second, that 'it has to follow its own rules, especially to allow the operation of the law without interference and not subject to political considerations…If courts and prosecutors are contemplated as levers to force the parties to negotiate, their independence and impartiality will be undermined because they will be turned on and off as political circumstances dictate.'[85] To this we ought to add the perceived legitimacy of the process, which feeds into the perception of the political or otherwise nature of the relevant Court or Tribunal.[86]

Any asserted deterrent function of prosecutions of course, requires a credible threat of prosecution of such leaders. Turning to the context at hand (Africa); after decades of non-prosecution, many African leaders assumed that victory or exile would serve to ensure their freedom and (often) continued wealth and influence. However, for many, the indictment, and eventual capture and prosecution of Charles Taylor was a considerable shock. An African leader, who had negotiated, and taken up, exile in Nigeria, and who had the support of well-known African figures such as Colonel Gadaffi and Omar al-Bashir, found himself no longer

[82] See e.g. S. Harrenhof, 'How Can Criminology Contribute to an Explanation of International Crimes?' (2014) 12 *Journal of International Criminal Justice* 231; J.G. Stewart, 'Overdetermined Atrocities' NYU School of Law, Public Law Research Paper No. 12-53.
[83] von Holderstein Holtermann, 'Slice', above note 29, at 294.
[84] *Ibid*., 295.
[85] Méndez, 'Justice' above note 19, at 35-36.
[86] See e.g. A. Marston Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510.

welcome in his new home, and was arrested and sent for trial.[87] In part, this was a political as much as a legal event, but the symbolic value of the arrest was huge.[88] Were al-Bashir to end up before the ICC, the message would become clearer, and given the horror with which most seem to view the possibility of being tried before an international criminal court, the possibility of specific deterrence ought not be discounted. Hence, although, prior to the 1990s, there was little chance of anyone being prosecuted for international crimes the tide is slowly turning against that position.

The real issue now is one that mixes the two criteria Méndez suggests. That is the prospect of selective enforcement. This is well-trodden ground, so it is not the intention of this piece to engage in detailed reflections on the selective aspects of international criminal law throughout its history. That has been done elsewhere.[89] What is important is the extent to which it characterizes modern practice, in particular in relations to Africa, and the extent to which it undermines the factors militating in favor of compliance.

Deterrence, insofar as it relies on the likelihood of prosecution, will, of necessity, be undermined if a person thinks that the law will not be enforced against them. Therefore the extent to which they may maintain leverage, and ensure that international criminal law will only be applied to others is likely to be part of the rational calculation that may be entered into when deciding whether or not to commit international crimes. For example, Yoweri Museveni had little to fear when he referred the situation in northern Uganda to the ICC to the extent to which he did not think the Prosecutor of the ICC would be interested in the UPDF, as, in time, it proved he was not. The same applies for other 'self-referrals' to the ICC, where it has proved to be the case that the ICC Prosecutor has focused his work on the conduct of rebels rather than those who referred the situation (i.e. the government). There are limited exceptions to this, primarily in the context of the post-election violence in Kenya, where after considerable African Union and other support for the possibility of ICC activity, the Prosecutor decided to proceed against all sides in the conflict on the basis of his *proprio motu* powers. That said, the (for the most part) refusal of the Prosecutor to aggressively pursue either governmental figures in Africa (outside the context of Security Council referrals) or any actors outside of Africa may give rise to a feeling that such people are safe from the ICC, and this is something that a rational actor would take into account. Again, without a credible threat of prosecution, the deterrent effect is limited. Given the perception in Africa, justified or not, that the ICC is a political organ that is targeting certain African actors on political grounds,[90] rather than undertaking its processes on legal ones, responses, and calculations with respect to it (including whether to commit international crimes) will be at the political level.

This is a significant dilemma. The first Prosecutor of the ICC was fond of stating that he was above politics, and will only follow the law in deciding what to do. For example, in Nuremberg in 2007 he said that 'As the Prosecutor of the ICC, I have been given a clear

[87] See A. Tejan-Cole, 'A Big Man in a Small Cell: Charles Taylor and the Special Court for Sierra Leone' in E.L.. Lutz and C. Reiger (eds.), *Prosecuting Heads of State* (Cambridge: CUP, 2009) 205-227. On the links see D. Crane 'The Bright Red Thread: The Politics of International Criminal Law-Do We Want Peace or Justice? The West African Experience' in L.N. Sadat (ed.), *Forging a Convention on Crimes Against Humanity* (Cambridge: CUP 2011) 59, at 59, 63.
[88] Tejan-Cole, 'Big Man' *ibid*., at 226-227
[89] Cryer, *Prosecuting*, above note 5.
[90] And this perception exists, see e.g. R.J.V. Cole, 'Africa's Relationship with the International Criminal Court: More Political than Legal' (2013) 14 *Melbourne Journal of International Law* 1.

judicial mandate. I must apply the law without regard to political considerations.'[91] Few are convinced of this.[92] A more realistic view has been given by David Crane, the ex-prosecutor of the Special Court for Sierra Leone

> International criminal law is about politics. It is a naïve Chief prosecutor who plans for and executes his prosecution plans (if he or she has one) without keeping in mind the bright red thread of politics that permeates the entire existence of a tribunal of court. Conceived due to a political event and a creature of political compromise, politics is in the DNA of all of the justice mechanisms that make up the modern era of international criminal justice.[93]

The story he tells, of how he had to ensure the support, both logistical, and military, to ensure the enforcement of the warrants of arrest from the US and UK, and at times behind the back of the Special Representative of the Secretary-General is an interesting one. [94] But it paints, in spite of its upbeat tone, and image of practicality it adopts, a picture of international criminal justice that is likely to remain heavily influenced by politics, and where politics enters, selective enforcement is soon to follow. Nor is his account unique in this regard.[95] As such, the role of international criminal prosecutions will remain, for the foreseeable future, one which is circumscribed with politics. Against this background, the way forward is to maximize the compliance effect of international criminal law as far as possible within the political boundaries in which it functions.

Many of the assumptions about deterrence are binary. Either international criminal law deters international crimes or it does not. This is, to say the least, unuanced. The better position to adopt is that prosecutions of violations of international criminal law are relevant to, and can contribute to, deterrence of international crimes. It is not necessary to assert that international criminal law, on its own, can deter international crimes. As many of the critics of deterrence in international criminal law have said, other aspects, such as sanctions, and military intervention may play a larger role in preventing international crimes than international criminal law.[96] But this is not the point. The more important question is whether or not the possibility of prosecution can contribute to the deterrence of international crimes rather than whether it can do so on its own. This means that international criminal lawyers need to renounce the hubris of perfect deterrence. A realistic approach is required that accepts that international criminal justice is an example of the art of the possible, and therefore perfect deterrence, or a perfect separation between law and politics, simply cannot be achieved.

3. Denunciation/education

[91] L. Moreno-Ocampo, 'Building a Future on Peace and Justice', Speech, Nuremberg, 24th June 2007.
[92] Although commentators disagree on whether or not the ICC's prosecutors ought not admit that political factors are relevant to their work, See the Roundtable on "The Political Ethics of the International Criminal Court' (2012) 26 *Ethics and International Affairs* at 53ff.
[93] Crane, 'Bright' above note 87, at 59.
[94] *Ibid*., at 70-71.
[95] C. Del Ponte with C. Sudetic, *Madam Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (New York: Other Press, 2009), V. Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: CUP, 2008).
[96] K.A. Rodman, 'Why the ICC Should Operate Within Peace Processes' (2012) 26 *Ethics and International Affairs* 59, at 60-63.

The other argument in favour of international criminal prosecutions contributing to compliance with IHL is that they can contribute to changing people´s minds about what is acceptable, and the creation of a culture of accountability, and thus compliance. This role is strongly linked to the Denunciatory/educative (or 'expressive') effect of international criminal prosecutions. Such justifications of punishment rely on the idea that one of the purposes of punishment is to denounce the behavior, and communicate to the offender, and society at large, that such conduct is wrongful, this vindicating, and publicizing, the relevant norm.[97] As can be seen, this also has specific and general aspects, as Lucia Zedner has explained, the communicative effect of prosecution is 'an opportunity for communicating with the offender, the victim and wider society the nature of the wrong done'.[98] The ICTY has asserted that international criminal law has this function,[99] and there is much to be said for the idea that international criminal law has, as a major function, if nothing else, the propagation of the norms that are encapsulated in its strictures. Kathryn Sikkink has also argued that much conduct which is law-compliant comes not simply from fear of punishment, but from acculturation to the relevant norms.[100] This is similar to Payam Akhavan´s view that:

> From the criminal justice process emanates a flow of moral propaganda such that punishment of the individual offender is transformed into a means of expressing social disapproval. In addition to the fear and conscious moral influence of prosecution, it is also possible to create "unconscious inhibitions against crime and perhaps establish a condition of habitual lawfulness" such that illegal actions will not present themselves consciously as real alternatives to conformity.[101]

It may be the case that the specific communicative role in international criminal law may be limited, owing to the fact that many of those prosecuted by international criminal tribunals denounce their legitimacy. In practice it might be questioned whether specific communication will ever be a major aspect of international trials. Perhaps, therefore general communication may be a better way to go.

In some ways, though a more basic claim can be made. As Nicholas Lamp has observed, although ignorance of the law is no defense, it is clearly the case that the parties compliance with the law can be helped by knowing what the relevant law is.[102] He argues that in the new wars this is very difficult. Some, such as William Schabas, argue that the norms of international criminal law represent behavior that is universally condemned as apodictically *mala in se*.[103] This is not always the case, so it is useful to engage in a case-study of a war crime that has only recently been clearly recognized as such, and prosecuted at the international level. This is the war crime of child soldiering.

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[97] For an example of such theories being applied to international criminal law see D.M. Amann, 'Group Mentality, Expressivism and Genocide' (2002) 2 *International Criminal Law Review* 93.
[98] L. Zedner, *Criminal Justice* (Oxford: Clarendon, 2007) p.109.
[99] *Prosecutor* v *Kordić and Čerkez*, Judgment, IT-95-14/2, 17 December.2004, paras. 1080–1.
[100] Sikkink, above note 59, pp.172-174.
[101] P. Akhavan, `Justice in the Hague: Peace in Former Yugoslavia´ (1999) 20 *Human Rights Quarterly* 737, at 746, footnotes omitted.
[102] Lamp, 'Conceptions', above note 31, at 241.
[103] W.A. Schabas, 'Interpreting the Statutes of the ad hoc Tribunals' in L.C. Vohrah *et al* (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese* (The Hague, Kluwer, 2003) 847-888, at 887.

Although there were a number of universal and regional (African) treaties that dealt with the prohibition of recruitment and use of child soldiers, such conduct was a frequent and widespread characteristic of African conflicts, and seen by many as culturally appropriate, or at least not wrong, on the basis that in Africa, or at least parts of it, it was a legitimate cultural practice and that the ability to act as a warrior was, for males, an indicium of the transition from childhood to adulthood.[104] The first time that child soldiering was subject to express criminalization, though, was in the Rome Statute in 1998. Article 8(2)(b)(xxvi) covers '[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities´. In international armed conflicts, more importantly for our purposes, owing to the fact that the majority of African conflicts are non-international, Article 8(2)(e)(vii) criminalises analogous conduct in non-international armed conflicts (without the limitation 'into national armed forces´.

This was included in the Statute of the Special Court for Sierra Leone's Statute in Article 3(c), however, as that provision was initially drafted by the Secretary-General, as suggested by the Secretary-General is more narrowly formulated than Article 8(2)(e)(vii) of the Rome Statute to cases involving abduction and forced recruitment. Owing to his concern that the provision was not customary as far back as 1996 (the starting point of the jurisdiction of the Special Court) the Secretary-General sought to cast it as a specific application of Common Article 3. The Security Council disagreed strongly with the Secretary-General on this point, and requested that the Secretary-General "modify...[Article 4(c)]...so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community".[105] The Security Council's suggested modification was to language tracing that in the Rome Statute, and appears to represent a claim that Article 8(2)(e)(vii) is not only customary now, but was also customary law in 1996.

This question was bitterly contested in the SCSL in the *Norman* decision. In this case the defense challenged the legality of the provision, on the basis that customary international law did not recognize such an offence in 1996. The majority in that case determined, on, it must be said, not a great deal of evidence that it did.[106] The controversial then-president of the Tribunal, Geoffrey Robertson disagreed, at least until the coming into being of the Rome Statute, and also raised a further point, relating to the drafting of the Statute, and the question of whether a defendant could have known whether or not international law criminalized the use of child soldiers.

> It might be thought odd that the state of international law in respect of child soldiers was doubtful to the UN Secretary-General in 2000 but was very clear to the President of the Security Council only two months later. If it was not clear to the Secretary-General and his legal advisers that international law had criminalised the enlistment of child soldiers, could it really have been clear to Chief Hinga Norman, or any other defendant at that time in embattled Sierra Leone?[107]

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[104] For a nuanced approach to the issue see M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Cambridge: OUP, 2012). For express discussion on the question of child soldiers and whether or not it was, or ought to be, seen as inherently wrong, and thus criminal, see B. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (New York: OUP USA, 2011) pp.267-268.

[105] *Letter from the Security Council to the Secretary General*, 22 December 2000, UN Doc. S/2000/123, at 2.

[106] *Prosecutor* v *Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment) SCSL-2004-14-AR72, 31 May 2004.

[107] Dissenting Opinion of Judge Robertson, para 6.

This is an interesting point, there are genuine questions about the extent to which the relevant actors were aware of the (existing or incipient) international prohibitions at this time. Although the enlistment and use of child soldiers is something of a NGO nostrum, there are genuine questions that have begun to be raised about whether the focus on prosecution of the use of child soldiers represents a rather Western approach to matters, in particular the cultural specificity of the underlying notions relating to the prohibition.[108] In addition some have questioned whether or not the large scale crimes such as murders and rapes that have been alleged against the first ICC convict, Thomas Lubanga, who it is said did not know that the use of child soldiers was a crime,[109] ought to have been prosecuted for as well.

That said, the prosecutions seemed to have had a considerable effect on African actors, both in terms of the knowledge of the prohibition, and their concern with living up to it for fear of appearing before the ICC. Again, some of the evidence here is anecdotal, in that those on the ground are not only being engaged by, e.g. the UN officers in relation to child soldiers, but also that they are raising the matter without prompting.[110] Also there is some evidence that relevant African actors, upon hearing about the prosecution of Thomas Lubanga for using child soldiers has led to actors bringing children to international officials and asking for them to be demobilized.[111] The importance of the ICC's focus on Child soldiers was attested to by Radhika Coomaswarmy, the UN Special Representative on Child soldiers, who testified before the ICC in the *Lubanga* case as follows:

> let me state how important the work of the ICC is to every one of us who works in the field. The willingness on the part of the Court to prosecute these cases has sent many armed groups to us - the United Nations - willing to negotiate action plans for the release of children; most recently yesterday in Nepal where the release of 3,000 children is about to begin today. We found your work to be so important…[112]

There is also some, admittedly ambiguous, evidence that the use of such soldiers is going down.[113] If nothing else, the fact that there are now a not insignificant number of children in Northern Uganda and South Sudan who are called 'Okambo' at least implies that the prosecution of the use of child soldiers has had a cultural impact.[114]

Even so, perhaps the best evidence on point is in relation to the recent Libya conflict. The guidelines issued by the National Transitional Council (NTC) for their fighters included, the demand that forces 'DO NOT allow persons who are less than 18 years of age to fight, even if they have volunteered to do so.' It is interesting to note that this did not come from the suggestion of an NGO from far away from the conflict, but the NTC itself. As Iain Scobbie, who helped draft the guidance explains:

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[108] Drumbl, above note 104.
[109] Méndez, 'Justice' above note 19, at 49.
[110] Personal communication, above, note 60.
[111] *Ibid.*
[112] *Prosecutor* v *Lubanga*, Transcript, ICC-01/04-01/06-T-223-ENG, 7 January 2010, p.16. The comment is mentioned by William Schabas in http://humanrightsdoctorate.blogspot.co.uk/2010/01/deterrence-and-international-criminal.html.
[113] Coalition to Stop the Use of Child Soldiers, 'Facts and Figures on the Use of Child Soldiers available at http://www.childsoldiersglobalreport.org/files/country_pdfs/Facts%20and%20Figures.pdf.
[114] I am grateful to Olympia Bekou for this point. See also, S. Nouwen, 'Justifying Justice' in J. Crawford and M. Koskenniemi (eds.), *The Cambridge Companion to International Law* (Cambridge: CUP, 2012) 327-351, p.327.

> When I discussed a draft of the guidelines at the Irish Centre for Human Rights in early May, it was pointed out that we had made no mention of child soldiers. To be honest, this was because we were working under pressure and were focused on our brief of explaining standards for detention and targeting. Shortly afterwards, however, the NTC itself asked for advice on child soldiers and we incorporated a few basic points in another revision.[115]

The difference between this and many conflicts in Africa even a decade ago, is highly notable. It might be countered that there may have been other causative factors (such as the desire of the NTC to maintain support in the West) but, in spite of the perhaps mixed motives, and the difficulties of establishing causative factors in international affairs more generally, this does give some hope for criminal prosecutions in the area of disseminating norms and providing for some level of inculcation of the norm.

A skeptic might suggest that fighters on the ground do not read the statutes and judgments of international criminal tribunals. This is almost certainly true, but that is not the point. The real issue is ensuring that those who set out the codes of conduct are aware, and think highly (for whatever reason) of the rules, and that they disseminate them in the relevant manner. It is of no practical import whether those on the ground are avid fans of the Geneva Conventions and other applicable rules of humanitarian law, or simply have the clear guidance that the NTC provides, what matters is compliance, and the extent to which prosecutions have led to it, and there are some grounds for cautious optimism here.

3.1. Conditions of Education.

Like general and specific deterrence, the educative function is marred when selective enforcement becomes an issue. The denuinciatory/educative function is intended, at both a micro, and macro level, to focus on the norm, rather than the identity of the perpetrator. At the micro-level, it is intended that the person is condemned, and told that they have been condemned for what they did, not who they are. The focus of the condemnation is the conduct, not the identity of the perpetrator. Selective enforcement starts to blur this message. At the macro level, to prosecute some of those, from one conflict, or one side in a conflict, and not another, would confuse the message that prosecution is meant to have in this area. Again, it would imply that the identity of the perpetrator is relevant to whether the conduct is condemned. The point of generalized education is its emphasis on the importance of the norm itself. It is also the case that for there to be any sort of denunciatory/educative function, the relevant court must be seen as legitimate, to some extent by the defendant (although this is, as mentioned above, not essential), and by society at large. Without this, the educative effect will be undermined. Unfortunately, there are clear pieces of evidence in the practice of the ICC, and international criminal law more generally, that it is far from perfect on point, if the ICC is perceived as being wrongly exclusively focused on Africa, thus a tool of Western neo-colonialism, people will not be receptive to the message it seeks to inculcate about the unacceptability of the conduct prohibited by international criminal law.[116]

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[115] I. Scobbie 'Operationalising the Law of Armed Conflict for Dissident Forces in Libya' available at http://www.ejiltalk.org/operationalising-the-law-of-armed-conflict-for-dissident-forces-in-libya/#more-3711.
[116] See Cryer, 'Selectivity' above note 61.

4. Conclusion

Much of what has gone before assumes that the case for international criminal law ought to be made on consequentialist grounds. Deterrence, as probably the strongest consequentialist argument for criminal prosecutions, has taken a front seat in those debates. Even if deterrence was out of the question, this would not mean that international criminal law was without justification. Even so, it is hoped that this contribution has shown that, in spite of the considerable obstacles to international criminal prosecutions, they may have some role to play in ensuring compliance with conflicts, including in Africa, and that Africa is no different to any other area of the world in this regard.[117] The evidence on point may be limited, and anecdotal, but that does not render it completely useless. If, for example, the Lubanga prosecution helped to lead to the demobilization of some child soldiers in sub-Saharan Africa, and the NTC in Libya prohibiting their use (even though that prohibition may not have been upheld in all circumstances) maybe this is an acceptable contribution to compliance with the norms against the use of child soldiers. As others have said, claims of deterrence: 'Is not a claim that everybody will be deterred all the time. It is a claim that some will be deterred some of the time..[and it is]… a claim that it will deter a sufficient number of potential perpetrators to justify the costs of producing this effect.'[118]

Even if we take the above as given, though, what is most important in this regard for our purposes is that in many, although emphatically not all, conflicts in Africa, those conflicts occur against a backdrop of limited effective governance by official authorities. As such, the possibility of prosecution at the international level, either by international courts, or by foreign domestic courts are one of the few enforcement mechanisms that can exercise an inhibiting effect on the behavior of the powerful. As Hannah Arendt put it: 'If genocide is an actual possibility in the future, then no people on earth...can feel reasonably sure of its continued existence without the help and protection of international law…'.[119]

In the absence of State-based incentive to comply with international humanitarian law it may fall to international law to provide the 'back stop' against the commission of crimes against international law. This function is not a new one. The point of having crimes against humanity in the Nuremberg Charter was that German criminal law did not fully protect (*inter alia*) the German (or stateless) Jewish, Roma, and homosexual population, hence the savings clause in Article 6(c) of the Charter, that applied crimes against humanity to conduct whether or not it was a violation of the criminal law in the *locus delicti*.

The contribution that the threat of criminal prosecution can make to prevention of international crimes ought to be appraised in a manner that accepts that criminal justice has a role, but not necessarily a determinative one, in ensuring compliance with humanitarian law. In this regard, it is important to note that it ought not be the case that anyone put all their eggs in the ICC's basket.[120] The Rome Statute itself does not claim that the ICC can, itself, prevent international crimes, the optimistic preamble limits itself to the claim that the ICC can

[117] Skeptics may say that this is owing to the fact that the author is an international criminal lawyer who, although critical of some (perhaps many) of its aspects, is nonetheless, a supporter of its ideals, and of the regime in the main.
[118] von Holderstein Holtermann, 'Slice' above note 29, at 300.
[119] H. Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Harmondsworth: Penguin, 1977) p.273.
[120] See e.g. K.A. Marshall, 'Prevention and Complementarity in the International Criminal Court: A Positive Approach' (2010) 17 *Human Rights Brief* 21, at 21.

'contribute' to the prevention of international crimes.[121] As a result, we ought to approach the possible preventative role of international criminal law and the ICC, with humility and an understanding of the limits of criminal justice.[122] Mark Osiel is correct in identifying the issue as, rather than focusing on whether one mechanism does nor does not prevent international crimes, 'aligning incentives' against the commission of such offences.[123] Just as there is more than one carrot available in responses to international crimes, there are more than one stick available too, be they financial sanctions (targeted or otherwise), derecognition or non-recognition of various parties to conflicts (as happened in Libya in 2011), refusal to grant aid, loans, or membership of international organizations.

In addition, it is important to remember the educative effect of international criminal law. The evidence we have, which is, again, anecdotal rather than systematic, is that the educative role of the ICC, in particular has been quite strong, and has had an impact on the ground. This needs to be borne in mind when the cost/benefit analysis is entered into (if we accept that it ought to be at all). It also has a bearing no aspects of institutional priority, in particular the extent to which outreach activities ought to be engaged with. The ICTY and ICTR have been criticized heavily in the past for their failings in this regard.[124] The ICC has been more pro-active in this regard, and such an approach seems to have paid off, at least to a reasonable degree. Therefore the possible role that criminal prosecution of violations of IHL should not be written off. Prosecutions have a role to play, and some grounds upon which they may do so ought not to be ceded to the skeptics without something of a fight.

[121] Rome Statute Preamble, operative paragraph 5. This is implied by Tomer Broude in, 'Invited Expert Comments' manuscript 1, 2 available at http://ucla lawforum.com/prevention.
[122] *Accord* Broude, *ibid*, at 4.
[123] M. Osiel, *Making Sense of Mass Atrocity* (Cambridge: CUP, 2009).
[124] See e.g. David Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings' (2002) 26(2) *Fletcher Forum of World Affairs* 7, at 13–14; Gabrielle Kirk McDonald, 'Problems, Obstacles and Achievements of the ICTY' (2004) 2 *Journal of International Criminal Justice* 558, at 567-69.