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*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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CONTENTS

Foreword	
<i>Claudia Geiringer and Rayner Thwaites</i>	vii
Constitution as a Catalyst: Different Paths within Australasian Administrative Law	
<i>Cheryl Saunders</i>	143
The Climate Change Response Act 2002: The Origin and Evolution of s 3A – The Treaty Clause	
<i>Anna-Marie Skellern</i>	167
Integrating Responses to Violators and Corporate Accomplices: A Role for the Security Council?	
<i>Shireen Daft</i>	193
Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law	
<i>Pádraig McAuliffe</i>	227
Book Review: <i>Tribal Constitutionalism – States, Tribes and the Governance of Membership</i>	
<i>Carwyn Jones</i>	263
1984 and All That: Opening Address to the EmpowerNZ Workshop	
<i>Hon Jim McLay</i>	267
EmpowerNZ: Drafting a Constitution for the 21st Century	
<i>Dean Knight and Julia Whaipooti</i>	287
Draft Constitution for the 21 st Century	
<i>Participants at the EmpowerNZ Youth Workshop</i>	301

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SUSPENDED DISBELIEF? THE CURIOUS ENDURANCE OF THE DETERRENCE RATIONALE IN INTERNATIONAL CRIMINAL LAW

*Pádraig McAuliffe**

Practitioners and advocates of international criminal law frequently justify this body of law and its institutions on the basis of the deterrent effect that it has on those who might commit mass atrocities. Nevertheless, detailed studies by external critics in the past 20 years of globalised justice have strongly called into question this deterrence rationale as it lacks support in the historical record. It is therefore necessary to explain why arguments based on the deterrent capacity of internationalised justice endure given the weight of evidence against the preventative potential of criminal proceedings. This article argues that for practitioners of international criminal law, belief in the deterrence rationale rests on a passionate legalistic belief in the possibilities of law. But as well, for many in the non-governmental organisation and policy-making communities, the avowal of the deterrence argument may owe more to its potency as a rhetorical device than to true belief – these actors suspect deterrence may not work but deliberately forget this in order to promote international criminal justice institutions. Faith in the deterrence rationale is also bolstered for some by studies that purport to prove its validity through anecdote or through employment of overly simplistic correlations between the fact that trials have taken place, and the fact that conflict or oppression has ended.

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If peace is not intended to be a brief interlude between conflicts, then in order to avoid future conflict, it must accomplish what justice is intended to accomplish: *prevent, deter, punish, and rehabilitate*.¹

Everybody knows that prevention does not work, even if one hopes it might one day. Everybody knows, but the knowledge has no consequences.²

I INTRODUCTION

Advocates of international criminal justice often justify this body of law on the basis that impunity for past atrocity is one of the key causes of contemporary atrocity. Scholars, activists and practitioners in the field routinely impute the recurrence of rights abuses to the absence of criminal punishment.³ One must pause before accepting such assertions – it is more likely, after all, that the absence of punitive sanction permits crime, as opposed to being the catalyst or cause for crime. Nevertheless, such claims reinforce what some intuitively feel to be correct – that the systematically enforced threat of punishment can deter people from committing serious international crimes.

Belief in the deterrent potential of international criminal justice is evident among many of the most respected figures in international criminal academia,⁴ journalism⁵ and human rights non-

1 M Cherif Bassiouni "Searching for Peace and Achieving Justice: The Need for Accountability" (1996) 59 *Law & Contemp Probs* 9 at 13 (emphasis added).

2 Immi Tallgren "The Sensibility and Sense of International Criminal Law" (2002) 13 *EJIL* 561 at 590.

3 For example in the academy see Martin Ngoga "The Institutionalisation of Impunity: A Juridical Perspective on the Rwandan Genocide" in Phil Clark and Zachary D Kaufman (eds) *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Columbia University Press, New York, 2009) 321 at 322; Darryl Robinson "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court" (2003) 14 *EJIL* 481 at 489; Neil J Kriz "Coming to Terms With Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights" (1996) 59 *Law & Contemp Probs* 127 at 127. In terms of activists see Human Rights Watch "Making Kampala Count: Advancing the Global Fight Against Impunity at the ICC Review Conference" (2010) *The American Society of International Law* <www.asil.org> at 71; Kenneth Roth "The Case for Universal Jurisdiction" (2001) 80 *Foreign Affairs* 150 at 150; Nahla Valji "Trials and Truth Commissions: Seeking Accountability in the Aftermath of Violence" *Human Security Report Project: Human Security Gateway* <<http://humansecuritygateway.com>> at 1 and 8. In terms of judges and practitioners see below n 73.

4 There have been a number of recent articles and monographs asserting the deterrent potential of international criminal law such as Hunjoon Kim and Kathryn Sikkink "Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries" (2010) 54 *International Studies Quarterly* 939; Tricia Olsen, Leigh Payne and Andrew Reiter *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (US Institute of Peace, Washington DC, 2010) at 133 and 136–146; Tove Grete Lie, Helga Malmin Binningsbo and Scott Gates "Post-Conflict Justice and Sustainable Peace" (2007) *The World Bank* <www-wds.worldbank.org>. See also Kathryn Sikkink *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (WW Norton & Co, New York, 2011); David Bosco "The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?" (2011) 19 *Mich St J Int'l L* 163 at 200, arguing that the International Criminal Court "has only begun to explore systematically its preventive potential." For earlier examples see M Cherif Bassiouni "Combating Impunity for Serious

governmental organisations (NGOs),⁶ and in the reports of investigatory commissions from Latin America⁷ to Darfur.⁸ Deterrence is used by the European Court of Human Rights to justify the need for criminal punishment.⁹ Equally, the International Criminal Tribunal for Rwanda (ICTR) has stated that the prosecution of international crimes can:¹⁰

... dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.

In *Prosecutor v Delalic*, deterrence emerged for the International Criminal Tribunal for the former Yugoslavia (ICTY) as "probably the most important factor in the assessment of appropriate sentences".¹¹ It was "a primary objective of those working to establish the international criminal court".¹² In *Situation in the Democratic Republic of Congo* (the *Lubanga* case), the International Criminal Court (ICC) Appeals Chamber suggested that "the deterrent effect of the Court is highest if no category of perpetrators is *per se* excluded from potentially being brought before the Court."¹³

Crimes" (2000) 71 U Colo L Rev 409 at 410, arguing that punishment is a deterrent provided the chances of successful prosecution are high; Rama Mani "Does Power Trump Morality? Reconciliation or Transitional Justice" in William A Schabas, Edel Hughes and Ramesh Thakur (eds) *Atrocities and International Accountability: Beyond Transitional Justice* (United Nations University Press, New York, 2007) 23 at 36, arguing that trials are essential to security and long-term peace to the extent that they signal to war criminals that their days of impunity are numbered; and David J Scheffer "War Crimes and Crimes Against Humanity" (1999) 11 Pace Int'l L Rev 319 at 328, arguing that as instruments of deterrence, the ad hoc tribunals were formidable.

- 5 William Pfaff "Why Expand a NATO that Fails to Enforce Peace in Bosnia?" *International Herald Tribune* (online ed, New York, 17 July 1997) at 8.
- 6 See for example Human Rights Watch, above n 3, at 71.
- 7 See for example *Final report on the situation of human rights in El Salvador submitted to the Commission of Human Rights by Mr José Antonio Pastor Ridruejo in the fulfilment of the mandate conferred under Commission resolution 1986/39 E/CN4/1987/21* (1987) at [60].
- 8 *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General S/2005/60* (2005) at [569].
- 9 See for example *X and Y v Netherlands* (8978/80) Chamber, ECHR 26 March 1985 at [27]. On deterrence in international criminal courts see further Part II.A below.
- 10 *Prosecutor v Rutaganda (Judgment)* ICTR Trial Chamber ICTR-96-3-T, 6 December 1999 at [455].
- 11 *Prosecutor v Delalic (Judgment)* ICTY Trial Chamber IT-96-21-T, 16 November 1998 at [1234].
- 12 United Nations "Overview of the Rome Statute of the International Criminal Court" (1998–1999) United Nations Treaty Collection <<http://untreaty.un.org>>.
- 13 *Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I entitled "Decisions on the Prosecutor's Application for Warrants of Arrest, Article 58"* ICC Appeals Chamber ICC-01-04-169, 13 July 2006 at [73].

The ICC Prosecutor has argued that the *Lubanga* trial will deter the future enlistment of child soldiers.¹⁴

What is notable about these affirmations of the deterrence rationale is that they typically arise in general considerations of the desirability of criminal punishment, rather than out of particularised empirical studies of the deterrent effect on perpetrators of mass atrocity. Even the ad hoc tribunals' philosophical justifications for sentencing have never truly rationalised deterrence, presenting a muddled picture of putative international criminal penology.¹⁵ As international criminal law has moved from academic conjecture to reality with the advent of the ad hoc tribunals and the ICC, scholars that have given more specific attention to deterrence have reached very different conclusions. They question whether an international tribunal can, in fact, deter the commission of systematic crime by authoritarian regimes, armies or violent non-state groups.¹⁶

A significant cause for this disquiet is that advocates of deterrence have "hungrily – yet arbitrarily" employed domestic utilitarian and retributive theories of punishment to justify international trials,¹⁷ neglecting the fact that these criminological and sociological premises were developed in functioning industrialised democracies, a context radically dissimilar to authoritarian or war-ridden states.¹⁸ As Tallgren observes in relation to international criminal law:¹⁹

14 Mariette Le Roux "Lubanga Trial Will Open Eyes to Child Soldiers: ICC Prosecutor" *Agence France Presse* (online ed, Paris, 23 January 2009).

15 The tribunals have generally failed to define their sentencing aims, resulting in a pattern of "obfuscation and confusion" on the part of international criminal tribunals when outlining the link between penal justification and sentencing practice: see generally Ralph Henham "The Philosophical Foundations of International Sentencing" (2003) 1 JICJ 64. For example in the *Tadic* sentencing judgment the ICTY Trial Chamber claimed rehabilitation of the accused was a desirable objective for the Tribunal in sentencing: *Prosecutor v Tadic (Sentencing Judgment)* ICTY Trial Chamber IT-94-1-S, 14 July 1997 at [25]. But in the later case of *Delalic*, the Appeals Chamber held that rehabilitation could never play a predominant role in sentencing: *Prosecutor v Delalic (Sentencing Judgment)* ICTY Appeals Chamber IT-96-21-A, 20 February 2001 at [806].

16 See for example Miriam J Aukerman "Extraordinary Evil, Ordinary Crimes: A Framework for Understanding Transitional Justice" (2002) 15 Harv Hum Rts J 39; David Gray "An Excuse-Centred Approach to Transitional Justice" (2006) 74 Fordham L Rev 2621 at 2663–3677; Jan Klabbbers "Just Revenge? The Deterrence Argument in International Criminal Law" (2001) 12 FYBIL 249; Kenneth A Rodman "Darfur and the Limits of Legal Deterrence" (2008) 30 Hum Rts Q 529; Julian Ku and Jide Nzelibe "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" (2006) 84 Wash U L Rev 777; Leslie Vinjamuri "Deterrence, Democracy and the Pursuit of International Justice" (2010) 24 EIA 191; and David Wippman "Atrocities, Deterrence and the Limits of International Justice" (1999) 23 Fordham Int'l L J 473.

17 Mark A Drumbl "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity" (2005) 99 Nw U L Rev 539 at 549.

18 Stanley Cohen "State Crimes of Previous Regimes: Knowledge, Accountability, and Policing the Past" (1995) 20 Law & Soc Inquiry 7 at 10.

... it generally seems to be taken for granted that whatever objectives and justifications work – or are supposed to work – on the national level should also, without any extra effort, cover the decisions and actions taken by states in concert.

Simply put, the normative universe in which state crime and war crime occurs differs dramatically from the functioning, peaceful society where intuitions about the effectiveness of state punishment are most applicable.²⁰ In stable societies, criminal acts are exceptional and normatively recognised as such, while in the state of war or authoritarianism, abuse is often both normal and/or state-sanctioned.²¹

The error in incorporating domestic utilitarian theories into international criminal prosecution is even more apparent when one remembers that criminological and penological literature has doubted the deterrent effects of criminal prosecution in even the most highly functioning justice systems. As James Gilligan argues, there are only four problems with the domestic deterrence model: "It is totally incorrect, hopelessly naive, dangerously misleading, and based on complete and utter ignorance of what violent people are actually like".²² The domestic deterrence model is all the more inapt in conditions of war, repression or genocide where the prosecutors may be either coterminous with, or act in fear of, those who committed the crimes.

The obvious alternative to domestic prosecution in such circumstances is international criminal law. Christopher Rudolf proposes three requirements for effective deterrence in international criminal justice – capability, commitment and credibility.²³ However, even the most cursory glance at the record since the fall of the Berlin Wall shows that one or more of these have consistently been lacking. The deterrence rationale is weak even within a state where there is a shared political community and a functioning, coercive criminal justice system. Therefore, one needs to ask how deterrence can work in culturally and geographically foreign courts within an inchoate international system whose coercive mechanisms are weak and exceptional, and where the record of enforcement is inconsistent.

This article asks why the belief in, or rhetoric of, deterrence has endured in the discourse on transitional justice and international criminal law. It argues that wishful thinking and

19 Tallgren, above n 2, at 565–566.

20 Robert Sloan "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law" (2007) 43 *Stan J Int'l L* 39 at 41.

21 Rajeev Bhargava "Restoring Decency to Barbaric Societies" in Robert I Rotberg and Dennis Thompson (eds) *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press, Princeton NJ, 2000) 45 at 45–50.

22 James Gilligan *Violence: Our Deadly Epidemic and Its Causes* (GP Putnam, New York, 1996) at 94–95.

23 Christopher Rudolf "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals" (2001) 55 *Int'l Org* 655 at 684.

methodological sloppiness have superseded reasoned appraisal of the actual motives of actors involved in authoritarianism and war. This article is far from unique in criticising the naive faith in deterrence: as noted above, many focussed academic analyses now take a highly sceptical view of generalised claims about the success of the deterrence rationale. Rather than offer yet another critique of the deterrence rationale, this article seeks instead to explain why the rationale endures. In doing so, the article positions discussion of deterrence in international criminal law at the intersection of international human rights law and transitional justice. It argues that faith in the rationale manifests the saviour mentality and self-justifying mode of analysis common to both fields.

As a preliminary matter, in the context of this article, "deterrence" refers to the proposition that well-defined punishments with a credible threat of enforcement discourage potential criminal defendants from offending because of the likelihood of punishment. This is distinct from the (also preventative) social pedagogical or expressive role of trial, where indictments and verdicts attempt to stigmatise political criminality or to render it outside the pale of legitimate political activity. Put another way, in deterrence, law and legal processes contain factual information about what is risked by disobedience to the law, while in social pedagogy the legal process is directed towards proclaiming it is morally wrong to disobey. Only the former is of relevance here.

After Part II briefly recapitulates the historic failure of the deterrence rationale, Part III examines the "heroic" agenda of the human rights and transitional justice movements. The understandable (some might say morally imperative) desire to see human rights abuses punished serves to exaggerate the capabilities of law to effect societal change. Deterrence, premised as it is on the prevention of the worst atrocities imaginable, has a great rhetorical utility as a justification for international criminal tribunals and transitional trials. This exuberance in turn has an effect on the methodological approaches that are used to assess the impact of international criminal trials, which have been characterised by "wishful thinking and sloppy legal analysis".²⁴ This forms the subject-matter of Part IV.

II POLITICO-MILITARY OBJECTIONS TO DETERRENCE – A SUMMARY

Before examining the reasons why the deterrence rationale persists among practitioners and advocates of international criminal law, it is necessary to briefly recapitulate the reasons for the growing body of scholarship questioning the deterrent effect of international criminal proceedings. As noted above, there is now widespread acceptance in the academic literature that the deterrence rationale is weak.²⁵ This emerging consensus is born out of particularised examinations of the

24 John R Crook "The International Court of Justice and Human Rights" (2003) 1 Nw U J Int'l Hum Rts 2 at 8.

25 For a sceptical survey of the pro-deterrence literature see James F Alexander "The International Court and the Prevention of Atrocities: Predicting the Court's Impact" (2009) 54 Vill L Rev 1.

application of deterrence: (i) to those who organise violence at elite military and political levels, and (ii) to those underlings beneath them in the hierarchy who perpetrate the atrocities. The critical literature in these areas is relatively well traversed and requires only a brief summary.

A Deterrence of Leaders

Concern with the prosecution of civilian and military leaders is apparent wherever international criminal justice is attempted. For example, as part of the ICTY's wind-up strategy, Security Council *Resolution 1503* urged the Tribunal to focus "on the prosecution and trial of the most senior leaders suspected of being responsible for crimes" and to transfer cases involving those who might not bear this level of responsibility to competent national jurisdictions.²⁶ The jurisdictions of the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia cover persons "who bear the greatest responsibility" for crimes committed,²⁷ "senior leaders" and those who were "most responsible" for atrocities committed.²⁸ Article 17(1)(d) of the Rome Statute of the ICC demands that the ICC Prosecutor focuses only on those few individuals who he or she believes bear the greatest responsibility for the most serious crimes that have been committed in each situation.²⁹ Most domestic prosecutions of crimes against humanity also focus on high-level military or political leaders.³⁰

Among those who retain faith in the deterrent potential of international criminal law, the predominant assumption is that punishment is most usefully directed at political or military leaders because they organise or manipulate violence that would not otherwise occur.³¹ There is a secondary assumption that prosecution of leaders is most likely to yield a deterrent effect (a) because they are presumed to know the law, therefore (b) they can rationally weigh the opportunities and costs before they choose a course of action, and (c) their position in the state hierarchy makes them the only figures in the state or army who can reach such a decision unfettered by a competing domestic

26 *Resolution 1503* SC Res 1503, S/Res/1503 (2003) at Preamble and [7].

27 *Resolution 1315* SC Res 1315, S/Res/1315 (2000) at [3].

28 Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea 2329 UNTS 1 (signed 6 June 2003, entered into force 29 April 2005), art 2.

29 Rome Statute of the International Criminal Court 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002) [Rome Statute], art 17(1)(d).

30 Diane F Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Legal Regime" (1991) 100 Yale LJ 2537 at 2602–2603.

31 Pablo Castillo "Rethinking Deterrence: The International Criminal Courts in Sudan" (UNISCI Discussion Papers No 13, January 2007) at 181.

power which might otherwise compel them to commit crimes.³² Malamud-Goti sceptically describes this logic as follows:³³

At best, dissuasive consequences would be applicable only to the generals at the top. For the rest of the officers, the deterrent impact of convictions would be neutralized by the immediate benefits that violating rights would bring about: within the armed forces, support from their comrades and superiors.

However, the historical record of modern international criminal law does not vindicate confidence in the preventive effect of prosecuting senior leaders. There was optimism about the deterrent capabilities of international tribunals when the ad hoc tribunals for Yugoslavia and Rwanda were established. Security Council *Resolution 827* pronounced that the creation of the ICTY would ensure that "violations are halted and effectively redressed" as part of the Security Council's mission to maintain international peace and security.³⁴ In the first annual report of the ICTY, President Antonio Cassese identified deterrence as one of three principal objectives of the Tribunal.³⁵ This optimism was soon, however, betrayed. The worst atrocities in the former Yugoslavia occurred after the Tribunal was established.³⁶ Most notably, the Srebrenica massacre occurred two years after *Resolution 827* at a time when it was obvious that Ratko Mladić and Radovan Karadžić would be indicted.³⁷ Mladić attacked the United Nations safe haven of Žepa and shelled Sarajevo indiscriminately after his indictment.³⁸ By the late 1990's, the ICTY had established itself as the best-funded and most vigorous court of its kind. Nevertheless, this was not enough to dissuade Slobodan Milošević from invading and ethnically cleansing Kosovo; indeed, he ignored face-to-face warnings that he would be prosecuted if he did not intervene to halt Serbian abuses in Kosovo.³⁹ As early as 1995, references to deterrence in ICTY annual reports ceased

32 Paul van Zyl "Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission" (1999) *J Int'l Aff* 647 at 665–666.

33 Jaime Malamud-Goti "Human Rights Abuses in Fledgling Democracies: The Role of Discretion" in Irwin P Stotzky (ed) *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press, Boulder, 1993) 225 at 231.

34 *Resolution 827* SC Res 827, S/Res/827 (1993) at Preamble.

35 Antonio Cassese *First Annual Report of the ICTY*, A/49/342 and S/1994/1007 (1994) at [11].

36 Aukerman, above n 16, at 66.

37 Jeremy Rabkin "No Substitute for Sovereignty: Why International Criminal Justice has a Bleak Future – and Deserves It" in William A Schabas, Edel Hughes and Ramesh Thakur (eds) *Atrocities and International Accountability: Beyond Transitional Justice* (United Nations University Press, New York, 2007) 98 at 108.

38 Gary Bass *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, Princeton NJ, 2000) at 229–231.

39 Testimony of Paddy Ashdown, former High Representative for Bosnia and Herzegovina, in Marlise Simons "Briton Gives Testimony on Warning to Milosevic" *The New York Times* (New York, 17 March 2002) at 7.

completely⁴⁰ and deterrence was later omitted from the ICTY's self-described "Five Core Achievements".⁴¹ By 1997, the nature of the ICTY judges' claims about the Tribunal's preventive efficacy had changed. Where once it was argued that prosecutions could inhibit the commission of offences, it was now accepted that the ICTY did not prevent the commission of massacres in Bosnia but instead merely underscored the commitment of the international community to achieving accountability.⁴² As for the ICTR, deterrence failed at both a national level (for example, in 1996 and 1997 the Rwandan army took part in mass crimes in Kivu) and internationally (the Rwandan army was active in the perpetration of war crimes in the Congolese civil war between 1998 and 2003).⁴³

Notwithstanding the ongoing ineffectiveness of the ad hoc tribunals in deterring criminality, throughout the 1990s, advocates of international criminal justice continued to posit that the external penal machinery of a permanent international court could fulfil the role ordinarily assumed by the national criminal justice system in consistently punishing crime.⁴⁴ In the interregnum between the ad hoc tribunals and the ICC, Theodor Meron argued, for example, that previous failures of deterrence could be explained not by any ingrained adversity associated with the conditions of mass authoritarianism or war but "because prosecutions for war crimes on both national and international planes are so exceptional that criminals do not believe they are likely to be prosecuted and punished".⁴⁵

The Rome Statute finally created the permanent global institution of the ICC, outlining its mission as being "to put an end to impunity for perpetrators of [crimes against humanity] and thus to contribute to the prevention of such crimes".⁴⁶ However, the decade post the creation of the ICC suggests that merely embedding a norm of non-impunity in a legal institution is not enough to give

40 It is not mentioned in Antonio Cassese *Second Annual Report of the ICTY*, A/50/365 and S/1995/728 (1995) or subsequent reports.

41 The list of "Five Core Achievements" is taken from one of the International Criminal Tribunal for the former Yugoslavia's [ICTY] own documents: ICTY "The Tribunal's Accomplishments in Justice and Law" <www.icty.org> and used to appear on the first page of "ICTY: At a glance" on the ICTY website. Reference to it can be found for example in *Report to Secretary-General of the Commission of Experts to Review the Prosecution of Serious Violations of Human Rights in Timor-Leste (then East Timor) in 1999 (26 May 2005)*, S/2005/45825 (2005) at [31].

42 Theodor Meron "Answering for War Crimes: Lessons from the Balkans" (1997) 76 *Foreign Affairs* 2 at 6–8.

43 Pierre Hazan "Measuring the Impact of Punishment and Forgiveness: A Framework for Evaluating Transitional Justice" (2006) 88 *International Review of the Red Cross* 19 at 34.

44 See for example Cherif Bassiouni "Searching for Peace and Achieving Justice", above n 1; and Douglas Cassell "Why We Need the International Criminal Court" (1999) 116 *The Christian Century* 532.

45 Theodor Meron "From Nuremberg to The Hague" (1995) 149 *Mil L Rev* 107 at 110.

46 Rome Statute, at Preamble.

it even a generalised deterrent effect. The lack of police powers, the infrequency of punishment and the various jurisdictional barriers to prosecution at The Hague (most notably the doctrine of complementarity) make analogies with the domestic paradigm of enforcement inappropriate.

As the indictments of Sudan's Omar al-Bashir (in 2008) and Libya's Muammar Gaddafi (in 2011) demonstrate, even the most clearly expressed threat of punishment does not necessarily dissuade leaders from commission of further crimes within their territory in an ongoing conflict. Al-Bashir's case in particular demonstrates the obvious weakness of the ICC system. As is the case in Sudan, most modern instances of mass atrocity occur in the context of civil war or repression, where the usual sovereign and geo-political barriers to intervention apply. Further, the states where such atrocities are most likely to occur are those least likely to actually sign the Rome Statute.⁴⁷ The jurisdiction awarded to the ICC over Sudan by Security Council referral did not serve to remedy the Court's lack of a coercive apparatus, and al-Bashir remains at large. It arguably remains difficult for dictators to anticipate (or even imagine) a set of circumstances where their actions might, in practice, be judged in a court of law.

Even if one accepts that international criminal law cannot deter criminals from committing atrocities within their own borders during an ongoing conflict, some nevertheless assert that the ICC can have a prospective deterrent impact across international boundaries on the basis that addressing mass human rights violations post hoc or contemporaneously in State A can prevent abuses in the future in State B by weakening the confidence of would-be perpetrators that they can commit a given act, or series of acts, with impunity.⁴⁸ However, the acts of Syria in the aftermath of the Security Council referral of Libya's Muammar Gaddafi to the ICC constitute recent evidence that points in the opposite direction. Even the precedent of indictments of figures from Gaddafi's family and regime did not deter President Assad, chief of Syria's armed forces, from assuming the risk of prosecution for illegal attacks on the national civilian population.⁴⁹

Deterrence sceptics have posited numerous reasons why dictators and war leaders are so complacent even in the face of credible threats, but the main reasons are practical. Belief in the improbability of prosecution may be based on a reasoned appraisal of the risk of international trial versus the benefits of maintaining or enhancing domestic control. After all, when international criminal law is breached, domestic courts are typically relied on as the primary formal method for its enforcement. However, when this sovereign judicial power fails, international law lacks almost

47 Elena Bayliss "Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks" (2009) 50 B C L Rev 1 at 20–21.

48 W Michael Reisman "Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics" (1998) 6 Tul J Int'l & Comp L 5 at 46.

49 "William Hague: Syria Could Face International Criminal Court" *The Telegraph* (online ed, United Kingdom, 10 April 2012).

entirely the coercive apparatus to remedy the breach.⁵⁰ In the absence of a functioning international criminal police force, or an independent domestic justice system, the chance of arrest for a perpetrator of international crimes is considerably less than for a perpetrator of domestic crime in a stable, functioning democracy. The impunity of Sudan's al Bashir to international criminal prosecution can only have emboldened the leadership of Middle Eastern regimes during the Arab spring.⁵¹ Additionally, faith in one's continued impunity may also be born of an exaggerated, megalomaniacal sense of invulnerability.

B Deterrence of Underlings

International tribunals have tried relatively low-level figures such as Duško Tadić in the ICTY, Augustine Gbao and Alex Tamba Brima in the Special Court for Sierra Leone and Kaing Guek Eav (alias Duch) at the Khmer Rouge trials. However, the deterrence rationale arguably becomes even less feasible when applied to criminals who hold relatively low positions in the political and military hierarchies that perpetrate the crimes. The objections to applying deterrence theory to subordinates are based on the practicalities of prosecution and analysis of the subordinates' decision-making processes.

In terms of the former, one must begin with the very basic question of whether a would-be low-level malefactor is likely to get caught or go on trial. Crimes of war, crimes against humanity and genocide are irreducibly collective – undertaken either by the apparatus of state (including its armies) or, alternatively, by groups who fight against that state. The number of potential indictees is likely to surpass the capacity of even the most efficient judiciary. Any international tribunal could only try a handful of the most culpable figures from any given conflict.⁵² The obvious option is to depend on national trials via a regime of complementarity, but vast numbers of trials are likely to surpass the capacity of the invariably struggling national justice system.⁵³ As one commentator put it, "[t]hose who 'merely' kill, rape, and plunder, but do not mastermind the carnage, have little to fear from prosecution."⁵⁴

50 Adam Roberts "The Laws of War: Problems of Implementation in Contemporary Conflicts" (1995) 6 *Duke J Comp & Int'l L* 11 at 69.

51 Michael Ignatieff "We're So Exceptional" *New York Review of Books* (online ed, New York, 26 March 2012).

52 For example while the Darfur Commission's Report contained a sealed envelope with the names of 51 people who the Commission determined were most responsible for crimes committed, thus far only six of those people have been indicted.

53 David Wippman argues that for low-ranking offenders, the risk of prosecution "must appear to be almost the equivalent of losing the war crimes prosecution lottery": Wippman, above n 16, at 477.

54 Aukerman, above n 16, at 67.

Perhaps most worryingly for the international criminal deterrence enthusiast, the weaknesses of the enforcement apparatus may not be the most significant permissive condition for international crimes: moral norms may compel commission of crime more than fear can deter them. In the context of war or authoritarian rule, those beneath leaders in the criminal hierarchy can be categorised crudely in a threefold typology of fanatics, opportunists and conformists.⁵⁵ Ordinary intuitions about the preventive capacity of law are, again, inappropriate. The model of the rationally-calculating malefactor on which domestic deterrent theory is based is somewhat abstracted from these contexts, which invariably involve moral corruption in systems of repression or conflict premised on distorting the difference between the permissible and the impermissible, the desirable and the legal.⁵⁶ The perpetrators of serious international crimes "generally belong to a collective that shares a mythology of ethnic, national, racial or religious superiority, perhaps even messianism."⁵⁷ Potential or even actual punishment is unlikely to constitute a significant restraint because society actively and intentionally corrodes the agency of the individual that would make criminal sanctions prospectively effective.⁵⁸

Deterrent theorists in international criminal law have failed to grapple with the paradox that because the most serious crimes in international criminal law are collective, they involve the weakest sense of individual responsibility.⁵⁹ The fact that strong, heavily bureaucratized central authorities are the most conducive to the commission of systematic atrocities exacerbates this paradox – even if independent moral judgment were possible, it would be exercised in circumstances where the *refusal* to perform the criminal act is socially deviant.⁶⁰ As Frédéric Mégret puts it, "[i]t beggars belief to suggest that the average crazed nationalist purifier or abused child soldier ... will be deterred by the prospect of facing trial."⁶¹

55 Jon Elster *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, New York, 2004) at 137–143.

56 Dana Villa "Conscience, the Banality of Evil, and the Idea of a Representative Perpetrator" in Dana Villa (ed) *Politics, Philosophy, Terror: Essays on the Thought of Hannah Arendt* (Princeton University Press, Princeton, 1999) 39 at 54.

57 Mark A Drumbl "A Hard Look at the Soft Theory of International Criminal Law" in Leila Nadya Sadat and Michael P Scharf (eds) *The Theory and Practice of International Criminal Law* (Martinus Nijhoff, Leiden, 2008) 1 at 8.

58 W Michael Reisman "Legal Responses to Genocide and Other Massive Violations of Human Rights" (1996) 59 LCP 75 at 77.

59 Drumbl "Collective Violence and Individual Punishment", above n 17, at 571.

60 At 549–550.

61 Frédéric Mégret "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project" (2001) 7 FYBIL 193 at 203 as cited in Drumbl "Collective Violence and Individual Punishment", above n 17, at 591, fn 271.

III "RESTRAINING THE BARBARIANS": INTERNATIONAL CRIMINAL LAW AS MESSIAH⁶²

The foregoing has demonstrated that academics and theorists of international criminal law who have paid close attention to the issue generally believe that the deterrence rationale is weak. The context of international enforcement is so radically different to that of a functioning state's legal system that analogies between the two are misplaced at best and damagingly misleading at worst. Indeed, the United Nation's Office of the High Commissioner for Human Rights reached the following sobering verdict:⁶³

The fact that large-scale atrocities continue to be committed in places such as the Democratic Republic of the Congo, despite several advances in the prosecution of such crimes (including the ICTR work on neighbouring Rwanda and the International Criminal Court's investigations on the Democratic Republic of the Congo itself), may indicate that the general possibility of prosecutions is not sufficient to dissuade those inclined to commit massive atrocities.

Nevertheless, a professed belief in the preventive capability of the ICC endures among those involved in the operation and promotion of international criminal justice, even if it is considerably less ebullient than it was when the ad hoc tribunals were established.⁶⁴ It is now conceded that the deterrent effect of international criminal prosecutions "seems likely to be modest and incremental, rather than dramatic and transformative".⁶⁵ Those who established the ICTY appeared to believe that establishing a tribunal based on vertical, top-down enforcement by a tribunal with primary jurisdiction and Chapter VII enforcement powers could exercise a general deterrent restraint on all sides in the Bosnian conflict. By contrast, because the ICC enjoys merely complementary jurisdiction (without Chapter VII enforcement powers), it must aspire towards a more horizontal, voluntary enforcement model. This relies more on developing a burgeoning worldwide human rights culture to render atrocity beyond the realm of the politically or morally acceptable than on compulsion.⁶⁶ In the era of a permanent international criminal judicial body, the focus is less on restraining the behaviour of specific regimes or criminals than on vindicating the legalist belief that establishment of tribunals (or indictment by them) could socialise states into less abusive patterns of

62 This title is taken from Tom Farer "Restraining the Barbarians: Can International Criminal Law Help?" (2000) 22 HRQ 90.

63 United Nations Office of the High Commissioner for Human Rights "Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives" (2006) Office of the High Commissioner for Human Rights <www.ohchr.org> at 4, fn 8.

64 See Kim and Sikkink, above n 4; Olsen, Payne and Reiter, above n 4; Lie, Binningsbo and Gates, above n 4; and Bosco, above n 4.

65 Wippman, above n 16, at 488.

66 Robert Cryer and others *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2010) at 30.

behaviour.⁶⁷ The argument is best summed up by Vinjamuri:⁶⁸

Their broader claim is that deterrence is neither confined to a particular individual or territory nor time-bound, but is a long-term project. Moreover, they argue that if international tribunals fail to deter further atrocities in a particular conflict, they are a sanction that increases the costs to potential future perpetrators – one that will gradually lead individual would-be perpetrators to comply with human rights and humanitarian norms.

The very establishment of a permanent court in the ICC is believed to have fundamentally altered the basis of criminal calculation, not by making continued perpetration of atrocities materially less feasible but by galvanising the international community's intolerance for impunity. One can see this change in the language used to justify the ICC on utilitarian grounds. For example, Payam Akhavan contends that even if prosecutions have failed to deter certain figures from committing offences in the course of on-going conflicts, further prosecutions relating to those conflicts might nevertheless invigorate the violated norms, thereby augmenting a developing global political culture which does not tolerate commission of such crimes.⁶⁹ Human Rights Watch still proclaims the objectives of its reports as *inter alia*:⁷⁰

... to hold oppressors accountable to their population, to the international community, and to their obligations under international law. ... to increase the price of human rights abuse. The more tyrants we bring to justice, the more potential abusers will reconsider committing human rights violations.

With so much doubt and so many hurdles to surmount before deterrence, even at a supra-general level, can be effective (defeat, intervention, capture, availability of an applicable justice machinery, the scale of that machinery, its willingness and ability), why does a residual belief in deterrence endure in court judgments, textbooks and among civil society?

Many of the NGOs and scholars asserting the potential for deterrence constitute what Peter Haas labels "advocacy groups", that is, professional actors with recognised expertise and competence capable of making authoritative claims of policy-relevant knowledge.⁷¹ These include both scholars and practitioners.⁷² Indeed, there is a very significant overlap between them. Those most influential

67 M Cherif Bassiouni "The Universal Model: The International Criminal Court" in M Cherif Bassiouni (ed) *Post-Conflict Justice* (Transnational Publishers, Ardsley New York, 2002) 813 at 820–821.

68 Vinjamuri, above n 16, at 194.

69 Payam Akhavan "Justice in The Hague, Peace in the Former Yugoslavia?" (1999) 20 HRQ 737 at 744.

70 Human Rights Watch "About us" Human Rights Watch <www.hrw.org>.

71 Peter M Haas "Introduction: Epistemic Communities and International Policy Coordination" (1992) 46 *Int'l Org* 1 at 3.

72 On scholars see Kim and Sikkink, above n 4; Olsen, Payne and Reiter, above n 4; Lie, Binningsbo and Gates, above n 4; and Bosco, above n 4. On practitioners see below n 73.

in practice frequently write and those most influential in the academy frequently practice – usually accepting and advertising the utility of international criminal justice with the common purpose of improving how it operates and is understood. For example, proponents of deterrence like M Cherif Bassiouni, Theodor Meron, Louise Arbour and Payam Akhavan coupled their leading roles in founding, judging and prosecuting at the ICTY with vigorous exhortations of the deterrent value of international criminal accountability.⁷³ Of course, lawyers and judges, by virtue of their legal profession, are likely to manifest a strong legalistic faith in the efficacy of international criminal institutions and the values those institutions try to inculcate.⁷⁴ However, actors from other fields that make up the international NGO community have internalised these values and constitute the strongest enthusiasts for international tribunals. This is most notable in the 800 NGOs present in the Coalition for an International Criminal Court at the Rome Conference.⁷⁵ As Leslie Vinjamuri and Jack Snyder observe:⁷⁶

Legalists who stress these justifications for war crimes tribunals have permeated human rights-based nongovernmental organizations (NGOs), international organizations, and universities. More than any other professional class, lawyers have moved freely among these institutions and taken leadership roles in the international tribunals whose creation they have advocated.

The fluidity between practice and scholarship has at times led to unduly romantic ideas of transitional justice's value and does little to encourage critical thinking within institutions about whether international criminal tribunals can deliver on the lofty expectations outlined in their founding documents. As Zinaida Miller argues, because scholars and practitioners tend to become consultants to new justice projects rather than external critics of the enterprise, actors in the field

73 For example see M Cherif Bassiouni "A New Frontier for the Defense of Human Dignity: From the Ad Hoc Tribunals to an International Criminal Court, Competence and Jurisdiction of an ICC" (1998) 2 *Mediterranean Journal of Human Rights* 27; Theodor Meron "War Crimes Law Comes of Age" (1998) 92 *AJIL* 462 at 463; Louise Arbour *Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Evidence and Procedure*, ICC-02/05 (10 October 2006) at [68] and [76]; Payam Akhavan "The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability" (2003) 97 *AJIL* 712.

74 David S Koller "The Faith of the International Criminal Lawyer" (2008) 40 *NYU J Int'l L & Pol* 1019 at 1050.

75 See for example William R Pace, head of the Coalition for an International Criminal Court (speech to International Criminal Court Conference, Rome, 17 July 1998): "The ICC will deter; the ICC will prevent; ... The ICC will save millions of humans from suffering unspeakably horrible and inhumane deaths in the coming decades."

76 Leslie Vinjamuri and Jack Snyder "Advocacy and Scholarship in the Study of International War Crimes Tribunals and Transitional Justice" (2004) 7 *Annual Review of Political Science* 345 at 348.

have been slow to examine or acknowledge how their professional and personal hopes and aspirations in terms of transitional justice impact on the targets they set for its mechanisms.⁷⁷

The interlinkage of practice and scholarship may explain the disparity in faith in deterrence between those involved in international criminal justice as judges, lawyers and NGO figures on the one hand, and external critics on the other. One plausible explanation for the persistence of belief in deterrence is that this persistence constitutes a pertinent example of David Kennedy's theory of tool enchantment. This theory posits that presumptions, biases, blind spots and professional vocabularies of humanitarians lead them to attach an "inherent humanitarian potency" to a particular tool (such as transitional criminal justice) abstracted from the context of its application.⁷⁸ Faith in deterrence may be a manifestation of what is variously labelled the "saviour mentality",⁷⁹ or "human rights idolatry"⁸⁰ present among institutional actors such as the United Nations, NGOs, academics and lawyers that make up the international human rights community. This messianic view of what human rights law can achieve underpins a judicial romanticism about the potential of its various instruments and mechanisms. This romanticism operates at times to exclude a pragmatic liberalism found in the fields of politics and diplomacy, which tend to be more open to acknowledging the difficulties in advancing human dignity.⁸¹

The roots of this excessive faith in deterrence may lie in the very nature of human rights itself. Because the idea of human rights is presented as natural and neutral, objective and trans-historical, it enjoys a degree of immunity from challenge, endowed with "an aura of timelessness, absoluteness, and universal validity".⁸² Notwithstanding the perceived roots of human rights in eurocentrism, Christianity, free-market ideology and colonialism,⁸³ human rights activists take for granted that they represent universal values and interests, and thus present their claims in righteous terms as non-negotiable.⁸⁴ Some view this as serving to fuel a messianism among human rights advocates that is

77 Zinaida Miller "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice" (2008) 2 IJTJ 266 at 290.

78 David A Kennedy *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, Princeton, 2004) at 119–142.

79 Makau Wa Mutua "Savages, Victims and Saviours: The Metaphor of Human Rights" (2001) 42 Harv Int'l L J 201.

80 Michael Ignatieff (ed) *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton, 2001) at 53–98.

81 David Forsythe *Human Rights in International Relations* (Cambridge University Press, New York, 2006) at 90.

82 Philip Alston "Making Room for New Human Rights: The Case of the Right to Development" (1988) 1 Harv Hum Rts YB 3 at 7.

83 Wa Mutua, above n 79, at 212–235.

84 Ignatieff, above n 80, at 20.

exacerbated by the "enemies" with which they joust: cruelty, oppression, degradation.⁸⁵ Because, as Makau Wa Mutua puts it, "many of the leaders and foot-soldiers of the human rights movement are driven by a burning desire to end human suffering", their self-conception as the saviour who "protects, vindicates, civilizes, restrains, and safeguards, ... the victim's bulwark against tyranny" is not only tempting, but natural.⁸⁶

The treatment of human rights as "an object of devotion rather than calculation"⁸⁷ forms the predicate for the more sceptical presentation of human rights advocacy as a secular religion,⁸⁸ an article of faith⁸⁹ or an expression of an eschatological will to extricate society from the tragedy of history.⁹⁰ Certainly, some of the aforementioned true believers in deterrence might manifest the tendency David Kennedy identifies of thinking more in theological terms than in pragmatic terms.⁹¹ The zealous advocacy of international criminal institutions suggests "more of a faith-based conviction than a conclusion based on sober analyses of the legalities of the matter and of the policy dilemmas such situations present".⁹²

Even putting aside the quasi-religious undertones in human rights advocacy, its rather exuberant theorising might also be explained by its apparent success. Since the late 1980s, the idea of human rights has progressed from its historically exceptionalist origins to the mainstream. This has served to boost the sometimes unyielding faith in its normative underpinnings and practical efficacy. The most obvious example of this is what Kathryn Sikkink and others have called the "justice cascade", whereby the endeavours of a transnational transitional justice advocacy network have successfully opposed the defiance of recalcitrant governments and stimulated a "rapid shift toward recognizing the legitimacy of human rights norms in international law and regional action to effect compliance with those norms".⁹³ Sikkink and others argue that ongoing norm diffusion, public debate and the

85 Amy Gutman "Introduction" in Michael Ignatieff *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton, 2001) xi; and Wa Mutua, above n 79, at 210, 219 and 243.

86 Wa Mutua, above n 79, at 219 and 204.

87 David Kennedy "The International Human Rights Movement: Part of the Problem?" (2002) 15 Harv Hum Rts J 101 at 102.

88 David Forsythe "Human Rights Studies: On the Dangers of Legalistic Assumptions" in Fons Coomans, Fred Grunfeld and Menno Kamminga (eds) *Methods of Human Rights Research* (Intersentia, Antwerp, 2009) 59 at 59.

89 Ignatieff, above n 80, at 53.

90 Hazan, above n 43, at 21.

91 Kennedy, above n 78, at 31.

92 A Mark Weisburd "International Law and the Problem of Evil" (2001) 34 Vand J Transnat'l L 225 at 230.

93 Ellen Lutz and Kathryn Sikkink "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America" (2001) 2 Chi J Int'l L 1 at 4.

pressure that human rights activists can muster at international and domestic levels have mitigated the unwillingness of nascent democracies (who care about what other states are doing and global normative trends) to deal with issues of the past. As such, advocates of international institutions can present this advocacy revolution as a history of moral progress from impunity to emancipatory accountability – from merely shaming governments to punishing them. The aspirations of those who advocate accountability include psychosocial healing of victims, construction of shared historical narratives, restoration of the rule of law, reform of institutions, reintegration of antagonists in communities, the end of impunity, and even the transformation or regeneration of a whole society.⁹⁴ Little wonder, then, that Rama Mani observes that the mechanisms applied are "considered to be ubiquitously good, or at least so well intentioned and firmly grounded both morally and legally that their outcome cannot but be positive."⁹⁵

Adding potency to this grand narrative of progress over time is the sheer horror of the contexts in which this narrative has been employed. The foregrounding of the American and French revolutions in the historical evolution of human rights can be interpreted as a reaction to the tyrannies and intolerances of history, which spurred ideational and institutional schemes to contain them in the future.⁹⁶ In the last century, this tendency re-emerged in accelerated form as progress ineluctably followed catastrophe – the Holocaust begat the Universal Declaration, the Balkans and Great Lakes atrocities begat the ad hoc tribunals and so on, encapsulating the assertive but defensive manner in which international law is typically presented.⁹⁷ Indeed, Hilary Charlesworth presents international law as a discipline of crisis, arguing that a crisis provides a focus for the development of its disciplines, allows international lawyers "the sense that their work is of immediate, intense relevance" and dominates their imagination.⁹⁸ Similarly, Makau Wa Mutua argues human rights law is primarily anti-catastrophic, fundamentally designed to prevent further calamities.⁹⁹ The centrality of crisis to how activists and scholars think about international criminal law "encourages

94 Kora Andriu "Transitional Justice: A New Discipline in Human Rights" (18 January 2010) Online Encyclopedia of Mass Violence <www.massviolence.org> at 3.

95 Rama Mani "Rebuilding an Inclusive Political Community After War" (2005) 36 *Sec Dialogue* 511 at 514–515.

96 Forsythe, above n 88, at 60.

97 Gerry Simpson "On Magic Mountain: Teaching Public International Law" (1999) 10 *EJIL* 70 at 72.

98 Hilary Charlesworth "International Law: A Discipline of Crisis" (2002) 65 *MLR* 377 at 377 and 382.

99 Wa Mutua, above n 79, at 203. See also Anne Orford "Muscular Humanitarianism: Reading the Narratives of the New Humanitarianism" (1999) 10 *EJIL* 679 at 699.

international lawyers to cast ourselves grandly in an heroic mould; it allows international law to be an 'arena of desire and fantasy'.¹⁰⁰

The risk is that the hero/saviour concentration on the dangers of climacterics and atrocity may foreclose a cooler, more reasoned appraisal of how much a given tool can actually achieve in inherently non-ideal circumstances. For example, the establishment of the ICC as a matter of urgency tended to foreground issues of practicalities and political compromise at the expense of more theoretical considerations of what the Court could realistically hope to achieve.¹⁰¹

This emotional calling to fight the strong on behalf of the weak or to fight the evil on behalf of the good drives the activist and scholar. This presents certain temptations to exaggerate or marginalise doubt, even if Ron Dudai goes too far in arguing that emotion and morality have replaced law and rationality at the centre of the human rights impulse.¹⁰² This incipient messianism, when coupled with the advocate's self-conscious mission to persuade governments of the merits of the laws and institutions they support (as opposed to providing "neutral" legal analyses),¹⁰³ carries an inherent risk of overstatement. For example, human rights organisations have on occasion asserted clear positions on the legal impermissibility of amnesties for serious crimes under customary international law which go well beyond the level of agreement reflected in state practice.¹⁰⁴

Unfounded utopianism has provided fertile grounds for critiques of human rights¹⁰⁵ and its offshoot, transitional justice.¹⁰⁶ As the survey of the sceptical literature in Part II demonstrates, external observers of the international criminal justice movement have likewise cast doubt on the deterrence rationale, based on the empirical record and what we know about the motivations of those who commit mass atrocity. Nevertheless, there remains a significant number of scholars and

100 Charlesworth, above n 98, at 387 citing David Kennedy "Autumn Weekends: An Essay on Law and Everyday Life" in Austin Sarat and Thomas R Kearns (eds) *Law in Everyday Life* (University of Michigan Press, Ann Arbor, 1993) 191 at 231.

101 Koller, above n 74, at 1020.

102 Ron Dudai "Advocacy With Footnotes: The Human Rights Report as a Literary Genre" (2006) 28 HRQ 783 at 790.

103 Louise Mallinder "Law, Politics and Fact-Finding: Assessing the Impact of Human Rights Reports" (2010) 2 J Human Rights Practice 166 at 168.

104 Louise Mallinder *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Hart Publishing, Oxford, 2008).

105 Samuel Moyné *The Last Utopia: Human Rights in History* (Harvard University Press, Cambridge (Mass), 2010).

106 Hazan, above n 43, at 21; John Bolton "The Global Prosecutors: Hunting War Criminals in the Name of Utopia" (1999) 78 Foreign Aff 157; and Colm Campbell and Catherine Turner "Utopia and the Doubters: Truth, Transition and the Law" (2008) 28 LS 374 at 375.

activists content to employ the rationale as both a sword against inaction and a shield against criticism.

A Deterrence as a Sword: The Rhetorical Utility of the Deterrence Argument

Given the weight of evidence against the preventative potential of criminal proceedings, it is arguable that the popularity of the deterrence argument owes as much to its potency as a rhetorical device as to true belief. While some no doubt believe the establishment of a tribunal can prevent carnage, others may well know it cannot do so, but deliberately forget this. Collective denial of the evidence may fall somewhere between a planned, conscious choice and a process of slippage where uncomfortable knowledge is repressed because the deterrence argument remains useful.

In the aftermath of war, repression or political violence, it is frequently assumed that justice must be pursued. The argument is usually posed as a counterfactual – what if there is no justice? Where the crimes concerned are as reprehensible as crimes against humanity, the natural intuition is that they must be prosecuted. Though no punishment can be equal to the crime itself, only the sentencing power of prosecution can guarantee a penalty of sufficient severity. As David Crocker puts it, "[e]thically defensible treatment of past wrongs requires that those individuals and groups responsible for past crimes be held accountable and receive appropriate sanctions or punishment."¹⁰⁷ Initially, a non-utilitarian case for retribution rested on the moral imperative of punishing crime, regardless of any deterrent or pedagogical effect.¹⁰⁸ As time has gone on, however, retributive theories of transitional justice have given way to more utilitarian rationales,¹⁰⁹ where the moral value of trial and punishment is based on its socially useful consequences.¹¹⁰ For example, while the jurisprudence of the Nuremberg and Tokyo trials betrayed a distinct retributive impulse, the ad hoc tribunals and ICC are consciously designed and implemented in instrumental ways as forms of peace-building.¹¹¹ Indeed, one can argue that international criminal justice is inherently utilitarian – the Security Council would have had no authority under Chapter VII of the United

107 David A Crocker "Reckoning With Past Wrongs: A Normative Framework" (1999) 13 EIA 43 at 53.

108 Lawrence Wechsler *A Miracle, A Universe: Settling Accounts with Torturers* (Pantheon Books, New York, 1990) at 244.

109 Jaime Malamud-Goti "Transitional Government in the Breach: Why Punish State Criminals?" (1990) 12 HRQ 1 at 7; and Eric A Posner and Adrian Vermeule "Transitional Justice as Ordinary Justice" (2004) 117 Harv L Rev 762 at 801.

110 For an overall view of utilitarian and consequentialist theory see CL Ten *Crime, Guilt and Punishment: A Philosophical Introduction* (Clarendon Press, Oxford, 1987) at 7–38.

111 For example United Nations Security Council *Resolution 955* outlines the purposes of the International Criminal Tribunal of Rwanda as accountability, deterrence, restoration of peace and reconciliation: *Resolution 955, S/Res/955* (1994) at Preamble.

Nations Charter to unilaterally set up the ad hoc tribunals but for the presence of the larger geopolitical need to restore collective peace and security.¹¹²

There are a number of possible reasons for this shift from retribution against the individual perpetrator(s) to an approach more corrective of wider society. The key reason was a perceived need to better integrate the international criminal justice system with forward-looking, on-going projects of social reconstruction like state-building, democratisation and development. These were more likely to attract scant resources than an explicitly backwards-looking, Kantian approach that punished wrongful acts for no greater reason than the fact that they deserved punishment.¹¹³ Indeed, as Paige Arthur points out, it was this addition of causal beliefs about facilitating transition that made the field of transitional justice distinct from human rights generally, with its traditional emphasis on punishment as a principled moral response to atrocity, as opposed to a means to achieve some wider societal purpose.¹¹⁴

However, one can also observe in the literature a distinct discomfort with the retributive rationale, even when couched in the language of victims' rights. Though the retributive impulse answers the counterfactual "what if?" question outlined above, the persistent confusion of retributive justice with revenge appears distasteful in comparison to more communitarian objectives.¹¹⁵ Immi Tallgren argues that utopian beliefs in utilitarian goals retain a possibly unjustified currency because the alternative basis of retribution comes close to being nothing more than satisfaction of instincts of revenge. As Nuremberg prosecutor Robert Jackson stated, this constitutes "obviously the least sound basis of punishment."¹¹⁶ Similarly, Jan Klabbers and Hannah Arendt acknowledge that the coercive and intentional infliction of pain for the sake of punishment is, for many, an uncomfortable proposition.¹¹⁷

Because international criminal justice is often equated with victors' justice and imperialism, a more constructive justification has been sought. David Kennedy has documented the tendency of

112 Jens David Ohlin "On the Very Idea of Transitional Justice" (2007) 8 *Whitehead J Dipl & Int'l Rel* 51 at 61.

113 See generally United Nations Secretary-General *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616 (2004).

114 Paige Arthur "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice" (2009) 31 *HRQ* 321 at 363.

115 A prime example is Desmond Tutu's argument against vengeance which identifies punishment with retribution and prefers instead the reconciliatory South African approach which alienates those who seek revenge in contradistinction to trial: Desmond M Tutu *No Future Without Forgiveness* (Doubleday, New York, 1999).

116 Robert H Jackson *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders* (1946) as cited in Tallgren, above n 2, at 591.

117 Klabbers, above n 16, at 265; and Hannah Arendt *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, New York, 1994) at 277.

humanitarians to worry as much about the defensibility of policies like international criminal justice as its potential to generate useful outcomes.¹¹⁸ Indeed, retribution itself is nowadays routinely euphemised as "combating impunity".

The faith- and anecdote-based deterrence rationale examined in the next Part sits comfortably with the tendency of scholars and advocates to present accountability in idealistic terms without clearly-defined goals.¹¹⁹ One of the most notable features of the treatment of deterrence in the last twenty years is that it is most vociferously asserted when attempts are being made to mobilise international support or funding for an international criminal institution. It is at these times that the messianic self-conception of the human rights advocate is most apt to manifest itself in urgent, perhaps exaggerated, appeals for intervention. As Hilary Charlesworth argues, crisis "allows us to shore up the image of international lawyers as tough humanitarians capable of pragmatic yet principled responses to restore freedom and order."¹²⁰ For example, the emotive deterrence-based arguments made in support of the ad hoc tribunals occurred during a time of war, when the tribunals were significantly under-funded and under-supported. Later, when the ICTY was functioning all too well and was coming under threat for taking up too large a fraction of the United Nation's funding, the deterrence argument was employed by one of its judges to make the case for its survival:¹²¹

... abandoning the tribunal now would have a negative impact on the behaviour of the parties to the conflict. ... On the ground, those committing war crimes would infer that regardless of their past or future violations they will not be held criminally accountable by the international community.

Arguments that lives are at risk will of course carry greater currency with donors, the Security Council and NGOs than more backward-looking entreaties. Constructive, emotional appeals based on prevention were also a feature of the Rome Conference for the establishment of the ICC. With an optimism largely unsupported by the experience of the Court's ad hoc predecessors, one delegate is quoted as saying that "the Conference everyday stands firmly by the principle that the more gas we give to the punishing machine, the less criminality we end up with".¹²² The over-selling of the deterrence argument has proven an extremely useful rhetorical device in garnering otherwise reluctant support for international criminal institutions. Richard Wilson, for example, argues that

118 Kennedy, above n 78, at 138.

119 This tendency is noted by Hugo van der Merwe: "Delivering Justice During Transition: Research Challenges" in Hugo van der Merwe, Victoria Baxter and Audrey Chapman (eds) *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (USIP Press, Washington DC, 2009) 115 at 121.

120 Charlesworth, above n 98, at 388.

121 Theodor Meron "The Case for War Crimes Trials in Yugoslavia" in Theodor Meron *War Crimes Law Comes of Age: Essays* (Oxford University Press, New York, 1998) 187 at 196.

122 Immi Tallgren "We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of the International Criminal Court" (1999) 12 LJIL 683 at 686.

although its advocates do not really believe in it, deterrence is used to "sell" tribunals as a palatable, publicly justifiable policy.¹²³

B Deterrence as a Shield: Undermining Accountability's Discontents

As noted above, human rights, transitional justice and international law typically present themselves heroically. Depicted as norm entrepreneurs who attempt to convince a critical mass to embrace new norms,¹²⁴ those who advocate accountability often present themselves in valorous terms, speaking truth to power on behalf of disenfranchised masses, selflessly enduring rocky relationships with the state¹²⁵ and reacting against the cynicism and betrayal of values inherent in the sovereign control of international affairs.¹²⁶

The justice cascade has been described as the work of NGOs acting as activists, advertisers and pressure groups – starting with the plucky efforts of small groups of activists domestically and mushrooming into a transnational network that has fundamentally changed the environment in which state actors work.¹²⁷ Speaking, like so many humanitarian groups, in the vocabulary of absolute normative commitment, activists have argued that only through pressure from victims' groups and NGO networks have states been "goaded" into creating justice mechanisms and making them effective.¹²⁸ For example, NGOs have taken credit for the creation of the ad hoc tribunals by persuading liberal members of the Security Council of their necessity.¹²⁹ Perhaps less controversially, they have taken credit for the creation of the ICC.¹³⁰

This activism invariably involves taking sides, not only against human rights abusers but also against those who doubt the viability and effectiveness of international criminal law. Debates on

123 Richard Wilson (remarks delivered at the Roundtable on Human Rights, International Studies Association, New Orleans, Louisiana, 2010) as cited in Vinjamuri, above n 16, at 199, fn 23.

124 Martha Finnemore and Kathryn Sikkink "International Norm and Political Change" (1998) 52 Int'l Org 887 at 895.

125 Eric Brahm "Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies" (2007) 9 Int'l J Not-for-Profit L 1 at 1.

126 Payam Akhavan, above n 73, at 721.

127 Sikkink, above n 4, at 96–128; Brahm, above n 125, at 3; and Chandra Lekha Sriram *Confronting Past Human Rights Violations: Justice vs Peace in Times of Transition* (Frank Cass Publishers, London and New York, 2004) at 24.

128 Naomi Roht-Arriaza "Institutions of International Justice" (1999) 52 J Int'l Aff 473 at 491.

129 Bass, above n 38, at 33; Robert Cryer *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, Cambridge, 2005) at 52; and Jack Snyder and Leslie Vinjamuri "Trials and Errors: Principle and Pragmatism in Strategies of International Justice" (2004) 28 IS 5 at 42.

130 See above n 75 and accompanying text.

international criminal justice are highly ideological. The old arguments on the relationship between sovereignty and impunity have been more or less resolved. On the other hand, the debate over peace versus justice in societies transitioning from conflict, and the arguments over the effectiveness of prosecuting a handful of perpetrators amidst widespread atrocity, have never fully gone away.

At a time when impunity for human rights abuses endures, when one trial has been completed in ten years at the ICC and when two on-going hybrid tribunals in Cambodia and the Lebanon flounder, the field of international criminal law is more embattled than the view of an international justice cascade would suggest. As the experiences of Uganda, Sudan and Syria show, rhetorical commitment to ending impunity rarely translates into effective action. The civil society actors most enthusiastic about the potential for trials to effect positive socio-political change often only get involved after pacts are agreed, the ancien régime has fled or power is shared:¹³¹

The area of justice in transition is the one in which civil groups are usually the least effective in shaping the course of the talks, and where the two main protagonists in the conflict act most expediently to protect their interests. It is one of the most elitist questions of all the issues in transitional negotiations, and the one in which leaders are most likely to reach a deal over the heads of ordinary people.

Civil society plays a valuable role in implementing, monitoring, scrutinising and advancing national ownership in most transitional justice mechanisms,¹³² but is rarely causally significant in the decision about which mechanisms to adopt. Advocates may act as counterweights to groups seeking immunity and may raise the political cost of not prosecuting, but these considerations may nevertheless operate on the margins of political decision-making when there is a realistic prospect of peace being jeopardised.¹³³

Indeed, a recent quantitative study of transitional justice has found that trials remain the exception rather than the norm as a transitional justice response.¹³⁴ Trials remain primarily dependent, not on the effectiveness of civil society advocacy, nor on the strength of arguments about their preventive/reconciliatory/pedagogical impact, but on the availability of a conducive military-political balance. This is most manifest in the ICC's underwhelming record: a single conviction and significant numbers of indictees at large. David Bosco suggests that because of these weaknesses,

131 Richard A Wilson "Justice and Legitimacy in the South African Transition" in Alexandra Barahona De Brito and others (eds) *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford University Press, Oxford, 2001) 190 at 198.

132 Mirielle Affa'a-Mindzie "Transitional Justice, Democratisation and the Rule of Law" in Chandra Lekha Sriram and Suren Pillay (eds) *Peace Versus Justice?: The Dilemma of Transitional Justice in Africa* (James Currey, Suffolk, United Kingdom, 2010) 113 at 118.

133 Orentlicher, above n 30, at 2549; and Bass, above n 38, at 33–35.

134 Laurel E Fletcher, Harvey M Weinstein and Jamie Rowen "Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective" (2009) 31 HRQ 163 at 215.

the Court's preventive effect has been deliberately emphasised to respond to criticisms and demonstrate some kind of effectiveness.¹³⁵

Because of the gap between rhetoric and reality, one gets the sense from the literature that advocates and practitioners of international criminal justice are engaged in a struggle to justify the vast sums expended with relatively little judicial output. It has been argued that human rights research in general, and transitional justice research in particular, are enterprises directed at manufacturing legitimacy for their fields of practice.¹³⁶ The deterrence rationale has proven very valuable in counteracting two of the most common arguments against international justice, namely that international justice may destabilise peace processes and that it is grossly selective in who can be tried.

The first of these arguments is probably the most familiar. The fulcrum of the debate is whether it is prudent to pressure nascent democracies or emerging peaces to undergo potentially destabilising processes of accountability.¹³⁷ The peace versus justice debate is one that has recurred since the earliest days of transitional justice. To generalise, the debate is one where idealist approaches advanced by some governments and scholars using moral, political and legal arguments for dealing with past human rights violations are met by realist approaches of other governments and scholars, who emphasise the dangers of trial, truth and lustration to emerging peaces.

At one stage committed democrats and human rights activists acquiesced to limited criminal sanctions, amnesty and impunity.¹³⁸ This arose from what Jon Elster calls "hard constraints" produced by negotiated transitions where justice is a bargaining chip, with impunity traded for justice. It was recognised that insistence on justice could delay a peace that otherwise looked inevitable by stiffening authority figures' will to resist in negotiations.¹³⁹ In such a context, pursuit of justice was deemed unfeasible, perhaps best exemplified by the Chilean dictator Augusto Pinochet's warning: "Touch one hair on the head of my soldiers, and you lose your new democracy".¹⁴⁰ Pinochet's recalcitrance forced the new Chilean President Patricio Aylwin to abandon a proposed series of trials in favour of

135 Bosco, above n 4, at 177.

136 Paul Gready "Telling Truth? The Methodological Challenges of Truth Commissions" in Fons Coomans, Fred Grunfeld and Menno Kamminga (eds) *Methods of Human Rights Research* (Intersentia, Antwerp, 2009) 159 at 159.

137 Diane F Orentlicher "'Settling Accounts' Revisited: Reconciling Global Norms with Local Agency" (2007) 1 *IJTJ* 10 at 12.

138 Aryeh Neier "What Should be Done About the Guilty?" *New York Review of Books* (online ed, New York, 1 February 2000) at 34.

139 Elster, above n 55, at 93.

140 Douglass Cassel "Book Review and Notes: A James McAdams *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, London, 1997)" (1998) 92 *AJIL* 601 at 602.

a limited truth commission that could not name perpetrators.¹⁴¹ Equally, indictments of, first, Karadžić and Mladić and, later, Milošević, were delayed until more favourable times so as not to imperil the Balkan peace processes. It is argued today that the ICC's pursuit of accountability for the Lord's Resistance Army imperils the peace process in Uganda.¹⁴²

However, over time and in response to officially sanctioned impunity, NGOs rallied around the cry of "no peace without justice" based on the assertion that there could be no permanent peace within the transitional state in question without trial and punishment.¹⁴³ This demand formed a potent basis for academic/activist critiques of lenient peace processes.¹⁴⁴

The basis of this claim is highly dubious, leading some to argue that international criminal justice does more harm than good. For example, Jack Snyder and Leslie Vinjamuri contend on the basis of an assessment of 32 cases from around the world that under certain conditions, transitional criminal trials can increase the likelihood of human rights abuses in the future, and can delay or thwart the resolution of conflict.¹⁴⁵ Far from deterring Libyan abuses, it is argued that when the ICC issued its indictment of Muammar Gaddafi in June 2011, it foreclosed the last exit for the dictator and guaranteed that he would go down fighting, as in fact he did.¹⁴⁶

Because it combats the security-based critique of trial, the deterrence rationale has proven a rhetorically compelling counter-argument. In the face of criticism, advocates of trial now argue that far from jeopardising peace or constituting an acceptable risk, trial actually increases security. A number of very prominent international criminal law advocates such as M Cherif Bassiouni,¹⁴⁷ Antonio Cassese,¹⁴⁸ Michael Scharf¹⁴⁹ and Stanley Cohen¹⁵⁰ refer specifically to Hitler's infamous

141 Sriram, above n 127, at 46.

142 Adam Branch "Uganda's Civil War and the Politics of ICC Intervention" (2007) 21 EIA 179.

143 This is most notably seen in the NGO, No Peace Without Justice <www.npwj.org>, but the cry is used by others, for example Amnesty International "Macedonia: No Peace Without Justice" (16 August 2001) Amnesty International <www.amnesty.org.uk>.

144 Margaret Popkin *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador* (Pennsylvania State University Press, Pennsylvania, 2000); Edward Aspinall "Peace Without Justice? The Helsinki Peace Process in Aceh" (April 2008) Centre for Humanitarian Dialogue <www.hdcentre.org>; and Karen Gallagher "No Justice, No Peace: The Legalities and Realities of Amnesty in Sierra Leone" (2000) 23 T Jefferson L Rev 149.

145 Snyder and Vinjamuri, above n 129.

146 Ignatieff, above n 51.

147 M Cherif Bassiouni "Justice and Peace: The Importance of Choosing Accountability Over Realpolitik" (2003) 35 Case W Res J Int'l L 191 at 195.

148 Antonio Cassese "Reflections on International Criminal Justice" (1998) 61 MLR 1 at 2.

149 Michael P Scharf and Paul R Williams "The Functions of Justice and Anti-Justice in the Peace-Building Process" (2003) 35 Case W Res J Int'l L 161 at 188.

reputed quip, "who still talks nowadays of the extermination of the Armenians?" to illustrate the permissive nature of impunity. They argue that failure to punish today's criminals inevitably gives a green light to future perpetrators to commit tomorrow's atrocities.

The deterrence rationale has also served to undermine criticism of selectivity in international criminal law, the phenomenon felt by many to be its most troubling aspect.¹⁵¹ As noted above, the scale of criminality in mass atrocity, allied to the material limitations of international and domestic transitional criminal justice systems, call the deterrent effect of international criminal law into question – especially as regards those below the upper echelon in the criminal hierarchy. Indeed, the more legalistic, fair and resource-intensive the criminal response is, the fewer the perpetrators that can actually be tried. What is called the "impunity gap" in international criminal law might better be described as "accountability pockets": the number of people tried will bear little relation to society-wide culpability.¹⁵² Spacio-temporal selectivity, therefore, is an inevitable feature of international criminal law.

While this selectivity undoubtedly serves to undermine, to some extent, the justification for international criminal law based on deterrence, it undermines the other justifications for international criminal law – both retributive and utilitarian – to an even greater degree. In rhetorical terms deterrence has had greater success than other rationales in reconciling the pragmatic constraints of mass atrocity's aftermath with the values of liberalism, and in thereby reconciling politics with the independence of law. This fact has served to bolster deterrence in rhetoric, even as it undermines it in practice.

In light of the practical constraints of the international criminal justice system, the United Nations advises that prosecutorial initiatives should have "a clear strategy that addresses the challenges of a large universe of cases, many suspects, limited resources and competing demands".¹⁵³ On this basis, deterrence is among the most defensible and appealing of rationales from which to justify a prosecution policy. For example, when Diane Orentlicher made the initial (and at the time, revolutionary) argument that international legal obligations could be satisfied by selective prosecution, she contended that while failure to punish *any* past violations would thwart the deterrence objective, selective prosecution would not.¹⁵⁴ Similarly, Miriam Aukerman asserts that a deterrence-based rationale for prosecutions could account for exemplary prosecutions of

150 Cohen, above n 18, at 20.

151 See for example Cryer, above n 129, at 191–204; Elster, above n 55, at 21; and Timothy McCormack "Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law" (1997) 60 *Alb L Rev* 681.

152 United Nations Secretary-General, above n 113, at [46].

153 United Nations Office of the High Commissioner for Human Rights, above n 63, at 2.

154 Orentlicher, above n 30, at 2601; see also Sriram, above n 127, at 8, who concurs.

genocidaires, while a retributive rationale could not.¹⁵⁵ Perhaps more than anything else, the selectivity issue demonstrates how advocates of the deterrence rationale can compensate in rhetorical terms for the deterrence rationale's empirical weaknesses.

By contrast, other justifications for accountability have struggled with the inevitability of impunity. Genuine retribution is impossible given the numbers who evade punishment. For example, even in what is arguably the most balanced prosecution policy, that of the Special Court for Sierra Leone, where three senior leaders from each faction in the war were tried, observers noted frustration with the inclusion and exclusion of indictees from certain factions or certain levels of responsibility.¹⁵⁶ Of the utilitarian justifications for punishment, only social pedagogy or legal expressivism (where the rationale for prosecutions of mass atrocity is to convey to citizens a disapproval of violations and support for certain democratic values) is consistent with selectivity. Punishing even a small number of high-level leaders "would serve as sufficient demonstration of a new regime's commitment to protect rights."¹⁵⁷ However, experience has shown that the resulting impunity for those human rights offenders who fall outside the prosecutorial criteria can be interpreted as legitimising their actions.¹⁵⁸ Selectivity's patina of victors' justice on the one hand, and its inability to acknowledge the level of harm inflicted on individuals on the other, will weaken its reconciliatory and rehabilitative utility. It also undermines restoration of the rule of law as a justification of transitional trial.

IV THE USE OF METHODOLOGY

If, as David Kennedy suggests, the gap between law and reality hollows promises of emancipation through law, it might reasonably be expected that the messianic view of deterrence should give way to critiques based on quantitative and qualitative research.¹⁵⁹ However, judicial romanticism has a frequent (though by no means inevitable) tendency to skew research methods towards favourable outcomes. There is a proclivity in human rights based policy-making to "enchant" certain tools like transitional justice, to treat the establishment of mechanisms as surrogates for outcomes and to mistake good intentions for good results at the expense of a pragmatic assessment of outcomes.¹⁶⁰ The primary reason for this is the very nature of legal science which, due to its concern for the normative question of what states and individuals should do, tends

155 Aukerman, above n 16, at 61.

156 Human Rights Watch "Bringing Justice: The Special Court for Sierra Leone: Accomplishments, Shortcomings and Needed Support" (September 2004) Human Rights Watch <<http://hrw.org>> at 20.

157 Gray, above n 16, at 2677.

158 Scharf and Williams, above n 149, at 172.

159 Kennedy, above n 87, at 117.

160 Kennedy, above n 78, at 115, 116 and 143.

to be expressed in a prescriptive voice.¹⁶¹ Because, in the international criminal law context, the norms in question are so fundamental and their preservation so urgent, the commitment to them "may dull an appropriately sceptical attitude" to the issue in question.¹⁶² The greater danger, however, is not that doubt is repressed but rather that the desire to promote institutions or react to atrocity results in research designed explicitly or implicitly to reach conclusions that support the researcher's activist commitments. A recent survey of human rights research methodologies by Fons Coomans, Fred Grunfeld and Menno Kamminga yielded the following conclusion:¹⁶³

Our hypothesis is that human rights scholars tend to passionately believe that human rights are positive. Many of the scholars are activists or former activists in the field of human rights. Although seldom stated, the explicit aim of their research is to contribute to improved respect for human rights standards.
...

In accordance with these terms, there is little room for research challenging the conventional wisdom that such systems are to be applauded.

In a 2007 survey of 65 people engaged in legal human rights research, 24 responded affirmatively to the question of whether they worked on the tacit assumption that their research should contribute better to the promotion of human rights.¹⁶⁴ Of these, only four conceded that this may be problematic.¹⁶⁵ The risk is that because human rights research generally attempts to be supportive of the human rights endeavour, evidence that contradicts positions such as deterrence can be marginalised or ignored.¹⁶⁶

Because human rights scholars often know which conclusions they want to arrive at before they begin their research, the temptation to engage in wishful thinking may be great. This wishful thinking may involve limiting sources to those that support the desired conclusion and ignoring literature or findings that point in the opposite direction. ... In human rights scholarship ... it often appears to be regarded as an achievement to document findings that support conventional wisdom. In other words, there appears to be a marked absence of *internal* critical reflection among human rights scholars.

161 Jan M Smits "Redefining Normative Legal Science: Towards an Argumentative Discipline" in Fons Coomans, Fred Grunfeld and Menno Kamminga (eds) *Methods of Human Rights Research* (Intersentia, Antwerp, 2009) 45 at 49.

162 Andreas Follesdal "Methods of Philosophical Research on Human Rights" in Fons Coomans, Fred Grunfeld and Menno Kamminga (eds) *Methods of Human Rights Research* (Intersentia, Antwerp, 2009) 233 at 233.

163 Fons Coomans, Fred Grunfeld and Menno Kamminga "Methods of Human Rights Research: A Primer" (2010) 32 HRQ 180 at 183.

164 Eva Brems "Methods in Legal Human Rights Research" in Fons Coomans, Fred Grunfeld and Menno Kamminga (eds) *Methods of Human Rights Research* (Intersentia, Antwerp, 2009) 77 at 86.

165 At 86.

166 Coomans, Grunfeld and Kamminga, above n 163, at 184.

Because the development of international criminal law has been accompanied by "a strong passionate commitment, especially in academic circles but also among practitioners" to its possibilities, a scholarship has emerged based more on faith than on sober analysis.¹⁶⁷ Policy and activism have hitherto proceeded less from analysis to conclusions than from commitments to action. Some argue that "the commitment to advocacy has come at the expense of progress in empirical research": the benefits of certain mechanisms are assumed rather than treated as empirical propositions to be tested rigorously.¹⁶⁸

Proponents of deterrence must attempt to refute the arguments of sceptics in a scholarly milieu now less inclined to accept uncritically their bold assertions as to the effectiveness of human rights and transitional justice institutions. Whereas in the past, dispensing with methodological constraints enabled human rights scholars to reach conveniently supportive positions, there is now an observable trend towards clarifying – through the use of social science methodologies and hard data – the causal relationships (if any) between individual mechanisms and general ends.¹⁶⁹ A sizeable literature has emerged on how to assess transitional justice's impact.¹⁷⁰ The expectation is that this scholarship can chip away at falsity and overly ambitious claims. Nevertheless, even the most advanced study is at the stage of enunciating difficulties in researching the effectiveness of accountability, as opposed to outlining a best practice for analysis.¹⁷¹

Two main types of human rights research have been used to attempt to refute criticisms of the deterrence rationale. The first, and most common, consists of single-case analyses which concentrate on a particular example of an individual or group forbearing to commit atrocities, and draws broader theoretical conclusions from it. The second, less common and more recent type of research consists of a small number of global comparisons that make broad empirical generalisations from conflict and post-conflict situations where there has been criminal legal accountability.

167 Koller, above n 74, at 1020.

168 Vinjamuri and Snyder, above n 76, at 359.

169 Coomans, Grunfeld and Kamminga, above n 163, at 180.

170 Most notably the special issue on methodologies in vol 4(4) of *International Journal of Transitional Justice*; van der Merwe, Baxter and Chapman (eds), above n 119; Oskar Thoms, James Ron and Roland Paris "State-Level Effects of Transitional Justice: What Do We Know?" (2010) 4 *IJTJ* 1; and Erik Melander "Justice or Peace? A Statistical Study of the Relationship Between Amnesties and Durable Peace" (August 2009) Lund University <www.lu.se>.

171 Hugo van der Merwe, Victoria Baxter and Audrey Chapman "Introduction" in Hugo van der Merwe, Victoria Baxter and Audrey Chapman (eds) *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (USIP Press, Washington DC, 2009) 1 at 7, noting that literature in the field can, as yet, only unpack the difficulties of research in the field, as opposed to outlining how-to manuals.

A Single Case Analysis and the Role of Anecdotal Evidence

Though the theoretical and empirical predicates of deterrence theory are dubious, it is impossible to prove that the risk of punishment or actual punishment does not have a deterrent effect. This is principally because the suppositions apply solely to the realm of the psychological. Complex social phenomena like deterrence are difficult, and perhaps even impossible, to verify accurately. As one scholar put it:¹⁷²

... when you have a permanent international court standing, I think there will be a possible deterrence effect. For people to say there will be no deterrence at all is as factually unprovable as to say there will be deterrence. You can't prove that. How do you prove that? How do you prove the state of mind of a perpetrator of these crimes ...

In maintaining the deterrent effect of the ICTY after the Srebrenica massacre, Prosecutor Richard Goldstone argued that "no criminal justice system is going to stop crime. It can only curb it. And what crimes might have been committed that weren't committed obviously it's impossible to say."¹⁷³

Of course the obverse is also true: adherents of deterrent theory equally cannot prove that criminal accountability has prevented recurrence. But for all the doubts about it, the task of the deterrence advocate is, in one sense, easier as he or she does not need to be – and rarely professes to be – correct all of the time. If the threat of, or the establishment of, an international criminal tribunal prevents even one atrocity, belief in the deterrent value of international criminal justice will be vindicated, even if it is not proven. This argument was perhaps best encapsulated by former United States Secretary of State Madeleine Albright (then United States Permanent Representative to the United Nations) in relation to the ICTY:¹⁷⁴

In short, the more serious we are about the Tribunal, the greater the potential deterrent the Tribunal will be. If this means that one village that would otherwise be attacked is spared, that one woman who would otherwise be violated is respected, that one prisoner who would otherwise be executed is allowed to live – the existence of the Tribunal would be validated on these grounds alone.

Faith, more than empirically verifiable truth, has animated much of the debate.

Albright's argument is extremely potent, exercising an intuitive and emotional appeal that a more hard-headed analysis lacks. To suggest that lives may be in danger opens the debate over

172 David Scheffer "Should the United States Join the International Criminal Court?" (2003) 9 UC Davis Journal of Int'l L & Pol'y 45 at 51.

173 As quoted in Bass, above n 38, at 293.

174 Madeleine Albright "Bosnia in Light of the Holocaust: War Crimes Trials" (speech delivered at the US Holocaust Memorial Museum, Washington DC, 12 April 1994).

deterrence to appeals based on anecdotal evidence from the frequently individual-based qualitative research found in human rights reports. If, as Richard Rorty suggests, the evolution of human rights culture owes "everything to hearing sad and sentimental stories", something of the obverse might also be true: individual examples of deliverance or crises averted can carry significant rhetorical weight.¹⁷⁵

As a result, the literature on deterrence relies to a significant degree on anecdotal evidence whereby the deterrent effect of tribunals and statutes is vindicated by the selection of isolated instances where moderation of tactics by wrongdoers is concurrent with investigations. For example, David Scheffer contends that in the Bosnian war, camp commanders and officials did what they could to improve the conditions of those under their care once they became aware the international community would investigate and punish those who failed to respect human rights standards.¹⁷⁶ The Open Society Justice Initiative alleges that a northern commander in Afghanistan moved heavy weaponry away from Mazar-e-Sharif after reading a Human Rights Watch report on atrocities in the area, and that Ivorian national radio ceased xenophobic broadcasting after the United Nations Special Advisor on the Prevention of Genocide warned that it might occasion an ICC referral.¹⁷⁷ At the *Lubanga* trial in 2010, the United Nations Special Envoy on Child Soldiers Radhika Coomaraswamy testified as an amicus curiae that the willingness of the ICC to prosecute cases of child soldier recruitment led armed groups to negotiate 14 action plans for the release of children who might otherwise have been pressed into military action, including 3000 in Nepal.¹⁷⁸ Perhaps more tenuously, it has been suggested that the indictment of members of the Lord's Resistance Army "cannot be discounted as one of the possible factors" motivating its willingness to negotiate with the Ugandan government from July 2006.¹⁷⁹

These 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

175 Richard Rorty "Human Rights, Rationality and Sentimentality" in Stephen Shute and Susan Hurley (eds) *On Human Rights: The Oxford Amnesty Lectures 1993* (Basic Books, New York, 1993) 112 at 118–119.

176 David Scheffer "International Judicial Intervention" (1996) 102 *Foreign Policy* 34 at 34 and 39.

177 Open Society Justice Initiative *International Crimes, Local Justice: A Handbook for Rule of Law Policymakers, Donors and Implementers* (Open Society Justice Initiative, New York, 2011) at 24.

178 Wairagala Wakabi "Lubanga Trial Highlights Plight of Child Soldiers" (5 October 2010) Thomas Lubanga Trial at the International Criminal Court <www.lubangatrial.org>.

179 Priscilla Hayner *Negotiating Justice: Guidelines for Mediators* (Centre for Humanitarian Dialogue and International Centre for Transitional Justice, New York, 2009) at 17.

establish the overall credibility of deterrence. In so doing, 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 took place. As Louise Mallinder argues, there is a tendency in human rights research to "cherry-pick" evidence from reports to use as a platform for urging governments to bring serious criminals to justice.¹⁸⁰ In deterrence research, much like the human rights reports it relies on, evidence is applied "in ways that help the case; counter arguments are not necessarily engaged with full candour in a way that we would expect an academic to do."¹⁸¹ Other generalised deterrent effects have been claimed by figures involved in the ICC,¹⁸² but overall these claims illustrate the tendency of isolated pieces of evidence of deterrence to be "anecdotal and uncertain".¹⁸³

B Quantitative Study: Asking the Wrong Questions in the Wrong Contexts?

Human rights and transitional justice scholarship has primarily focused on single- or dual-mechanism case studies and comparative qualitative case studies of a limited number of states. This scholarship has emphasised disproportionately certain transitions or transition types conducive to study, and made generally applicable policy conclusions difficult to elaborate.¹⁸⁴ Findings across states have been observably contradictory. The literature has been variously criticised for wishful thinking¹⁸⁵ and for its reliance on anecdote, hypothesis¹⁸⁶ and analogy.¹⁸⁷ Oskar Thoms, James Ron and Roland Paris put it best:¹⁸⁸

The empirical [transitional justice] research to date has been analytically weak, relying largely on impressionistic descriptions of a small number of well-known cases, rather than systematically comparing impacts across a broad range of cases, including societies in which [transitional justice] has *not* been pursued.

180 Mallinder, above n 103, at 170.

181 Dudai, above n 102, at 789.

182 See for example Judge Philippe Kirsch, President of the International Criminal Court (lecture given at the Midwest Regional Conference on International Justice: The International Criminal Court 10 Years after the Rome Conference, DePaul University, 25 April 2008).

183 Theodor Meron, above n 73, at 463.

184 Olsen, Payne and Reiter, above n 4, at 25–26.

185 At 25.

186 David A Crocker "Punishment, Reconciliation, and Democratic Deliberation" (2001–02) 5 *Buff Crim LR* 509 at 541.

187 Eric Brahm "The Impact of Transitional Justice in Post-Conflict Environments" (2008) Social Science Research Network <<http://papers.ssrn.com>> at 3.

188 Oskar NT Thoms, James Ron and Roland Paris "The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners" (April 2008) Human Security Report Project: Human Security Gateway <www.humansecuritygateway.com> at 5.

There are, however, a few works that systematically apply rigorous, cross-national assessment methodologies to test the claims made for the deterrence rationale. The expectation is that methodologies employing large and complex data sets comprising quantitative variables can establish some empirical generalisations about the relationships between prosecutions and the restraint of criminality. These data sets allow for different variables (like number of prosecutions, position of indictees in the criminal hierarchy, regime type, war type or duration between transition and punishment) to be tested against each other to assess the plausibility of various assertions made about the preventive potential of trial. However, the studies conducted thus far that purport to illustrate the deterrent effect betray many of the biases and wishful thinking that smaller-scale studies have manifested.

The most obvious example is a 2010 study by Hunjoon Kim and Kathryn Sikkink that used quantitative human rights data to answer the question of whether prosecutions can prevent future human rights abuses. This study attempted to offer "the first quantitative support for the existence of a deterrent effect in the realm of human rights."¹⁸⁹ The deterrence hypothesis the authors worked from was one explicitly based on perpetrator rationality, positing that increases in the probability of prosecutions should diminish repression.¹⁹⁰ However, both the contexts examined and the smaller sub-hypotheses employed to test the main hypothesis offered only very partial assessments of the theory. In terms of the former, hypotheses were tested in three types of transition country: democratic transition, transition from civil war and transition by state creation. The authors explicitly excluded fully authoritarian countries "because generally they do not hold free and fair trials, nor do they have an independent judiciary".¹⁹¹ This approach effectively meant that deterrence was being tested outside the contexts, and without examination of the types of state criminal, that had caused scholars to call the deterrent rationale into question. The research was not studying the effect of prosecution on a Gaddafi, an al-Bashir or a Taylor – it was testing the correlation of trials with improvements in human rights in the likes of democratising Argentina, Croatia or Slovakia. In these contexts, there are numerous reasons why human rights abuses do not occur, most of them relating more to the type of state created, the type of actors involved in the new regime and regional political factors. As a result, the mini-hypotheses tested actually demonstrate very little about the impact of criminal trial on repressive rulers.

While Kim and Sikkink find that states that hold human rights trials see greater improvements in human rights than those that do not,¹⁹² this may be a function of the fact that states that are secure enough to have trials are those where democratisation has become entrenched through elections,

¹⁸⁹ Kim and Sikkink, above n 4, at 940.

¹⁹⁰ At 940.

¹⁹¹ At 946.

¹⁹² At 951–955.

constitutionalism and international support. The diminution in abuses may be entirely explicable without reference to trial. Even the greatest deterrence sceptic might willingly concede that democratising states capable of undertaking transitional trials are less likely to see human rights abuses.

The second finding – that trials do not exacerbate human rights abuses in situations of conflict and war – says little about the deterrence rationale: deterrence sceptics argue that criminal proceedings do not deter abuses, not that trials will increase abuses.¹⁹³ The third significant finding – that human rights prosecutions have a positive impact on improvement of human rights protection in neighbouring countries – makes the same error.¹⁹⁴ Deterrence scepticism is not built on the belief that trials exacerbate human rights abuses in democratising states but rather that they do not prevent tyrants from committing abuses under conditions of authoritarianism or war. Again, the fact that transitional trials are contemporaneous with improved human rights abuses may mistake causation for correlation: for example, the fact that human rights abuses decreased in Croatia or Bosnia might have less to do with the ad hoc tribunals than with the end of war, democratisation, peace-building missions and application for European Union membership. Other cross-national assessments by Tricia Olsen, Leigh Payne and Andrew Reiter¹⁹⁵ and by Tove Lie, Helga Binningsbo and Scott Gates¹⁹⁶ similarly use dichotomous/control variables and regression analyses to find positive correlations between trials and levels of human rights abuse, but also fail to distinguish between the impacts on transitional and non-transitional states.

Simply put, while research establishes that trials in democratising states tend to coincide with improved human rights protections, this is a type of deterrence far removed from that which has animated the call for international criminal justice. Advocates have yet to find quantitative data that demonstrates that prosecution of human rights abusers can serve to restrain leaders or foot-soldiers from committing abuses in the course of war or authoritarianism.

VI CONCLUSION

Despite the sustained and damaging critique to which it has been subjected, the deterrence rationale still finds support in activist and practitioner communities. This article has sought to explain why that is so.

Proponents of the deterrence rationale may argue the cause more in hope than expectation, but they can revel in the uncertainty and emotive appeal of their arguments. In the face of scepticism, they point at micro-level examples of deterrence in which a village or school or individual is saved,

¹⁹³ At 953.

¹⁹⁴ At 956–957.

¹⁹⁵ Olsen, Payne and Reiter, above n 4, at 133 and 136–146.

¹⁹⁶ Lie, Binningsbo and Gates, above n 4.

or they contend on a macro-global level that the threat of prosecutions is socialising states into less abusive state policies. The deterrence argument has also proven popular as a more palatable or sale-worthy alternative to retribution, and for its ability to mitigate the damage that prosecutorial selectivity does to international criminal law. Its strategic deployment has "been crucial to advocacy campaigns surrounding the most highly visible and hotly contested indictments issued by international tribunals".¹⁹⁷ Even in an era of greater empirical scrutiny, the single-case analyses and cross-national comparisons betray many of the shortcomings of human rights research methodologies by extrapolating too much from limited evidence and overly-favourable selection of data.

Having explained the endurance of the deterrence rationale, it is necessary to ask whether its persistence is a boon or a handicap. The answer will probably depend on one's view of the overall value of international criminal law. Since their inception, transitional justice and human rights (at the intersection of which sits international criminal law) have, for many, operated under the presumption that their institutions and goals are "by definition a good thing."¹⁹⁸ On this basis, anything that justifies and sustains support for the globalisation of justice is welcome, even if its rhetorical value is not underpinned by lived experience. On the other hand, for those sceptical about the propriety or efficacy of international penal correction, the juxtaposition of deterrence's evident failure with its ubiquity in debates on international criminal law may add grist to the mill.¹⁹⁹ It has even been suggested that most of the disenchantment with international criminal law is explained by the failure of the various tribunals to deter as promised.²⁰⁰

¹⁹⁷ Vinjamuri, above n 16, at 194.

¹⁹⁸ Ellen Lutz "Transitional Justice: Lessons Learned and the Road Ahead" in Naomi Roht-Arriaza and Javier Marrizcuena (eds) *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge University Press, New York, 2006) 325 at 339.

¹⁹⁹ See Vinjamuri, above n 16, at 206–207:

The potential of a backlash against international justice is great if, as [sceptics] fear, evidence emerges that ICC indictments undermine humanitarian efforts, inhibit peace talks, and impede successful implementation of peace accords. ...

Arguments on behalf of justice will benefit from modesty. Grandiose statements that attribute to international justice a single-handed ability to deliver peace stand a high chance of backfiring.

²⁰⁰ Castillo, above n 31, at 179.