POTENTIAL AND PERIL: INCAPACITATION IN THE NEW AGE OF INTERNATIONAL CRIMINAL LAW

by

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Abstract

International criminal law (and in particular the permanent ICC) is experiencing the new and unique context of operation within ongoing contexts. In an attempt to clarify our intentions and purposes in the orchestration of international tribunals, this thesis confronts the role of incapacitation in such a context. This leads to a new interpretation of justice in both the international, as well as the domestic, criminal law spheres.

The thesis methodology comprises of a theoretical consideration of jurisprudential theories of domestic and international criminal law theories (predominantly incapacitation, but also deterrence, retribution, rehabilitation, reparation, and restitution), including a comprehension of the deontological/consequentialist discourse. It subsequently explores case-studies of three chosen situations in which international criminal law has operated. These contexts and examined individuals are: the 'Butchers of Bosnia' (Radovan Karadžić and Ratko Mladić) in context of the former Yugoslavia; Joseph Kony and the LRA in Northern Uganda; and President Al Bashir in Sudan's Darfur region. These studies encompass a historical, social, political, and legal perspective of the context and perpetrated crimes.

Results of the explorations and theoretical discoveries within this paper lead to a new, expanded concept of incapacitation that brings light to both international and domestic criminal legal theory. Law is portrayed as a carefully wielded weapon which may render culpable, powerful war criminals toothless and alone. 'Incapacitation' so called becomes a broader and substantially different concept. This contains a new distinction between 'direct' and 'indirect' incapacitation – the latter referring to the possibility of law to impact on the actions of the accused before incarceration, for instance by restraining personal liberty, political power, freedom of movement, and overall legitimacy. Recommendations for how this newly defined power can be harnessed by international criminal institutions and actors are explored. There is also a reflection on the potential negative outcomes of international criminal law, which must be taken seriously if the ultimate objective of the law is indeed consequential.

Preface

This thesis is the original work of the author.

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List of Abbreviations

AMIS …….African Union Mission in Sudan
AU……..African Union
CAR ……..Central African Republic
COMESA……...Common Market for Eastern and Southern Africa
DRC……Democratic Republic of the Congo
EU……...European Union
HSM……Holy Spirit Movement (Uganda)
GoS …….. Government of Sudan
ICC……International Criminal Court
ICLIOC……. International Criminal Law in Ongoing Conflicts
ICTY……..International Criminal Tribunal for the former Yugoslavia
ICTR……International Criminal Tribunal for Rwanda
IDP……Internally Displaced Person
JEM……Justice and Equality Movement (Sudan)
JNA……Yugslav People's Army
LRA……Lord's Resistance Army (Uganda)
NATO…… The North Atlantic Treaty Organization
NRA…….. National Resistance Army (Uganda)
NRM……. National Resistance Movement (Uganda)
OTP……Office of the Prosecutor (ICC)
PDF…… Popular Defence Force (Sudan)
SDS…… Srpska Demokratska Stranka
SFOR……. Stabilisation Force (NATO-led)
SLA…….Sudan Liberation Army
SPLA……. Sudan People's Liberation Army
UN……. United Nations
UNAMID…… African Union/United Nations Hybrid Operation in Darfur
UPDA…… Uganda People's Democratic Army
UPDF…… Uganda People's Defence Force
VRS …….. Army of the Serbian Republic of Bosnia and Herzegovina

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Chapter One: Introduction, Methodology, and Limitations

Introduction

The purpose of this thesis is to explore and critique the relationship of the criminological theory of incapacitation in the context of contemporary international criminal law, particularly in the emerging context of ongoing conflicts. Throughout this thesis I will consider case law, the effect of international criminal trials on the wider national, continental and international community, the politicised elements of the choice to prosecute, and the grounded reality of attempting to end impunity for international criminals. I intend to gain insights that will not only clarify our intentions and purposes in the orchestration of international tribunals, and elucidate the impediments against the fulfilment of these objectives, but that will also reflect new interpretations of justice in the domestic criminal law sphere.

A Justification: Why International Criminal Law? Why Theories of Law?

International Criminal Law (ICL) offers a new and extraordinary field of law, carrying both the substantial hopes and the hefty expectations of the international community. Never before has there been a permanent international tribunal competent to try enormous international crimes and bring an end to the instinctively repulsive default impunity of those most serious criminals. *Génocidaires*, warlords, terrorists, powerful despots and commissioners of crimes against humanity- those whose crimes affect the lives of thousands: these are the targets of the extraordinary new international regime. In particular, the burgeoning ICC, established by the Rome Statute in 2002, brings new opportunities, ambitions, and burdens to the international criminal law community.

The mere existence of such a court is astounding, representing 'a remarkable transfer of authority from sovereign states to an international institution.'[1] The permanence and purported universality of the Court renders it a tribunal like none before: it has the capability of participating in the live and vibrant moment on the international stage. Unlike its precursors, the ICC can step into an ongoing situation of strife and meddle with its key players, theoretically plucking the *génocidaire* or despot leader out from the context of crisis, interfering with his or her ongoing crimes. As such, it was hoped that 'a permanent court would deter violators in ways that geographically limited *ad hoc* criminal tribunals…could not.'[2] The unique permanence of the ICC renders it 'able to shift the delivery of post-conflict justice towards in-conflict justice.'[3] The ICC is seen as 'other' in comparison to the preceding ad hoc tribunals because its basis in treaty renders it more democratically legitimate,[4] but mainly because it is permanent and theoretically universal and thus retains the flexible capacity to react faster and affect 'those fighting in the middle of a conflict situation'.[5] It is this capacity of immediate incapacitation which marks a cross on the controversial battle-line between international politics and law. This underscores some of the most controversial aspects of the ICC, but also emphasises the most boundless capabilities and possibilities for the fledgling court.

Imagine an independent, transnational, authoritative tribunal, removing those individuals who constitute the worst of the worst of modern society from their contexts of crime. To combat the vitriol of dehumanisation and atrocious crimes with the calm rule of law; to protect potential

[1] David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford: Oxford University Press, 2014) 2
[2] David Bosco, 'The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?' 19 Mich. St. U. Coll. L. J. Int'l L. (2011) 163 at 164
[3] Philipp Kastner, 'The ICC in Darfur – Savior or Spoiler?' 14 ILSA Journal of International and Comparative Law (2008) 145 at 146
[4] Kastner, *ibid*. at 153
[5] Kastner, *ibid*. at 154

victims and prevent the expansion and continuation. These are the laudable aims in the new period of international law. However, due to the nascent and burgeoning status of ICLIOC, and to other limitations and distractions, there is a lacuna of analysis regarding how this aim plays out in the real-time context of international conflicts. It is 'imperative that the ICC coalesces around a primary justification for its work and set modest expectations'[6] in order to prevent 'overreach' and an espoused 'smorgasbord of ideological objectives for international criminal prosecutions, resulting in perverse and confusing justifications'.[7] We need theory to provide a backbone of logic and consistency in the decisions made in international criminal law, decisions which have the potential to impact the lives of individuals and whole societies.

What is it that we are trying to achieve through the lengthy and expensive international tribunals of the ICC? Oughtn't we to explore the theoretical rationales for this unprecedented and vulnerable new field of law, that we better contemplate its aims and evaluate its successes and constraints? It is surely necessary to give a level of clarity, some definition, to this instinctive repugnance and disgust, this inherent feeling of *wrongness* that led to the creation of the tribunal. Why accountability? Why by judicial trial? Why now?

We have much to learn from an analysis of conceptions of justice in ongoing conflicts. The situational contexts of these prosecutions and trials are so unique that they offer a whole new range of questions and justifications for the pursuance of justice. The rhetoric of an 'end to impunity' has been widely paraded with relatively little exploration of the theoretical significance of the sentiment. The fundamental question of the aims and objectives of

[6] Shahram Dana, 'The Limit of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?' 3 Journal of Law and International Affairs (2014) at 44
[7] Dana, *Ibid*. at 109

international criminal law 'permeates every critical decision' with regard to the tribunals,[8] from the selection of situations and cases to the determination of sentences. While it is likely, indeed necessary, that the international criminal system supports the promotion of multiple goals, blind non-consideration of outcomes 'can only delay the inevitable choice…(when) these objectives are in conflict'.[9] It is instead important to 'think concretely about what specifically we have in mind when we say justice'.[10] This will also avoid criticisms of overreach and of judicial partisanship in arbitrarily choosing ideologies to follow in a particular case.[11] Specifically regarding incapacitation, the 'bald acceptance that un-seating politicians is a legitimate purpose of the judicial process' requires at least some level of interrogation.[12]

The research of this thesis matters because there is a lacuna in the literature concerning this specific issue. Furthermore, there have been notable comments made concerning the relevance and potential benefit of applying such principles to the arena of international criminal law, in particular in ongoing conflicts. There are a great many comprehensive treatises of the various ongoing conflicts in which international criminal law applies, albeit mainly from a historical or social perspective.[13] It is also noted that the field of theories of justice in a domestic context is a

[8] Dana, *ibid*. at 35
[9] Dana, *ibid*. at 44
[10] Samantha Power, 'Stopping Genocide and Securing "Justice": Learning by Doing' 69(4) Social Research (2002) 1093 at 1101
[11] Dana, *supra* note 6, at 109-111
[12] Daniel Saxon, 'The Legitimacy and Limits of "Incapacitation": A response to Carsten Stahn' The Hague Justice Portal, 30 October 2009, available online at http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Saxon_The%20Legitimacy%20and%20Limits%20of%20Incapacitation_EN.pdf, last accessed on 03/06/14, at 1
[13] See, for example, Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford: Oxford University Press, 2009); Jason Stearns, *Dancing in the Glory of Monsters: The Collapse of the Congo and the Great War of Africa* (New York: PublicAffairs, 2011); Gérard Prunier, *Darfur: A 21st Century Genocide* (London: C. Hurst & Co, 2005); Phillip Gourevitch, *We Wish to Inform You that Tomorrow We Will be Killed With Our Families: Stories from Rwanda* (New York: Farrar, Straus & Giroux, 1998); Brian Mealer, *All Things Must Fight to Live: Stories of War and Deliverance in Congo* (New York: Bloomsbury, 2008); Nick Hawton, *The Quest for Radovan Karadžić* (London: Hutchinson, 2009); Romeo Dallaire, *They Fight Like Soldiers, They Die Like Children: The Global Quest to Eradicate the Use of Child Soldiers* (Toronto: Random House, 2011)

very broad and celebrated school.[14] There is also a smaller pool of literature considering theories of justice in an international criminal law sphere (though notably in a largely post-conflict paradigm rather than an ongoing conflict situation).[15] However many theorists have also noted the potential benefits of more comprehensively theorising international criminal law.[16] Each stress the potential benefits that theorising ICL could bring, in particular a greater logical justification and clarification for the evaluation of ICL and the grounded proposal of future directions.

As such, this thesis is a unique continuation of the works of a variety of legal, philosophical, and social fields. It brings a new application of pre-existing criminological theories of punishment to a unique field of law: international crime as prosecuted during ongoing conflicts.

Why Incapacitation?

The new aims of ICLIOC, introduced above, can most clearly be comprehended through an incapacitative lens. Domestically, the theory of incapacitation refers to the removal of the criminal from his or her societal context of crime through mechanisms capable of reducing her power, freedom and capability to continually commit crimes. In the international criminal law (in ongoing conflicts) framework, incapacitation, too, can mean rendering the perpetrator incapable

[14] See, for example, Michael H Tonry (ed), *Why Punish? How Much?: A Reader on Punishment* (New York: Oxford University Press, 2011); RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2007); Michael S Moore, *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997)

[15] See, for example, Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge University Press, 2007); Kamari Maxine Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge: Cambridge University Press, 2009); B. Wringe, 'War Crimes and Expressive Theories of Punishment: Communication or Denunciation' 16 *Res Publica* (2010) 119; Mirjan Damaska, 'What is the Point of International Criminal Justice?', 83(1) Chicago-Kent Law Review (2008) 329; Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2002), Gerry Simpson, *Law, War, and Crime* (Cambridge: Polity Press, 2007)

[16] Paul Roberts and Nesam McMillan, 'For Criminology in International Criminal Justice' 1(2) J Int Criminal Justice (2003) 315; W. Schabas, 'Criminology, Accountability, and International Justice' in M. Bosworth and C Hoyle (eds.), *What is Criminology?* (Oxford University Press, 2011); Mark Drumbl, 'Towards a Criminology of International Crime' Washington & Lee Public Law Research Paper No. 03-07 (2003)

of continuing his crimes, through the direct removal to an external centre of incarceration, or through more nuanced, indirect, and intangible assaults on the capability of atrocity perpetrators to commit crimes.

A second core reason for isolating incapacitation amid the various potential theories of punishment is that incapacitation has been a somewhat abandoned theory of late. Incapacitation is a theory and role of the international criminal system which 'is usually neglected by experts'.[17] Particularly within the context of international criminal law, incapacitation has been the mute theory, with little reference among the annexed documents comprising such law. Instead, during negotiation of the Rome Statute, 'deterrence displaced discussion of broader preventive theories, including incapacitation'.[18]

Further, the theory of incapacitation seems to be more nuanced and complex than it first appears. Although the majority of the ICC's indictments remain unenforced, suggesting an abject incapacitative failure for the Court, instead we shall see that it has had a significant impact on many of the contexts in which it operates. In fact, '(i)n the case of ongoing crimes, the ICC may hope that issuance of an indictment will lead the indicted individual to modify his or her behaviour even if there is little prospect of the individual being apprehended.'[19] Incapacitation can no longer be seen through a black or white analysis.

[17] Journalist Dejan Anastasijevic, quoted in Diane F. Orentlicher, 'Shrinking the Space for Denial: The Impact of the ICTY in Serbia', Open Society Justice Initiative, New York, Open Society Institute (2008) at 41
[18] Bosco, *supra* note 2 at 174
[19] Bosco, *supra* note 2 at 192

The Rationale Behind the Choice of Case Studies

During the preparation of this work, concern arose that the various international conflicts which exist do not exhibit homogenous tenets that can lead to a good evaluation of international criminal judicial theory which can fit all situations. However, within the limited scope of this thesis, I attempted to survey a range of contexts which may present a more complete and nuanced picture of the operation of international criminal law today. In the three chosen case study situations of the former Yugoslavia, northern Uganda, and Sudan's Darfur region, I chose a conflict that has essentially finished, one which is ongoing but low-level, and one which has been worsening even during the completion of this work. I situated the analysis in three different geographical regions, albeit with two based in Africa, where the ICC undertakes the majority of its prosecutions. I considered three different levels of incapacitation: the (eventually) directly incapacitated, the indirectly incapacitated, and the near-abject failure of incapacitation. I also chose contexts with different statuses of perpetrator: an army general, a rebel commander, and two national presidents. These variations and contextual differences presented the working of the incapacitative theory amid some of the plethora of circumstances in which operates international criminal law.

Methodology

My approach was primarily theoretical, although I come at my research with a pragmatic and realism-oriented standpoint. As such I divide my methodology into two clear areas. Firstly, I considered the theories of many renowned domestic and international criminal law scholars, including the theories they espouse, the critical reactions and responses to those theories, and the interplay between different theorists' arguments. I considered both the core treatises on

contemporary theories of justice, and works which contextualised these ideas and provided critical reflection on them. Within this context I present a description of the incapacitative theory of justice to be analysed throughout the remaining body of the thesis.

Secondly, I undertook research into three international criminal situations, focusing on specific perpetrators and the role and outcome of incapacitation in their respective cases. It was important to understand the unique tenets of such circumstances in order to be able to adequately form a criminological theory which is sensitive to the specifics of the context. As such I looked into the situational context of each case study, particularly where such context was particularly relevant to the subsequent successes or failures of the international tribunal. This involved researching historical, social, and political works which deal with the situations of current ongoing conflicts. I note that although my research is primarily legal, it inevitably includes interdisciplinary aspects including considerations of politics, sociological context and historical circumstance.

Limitations

One limitation of this thesis is its lack of consideration of mixed theories of justice in the initial review of contemporary and traditional theories of punishment. This lacuna is due to temporal and spatial limits, and to the wide variety and depth of nuance amongst such mixed theories in the contemporary context. For similar reasons, this thesis covers neither all international criminal courts,[20] nor all situations in which international criminal law has recently operated. It was simply outside the ambit and scope of the paper to provide a comprehensive or empirical review of all the individuals indicted to international criminal courts, or of all ongoing conflicts which have, or ought to have, involved the International Criminal Court.

[20] Particularly, I would like to have covered the ICTR, SCSL, and Special Tribunals in Lebanon, Cambodia, and East Timor.

There are also aspects of incapacitation which I would like to have covered, in particular corporate incapacitation – namely the potential of international criminal law to isolate and incapacitate corporations whose actions feed the fires of conflict, and as such play an even more comprehensive role in the cessation of hostilities. Such an opportunity has as yet not been adequately pursued by the ICC or other tribunals, but it would in future be very pertinent to consider, for example, the potential of prosecuting corporations for the illegal pillage of natural resources in conflict contexts. This might eventually become an even more potent possibility than the contemporary paradigm of solely targeting culpable individuals.

It is also extremely important to emphasise that 'an isolated assessment of accountability mechanisms in post-conflict societies can hardly be comprehensive since there are many other factors that must be considered.'[21] Such other aspects might include the surrounding local and international politics, the role of other peace mechanisms, the particulars of each conflict situation's socioeconomic circumstances, geography, topography, and history. To an extent I have attempted to include many of these factors in my review of the three case studies, however a comprehensive analysis of these factors would be lengthy and, in most cases, impossible, due to the invisible currents of causation. As one commentator notes, '(a)ccurately measuring a change in…mass atrocity following the introduction of international criminal tribunals, let alone demonstrating causation, is a daunting proposition.'[22]

This thesis also focuses mainly on the prosecution and capture of perpetrators, rather than on their sentencing. This may seem like a somewhat unique approach for a study which purports to consider theories of punishment, which are often overly preoccupied with the analysis of

[21] Kastner, *supra* note 3 at 150
[22] Kate Cronin-Furman, 'Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity', 7 International Journal of Transitional Justice (2013) 434 at 435

sentencing outcome of trials. However it is due to several preliminary findings. Firstly, although the ICC is admittedly new and has virtually no sentencing history, it is nonetheless becoming clear that international criminal law is much more about prosecution and/or apprehension than about sentencing (or at least, the weight of significance is on the former rather than the latter). The enormous impact of investigating, prosecuting and bringing an indicted international criminal to trial is likely to be as much, if not more, of an influence upon the context of criminality and context than the ultimate conviction and sentencing of that person. This is especially so at this nascent early stage of ICL – perhaps a future study could consider the theories of incapacitation with a sentencing review of the ICC in mind – looking at the impact of sentence duration on conflict resolution or international crime abatement.

Secondly, this focus in investigation and prosecution, rather than sentencing, emerges out of the conviction that the distinction between 'theories of punishment' and 'theories of justice' are false, in a context where punishment is neither the overarching aim nor the core function of the legal system. In international criminal law, we will find that it is impossible to divorce the ultimate 'punishment' or outcome of the system, from its ongoing processes of prosecution and charging. Perhaps this is so for all contexts of criminal law. It is especially clear, however, in the immense politically charged atmosphere of the international criminal arena, where charges are thrown at the highest levels and the implications of such accusations are tangible and extreme. Throughout this thesis I use the term 'theories of punishment' for ease of clarification, but it is to be noted that this refers not to the easily encapsulated term of years meted out by a tribunal after months of debate, but to the wider immeasurable 'punishments' and impacts that occur when an individual is purposefully exposed to the grinding machinery of the international criminal legal system. Indeed, '(t)he mere monitoring of a situation could deter future crimes from being

committed',[23] while the impact of prosecutions on international diplomatic relations may restrain perpetrators in other ways. This finding, in itself, is an interesting one with various implications, and it will be considered further in the concluding chapter. But even at this early stage, such a deduction provides reason to consider the enormity of power and possibility placed in the control of the ICC Prosecutor, and the fact that the 'selection of charges therefore becomes an important element…and could be used to maximise the court's preventive impact'.[24]

Thesis Structure

In Chapter Two, I introduce core traditional and contemporary theories of punishment, as applied largely to domestic criminal law. For each theory I consider its key theorists, its critiques, responses, and a brief note on its potential role in international criminal law in ongoing conflicts. Within this context, I introduce incapacitation as a domestic criminal theory, noting its variant forms and some preliminary criticisms of the theory.

The subsequent three substantive chapters contain case studies which apply the theory of incapacitation to particular contexts of ongoing conflicts. In Chapter 3, I look at the prosecution of ex-President Radovan Karadžić and military commander Ratko Mladić for their role in the conflict in the former Yugoslavia, noting the years that each spent in exile, fugitive from the International Criminal Tribunal for the former Yugoslavia, and their eventual removal to the Tribunal to face trial. In Chapter 4, I consider the notorious personality of Joseph Kony, warlord and accused perpetrator of heinous crimes across northern Uganda. I note with more detail the personal history of Kony and his predecessor, Alice Auma, in an attempt to illuminate the

[23] 'Report on Prosecutorial Strategy', ICC Office of the Prosecutor, 14 September 2006, available online at http://www.icc-cpi.int/NR/rdonlyres/D673DD8C-D427-4547-BC69-2D363E07274B/143708/ProsecutorialStrategy20060914_English.pdf, accessed 228/7/2014 at 6

[24] Bosco, *supra* note 2, at 191

mythical aspects which rendered their hold of power so unique and difficult to counter. Finally, in Chapter 5, I look at the ongoing struggle to bring Sudanese President Omar Al Bashir to the International Criminal Court for his role in the potentially genocidal acts meted out against hundreds of thousands of citizens in the Darfur region of Sudan. I note the geographical and historical context of this situation particularly, because of its linkages with the failure to incapacitate Al Bashir and provide an end to the conflict which continues today. In each case study, I note the unique social, historical, and personal facets which render the individual(s) more or less conducive to the incapacitative reach of the international criminal tribunal in question.

Finally, in Chapter 6, I synthesise lessons and draw together implications within the case studies to form a conclusion as to the extent to which incapacitation is a suitable justification for the continuation of international criminal law, as well as the extent to which such an aim is, or is not, being fulfilled through international tribunals.

Chapter Two:

The Theory of Incapacitation Contextualised Within Theories of Punishment

Introduction

This chapter intends to introduce the concept of incapacitation in its traditional and dominant sense, contextualised within an overview of several of the prevailing classical and contemporary theories of criminal punishment. I shall precede this with a brief discussion of the deontological/consequentialist discourse for categorising theories of justice as a context within which I conceptualise theories of justice. I will then move on to discuss retribution and theories of 'just desert', followed by consequentialist theories of punishment, including deterrence, rehabilitation, reparation, restoration and restitution. I shall consider some key proponents of each theory, as well as critiques of its tenets, and a brief reflection of its application to international criminal law in ongoing conflicts. Within this context I shall then present an introduction to the theory of incapacitation in its many forms, including refutations.

Since the beginning of institutionalised justice, theories of why and how we should punish those responsible for crimes have developed and expanded. Some theories are viewed now as archaic, some disproved as empirically unlikely. Others come full cycle, rising again every few years from the conceptual ash and reclaiming their dominance over criminal law. I will discuss these traditional or 'prima facie' theories of justice[25], noting that they are usually (inevitably) applied in a domestic criminal law context, but briefly considering how their application to international criminal law alters or comprehends their content.

[25] Moore, *supra* note 14 at 84

Part One: The Deontological/Consequentialist Discourse

Among the various terminological options available for categorising theories of justice, I have chosen the expressions 'deontological' (sometimes also known as retributive, deserts-based, or past-orientated) and 'consequentialist' (sometimes also known as utilitarian, reductive, or future-orientated). The distinctions between these perspectives will be explored below, but briefly, 'deontological' theories measure and view as valuable the level of culpability or 'desert' accrued by a defendant when justifying punishment, whereas 'consequentialist' theories value the positive consequences caused by punishment. These ideological bases lead theorists to remarkably diverse conclusions: 'Kant insisted that the last murderer be executed. Bentham would have said there was no point.'[26] The theories are thus 'jealous'[27] as in their pure forms they cannot logically both be right. Although there have been efforts to devise 'mixed theories' combining them, exploring such theories is beyond the possible scope of this paper.

Part Two: Retribution and Theories of 'Just Desert'

2(i) Kant and Classical Retributivism

The theory of retribution is intuitive and emotional, and is possibly the longest-standing theory of punishment.[28] The retributive idea arguably resides, unspoken, in the intuitive part of all of

[26] Michael Tonry, "Introduction: Thinking about Punishment" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 3 at 22
[27] George P. Fletcher, "The Place of Victims in the Theory of Retribution" (1999) 3 Buffalo Crim. L. Rev. 51 at 52
[28] Michael Tonry, "Retributive Theories" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 107 at 107

us,[29] the part that cries for *justice* in the face of pain and atrocity, that demands 'justice, though the heavens fall'.[30] Punishment, retributivists argue, is the morally appropriate response to crime.

Immanuel Kant is the classical proponent of the retributive theory of punishment. He described punishment both in terms of a *right* and a *duty*. The *right* of the law to punish a convict arises as a 'consequence of his having committed a crime.'[31] Kant's 'principle of equality'[32] proclaimed that evils done must be repaid, that the inequity of vice may be rebalanced. Kant's justification for such a principle was in the *spiritual* notion that 'any undeserved evil that you inflict on someone else among the people is one that you do to yourself';[33] indeed his ideas were predicated on the practical necessity for a belief in God.[34] Kant further proposed that the idea of punishment necessitated not just a right, but a *duty* to inflict punishment on wrongdoers. In a civil society, based on equality and desert, 'the last murderer remaining in prison must first be executed'[35] before its members can be free of the affliction of evil.

In surmising the requisite level of punishment, Kant advocated strict proportionality, punishment being absolutely 'commensurate with the seriousness of their crimes'[36]. Reflecting biblical demands for 'an eye for an eye',[37] Kant declared that 'if he has committed a murder, he must die…there is no substitute'[38]. In so arguing, however, Kant refused to go further than the absolute proportionality necessitated by retributive punishment. He argued vehemently for the

[29] Moore, *supra* note 254 at 84
[30] *Fiat Justitia Ruat Caelum* ('Let justice be done, though the heavens fall') – see Lord Mansfield, 1772, *Sommersett*'s case
[31] Immanuel Kant, "The Penal Law and the Law of Pardon" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 31 at 31
[32] Immanuel Kant, *ibid* at 32
[33] Immanuel Kant, *ibid* at 33
[34] Immanuel Kant, *The Critique of Pure Reason* (Translated by J. M. D. Meiklejohn, An Electronic Classic Series Publication, originally 1781 http://www2.hn.psu.edu/faculty/jmanis/kant/critique-pure-reason6x9.pdf) at 30
[35] Immanuel Kant, *supra* note 31 at 33
[36] Tonry, "Introduction" *supra* note 266 at 22
[37] *King James Bible* (1611) Exodus 21:24
[38] Immanuel Kant, *supra* note 31 at 33

moral autonomy of humans, declaring that punishment ought never to be used 'as a means to promote some other good for the criminal himself or for civil society'.[39] He thus declared that only an individual found deserving of punishment may be punished, and then he must be, but only to the level proportionate to his crimes.

2(ii) Hegel and the Right to Punishment

Hegel categorised crime as an abstract use of coercion to infringe 'the existence [*Dasein*] of freedom in its *concrete* sense'[40]. He viewed retribution as the 'negation' of the 'determinate qualitative and quantitative magnitude' of crime[41]. Hegel regarded punishment as the 'cancellation [*Aufheben*] of the crime'[42], punishment is thus necessary because the criminal act '*would otherwise be regarded as valid*'[43] by the community. Like Kant, Hegel acknowledges the true rationality of a person. Hegel, however, went a step further and considered punishment to be 'a *right for the criminal himself*'[44] as the infliction, consent for which is embodied in the criminal's acts, honours the criminal's inherent rationality[45]. Hegel compares this to the alternative of treating the criminal 'simply as a harmful animal which must be rendered harmless'[46]. Hegel diverged from Kant, too, in his relative prescription of retribution. He was less absolutist than Kant, measuring desert not through strict proportionality (that '*what the criminal has done should also happen to him*'[47]), but through the '*inner equality* of things'

[39] Immanuel Kant, *supra* note 31 at 31
[40] G. W. F. Hegel, "Wrong (Das Unrecht)" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 37 at 40-41
[41] Hegel, *ibid* at 46
[42] Hegel, *ibid* at 43
[43] Hegel, *ibid* at 43 [emphasis in original]
[44] Hegel, *ibid* at 45 [emphasis in original]
[45] See Hegel, *ibid* at 45-46
[46] Hegel, *ibid* at 45-46
[47] Hegel, *ibid* at 46 [emphasis in original]

measuring an inherent value distinct from the folly of '*specific equality*' which prescribes a tooth for a tooth.[48]

2(iii) The Varied Contemporary Versions of Retributivism

The theory of retributive justice is a cyclical phenomenon, returning at uncertain intervals especially where newer theories of punishment appear to fail or lose public faith.[49] Theorists returned to retributive theories, responding to earlier critiques by developing altered or nuanced versions of retributive (or 'quasi-retributive'[50]) theories. Behind the differences within the theories, they share a 'call for apportioning punishments to the moral gravity of offenders' wrongdoing.'[51]

Feinberg, in *The Expressive Function of Punishment*, focuses on the condemnatory aspect of punishment as the 'essential ingredient'[52] which both legitimates punishment and distinguishes it from 'mere penalties'[53]. Symbolic punishment '*expresses the community's strong disapproval of what the criminal did*.'[54] Punishment, therefore, has four functions: 'authoritative disavowal',[55] 'symbolic nonacquiescence',[56] 'vindication of the law'[57], and 'absolution of others'.[58] Through this communal condemnation, Feinberg distinguishes punishment both from mere penalties, such as parking fines, and from the wrongful application of cruel laws, where 'strictly speaking, they

[48] Hegel, *ibid* at 47
[49] For example the fall of rehabilitative theories in the 1970s because of low success rates found in empirical research: see Michael Tonry, "Retributive Theories", *supra* note 28 at 107
[50] Tonry, "Retributive Theories", *supra* note 28 at 108
[51] Tonry, "Retributive Theories", *supra* note 28 at 108
[52] Joel Feinberg, "The Expressive Function of Punishment" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 111 at 113
[53] Feinberg, *ibid* at 111
[54] Feinberg, *ibid* at 114 [emphasis in original]
[55] Feinberg, *ibid* at 115
[56] Feinberg, *ibid* at 116
[57] Feinberg, *ibid* at 117
[58] Feinberg, *ibid* at 117

have not been *punished*; they have been treated much worse.'[59] Feinberg goes so far as to suggest that in the ideal society, the 'harsh treatment' required as a component of this public condemnation could be eradicated, instead imagining 'an elaborate public ritual…(which) would preserve the condemnatory function of punishment while dispensing with its usual physical media'.[60]

Marxist theories of punishment typically also retain a retributivist link, finding that retributivist theory 'recognises human dignity in the abstract',[61] is commensurate with 'the notion of people having rights',[62] and does not permit the use of an innocent individual for the betterment of society. However, in the current capitalist paradigm, Marxists argue that even retributivism 'functions merely to provide a "transcendental sanction" for the status quo'.[63] This is because 'criminality is economically based',[64] attributable to the environment of social inequality and inequitably distributed opportunities. In the current context of individuality and competition, society encourages greed and selfishness.[65] Thus 'the retributive theory, though formally correct, is materially inadequate'[66] in the current state structure. The only resolution is to restructure society so that potential criminals 'are autonomous and…do benefit in the requisite sense'[67] – Marxists note, however, that in such a society, a theory of punishment – indeed, state sanctioned

[59] Feinberg, *ibid* at 120
[60] Feinberg, *ibid* at 124
[61] Karl Marx, "Capital Punishment" (New York Daily Tribune, 1853) quoted in Jeffrie G. Murphy, "Marxism and Retribution" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 127 at 127
[62] Murphy, *ibid* at 129
[63] Murphy, *ibid* at 130
[64] William Adriaan Bonger, *Criminality and Economic Conditions* (1916) quoted in Murphy, *supra* note 61 at 139
[65] See Murphy, *supra* note 61 at 142-3
[66] Murphy, *supra* note 61 at 143
[67] Murphy, *supra* note 61 at 145

punishment itself – would 'radically decrease if not disappear entirely' due to the satisfied nature of man.[68]

Commonly, retributivist theorists link their legal philosophy with some form of religious context. Herbert Morris used many philosophical analogies in *A Paternalistic Theory of Punishment* to show how the law can teach citizens the permissible and impermissible boundaries within society, much as a parent chastises a child, or a priest reprimands his flock. Like Feinberg, Morris focused on the 'communicative component' as the 'defining characteristic' of punishment,[69] and like Hegel, Morris noted that the moral 'good' to be discerned from punishment was focused on the criminal themselves, as it promotes their moral progress and relieves the danger that '(h)is soul is in jeopardy'.[70] Punishment is the fulfilment of the 'non-relinquishable right…to one's status as a moral being'.[71]

R. A. Duff, secondly, analogises punishment as 'a species of secular penance'[72] which promotes repentance and atonement. Penance, for Duff, is a mixed device, it 'looks both backward (enabling the sinner to understand her crime, and communicating the wrongness of the act) …and forward, to the restoration of the sinner's relationships with those whom she wronged'.[73] Punishment is 'inclusionary' as it works to return the criminal to their status within society.[74] Distinct from religious penance, however, Duff acknowledges that secular criminal law can only *persuade* attitudes of repentance, rather than coerce them, and that it can only deal with external,

[68] Murphy, *supra* note 61 at 145
[69] Herbert Morris, "A Paternalistic Theory of Punishment" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 147 at 149
[70] Morris, *ibid* at 155
[71] Morris, *ibid* at 155
[72] R. A. Duff, "Penance, Punishment, and the Limits of Community" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 173 at 173
[73] Duff, *ibid* at 178
[74] Duff, *ibid* at 185

surface-level acts, rather than the 'inner citadels of offenders' souls'.[75] Thus, like Feinberg and the Marxist critics, Duff proposes his theory of punishment to promote an ideal which, for its ultimate success, depends on reform of the 'larger political, social and legal context'.[76]

Like many retributivists, Scanlon views the key feature of retributivist justice to be *affirmation* of the wrongs done – 'what is crucial is recognition, not suffering'.[77] This relates to retribution as it is backwards-looking and is justified in only concerning the culpable actor.[78] Lack of affirmation, argues Scanlon, creates a cynical perspective and a reduced respect for law, the phenomenon that noted Argentine philosopher Carlos Nino calls 'anomie'.[79] Thus Scanlon ultimately posits that retributive justice builds the rule of law: a notion that clearly has mixed consequentialist tenets which enable Scanlon to argue that not every offender *must* be punished, but that generally there ought to be a right to affirmation of a crime.[80] Scanlon's more muted recourse to retributivism, therefore, is tempered by the argument that the harsh treatment imposed as punishment ought to be further justified by the consequentialist aim of promoting the rule of law.[81]

2(iv) Moore and a Return to 'Classic' Retributivism

The most recent resurgence of a more absolute principle of retributivism has occurred in the last ten years.[82] A key modern proponent is Michael S. Moore, who published *Placing Blame: A Theory of Criminal Law* in 2010. Moore's argument emerges from the latent critiques of

[75] Duff, *ibid* at 176, see also 181-182 generally
[76] Duff, *ibid* at 184
[77] T. M. Scanlon, "Punishment and the Rule of Law" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 161 at 164
[78] Scanlon, *ibid* at 164
[79] Scanlon, *ibid* at 165
[80] Scanlon, *ibid* at 165
[81] Scanlon, *ibid* at 171
[82] Moore, *supra* note 14 at 83

retributivism; he believes strongly in the theory, but notes that the contemporary narrative has displayed little patience for deontology in the criminal law.[83] He nevertheless argues that once all the other consequentialist and more contemporary theories of justice fall to critique, retribution is the sole theory of justice that remains. As such, he takes the reader through a series of critiques of other potential theories of justice to conclude that by default, retributivism must be correct. Moore calls this position 'closet retributivism'.[84]

Retributivism, to Moore, is based on 'the view that we ought to punish offenders because and only because they deserve to be punished.'[85] The theory '*obligates* us to seek retribution through the punishment of the guilty.'[86] Unusually, however, Moore argues that retributivists can be consequentialist. Punishing the guilty has an '*intrinsic* goodness'[87] but this does not equate to a 'categorical duty to punish the guilty on each occasion'.[88] Noting the Eichmann trial, Moore emphasises that 'retributivists are not monomaniacal about the achieving of retributive justice',[89] as 'sometimes the wrong that would go unpunished if the principle of legality were observed is so enormous…that the goods of legality are themselves overridden.'[90] '(C)onsequentialist retribution' is thus a 'recognizable version' of the theory.[91]

Moore justifies his version of retribution morally, arguing that it is an intrinsic good to punish offenders. He admits, and attempts to refute, the 'charge of base emotion'[92] against retribution,

[83] Moore, *supra* note 14, generally at 88-90
[84] Moore, *supra* note 14 at 83
[85] Moore, *supra* note 14 at 153
[86] Moore, *Supra* note 14 at 154
[87] Moore, *Supra* note 14 at 157 [emphasis in original]
[88] Moore, *Supra* note 14 at 157
[89] Moore, *Supra* note 14 at 186
[90] Moore, *Supra* note 14 at 187
[91] Moore, *Supra* note 14 at 159
[92] Moore, *Supra* note 14 at 164

arguing that the 'emotion of guilt' is a valid base for punitive sanctions.[93] Further, this personal guilt should be applied to others (regardless of their moral perspective) because to not do so 'is to arrogate to yourself a godlike position…that denies one's common humanity'.[94] Moore does not expound from other 'first principles' from which retribution could logically follow – such as God's anger, or the power of denunciation.[95] Instead, he designates retributive principles to be ''secondary' moral rights and duties'[96] which arise from primary rights (to property, life etc.). These secondary duties thus dictate that we *ought* to correct injustice by making amends, to put the promisee back to his original position, to compensate for loss[97]. However, these rules are 'context-specific',[98] operating only '*Within the set of conditions constituting intelligible reasons to punish*'.[99]

Moore attempts to explain the phenomenon of desert, as the 'best explanation for why we have the reactions we do' to criminal acts, as 'caused by the existing moral qualities of wrongness and of culpability, the combination of which I call *desert*.'[100] Refuting arguments that such emotions are socially and psychologically driven,[101] Moore responds that 'there is nothing in Mackie's explanation that excludes an explanatory role for the objective moral property of desert.'[102] Moore states that 'There exists in the world a moral property of relevance to punishment, namely, desert.' Moore makes little attempt to justify his principle of desert, noting this lacuna but arguing 'of course, that objection can be raised *ad infinitum* for any answer that might be

[93] Moore, *Supra* note 14 at 164
[94] Moore, *Supra* note 14 at 165
[95] See generally Moore, *Supra* note 14 at 170
[96] Moore, *Supra* note 14 at 170
[97] See generally Moore, *Supra* note 14 at 171
[98] Moore, *Supra* note 14 at 173
[99] Moore, *Supra* note 14 at 173 [emphasis in original]
[100] Moore, *Supra* note 14 at 177 [emphasis in original]
[101] See J. L. Mackie: "Retributivism: A Test Case for Ethical Objectivity" in *Philosophy of Law*, Joel Feinberg and Hyman Gross, eds, (Belmont: Wadsworth, 1991)
[102] Moore, *Supra* note 14 at 178

given.'[103] He locates his truth through considering the 'emotional experience as the harbinger of a deep truth about morality'.[104] '(O)ur emotions are our main heuristic guide to discovering moral truths',[105] Moore argues, noting that 'most of us most of the time feel emotions of a certain kind and of a certain intensity'.[106] This, for Moore, is a sufficient basis for determining the facets of retributivism.

Although Moore leads us through a helpful and wide-ranging description and critique of the paradigmatic contemporary models of theoretic criminal justice, I find flaws in his argument that the default of a set of failed theories must be the one left standing.[107] In an evolving world of criminal philosophy, it is entirely possible that we have yet to land upon the 'right answer' justifying prosecution and punishment. This is especially the case in the context of new and evolving spheres of law, such as the emerging sector of international criminal law, which may proffer new insights into the nature and normativity of criminal law generally. Further, it is quite possible that if none of the contemporary theories of justice are infallible to a satisfying extent, then there is *no* justification for criminal punishment. As such I dispute Moore's general precondition that retributive theory is essentially 'proven' because of its default survival.

2(v) Critiques of Retributivism

The retributive theory is primarily critiqued for being a mere reflex response of blind vengeance and irrational emotion, without basis in rationality or calm logic. It is such decried as being primitive and uncivilised, a stagnant and undeveloped remnant of simpler (and possibly less humane) times: 'No thoughtful person today seriously holds this theory of sublimated social

[103] Moore, *Supra* note 14 at 175
[104] Moore, *Supra* note 14 at 183
[105] Moore, *Supra* note 14 at 181
[106] Moore, *Supra* note 14 at 182
[107] Moore, *Supra* note 14 at 103

vengeance'.[108] It is a policy based 'upon the hatred of those who commit such acts'[109] and is thus conducive neither to individual victims' personal healing nor to the progress and improvement of society. Retributive theories seem even more outdated and insufficient in an international criminal law context, as this 'characteristic discourse of…blameworthiness, and the restoration of some moral balance – remains strongly redolent of religions of justice ill-suited to a diverse international community'.[110]

Secondly, for retributive theories to be logically consistent, they require the creation of scales of values for the determination of moral 'wrongs' to be punished – without offering a legitimate source for discovering such values. Traditionally, the religious domain would have provided a basis for such morality,[111] but this is no longer sufficient, particularly in the pluralistic context of a multiplicity of cultures and histories. To instil a criminal legal system on the vague and unwritten ideas of moral right and 'desert' enhancement against crimes that have no consensual moral basis is increasingly perverse in a system of so clearly opposed 'inherent' or 'universal' moral ideas. Theorists enshrine moral ideas behind a mystique of deification, but arguably these nebulous 'transcendental' ideas are mere historic-traditional-cultural or religious notions that ought to be displaced by rational formulations such as Beccaria's measurement of crime 'only…by the injury done to society'.[112] C S Lewis, in disputing utilitarian theories, argued that rehabilitation is to be 're-made after some pattern of 'normality'…to which I never professed

[108] Sheldon Glueck, "Principles of a Rational Penal Code" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 71 at 74
[109] Glueck, *ibid* at 74
[110] Robert D. Sloane, "Limits of the National Law Analogy and the Potential of International Criminal Law" (2007) 43 Stanford Journal of International Law 39 at 77
[111] See Glueck, *supra* note 108 at 74
[112] Cesare Bonessana di Beccaria, *An Essay on Crimes and Punishments* (Albany: W.C. Little & Co., 1872 (originally 1764)) Chapter VII at 15

allegiance',[113] but this begs the question of who, too, professes allegiance to the pattern of 'morality' to which we are otherwise held account. How is this imposition of moral dogma any less demeaning or deleterious of human autonomy than the more obverse use of individuals as means for an openly professed consequential aim?

Finally, retributivist theories rest on an assumption of human culpability for their actions, which is by no means proven. '(N)o device yet invented can dive into the heart and mind of an individual and come up with the exact apportionment of blame and blamelessness which even a rationalized vengeance called 'solemn justice' demands as a prerequisite to castigation.'[114] This is relevant in an international criminal context, where the concept of 'universal deviance'[115] renders individual culpability even more complex.

2(vi) Retributivism Applied to ICLIOC

Applying retributivist theories to the context of international criminal law in ongoing conflicts provides a range of new insights into the concept. In the first place, it brings into question the theory's dependence on the notion of proportionality. Retribution seeks 'geometric equality', but is there any punishment to match the international crimes that breach the severity threshold sufficient to bring a perpetrator before the International Criminal Court? What sentence could balance the conscription of child soldiers,[116] the perpetration of the murder of 8000 Bosnian Muslim men and boys,[117] or the systematic rape of civilian populations[118]? It is 'absurd to suppose that any particular term of years represents the correct penalty' for such crimes.[119]

[113] C S Lewis, "The Humanitarian Theory of Punishment" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 91 at 93
[114] Glueck, *supra* note 108 at 74
[115] See Drumbl, *supra* note 15
[116] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06: Dyilo was sentenced to 14 years by the ICC in 2012
[117] Prosecutor v. Radovan Karadzic, IT-95-5/18, case ongoing at the ICTY

Conversely, retributivist theories also require a deviant moral act for criminal culpability to ensue. Whereas such a paradigm might be fitting for the leaders and generals indicted by the ICC, it is more difficult to apply to the average wayward soldier or militiaman. Situations of ongoing conflict are 'characterised by the erosion, if not inversion, of basic social norms'[120] where perpetrators may be 'convinced by the rhetoric of their own decrees and believe that previous law had been swept away'.[121] Morality and culpability are endangered species in the barren wilderness of mass atrocity.

Retribution also arguably imports an obligation to punish criminal perpetrators: a compulsion which becomes more complex with the context of ongoing conflict, where a significant proportion of society may be implicated in criminal acts. The theory of retribution talks of 'blood guilt'[122] and moral disorder, whereupon 'allowing crimes to go unpunished somehow repeats the evil' implicating society in 'liability for impunidad'.[123] How must this obligation operate where its enforcement may engender the destabilisation of a society, or the renewal and amplification of an ongoing conflict? Scanlon discusses prosecutions after the Argentinian 'Dirty War', where 'prosecution of those in decision-making positions…could be held to represent adequate recognition of every sufferer's wrong, even though not every wrongdoer was called to account.'[124] Does such an approach invalidate the system of international criminal justice, or can it remain legitimate even when great numbers of perpetrators are not held to account?

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[118] Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, case ongoing at the ICC
[119] Sloane, *supra* note 110 at 83
[120] Sloane, *supra* note 110 at 41
[121] Scanlon, *supra* note 77 at 170
[122] Fletcher, *supra* note 27 at 60
[123] Fletcher, *supra* note 27 at 61
[124] Scanlon, *supra* note 77 at 165

The retributivist theory does, however, present the clearest expression of our most fundamental reaction to the perpetration of such atrocities. The sort of crimes which can be tried at the ICC are very clear demonstrations of the most abhorrent and repugnant acts committed by mankind. The visceral response that the individuals responsible ought to be punished is clear and pervasive, and the retributive theory can give a very real expression of this response. '(T)he abhorrent nature of ICL violations…invite 'intuitive-moralistic answers,' making debate about the rationales for punishing serious human rights atrocities seem pejoratively academic'.[125]

Part Three: Consequentialist Theories of Punishment

3(i) Utilitarianism and the Consequential Perspective

Utilitarian theories of punishment are consequentialist in that they are 'concerned with the good of society as a whole'[126] and thus contain the 'goal-based'[127] forward-looking aim of improving society through the eradication or diminishment of instances of crime.

3(i)(a) The History and Core Proponents of Utilitarianism

Bentham (1748-1832) and Beccaria (1738-1794) are perceived as the classical proponents of utilitarian theory. Bentham began from the premise that man has two 'sovereign masters', namely *pleasure* and *pain.*[128] His 'principle of utility' so called, therefore, was the theory 'which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party'.[129] All pain, however inflicted, was a

[125] Sloane, *supra* note 110 at 39
[126] Roger Hopkins Burke, *Criminal Justice Theory: An Introduction* (Abindon, Oxon: Routledge, 2012) at 148
[127] Burke, *ibid* at 149
[128] Jeremy Bentham, "An Introduction to the Principles of Morals and Legislation" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 51 at 51
[129] Bentham, *ibid* at 52

'mischief', an evil,[130] regardless of its legitimacy or of the moral impurities of its victim. *Not excluding* state-permitted chastisement, Bentham noted 'all punishment is mischief, all punishment in itself is evil.'[131] Such an evil could be justified not by moral reflex in response to harm done, but 'only…in as far as it promises to exclude some greater evil' in the *future*.[132] Punishment must only exist to 'lessen or exclude a greater 'evil'.'[133] Thus '(t)he business of government is to promote the happiness of society, by punishing and rewarding'.[134] Unlike Kant, Bentham did not advocate for the universality and inescapability of punishment. Instead he argued that punishment should not be inflicted where it would be groundless, inefficacious, unprofitable, or needless.[135] As such, the 'cheapest' or least invasive possible version of punishment or sanction capable of preventing the mischief ought to be used.[136]

Contrary to critics, Bentham's theory was not devoid of some form of proportionality between offences and punishments. Bentham was able to retain the justification of proportionately applied sentences by arguing that, after attempting the prevention of crime, the law's 'next object is to induce him to commit an offence *less* mischievous, *rather* than one *more* mischievous'[137] through the medium of higher sanctions for more serious crimes. However, Bentham was not strictly loyal to a theory of proportionality as such. Indeed, he suggested that 'it may sometimes be of use…to stretch a little beyond that quantity which…would be strictly necessary…to answer

[130] Bentham, *ibid* at 57
[131] Bentham, *ibid* at 57
[132] Bentham, *ibid* at 57
[133] Burke, *supra* note 126 at 149
[134] Bentham, *supra* note 128 at 52
[135] Bentham, *supra* note 128 at 58
[136] Bentham, *supra* note 128 at 58 and 64
[137] Bentham, *supra* note 128 at 63 [emphasis in original]

the purpose of a moral lesson.'[138] Bentham thus exhibited an early concerning propensity for individuals to be used as means for society's ends in the reinforcement of a societal lesson.

Beccaria's arguments portrayed similar conclusions, though with some marked differences. Commencing with a form of Hobbes, Locke and Rousseaus' oft-formulated notion of the 'social contract', Beccaria argued that each individual gives up a small part of their liberty in order to constitute a secure society, and that '(t)he sum of all these portions of the liberty of each individual constituted the sovereignty of a nation'.[139] It is however the natural state of all individuals to 'endeavour to take away from the mass…to encroach on that of others'.[140] Without some form of constraint, 'men would return to the original state of barbarity',[141] for 'neither the power of eloquence, nor the sublimest truths'[142] could constrain them from their true nature. Thus 'the sovereign's right to punish crimes is founded…upon the necessity of defending the public liberty…from the usurpation of individuals'.[143]

Beccaria conceded with Bentham that not only punishments, but further that '(e)very act of authority of one man over another, for which there is not absolute necessity, is tyrannical.'[144] The only justification for punishment, therefore, was 'no other, than to prevent others from committing the like offence.'[145] Beccaria openly noted that this feat would be achieved through the medium of fear, the intention of punishments being '(t)o terrify, and to be an example to others.'[146] He confined this to fear of the *law* only, however, as 'the fear of men is a fruitful and

[138] Bentham, *supra* note 128 at 67
[139] Beccaria, *supra* note 112 Chapter I, at 9
[140] Beccaria, *supra* note 112 Chapter I at 9
[141] Beccaria, *supra* note 112 Chapter II at 10
[142] Beccaria, *supra* note 112 Chapter I at 9
[143] Beccaria, *supra* note 112 Chapter II at 9
[144] Beccaria, *supra* note 112 Chapter II at 9
[145] Beccaria, *supra* note 112 Chapter XII at 20
[146] Beccaria, *supra* note 112 Chapter XVI at 24

fatal source of crimes.'[147] Like Bentham, Beccaria rejected that punishment could have any retrospective effect, noting that 'the intent of punishments is not to torment a sensible being, nor to undo a crime already committed.'[148] Denouncing vengeful retributivism as 'useless cruelty, the instruments of furious fanaticism',[149] Beccaria noted that morality was an uncertain and non-universal concept, as 'the ideas of virtue and vice…change with the revolution of ages…(and) with the boundaries of states'.[150] Instead of locating criminality within nebulous and transcendental ideas of morality, Beccaria noted that 'crimes are only to be measured by the injury done to society.'[151] In denouncing the deontological, desert-based paradigm, Beccaria thus asked '(c)an the groans of a tortured wretch…reverse the crime he has committed?'[152]

Like Bentham, too, Beccaria promoted the proportionality between crimes and punishment, as the 'crimes of every kind should be less frequent, in proportion to the evil they produce to society.'[153] However, Beccaria also emphasised that society ought to use the minimal punishment possible to achieve utilitarian aims, as '(a)ll severity beyond this is superfluous, and therefore tyrannical.'[154] Noting immediacy[155] and certainty[156] as significant factors for the successful deterrence of crimes, Beccaria concluded that 'in general…*the consequences of a crime, ought to be so contrived, as to have the greatest possible effect on others, with the least possible pain to the delinquent*.'[157]

[147] Beccaria, *supra* note 112 Chapter XLI at 55
[148] Beccaria, *supra* note 112 Chapter XII at 20
[149] Beccaria, *supra* note 112 Chapter XII at 20
[150] Beccaria, *supra* note 112 Chapter VI at 14
[151] Beccaria, *supra* note 112 Chapter VII at 15
[152] Beccaria, *supra* note 112 Chapter XII at 20
[153] Beccaria, *supra* note 112 Chapter VI at 13
[154] Beccaria, *supra* note 112 Chapter XXVII at 36
[155] Beccaria, *supra* note 112 Chapter XIX at 29
[156] Beccaria, *supra* note 112 Chapter XXVII at 36
[157] Beccaria, *supra* note 112 Chapter XIX at 29 [emphasis in original]

Unlike Bentham, Beccaria emphasised repeatedly the fundamental value of the autonomy of the individual, a value which, indeed, the law was created to uphold. Beginning with the position that 'every member of society has a right to do anything that is not contrary to the laws'[158] as this enables 'our minds (to) become free, active and vigorous',[159] Beccaria stated foundationally that '(l)iberty is at an end, whenever the laws permit, that, in certain cases, a man may cease to be a *person*, and become a *thing*.'[160] As such, Beccaria refutes the notion that we may utilise the innocent in individual circumstances in order to achieve utilitarian aims, proclaiming that 'No man can be judged a criminal until he be found guilty'.[161] Seeming to argue directly against the subversive abuse of even a solitary individual as an object for the greater good, Beccaria warns against disregarding 'the little insect that gnaws through the dyke, and opens a sure, though secret, passage to inundation.'[162]

3(i)(b) Criticisms of Utilitarianism

The core utilitarian critique is the theory's ability to justify the use of certain individuals as means for the ends of wider society. Particularly through Bentham's conceptualisation, it is thus theoretically possible to punish an innocent person (if they were widely believed to be guilty) for the purpose of warning others.[163] Scanlon notes the pragmatic danger of this theoretical scenario, as in Argentina '(j)ustifications of this kind were actually offered for the "dirty war against subversion," and they are a chilling reminder that this argument is not just a stale academic warhorse.'[164] Even for the culpably guilty, use of individuals through punishment as a warning to

[158] Beccaria, *supra* note 112 Chapter VIII at 16
[159] Beccaria, *supra* note 112 Chapter VIII at 17
[160] Beccaria, *supra* note 112 Chapter XX at 30 [emphasis in original]
[161] Beccaria, *supra* note 112 Chapter XVI at 24
[162] Beccaria, *supra* note 112 Chapter XX at 31
[163] Lewis, *supra* note 113 at 94
[164] Scanlon, *supra* note 77 at 166

others denies their essential autonomy and inherent individual value. In this critique we should distinguish Bentham from Beccaria, who at least enshrined individual autonomy within his theory: however even for Beccaria, the value and culpability of an individual is a by-product, not encapsulated as the core tenet of utilitarianism: indeed it is counterintuitive to the core preference of society over individual. However, it can be rebutted that *all* theories of punishment to some extent objectify and 'use' the criminal: punishment by definition consists of a removal of autonomy and acts against one's will. Kant's paradigmatic retributivist definition argued that society is scarred if the guilty is not punished – arguably, then, in retributive theory we are *using* the perpetrator (to purge society) in just the same way.

Other arguments against utilitarianism include the fact that there is no consensus on what a 'good' society is (this is particularly relevant in the pluralist ICLIOC context), and the idea that it renders mitigation pointless[165] because the purpose of sentencing is external, to society, rather than looking at an individual's culpability. I find this latter argument unpersuasive, as mitigation responds to the culpability of an individual (due for example to their background, and the context of the offence (particularly duress)), and it is to this culpability that the wider society responds. Another frequent critique is that utilitarian-led justice reforms rarely work to produce utilitarian aims.[166] Proponents have countered, however, that 'restorative justice, rehabilitation, deterrence and incapacitation…succeed often enough for it to be true that there are cost-effective ways of reducing crime'.[167]

Finally, and most significantly in the ICLIOC context, utilitarian notions of punishment are critiqued for simply not reflecting the very real emotional and moral repugnance that is

[165] Burke, *supra* note 126 at 150
[166] See, for example, the critique of deterrence as ineffective (below, pages 37-38)
[167] John Braithwaite, "In Search of Restorative Jurisprudence" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 337 at 339

collectively felt when we are confronted with heinous crimes. Although working to create a better future, utilitarian theories say nothing about that evil past, they cannot encompass an '*affirmation* of the victims' sense of having been wronged.'[168] We are distressed, and made angry – rightfully, passionately so – when met with the unforgiving facts of the worst crimes of human history. It is this emotive response which spurs us to empathy and to the struggle for accountability, for the 'end to impunity'.[169] Utilitarian theories, in their cold objectivity, remove from justice this most human instinct.

3(i)(c) Utilitarianism as applied in ICLIOC situations

The application of utilitarian principles to international criminal law in ongoing conflicts renders several unique conclusions. Firstly, it alters the utilitarian perception of 'society', necessitating instead an appreciation of the wider 'global society' and reducing the credibility of the paradigmatic 'sovereign', who is absent from the international regime. International law generally is more horizontal and less hierarchical than traditional national societies, and this enables us to look with a different lens at what we mean when we say that laws are *imposed* upon individuals.

Secondly, Bentham's notion that punishment should not be inflicted where it would be *unprofitable* or too expensive so that 'the mischief it would produce would be greater than what it prevented'[170] applies pertinently to the situation of ICLIOC. Interventions of international justice have often been derided as impeding or preventing the establishment of peace, as

[168] Scanlon, *supra* note 77 at 163 [emphasis in original]
[169] Rome Statute of the International Criminal Court, Preamble
[170] Bentham, *supra* note 128 at 58

negotiations between powerful parties are prevented or inflamed by criminal indictments.[171] Many theorists have argued that international criminal tribunals may 'exacerbate rather than prevent atrocities';[172] for example the fledgling peace process in Uganda was arguably disrupted by ICC indictments of militia leaders.[173] This 'peace versus justice' argument has been frequently explored, and brings a new light to our questions of whether justice ought to be pursued where it may indirectly cause greater detriment. Is retributive justice, for the sake of desert, an important enough aim to displace the potentially greater evil of continuous war? Do we intervene in ongoing conflicts *because* we wish to end the conflict, or *despite* the fact that our intervention may inflame it? Ought justice to be done, and damn the consequences, while the heavens fall?

3(i)(d) Utilitarianism Applied: The Encompassing Theories

The utilitarian or consequentialist theory of justice is not really a prescriptive theory at all, instead an ideal or perspective from which to derive more substantive theories of justice. Although most closely aligned to the theories of deterrence, utilitarian notions can also apply to rehabilitation, reparation/restitution/restoration, and incapacitation. I shall consider each of these and their applications to international criminal law in ongoing conflicts.

[171] See below, particularly ch. 5 s3(ii), discussion of Bashir's indictment and subsequent deterioration of Darfuri aid access

[172] Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism" 31 Human Rights Quarterly (2009) 624 at 627

[173] Thomas Unger and Marieke Wierda, "Pursuing Justice in Ongoing Conflict: A Discussion of Current Practice" in *Building a Future on Peace and Justice: Studies on Transnational Justice, Peace and Development*, Kai Ambos et al., eds (Springer-Verlag: Berlin, 2009) 263 at 277

3(ii) Deterrence

3(ii)(a) Deterrence: Introducing the Theory

From the outset it is important to note that 'deterrence' refers to two separate groups of theories, more specifically, 'individual' and 'general' deterrence. However, the theories are united in that 'punishment can be morally justified only if the harm and suffering it prevents is greater than the harm it inflicts on offenders'[174] as otherwise punishment 'would add to rather than educe the sum of human suffering.'[175] Further, both aim 'to create a fear of punishment'[176] as a means to this end.

'Individual' (or 'specific') deterrence denotes the attempt to prevent an individual offender from repeating these or other offences through the medium of directly experiencing prosecution and punishment. This is usually achieved through a 'cost/benefit analysis'[177] so that the potential costs of criminal behaviour are increased in comparison to the relative profits. The balancing of this equation theoretically makes it more unfavourable to commit crimes, therefore logically reducing the likelihood of recidivism. Individual deterrence has, however, been generally critiqued as a justification for punishment as 'deterrence has not been proven to be a valid consequence of the dominant form of punishment, imprisonment.'[178] Statistics have frequently (though not universally) shown that any deterring effect of imprisonment or punishment have

[174] Ian Marsh, *Criminal Justice: An Introduction to Philosophical Theories and Practice* (London: Routledge, 2004) at 8
[175] Marsh, *ibid* at 8
[176] Burke, *supra* note 126 at 152
[177] Burke, *supra* note 126 at 151
[178] Burke, *supra* note 126 at 150

been negligible at best,[179] with some commentators arguing that some punishment acts to *increase* individual recidivism, as prisons are essentially 'universities of crime'.[180]

'General' deterrence, by contrast, is the wider prevention of crime throughout the population or citizenry (even amongst law-abiding citizens) through the medium of the threat or imagined conception of prosecution and punishment. Aside from the characteristics of the persons targeted by the theories, the distinction is therefore simply that individual deterrence relies on memory, while general deterrence utilises human capacity for imagination. General deterrence relies on longer-term methods of shaping, strengthening, and inculcating values',[181] and has been appraised for its 'enormous potential efficiency'[182] to change the behaviour of many through the example of few openly punished criminals.

Both forms of deterrence share certain characteristics for their ultimate success. Both display an 'assumption…that citizens are rational beings'[183] to enable the intended deterrent effect. The subject 'must know the rule by which the law seeks to influence' them, and 'must be able and willing to calculate the costs and benefits for their own self-interest'.[184] A person without the rational capacity to consider consequences and fully imagine the implications of their acts would not be a successful subject of either deterrent effect. Further, although studies are inconclusive concerning the successes of deterrence in individual or societal cases,[185] it has been more successfully posited that the effect is greatly improved where punishment is both more

[179] Burke, *supra* note 126 at 150
[180] See e.g. Gordon Hawkins, *The Prison: Policy and Practice* (Chicago: The University of Chicago Press, 1976) at 58
[181] Sloane, *supra* note 110 at 75
[182] Paul H. Robinson, *Intuitions of Justice and the Utility of Desert* (Oxford: Oxford University Press, 2013) at 144
[183] Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge: Cambridge University Press, 4th Ed, 2005) 75
[184] Robinson, *supra* note 182 at 144
[185] See Zimring and Hawkins, 1973, Gibbs, 1975, Beyleveld, 1978, Bishop, 1984 – in Burke, *supra* note 126 at 153

immediate in temporal relation to the crime and more certain in likelihood of occurring.[186] Even in lieu of empirical studies, logically 'the certainty of a punishment, even if it be moderate, will always make a stronger impression' on a potential offender.[187]

3(ii)(b) Critiques of Deterrence

Aside from the criticisms of utilitarian theories of punishment generally, deterrence is frequently critiqued for its conceptual mechanism of governing through fear. Such a notion utilises a base and uncomplicated formulation of human nature, without considering the 'complex mental and social factors which enter into the commission or failure to commit crimes'.[188] Secondly, deterrence theory is generally critiqued because punishment is arguably ineffective in achieving deterrent aims. The prevention of future punishment 'has not been proven to be a valid consequence of the dominant form of punishment'.[189] The requirements of rationality of individual, and certainty and immediacy of punishment, are almost always imperfectly applied, rendering the power of deterrence even weaker.

However, it is arguably certain that there is at least some level of general deterrence operative in context of relative criminal justice. There is 'little dispute that having a criminal justice system that is known by all to impose punishment for violations has a general deterrent effect.'[190] Evidence for such a presumption can be shown in unique contexts such as police strikes[191] where crime rates significantly rose, and similarly in any 'post-catastrophic confusion' following a

[186] Robinson, *supra* note 182 at 147
[187] Beccaria, *supra* note 112 at 58
[188] Glueck, *supra* note 108 at 78
[189] Burke, *supra* note 126 at 150
[190] Robinson, *supra* note 182 at 144
[191] Beyleveld, 1980, quoted in Burke, *supra* note 126 at 153

natural disaster or conflict.[192] Thus whether or not deterrence works in individual cases may be a moot question; the more significant changes being the reinforced societal norm and a general cultural rejection of crime. The creation of legal social structures prevents a descent into brutish anarchy and is thus necessary for the protection of individual and group interests. As especially shown in the volatile context of ICLIOC offences, a society without law at all would be vastly more predisposed to crime (so called) than a society with a legal system, however imperfect.

3(ii)(c) Deterrence as Applied in ICLIOC Situations

In an ICLIOC situation, it seems likely that individual deterrence would reduce in significance as a purpose of justice, as the opportunities of repeating international crimes reduce with changing social and political contexts. Individual deterrence may in any case be significantly less effective in an ICLIOC context: 'deterrence…requires the credible and authoritative communication of a threatened sanction. The figurative nature of the international community poses tremendous obstacles to this enterprise', because it is a 'culturally foreign and geographically distant tribunal'.[193] Further, in a conflict situation, the individual's cost-benefit analysis may become skewed by the moral turpitude, institutional failings and 'collective pathologies' of the local society. Thus in ICLIOC, prosecution may be more centred around general deterrence and the idea of restoring the rule of law. Such a general deterrent effect may be operative both within the local afflicted community, and throughout the wider global 'elite' of political and military leaders. In this context, the 'efficiency' benefit of deterrence[194] would apply spectacularly, as the prosecution of a few may reflect a game-changer for every leader. Indeed, 'Evidence presented at the recent tribunals strongly suggests that a failure to prosecute perpetrators such as Pol Pot, Idi

[192] Glueck, *supra* note 108 at 76
[193] Sloane, *supra* note 110 at 72
[194] See Robinson, *supra* note 182 at 144

Amin, Saddam Hussein, Augusto Pinochet, and Papa Doc Duvalier convinced the Serbs and Hutus that they could commit genocide with impunity.'[195]

The controversial and extremely public nature of ICLIOC prosecutions at the ICC may render a significant deterrent effect, as the rhetoric of such indictments are frequently widely publicised and used as a political threat or tool for negotiations. However the perceived distance – temporally and geographically – of international criminal justice over powerful elites may dilute this power. If deterrence were to be seen as a core aim of ICLIOC, measures for future improvement may need to focus on locating tribunals closer to the conflict[196] or reducing the time delay between crime and conviction.[197] Finally, the liberal bent of international criminal law has the interesting effect that sentences are often more lenient in such tribunals than in their domestic counterparts. In the ICTR, for example, sentences are frequently vastly lower than those in Rwandan domestic courts, where the death penalty is permitted.[198] One possible reaction to draw from this may be a notion of deterrence as being felt at the indictment, rather than sentencing level: indictments by international tribunals reduce the credibility of the individual, affecting travel, trade, and political relationships, effectively cutting off the offender.[199] This conclusion would alter the retributive paradigm of formalised desert calculated in official sentences.

[195] Akhavan, *supra* note 172 at 629
[196] See e.g. Judge Sir Adrian Fulford, "The Reflections of a Trial Judge", Criminal Law Forum (2011) 215 at 216, discussing the failed attempt to relocate certain ICC trials to the DRC
[197] For example, Germain Katanga was convicted on March 7th 2014 for crimes committed in 2003
[198] See Andrew N. Keller, "Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR" 12 Ind. Int'l & Comp. L. Rev. (2001-2002) 53, generally and at 60
[199] See, e.g., the effect of ICC indictment upon Joseph Kony, analysed in Makau Mutua, "The International Criminal Court in Africa: Challenges and Opportunities" Noref Working Paper (2010) 3 at 4

3(iii) Rehabilitation

3(iii)(a) Rehabilitation: Introducing the Theory

The theoretical justification of rehabilitation also has the consequentialist aim of decreasing the total occurrence of crime; however it intends to achieve this aim through the alteration or reform of the individual from an offender into a valuable citizen with disinclination to reoffend. As such rehabilitation aims to 'cure offenders of their criminal tendencies'.[200]

The theory arose particularly during the early 20th century in reaction to the previous punitive philosophy through the emergence of 'correction' policies and facilities in the UK and USA.[201] Two official reports from the USA[202] and the UK[203] concurrently 'argued that crime was the result of some form of deprivation',[204] and enabled the peak of state expansion and intervention into civilian life.[205]

The rehabilitative notion thus proceeds from the assumption that 'human behaviour is the product of antecedent causes'[206] which are not necessarily due to the individual's fault or choice, but which can be logically controlled. Glueck calls this 'heredity and acquired weaknesses'.[207] The theory usually advocates an expansion of doctrine to include 'methods and attitudes from outside the realm of the formal law',[208] specifically arguing that '*Society should utilize every*

[200] Burke, *supra* note 126 at 159
[201] Burke, *supra* note 126 at 159
[202] 'President's Commission on Law Enforcement and the Administration of Justice' (1967)
[203] 'Royal Commission on the Penal System in England and Wales' (1967)
[204] Burke, *supra* note 126 at 160
[205] Burke, *supra* note 126 at 160
[206] Francis Allen, "Legal Values and the Rehabilitative Ideal" in Michael Tonry, ed, *Why Punish? How Much?* (New York: Oxford University Press, 2011) 97 at 97
[207] Glueck, *supra* note 108 at 74
[208] Glueck, *supra* note 108 at 72

scientific instrumentality for self-protection against destructive elements in its midst'.[209] Indeed, the retributive theory is frequently combined with the perspective that 'all crime is more or less pathological',[210] however combined with the optimism of possible change and the right to receive 'the greatest promise of self-improvement'.[211] The focus of rehabilitation is inherently individual, advocating personalised justice over the current 'mechanised' or 'mass-treatment' method,[212] considering instead the offender's 'potentialities for good and evil, his response to treatment and so on'.[213] Punishment is thus used as a 'medicine' imposed by 'trained scientists'[214] and proportional not to the gravity of offence (regarding either intention or outcome) but to the dangerousness of the offender, and 'his responsiveness to peno-correctional treatment.'[215]

3(iii)(b) Critiques of Rehabilitation

Despite its humane intentions,[216] the theory of rehabilitation has been one of the most widely criticised by criminal theorists, particularly reducing in credibility in the 1970s and 1980s[217]. Criticisms largely fall into two categories: normative and pragmatic.

Author and theorist C S Lewis was a vehement normative critic of the 'dangerous illusion' of rehabilitation.[218] Lewis' ultimate grievance with the rehabilitative theory was that it denied the status of a person as a free agent, such that from the moment of criminality we are each

[209] Glueck, *supra* note 108 at 73 [emphasis in original]
[210] Lewis, *supra* note 113 at 91
[211] Glueck, *supra* note 108 at 73
[212] Glueck, *supra* note 108 at 81
[213] Glueck, *supra* note 108 at 76
[214] Glueck, *supra* note 108 at 77
[215] Glueck, *supra* note 108 at 83 [emphasis omitted]
[216] Burke, *supra* note 126 at 160
[217] Sloane, *supra* note 110 at 86
[218] Lewis, *supra* note 113 at 91

'deprived the rights of a human being'.[219] Individuals were denied the 'right to retain their personality' and autonomous status;[220] Glueck in fact refers directly to criminal offenders as 'laboratory material'.[221] However 'To be 'cured' against one's will…is to be put on a level with those who have not yet reached the age of reason',[222] Lewis eloquently declares. 'No one will blame us…no one will revile us. The new Nero will approach us with the silky manners of a doctor…all will go on within the unemotional therapeutic sphere where words like 'right' and 'wrong' or 'freedom' and 'slavery' are never heard…*it will not be persecution*.'[223]

Lewis also argues that the rehabilitative theory removes entirely the notion of *desert* from criminal punishment. We 'cease to consider what the criminal deserves and consider only what will cure him',[224] and therefore implicitly leave the notion of justice behind. In removing desert from punishment, we remove, too, any justification which may have remained for treating a person as a means or an object rather than an end or a subject. 'Why, in Heaven's name, am I to be sacrificed to the good of society in this way? – unless, of course, I deserve it.'[225]

Francis Allen offered a more pragmatic critique of the rehabilitative ideal, arguing that it has been 'debased in practice'[226] and has the dangerous capacity to 'disguise the true state of affairs'[227] which in fact have led to increasingly severe penal measures, indeterminate confinement, and violations of individual liberty.[228] Glueck, in his promotion of rehabilitation, had argued that 'it is conceivable that a socially dangerous personality may remain incarcerated

[219] Lewis, *supra* note 113 at 92
[220] Burke, *supra* note 126 at 161
[221] Glueck, *supra* note 108 at 82
[222] Lewis, *supra* note 113 at 94
[223] Lewis, *supra* note 113 at 95 [emphasis added]
[224] Lewis, *supra* note 113 at 92
[225] Lewis, *supra* note 113 at 94
[226] Allen, *supra* note 206 at 101
[227] Allen, *supra* note 206 at 101
[228] Allen, *supra* note 206 at 102

for life'[229] regardless of the gravity of the offence, noting that the ultimate rehabilitative system would promote 'a wholly and truly indeterminate sentence'.[230] Release from incarceration was therefore granted 'not necessarily (for) those who were reformed but those who had conformed to the system',[231] with the only logical alternative being release of all those offenders who could not be rehabilitated.[232] Allen argued that this has resulted in a little-scrutinized, overly scientific system where 'men of good will…claim immunity from the usual forms of restraint'[233] resulting in systems which imperil the principles of individual liberty. Not only are we woefully ill-equipped to actually reform many offenders,[234] the predominant culture of good intentions encourages 'procedural laxness and irregularity'[235] as society comfortably assumes that the status quo led by benevolent physicians is inherently justified.

3(iii)(c) Rehabilitation as Applied in ICLIOC Situations

An early instinct when confronting rehabilitation in the context of international criminal law is that the theory seems anathema to common sense, as both impossible and repugnant in the highly politicised and reprehensible situation. Glueck[236] implies that we should treat criminals more leniently if they pose no danger: this most likely applies to ICLIOC criminals who, outside of their temporal and geographical context, are largely powerless and much less likely to commit international crimes. However this lenience goes against most emotive and rational reflexes in a context of mass atrocity. A key area of contention in ICLIOC contexts is child soldiers – often coerced or kidnapped before the age of legal culpability, and then forced and conditioned into

[229] Glueck, *supra* note 108 at 76
[230] Glueck, *supra* note 108 at 89
[231] Burke, *supra* note 126 at 161
[232] Robinson, *supra* note 182 at 148
[233] Allen, *supra* note 206 at 103
[234] See Allen, *supra* note 306 at 103, and Robinson, *supra* note 182 at 148
[235] Allen, *supra* note 206 at 104
[236] Glueck, *supra* note 108 at 83

horrific acts, these 'victim/perpetrators' perhaps deserve *both* rehabilitation and punishment. These observations may point to a question of whether 'crime' is even the correct word in an ICLIOC context – the lack of deviance, individualism and predictive social characteristics separate international crime from 'ordinary' domestic or even transnational crime. Perhaps the cold, 'banal' acts of a bureaucrat[237] or politician fit not under the adjective of 'criminal' but under some wider, societally dominant system. Perhaps, then, it is not the individual that needs rehabilitation, but wider society.

3(iv) Reparation, Restoration and Restitution

3(iv)(a) Introducing the Theories

Each of these theories of justice rests on a premise of 'repairing' damage done to the victim or wider society through punitive and complementary means. Reparation denotes the intention 'not only to redress the balance between the offender and victim or society'[238] but also 'that offenders should…be made aware of the harm they have caused'.[239] An example of a paradigmatic reparative punishment is a term of community service. Restitution, although expressing similar aims, has a different philosophical base, namely that a crime is a 'wrong' which must be righted by the 'payment' of the offender.[240] It thus focuses more closely upon the individual relationship of victim/offender, although becomes 'seriously problematic' when the offence is not a property-related crime, and thus repayment becomes less straightforward.[241] Restoration, too, focuses on the 'active responsibility for righting the wrong',[242] with the ultimate aim of improving the safety

[237] See Hannah Arendt, *Eichmann in Jerusalem: A Report on The Banality of Evil* (London: Penguin Books, 1963)
[238] Burke, *supra* note 126 at 169
[239] Burke, *supra* note 126 at 169
[240] Burke, *supra* note 126 at 169
[241] Burke, *supra* note 126 at 170
[242] Braithwaite, *supra* note 167 at 342

of the wider community. Restorative justice takes place at an institutional level, promoting values such as empowerment, accountability, restoration of human dignity, connection with community, remorse, and forgiveness.[243]

3(iv)(b) Critique of reparation, restoration and restitution

These theories of punishment again display a lack of deference to proportionality in sentencing, preferring 'openness to innovation and evaluation'[244] to the constraints of strict punishment guidelines. Braithwaite nonetheless notes that there is 'near universal consensus' among restorative theorists that punishments should at least respect fundamental human rights, although this guarantee exhibits a suspicious paucity of justification. Secondly, at the purest level, community-focused justice permits selective prosecutions which enable the acquittal of corporate criminals for the good of the economy[245] and the discriminatory targeting of communities based on their propensity to commit crime[246] – neither of which sit well with a contemporary paradigm of rights-centred crime prevention.

3(iv)(c) Reparation, Restoration and Restitution as Applied in ICLIOC Situations

A conversation relating the restorative theories of justice and ICLIOC touches on the frequent distance between international criminal tribunals (especially at the ICC and ad hoc tribunals) and the locality of the initial offence. Should ICLIOC criminals be ordered to complete community service in an attempt to rebuild the areas they afflicted and demonstrate the reach of international justice to their victims? Would a more localised system, such as the Gacaca trials in Rwanda, enable a more tangible and long-term healing of the aggrieved society? Secondly, the notion of

[243] Braithwaite, *supra* note 167 at 348-9
[244] Braithwaite, *supra* note 167 at 339
[245] Braithwaite, *supra* note 167 at 340
[246] Braithwaite, *supra* note 167 at 341

restorative justice brings to the fore questions regarding the role of victims in ICLIOC, and whether the ICC should continue in the direction of including victims as participants in all stages of pre-trial and trial proceedings as an independently represented party, despite concerns that this may affect procedural rights of defendants.[247]

Part Four: Incapacitation

4(i) Introducing Incapacitation: a Consequentialist Theory

Incapacitation, as one of the prima facie simplest rationales and justifications for criminal justice, consists merely of the 'prevention of similar offences on the part of the same individual by depriving him of the *power* to do the like'.[248] Rather than appealing to higher moral tenets, the tools of hypothesis and fear, or individual physiological rebuilding, the 'fundamental notion of incapacitation is taking a slice out of an individual criminal career'.[249] It is, as such, a fundamentally consequentialist theory of criminal punishment. Rendering penitentiary systems as mere 'cold storage depots'[250] the theory concedes that '(i)f the prison can do nothing else…it can detain offenders for a time and thus delay their resumption of criminal activity.'[251] The theory thus contains the simplicity of 'schoolboy logic',[252] an easily communicated and populist ideology of 'lock him up and throw away the key'. Despite its logical origins in mechanisms of

[247] See Judge Christine Van den Wyngaert, "Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge" 44 Case W. Res. J. Int'l L. (2011) 475
[248] Jeremy Bentham, 'Panopticon versus New South Wales: The Panopticon Penitentiary System and the Penal Colonization System Compared' (1802) at 174, emphasis in original
[249] Alfred Blumstein, 'Incapacitation' in S.H. Kadish (ed), *Encyclopedia of Crime and Justice, Volume 3* (New York: The Free Press, 1983) 873 at 874
[250] Rupert Cross, *Punishment, Prison, and the Public: An Assessment of Penal Reform in Twentieth-Century England by an Armchair Penologist* (London: Stevens & Sons, 1971) 85-6
[251] Malcolm M. Feeley and Jonathan Simon, 'The New Penology: Notes on the Emerging Strategy of Corrections and its Implications', 30 Criminology (1992) 449 at 458
[252] Franklin E. Zimring and Gordon Hawkins, *Incapacitation: Penal Confinement and the Restraint of Crime* (Oxford: OUP, 1995) at 42

execution, transportation and excommunication,[253] incapacitation is today most clearly exemplified by incarceration in prison. 'Society has defined the need for the removal of the criminal, and the prison system, as an organization, has come into being to achieve that task.'[254] The prison system incapacitates through its ability to physically confine and restrain crimogenic individuals, thereby potentially preventing the crime that would have occurred were those individuals at large. In either the traditional or contemporary sense, such '(r)emoval from a community…is, of course, society's most primitive form of social defense'. [255]

4(ii) A History of the Theory

The growth of incapacitation as a significant theory of justice has been a relatively recent occurrence,[256] coinciding largely with the decline of rehabilitation as a principled ideal in the 1970s[257] and the increasing conservatism of Western political and penal ideology during the 1970s and 1980s.[258] The dominant and once-revolutionary notion of rehabilitation began to lose public confidence in this era due to perceived increasing rates of crime, low success rates of rehabilitative programs, and the exhaustive conclusion of an infamous panel of researchers that "nothing works":[259] an admission of abject failure in the struggle to find successful rehabilitative techniques. At least in the USA and the UK, this era was also a time of lost confidence in political and social institutions,[260] a 'fearful and punitive' public attitude,[261] and increasing

[253] Zimring and Hawkins, *ibid* at 18
[254] J.E. Thomas, *The English Prison Officer Since 1850: A Study in Conflict* (London and Boston: Routledge and K. Paul, 1972) at 5
[255] Zimring and Hawkins, *supra* note 252 at 18
[256] Zimring and Hawkins, *supra* note 252 at 3
[257] Kathleen Auerhahn, 'Selective Incapacitation and the Problem of Prediction', Criminology, Volume 37 number 4 1999 703 at 704, and Zimring and Hawkins, *supra* note 252 at 3-11
[258] Feeley and Simon, *supra* note 251 at 449
[259] D.S. Lipton, R. Martinson and J. Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Validation Studies* (New York: Praeger Press, 1975)
[260] F. Allen, *The Decline of the Rehabilitative Ideal: Penal, Policy and Social Purpose* (New Haven: Yale University Press, 1981) at 18

political conservatism. As such, incapacitation was a 'residual justification for imprisonment',[262] not positively advocated, but merely the only logical tenets of criminological theory left after the 'undoing of the old order'.[263]

Prior to the early 1970s, arguably little academic attention was focused on the theory of incapacitation as justifying and explaining the criminal law: the terms 'incapacitation' and 'preventative detention' were rarely used in the titles of articles prior to the 1970s.[264] However, despite the close coexistence in time between the notion of incapacitation and the rise of the new right, theorists Zimring and Hawkins argued that incapacitation is compatible with both conservative and liberal perspectives. 'Both the minimalist and the expansionist rationale for imprisonment in the 1970s seem to have been grounded in the notion of crime prevention through incapacitation'.[265] While conservatives imagined expansionist policies and mass incarceration, liberals theorised 'mini-prisons relegated to the confinement of small numbers of habitual offenders or specially dangerous persons'.[266] Notably, in 1802 Bentham also argued that incapacitation presented a justification for the more liberal use of prisons rather than transportation (perceived as the severe option).[267] Thus despite the two disparate versions of incapacitation logic, in the 1970s and 1980s there emerged on both sides 'something approaching a consensus about the priority of restraint'.[268]

It is widely disputed whether the rise of incapacitation theory pre-empted, or was caused by, the increasingly high incarceration rates exhibited in the USA from the 1970s until the present day.

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[261] Zimring and Hawkins, *supra* note 252 at 11
[262] Zimring and Hawkins, *supra* note 252 at 3
[263] Zimring and Hawkins, *supra* note 252 at 9
[264] Zimring and Hawkins, *supra* note 252 at 13
[265] Zimring and Hawkins, *supra* note 252 at 10
[266] Zimring and Hawkins, *supra* note 252 at 4
[267] Bentham, *supra* note 224 at 173
[268] Zimring and Hawkins, *supra* note 252 at 3

Even in the 1990s, prison rates were seen to vastly increase despite the fact that 'rates of reported crime have risen only modestly and victimization rates have declined.'[269] More recent statistics suggest that over 2 million people are incarcerated in the USA.[270] It is likely that this rise both precipitated the new discussions of incapacitation, and was in turn exacerbated by them: 'Inevitably, appeals to build more new prisons…have been framed in terms of incapacitation.'[271]

The rise of incapacitative theory also corresponded with new and emerging research concerning the new 'career criminal' phenomenon, whereby researchers found small percentages of individuals to be responsible for the majority of offenses.[272] The research also pointed to an understanding that criminality only exhibited itself for a limited number of years, before expiring with the near-inevitable maturity of the offender.[273] This new conception and understanding of the archetypal 'criminal' seemed to reinforce the logic of incapacitating those prolific individuals for the duration of their potential criminal 'careers'. For many, 'the findings from criminal career research are logically consistent with the idea of selective incapacitation as an efficient means of targeting penal resources.'[274]

One of the more preeminent conceptions of incapacitation theory was constructed by Feeley and Simon in the early 1990s, where their form of 'new penology' emphasised a uniquely 'managerial' style of dealing with offenders.[275] Rather than focusing on the rehabilitation or punishment of certain individuals, new penology 'is about identifying and managing unruly

[269] Feeley and Simon, *supra* note 248 at 450
[270] Alex R. Piquero and Alfred Blumstein, 'Does Incapacitation Reduce Crime?', J. Quant Criminol (2007) 23:267 at 269
[271] Zimring and Hawkins, *supra* note 252 at 15
[272] Marvin E. Wolfgang, Robert M. Figlio, and Thorsten Sellin, *Delinquency in a Birth Cohort* (Chicago: University of Chicago Press, 1972) at 89
[273] Auerhahn, *supra* note 257 at 707
[274] Auerhahn, *supra* note 257 at 708
[275] Feeley and Simon, *supra* note 251

groups'[276] through a notion of 'systematic rationality and efficiency'.[277] The theorists consciously removed their focus away from ideas of 'responsibility, fault, moral sensibility, diagnosis, or intervention and treatment of the individual offender',[278] instead working to describe and locate groups defined by their dangerousness, 'to *regulate* levels of deviance',[279] in order 'not to eliminate crime but to make it tolerable through systematic coordination'.[280] The theory is thus one of 'probabilistic calculations and statistical distributions',[281] the criminal legal system likened to 'the circulation of baggage in airports or delivery of food to troops'.[282] Openly unprincipled in approach, the authors look to a future hypothetical theorist to 'stamp his or her own sense of order on the messy results of incremental change.'[283]

4(iii) Terms in incapacitation theory

4(iii)(a) Selective Incapacitation

The term 'selective incapacitation' describes the conclusion of incapacitation theorists that length of sentence should 'depend not upon the nature of the criminal offense or upon assessment of the character of the offender, but upon risk profiles.'[284] The intention is to isolate those individuals who pose a substantive 'risk' and to incapacitate them for as long as necessary, as opposed to for as long as they deserve (by dint of their convicted offenses). This permits a more effective criminal system as well as 'an efficient means of targeting penal resources'.[285]

[276] Feeley and Simon, *supra* note 251 at 455
[277] Feeley and Simon, *supra* note 251 at 452
[278] Feeley and Simon, *supra* note 251 at 452
[279] Feeley and Simon, *supra* note 251 at 452, emphasis in the original
[280] Feeley and Simon, *supra* note 251 at 455
[281] Feeley and Simon, *supra* note 251 at 452
[282] Feeley and Simon, *supra* note 251 at 467
[283] Feeley and Simon, *supra* note 251 at 460
[284] Feeley and Simon, *supra* note 251 at 458
[285] Auerhahn, *supra* note 257 at 708

4(iii)(b) Individual Impact and Community Impact

These terms are used by Zimring and Hawkins to distinguish the different potential forms of impact that can be measured when assessing incapacitation frameworks. Individual impact 'refers to the number of criminal acts that an individual would have committed had he or she not been restrained from doing so'.[286] Community impact, by contrast, is seen as a more sophisticated (and difficult to calculate) measure, comprising the 'net effect of (the offender's) absence'.[287] This calculation must therefore take into account the actions of the criminal group (who may take over from or replace the incarcerated individual), the prior status of the incarcerated individual within the criminal community, and other factors regarding the community as a whole. Zimring and Hawkin note that 'it is rarely safe to assume that individual and community-level incapacitation effects would be identical.'[288]

4(iv) Strengths of Incapacitation

Incapacitation theory is almost irrefutable in its elegant logic. Its 'seductive simplicity'[289] and seeming lack of complexity invites a high level of reverent faith in the notion that 'locking up more offenders *must* reduce criminal activity'.[290] It is thus an *instinctively* sound theory to which many respond positively. The simplistic theory and operation of incapacitation has pragmatic strengths beyond its aesthetic appeal – with no requirement to deter, rehabilitate, or morally chastise the offender, there is no barrier between themselves and the punishment's justification: 'the machinery if incapacitation does not have any moving parts.'[291]

[286] Zimring and Hawkins, *supra* note 252 at 43
[287] Zimring and Hawkins, *supra* note 252 at 43
[288] Zimring and Hawkins, *supra* note 252 at 43
[289] Auerhahn, *supra* note 257 at 727
[290] Zimring and Hawkins, *supra* note 252 at 16
[291] Zimring and Hawkins, *supra* note 252 at 42

Incapacitation also fits with our contemporary actuality, the criminal law paradigm of prison as the main tool of justice. '(W)hat imprisonment involves – locking offenders up and away from community settings – is ideally suited to the incapacitative function'.[292] As noted above, the theory also abides with the conception of 'career criminals', as it becomes more logically salient that incarcerating specific dangerous individuals for the at-risk period of their lives would have an efficient ability to greatly reduce criminality.

Finally, unlike many other consequentialist conceptions of justice, incapacitation avoids the critique that the theory can be logically used to target scapegoats – those other than the morally culpable. Incapacitation 'singles out blameworthy persons for disadvantageous treatment'[293] rather than merely vindicating an overall system of incarceration, as it works by 'punishing particular individuals to prevent *them* from committing further crimes'.[294] It is thus a theoretically more morally tenable model than theories of deterrence and rehabilitation, where the morally culpable individual can be subsumed by a system of justice.

4(v) Critiques and Weaknesses of Incapacitation

At its ultimate logical conclusion, the most effective and efficient form of incapacitation would be the imposition of the death penalty upon convicted offenders. At the very least, excommunication or permanent removal of an individual from society would be necessary for the fulfilment of a complete incapacitative effect. However in a contemporary context where neither of these options (with a few exceptions) are viewed as palatable, the normative effect of the incapacitative potential is somewhat deadened. Where very few countries promote whole-life sentences except in the most extreme circumstances, the effects and legitimacy of incapacitation

[292] Zimring and Hawkins, *supra* note 252 at 14
[293] Zimring and Hawkins, *supra* note 252 at 14
[294] Zimring and Hawkins, *supra* note 252 at 15, emphasis in the original

as a theory are reduced. Indeed, 'unless we are prepared to tolerate the incarceration of a certain number of people for the whole of their natural lives, the protection of the public…by means of a prison sentence must always be a matter of degree.'[295]

Further, in a situation of mass incarceration the incapacitation ideal has failed to materialise. Blumfield notes that in the USA (the 'clear world leader in incarceration'),[296] while the prison rate has grown exponentially by between 6% and 8% per year since 1970, resulting in 'the striking estimate that 1% of the U.S. adult population is in prison or jail on any given day',[297] the crime rate itself has changed very little over the same time frame.[298] This suggests both that any increase in crime 'contributed hardly at all to the prison population',[299] and also, perturbingly, that even increasing the incarceration rate to 1% of the adult population results in little perceivable incapacitative effect in reducing crime.

While the American test case of mass incarceration appears to have failed, more selective incapacitation techniques can also be critiqued for their predictive incapabilities. The legal system is arguably unable to adequately predict the future proclivities or actions of impugned individuals. 'The prospective identification of dangerous offenders is not something we do well',[300] indeed 'no convincing evidence exists that this is possible.'[301] Auerhahn notes the dangers of both '*underprediction*' – whereby high-rate criminals are misidentified as low-risk, and '*overprediction*' – the phenomenon of erroneous de jure high-risk attribution to de facto ordinary offenders. The latter phenomenon presents the ethically fraught likelihood that innocent

[295] Cross, *supra* note 250 at 159
[296] Alfred Blumstein, 'Bringing Down the U.S. Prison Population', 91 The Prison Journal (2011) 12 at 14
[297] Blumstein, *ibid* at 14
[298] Blumstein, *ibid* at 18
[299] Blumstein, *ibid* at 18
[300] Auerhahn, *supra* note 257 at 724
[301] Auerhahn, *supra* note 257 at 726

– or less guilty – individuals might be targeted with unjustifiably high sentences in misplaced pursuance of incapacitative aims. Such a misplacement is indeed a likelihood: Auerhahn notes that 'Most schemes that purport to predict offender risk have false positive rates of greater than 50%'.[302] Even post-facto, it is very difficult to discern the success or otherwise of incapacitation policies on overall crime rates. Causal correlations between higher or more specific incarceration rates and different patterns of crime are extremely difficult to prove. Indeed, 'Detailed observation of large numbers of persons who commit crime would be necessary over long periods of time before it would be possible to assemble the sort of historical data that would cover the…patterns of offenders.'[303]

Even regardless of prediction and measurement impediments, there are various ethical dimensions to the critiques of incapacitation as a theory of criminal justice. Auerhahn and Chaiken and Chaiken note the 'ethical ramifications' of punishing offenders for potential future crimes, being inconsistent with many core principles of criminal law and in denial of the autonomy and moral choice of the incarcerated individual.[304] The implied conclusion of incapacitation proponents that 'nothing works' to reform or rehabilitate persistent offenders[305] is a cynical disavowal of both the countless individuals who work tirelessly in rehabilitation programs, and of the many who have successfully turned from a life of crime. Incapacitation is at its core a nihilistic theory, too – through its isolation of the dangerous from the wider

[302] Auerhahn, *supra* note 257 at 709
[303] Zimring and Hawkins, *supra* note 252 at 46
[304] Auerhahn, *supra* note 257 at 710, *see also* Jan M. Chaiken and Marcia R. Chaiken, *Varieties of Criminal Behaviour* (The RAND Corporation, 1982) at 180
[305] See Lipton et al., *supra* note 259

community, prison systems deny the possibility and ability of inmates to contribute to wider life, for 'while executed criminals do not destroy, neither do they build'.[306]

Incapacitation, too, is merciless against the myriad frailties of the human individual. A defense of insanity against a criminal conviction and sentence is weakened when the purpose of the justice system is to incapacitate.[307] Indeed at its logical extent, all individuals who are rendered 'dangerous', regardless of fault, ought to be incarcerated under incapacitative doctrines.

Finally, it is arguable – and highly possible – that perceptions of 'dangerousness' may not correspond with reality. Indeed such a nebulous term as 'dangerous' is highly vulnerable to ulterior attributions and unwholesome usages. Auerhahn notes that in crimogenic prediction activities, 'some of the information used, such as employment history, and juvenile and adult drug use, have been called merely "proxies for race and class".'[308]

4(vi) Incapacitation: a Conclusion

Incapacitation theory has been praised for its pragmatism and vilified for its futility and ultimate nihilism. Incapacitation-based doctrines have also been criticised for eliciting prison overcrowding, the lack of normative proportionality between offence and sentence, and the likelihood of 'false positives' in assessing likelihood to commit future crime. In the emerging paradigm of international criminal law in ongoing conflicts, incapacitation plays a critical role in understanding the unspoken reality of the choices and actions of the International criminal Court. There will be much to say about the utility and justification of incapacitation of offenders before or during their perpetration of crimes, especially where the political context will inevitably be

[306] Glueck, *supra* note 108 at 82
[307] Richard A. Posner, 'An Economic Theory of the Criminal Law', Columbia Law Review Volume 85 (6) October 1985, 1193 at 1223
[308] Auerhahn, *supra* note 257 at 720

fraught, and where the day-to-day practicalities of obtaining custody for such offenders is vastly prohibitive. It is interesting to note that the ICC and related jail system constitutes a modern form of excommunication – removed, as perpetrators are, from the societal context of their crime. Time will tell if this system is extra-effective in the successful incapacitation of international criminals. The ICC context also alters the paradigm of incapacitation as requiring a prediction of the likelihood of reoffence: in the ongoing conflict situation, incapacitation is instead about apprehending the offender mid-atrocity.

Chapter 3: Case Study A – The 'Butchers of Bosnia':

Radovan Karadžić and Ratko Mladić

Introduction

In this chapter I shall consider the notion of incapacitation in international criminal law with regard to the two case studies of Radovan Karadžić and Ratko Mladić. Both of these individuals were key players in the Yugoslav conflict, and both have ultimately been apprehended by the ICTY to face trial. However in neither case was apprehension and incapacitation straightforward, and both raised complex questions of the aims, strengths and flaws in international justice regarding the incapacitative objective.

I will commence with a brief introduction of the background, rise to power, and purported crimes of each individual in turn. I shall then focus specifically on the facets of their indictment, lengthy fugitive lives, and eventual apprehension by the Court. Subsequently I shall consider the lessons and questions to have emerged from this experience. Discussing both concepts of direct and indirect incapacitation, I shall consider the extent to which these objectives were achieved by the ICTY in these cases. I shall go on to consider the factors which may have assisted or hindered the process of incapacitation. Finally, with regard to the Court's experiences in Karadžić and Mladić, I shall question the legitimacy of incapacitation as an international criminal law objective.

Part One: The Men

1(i) An Introduction to Radovan Karadžić: 'This poet has blood on his hands'[309]

Radovan Karadžić is one of the most interesting, complex, and potentially misunderstood of the world's great villains. Possessing charisma, natural authority, and 'several attributes of the phenomenology of narcissism',[310] Karadžić was psychologist by day, poet criminal by night, known for both his 'lyrical' soul and his status as 'a poet of holocaust'[311] He combined 'the psychology of a genocide perpetrator with that of a charismatic...political leader'.[312]

Born to peasant parents on the 19th of June 1945 in Savnik, Montenegro,[313] Karadžić experienced early life amidst 'a fountainhead of Serbian nationalism', during the period subsequent to a war which caused the death of some one million Yugoslavs.[314] He directed his life initially towards the study of medicine, in particular the practice of psychiatry, while simultaneously becoming one of 'the most gifted of a younger generation of poets on Sarajevo'.[315] The stark irony of his focus in medicine marks Karadžić out as 'the first physician to be so indicted (as a war criminal) since the 1946 Nuremberg Doctors' Trial',[316] leading to the American Psychiatric Association to declare his actions as 'a profound betrayal of the deeply human values of medicine'.[317] Others have noted the high concentration of psychiatrists in the

[309] Jay Surdukowski, 'Is Poetry a War Crime? Reckoning for Radovan Karadžić the Poet-Warrior', 26 Michigan Journal of International Law (2005) 673 at 686
[310] Kenneth B. Dekleva, MD, and Jerrold M. Post, MD, 'Genocide in Bosnia: The Case of Dr. Radovan Karadžić', 25(4) Journal of the American Academy of Psychiatry and the Law (1997) 485 at 491
[311] Surdukowski, *supra* note 309, at 673
[312] Dekleva and Post, *supra* note 310 at 486
[313] ICTY: 'Third Amended Indictment against Radovan Karadžić', IT-95-5/18-PT, 27 February 2009, at 2; *see also* Dekleva and Post, *supra* note 310 at 486
[314] Dekleva and Post, *supra* note 310 at 486
[315] Dekleva and Post, *supra* note 310 at 487
[316] Dekleva and Post, *supra* note 310 at 486
[317] 'APA Condemns Bosnian Serb Leader for Serb Atrocities', Psychiatric News, April 7 1993

Serbian Democratic Party of Bosnia and Herzegovina (*Srpska Demokratska Stranka*, or SDS),[318] resulting in accusations of 'psychological manipulations of the combatants…fanned by the psychobabble of…Karadžić'.[319]

Much has also been written of the poetic tendencies of the leader. Described as a 'poet warrior',[320] the apocalyptic and apparently pro-violent bent of Karadžić's writing evoke premonitions of the future,[321] even blatant propaganda, cutting 'visceral similarities between art and life'.[322] In his poems, '(b)ullets are beautiful'[323] and the 'language has a gentle longing for the warrior life'.[324] With hindsight, much of his work presents 'a future he himself had invented',[325] often read as 'nationalist and prophetic of the butchery he would lead'.[326] Karadžić's poems transcended the academic, in the Yugoslav war, 'During frequent visits to the frontline', he would purportedly use poem recitals 'to incite his troops'.[327] At least one author has described this 'stirring up of troops with blood curdling poetry...(as) no different from...RTLM Rwanda' during the 1995 genocide.[328]

Through his pre-political life, Karadžić and his wife, fellow psychiatrist Ljiljana Zelen, were reported to have lived 'in a mixed neighbourhood populated by Serbs, Croats, and Muslims' with the Karadžić family 'counting many Muslims among their friends'.[329] Subsequently, however,

[318] Dekleva and Post, *supra* note 310 at 489
[319] D. L. Breo, 'Cherif Bassiouni Condemns 'psychology' of Balkan Crimes', Human Rights II: JAMA 270 (1993) at 643-4
[320] Surdukowski, *supra* note 309 at 692
[321] Dekleva and Post, *supra* note 310 at 491
[322] Surdukowski, *supra* note 309 at 686
[323] Surdukowski, *supra* note 309 at 684
[324] Surdukowski, *supra* note 309 at 685
[325] Christopher Merrill, *Only the Nails Remain: Scenes from the Balkan Wars* (Oxford: Rowman and Littlefield, 1999) at 155
[326] Surdukowski, *supra* note 309 at 684
[327] Surdukowski, *supra* note 309 at 688
[328] Surdukowski, *supra* note 309 at 695
[329] Dekleva and Post, *supra* note 310 at 488

Karadžić's reputation suffered as became embroiled in a criminal accusation of fraud and the misuse of public funds, serving 11 months in prison[330] in the mid-1980s, although later being released when charges were dropped. Claiming the accusation to be 'political' due to his Communist Party membership,[331] this period may have marked his turn to active politics, with Karadžić becoming a founding member of the SDS in 1990.[332] Through a swift and relentless political trajectory, Karadžić rose to the Presidency of the Republica Srpska and Supreme Commander of the Republica Srpska armed forces 'from 17 December 1992 until about 19 July 1996'. Karadžić was thus 'one of the highest-ranking officials to be indicted by the ICTY'[333] and 'the highest civilian and military authority in the Republica Srpska',[334] with de jure power which included commanding the entire army of the Bosnian Serb administration, creating and pursuing military and administrative policy, and appointing and discharging key military officers.

During the Yugoslav conflicts, these powers became Karadžić's ultimate hamartia, and he today stands at trial in the ICTY for participating both through a joint criminal enterprise and directly in crimes of genocide, extermination, murder, persecutions, and other crimes.[335] His trial, which began in 2009, came after some fourteen years of fugitive undercover life during which Karadžić evaded the law. That such a high-profile individual avoided capture and incarceration for so many years subsequent to his indictment is a phenomenon that will be discussed below. At current, it is pertinent merely to note the severity and seriousness of his crimes. Karadžić is implicated both in the Bosnian Serb Army murder of over 8,000 men and boys during the

[330] Dekleva and Post, *supra* note 310 at 488
[331] Dekleva and Post, *supra* note 310 at 488
[332] Third Amended Indictment, *supra* note 313 at 2
[333] Willem de Lint, Marinella Marmo, and Lerida Chazal, eds, *Crime and Justice in International Society* (New York: Routledge, 2014) at 190
[334] Third Amended Indictment, *supra* note 313 at 2
[335] ICTY: 'Statement of the Office of the Prosecutor on the Arrest of Radovan Karadžić', Press Release, The Hague, 21 July 2008, available online at http://www.icty.org/sid/9950, last accessed on 03/07/2014

Srebrenica genocide in July 1995,[336] and charged with a significant contribution to the forty-four-month siege of Sarajevo in which some 12,000 perished.[337] He is additionally accused of 'taking UN peacekeepers and military observers hostage'[338] as well as participation in various other attacks in towns in Bosnia and Herzegovina, including the transfer of thousands of non-Serbs to detention facilities.[339] All of these alleged crimes were purported to have been committed 'with the aim to permanently remove Bosnian Muslim and Bosnian Croat inhabitants as part of (a) campaign of ethnic cleansing.'[340]

During his trial, Karadžić has gained new renown for his non-cooperation and his tendency to 'exasperate the Chamber by misusing the time allocated for cross-examination in order to make comments'.[341] Through his declaration of non-recognition of the tribunal's legitimacy, his lengthy self-representation, and his occasional refusal to appear at trial,[342] Karadžić has been accused of both sabotage and an attempt to 'instrumentalize the publicity' that the trial affords.[343]

[336] Third Amended Indictment, *supra* note 313
[337] Surdukowski, *supra* note 309 at 674-5
[338] ICTY: 'Prosecutor Serge Brammertz Statement on the Transfer of Radovan Karadžić' Press Release, The Hague, 30 July 2008, available online at http://www.icty.org/sid/9955, last accessed on 03/07/2014
[339] Statement of the Office of the Prosecutor, *supra* note 335
[340] De Lint et al, *supra* note 333 at 191
[341] Stefan Treschel, 'Rights in Criminal Proceedings under the ECHR and the ICTY Statute – a Precarious Comparison' in Bert Swart, Alexander Zahar, and Goran Sluiter, eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 149 at 187
[342] Nancy Amoury Combs, 'Regulation of Defence Counsel: An Evolution Towards Restriction and Legitimacy' in Bert Swart, Alexander Zahar, and Goran Sluiter, eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 296 at 313
[343] Treschel, *supra* note 341, at 187

1(ii) An Introduction to Ratko Mladić: the man who 'made a career out of terror'[344]

Emerging, like Karadžić, out of a period of international turbulence, Ratko Mladić was born in Kalinovik, Bosnia and Herzegovina, on the 12th of March, 1942.[345] Growing up in Tito's Yugoslavia, Mladić's father was killed on his second birthday in 1945 fighting pro-Nazi Croatian Ustasha military.[346]

The young Mladić quickly became involved in the armed forces himself, training at the Military Academy in Belgrade,[347] and becoming a regular officer of the Yugoslav People's Army (JNA).[348] Rising through the ranks of the JNA in the early 1990s, Mladić was appointed 'Commander of the Main Staff of the VRS (Army of the Serbian Republic of Bosnia and Herzegovina)', a newly created Bosnian Serb army, on the 12th of May 1992.[349] He remained in this position of command until at least the 8th of November, 1996, being promoted to Colonel General in June of 1994.[350] Thus Mladić was 'the Bosnian Serb army chief throughout the Bosnian war – and the man many hold responsible for the worst atrocities in that bloody conflict.'[351]

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[344] Julian Borger, The Guardian: 'Ratko Mladic: the full story of how the general evaded capture for so long', 2 April 2013, available online at http://www.theguardian.com/world/2013/apr/02/ratko-mladic-life-run, last accessed on 03/07/2014

[345] ICTY: 'Case Information Sheet: Ratko Mladic' IT-09-92, available online at http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf, last accessed on 06/07/2014; ICTY: 'Fourth Amended Indictment (Prosecutor v Ratko Mladic)' IT-09-92-PT, 16 December 2011, available online at http://www.icty.org/x/cases/mladic/ind/en/111216.pdfl, last accessed on 02/07/2014, at 1

[346] BBC News Europe: 'Profile: Ratko Mladic, Bosnian Serb Army Chief', 16 May 2012, available online at http://www.bbc.co.uk/news/world-europe-13559597, last accessed on 02/07/2014

[347] Fourth Amended Indictment, *supra* note 345, at 1-2

[348] Profile: Ratko Mladic, *supra* note 346

[349] Profile: Ratko Mladic, *supra* note 346; Fourth Amended Indictment, *supra* note 345, at 2

[350] Case Information Sheet (Mladic), *supra* note 345, at 1; Fourth Amended Indictment, *supra* note 345, at 2

[351] Profile: Ratko Mladic, *supra* note 346

The 'stocky, ruddy-faced'[352] Mladić has been described as 'a career soldier' who 'inspired passionate devotion'[353] in his inferiors. He utilised this extreme leadership to the detriment of Bosnian Muslims and Bosnian Croats during his reign of military power. Coming to 'symbolise the Serb campaign of ethnic cleansing of Croats and Bosniaks',[354] Mladić is today charged with genocide, persecution, extermination, murder, deportation inhumane acts, terror, unlawful attacks on civilians, and the taking of hostages.[355] He is accused of having committed these crimes with the overall intention to 'permanently remove Bosnian Muslims and Bosnian Croats from Bosnian Serb-claimed territory'.[356] Due to his unique position of military superiority, Mladić was purported to have completed these crimes through a joint criminal enterprise (alongside Radovan Karadžić, among others), through his position of superiority and effective control, and through direct participation in the planning and instigation of the crimes charged.[357] Indicted in 1995, Mladić subsisted undercover for even longer than Karadžić, arriving at The Hague in late May of 2011.

Like Karadžić, the specific charges against Mladić include participation in the massacre at Srebrenica, unlawful civilian targeting during the siege of Sarajevo, and the taking of UN hostages, among other attacks and crimes.[358] During the Srebrenica massacre, Mladić was purportedly 'at the Muslim enclave…reassuring panicked women captives their loved ones

[352] Borger, *supra* note 344
[353] Profile: Ratko Mladic, *supra* note 346
[354] Profile: Ratko Mladic, *supra* note 346
[355] Case Information Sheet (Mladic), *supra* note 345
[356] Fourth Amended Indictment, *supra* note 345 at 4
[357] Case Information Sheet (Mladic), *supra* note 345
[358] Fourth Amended Indictment, *supra* note 345

would be safe'.[359] At the siege of Sarajevo, Mladić's 'disregard for civilian casualties' emerged through his issued commands: '"Burn their brains!" was one'.[360]

While any rational motivation for such a virulent disregard for innocent humanity is hard to obtain, attempts have been made in Mladić's case. Some comment has emerged about the fact that Mladić's daughter, Ana, killed herself with Mladić's pistol in Belgrade a year before the Srebrenica massacre, due, according to some, to her having 'chosen suicide after learning of atrocities committed by forces under her father's command'.[361] Difficult as such speculations are to substantiate, it is certain that bloodshed and familial loss trailed Mladić through much of his life.

During his trial at the ICTY, Mladić has become 'famous for his animated appearances',[362] appealing to the audience and engaging in emphatic gestured affectations. In performing a threatening throat-slitting gesture to the public gallery, which included women from Srebrenica, he enhanced his unconstrained and violent reputation.[363] He forcefully denies all 11 charges held against him. The toll to his health of the years spent undercover, alongside Mladić's increasing age, are becoming impediments in the progress of the trial, however. During cross-examination he 'struggles to stand' and purportedly 'suffers from a memory disorder that makes it hard for him to differentiate between truth and fiction.[364]

[359] Borger, *supra* note 344
[360] Profile: Ratko Mladic, *supra* note 346
[361] Profile: Ratko Mladic, *supra* note 346
[362] BBC News Europe: 'Ratko Mladic War Crime Defence Begins', 19 May 2014, available online at http://www.bbc.co.uk/news/world-europe-27464998, last accessed on 02/07/2014
[363] Julian Borger, The Guardian, 'Ratko Mladic's trial opens with a cut-throat gesture', 16 May 2012, available online at http://www.theguardian.com/world/2012/may/16/ratko-mladic-war-crimes-trial, last accessed on 13/09/2014
[364] Ratko Mladic War Crime Defence Begins, *supra* note 362

Part Two: The Fugitives

2(i) Fugitive Life and the Incapacitation of Radovan Karadžić

Radovan Karadžić was indicted as a war criminal by the ICTY in July 1995, and indicted several times subsequently. Due to the failure to arrest Karadžić and his co-perpetrator, Mladić, the ICTY Trial Chamber decided to pursue a procedure of 'confirmation of charges',[365] in which evidence adducing to all the counts was presented and considered by the Chamber. The measure was aimed at 'taking some action to react to the lack of cooperation of states…to detain persons accused of appalling crimes.'[366] As well as permitting the issuance of international arrest warrants and seizure of assets, the procedure was 'designed to stimulate states to arrest indictees'.[367] As a result of the procedure, all charges were confirmed and the ICTY Prosecutor issued an international arrest warrant for the two fugitives in 11 July 1996.[368] The UN Security Council responded to the findings by issuing a statement to Serbia in 1996 requesting their fulfilling the warrants of arrest.[369]

Initially, Karadžić 'showed cunning and staying power'[370] by managing to remain in office, although the ICTY indictment prevented the leader from attending the Dayton Peace Accords. At Dayton, an agreement was made that an indicted individual could not hold public office,[371] as

[365] A measure adopted by the ICTY under Rule 61 of the Rules of Procedure and Evidence – Confirmation of Charges Procedure
[366] A. Cassese et al, eds, *Cassese's International Criminal Law: Third Edition* (Oxford: Oxford University Press, 2013) at 361, fn 65
[367] Cassese, *ibid*.
[368] Case Information Sheet (Mladic), *supra* note 345; Dekleva and Post, *supra* note 2 at 489
[369] Kimberly Prost, 'The ICTY and its Relationship with National Jurisdictions: Powers, Limits, and Misconceptions' in Bert Swart, Alexander Zahar, and Goran Sluiter, eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 434 at 439
[370] Dekleva and Post, *supra* note 310 at 492
[371] General Framework Agreement for Peace in Bosnia and Herzegovina, November 21, 1995, Article IX(1), available online at http://peacemaker.un.org/sites/peacemaker.un.org/files/BA_951121_DaytonAgreement.pdf, last accessed on 06/08/2014

such vast public pressure was placed on Karadzic to resign, despite his desire to remain until the following elections. Eventually, a controversial meeting with US special envoy Richard Holbrooke led to Karadzic agreeing to step down from public life, with the apparent (highly contentious) bargain that he would not face prosecution.[372] After resigning from public life, Karadzic remained living in Belgrade for some time, until he began to fear increasing calls for his arrest, and eventually dropped out of public sight. Karadžić was purportedly last seen in public 'in eastern Bosnia in 1996'.[373] Even undercover, his fugitive lifestyle has 'not dampened Karadžić's literary career',[374] as the author-turned-accused *genocidaire* was able to publish new editions of his poetry and a novel years into his undercover life.[375]

Karadžić's early fugitive years are subject to much speculation and few confirmed facts. Some claim that he received a retinue of bodyguards provided by Bosnian Serb authorities up until 2000.[376] After 2000, it is likely that he was 'living anonymously in a series of apartments in Belgrade', writing and hiding, physically concealed from the public eye.[377] Relatively few family members knew of his whereabouts;[378] upon his arrest, his wife Ljiljana apparently stated 'at least now we know he is alive'.[379]

However, at least in the later years of his concealment, Karadžić's technique for avoiding capture involved hiding in plain sight, 'under the assumed identity of a new-age healer, Dragan Dabic,

[372] ICTY Prosecutor v Radovan Karadzic, Case no. IT-95-5/10-PT, 'Decision on the Accused's Holbrooke Agreement Motion', 8 July 2009, available online at http://www.icty.org/x/cases/karadzic/tdec/en/090708.pdf, last accessed on 05/08/2014
[373] BBC Europe: 'Secret Life of Fugitive Karadžić', 25 July 2008, available online at http://news.bbc.co.uk/2/hi/europe/7520661.stm, last accessed on 03/07/2014
[374] Surdukowski, *supra* note 309 at 683
[375] Surdukowski, *supra* note 309 at 683
[376] Hawton, *supra* note 13 at 200
[377] Hawton, *supra* note 13 at 202
[378] Hawton, *supra* note 13 at 205
[379] Hawton, *supra* note 13 at 174

complete with topknot and loose clothing'.[380] Hiding 'not in a distant monastery or a dark cave'[381] but behind a long white beard, Karadžić lived in a variety of homes mainly in Belgrade. He worked at a clinic for alternative medicine, in an 'open and active life that would appear to be an extraordinary risk for one of the world's most wanted men.'[382] His choices were presumably driven predominantly by the need to make money and an obvious inability to produce certificates proving his medical qualification. 'Masquerading as an expert in human quantum energy',[383] Karadžić maintained a website, gave regular public lectures on alternative medicine, and frequently visited, and performed traditional music in a local bar.[384] While his family purportedly had no knowledge of his whereabouts,[385] with their property being occasionally raided by the police and European Union peacekeepers,[386] Karadžić did not require any security at all.[387] Very few people knew of his true identity – neither his landlord, nor the editor of a magazine to which he frequently contributed.[388] '(T)his man did not fear anything'.[389]

Karadžić was eventually arrested as a possible result of a tip-off or communication mistake[390] on either the 18th[391] or the 21st of July 2008[392] by Serb authorities, and was shortly transferred to

[380] Borger, *supra* note 344
[381] Nicholas Kulish and Graham Bowley, New York Times: 'The Double Life of an Infamous Serbian Fugitive', July 23 2008, available online at http://www.nytimes.com/2008/07/23/world/europe/23Karadžić.html?pagewanted=all&_r=0, last accessed on 03/07/2014
[382] Kulish and Bowley, *ibid*.
[383] Secret Life of Fugitive Karadžić, *supra* note 373
[384] Kulish and Bowley, *supra* note 381; Secret Life of Fugitive Karadžić, *supra* note 373
[385] Hawton, *supra* note 13 at 174
[386] Kulish and Bowley, *supra* note 381; 'EU raids homes of Karadzic family', Al Jazeera, 27 March 2008, available online at http://www.aljazeera.com/news/europe/2008/03/200861502332215152.html, last accessed on 05/08/2014
[387] Secret Life of Fugitive Karadžić, *supra* note 373
[388] Kulish and Bowley, *supra* note 381
[389] Goran Kojic (editor, Healthy Life Magazine) quoted in Secret Life of Fugitive Karadžić, *supra* note 373
[390] Kulish and Bowley, *supra* note 381
[391] Hawton, *supra* note 13 at 182-5
[392] Prosecutor Serge Brammertz Statement, *supra* note 338; ICTY: 'Tribunal Welcomes the Arrest of Radovan Karadžić' Press Release, The Hague, 21 July 2008, available online at http://www.icty.org/sid/9952, last accessed on 03/07/2014

The Hague.[393] At the time, a $5 million award had been offered for his arrest.[394] The exact location of the arrest, somewhere in Belgrade, was not disclosed, although Serbian officials denied any foreign involvement in what had been a domestic operation.[395] One author states that he was arrested while travelling on the Number 73 bus out of Belgrade by a officers who had been following the ex-leader 'for some time'.[396] While speculation that the Serbian government might have known the whereabouts of Karadžić for a long while was emphatically denied,[397] the arrest 'seemed aimed at strengthening Serbia's ties to the European Union'.[398] It is undoubtable that the ICTY faced great negative public opinion and 'political obstructionism' in Serbia,[399] and even at the time of his arrest, many in Belgrade viewed Karadžić as a 'great hero',[400] with some 10,000 supporters taking to the streets to protest his arrest.[401]

2(ii) Fugitive Life and the Incapacitation of Ratko Mladić

Alongside Karadžić, the ICTY indicted Mladić primarily on the 25th of July 1995, followed by several further and amended indictments up until December 2011.[402] The Trial Chamber confirmation proceeding, discussed above, also applied to Mladić's pursuit. However Mladić remained at large until May 2011, some sixteen years after this date. Indeed, the indictment did not even spark the immediate removal of Mladić from his military post: President Slobodan Milošević dismissed him instead only on the 8th of November 1996.

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[393] Prosecutor Serge Brammertz Statement, *Supra* note 338
[394] Hawton, *supra* note 13 at 5
[395] Kulish and Bowley, *supra* note 381
[396] Hawton, *supra* note 13 at 3
[397] Hawton, *supra* note 13 at 19
[398] Kulish and Bowley, *supra* note 381
[399] Janine Natalya Clark, 'The Impact Question: The ICTY and the Restoration and Maintenance of Peace' in Bert Swart, Alexander Zahar, and Goran Sluiter, eds, *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press, 2011) 55 at 58
[400] Kulish and Bowley, *supra* note 381
[401] Hawton, *supra* note 13 at 174
[402] Case Information Sheet (Mladic), *supra* note 345

In the interim years between indictment and arrest, Mladić lived an increasingly constrained life. Although initially enjoying the open support and protection' of Milošević,[403] living in relative luxury with a large retinue of staff and spending time in public places, restaurants and football matches,[404] this elevated lifestyle was not to last. In the late 1990s Mladić removed himself from public view, made paranoid by increased international focus upon catching war criminals, and the 2001 arrest of Milošević.[405] He placed his trust in a dwindling circle of confidants, including the Serbian military, his wartime lieutenants, and finally his family members.[406] Commentators have argued that he achieved compliance and assistance through a combination of blackmail and fear.[407] For a while, Mladić lived very close to Karadžić, although the two 'loathed each other', adopted contrasting covert techniques, and had support networks that did not overlap, and so they never joined forces.[408]

Mladić's quality of life was quickly deteriorating, he rarely ventured outside, and was 'fastidious' about the protection of his health, lest a doctor's visit compromise his anonymity.[409] There is evidence that he may have spent time hidden in underground bunkers in Belgrade.[410] By the last years of his concealment, Mladić was living in one room with a relative, almost entirely isolated – even from his wife and son – suffering repeated strokes without medical attention.[411] From a luxurious life with a wide network of allies and expensive tastes, Mladić eventually

[403] Profile: Ratko Mladic, *supra* note 346
[404] Profile: Ratko Mladic, *supra* note 346; Borger, *supra* note 344
[405] Profile: Ratko Mladic, *supra* note 346
[406] Borger, *supra* note 344
[407] Borger, *supra* note 344
[408] Borger, *supra* note 344
[409] Borger, *supra* note 344
[410] Borger, *supra* note 344
[411] Borger, *supra* note 344

'stayed free by trusting fewer and fewer people, (and) living in increasing isolation and squalor'.[412]

Although efforts to arrest Mladić had become increasingly intense during the late 2000s, not least due to pressure from the USA and the EU making war criminal arrest a precondition for Serbia's entry,[413] it was apparently a routine patrol that eventually broke the fugitive's concealment. On the 26th of May 2011, a policeman patrolling a farmhouse in Lasarevo, northern Serbia[414] 'opened the door and saw…an old, ailing man'[415] who immediately identified himself as Ratko Mladić, bringing the years-long search to its conclusion. Mladić was eventually transferred to the ICTY in The Hague on the 31st of May 2011,[416] with the trial officially commencing on the 16th of May 2012. By the time of his arrest, Mladić 'was in poor health, and had difficulty moving, apparently due to a series of strokes.'[417]

Part Three: Incapacitation and the 'Butchers of Bosnia': Lessons and Questions

3(i) Introduction: Direct incapacitation vs. Indirect incapacitation

In response to the experiences and events described above, I shall consider the extent to which the aim of incapacitation was fulfilled, whether this could or should have been a core priority of the ICTY, and the factors that worked in favour or against the success of an incapacitative success in the cases of Radovan Karadžić and Ratko Mladić.

I shall first consider 'direct incapacitation'. By such a notion, I mean the more obvious and recognised notion of incapacitation: this includes both the incarceration of the accused by a

[412] Borger, *supra* note 344
[413] Profile: Ratko Mladic, *supra* note 346
[414] Profile: Ratko Mladic, *supra* note 346
[415] Borger, *supra* note 344
[416] Case Information Sheet (Mladic), *supra* note 345 at 1
[417] Profile: Ratko Mladic, *supra* note 346

judicial institution in order to await trial and/or conviction, and the removal of the impugned individual from the societal situation of their accused crime(s).

I will subsequently consider 'indirect incapacitation'. Although there is substantial overlap between the direct and indirect forms, by the latter I mean to convey the notion that while not physically apprehending the accused, a judicial institution can nevertheless render their freedoms so limited so as to make continuation of their prior life, and in particular their perpetration of crimes, impossible. Among other eventualities, this notion includes 'the ability of international criminal tribunals to de-legitimate political leaders and shrink the public space for denial that notorious atrocities occurred.'[418]

Both of these concepts of incapacitation shall be discussed in the following sections with regard to the accused criminals, Radovan Karadžić and Ratko Mladić.

3(ii) Direct Incapacitation as **Successful** *Regarding Karadžić and Mladić*

In the case of both Karadžić and Mladić, it seems that the ICTY indictments undoubtedly contributed to the leaders' removal from their sphere of influence. But for the ICTY, the pair 'might still hold positions of power in the former Yugoslavia'.[419] In many ways, their powers were stripped both formally and de facto: 'prominently', Karadžić was barred from participating in the 1995 Dayton Peace Talks[420] despite his Presidency of a key state, due to the indictment. While neither were immediately removed from their posts following the ICTY's 1995 indictment, Karadžić becoming ousted at the 1996 elections and Mladić being removed from his military commander role in November of 1996, it seems imprudent to refute that the eventual

[418] Saxon, *supra* note 12 at 1
[419] Saxon, *supra* note 12 at 1
[420] Carsten Stahn, 'The Future of International Justice', The Hague Justice Portal, 9 October 2009, available online at http://www.haguejusticeportal.net/index.php?id=11106, last accessed on 07/06/2014

diminishment of their power came as a partial result of the accusations against them. The loss of reputation, legitimacy, and international political currency as a result of the indictments certainly played a role in their increasing isolation and seclusion. Eventually, of course, the two were also physically removed from the geographical arena in which their accused crimes occurred – although many would argue that this eventuality occurred so temporally distantly (in 2008 for Karadžić and 2011 for Mladić) from the crimes committed as to have had negligible effect on the prevention of further crimes or the improvement of the post-war society.

This dethronement of two major leaders in the Yugoslav conflict had pertinent and real results. 'Many are convinced that over time, as the ICTY has gained custody over…senior officials, it has deterred atrocious crimes that would have been committed'.[421] The physical removal of some of the worst criminals from both the political and/or military sphere, and, eventually, from the geographical location of their crimes, has reduced the likelihood and capability for further international crimes to occur, at least at the behest of these perpetrators. Perhaps '"only" 10,000 people (were) killed in the 1999 (Kosovo) war because would-be killers were afraid of ending up at The Hague'.[422]

The physical or political incapacitation of these and other individuals, in particular former President Milošević, also 'facilitated Serbia's transition to democracy'.[423] Removal of the worst repeat criminals from their situational context is undoubtedly a precursor to the achievement of a sustainable renewal process for the society involved. '(T)hanks to the tribunals', one commentator writes, 'the most dangerous people…are not playing active roles and undermining

[421] Diane Orentlicher, 'International Justice Marks its Fifteenth Anniversary: A Preliminary Assessment of the ICTY's Impact in Serbia' Human Rights Brief 16, no. 2 (2009) 19 at 20
[422] Power, *supra* note 10 at 1101
[423] Orentlicher, *supra* note 421 at 21

extremely fragile peace in the countries they once manhandled.'[424] The possibly invasive surgical procedure also contributes to negating the spread of infectious corrupted, prejudicial and nepotistic facets of the leadership. Indeed, Serbian journalist Filip Svarm argued that, without the indictments, "we would have had a mafia oligarchy as our leaders".[425] However flawed the international tribunals' intervention has been, prior to the 1990s, no such intervention could or would have occurred at all.

As well as contributing to the disempowerment of both individuals, the ICTY indictments had a further effect of invalidating the political and social support of Karadžić and Mladić. A 2008 Open Justice Initiative study found that 'the most important contribution of the ICTY was its de-legitimating effect in politics'.[426] Even disregarding their de jure removal from power, accusations of international criminality and the use of poignant terminology like 'genocide' and 'persecution' helped 'to de-legitimize former political elites and national 'heroes'.'[427]

While much of these outcomes can be credited to the ICTY and its indictments, it is also important to note the ability of the ICTY to affect the behaviour and actions of alternative, potentially more potent bodies which also assisted in the incapacitation of Mladić and Karadžić in this case. Theorists argue that 'other, more powerful stakeholders [including the United States, NATO, and the EU] adopted the ICTY's mission and made their relationships with Serbia conditional upon Belgrade's cooperation with the ICTY'.[428] As such, 'the court has indirectly

[424] Power, *supra* note 10 at 1101
[425] Filip Svarm (Serbian journalist) reported in Orentlicher, *supra* note 17 at 41
[426] Orentlicher, *supra* note 17 at 7
[427] Stahn, *supra* note 420 at 7
[428] Patrice C. McMahon and David P. Forsythe, 'The ICTY's Impact on Serbia: Judicial Romanticism meets Network Politics' 30(2) Human Rights Quarterly (2008) 412 at 433

shaped domestic discourse and outcomes' leading to the eventual consequence of the de-legitimisation and incapacitation of the two indictees.[429]

3(iii) Direct Incapacitation as **Unsuccessful** *Regarding Karadžić and Mladić*

The most obvious argument in rebuttal to the perceived success of the ICTY in incapacitating Karadžić and Mladić is simple: the two were not incapacitated by the ICTY, or at least not until more than a decade after the conclusion of their accused crimes. This 'flight from the law became an embarrassment to Serbia' and the wider international community.[430] While the causes of this lacuna of action will be discussed below, it is enough to note that such a level of impotency is very unlikely to be viewed as a resounding success for any judicial institution.

The failure of the ICTY to resoundingly incapacitate the core of leaders accused of being responsible for major atrocities during the Yugoslav conflict has potentially also led to adverse results. Many note that the Srebrenica massacre, deemed 'the worst atrocity in Europe since the Holocaust',[431] occurred after the creation of the ICTY – although notably not after the indictment of the two individuals discussed here. Further, 'Perhaps the conflict re-emerged, this time in Kosovo, precisely because of the impunity that evolved' in response to the ICTY indictments.[432]

With regards to both Mladić and Karadžić, neither lost power or were removed from society in a meaningful way immediately following the indictments. There was 'little evidence that the ICTY (had) significantly changed Serbian elite behaviour in any obvious way.'[433] Similarly, head of state Slobodan Milošević remained in power after his 1999 indictment until his loss of a general

[429] McMahon and Forsythe, *ibid*, at 433
[430] Profile: Ratko Mladic, *supra* note 346
[431] Orentlicher, *supra* note 421, at 20
[432] Gabriel Kirk McDonald, 'Problems, Obstacles and Achievements of the ICTY' 2 J Int'l Crim. Just. (2004) 558 at 565
[433] McMahon and Forsythe, *supra* note 428 at 413

election in October 2000 (although it is likely that this election result was influenced by the pending allegations of criminality). Even then, the ex-leader's initial arrest was solely for domestic corruption charges;[434] Milošević was not transferred to The Hague until two months subsequently, when these domestic charges failed to stick.

Some argue, too, that the actions of the Court in indicting certain individuals had the inverse effect from that desired. Rather than reducing the legitimacy and attraction of such individuals, some commentators instead argue that 'the transfer to The Hague actually helped to 'mystify' them.'[435] This was exacerbated by the fact that public perception of the ICTY in Serbia has been extremely low, recorded in a 2009 assessment which found that 28% of respondents had a 'Mostly negative' view of the Tribunal, with another 44% holding an 'Extremely negative' viewpoint, compared to a combined 14% of respondents reporting in the positive spectrum.[436] Particularly regarding the similarly indicted Serbian Radical Party leader Voojislav Šešelj, a theorist has noted that the prosecution 'may have boosted his stature'[437] because "(b)eing prosecuted in The Hague means you're special".[438] As the ICTY fell further out of favour with many segments of the public, this boost to popularity may have increased over time.[439] The increasing lag-time between indictment and prosecution, too, may have worked in favour of the

[434] Prost, *supra* note 369 at 439
[435] Stahn, *supra* note 420 at 7
[436] Organization for Security and Co-operation in Europe: Mission to Serbia, Belgrade Centre for Human Rights, and Ipsos Strategic Marketing, 'Public perception in Serbia of the ICTY and the national courts dealing with war crimes', Serbia, 2009, available online at http://wcjp.unicri.it/proceedings/docs/OSCESrb_ICTY_Perception_in_Serbia.pdf, last accessed 13/09/2014
[437] Orentlicher, *supra* note 17 at 42
[438] Ana Miljanic, quoted in Orentlicher, *supra* note 17 at 42
[439] *See, e.g.,* Office of the UN Resident Coordinator in Bosnia and Herzegovina, 'Public Opinion Poll Results: Analytical Report', June 2013, available online at http://www.un.ba/upload/documents/Prism%20Research%20for%20UN%20RCO_Statistical%20report.pdf, last accessed on 06/08/2014, at 28, where 'More than half of the respondents state that (the ICTY's) contribution (to reconciliation) was either small or partial.'

accused. With regard to Mladić, 'evading his pursuers for so long burnished his folk-hero image among nationalists as a Serbian Scarlet Pimpernel'.[440]

While these key players were eventually dethroned and removed from society, many refute a causal connection with the ICTY. In a 'plurality of causes' including socio-economic, political and cultural contexts, 'the individual contribution of justice is difficult to locate'.[441] One commentator notes 'If we have in fact managed to put perpetrators of mass atrocity on trial, it is usually because they are definitively no longer in a position to offend on that scale.'[442] Condemning the creation of a war crimes tribunal as 'hollow', another argues that the steps to end domination of international criminals in the Former Yugoslavia instead included 'the imposition of economic sanctions, the denunciations, and…(i)ncidentally…military force.'.[443] While these condemnations appear harsh, it is undoubtable that 'the creation of the ICTY did not by itself end atrocities in the Balkans'.[444]

3(iv) Indirect Incapacitation Regarding Karadžić and Mladić

While the two indicted individuals remained geographically in the location of their crimes, and certainly not incarcerated by the ICTY, it may be nonetheless incorrect to suggest that the two were 'at large' or maintained any semblance of the same lifestyle, power, or dangerous capability as during the war years. In the case of Karadžić, his indictment required a drastic change of lifestyle, living in a variety of homes, and disrupting his ordinary family and social life. Eventually, the accusations against him lead to an entire overhaul of Karadžić's identity,

[440] Borger, *supra* note 344
[441] Stahn, *supra* note 420 at 7
[442] Jakob von Holderstein Holtermann, 'A "Slice of Cheese" – a Deterrence – Based Argument for the International Criminal Court' 11 Human Rights Review (2010) 289 at 291
[443] Power, *supra* note 10 at 1096
[444] Stahn, *supra* note 420 at 6

adopting a new name, new appearance, and new career. This in some sense acted to destroy the true Radovan Karadžić, to entrap him in a very real sense in the fugitive's new identity. Karadžić retained none of his original powers, influence, or ability to impact the outcome of state-level policy decisions. He was, in many ways, indirectly incapacitated.

To an even greater extent, Mladić, too, suffered from indirect incapacitation at the hands of the ICTY. He removed himself from public view, experiencing dwindling trust in friends, allies and family; he eventually isolated himself into near solitude. Mladić's quality of life, too, vastly deteriorated: he rarely went outside, may have spent a considerable amount of time living underground, and certainly resided in confined conditions of squalor. Despite his fastidious attentiveness to his own health, Mladić's indictment-induced fear of doctors led to a significant reduction in his wellbeing, he suffered a number of life-threatening strokes without required treatment. While human rights advocates and proponents of international criminal law would not advocate this as a positive outcome of the indictments, the effects were certainly indicative of a wider isolation and the defendants' ultimate fall from grace. Like Karadžić, Mladić had become a shadow of the man he was before, and retained none of the powers through which he caused such pain.

Part Four: Factors Affecting the Success/Failure of the Incapacitation of the 'Butchers of Bosnia'

4(i) Factors which **Restricted** *the Success of the ICTY in Incapacitating the 'Butchers of Bosnia'*

The most frequently noted cause for the failure of the ICTY to incapacitate key international players is its lack of effective enforcement mechanism. Those soft mechanisms available in the

Tribunal 'are not analogous to national jurisdictions',[445] they do not involve powerful enforcement agencies such as a police force or army which is capable of apprehending criminals. Even a state-level compelling power is beyond the ICTY: 'in the event of non-compliance, it must rely on the Security Council' to compel Member State cooperation with its indictments.[446] As such the international criminal system, embodied in the ICTY statute, 'install(s) obligations which manifestly cannot be fulfilled', rendering a 'myth system of international law'.[447]

Such a lack of strong enforcement mechanisms in the ICTY is coupled with the general political non-compliance of certain states with regard to the ICTY's mandates. Many of the states in the former Yugoslavia opposed the operation of the Court, due to political and priority differences and the sense of imposed justice.[448] The tribunal initially faced the further issue that the states involved were still embroiled in an ongoing conflict. This led not only to complications in obtaining practical assistance from these countries, but to further problems of politicisation and accusations of partisan action.[449] Thus even many external states 'thought it best to establish a tribunal only after the conflict in the region came to a close.'[450]

The state of upheaval and turbulence within the conflict region also meant that there were very real threats and dangers present on those who investigated or informed against the remaining fugitive war criminals. It has been suggested that the undercover Mladić was able to maintain secrecy and loyalty among his varied and fluctuating ally network through 'the common factor…(of) fear', including blackmail and threats upon the family members of those who knew

[445] Prost, *supra* note 369 at 438
[446] Kirk McDonald, *supra* note 432 at 559
[447] W. Michael Reisman, 'Acting Before Victims Become Victims: Preventing and Arresting Mass Murder', 40 Case Western Reserve Journal of International Law (2008) 57 at 82
[448] Kirk McDonald, *supra* note 432 at 559
[449] Kirk McDonald, *supra* note 432 at 559
[450] Kirk McDonald, *supra* note 432 at 559

his whereabouts, should they reveal it illicitly.[451] In a more sinister turn, on the 12th of March 2003, Serbian Prime Minister Mr. Djindjic was assassinated by a sniper. His deputy, Boris Tadic, argued that '(h)is pursuit of war crimes suspects…was one of the reasons Djindjic was assassinated.'[452]

Others argue that one of the main flaws in the ICTY's ability to apprehend at-large criminals was due to the construct of international criminal law itself. Despite the 'apparent priority accorded to the prevention of genocide' and war crimes in the ICTY statute and the Genocide Convention,[453] the reality is the inverse. Instead, the entire system of international criminal justice is skewed, in that it prefers after-the-fact judicial absolution rather than mid-conflict intervention. In international criminal law, 'the remedy du jour for nearly every mass murder has not been to try to prevent them or to arrest the murders as they were occurring but to wring our hands, utter condemnations…allow them to run their course, and then to establish international tribunals and punish'.[454] This is partly because the Conventions and Statutes do not require the SC members to exercise intervention techniques,[455] and partly because of a prevalent 'tendency…to look away, to cast doubt on horror stories, to…refuse to let the magnitude of the atrocities or the moral imperative seep in.'[456] This tendency, exacerbated by international institutions and state-level bureaucracies, works to 'amplify the propensity for denial and inaction'.[457] As such, international criminal tribunals may be a force for actually impairing the incapacitative and mid-conflict interventional aspects of international relations. Acting as an emotional 'get-out clause', the post-

[451] Borger, *supra* note 344
[452] Borger, *supra* note 344
[453] Reisman, *supra* note 447 at 61
[454] Reisman, *supra* note 447 at 63
[455] Reisman, *supra* note 447 at 62
[456] Power, *supra* note 10 at 1093-4
[457] Power, *supra* note 10 at 1094

hoc courts allow us to feel vindicated in our actions while doing little to address the true issue. They are mere 'exercises in momentary euphoria'.[458]

This hands-off instinct is not an altogether illogical response. There are vast emotional, political, economic, military and diplomatic risks to becoming embroiled in the complex interplays of an ongoing conflict.[459] Such risks are seen as too much for many non-interventionist states who might otherwise intercede to mediate and impact the outcome on behalf of innocent parties. Even the easiest mid-conflict measures, such as soft sanctions and non-military participation, 'seem incommensurate with mass slaughter'[460] and perversely induce powerful states to not act at all. Instead, whereas post-atrocity justice is comparatively easy and unambiguous, 'intervention in interstate affairs…becomes fraught with its own moral problems and thorny policy questions'.[461]

Some fault must be levelled at the international community, however. Whatever international 'culture' that exists and which responds to such wide-scale atrocities offers little actual incentive for individuals to take real action. There is no 'career price to be paid for by American officials if atrocities begin to escalate'.[462] Similarly, in most countries external to a conflict zone, 'politicians have paid no electoral price…(or) even a reputational price for being a bystander' to a situation of enormous brutality where there exist options for action.[463] It is thus within the responsibility of all citizens of democratic states to participate in making the international community one of participation, intervention, and accountability for the lives and wellbeing of others for whom it is within our power to assist.

[458] Reisman, *supra* note 447 at 82
[459] Power, *supra* note 10 at 1097
[460] Power, *supra* note 10 at 1097
[461] Reisman, *supra* note 447 at 85
[462] Power, *supra* note 10 at 1097
[463] Power, *supra* note 10 at 1098

Despite all these seemingly insurmountable flaws, however, there is hope that a more functional, permanent and international court might fare better in the struggle to incapacitate key protagonists of international crimes. One criticism of the ICTY – that it and other ad-hoc tribunals were established after the bulk of the atrocities were instigated or carried out – can be countered by the recent establishment of the permanent International Criminal Court. Such an institution 'will be in place, hopefully affecting a would-be killer's calculus *before* he or she strikes', particularly if it emphasises 'its preparedness to make arrests'.[464] Such a court will need the full backing of as much of the international community as possible, however, in order to permit the enforcement of its indictments and the apprehension of its accused criminals. In this context, it is highly possible that 'a more fully functioning international tribunal can deter crimes'[465] – or at least 'be able to deter *enough perpetrators to justify its costs*'.[466]

4(ii) Factors which **Aided** *the Success of the ICTY in Incapacitating the 'Butchers of Bosnia'*

With due consideration to the above arguments, it is nevertheless assured that there were certain aspects of the ICTY indictments that inspired a greater trend towards successful incapacitation in these cases. Primarily, the (eventual) assistance from international organisations, certain intervening states, the NATO-led SFOR stabilisation force, and the United States' encouragement led to greater enforcement power and perceived international ability to apprehend wanted criminals.[467] While some decry the Tribunal's reliance on these external – and fickle – bodies to assist in the apprehension of its subjects, others note that the ability of the

[464] Power, *supra* note 10 at 1101
[465] Orentlicher, *supra* note 421 at 20
[466] Holtermann, *supra* note 442 at 290 [emphasis in the original]
[467] Kirk McDonald, *supra* note 432 at 563-4

ICTY to inspire such powerhouses into action should be viewed with pride: it is 'an indirect influence on the restoration and maintenance of peace'.[468]

Secondly, the ability of the ICTY Prosecutor to issue secret indictments, a tool introduced by Prosecutor Louise Arbour, 'had revolutionary, but again largely immeasurable consequences'.[469] The logic is that those individuals with blood on their hands would fear the intervention of the ICTY even where they were not knowingly indicted. The psychological impact of being unaware as to whether one was the subject of an international criminal investigation led to increased paranoia and circumspection of action on behalf of the guilty.[470] It is highly likely that the known existence of a concealed justice system resulted in many otherwise influential figures 'laying low in the fear that they might be on The Hague's secret indictment list.'[471]

Finally, it is arguable that the ICTY's confirmation procedure under Rule 61 of the Rules of Procedure and Evidence may have contributed to the success of the ICTY's incapacitative aims. The procedure, an evidence-based mini-trial conducted with the accused *in absentia*, took place for the case against Karadžić and Mladić, as well as for several other cases at the ICTY. Some have argued that the procedure 'gave an opportunity (for victims) to testify', permitting a level of closure, while also enabling the Court 'to publicize its work and make itself known.'[472] This was indeed the case regarding Mladić and Karadžić, the confirmation procedure, which was held in 1995-6, 'certainly garnered the attention of the media'[473] – although admittedly not the short-term apprehension of the indictees. Finally, the procedure also often has the effect of 'triggering

[468] *See* Natalya Clark, *supra* note 399 at 59
[469] Power, *supra* note 10 at 1102
[470] Kirk McDonald, *supra* note 432 at 564
[471] Power, *supra* note 10 at 1102
[472] Power, *supra* note 10 at 561
[473] Power, *supra* note 10 at 562

the reporting of non-state compliance by the President to the Security Council',[474] an eventuality which occurred regarding Karadžić and Mladić.

Part Five: The Legitimacy of Incapacitation as an Objective of International Criminal Law With Regard to the ICTY's Experience with Karadžić and Mladić

5(i) Incapacitation as an **Illegitimate** *Objective for the ICTY in Karadžić and Mladić*

One of the main flaws with incapacitation as a theory of justice in international criminal law is that in an ongoing conflict situation, it often requires choices which are, or may be perceived to be, vastly more political than legal in nature. 'Who will determine, after all, which political elites require de-legitimization…?'[475] If the answer is to be the courts, then however balanced, legitimate, and accountable they may be, such an eventuality turns these courts into powerful and dangerous weapons which may become open to abuse and manipulation.[476] In an international setting, this may render such a Court as a mere 'political took of powerful countries',[477] removing the institution from its core legitimisation under the rule of law.[478]

A second core flaw with incapacitation as a central objective of justice is that it severs the link concerning culpability in sentencing.[479] As with other consequentialist theories of justice, the fulfilment of incapacitation does not require a normative link between the actions of the convicted individual and the length or nature of the sentence they receive. That the individual is removed from the social context of crime, possibly for a significant duration of time, is a more pressing priority. Many view this as repulsive to notions of fairness and retributive justice.

[474] Power, *supra* note 10 at 561
[475] Saxon, *supra* note 12 at 1
[476] Saxon, *supra* note 12 at 1
[477] Dana, *supra* note 6 at 39
[478] Saxon, *supra* note 12 at 2
[479] Dana, *supra* note 6 at 38

Particularly in an international justice context, such a 'sentencing practice appears unprincipled, political and unjust',[480] due to the international imposition of sentences on convicted offenders.

5(ii) Incapacitation as a **Beneficial** *Objective for the ICTY in Karadžić and Mladić*

While many argue that judicial law and politics should not mix, others suggest the combination of these two facets, particularly in an international criminal context, is unavoidable. Indeed, '(l)aw is only an extension of politics', and can be used as such as 'a benevolent tool'.[481] Justice, in an international concept, cannot be viewed as merely isolated in the court room. Instead, 'the effects of justice (must) be measured…by their impact internationally'.[482] So long as the ICTY (and subsequently the ICC) remains open and accountable to its members and subjects, it may similarly remain open in its actions to intervene with conflicts which it determines to violate international law.

More significantly, it has often been noted that the paradigmatic 'after the fact' responses to most international atrocities (where there has even been a response) 'contrasts with state duties to prevent crime'.[483] Such a post-hoc form of international response to atrocity is unable to prematurely halt international crimes while they occur, nor to immediately protect would-be victims. It is notable that unlike 'ordinary' domestic crimes such as murder, state-level atrocities are preventable and abatable as 'the business of killing a large group of people takes time, communication, and organisation'.[484] Such wide-scale crimes also require a level of cultural acclimatisation and 'long-term socialization',[485] often characterised by harbinger clues which are

[480] Dana, *supra* note 6 at 39
[481] Saxon, *supra* note 12 at 2
[482] Stahn, *supra* note 420 at 2
[483] Stahn, *supra* note 420 at 5
[484] Reisman, *supra* note 447 at 39
[485] Reisman, *supra* note 447 at 59

precursors to the events to come. As such, the 'manifestly second-best remedies' of post-crime punishment 'are *not* the only thing that can be done'.[486] The international court system can, instead, participate in arresting ongoing conflicts and protecting their victims through the targeted indictment and incapacitation of responsible individuals. The oft-repeated motto of 'never again' may be much greater served by this active intervention, instead of soft declarations and vehement (but toothless) denunciation. As such, the phenomenon of international criminal law can make some 'far more robust steps along the continuum of intervention'.[487]

As well as affecting the immediate conflict, the act of incapacitating key leaders and military actors within a criminal regime could have the effect of reducing atrocity and state-level criminality around the world. One commentator noted that the incapacitation of Radovan Karadžić is important 'because it clearly demonstrates that there is no alternative to the arrest of war criminals and that there can be no safe haven for fugitives'.[488] Such a promotion of the inescapable hand of justice is especially poignant when directed towards powerful and rarely accountable leaders, and it might cause potential perpetrators to restrain their actions when contemplating the commission of international crimes.

It is also often overlooked that the failure to incapacitate those individuals who are the 'root causes of conflict'[489] prolongs the pain of victims. While those accused of initiating the crimes against them remain unpunished, there can be no closure for the victims and relatives who

[486] Reisman, *supra* note 447 at 59 [emphasis in the original]
[487] Power, *supra* note 10 at 1099
[488] Prosecutor Serge Brammertz Statement, *supra* note 338
[489] Stahn, *supra* note 420 at 4

suffered at their hands. Regarding the long evasion of Ratko Mladić, the victim's 'pain…has been prolonged because of the 16 years the General managed to evade capture.'[490]

The incapacitative objective of international criminal law is often overlooked or underrated, and yet may be a relatively unassertive mechanism through which to definitively impact ongoing conflicts. 'We never talk about this achievement',[491] yet the 'essential objective'[492] of removing senior felonious figures from the community is one of the most revolutionary, effective and potentially nonviolent inventions to emerge from the international criminal law regime. In both its direct and indirect forms, incapacitation may well become one of the most successful outcomes of the burgeoning foray into interstate-level accountability.

Conclusion

Although Radovan Karadžić and Ratko Mladić were not immediately directly incapacitated as a result of their indictment at the ICTY, the indirect consequences of the court's actions are more ambiguous. The existence of the ICTY and its ability to indict Karadžić and Mladić resulted in the consequence that they 'had their mobility, authority, and influence diminished by being forced into hiding or having their assets frozen.'[493] The indictments were reinforced by the significant 'reconfirmation of charges' procedures held by the Court in the defendants' absentia, which 'certainly garnered the attention of the media',[494] rendering any political or influential activism of Karadžić increasingly restrained. It was further assisted by the practice of issuing sealed indictments, and other mechanisms at use in the ICTY. The non-capture of both Karadžić

[490] Profile: Ratko Mladic, *supra* note 346
[491] Power, *supra* note 10 at 1101
[492] de Lint et al, *supra* note 333 at 139
[493] Kelly D. Askin, 'Reflections on Some of the Most Significant Achievements of the ICTY', 37 New England Law Review (2002-3) 903 at 904
[494] Kirk McDonald, *supra* note 432 at 562

and Mladić were seen as blocks in the path to European integration by the wider EU community.[495] As such, external pressure to incapacitate the pair may have paid as strong a role as the existence of the ICTY in the eventual arrest of the figures. However it is nonetheless extremely likely that the ICTY played a substantial role in the symbolic, societal, and eventually physical incapacitation of these two highly dangerous individuals, resulting in a clearer and more certain path towards peace in the region.

[495] Aleksander Boskovic, 'Ratko Mladic: Relativism, Myth and Reality', 27 (4) Anthropology Today (2011) at 1

Chapter Four: Case Study B – Joseph Kony: Messianic Prophet, Child Abductor, Craft Perpetrator of Evil

Introduction

In this section I will explore the context and case of Joseph Kony and his notorious Lord's Resistance Army, including considering the role of the ICC in northern Uganda, its attempts to incapacitate key members of the rebellion, and arguments for and against the Court's indictments. I shall begin with an explanation of the conflict in northern Uganda, including its history and political roots. I will continue with an exploration of the character of Joseph Kony himself, the establishment and growth of the Lord's Resistance Army, and their aims and unique aspects. It is important to consider the unique facets of the 'cult of personality' and spirituality of the LRA to better understand the potential impact of incapacitation due to Kony's unique blend of power and vulnerability within the movement. The wider geopolitical context and relationship with Sudan, in particular, are also important to explore in order to greater understand the ultimate effect of the ICC indictment in this context.

Thereafter, I shall look to the ICC's indictments and attempted arrest of Mr. Kony and his counterparts, considering the extent to which incapacitation has occurred in this case. Confronting the arguments in favour of and in opposition to these 2005 indictments, I will consider their effect in hindsight and look to alternative avenues that have been pursued by the international community. Finally, I shall focus on the key reasons why incapacitation may not have been successful in this case, in particular the ongoing conflict in the region, and the spiritual nature of the guerrilla movement.

Part One: The History and Context of the Northern Ugandan Conflict

1(i) An introduction to the region: Uganda, the Acholi, Alice Auma, and beyond

The area referred to as 'Acholiland' spans some 28,000 square kilometres, containing around 1.5 million people of 99% Acholi heritage.[496] The vast, low-population area has 'few known natural resources[497] but 'considerable agriculture and livestock development potential'.[498] Its history has frequently been one of division and oppression.

As with so many contemporary African fissures, the roots of the struggle in northern Uganda can be traced back to colonial influence in the region. During the British colonial era, 'a division between northern and southern Uganda was created with respect to economic development and to systems of labour recruitment.'[499] While southern areas experienced economic boom through the introduction of cash crops and industry, northern Uganda was perpetuated as a 'reservoir of labour'[500] which was largely militarised to form the greatest pool for army recruitment in the country.[501] These events transformed the Acholi people of the north 'into a 'military ethnocracy''[502] characterised by continuous 'ethnic competition' with the south.[503] The resulting economic and military imbalance created divisions which continued long after the colonial administration ended, a separation which was created by external forces and which has 'marked

[496] Sheetal H. Patel et al: 'In the face of war: examining sexual vulnerabilities of Acholi adolescent girls living in displacement camps in conflict-affected Northern Uganda' 12 BMC International Health and Human Rights (2012) 38 at 2
[497] Ruddy Doom and Koen Vlassenroot: 'Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda' 98 African Affairs (1999) 5 at 57
[498] Patel et al, *supra* note 496 at 2
[499] Doom and Vlassenroot, *supra* note 497 at 7
[500] Kasaija Phillip Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda' 4 Journal of International Criminal Justice (2006) 179 at 180-181
[501] Doom and Vlassenroot, *supra* note 497 at 7
[502] Doom and Vlassenroot, *supra* note 497 at 8
[503] Apuuli, *supra* note 500 at 181

Ugandan politics and society since independence'.[504] It is notable that, prior to the 1930s, 'the ethnonym 'Acholi' did not even exist' and the group had no fixed territorial boundaries or central government.[505] Post-colonialism, however, the Acholi became 'a people, bound together by a common culture, defining itself as…the military backbone of the state'.[506]

Uganda since liberation has had a long and chequered history of depositions, coups and dictatorial leaders. The first Prime Minister (and subsequently President) Milton Obote, who gained power in 1962, inherited an army of predominantly Acholi members, 'who saw the profession of arms as their natural vocation'.[507] Obote was viewed (by Ugandans and subsequent President Idi Amin) as sympathetic towards the Acholi people,[508] ruling for extensive periods from 1962-1971 and from 1980-1985. Later, General Tito Okello, who ruled Uganda for six months from 1985-1986, was Acholi-born himself.[509] As such the deposition of Okello at the hands of an National Resistance Army (NRA)-led bush war in 1986 amid mass civilian killings[510] and the rise of the southerner Yoweri Museveni stifled Acholi power and led to reverberations of dissent among the north: 'many a group in Uganda was in the mood for settling scores.'[511] Theorists argue that northern Ugandan people 'felt unable to accept' the loss of state power after Museveni's arrival,[512] especially since the once Acholi-dominated armed forces were subsequently recomposed to become 'mainly controlled and peopled by southerners'.[513] Others argue that the string of rebellion movements that formed, and remained, in northern Uganda were

[504] Apuuli, *supra* note 500 at 180
[505] Doom and Vlassenroot, *supra* note 497 at 10
[506] Doom and Vlassenroot, *supra* note 497 at 8
[507] Doom and Vlassenroot, *supra* note 497 at 8
[508] Doom and Vlassenroot, *supra* note 497 at 8
[509] Doom and Vlassenroot, *supra* note 497 at 13
[510] Issaka K. Souare, 'The International Criminal court and African Conflicts: The Case of Uganda' 36(121) Review of African Political Economy (2009) 369 at 372
[511] Doom and Vlassenroot, *supra* note 497 at 10
[512] Souare, *supra* note 510 at 372
[513] Doom and Vlassenroot, *supra* note 497 at 13

equally a long-term reverberation of the colonial economic marginalisation of the northern regions.[514]

In any case, the rise of Museveni's NRA (later to become Uganda's national army, the Uganda People's Defence Force (UPDF), under Museveni's National Resistance Movement government (NRM)) led to a splintered history of reactive rebel groups which was ultimately characterised by Joseph Kony's LRA. Due in part to colonial ethnic characterisations, northern Uganda was a region 'where the culture of violence was already in place',[515] creating a near inevitability of retaliatory violence. An early rebellion, the Uganda People's Democratic Army (UPDA) existed from 1986-8 and formed out of some of Okello's deposed soldiers and Acholi rebels who joined in an attempt to return the Acholi to their previous status in Uganda.[516] More famously, the Holy Spirit Movement (HSM) of Alice Auma Lakwena preceded Kony's rise.

Alice Auma, a 'self-styled prophetess who claimed…the power to perform miracles',[517] was born an Acholi in Bunkatira in 1958.[518] After spending 40 days in Nile waters[519] she took the nickname 'Lakwena', "the messenger",[520] and announced her ability to speak with the Holy Spirit.[521] Alice's mystique was 'more attractive for the bitter and disoriented young Acholi soldiers who had just lost power',[522] responding to the 'overwhelming new…fear of extinction held by many Acholi people'[523] and she gathered splintered UPDA soldiers into a force of up to

[514] Souare, *supra* note 510 at 373
[515] Doom and Vlassenroot, *supra* note 497 at 22
[516] Paul J. Zwier, *Principled Negotiation and Mediation in the International Arena* (Cambridge: Cambridge University Press, 2013) at 305
[517] Payam Akhavan: 'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court' 99(2) American Journal of International Law (2005) 403 at 406
[518] Doom and Vlassenroot, *supra* note 497 at 16
[519] Doom and Vlassenroot, *supra* note 497 at 16
[520] Prunier, *Africa's World War, supra* note 13 at 81
[521] Zwier, *supra* note 516 at 304
[522] Prunier, *Africa's World War, supra* note 13 at 81
[523] Doom and Vlassenroot, *supra* note 497 at 17

7,000[524] whom she 'exhorted…to overthrow the newly established NRM government'.[525] Alice inspired her troops through rituals and magic, creating a 'spiritual community, densely populated with spirits',[526] encouraging her force to 'sprinkle itself with holy water before going into battle'[527] and smearing them with *dawa* (magic medicine).[528] Alice's troops won a major early battle in November 1986, inspiring many other soldiers to join her and creating a broad movement that 'was a political manifestation of an Acholi society driven into a corner'.[529] However, the force's push south was eventually abated by superior firepower near Jinja in October 1987,[530] Auma fled to Kenya, her father, Severino Likoya Kiberu, briefly tried and failed to revitalise the struggle, and the HSM was defeated.[531]

Though described as 'a lunatic prostitute turned witch',[532] Alice at least demonstrated that the Acholi were 'eager to follow prophetic or charismatic leaders to win a war that was virtually lost',[533] and the leader certainly inspired her nephew[534] or cousin,[535] a young man named Joseph Kony, to take up her mantle.

1(ii) The Warlord: Joseph Kony

Joseph Kony was born the son of a farmer in Odek, Gulu, in 1961.[536] A school drop-out, purportedly ridiculed 'for being big and stupid',[537] the young Kony apprenticed as a witch doctor

[524] Zwier, *supra* note 516 at 305
[525] Akhavan, *supra* note 517 at 406
[526] Doom and Vlassenroot, *supra* note 515 at 17
[527] Zwier, *supra* note 516 at 305
[528] Prunier, *Africa's World War, supra* note 13 at 81
[529] Doom and Vlassenroot, *supra* note 497 at 16-18
[530] Prunier, *Africa's World War, supra* note 13 at 81
[531] Doom and Vlassenroot, *supra* note 497 at 18-19
[532] Doom and Vlassenroot, *supra* note 497 at 20
[533] Doom and Vlassenroot, *supra* note 497 at 18
[534] Apuuli, *supra* note 500 at 181
[535] Doom and Vlassenroot, *supra* note 497 at 20; Prunier, *supra* note 25 at 81
[536] Zwier, *supra* note 516 at 304; Doom and Vlassenroot, *supra* note 2 at 20
[537] Zwier, *supra* note 516 at 304

with his brother,[538] served as an altar boy, and eventually joined the UPDA in the 1980s.[539] In 1988 he declared himself the spiritual heir of his relative, Alice Auma,[540] forming and unilaterally reigning over the Lord's Resistance Army (LRA, previously Holy Spirit Movement II, Lord's Salvation Army, and United Democratic Christian Force), initially a splinter group of the previous HSM.[541] Kony declared it his 'mission to free the Acholi people of northern Uganda by overthrowing the government and installing a system based on the Biblical Ten Commandments'.[542] He was and is the sole 'leader, chairman and commander of the LRA',[543] controlling all aspects of life and death, military movements, targets, and attacks within it.[544] A 'self-proclaimed messianic prophet',[545] Kony sees himself as 'a freedom fighter…not a terrorist'[546] and has been described as having 'a mesmerising voice…dresses his hair in beaded braids…(and) sometimes he appears in women's clothes'.[547] He is also 'the very epitome of an *evil* actor'[548] and 'the craft perpetrator of some of the greatest human rights violations the world has ever seen.'[549]

[538] Zwier, *supra* note 516 at 304
[539] Doom and Vlassenroot, *supra* note 497 at 21
[540] Akhavan, *supra* note 517 at 406
[541] Dallaire, *supra* note 13 at 135
[542] H. Abigail Moy, 'The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity' 19 Harvard Human Rights Journal (2006) 267 at 267
[543] 'Press Conference, International Criminal Court, Statement by Chief Prosecutor Luis Moreno Ocampo (October 14 2005) available at http://www.icc-cpi.int/NR/rdonlyres/9AC37606-6662-448F-8689-7317E341E6D7/277305/Uganda_LMO_Speech_141020091.pdf, last accessed on 07/07/2014 at 4
[544] *Ibid* at 5
[545] Moy, *supra* note 542 at 267
[546] Mareike Schomerus, ''A Terrorist is not a Person Like Me': An Interview with Joseph Kony' in Allen and Koen Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (London: Zed Books, 2010) 113 at 129
[547] Doom and Vlassenroot, *supra* note 497 at 21
[548] Zwier, *supra* note 516 at 302, emphasis in original
[549] Patel et al, *supra* note 496 at 2

1(iii) The Rebellion: Lord's Resistance Army

Introduction: attempts to rationalise mindless violence

The most common approach when attempting to understand the motivations of Kony and the crimes of the LRA is to radiate incomprehension. The conflict originates from 'a mixed bag of reasons'[550] as the LRA's 'agenda and purposes have remained murky at best'[551] and there is little 'clear understanding of its final goals, if they exist as such'.[552] The LRA 'has had no coherent ideology, rational political agenda, or popular support'[553] while '(t)he most common thing said…was that nobody knew what they were fighting for'.[554] Gerard Prunier, in an interview, 'simply concludes that the LRA rebels are 'mad'';[555] the northern Uganda conflict 'has frequently been described as one of those bizarre African wars that really cannot be comprehended'.[556] After review, '(w)hat emerges is a patchwork of motives, methods and structure, with different accounts sometimes in direct conflict.'[557]

Such a simplistic approach to the LRA does not take account of the complex historical and political context within which the LRA operated, nor does it pay heed to the nuances of the variations in the LRA's actions and motives over time. One author detects two eras of the actions

[550] J. Oloka-Onyango, quoted in Doom and Vlassenroot, *supra* note 497 at 21
[551] Zwier, *supra* note 516 at 303
[552] Doom and Vlassenroot, *supra* note 497 at 20
[553] Akhavan, *supra* note 517 at 407
[554] Schomerus, *supra* note 546 at 115
[555] Prunier, quoted in Sverker Finnstrom: 'An African Hell of Colonial Imagination? The Lord's Resistance Army in Uganda, Another Story' in Tim Allen and Koen Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (London: Zed Books, 2010) 74 at 75
[556] *Ibid* at 78
[557] Christopher Blattman and Jeannie Annan, 'On the nature and causes of LRA abduction: what the abductees say' in Tim Allen and Koen Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality'* (London: Zed Books, 2010) 132 at 132

and motives of the LRA.[558] I would contemporise this theory by presenting an indefinite three-era analysis of the movements, engagements, and purposes of Kony and the LRA.

Era One: The Early Years (1988-1994)

The initial and early actions of the LRA were characterised by a continuation of the struggle of Alice Auma, with Kony as the prophetess' 'radical heir'[559]. The motivations of this early version of the LRA seemed to emulate that of the UPDA and HSM: a reaction to the change of government and resultant removal of the Acholi from power in Uganda, a response to the Acholi fear of imminent genocide,[560] and a reflection of the feeling of many Acholi that the structural adjustments and neoliberal developments in Uganda 'effectively denied (them) Ugandan citizenship.'[561] As noted above, the 'story of marginalization and exclusion'[562] extended as far back as the colonial era. Others argue that a supplementary cause was the actions of the NRA towards northern Ugandan civilians during the military takeover, which included 'rape and other forms of physical abuse…(t)orture and maltreatment'.[563] It is thus possible that 'the immediate cause of the (LRA) rebellion was the unbecoming and undisciplined behaviour of the 35th battalion of the NRA'.[564]

In this era, the LRA was a poorly supported guerrilla army in north Acholi, consisting of a small force, lack of popular support, and a prevalence of mysticism and spirituality. From the beginning, 'some former fighters of the defunct UPDA and HSM joined (Kony) voluntarily, and

[558] Doom and Vlassenroot, *supra* note 497 at at 22-24
[559] Doom and Vlassenroot, *supra* note 497 at 22
[560] Doom and Vlassenroot, *supra* note 497 at 22
[561] Finnstrom, *supra* note 555 at 81
[562] Finnstrom, *supra* note 555 at 76
[563] Finnstrom, *supra* note 555 at 78
[564] Apuuli, *supra* note 500 at 181

others did so out of despair',[565] although 'popular support was considerably less' than for these earlier movements.[566] The LRA kept up 'a small guerrilla war…in north Acholi', but Kony's 'position remained extremely difficult'.[567] In order to maintain his position of power, therefore, Kony's high-profile 'spiritual order proved a useful framework for compensating for the lack of an elaborated military infrastructure'.[568]

Kony's spirituality has been much-discussed, and (often wrongly) evoked to supplant any political motivations of the LRA. However this element certainly has had a strong role in the organisation past and present, and merits analysis. Kony 'preaches that he is a direct conduit of the word of God' with his actions portraying 'a toxic stew of hate, magic and twisted Christianity'.[569] The leader, who presents himself as 'possessed by a number of spirits'[570] apparently 'invented his own rituals and belief-system'[571] which nonetheless exuded substantial references to Acholi beliefs[572] and included acts such as the smearing of 'Moo ya' or shea nut oil on fighters and the sprinkling of water on the battlefield to mark invincibility.[573] The spiritual aspects of the movement not only offered a cultural hand-hold around which to centre the movement and establish an identity, but also worked through 'guaranteeing internal cohesion and controlling and motivating the combatants'.[574] The structure of spiritual rules enabled 'fighters to 'grow into' the LRA',[575] a factor of particular importance as the LRA ranks were becoming increasingly drawn from abducted child civilians. These newcomer rites of passage 'marked (the

[565] Doom and Vlassenroot, *supra* note 497 at 22
[566] Doom and Vlassenroot, *supra* note 497 at 23
[567] Prunier, *Africa's World War, supra* note 13 at 81
[568] Kristof Titeca, 'The Spiritual Order of the LRA' in Tim Allen and Koen Vlassenroot (eds), *The Lord's Resistance Army: Myth and Reality* (London: Zed Books, 2010) 59 at 71
[569] Dallaire, *supra* note 13 at 135
[570] Titeca, *supra* note 569 at 62
[571] Doom and Vlassenroot, *supra* note 497 at 22
[572] Titeca, *supra* note 568 at 65
[573] Titeca, *supra* note 568 at 64
[574] Titeca, *supra* note 568 at 61
[575] Titeca, *supra* note 568 at 63

new recruits') distinction from Acholi in general' and 'transformed them into *malaika* or angels.'[576] The use of spirituality had a further, external role of intimidating the outside world,[577] subjecting opposition soldiers to myths of the LRA troops' invincibility,[578] psychologically daunting the enemy. The result was 'a cult of mystery and spiritual power which few abductees or civilians question even now.'[579]

The end of this first era of the LRA was marked by the attempted peace talks hosted by Betty Bigombe, Acholi, Ugandan Minister for the North and Gulu-town resident.[580] The peace talks collapsed in 1994,[581] leading to a renewal of violence and a second, more turbulent epoch of Kony's army.

Era Two: 'A Morass of Blood'[582] (1994-2005)

During the collapse of the attempted Ugandan peace talks in 1994, accusations flew of double-dealing, suspicious claims 'fanned from various sides', and eventually 'Museveni lost all confidence'.[583] Subsequently, Kony 'lost what little confidence he had in the government's peace overtures, and blamed the Acholi people for not supporting his war.'[584] This era was characterised by 'increasing…frequency and ferocity of (the LRA's) attacks'[585] and an 'enhanced phase of terror'[586] as the LRA 'turned on the very people it claimed to represent'.[587] This was despite the fact that the Acholi community was not obviously sympathetic to Museveni,

[576] Doom and Vlassenroot, *supra* note 497 at 23
[577] Titeca, *supra* note 568 at 61
[578] Titeca, *supra* note 568 at 69-70: '(I)t takes between ten and thirty bullets to kill them' – UPDF soldier
[579] Blattman and Annan, *supra* note 557 at 141
[580] Doom and Vlassenroot, *supra* note 497 at 24
[581] Akhavan, *supra* note 517 at 406
[582] Doom and Vlassenroot, *supra* note 497 at 26
[583] Doom and Vlassenroot, *supra* note 497 at 24
[584] Doom and Vlassenroot, *supra* note 497 at 25
[585] Akhavan, *supra* note 517 at 407
[586] Patel et al, *supra* note 496 at 2
[587] Dallaire, *supra* note 13 at 146

with only some 10% voting in support of the government in the 1996 and 2001 presidential elections.[588] Indeed the Acholi people 'became hugely critical of the Ugandan government'[589] for its failure to stop their children being killed and abducted – '(e)ach attack by the LRA…is seen as a demonstration of (Museveni's) lack of power or his unwillingness to turn Acholi-land into a safe haven.'[590]

Nonetheless, Kony's LRA began to substantially increase the level and frequency of its attacks, largely upon Acholi civilian areas. To Kony, 'the people as a whole seemed to be declared guilty'.[591] This time period can be more fairly depicted through a prism of lack of direction and political motivation within the LRA: violence had become both a tool and a purpose. The war had 'become an end in itself, with violence reinforcing further violence',[592] the movement did not 'aim at a radical change of the system; they want(ed) to destroy it'.[593] The LRA's ranks had become 'filled with ruthless warlords and slave masters'[594] for whom 'violence (found) its own rationale in more violence.'[595] During this era it was 'very hard to see any political perspectives in the movement's later actions…(the LRA's) political message has evaporated…It appears to be an act of auto-genocide.'[596]

In this time, the LRA's ranks swelled, though not through voluntary conscripting, but through coercion, now 'the only way that the LRA could maintain its forces.'[597] During his reign, Kony

[588] Finnstrom, *supra* note 555 at 79
[589] Dallaire, *supra* note 13 at 146
[590] Doom and Vlassenroot, *supra* note 497 at 28
[591] Doom and Vlassenroot, *supra* note 497 at 25
[592] Finnstrom, *supra* note 555 at 75
[593] Doom and Vlassenroot, *supra* note 497 at 35
[594] Akhavan, *supra* note 517 at 407
[595] Doom and Vlassenroot, *supra* note 497 at 27
[596] Doom and Vlassenroot, *supra* note 497 at 26
[597] Akhavan, *supra* note 517 at 407

and the LRA have been accused of abducting between 20,000[598] and 100,000[599] boys and girls from civilian areas. Claims circulate that up to 80% of LRA membership was made up of abducted children,[600] an 'almost total reliance on forced recruitment'.[601] Kony, meanwhile, categorically denied his troops' abduction in any circumstances.[602]

Despite suggestions to the contrary, the conscription of child soldiers was not due to just 'the same barbarism and irrationality'[603] that has come to define the LRA: instead, it is a result of 'rational calculation'.[604] Reasons for the choice of young soldiers include the over-representation of young people in Ugandan society,[605] the effectiveness of the small stature in guerrilla fighting,[606] young peoples' underdeveloped concepts of death, vulnerability, and risk,[607] the increased availability of light weaponry[608], and the ease of indoctrinating the young into the LRA's warped logic.[609]

Those who were abducted were overwhelmingly young Acholi civilians,[610] and predominantly adolescent males (though also frequently females) between the ages of 12 and 16.[611] Consisting

[598] Moy, *supra* note 542 at 268; *see also* Blattman and Annan, *supra* note 557 at 135 (20,000-25,000, 'The total number of abductees…may be three times this amount, however'); Patel et al, *supra* note 496 at at 2 (30,000 by May 2004); Joshua Keating: 'Guest Post: Joseph Kony is not in Uganda (and other Complicated Things)', Foreign Policy, March 7 2012, available online at http://blog.foreignpolicy.com/posts/2012/03/07/guest_post_joseph_kony_is_not_in_uganda_and_other_complicated_things, last accessed on 15/7/2014 (30,000 abductees)
[599] Zwier, *supra* note 516 at 306
[600] Blattman and Annan, *supra* note 557 at 135
[601] Blattman and Annan, *supra* note 557 at 139
[602] Schomerus, *supra* note 546 at 131
[603] Blattman and Annan, *supra* note 557 at 132
[604] Blattman and Annan, *supra* note 557 at 133
[605] Blattman and Annan, *supra* note 557 at 133
[606] Blattman and Annan, *supra* note 557 at 151
[607] Blattman and Annan, *supra* note 557 at 144
[608] Blattman and Annan, *supra* note 557 at 144-5
[609] Blattman and Annan, *supra* note 557 at 133
[610] Akhavan, *supra* note 517 at 407; Dallaire, *supra* note 13 at 146; Moy, *supra* note 542 at 267
[611] Blattman and Annan, *supra* note 557 at 134

of the 'longest child hostage crisis in human history',[612] young recruits were held from various periods between a couple of weeks and several years or even decades.[613]

Although not every abductee went through the same experience, some factors unite them all. In almost all cases, young recruits were subjected to severe mistreatment 'in order to destroy their sense of self',[614] which sometimes included the ritual killing of new members, the children's parents or siblings, and/or massacres of escapees.[615] This 'well-designed process of brutalization'[616] resulted in a significant 49% of long-term abductees (those who had remained abducted for over one year) stating that they had been forced to kill a civilian or soldier during their time with the LRA.[617] Through such a process, combined with the use of empowering spirituality[618] as noted above, the LRA was able to 'terrorize the children and simultaneously indoctrinate…them'.[619]

After usually moving the child recruits as far from their home as possible to prevent escape,[620] the LRA used them as 'laborers, sex slaves, or human shields'.[621] 'Violence…(was the) principal instrument of control',[622] in particular for attempted escapees.[623] Abductees, too, were at an extremely high risk of death, by becoming purposeful 'cannon fodder', or by succumbing to starvation, disease and dehydration.[624] Kony was widely accused of placing child soldiers in harm's way 'in hope that the media outrage over their deaths would hamper government military

[612] Patel et al, *supra* note 496 at 2
[613] Blattman and Annan, *supra* note 557 at 142
[614] Akhavan, *supra* note 517 at 407
[615] Blattman and Annan, *supra* note 557 at 139
[616] Akhavan, *supra* note 517 at 408
[617] Blattman and Annan, *supra* note 557 at 141
[618] Dallaire, *supra* note 13 at 135
[619] Ocampo, *supra* note 543 at 5
[620] Blattman and Annan, *supra* note 557 at 141
[621] Moy, *supra* note 542 at 268
[622] Blattman and Annan, *supra* note 557 at 140
[623] Ocampo, *supra* note 543 at 5
[624] Akhavan, *supra* note 517 at 408

action against him.'[625] Lives were also at risk from within, with many children forced to murder each other for misdemeanors – the 'especially brutal' killings involved 'severe beatings with clubs, or mutilation and dismemberment with machetes – sometimes over a number of days'.[626]

Female abductees were likely to become bush wives, with commanders able to 'receive abducted girls as sex slaves'[627] and Kony purportedly retaining up to 60 'wives' of his own.[628] The girls were frequently and un-ironically referred to as 'wives' or 'sisters' by the LRA[629] and their rapes often resulted in children, reports finding that some 800 babies were born to LRA 'wives' during the 1990s in Jabelein LRA camp alone.[630] Kony, who was said to control all elements of the abduction of 'wives', apparently preferred the kidnapping of younger girls because of their lower likelihood to carry sexually transmitted infections.[631]

Even children who were not abducted by the LRA faced grave impediments to their lives. The tens of thousands of 'night commuters' who travelled from villages into urban areas to sleep in open spaces every night attested to the depth of fear of abduction by LRA forces.[632] Particularly 'between 1999 and 2004, large hordes of children took refuge on the streets' in an attempt to avoid Kony,[633] gaining international attention in the process.

Even for those who survived their time in the LRA, the effects of abduction persist into their civilian lives. Around 'one fifth of male abductees never returned'[634] and are mainly presumed to

[625] Dallaire, *supra* note 13 at 146
[626] Akhavan, *supra* note 517 at 408
[627] Ocampo, *supra* note 543 at 5
[628] Akhavan, *supra* note 517 at 408
[629] Ocampo, *supra* note 543 at 6
[630] Akhavan, *supra* note 517 at 408
[631] Ocampo, *supra* note 543 at 5
[632] Akhavan, *supra* note 517 at 409
[633] Keating, *supra* note 598
[634] Blattman and Annan, *supra* note 557 at 135

have been killed. Of those who returned, most escaped,[635] with very few being rescued by outside forces. Those who returned remained severely traumatised, considering themselves 'evil outcasts' and rendering full rehabilitation virtually impossible.[636] Substantial numbers of raped women and girls were rejected by their family, with up to 83% of husbands rejecting wives who had been victims of rape.[637]

As well as the widely-documented spectre of child abduction, the second era of LRA terror was marked by an array of massacres and attacks, frequently on civilian targets. The LRA was 'engaged in wanton destruction and pillage of civilian property, including burning and looting thousands of homes'.[638] Meanwhile, more than 20,000 people were killed[639] in myriad massacres 'such as at Atiak (an estimated 170-220 dead, 22 April 1995); Karuma (50 deaths, 8 March 1996); Acholpi refugee camp (100 deaths, July 1996); Lokung-Palabek (over 400 dead, January 1997)'[640] and the Kitgum massacre of 48 people on July 25 2002,[641] among many others. Those at risk of dissent or sympathy with the government were often punished through 'amputation of hands, lips, and ears'.[642]

One result of these constant threats to the Acholi people was the eventual removal of nearly two million people from their homes into camps for internally displaced persons.[643] Some 23 of these government-recognised camps existed by 2000,[644] housing over 90% of the population of

[635] Blattman and Annan, *supra* note 557 at 143
[636] Akhavan, *supra* note 517 at 408
[637] Doom and Vlassenroot, *supra* note 497 at 27
[638] Akhavan, *supra* note 517 at 409
[639] Zwier, *supra* note 516 at 303
[640] Doom and Vlassenroot, *supra* note 497 at 25
[641] Akhavan, *supra* note 517 at 408
[642] Akhavan, *supra* note 517 at 409
[643] Moy, *supra* note 542 at 268; Zwier, *supra* note 516 at 303; Patel et al, *supra* note 496 at 2
[644] Patel et al, *supra* note 496 at 2

northern Uganda.[645] This 'massive displacement'[646] produced 'a humanitarian crisis (which) has devastated the economy of northern Uganda'.[647] Unfortunately, even in the camps, inhabitants remained targets of the LRA, continuing to be 'maimed, raped, murdered, and abducted'.[648]

What had begun as a fringe spiritual group fighting for Acholi independence had, over this second era, developed into a vast armed group conducting a campaign of terror so massive that it resulted in the displacement of nearly the entire northern population. This huge growth in influence was made possible in substantial part because of a wider international context which provided Kony with an unexpected source of support. Such growth in members and reach of the LRA was possible in substantial part because of the wider international context through which destiny had unexpectedly favoured Kony. Though the surrounding conflicts and relationships remain complex, in brief, the government of Sudan (prior to the secession and independence of South Sudan) was fighting a lengthy conflict with the Sudan People's Liberation Army (SPLA) based in southern Sudan, which was 'waging a so-called liberation war against oppression by Arabs and Islamist intolerance.'[649] The National Islamic Front (NIF), which has nominally ruled Sudan since the 1989 military coup, viewed Uganda as a barrier to its expansive Islamic agenda.[650] Khartoum, too, drew links between Museveni and John Garang, an SPLA leader, as the two had apparently been old friends,[651] or at least each attended the same university, albeit at different times, and may indeed have 'hardly known each other'.[652]

[645] Patel et al, *supra* note 496 at 2; Moy, *supra* note 542 at 268
[646] Doom and Vlassenroot, *supra* note 497 at 30
[647] Moy, *supra* note 542 at 268
[648] Moy, *supra* note 542 at 268
[649] Doom and Vlassenroot, *supra* note 497 at 28
[650] Prunier, *Africa's World War, supra* note 13 at 81
[651] Doom and Vlassenroot, *supra* note 497 at 28
[652] Prunier, *Africa's World War, supra* note 13 at 80

Either way, the end result was that Sudan decided to support Kony and the LRA in one of many attempts to disrupt its enemies' political regimes.[653] After Ethiopia's Colonel Mengistu fell in 1991, the SPLA lost a key ally and split into rivalling factions, and the Sudanese government seized their chance to make contact with the LRA.[654] Thus, 'in exchange for a symbolic smattering of Islam',[655] the LRA gained a major military ally. This was 'a strange coalition indeed'[656] consisting of 'an unlikely, Faustian alliance between the Islamist government of Sudan and a nominally "Christian" insurgency'.[657] To a substantial extent, the LRA were simply 'fulfilling a political role on the chessboard',[658] such that 'Kony and his people (were) but the dogs of war.'[659]

By 1994, in exchange for their continuing disruption the LRA received support in the form of weapons, training facilities,[660] cultivatable land, materials, hospitals, safe base camps, ammunition[661] and even intelligence.[662] As such the LRA 'was suddenly up to over two thousand well-equipped troops by March 1994'.[663] Over time, the relationship between Khartoum and the LRA was impacted in various ways by the fallout from the 9/11 terrorist attacks in the USA, causing greater external pressure to reduce terrorist support,[664] Bashir's indictment by the ICC, which rendered him less conducive to helping Kony,[665] the collaborative 'Operation Iron Fist'

[653] Doom and Vlassenroot, *supra* note 497 at 29: 'The Bashir regime (also) supports rebels or defeated remnants of former armies in Ethiopia, Rwanda and the DRC'
[654] Prunier, *Africa's World War, supra* note 13 at 81-2
[655] Prunier, *Africa's World War, supra* note 13 at 82
[656] Doom and Vlassenroot, *supra* note 497 at 28
[657] Akhavan, *supra* note 517 at 406
[658] Doom and Vlassenroot, *supra* note 497 at 29
[659] Doom and Vlassenroot, *supra* note 497 at 30
[660] Doom and Vlassenroot, *supra* note 497 at 28
[661] Patel et al, *supra* note 496 at 2
[662] Zwier, *supra* note 516 at 306
[663] Prunier, *Africa's World War, supra* note 13 at 82
[664] Patel et al, *supra* note 496 at 2
[665] Zwier, *supra* note 516 at 308

between Uganda and Sudan to rout LRA bases,[666] and, of course, the eventual separation of Sudan. During the early years of this second era, however, the international collaboration was key to enabling Kony maintain and expand his reign of terror.

Era Three: Post-Indictment (2005-2014)

Among the many elements which marked the downfall of Kony's reign in the mid-2000s is included the 2005 ICC indictments of Kony and four of his henchmen, and the attempt to hold peace talks in 2006, and their subsequent collapse. There has been some speculation that the enactment of the former contributed to bringing the LRA to the latter's negotiating table in 2006.[667] Nevertheless, although a cessation of hostilities agreement was signed by the LRA and the Ugandan government in 2006,[668] the agreement ultimately failed. Shortly thereafter, an international military force composed largely of AU and Ugandan soldiers succeeded in driving the LRA out of Uganda,[669] where they remain, operating nomad-like in a myriad of remote bases in the DRC, CAR, and South Sudan.[670] Northern Uganda has returned to relative peace[671] and as

[666] Apuuli, *supra* note 500 at 182
[667] Terry Beitzel and Tammy Castle: 'Achieving Justice Through the International Criminal Court in Northern Uganda: Is Indigenous/Restorative Justice a Better Approach?' 23(1) International Criminal Justice Review (2013) 41at 43
[668] Finnstrom, *supra* note 555 at 88
[669] Keating, *supra* note 598; Olivia Becker: 'UN: The Capture of Joseph Kony is 'Coming Pretty Soon', Vice News, May 13 2014, available online at https://news.vice.com/article/un-the-capture-of-joseph-kony-is-coming-pretty-soon, last accessed on 15/07/2014; Rodney Muhumuza, 'Rebel Leader Kony "Hibernates," evades Jungle Hunt', ABC News, July 4th, 2014, available online at http://abcnews.go.com/International/wireStory/rebel-leader-kony-hibernatesevades-jungle-hunt-24425323, last accessed on 15/07/2014 at 2; Michelle Nichols, 'Warlord Kony Hiding in Disputed South Sudan Enclave: UN', Reuters, May 6, 2014, available online at http://www.reuters.com/article/2014/05/06/us-southsudan-sudan-un-kony-idUSBREA450ZR20140506, last accessed on 15/07/2014
[670] Keating, *supra* note 598; Muhumuza, *supra* note 669 at 2
[671] Henry D Gombya, 'Northern Uganda Peaceful as Kony Left Five Years Ago – Gakumba' The London Evening Post, March 15 2012, available online at http://www.thelondoneveningpost.com/northern-uganda-is-peaceful-as-kony-left-fice-years-ago-gakumba/, last accessed on 15/07/2014

of 2009, around 80.7% of internally displaced persons (some 1,452,000) have left the camps and returned to their home villages.[672]

As far as intelligence shows, this is the situation as it remains today. Joseph Kony has gone into 'hibernation',[673] and the LRA has been reduced from thousands to fewer than 500 active members.[674] The movement is now focused mainly on survival,[675] including looting and theft, and may be split into 'several highly mobile groups'.[676] Many original members are reported to have defected or been killed, including some 700 in 2008.[677] Nevertheless, the LRA is still described as 'a serious threat, with its senior leadership intact and with the potential to destabilize the sub-region'.[678] Already in 2014, at least 64 LRA attacks have been reported, 'during which 93 people were abducted and two people killed.'[679] The LRA, even in its diminished form, is 'still wreaking havoc and (remains) very hard to catch'.[680] Understandably, therefore, 'until Kony is caught or killed, victory can't be declared'.[681]

As such, the Ugandan military, supplemented by AU troops and US Special Forces and equipment,[682] is hunting Kony from the remote tactical base of Obo in the Central African Republic.[683] Around 5,000 troops,[684] supplemented by financial and logistical support of the EU

[672] 'What Happened after Joseph Kony left Northern Uganda?' Live 58, available online at http://www.live58.org/what-happened-after-joseph-kony-left-northern-uganda, last accessed on 15/07/2014
[673] Muhumuza, *supra* note 669 at 1
[674] Muhumuza, *supra* note 669 at 2; IPU ('there are 300 LRA members left')
[675] Muhumuza, *supra* note 669 at 2; Nichols, *supra* note 669
[676] Ban Ki-Moon quoted in Nichols, *supra* note 669
[677] Muhumuza, *supra* note 669 at 1
[678] Ban Ki-Moon quoted in Nichols, *supra* note 669
[679] Nichols, *supra* note 669
[680] Keating, *supra* note 598
[681] Muhumuza, *supra* note 669 at 2
[682] Keating, *supra* note 598
[683] Muhumuza, *supra* note 669 at 1; Nichols, *supra* note 669
[684] Elias Biryabarema and Crispin Dembassa-Kette, 'Uganda says Seleka now its enemy as it hunts LRA in Central African Republic', Reuters Canada, July 1 2014, available online at http://ca.reuters.com/article/topNews/idCAKBN0F643520140702?pageNumber=1&virtualBrandChannel=0, last accessed on 15/07/2014

and the US[685] are deployed in the region. The US has offered a $5m reward for Kony's capture.[686] Conflicting reports suggest that LRA members may be collaborating with ousted Seleka rebels from the Central African Republic,[687] or that they may be operating out of the disputed Kafia Kingi enclave, supported by Sudanese forces.[688]

Kony is apparently increasingly paranoid for his personal safety and secrecy. He reportedly 'eschews any use of hi-tech devices'[689] to prevent enemy interception and utilises personal couriers to transfer messages and orders.[690] The increased scrutiny of powerful and technologically developed international institutions such as the ICC may have contributed to this outcome. Many defected commanders 'have denied seeing or communicating with Kony' since 2010.[691] He has also apparently named his son as one of his deputies, demonstrating his increasing concern for the breakdown of military alliances.[692] The infamous 'Kony 2012' viral internet campaign created an increase in scrutiny and attention towards the region,[693] reducing still further Kony's options for exile outside of the jungles of central Africa. In northern Uganda, attention has shifted towards reconstruction and rehabilitation after decades of conflict, including addressing issues of unemployment, lack of health care provisions, internal corruption, and human rights abuses.[694]

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[685] 'Africa: the African Union Appoints a New Special Envoy for the Issue of the Lord's Resistance Army' 10 July 2014 AllAfrica, available online at http://allafrica.com/stories/201407111361.html, last accessed on 15/07/2014
[686] Muhumuza, *supra* note 669 at 1
[687] Nicholls, *supra* note 669; Biryabarema and Dembassa-Kette, *supra* note 684
[688] Muhumuza, *supra* note 669 at 2; Nichols, *supra* note 669
[689] Muhumuza, *supra* note 669 at 1
[690] Muhumuza, *supra* note 669 at 1
[691] Muhumuza, *supra* note 669 at 1
[692] Muhumuza, *supra* note 669 at 2
[693] Kamari Maxine Clarke, 'Kony 2012, the ICC, and the Problem with the Peace-And-Justice Divide', Proceedings of the Annual Meeting (American Society of International Law) Volume 106 (March 2012) 309
[694] Keating, *supra* note 598

Part Two: The ICC and Incapacitation

2(i) The Indictment of Joseph Kony

On the 16th of December 2003, President Museveni finally formally referred the situation of the LRA to the International Criminal Court, under Articles 13(a) and 14 of the Rome Statute.[695] This, the first state referral to the ICC in its history,[696] specifically pointed to the situation of the LRA[697] and invited the Court to begin investigations and prosecutions in the region. The investigation subsequently opened on the 28th of July 2004,[698] resulting in the eventual issuance of five arrest warrants for key senior leaders of the LRA. The warrants, issued on the 8th of July 2005, were initially sealed, 'primarily because of security considerations',[699] in particular to 'secure the safety of witnesses and victims vulnerable to retaliatory attacks'.[700] Prosecutor Luis Moreno Ocampo eventually unsealed the indictments on the 14th of October 2005[701] in 'heavily redacted form',[702] but specifically naming Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya as the indicted individuals.[703] The allegations included various counts of war crimes and crimes against humanity from the period of mid-2002 (when the Court's mandate began) until at least late 2003.[704] Kony has been accused of issuing specific orders to 'attack, kill, loot, and abduct civilian populations, including those living in IDP camps.'[705] He has a total of thirty-three counts of crimes against humanity and war crimes against him, including 'ordering rape, enslavement, mass murder of civilian populations,

[695] Moy, *supra* note 542 at 169
[696] Ocampo, *supra* note 543 at 2; Beitzel and Castle, *supra* note 667 at 43
[697] Apuuli, *supra* note 500 at 185
[698] Ocampo, *supra* note 543 at 3
[699] Ocampo, *supra* note 543 at 3
[700] Moy, *supra* note 542 at 267
[701] Apuuli, *supra* note 500 at 179; Moy, *supra* note 542 at 267
[702] Moy, *supra* note 542 at 267
[703] Moy, *supra* note 542 at 267
[704] Moy, *supra* note 542 at 268
[705] Moy, *supra* note 542 at 268

abductions and conscriptions of child soldiers' and others[706]. There is a specific focus on six grave attacks against civilians in northern Uganda in various regions since July 2002.[707]

2(ii) The Fate of Kony's Co-Conspirators

Of the five indicted LRA members, at least three are already dead, or presumed so. Major General Raska Lukwiya was killed on the 12th of August 2006 in Kitgum District by UPDF forces engaged in battle with the LRA.[708] A DNA test confirmed the very strong likelihood that remains belonged to Lukwiya.[709] After official confirmations of his death, the ICC subsequently terminated proceedings against Raska Lukwiya on the 11th of July 2007.[710]

Although not confirmed, Okot Odhiambo is reportedly 'feared dead'[711] according to the evidence of recently defected LRA soldiers. He was apparently killed in combat with UPDF troops in December of 2013.[712] Prior to his death, Odhiambo was purportedly one of Kony's 'most trusted commanders and his chief deputy'.[713] Reports are unconfirmed and there had been no body discovered, and as such the ICC is yet to terminate proceedings against Odhiambo.

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[706] Zwier, *supra* note 516 at 303
[707] Ocampo, *supra* note 543 at 4
[708] ICC ANNEX ICC-02/04-01/05-270, Republic of Uganda Ministry of Justice and Constitutional Affairs, 'Notice Confirming the Death of Raska Lukwiya', available online at http://www.icc-cpi.int/iccdocs/doc/doc444915.pdf last accessed on 18/07/2014, last accessed on 18/07/2014
[709] *Ibid*.
[710] ICC Pre-Trial Chamber II: Decision to Terminate the Proceedings Against Raska Lukwiya' ICC-02/04-01/05 11 July 2007, available online at http://www.icc-cpi.int/iccdocs/doc/doc297945.PDF last accessed on 18/07/2014
[711] Tabu Butagira, 'LRA Commander Okot Feared Dead', Daily Monitor, 14th February 2014, available online at http://www.monitor.co.ug/News/National/LRA-commander-Okot-Odhiambo-feared-dead/-/688334/2205586/-/w4e3h2/-/index.html last accessed on 18/07/2014, last accessed on 18/07/2014
[712] Patrick Munduga and Paul Ronan, '5 Things You Should Know About Okot Odhiambo', Huffington Post, 02/19/2014, available online at http://www.huffingtonpost.com/patrick-munduga/okot-odhiambo_b_4810668.html, last accessed on 18/07/2014
[713] *Ibid*.

Vincent Otti, once 'Kony's second in command and most trusted adviser',[714] was purportedly murdered at the age of 61 by or on behalf of Kony in October 2007.[715] Apparently a split in the LRA leadership led to Otti being executed by 'fellow officers' at Kony's jungle hideout.[716] Some argue the death was a result of the fact that Otti was 'pressing the peace process too energetically'.[717] Otti had apparently recently attempted to negotiate a reconciliation agreement with UN mediators, with an enthusiasm that clearly offended Kony.[718] Although Kony confirmed Ottis's death in January 2008,[719] since the death has not been independently verified, the ICC continues its proceedings against him.

Finally, although early reports suggested that Dominic Ongwen was killed on September the 30th 2005 by the UPDF in Soroti district,[720] these stories appeared to have later been proved false, with DNA tests finding that the discovered body was not his.[721] The BBC in 2008 noted that 'one can never be sure' whether Ongwen and his surviving co-conspirators are still alive.[722]

[714] Ocampo, *supra* note 543 at 6
[715] Noel Mwakuga, 'Obituary: LRA Deputy Vincent Otti', BBC, 23 January 2008, available online at http://news.bbc.co.uk/2/hi/africa/7083311.stm, last accessed 18/07/2014
[716] *Ibid*.
[717] Zwier, *supra* note 516 at 309
[718] Zwier, *supra* note 516 at 309
[719] Henry Mukasa, 'Kony Confirms Otti's Death', New Vision Uganda, 23 January 2008, available online at http://www.newvision.co.ug/D/8/13/608136, last accessed 18/07/2014
[720] International Criminal Court, 'Submission of Information Regarding Dominic Ongwen', ICC-02/04-01/05, 5th October 2005, available online at http://www.icc-cpi.int/iccdocs/doc/doc97169.pdf#search=Ongwen last accessed 18/07/2014; Apuuli, *supra* note 500 at 197 FN 2; Uganda Radio Network: 'ICC Investigates Doinic Ongwen's Death', 03/02/2006, available online at http://ugandaradionetwork.com/a/story.php?s=3110, last accessed 18/07/2014
[721] New Vision Uganda: ''Dead' LRA Chief Alive', July 10 2006, available online at http://www.newvision.co.ug/D/8/12/508695, last accessed 18/07/2014
[722] Steve Bradshaw, 'Justice Dilemma Haunts Uganda', 8 September 2008, available online at http://news.bbc.co.uk/2/hi/africa/7603939.stm, last accessed on 18/07/2014

2(iii) The Attempted Arrest of Kony

Although subject to the first arrest warrant in ICC history,[723] Kony has yet to be apprehended by the Court. The UPDF, supported by the AU and international assistance, has been continuing in their attempts to execute the ICC's arrest warrants. However, with the remaining fugitive(s) 'moving between (at least) three countries'[724] and basing themselves deep in remote jungle bases,[725] as well as the complicating factors of turbulence in the region[726] and perceived lack of support from some state actors,[727] there is significant doubt as to how the warrants render it feasible to 'charge Uganda to arrest Joseph Kony when they have failed for the last 19 years'.[728]

Part Three: Assessing the Impact of the ICC in Northern Uganda

Uganda's decision to refer the situation of the LRA to the ICC, and the OTP's subsequent decision to issue indictments for key leaders, have both been highly controversial and significantly critiqued. While the warrants were 'hailed by the government of Uganda and some international human rights organizations',[729] similarly 'some sections of the local population and civil society groups…(were) not happy' with the action.[730] Their effects have 'been much disputed both domestically and internationally'[731] from 2005 until the current date.

[723] Ocampo, *supra* note 543 at 8
[724] Ocampo, *supra* note 543 at 7
[725] Zwier, *supra* note 516 at 309
[726] *See* Nichols, *supra* note 669; Biryabarema and Dembassa-Kette, *supra* note 684; and UTK – Seleka rebel groups which ousted President Bozize of CAR in March 2013 and were themselves routed in January 2014 may be contributing to the LRA cause
[727] *See* Muhumuza, *supra* note 669 at 2; Nichols, *supra* note 669– reports accuse Sudan of not assisting in the search for the LRA in the disputed Sudan-controlled Kafia Kingi region
[728] Archbishop Ondamana quoted in Apuuli, *supra* note 500 at 187
[729] Apuuli, *supra* note 500 at 180
[730] Apuuli, *supra* note 500 at 180
[731] Beitzel and Castle, *supra* note 667 at 43

3(i) An Optimist's Outlook: The ICC's Indirect Incapacitation of Joseph Kony

3(i)(a) Praise of International Organisations and Civil Society Groups

In the immediate wake of the ICC's indictments, a wave of positive feeling was espoused among the international community. Then-UN Secretary General Kofi Annan 'offered glowing praise'[732] while Human Rights Watch and Amnesty International 'applauded the ICC for taking action'.[733] Many considered this a bright new end for the conflict, and a fitting response to the brutalities of a heinous warlord.

3(i)(b) The Internal effect of the ICC warrants on the LRA

The ICC warrants may have had significant impact of indirect incapacitation within the LRA movement, too, which would evidently participate in the isolation and disempowerment of Kony, as its leader. There is some argument that the ICC referral and subsequent warrants substantially increased the number of LRA rebels to come out of hiding under the previously 'much-neglected Amnesty Act of 2000'.[734] The Amnesty Act had 'produced few converts until that point',[735] but the ICC's increased pressure has indirectly encouraged non-indicted members to defect. Divisions within the top leadership caused by the ICC indictments isolating just a few resulted in the surrender of key individuals such as LRA's 'top negotiator', Sam Kollo,[736] the 'high-profile' Colonel Onon Kamdulu,[737] and 'senior rebel commander' Sam Opio.[738] A 2011 report by The Amnesty Commission stated that in total some 13,021 LRA members had reported to the

[732] 'Annan Hails International Criminal Court's Arrest Warrants for Five Ugandan Rebels', UN News Service, October 14 2005, http://www.un.org/apps/news/printnewsAr.asp?nid=16243 quoted in Moy, *supra* note 542 at 269
[733] Moy, *supra* note 542 at 169; see, e.g., Human Rights Watch: 'ICC Takes Decisive Step for Justice in Uganda', 14th October, 2005
[734] Moy, *supra* note 542 at 271
[735] Moy, *supra* note 542 at 271
[736] Akhavan, *supra* note 517 at 417
[737] Akhavan, *supra* note 517 at 417
[738] Muhumuza, *supra* note 669 at 1

commission,[739] noting also that 'a significant number of returnees (go) home without reporting'.[740]

Further, it is possible that the arrest warrants played a part in convincing Kony and the leading LRA players to take part in renewed peace talks with Uganda.[741] This encouragement was exacerbated by the indirect effect of the indictments reducing Sudan's support in the region (see below, s3(i)(c)), drastically limiting the manoeuvrability and military capability of the LRA, creating 'political isolation and military containment'.[742] Thus, Kony's indictment 'helped to bring the LRA/M leaders to the negotiating table in 2006',[743] playing an 'important role'[744] despite the empty threat that the LRA would withdraw if the ICC warrants remained.

3(i)(c) The External effect of the ICC Warrants

Many laud the ICC's positive impact in the wider international world. In terms of raising international public consciousness about the existence of the northern Ugandan struggle, the ICC arrest warrants were certainly 'a means of thrusting this long-forgotten African war back onto the international stage.'[745] The investigation and subsequent indictments succeeded significantly in both educating swathes of the public about Kony's existence, and paving the way for provision of relatively objective and verified information about the LRA's crimes.

[739] Damian Kato, 'The Amnesty Commission DDR in Uganda', 2011, available online at http://www.tdrp.net/PDFs/KampalaPPT_Kato.pdf last accessed on 18/07/2014 at 4
[740] *Ibid* at 20
[741] Richard Dicker of Human Rights Watch, quoted in Mutua, *supra* note 199 at 4
[742] Akhavan, *supra* note 517 at 404
[743] Beitzel and Castle, *supra* note 667 at 43
[744] Fatou Bensouda, Op-Ed, 'International Justice and Diplomacy', NY Times Opinion, 19 March 2013, available online at http://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html?smid=tw-share&_r=5&, last accessed on 15/07/2014
[745] Akhavan, *supra* note 517 at 404

It is significant to note that it was likely in the wake of the referral of the situation to the ICC, and the subsequent arrest warrants, 'that Sudan was finally persuaded to end its support for the LRA', such that it has.[746] In 2004 Sudan agreed to permit UPDF troops into southern Sudan to target presumed LRA bases,[747] an eventuality that 'significantly weakened the rebel group'.[748] As a result of the attention drawn to LRA crimes by the arrest warrants, Sudan cut significant ties with the movement, rendering it 'increasingly difficult for the LRA to find a home where it can continue to fester.'[749] Eventually, Khartoum 'appeared to end, or at least significantly decrease, supplies to the LRA',[750] further isolating and limiting the movement.

3(i)(d) A Positive Logic of Incapacitation With Regard to Kony

One of the clearest reasons why it is worthwhile to attempt to incapacitate Kony and key members of the LRA is that not to do so would be abhorrent. The impunity that results from a lack of accountability for heinous actions 'is a drug' which 'strengthens the self-confidence' of commanders.[751] There is something repugnant about offering amnesty, and attempting to make peace, 'with someone who has been such a brutal killer of innocent Ugandans'.[752] As more than two decades of history, as well as moral instinct, can show, the 'continued suffering of Acholiland's tormented population' cannot be solved by 'the appeasement of brutal warlords.'[753]

Whether the LRA is a large, externally supported group or a small guerrilla movement, Kony remains an 'extremely destabilizing force in both Sudan and Uganda',[754] such that all possible

[746] Moy, *supra* note 542 at 271
[747] Akhavan, *supra* note 517 at 404
[748] Moy, *supra* note 542 at 271
[749] Apuuli, *supra* note 500 at 187
[750] Akhavan, *supra* note 517 at 417
[751] Doom and Vlassenroot, *supra* note 497 at 27
[752] Apuuli, *supra* note 500 at 183
[753] Akhavan, *supra* note 517 at 420
[754] Zwier, *supra* note 516 at 310

efforts ought to be taken to stop him. Kony, as the spiritual and military leader, and possibly one of the few surviving high-ranking LRA members, is the 'soul' of the organisation. He 'stands at the apex of the LRA structure…central to its organization and actions (and) to its very purpose.'[755] As such, his removal is 'the key to undoing the LRA's cohesion and motivation and creating new opportunities for peace.'[756] In the case of a powerful, even prophetic leader such as Kony, 'incarceration is appropriate in ensuring that (he) should no longer be in a position to direct future atrocities.'[757]

Another substantial reason why it was not a mistake to attempt to incapacitate Kony and his allies through invasive judicial means is that the so-called 'peace talks' were both ineffective and unlikely to be successful in the near future. On every attempt over the twenty-plus years of rebellion, peace talks between the parties broke down.[758] Kony appeared to have a lacklustre approach towards peace talks even long before the warrants; he 'consistently demonstrated a penchant for ruthlessness and an unwillingness to negotiate'.[759] Some have argued that he used peace negotiations to buy time in order to re-arm and regroup instead of having any serious predisposition to creating a solution.[760] The leader 'has ignored every opportunity' that he has been given to 'come out of the bush and end the war'.[761] Indeed, it appears that Kony eventually killed his deputy, Vincent Otti, because he was attempting 'too energetically' to negotiate peace.[762] That the LRA was so ideologically disparate and logically obtuse is significant here, as little 'can be expected from negotiations with a group that lacks a coherent ideology or clear

[755] International Crisis Group, Northern Uganda, 'Understanding and Solving the Conflict' 7 Africa Report No 77 (April 14, 2004) available online at www.icg.org at 5
[756] *Ibid*. at 8
[757] Beitzel and Castle, *supra* note 667 at 46
[758] Apuuli, *supra* note 500 at 183
[759] Akhavan, *supra* note 517 at 419
[760] Akhavan, *supra* note 517 at 417
[761] Apuuli, *supra* note 500 at 184-185
[762] Zwier, *supra* note 516 at 309

political objectives'.[763] It becomes particularly 'difficult to develop an effective counter strategy' because 'LRA actions are difficult to place within a coherent strategy'.[764] Indeed, the closer the LRA looks to a cult, the more 'there is reason to be sceptical about (Kony's) willingness to renounce an apocalyptic mission in exchange for life as a mere mortal.'[765]

There is also the point to make that Uganda couldn't, and shouldn't, be required to deal with such a situation as the LRA rebellion itself. Over time, the situation has changed so that the LRA 'is a regional issue'[766] which can no longer be contained by Ugandan forces, but instead *must* include the wider international community. The LRA are now shifting between at least three countries, in a cross-border nightmare that has not for years been capable of being described as 'contained'. And yet, due to 'the absence of any vital national interests', the international community has been largely blind to the problem of the LRA in the time leading up to the ICC indictments,[767] instead leaving the burden upon Uganda to 'negotiate a peaceful settlement with a ruthless, cult-like insurgency.'[768] The wider international community has been largely indifferent to the crisis, distancing itself from engagement with a conflict in which 'there was simply no sufficient vital interest to prompt action'.[769] The ICC referral, then, came as a last resort, a final tool to end the violence in northern Uganda through both directly intimidating the combatants and strategically engaging the international community.[770]

There is a justice-based reason, too, why Uganda may not be best-placed to prosecute Kony alone: the perceived objectivity and impartiality of the International Court adds legitimacy to a

[763] Moy, *supra* note 542 at 271
[764] International Crisis Group, *supra* note 755 at i
[765] Akhavan, *supra* note 517 at 419
[766] Kato, *supra* note 739
[767] Akhavan, *supra* note 517 at 404
[768] Akhavan, *supra* note 517 at 404
[769] Akhavan, *supra* note 517 at 409
[770] Akhavan, *supra* note 517 at 410

battle which many might otherwise dismiss as partisan. The participation of the ICC helps 'to distance the LRA prosecutions from local politics'[771] through the use of a geographically distinct and depoliticised judicial venue. The alternative, the use of Ugandan domestic courts to prosecute its government's rebels, would be understandably controversial and potentially dismissed by LRA members and supporters as an illegitimate justice.

There are temporally longer and geographically wider effects of Kony's indictment which must also be taken into consideration when assessing its merit. First, it must be noted that the LRA is not the only ruthless rebellion group which exists and which is capable of carrying out heinous crimes against civilians. The interests of not just the local, but the global, rest upon real and demonstrated accountability and de-legitimacy of such regimes. Without an international justice regime, 'since the mid-1970s, more than 15 states on four continents have passed amnesty laws exonerating past regimes or warlords'[772] as the only possibility for dealing with combatants. Such a history requires vast revision in order to adjust the mentality of contemporary aggressors. ICC indictments take one step towards both 'changing the cost-benefit calculus of using atrocities as an instrument of power' and establishing 'far-reaching, socio-pedagogical influence'[773] which changes the very *culture* of international relations and intrastate action. Through international denunciation of abhorrent regimes such as that of Joseph Kony, the International Criminal Court may make a long-term and cross-border adjustment to the very fibre in which such groups operate, disavowing perpetrators' feelings of both invulnerability and legitimacy.

[771] Akhavan, *supra* note 517 at 418
[772] Souare, *supra* note 510 at 369
[773] Akhavan, *supra* note 517 at 419

Secondly, it is argued by many that, in stark contrast to the supposed 'peace versus justice' dichotomy, a judicial and objective response to atrocity is a key figment of the peace process, indeed it may be the only thing that can bring true, lasting peace to a region. Having a prolific human rights abuser and criminal perpetrator walking amongst the community upon which he wreaked havoc 'does not augur well for the peace reached'.[774] Even worse is to see such an individual receiving special treatment, ceremonial positions of power, or other rewards for atrocious acts. As such, peace-justice discourses 'obfuscate some of the issues at the core of the violence on the African continent' by seeing justice and peace as mutually exclusive.[775] In the case of Kony, permitting his return to Acholiland would violate the instinctive moral rights of the many survivors and escapees against whom he perpetrated criminal acts, particularly in the context that many of his victims were abducted children, who have returned to their communities but still live with the post-traumatic scars of their LRA lives. Further, Kony's charisma and lasting aura of spirituality may serve to permit his reintroduction into a position of power in the fragile northern Ugandan region, a dangerous eventuality that would not be permitted were he conclusively removed from the region by the International Court.

Ultimately, it seems clear that Kony's indictment, while critiqued, 'came after a decade of failed military interventions and peace negotiations'[776] as a last resort to the impregnable struggles of the region. While not directly incapacitating the leader, the ICC involvement has certainly initiated and accelerated the 'process of isolating the LRA leadership' from its allies, resources,

[774] Souare, *supra* note 510 at 372
[775] Maxine Clarke, *supra* note 693 at 309
[776] Beitzel and Castle, *supra* note 667 at 43

geographical bases and coercive recruitment stream.[777] Thus for many, the international judicial system consisted of the first 'realistic prospect of putting an end to the scourge of the LRA'.[778]

3(ii) A Pessimist's Perspective: The Failure of the ICC in Uganda

Amidst some praise, the ICC indictments upon Joseph Kony and his counterparts have received everything from justified concern – often on the part of those human rights organisations who initially lauded them[779] – to barely-disguised vitriolic disgust. The key arguments suggest that, despite their fairly unimpeachable objective of ending atrocity in northern Uganda, the indictments were either incomplete or conflicted with other substantial interests felt by people in the region and surrounding.

3(ii)(a) Partisanship and Political Selectivity

One of the most widely-stated arguments against Kony's indictment, particularly by the Acholiland civilians at the centre of the violence, is that such an accusation is incomplete due to its censored non-criticism of the actions of the UPDF and Ugandan government officials. The ICC fails to take into account 'violations perpetrated on the other side of the conflict'.[780] The Ugandan government was allegedly 'brutal' towards Acholi civilians, using excessive force to destroy 'suspected rebel support' amid the masses.[781] Such events included the UPDF bombing and torching of Acholi villages, exacerbating the displacement of civilians in the search for LRA insurgents, as well as 'overzealously killing any civilian found outside IDP camps'.[782] A Human Rights Watch report published in 2005 documented numerous UPDF incidences of 'rapes,

[777] Akhavan, *supra* note 517 at 418
[778] Akhavan, *supra* note 517 at 420
[779] Human Rights Watch, quoted in Akhavan, *supra* note 517 at 411
[780] Moy, *supra* note 542 at 269
[781] Souare, *supra* note 510 at 373
[782] Moy, *supra* note 542 at 269

torture, killings and arbitrary arrests and detentions of the civilian population in northern Uganda.'[783] The ICC's conspicuous non-confrontation of UPDF acts therefore seems to be an affront to both the victims of these events and the tense political north-south dichotomy which is exacerbated by the Court's partisanship.

Any perception of the ICC as 'political' or selectively biased in any way would be a tremendous blow to its legitimacy. The court's ability to provide an impartial and objective forum would 'be severely compromised' if such a critique were to stand.[784] For many, the ICC's intervention on behalf of the government is similar to it 'acting on behalf of the Ugandan state',[785] a breach of its duty to represent justice, separate from the political realm. However, the Office of the Prosecutor responded strongly to suggestions of partisanship, arguing that the 'criteria for selection of the first case (to be brought to the ICC) was gravity'[786] and that the crimes of the LRA 'were much more numerous and of much higher gravity'[787] than those of the government. The ICC's involvement was also probably the most apolitical forum available for trying the LRA, departed, as it was, from the politicised context of the historic intra-state divisions.[788] It is also worthwhile to note that, while full accountability for the UPDF's actions must also be pursued, 'eliminating or at least neutralising the LRA was a matter of common interest'[789] due to the seriousness of their crimes, which superseded the political realm.

[783] Apuuli, *supra* note 500 at 186
[784] Apuuli, *supra* note 500 at 186
[785] Tim Allen, 'War and Justice in Northern Uganda: An Assessment of the International Criminal Court's Intervention', CSRC Special Reports, (2005) at 39
[786] Ocampo, *supra* note 543 at 3
[787] Ocampo, *supra* note 543 at at 3
[788] Akhavan, *supra* note 517 at 404
[789] Akhavan, *supra* note 517 at 404

3(ii)(b) Peace and Amnesty

An alternative argument which is hotly debated with regard to the ICC's decision to issue indictments for key LRA leaders is its impact on the purportedly budding peace process in Uganda. For some, the ICC's 'terrible blunder' risks the possibility of 'having in the end neither justice nor peace delivered'.[790]

A key issue in this debate is the 2000 Amnesty Act adopted by the Ugandan government in January 2000, providing for the amnesty of anyone 'engaged in an armed rebellion against the government since 1986'.[791] The act required surrender of arms and renunciation of political rebellion,[792] but was applied to all rebels regardless of rank, and 'intended to provide an incentive for defection from the LRA'.[793] The ICC indictments were therefore seen as contradictions of the Amnesty Act,[794] undermining its ability to end the conflict in a more constructive way and precluding Uganda's promised protection.[795] The Act had been successful up to the indictments, with some 5000 former LRA fighters surrendering by mid-2004.[796] Many of the returns were sparked by radio stations such as MEGA FM, whose 'Dwog Paco' programs in 2003-4 'appeal(ed) to those still in the bush to come back home',[797] to significant success.

In participating in these programmes of voluntary surrender, former LRA soldiers were able to demonstrate a wholehearted renunciation of their former violence, and eventually to reintegrate

[790] Josefine Volqvartz, 'ICC Under Fire Over Uganda Probe', February 23 2005, CNN
[791] Akhavan, *supra* note 517 at 409
[792] Apuuli, *supra* note 500 at 184
[793] Moy, *supra* note 542 at 270
[794] Souare, *supra* note 510 at 374
[795] Moy, *supra* note 542 at 270
[796] Allen, *supra* note 785 at 75
[797] Joanna R. Quinn, 'Getting to Peace? Negotiating with the LRA in Northern Uganda' 10 Human Rights Review (2009) 55 at 67

much more effectively back into their communities. [798] The amnesty programmes were especially attractive for those soldiers who had been coerced into joining the LRA as abducted children. By providing the opportunity for former child soldiers to return home without fear of recrimination, they enabled the healing of families and communities who had lost their children to Kony's brutal strategy for expanding his troops.[799] ICC indictments, by contrast, 'provided incentives for the LRA/M to continue fighting'[800] by making it clear that Uganda had rescinded its promise, at least for the highest commanders.

However, such critiques have been countered by many who feel that amnesty provisions violate the rights of victims and the wider community. Commentators argue that amnesties are in violation of international law, cannot be morally justified, and do not lead to a guarantee of durable peace.[801] Legislation such as Uganda's Amnesty Act 'disregard(s) the rights of the victims' by treating them 'as if they did not have pre-determined rights at the moment of abuse'[802] or at least as if those rights did not merit protection. As noted above, too, impunity and judicial inaction 'merely postpone the eruption of discontent' by failing to deal with past crimes and failing to neutralise dangerous individuals.[803] In the case of the LRA, while the Amnesty Act was fairly successful among ground troops and previous child soldiers, it is notable that the flow of 'reporters' did not cease when the ICC issued its indictments, but instead continues at a strong pace up until the present day.[804] Secondly, many have noted that key leaders and high-level commanders were not encouraged to surrender because of the Amnesty Act: '(n)ot a single senior LRA commander took advantage' of the offer, at least in its early years. Indeed, it is only

[798] Souare, *supra* note 510 at 373
[799] Beitzel and Castle, *supra* note 667 at 44
[800] Beitzel and Castle, *supra* note 667 at 44
[801] Souare, *supra* note 510 at 375
[802] Souare, *supra* note 510 at 376
[803] Souare, *supra* note 510 at 377
[804] Kato, *supra* note 739

when the ICC's indictments indirectly affected conditions of life in the LRA (by removing key international allies and causing an increase in international scrutiny of and action against LRA atrocities) that higher-level LRA members began to take advantage of the continuing Amnesty Act.[805] It is thus highly likely that the ICC indictments did not violate the Amnesty Act, but instead complemented it, increasing its effectiveness and ability to end the conflict.

The indictments may have had a second, and more substantial, negative effect upon peace in Uganda, however. It is highly likely that the ICC's actions may have altered, even damaged, the fledgling peace talks that took place repeatedly in Uganda during and after the indictments' issuance. In late 2003, former Minister Betty Bigombe met with LRA members and established a seven-day ceasefire, renewed continuously;[806] however after Museveni's referral of the situation to the ICC the peace agreements were disrupted in January 2004, reinitiating hostilities.[807] In 2004-5, Betty Bigombe hosted further peace talks between LRA leaders and Ugandan officials, supported by the USA, UK, The Netherlands, and Norway.[808] Although she 'came close to brokering a ceasefire agreement',[809] the peace talks fell apart after the issuance of indictments by the ICC, which to Bigombe 'marked the end of her work' by rendering it impossible to continue.[810] The ICC's unfortunate timing in unsealing the indictments in October 2005 resulted in their emergence in the midst of the talks, 'curtailing that process' significantly.[811] Bogombe noted that 'rescinding the amnesty option deprived her of a crucial bargaining chip'[812] and eroded any trust the LRA had in the proceedings. The indictments also have the effect of

[805] See, e.g., Akhavan, *supra* note 517 at 417; Muhumuza, *supra* note 669 at 1
[806] Maxine Clarke, *supra* note 693 at 310
[807] Maxine Clarke, *supra* note 693 at 310
[808] Moy, *supra* note 542 at 270
[809] Moy, *supra* note 542 at 270
[810] Apuuli, *supra* note 500 at 180
[811] Maxine Clarke, *supra* note 693 at 310
[812] Moy, *supra* note 542 at 270

'branding the LRA criminals',[813] which reduces the legitimacy of even attempting to negotiate with them.

The context of Kony's indictment has led to the rise of arguments evoking Article 53(1)(c) of the Rome Statute, which provides that in determining whether to investigate or prosecute, the Prosecutor should take into account the 'interests of justice'.[814] This requires that the Prosecutor should exercise his or her discretion to 'take into account the broader context within which international justice operates',[815] in particular where prosecutions may 'prolong or aggravate ongoing conflict or undermine a fragile peace process'.[816] Many argue that this Article should have been invoked to stop the indictments, with view of both the fragile peace agreement, and of Uganda's Amnesty Act which appeared to strongly contradict the ethos and effects of ICC prosecutions. Others counter that the ICC was invited to investigate by Museveni, an eventuality which negated much of the Prosecutor's need to consider the interests of his participation in the conflict.[817]

The continuation of the ICC indictments also have been said to hamper further peace talks that took place from 2006-2008 in Juba, South Sudan (then Sudan). Many describe the accusations as 'main inhibitors' to the talk, rendering negotiating difficult and making the ICC 'an unwanted guest in Northern Uganda'.[818] In several instances, the LRA have refused to negotiate effectively 'unless the (ICC) indictments (were) quashed and the case dropped',[819] a comprehensive level of action which the Ugandan government was likely unwilling, and certainly unable, to offer. Kony

[813] Apuuli, *supra* note 500 at 184
[814] Rome Statute of the International Criminal Court, Article 53(1)(c)
[815] Akhavan, *supra* note 517 at 416
[816] Akhavan, *supra* note 517 at 416
[817] Moy, *supra* note 542 at 272-3
[818] Quinn, *supra* note 797 at 65
[819] Mutua, *supra* note 199 at 4

himself stated in a 2006 interview, 'I am not guilty. I am not guilty. I am not guilty…if they want peace, they will take that case from us.'[820] The leader promised, 'when we talk this peace talk…and everything is finished well, we go (to The Hague)…We go and judge that case to show that I am not found guilty.'[821]

There is, then, some evidence that the ICC investigation did impact negatively on the peace talks being held at the time. This would appear to provide some justification for the numerous accusations that the ICC has in Uganda prioritised justice over peace, to the detriment of many innocent individuals. In reality, however, it is difficult to prove this alleged causative effect. Decades of failed peace talks long before the ICC's involvement suggest that they were unlikely ever to succeed. Despite his statements to the contrary, the 'cult of personality' exhibited by Kony, combined with his authoritarian status, lack of defined political goals, and irrational spiritual basis, render it extremely unlikely that he would ever accept a peace agreement and return to 'life as a mere mortal'[822] with or without ICC indictments hanging over him.

3(ii)(c) Imperialism Versus Traditional Justice

A further critique of the ICC's intervention in Uganda consists of the argument that such international justice imposes non-local norms and displaces traditional justice systems which may be more suitable to the context[823]. International judicial procedures form a 'disjuncture' with 'local community traditions, values, and notions of justice'[824] according to Makerere

[820] Schomerus, *supra* note 546 at 128
[821] Schomerus, *supra* note 546 at 128
[822] Akhavan, *supra* note 517 at 419
[823] Apuuli, *supra* note 500 at 184
[824] "ICC Statement" July 28 2004, Refugee Law Project, Makerere University, at 1, in Beitzel and Castle, *supra* note 667 at 43

University's Refugee Law Project. Traditional methods of justice called *Mato Oput*[825] involve 'confessions of guilt, cleansing rituals, and the eventual acceptance of LRA members back into communities'[826] which may be more conducive to the long-term growth of the Acholi community. It is notable, however, that these mechanisms are not mutually exclusive to international justice, especially as concerns the vast majority of LRA foot-soldiers who will not be subject to international justice. A 2007 Uganda-LRA agreement, supported by a subsequent 2008 High Court of Uganda ruling, reinforced the use of transitional and reconciliatory justice through traditional mechanism for LRA members,[827] notably after the ICC indictments had been in force for some time.

The existence of arguments about the use of traditional justice, however, may be indicative of a wider issue: that the concepts of justice differ as between northern Ugandan citizens and practitioners of the international legal community. Whereas 'from the perspective of the ICC, the primary image of justice was that of Joseph Kony…being found, extradited, and brought to trial', for many in Uganda, justice instead meant a mechanism 'through which they could return home in safety'.[828] When questioned, a mere 3% of northern Ugandan citizens in 2007 named justice as a 'top priority' for their near future, most instead mentioning 'peace, food, health, land, education, and money.'[829] Maxine Clarke calls it a 'fiction of justice' that we focus on the individual's responsibility in lieu of vast state-wide and systematic change.[830] To reassign mass guilt and perpetration into the hands of a single individual cannot 'produce the conditions for a

[825] Beitzel and Castle, *supra* note 667 at 44
[826] Moy, *supra* note 542 at 270
[827] Beitzel and Castle, *supra* note 667 at 48
[828] Maxine Clarke, *supra* note 693 at 311
[829] Beitzel and Castle, *supra* note 667 at 49
[830] Maxine Clarke, *supra* note 693 at 312

violence-free future' without reengaging with root causes of conflict.[831] Indeed it has been argued that Kony's incapacitation and demise may lead ultimately to a power vacuum in which any one of his deputies may take his place[832] to 'continue the senseless conflict'.[833]

Such different concepts of justice can also lead to accusations of imperialism, where the West is viewed as 'determining another community's sense of justice' against its desires and best interests.[834] These 'philanthropic and humanitarian gestures' are 'ultimately flawed'[835] in their failure to deal with the wider social problem, and may indeed detract attention and resources away from more suitable and sustainable causes of action. Others counter that the 'gravity and notoriety of LRA abuses' are so serious and exceptional as to have 'justified international judicial intervention':[836] these were exactly the type of 'human race' crimes that the international judicial system was devised to counter.

Conclusion: Lessons and Questions

While the ICC has been resoundingly unsuccessful in directly incapacitating Joseph Kony in the almost nine years since his indictment, there are significant arguments to be made that the Court has made a substantial contribution to the reduction of his force, his allies, and his capability for further violence in the northern Ugandan region. Like Karadzic and Mladic, the indirect effect of the international tribunal's accusations have reduced Kony to a shadow of his former power,

[831] Maxine Clarke, *supra* note 693 at 309-10
[832] Zwier, *supra* note 516 at 310-311
[833] Mutua, *supra* note 199 at 4
[834] N. B. Jacques and B. Tucky, 'Promoting International Support for Community-Based Justice Mechanisms in Post-Conflict Burundi and Uganda', 17 Africa Faith and Justice Network (2009) at 3
[835] Maxine Clarke, *supra* note 693 at 310
[836] Akhavan, *supra* note 517 at 404

forcing him into 'survival mode',[837] and while he remains highly dangerous and influential, he is at least contained and reduced, in contrast to his pre-2005 state.

One of the many questions that must be asked here is why direct incapacitation was so unsuccessful in Kony's case. While answers probably range from the complex and volatile political situation across and between various central African states to the ICC's much-lamented lack of enforcing police force, there are two significant elements that should be specifically mentioned.

The first is that the region is one of ongoing conflict, and that Kony was indicted in the midst of his personal war, rather than subsequent to the completion of hostilities. This is the new possibility of the ICC, and also the source of some of its biggest weaknesses. That the Court is permanent and near-universal makes it ready, at a moment's notice, to render indictments and investigations during situations of live conflict in a manner which may actually and substantially affect both the outcome and the status of the conflict. However, that the conflict in Uganda was ongoing when Kony was indicted has led also to vast practical and conceptual issues. It permitted accusations of partisanship and political selectivity to an extent that might not have been felt had the two sides come to an agreement and the stakes for each side therefore not been so high. This is in part because it is problematic to defend accusations of atrocities and serious crimes when verifiable evidence is so difficult to obtain. ICC investigators noted the 'highly challenging environment' in which they worked, including security issues for witnesses, victims and investigators.[838] It is both challenging and dangerous to contact members or ex-members of the LRA, and further '(h)ardly any written documents are available'[839] to substantiate

[837] Moy, *supra* note 542 at 271
[838] Ocampo, *supra* note 543 at 3
[839] Schomerus, *supra* note 546 at 61

investigators' claims. More pragmatically, the mid-conflict indictment also rendered the locating and apprehending of Joseph Kony near impossible, as has been demonstrated by the subsequent years of his non-discovery, even with not-insignificant international assistance.

The second major factor which may have scuppered the Court's ability to incapacitate Kony is the highly spiritual and mystical nature of the LRA movement. Such a basis for a rebellion permits enhanced feelings of invulnerability that supersede the seemingly obvious fact that the war is lost; it also effectively rebuts the illegitimacy which ought otherwise to arise as a result of international judicial condemnation. Kony's version of spirituality has been used to explain 'the many reports of abductees who did not escape…or even refused to be released…out of fear of spiritual revenge.'[840] It is a power through fear and exploitation that is often stronger than the distant echoing statements of a detached international court. More than a 'primitive and irrational madness',[841] the LRA's ritualistic order exhibits 'a complex system of control…wherein the transcendental character of the rules is an authoritative incentive for compliance.'[842] This is a form of power which the International court is not designed to understand, and one with which it is extremely difficult to deal.

Looking to the future, it is very difficult to extract meaningful lessons from the ICC's experience in northern Uganda, not least because the conflict was and is so unique to the situational, political and cultural context of the region. It would be short sighted to suggest that the ICC should stop investigating and prosecuting during ongoing conflicts, as this is the arena in which the Court can have the most substantial impact. Instead, the answer is one of complementarity and compromise: utilising the exceptions granted in Section 53(1)(c) of the Rome Statute to

[840] Titeca, *supra* note 568 at 62
[841] Titeca, *supra* note 568 at 59
[842] Titeca, *supra* note 568 at 62

withdraw temporarily from a situation where there is real and substantial likelihood of a non-judicial peace agreement, for example. I conclude that this was not the case in northern Uganda, where peace discussions had continued for decades, and where at least one side of the conflict appeared to have no genuine interest in pursuing the peace it professed to desire. While the Amnesty Act was a suitable response for myriad ex-child soldiers who became coerced pawns in the LRA machine, it ought never to have been offered for the higher members of the organisation, whose persistent domination continually destabilised the region and without whose accountability there cannot be lasting peace. Further, Museveni's initial referral to the ICC dispels arguments that the ICC's involvement violated domestic legislation in the form of the Amnesty Act. Uganda, too, has demonstrated that the ICC does not preclude the use of more traditional and retributive mechanisms of justice, at least for the vast majority of LRA participants who were not subject to the isolating indictments of the international court.

Finally, the ICC's experience in northern Uganda has re-emphasised the understanding that incapacitation may come in many forms. While Kony remains a fugitive and as such the ICC has 'failed' in its attempts to bring him to justice, the indictments have nevertheless had substantial and lasting effects, resulting in the prompt isolation and diminishment of the rebel force. This amounts to a clear case of substantial indirect incapacitation. The Court contributed to Kony's loss of significant international allies, and reduction of his geographical area of control. With indictments leading to increased international awareness and scrutiny of the rebel group's crimes, Kony has been efficiently pushed out of his northern Ugandan stronghold, returning peace to a region after decades of turbulence. The indictments seem also to have contributed substantially to the diminishment of the LRA from within, increasing internal defections and creating high-level rifts in the organisation. The attempted incapacitation of Joseph Kony also

triumphs from a moral perspective: in the face of unmitigated international inaction, the Court made a tremulous stand on behalf of a long-victimised people. This symbolic promise, while intangible, ought not to be forgotten.

Chapter Five: Case Study C –

'Not ready to die for Darfur':[843] Al Bashir and the 'quintessential "African crisis"'[844]

Introduction

This chapter focuses on the conflict and crisis in Darfur, the contribution therein of President Al Bashir, and the subsequent attempt of the International Criminal Court to incapacitate the President and hold him accountable for his role in the conflict's crimes. In this case, incapacitation has probably been the least successful out of the case studies considered throughout this thesis, as President Al Bashir remains in power, with near-equal strength and a solid ability to engage in international political relations. Further, the conflict in Darfur has seen a renewal in recent years, with an ever-growing number of killed and displaced civilians across the region.

I shall focus in Part One on the origins of the Darfur conflict and its early and contemporary forms, including the crimes committed and response of the international community. In Part Two I shall move on to the referral and indictments of Al Bashir, looking at responses to the indictments within and outside of Sudan. In Part Three I shall consider arguments for and against the position that the indictments have had an indirect effect of 'politically' incapacitating Al Bashir, and in Part Four I note the key factors which contribute to the failure of the ICC in incapacitation in this case. Finally, in Part Five I reiterate the need for incapacitation of Al Bashir, and look to potential solutions in the future to promote better outcomes for the Court.

[843] Jean-Paul Marthos, *Le Soudan, Pays de Tous les Enjeux*, 14 Enjeux Internationaux 13 (2006) at 15, 'les Europeens ne sont pas prets a mourir pour le Darfur', quoted in Kastner, *supra* note 3 at 172
[844] Gerard Prunier, *Darfur: The Ambiguous Genocide* (New York: Cornell University Press, 2005) at 124

Part One: Darfur: The Origins of a Complex Conflict

1(i) The Darfur Region and its Early history

Darfur is today the westernmost province of Sudan, and consists of a region roughly the size of France[845] with an area of around 500,000 square kilometres.[846] The region lies mostly on a plateau between 650 and 100 metres above sea level[847] as 'one of the most landlocked parts of the African continent'[848] rendering it even now 'an extraordinarily isolated place'.[849] Darfur shares a long border with Chad and contains a sparse population of about 6.5 million inhabitants,[850] with few substantial settlements outside of the three main cities of el Fasher, Nyala, and el Geneina.[851] The northern areas of the region are desert-like and uninhabited, while the remainder lies 'in the zone between true desert and savanna grasslands'.[852] Prunier notes that 'None of the so-called 'parts' of the Sudan is homogenous',[853] and Darfur is no exception, containing 'a multitude of ethnic groups',[854] including the Masalit, Baggara, Rizeigat, Habbanyia, Zaghawa, and the eponymous Fur.[855] Despite its Arab/African fault lines (to be discussed below, s1(ii)) however, the region of Darfur is 'almost entirely Muslim'.[856]

[845] Nicholas D. Kristof, 'Dare we call it Genocide?' New York Times, June 16, 2004, available online at http://www.nytimes.com/2004/06/16/opinion/dare-we-call-it-genocide.html, last accessed on 26/07/2014
[846] Ola Ollson and Eyerusalem Siba, 'Ethnic Cleansing or Resource Struggle in Darfur? An Empirical Analysis', 103 Journal of Development Economics (2013) 299 at 300
[847] Jennifer Alix-Garcia, Anne Bartlett, and David Saah, 'The Landscape of Conflict: IDPs, aid and land-use change in Darfur', 13 Journal of Economic Geography (2013) 589 at 592
[848] Prunier, *supra* note 844 at 2
[849] Prunier, *supra* note 844 at 2
[850] Olsson and Siba, *supra* note 846 at 300
[851] Alix-Garcia et al, *supra* note 847 at 592
[852] Alix-Garcia et al, *supra* note 847 at 592
[853] Prunier, *supra* note 844 at 78
[854] Olsson and Siba, *supra* note 846 at 300
[855] Kastner, *supra* note 3 at 160; Olsson and Siba, *supra* note 846 at 300
[856] John Hagan and Wenona Rymond-Richmond, 'The Collective Dynamics of Racial Dehumanization and Genocidal Victimization in Darfur' 73 American Sociological Review (2008) 875 at 880

In order to make sense of the complex relationships, allies and enemies within the Darfuri conflict, it is necessary to briefly cover the earliest context of the situation, which is one that stretches along the length of the recorded history of the region.[857] Darfur's pre-colonial history of dynastic displacements, aboriginal groups and regional migration led to 'a long running conflict over succession' that ultimately permitted British-run Egypt to conquer Darfur in autumn 1875.[858] The ultimate result was that the once-independent Darfur became superficially amalgamated with British Sudan,[859] voiding hundreds of years of previous self-sovereignty and refuting the regions 'autonomous…sense of identity'.[860]

When it arrived, the advent of colonialist rule was not a harbinger for advancement in the Darfur region. The colonial government retained 'a lack of interest in developing Darfur'[861] due to the imposters' need to centralise power and economic resources within Khartoum and vitiate threats to the colonial leadership. Integration of Darfur with the wider state of Sudan ultimately caused 'economic and political marginalization' of the region's citizens, including a denial of mass education.[862] Darfur suffered under 'benign neglect parading as cultural respect'[863] including the limiting of education to only Chiefs and their sons. A long history of slavery in the region added torment and 'left deeply engrained animosities'.[864] Ultimately, the colonialists' 'deliberate underdevelopment of Darfur'[865] laid a heavy and oft-repeated precedent.

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[857] Chukwuemeka Eze Malachy, 'Exogenic Factor and the Futility of Conflict Resolution in Africa: The Darfur Experience' 6(2) African Journal of Political Science and International Relations (2012) 33 at 35
[858] *Ibid* at 35
[859] Gwen P. Barnes, 'The International Criminal Court's Ineffective Enforcement Mechanisms: the Indictment of President Omar Al Bashir' 34 Fordham Journal of International Law (2011) 1584 at 1603-1604
[860] Olsson and Siba, *supra* note 846 at 301
[861] Olsson and Siba, *supra* note 846 at 301
[862] AU Peace and Security Council 207th Meeting, *Report of the AU HLP on Darfur*, October 29 2009, at 55
[863] Prunier, *supra* note 844 at 29
[864] John W. Burton, 'Development and Cultural Genocide in the Sudan' 29(3) Journal of Modern African Studies (1991) 511 at 514, noted in Hagan and Rymond-Richmond, *supra* note 856 at 880
[865] Kastner, *supra* note 3 at 155

After Sudan gained independence in 1956, the historic marginalization of Darfur was continued by successive governments[866] due in part to the common colonial interest in centralizing power.[867] Although the 1970s constituted a brief a period of optimism, improvement and espoused equality,[868] by the 1980s a supremacist 'Arabization' policy worked to dissolve these advancements in the region.[869] The imperialist, Islamic-supremacist ideology promoted a marked 'assault on traditionalist African cultures'[870] including rejection of tribal dancing, alcohol consumption, independent women, and traditional modes of dress, while emphasizing the Arabic language and Muslim religion.[871] Controversially, a non-Darfurian was appointed as the governor of Darfur in 1980, leading to local apprehensions of powerlessness,[872] while in 1987 a group of Arab intellectuals sent a 'widely publicized' letter to Sudan's Prime Minister Sadiq al-Mahadi 'celebrating the "Arab race" for the "creation of civilization in the region"'.[873] Meanwhile African members of the regional Civil Service began to be replaced by Arabs.[874] Ergo, the contemporary Sudanese racism 'is not exceptional' but consists merely of a continuation of 'traditional Northern feelings of the legitimacy of Arab domination in the Sudan.'[875]

[866] Barnes, *supra* note 859 at 1604
[867] Olsson and Siba, *supra* note 846 at 301
[868] Hagan and Rymond-Richmond, *supra* note 856 at 880
[869] Olsson and Siba, *supra* note 846 at 301
[870] Hagan and Rymond-Richmond, *supra* note 856 at 880
[871] Hagan and Rymond-Richmond, *supra* note 856 at 880
[872] Barnes, *supra* note 859 at 1604
[873] Hagan and Rymond-Richmond, *supra* note 856 at 881
[874] Hagan and Rymond-Richmond, *supra* note 856 at 881
[875] Prunier, *supra* note 844 at 104

1(ii) Al Bashir and Contemporary History

In 1989, Al Bashir seized power in Sudan at the head of a group of army officers in a bloodless military coup[876] known as "the Salvation Revolution".[877] Omar Hassan Ahmad Al Bashir had been born in 1944 in Hoshe Bannaga, a rural area north of Khartoum, into an Arab-descended farming community and family.[878] After secondary school, he studied at military academies in Cairo and Khartoum, graduating in 1966,[879] before fighting as an Egyptian army paratrooper against Israel in the 1973 Yom Kippur war.[880] Although little is known about the long-term leader's private life, authoritative sources report that he currently has two wives, his cousin Fatima Khalid, and Widad Babiker, the widow of a Sudanese military hero, and no children.[881] Described as 'hot-headed'[882] and a 'proud and egotistical man who reacts aggressively to slights against him',[883] others note that Al Bashir is relatively moderate compared to others in his party: '(h)e is a pigeon, not a hawk.'[884]

Al Bashir purportedly led the military coup against former civilian Prime Minister Sadiq al-Mahdi in order to prevent a 'blasphemous' peace agreement which might have ended the

[876] Barnes, *supra* note 859 at 1603; Grant Niemann, 'International Criminal Law Sentencing Objectives', in Willem de Lint, Marinella Marmo, and Nerida Chazal (eds), *Criminal Justice in International Society* (New York: Routledge, 2014) 135 at 147
[877] Randy James, 'Sudanese President Omar Hassan al-Bashir', Time, March 5 2009, available online at http://content.time.com/time/world/article/0,8599,1883213,00.html, last accessed 29/7/2014
[878] Xan Rice, 'Profile: Omar al-Bashir', The Guardian, 4 March 2009, available online at http://www.theguardian.com/world/2009/mar/04/omar-bashir-sudan-president-profile, last accessed on 29/7/2014; James, *supra* note 877
[879] Rice, *ibid.*
[880] James, *supra* note 877; Rice, *supra* note 878
[881] Rice, *supra* note 878; James, *supra* note 877
[882] Sudan analyst Alex de Waal of Harvard University, quoted in 'Profile: Sudan's Omar al-Bashir', BBC, December 5, 2011, available online at http://www.bbc.com/news/world-africa-16010445, last accessed on 04/08/2014
[883] Rice, *supra* note 878
[884] Ghazi Suleiman, Sudanese human rights lawyer, quoted in 'Sudan Rallies Behind Leader Reviled Abroad', New York Times, July 27 2008, available online at http://www.nytimes.com/2008/07/28/world/africa/28sudan.html?pagewanted=all&_r=0, last accessed on 04/08/2014

southern war.[885] He immediately declared himself 'Chairman of the Revolutionary Command Council for National Salvation', suspended trade unions, political parties, and government bodies[886] and 'instituted Islamic law in much of the country'.[887] In 1993, Al Bashir appointed himself as president, returning civilian law and 'democratic' governance to Sudan.[888] His iron-fisted rule has been marked by human rights violations and the suppression of political dissent, 'all while conducting a brutal campaign…(in) South Sudan and the Darfur region'.[889]

Meanwhile within the Darfur region, harsh climactic conditions and competitions for scarce resources had exacerbated the fault-line tensions of the otherwise 'relatively peaceful coexistence between nomads and farmers'.[890] During its centuries of independent history, 'Darfur was an ethnic mosaic, not a land divided along binary lines of fracture.'[891] However today the historical 'nomad/sedentary dichotomy'[892] blurs into the oft-repeated Arab/African cleavage, although the distinctions are not quite equivalent. Typically, 'Africans' were settled agriculturalists, while 'Arabs' constituted 'landless nomadic…pastoralists'[893] generally herding either cattle or camels in seasonal migrations.[894] However 'the distinction between the two is not always clear'[895] and there was always significant crossover, with members of the two groups intermarrying and sharing a religion and language.[896] In particular, the Zaghawa tribe was predominantly African, yet also nomadic, demonstrating a violation of the perceived dominant

[885] Rice, *supra* note 878
[886] Rice, *supra* note 878
[887] James, *supra* note 877
[888] Rice, *supra* note 878
[889] Andrew Friedman, 'The Uninvited to the US-Africa Leaders Summit: Sudan's Omar al-Bashir', AFK Insider, July 22 2013, available online at http://afkinsider.com/64992/uninvited-sudans-omar-al-bashir/, last accessed on 25/7/2014
[890] Kastner, *supra* note 3 at 155
[891] Prunier, *supra* note 844 at 23
[892] Prunier, *supra* note 844 at 162
[893] Hagan and Rymond-Richmond, *supra* note 856 at 881
[894] Olsson and Siba, *supra* note 846 at 300
[895] Olsson and Siba, *supra* note 846 at 300
[896] Kastner, *supra* note 3 at 157

system.[897] Historically, therefore, the dichotomy has 'very little biological or even cultural relevance', and in the contemporary conflict, the traditional distinction 'took on its present meaning through ideological constructions which occurred much later'.[898]

While the history of the coexistence of these two groups had typically been one of bumpy peace, their traditional resource-management system was abolished by the Sudanese government in 1970[899] leading to a loss of expertise and conflict-resolution facilitation, and adverse climactic conditions exacerbated fragmented clashes. The 1970s and 1980s had brought severe droughts to the region,[900] creating a population which was 'growing increasingly desperate for access to water and pastures'.[901] The expanse of desertification amid an increasing population triggered rising racial tensions[902] in a situation which was 'brutally sharpened' by the 1984 famine[903] which devastated the region and caused some 100,000 deaths.[904]

The new Government of Sudan (GoS) under President Al Bashir took advantage of these rising divisions[905] in an embracement of the existing 'Arabization ideology'[906] through measures directed at the unabashed constriction of perceived non-Arab groups. The President divided Darfur into the three states of Shamal, Janub, and Gharb in 1994,[907] which artfully reduced the large Fur tribe to a minority in each region[908] and enabled the election of Islamist candidates. Further reforms in 1995 'shifted the power of the electoral college' away from Masalit

[897] Olsson and Siba, *supra* note 846 at 300
[898] Prunier, *supra* note 844 at 5
[899] Olsson and Siba, *supra* note 846 at 302
[900] Kastner, *supra* note 3 at 156
[901] Hagan and Rymond-Richmond, *supra* note 856 at 881
[902] Olsson and Siba, *supra* note 846 at 302, Hagan and Rymond-Richmond, *supra* note 856 at 881
[903] Prunier, *supra* note 844 at 162
[904] Kastner, *supra* note 3 at 156
[905] Hagan and Rymond-Richmond, *supra* note 856 at 881
[906] Olsson and Siba, *supra* note 846 at 301
[907] Malachy, *supra* note 857 at 36
[908] Barnes, *supra* note 859 at 1604

citizens.[909] Khartoum increasingly emphasized the distinctions between racial "Arabs" and "Zuruq" (black), propagating anti-African crimes.[910] The pre-existing 'Arab-Islamic supremacist ideology' became increasingly imposed, with the Government exhibiting 'a more open and degrading use of force'.[911]

In 2000, 'a mysterious *kitab al-aswad* ("Black Book") was published' anonymously, highlighting the oppressive policies faced by Darfur, the disproportional lack of political representation in Sudan's west, and the domination and impoverishment endemic to the region.[912] The book sparked rebellions and the commencement of several armed anti-government movements.[913] What the west saw as a 'new' oppression in the mid-2000s was merely 'a sudden spectacular growth of what they had had to live through for the previous twenty years',[914] with GoS policy 'verging on genocide in its general treatment of the national question in Sudan.'[915] In a highly divisive country which constituted 'one of the last multi-national empires on the planet'[916] conflict was part of the policy of a government bent on consolidating its power: there was 'a context of permanent war'.[917]

External factors also notably contributed to the rising tension within the Darfur region. The Libyan *de facto* ruler Muammar Gaddafi propagated his expansionist "Arab belt" ideology across Darfur, bringing weapons and inciting division in the region.[918] Events in bordering Chad

[909] Barnes, *supra* note 859 at 1604
[910] Kastner, *supra* note 3 at 156
[911] Hagan and Rymond-Richmond, *supra* note 856 at 880-881
[912] Malachy, *supra* note 857 at 33; Prunier, *supra* note 844 at 85
[913] Malachy, *supra* note 857 at 36
[914] Prunier, *supra* note 844 at 104
[915] Prunier, *supra* note 844 at 105, *emphasis removed*
[916] Prunier, *supra* note 844 at 105
[917] Prunier, *supra* note 844 at 104
[918] Hagan and Rymond-Richmond, *supra* note 856 at 881

and nearby Libya 'buffeted' Darfur,[919] each highlighting and exacerbating existing tensions. The flow of arms through these regions into Darfur aggravated traditional disputes further, with increasing availability of automatic weapons permitting recourse to blood as a matter of course.[920]

1(iii) The Outbreak of War

The conflict with which the ICC indictments are concerned is that which broke out in early 2003, when the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM) united in their opposition of the Government of Sudan, launching several military attacks.[921] The outbreaks included an attack on the el Fasher airport in April 2003,[922] and the offensive in the town of Golu in February 2003 in which some two hundred government soldiers were killed by the SLA.[923] The demands espoused by these opposition groups included a substantial response to the socio-economic non-development of Darfur and Khartoum's neglect and discrimination,[924] as well as a separation of politics and religion.[925] While the SLA and JEM espoused common aims, they maintained largely separate identities, with the SLA consisting 'mainly of Fur and Masalit tribesmen'[926] and consisting of a force of up to 11,000 by 2005,[927] while the predominantly

[919] Malachy, *supra* note 857 at 36
[920] Alix-Garcia et al, *supra* note 847 at 593; Kastner, *supra* note 3 at 156
[921] Barnes, *supra* note 859 at 1603; Hagan and Rymond-Richmond, *supra* note 856 at 881; Kastner, *supra* note 3 at 155; Olsson and Siba, *supra* note 846 at 300
[922] Alix-Garcia et al, *supra* note 847 at 593; Barnes, *supra* note 859 at 1603
[923] Kastner, *supra* note 3 at 157
[924] Isma'il Kushkush, 'New Strife in Darfur Leaves Many Seeking Refuge', New York Times, May 23, 2013, available online at http://www.nytimes.com/2013/05/24/world/africa/new-strife-in-darfur-leaves-many-seeking-refuge.html, last accessed on 26/7/2014
[925] Kastner, *supra* note 3 at 157
[926] Olsson and Siba, *supra* note 846 at 300
[927] Kastner, *supra* note 3 at 158

Zaghawa JEM[928] was a much smaller force, albeit with advanced military and political experience within its ranks.[929]

The GoS's response to the attacks was one of 'overwhelming force',[930] uniting the Sudan People's Armed Forces, the Sudanese Police Forces, the National Intelligence and Security Service, and the Humanitarian Aid Commission in a series of counterattacks.[931] Initially, the GoS's forces were 'incompetent and insufficiently prepared',[932] due in part to competing Sudanese engagements with SPLA rebels in the south,[933] and the GoS suffered major losses in western Darfur, sparking their recourse to pre-existing relations with militia groups in the region, groups collectively known as the *Janjaweed* warriors.

Much of the alleged criminality of Al Bashir circumvents around his Government's support for the Janjaweed militias in their role in Darfur. 'Janjaweed' translates literally to 'a man with a gun on a horse',[934] and is made up mainly of members from six groups: former bandits and highwaymen, demobilized regular soldiers, members of conflict-involved Arab tribes, common criminals, members of the *Tajammu al-Arabi* (Islamic Legion), and young unemployed men.[935] They are a 'mocking echo of that great tradition of the *fursan* (Darfurian chain-mailed cavalry knights) of old'.[936] The militia has existed in some form since the 1980s,[937] with members having 'long conducted raids on the country's Black African populations' and being known for 'using

[928] Olsson and Siba, *supra* note 846 at 300
[929] Kastner, *supra* note 3 at 158
[930] Kushkush, *supra* note 924
[931] Barnes, *supra* note 859 at 1603
[932] Kastner, *supra* note 3 at 157
[933] Olsson and Siba, *supra* note 846 at 300
[934] Friedman, *supra* note 889
[935] Prunier, *supra* note 844 at 97-98
[936] Prunier, *supra* note 844 at 13
[937] Kastner, *supra* note 3 at 156

violence to wrestle control of…resources from Black African tribes'.[938] After their aggressive expansion in 2003,[939] therefore, the Janjaweed became perfectly placed to fulfil the GoS intention 'to rid the planet of the Fur, Masalit and Zaghawa ethnic groups in Darfur',[940] becoming the nightmare catalyst of wide-spread atrocities in the region.[941]

While the GoS maintains its denial of ever having supported, mobilized or controlled the Janjaweed[942] whom it calls mere 'armed bandits',[943] there are today 'too many proofs of government involvement…for any credible denial to be possible.'[944] Evidence suggests that the GoS armed, funded, trained, paid, and supplied the Janjaweed,[945] providing weapons, official uniforms, coordination for attacks,[946] and supporting through intelligence and aircraft.[947] The Khartoum government expanded the Janjaweed's ranks through recruitment of 'mercenaries from Libya, Chad, and other countries'.[948] Janjaweed militias 'operated in full cooperation with the regular army'[949] during their attacks, and were incorporated into the Sudanese army in part through the Popular Defence Force (PDF) group.[950] Indeed, reports by Darfuri victims frequently recounted Janjaweed troops repeating the boast that they were government-supported '*ad nauseam*, as if the perpetrators needed to convince themselves of their good fortune.'[951]

[938] Friedman, *supra* note 889
[939] Friedman, *supra* note 889
[940] Friedman, *supra* note 889
[941] Kastner, *supra* note 3 at 158
[942] Friedman, *supra* note 889; Olsson and Siba, *supra* note 846 at 300
[943] Kastner, *supra* note 3 at 160
[944] Prunier, *supra* note 844 at 98
[945] Kastner, *supra* note 3 at 158
[946] Kastner, *supra* note 3 at 160
[947] Olsson and Siba, *supra* note 846 at 301
[948] Kastner, *supra* note 3 at 157
[949] Prunier, *supra* note 844 at 98
[950] Kastner, *supra* note 3 at 158
[951] Prunier, *supra* note 844 at 102

1(iv) Battle Acts and Crimes in the Early Years of War

After its initially slow response to the offensives led by JEM and SLA, the GoS rallied and began to conduct 'a campaign of incessant violence'[952] in Darfur, predominantly directed towards civilian groups of the Fur, Zaghawa, and Masalit tribes whose members constituted much of the rebellion force.[953] The regrettable technique of the GoS and GoS-sponsored forces was not always to target rebellion militias directly, but instead to focus attacks on villages and communities which retained the same ethnic identity as those militias.[954] The distorted logic was either that such civilians might feasibly support (through shelter, food and resources) rebel groups, or simply that 'a terror campaign against the rebel fighters' home villages would be a more effective military strategy' than locating the disparate and well-hidden dissident forces.[955] Targeted villages were usually undefended and unprotected, with JEM and SLA fighters concealed far from the vicinity.[956]

A typical and much repeated pattern of offensives usually occurred during village attacks. Commencing with an aerial attack,[957] Sudanese army-piloted Anotov An-12 transport planes dropped 'bombs' of old oil drums filled with explosives into built-up areas in an indiscriminate and militarily 'completely useless' preliminary attack.[958] Although unable to aim specifically at military targets, the 'primitive free-falling cluster bombs'[959] nevertheless retained 'a deadly efficiency against fixed civilian targets'.[960] Subsequently, a wave of military helicopters or MiG bombers would arrive and begin 'machine-gunning and firing rockets at any large targets such as

[952] Friedman, *supra* note 889
[953] Kastner, *supra* note 3 at 159
[954] Kastner, *supra* note 3 at 159
[955] Olsson and Siba, *supra* note 846 at 301
[956] Olsson and Siba, *supra* note 846 at 301
[957] Kastner, *supra* note 3 at 159
[958] Prunier, *supra* note 844 at 99
[959] Prunier, *supra* note 844 at 99
[960] Prunier, *supra* note 844 at 100

a school or warehouse which might still be standing',[961] followed shortly by militias, predominantly Janjaweed, on camel or horseback,[962] or in later years in pick-up trucks.[963] The attacks have been described as 'part of a deliberate strategy to ensure that the village would be forever uninhabitable'[964] including through the use of techniques such as destroying agricultural dams and water pumps, poisoning wells, and burning homes, schools and mosques to the ground.[965] Militias also frequently would rape women and girls of the village, arbitrarily execute others, and plunder or destroy equipment and belongings.[966]

A similar fate met hundreds of villages in several regions in Darfur,[967] with the 'most intense campaigns' occurring in 2003 and late 2004.[968] As well as the village attacks, 'regular military battles' occurred between rebels and Janjaweed/GoS troops.[969] Subsequently the epicentre of fighting moved southwards[970] and the conflict 'shifted towards a chaotic system' with fragmented groups 'fighting without common goals'.[971] The GoS, responding to some much overdue international pressure, negotiated several ceasefire agreements[972] which were all ultimately unsuccessful, and commenced weak actions to tackle crimes in Darfur such as the 2004-established National Commission of Inquiry, and the 2005 Special Court for Darfur, which both 'had very limited effects'.[973] The large UN/AU force UNAMID (African Union/United

[961] Prunier, *supra* note 844 at 100
[962] Kastner, *supra* note 3 at 159
[963] Olsson and Siba, *supra* note 846 at 301
[964] Kristof 2004, *supra* note 845
[965] Kristof 2004, *supra* note 845
[966] Olsson and Siba, *supra* note 846 at 301
[967] Barnes, *supra* note 859 at 1604
[968] Olsson and Siba, *supra* note 846 at 301
[969] Olsson and Siba, *supra* note 846 at 301
[970] Alix-Garcia et al, *supra* note 857 at 593
[971] Kastner, *supra* note 3 at 163
[972] Kastner, *supra* note 3 at 158-159
[973] Kastner, *supra* note 3 at 166

Nations Hybrid Operation in Darfur) was deployed in the region in 2007[974] after the 2006 Darfur Peace Agreement (signed only by the GoS and a faction of the SLA) failed to bring peace.[975] At least one author has noted that peace in Darfur was not in the best political interests of the GoS in the 2000s, as a united Darfuri political front would generate a threat to the re-election chances of Al Bashir and his party.[976]

While the Darfur conflict could hardly be described as finished (see below, Section 1(vi)), many have nonetheless attempted to tally the dead, displaced, and victimised in the conflict's turbulent early years. Estimates vary from a minimum of 35,000 civilians killed in fighting in 2003 and 2004[977] to some 300,000 civilians killed across the entire decade of war from 2003 to 2013.[978] The government, meanwhile, maintained a civilian casualty estimate of 10,000 for the duration.[979] It is *additionally* estimated that hundreds of thousands of civilians were killed indirectly through starvation and disease in their flight from danger and subsequent life in vastly under-resourced refugee camps, up to around 10,000 deaths per month in 2005.[980]

In these early years of fighting, between 2 and 2.7 million civilians became internally displaced persons (IDPs), forced to leave homes and communities and subsist in internal refugee camps[981]. Hundreds of thousands of refugees also crossed into Chad during this time,[982] and for those

[974] Mark Tran, 'Darfur Conflict: Civilians Deliberately Targeted as Tribal Violence Escalates', The Guardian, 14 March 2014, available online at http://www.theguardian.com/global-development/2014/mar/14/darfur-conflict-sudan-civilians-deliberately-targeted, last accessed on 26/07/2014
[975] Kastner, *supra* note 3 at 163
[976] Kastner, *supra* note 3 at 169
[977] Barnes, *supra* note 859 at 1604-1605; *see also* AU Peace and Security Council 207th meeting, *supra* note 862, at 95
[978] Olsson and Siba, *supra* note 846 at 299; Kushkush, *supra* note 924; Kastner, *supra* note 3 at 159 (reporting 'at least 200,000 deaths' by 2008)
[979] Kushkush, *supra* note 924
[980] Jeevan Vasagar and Ewen MacAskill, '180,000 die from hunger in Darfur', The Guardian, 16 March 2005, available online at http://www.theguardian.com/world/2005/mar/16/sudan.ewenmacaskill, last accessed 29/7/2014
[981] Kastner, *supra* note 3 at 159; Vasagar and MacAskill, *ibid*; Tran, *supra* note 974; Alix-Garcia et al, *supra* note 847 at 593
[982] Vasagar and MacAskill, *supra* note 980

remaining in their communities, over 6 million civilians depended on food aid.[983] Costs were counted in other ways, too, with over 47 aid workers killed in the region and 'many more injured and abducted', at least 57 UN/AU peacekeepers killed, and the overall monetary cost to humanitarian aid organisations and the UN amounting to at least $10.5 billion up to 2013.[984]

Women faced specific victimisation during the ongoing conflict, suffering frequently from rape and abduction by Janjaweed/GoS troops in the course of attacks, and while residing in IDP camps.[985] Often such attacks were perpetrated with the attempt to stigmatise or alter the race of the victims and their offspring. Janjaweed militia were known for routinely branding raped women in an attempt at '(s)exual humiliation…to drive out the African tribespeople'.[986] Objectifying and genocidal comments were frequently reported, with some victims being told "You are now Arab wives".[987] Overall, the entirety of the Darfur conflict and crisis has been described as 'one of the worst ongoing humanitarian disasters' in contemporary times.[988]

1(v) The Response of the International Community in the Early Years

The initial response of the international community, regional bodies and transnational organisations can be described as catastrophically slow. The context of the conflict's beginning came at a time where the world's focus was on the burgeoning peace negotiations in southern Sudan; 2003 being the same year that the Comprehensive Peace Agreement was signed by SPLA leader John Garang and GoS Vice President Ali Osman Taha.[989] As such the diplomats who were

[983] Kastner, *supra* note 3 at 177
[984] Fatou Bensouda, 'Statement to the United Nations Security Council on the Situation in Darfur, Pursuant to UNSCR 1593 (2005), 11 December 2013, available online at http://www.icc-cpi.int/iccdocs/otp/OTP-UNSC-Darfur-Speech-Dec-2013-Eng.pdf, last accessed on 27/7/2014, at 2
[985] Hagan and Rymond-Richmond, *supra* note 856 at 889
[986] Kristof, *supra* note 845
[987] Unnamed Darfur rape victim, reported in Hagan and Rymond-Richmond, *supra* note 856 at 889
[988] Kastner, *supra* note 3 at 146; Olsson and Siba, *supra* note 846 at 299
[989] Zwier, *supra* note 516 at 297

engrossed in understandable self-congratulation failed to notice – or to want to notice – the disintegrating situation in Sudan's west. Those who might have spoken against the GoS were willing 'to postpone open criticism…in order to avoid engendering the promising peace process for the South'.[990]

The European Union 'presented a spectacle of complete lack of resolve and coordination',[991] failing to agree on action or enforce the measures eventually taken. The US at least led the way in discourse, with Congress declaring a Darfur 'genocide' in July 2004.[992] The UN was invoked and blamed by Member States for its inaction, while those same States were unwilling to provide 'the necessary financial, military and political means' to act.[993] The UN suffered the further debilitation that 'the Arab/Black African split which was implicit in the Darfur crisis had many echoes inside the UN'.[994] China and Russia's oil and weapons interests in the region led to their vetoing any substantial Security Council measures.[995] The UN exhibited aimless indecision through its use of discourse, too, tentatively mentioning 'genocidal intentions' but not 'genocide', in its 'latest but perhaps not the final example of…a coordinated show of egregious disingenuousness'.[996]

Although the AU, too, 'tried…to minimize the racial angle of the crisis',[997] the organisation at least had a very strong involvement with the conflict since its early stage, including a 7,000-strong African Union Mission in Sudan (AMIS) force deployed since 2004.[998] However this

[990] Kastner, *supra* note 3 at 161
[991] Prunier, *supra* note 844 at 140
[992] Kastner, *supra* note 3 at 161
[993] Prunier, *supra* note 844 at 142
[994] Prunier, *supra* note 844 at 142
[995] Kastner, *supra* note 3 at 162
[996] Prunier, *supra* note 844 at 143
[997] Prunier, *supra* note 844 at 145
[998] Kastner, *supra* note 3 at 163

mission could only 'provide very limited protection to civilians',[999] and the AU's overall intervention, though 'praiseworthy,…unfortunately has not proved very effective'.[1000]

Throughout, the international community demonstrated a debilitating 'lack of a unified position'[1001] which corresponded to little pragmatic action. Many perceived the conflict in Darfur to be 'distant, esoteric, extremely violent, rooted in complex ethnic and historical factors…and devoid of any identifiable practical interest for rich countries.'[1002] A commentator noted despondently that '(t)he sad reality is that Darfur simply does not matter enough, and Sudan matters too much, for the international community to do more to stop the atrocities.'[1003]

Those few policies that were pursued included a 'constantly violated'[1004] arms embargo to Darfur, which nevertheless unfortunately excluded the Sudanese army,[1005] and a subsequent UN Security Council Resolution condemning ceasefire violations.[1006] Ultimately, the Security Council referral of the situation to the ICC[1007] became the 'only major reaction of the international community to the Darfur crisis' in its early years.[1008]

1(vi) Contemporary Events: 2009-2014

With Al Bashir still incumbent as President in Sudan and little diplomatic, military or judicial progress, the conflict in Darfur remains heightened, particularly in very recent years.

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[999] Kastner, *supra* note 3 at 163
[1000] Kastner, *supra* note 3 at 163
[1001] Kastner, *supra* note 3 at 162
[1002] Prunier, *supra* note 844 at 124
[1003] Nick Grono, 'Briefing – Darfur: The International Community's Failure to Protect' 105 African Affairs (2006) 621 at 628
[1004] Kastner, *supra* note 3 at 162
[1005] SC Resolution 1556, July 30, 2004, available online at http://www.sipri.org/databases/embargoes/un_arms_embargoes/sudan/1556, last accessed on 04/08/2014
[1006] SC Resolution 1591, March 29 2005, available online at http://www.treasury.gov/resource-center/sanctions/Documents/1591.pdf, last accessed on 04/08/2014
[1007] UN Security Council Resolution 1593, 31 March 2005, available online at http://www.icc-cpi.int/nr/rdonlyres/85febd1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf, last accessed on 30/29/2014
[1008] Kastner, *supra* note 3 at 165

After an optimistic 2009 statement that the war in Darfur 'is over',[1009] 2010-2011 brought relative success in the form of the Doha Document of Peace in Darfur signed by the GoS and the Liberation and Justice Movement (an umbrella movement of ten smaller rebel factions) in July 2011.[1010] Al Bashir had been strongly re-elected President in 2010 in a vote which 'fell short of global standards'[1011] amid widespread accusations of fraud, intimidation,[1012] boycotts,[1013] and the circumscription of political freedoms.[1014] 2012, however, brought 'some hopeful signs of improvement',[1015] including some 100,000 Darfur IDPs voluntarily leaving camps and returning to their home villages.[1016] Simultaneously, South Sudan became an independent country on July 9th 2011 after a relatively smooth referendum and secession process.[1017]

Thereafter the conflict took a turn for the worse, however. In early 2013, reports began to circulate of a 'resumption of mass atrocities in Darfur'.[1018] This surge of fighting has included a 'new spasm of murder, rape and pillage'.[1019]

[1009] UNAMID General Martin Agwai, quoted in "War in Sudan's Darfur 'is over'", BBC News, 27 August 2009, available online at http://news.bbc.co.uk/1/hi/world/africa/8224424.stm, last accessed 1/8/2014

[1010] Kushkush, *supra* note 924; 'Doha Document for Peace in Darfur', UNAMID, available online at http://unamid.unmissions.org/Default.aspx?tabid=11060, last accessed on 27/7/2014

[1011] 'Sudan's President Omar Hassan al-Bashir, who is wanted by the International Criminal Court for alleged crimes against humanity, has officially been declared winner of the country's first multi-party presidential election in over two decades', France24, available online at http://www.france24.com/en/20100426-al-bashir-wins-sudan-presidential-election/, last accessed on 29/7/2014

[1012] 'President Omar al-Bashir declared Winner of Sudan poll' BBC, 26 April 2010, available online at http://news.bbc.co.uk/1/hi/world/africa/8643602.stm, last accessed on 29/7/2014

[1013] Marlise Simons, 'International Court adds Genocide to Charges Against Sudan Leader', New York Times, July 12, 2010, available online at http://www.nytimes.com/2010/07/13/world/africa/13hague.html?_r=0, last accessed 29/7/2014

[1014] The Carter Centre: Observing Sudan's 2010 National Elections, April 11-18, 2010, Final Report, available online at http://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/FinalReportSudan-Apr2010.pdf, last accessed 26/7/2014 at 3

[1015] Kushkush, *supra* note 924

[1016] Jeffrey Gettleman, 'A Taste of Hope Sends Refugees Back to Darfur', New York Times, 26 February 2012, available online at http://www.nytimes.com/2012/02/27/world/africa/darfur-refugees-returning-home.html?pagewanted=all&_r=0, last accessed on 26/7/2014

[1017] Barnes, *supra* note 859 at 1605

[1018] Nicholas D. Kristof, 'Darfur in 2013 Sounds Awfully Familiar', New York Times, July 20 2013, available online at http://www.nytimes.com/2013/07/21/opinion/sunday/darfur-in-2013-sounds-awfully-familiar.html, last accessed on 26/07/2014

The commencement of this new era of fighting has included an 'unnerving increase in civilian upheaval'[1020] resulting in the fresh displacement of another 300,000 civilians in the first five months of 2013[1021] – as many as in the previous two years combined – and a total displacement of some 460,000 over the course of the whole year.[1022] The new internal refugees join the approximately 1.4 million already internally displaced persons[1023] in around 99 camps across Darfur,[1024] and contribute to some 3 million citizens relying on food aid.[1025] The largest camps, such as Zam Zam outside el Fashir, hold up to 100,000 people and are still growing,[1026] but nonetheless the UN Refugee Agency was forced to hastily construct a new camp for refugees in Abgadam in 2013.[1027] The 'plight of Darfur victims continues to go from bad to worse',[1028] with many, including those in the central Jebel Marra area, still unable to access humanitarian assistance.[1029] Experts raised impending fears of 'the very real prospect of a man-made famine' in the region.[1030] Prosecutor Fatou Bensouda reported that the Darfur situation 'had not changed

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[1019] *Ibid*.
[1020] Kushkush, *supra* note 924
[1021] UN Media, 'UN Reports 300,000 people this year have fled fighting in Darfur' (8 July 2013) available online at http://www.unmultimedia.org/radio/english/2013/07/un-reports-300000-people-this-year-have-fled-fightin9g-in-darfur/, last accessed on 26/7/2014; Tran, *supra* note 974; Kristof 2013, *supra* note 1018; Kushkush, *supra* note 924
[1022] Amnesty International, *Sudan: We Can't Endure Any More: The Impact of Inter-Communal Violence on Civilians in Central Darfur* (London: Amnesty International, 2014) available online at http://www.amnesty.org/en/library/asset/AFR54/002/2014/en/8da5fe37-ab2b-445a-bf50-7ab84c28e5cb/afr540022014en.pdf, last accessed on 27/7/2014, at 7; Bensouda, *supra* note 984 at 3
[1023] Report of the Panel of Experts on the Sudan Established Pursuant to Resolution 1591 (2005)', 22 January 2014, available online at http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/87, last accessed on 27/7/2014, at 46
[1024] Kushkush, *supra* note 924
[1025] Glenys Kinnock and Michael E Capuano, 'A Decade On, Sudan Threatens to Repeat the Tragedy of Darfur', The Guardian, 10 March 2013, available online at http://www.theguardian.com/commentisfree/2013/mar/10/decade-on-sudan-tragedy-darfur, last accessed on 26/07/2014
[1026] Kushkush, *supra* note 924
[1027] Kristof 2013, *supra* note 1018
[1028] Bensouda, *supra* note 984 at 2
[1029] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 46
[1030] Kinnock and Capuano, *supra* note 1025

over the last ten years…with continuous aerial bombardments in civilian areas…and a pervasive climate of impunity.'[1031]

The perpetrators in this increasingly complex conflict include old names and new rebel groups, with the dynamics of the conflict evolving to circulate more around land and resources[1032] due in part to the declining Sudanese economy.[1033] Many victims, too, come from the Salamat and Beni Hussein communities, two ethnically Arab groups which 'have not previously been singled out in Darfur'.[1034] While much of the fighting appears to operate between rebel groups such as the Misseriya and Salamat,[1035] there is still significant involvement of Janjaweed and militia troops, both in their capacity as GoS proxies and operating in isolation.[1036] Reports materialized of aerial strikes committed by the GoS[1037] with civilians again directly targeted by rebel and GoS-sponsored groups.[1038] The GoS is reportedly 'deploying the same brutal tactics' of targeting undefended civilians and villages '(i)n an appalling repetition of history'.[1039] Meanwhile, armed groups operate with 'boldness and impunity'[1040] while it becomes increasingly clear that the violence of the Darfur conflict has become 'the major cause of death among refugees'.[1041]

As the international community notes the lack of progress towards peace[1042] as processes agreed in the Doha Document for Peace 'continue to be stymied by the contradictory and irreconcilable

[1031] Amnesty International 2014, *supra* note 1022 at 28
[1032] Tran, *supra* note 974
[1033] Amnesty International 2014, *supra* note 1022 at 7
[1034] Kristof 2013, *supra* note 1018
[1035] Tran, *supra* note 974
[1036] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 46
[1037] Paul McKell, Representative of the UK at the UNSC, reported in 'International Criminal Court Prosecutor Tells Security Council Violence in Darfur Will Not End Without Robust Determination to Apprehend Perpetrators', UNSC 7080th Meeting, SC/1129, 11 December 2013, available online at http://www.un.org/News/Press/docs/2013/sc11209.doc.htm, last accessed on 27/7/2014
[1038] Tran, *supra* note 974
[1039] Kinnock and Capuano, *supra* note 1025
[1040] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 46
[1041] Bensouda, *supra* note 984 at 5
[1042] UNSC 7080th Meeting, *supra* note 1037

positions of the Government and the armed opposition groups',[1043] meanwhile myriad attacks on humanitarian workers and UN/AU peacekeepers occur.[1044] The UN praises the GoS's '(s)everal attempts…to find lasting solutions to intertribal fighting' through unsuccessful ceasefires and agreements,[1045] as the UNAMID base in Muhajeria was attacked in April by forces under the 'highly probable' control of the GoS itself.[1046] Meanwhile, western media is becoming enmeshed in fatigue: 'It is no longer news that the Sudanese government is slaughtering its people.'[1047]

Early 2014 shows an extension of the reignited violence, with another estimated 100,000 people becoming displaced 'because of increased violence' in Darfur in February-March.[1048] An April 2014 attack caused over 100 civilian deaths,[1049] and Amnesty International reported the continued 'use of indiscriminate bombardments by the Sudanese Armed Forces'.[1050] Citizens are frequently unlawfully targeted with 'killings, sexual violence including rape, shootings and looting'[1051] while the involved militia are fortified by government weapons, vehicles, and sometimes GoS paramilitary forces themselves.[1052] The GoS is currently doing little to protect its civilians, hold systematic violators to account, or abate the violence.[1053] Its meagre measures include 'belated troop deployment' during late 2013, reconciliation efforts, and government orders intended to prevent further fighting.[1054] However UNAMID and humanitarian organisations remains restricted to prescribed areas[1055] and there is a 'pervasive culture of

[1043] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 4
[1044] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 47 and 50-51
[1045] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 46
[1046] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 48
[1047] Kristof 2013, *supra* note 1018
[1048] Tran, *supra* note 974
[1049] Tran, *supra* note 974
[1050] Amnesty International 2014, *supra* note 1022 at 7
[1051] Amnesty International 2014, *supra* note 1022 at 7
[1052] Amnesty International 2014, *supra* note 1022 at 27 and 7
[1053] Amnesty International 2014, *supra* note 1022 at 7 and 27
[1054] Amnesty International 2014, *supra* note 1022 at 27
[1055] Amnesty International 2014, *supra* note 1022 at 28

impunity'.[1056] Amnesty International expressed recent concern that '(t)he lack of justice for grave human rights violations perpetuates the cycle of violence in Darfur.'[1057]

Part Two: Referrals, Indictments, and Attempted Arrest

2(i) The Referral and Indictment of President Al Bashir

In an action that marked a 'novelty in international law and international relations',[1058] the UN Security Council referred the situation regarding Darfur to the ICC Prosecutor in March 31, 2005.[1059] As Sudan was (and is) not a State Party to the Rome Statute, the Security Council used the mechanism within Article 13(b) of the Statute[1060] to activate jurisdiction without Sudan's consent. This was both a unique first occurrence for the new Court,[1061] and somewhat surprising, due to the latent opposition to the Court expressed by Permanent Members of the Security Council, the US and China.[1062] The court nonetheless obtained jurisdiction to investigate crimes committed in Darfur since July 1, 2002, the date the Rome Statute came into force. Subsequently the Prosecutor agreed in accordance with Rome Statute Article 53[1063] to investigate the situation on June 1 2005.[1064]

In 2007 the ICC issued the first warrants of arrest with regard to the Darfur situation, naming Sudan's Humanitarian Affairs Minister, Ahmed Mohammed Harun, and Janjaweed Militia

[1056] Amnesty International 2014, *supra* note 1022 at 28
[1057] Amnesty International 2014, *supra* note 1022 80 at 28
[1058] Kastner, *supra* note 3 at 146
[1059] UN Security Council Resolution 1593, *supra* note 1006
[1060] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 13(b)
[1061] Barnes, *supra* note 859 at 1601
[1062] Kastner, *supra* note 3 at 164
[1063] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 53
[1064] Barnes, *supra* note 859 at 1601

Commander Ali Kushayb.[1065] These indictments were followed on March 4th 2009 by the first arrest warrant for President Al Bashir for several counts of crimes against humanity and war crimes. Shortly thereafter, the ICC requested that States Parties surrender Al Bashir to the Court if possible, pursuant to Article 89(1) of the Rome Statute.[1066] This became another first for the Court, namely the indictment of a sitting head of state.[1067] It was followed on July the 12th 2010 with a second indictment of Al Bashir, this time for three counts of genocide.[1068]

In its indictments and arrest warrants regarding the situation in Sudan, Prosecutor Luis Moreno Ocampo adopted a 'more aggressive approach'[1069] including the use of unsealed warrants and his frequent public hyperbole alluding to the accused's crimes and inevitable guilt.[1070] Publicly comparing 'the Sudanese regime to Nazi Germany',[1071] Ocampo was criticised for is 'confrontational and partial' attitude which ignored 'well-entrenched norms of prosecutorial discretion'.[1072]

2(ii) The Alleged Crimes of Al Bashir

Al Bashir has been accused in the cumulate of three counts of genocide, five counts of crimes against humanity, and two counts of war crimes. He is 'alleged to be responsible for the death of more than 250,000 people in the Darfur region',[1073] although that number is subject to change

[1065] ICC Pre-Trial Chamber, *The Prosecutor v Ahmad Muhammad Harun and Ali Muhammad Al Abd-Al-Rahman*, 'Warrant of Arrest for Ahmad Harun' *and* 'Warrant of Arrest for Ali Kushayb', available online at http://www.icc-cpi.int/, last accessed on 04/08/2014
[1066] Barnes, *supra* note 859 at 1602
[1067] Niemann, *supra* note 876 at 147
[1068] ICC Pre-Trial Chamber, *The Prosecutor v Omar Hassan Ahmad Al Bashir*, 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir', 12 July 2010, available online at http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf, last accessed on 04/08/2014
[1069] Kai Sheffield, 'Speak Softly and Carry a Sealed Warrant: Building the International Criminal Court's Legitimacy in the Wake of Sudan', 18 Appeal: Review of Current Law and Law Reform (2013) 163 at 164
[1070] Sheffield, *ibid* at 165
[1071] Sheffield, *ibid* at 165
[1072] Sheffield, *ibid* at 164-165
[1073] Niemann, *supra* note 876 at 147

with recent conflict developments. Al Bashir's liability extends from his position at the pinnacle of the hierarchical command structure of the Sudanese government and military. In his role as President, Al Bashir 'exercises *de jure* authority over the army' according to both the 1998-2005 Sudanese Constitution and the 2005 Interim National Constitution.[1074] This also extends to *de facto* military control due to the 'extremely hierarchical…organization' structure.[1075] Much of the case's success, should it ever come to trial, however, will hinge on the relationship between the GoS and the Janjaweed militia forces which carried out a significant amount of fighting in Darfur. The ICTY Case of *Tadic* held that a successful attribution of the acts of a paramilitary group to a state must demonstrate 'that the State wields overall control over the group…by coordinating or helping in the general planning of its military activity'.[1076] Evidence dependant, it appears likely from the above observations that such a relationship of coordination and control can be proven in the case of the Janjaweed militia and the GoS in Darfur.

A second cause of contention in the hypothetical trial against Al Bashir will be the attribution of genocidal intent to his actions and those of his troops. As noted above, the supposed ethnic and tribal distinctions evoked throughout the conflict were not clear and divisive – some disavow the common Arab/African division and view the conflict as wholly political[1077] and an early UN International Commission of Inquiry report concluded that the victims (predominantly members of the Fur, Masalit and Zaghawa tribes[1078]) did not constitute a recognizably protected ethnic or

[1074] Kastner, *supra* note 3 at 168
[1075] Kastner, *supra* note 3 at 168
[1076] ICTY, *Prosecutor v Tadic*, Case No. IT-94-1-A (July 15 1999), Judgment, Paragraph 131
[1077] Khalid Medani, 'The Darfur Crisis and the Challenge of Democracy in Sudan' (Paper presented to the Conference *The Challenge of Development in Sub-Saharan Africa: Conflict Resolution, Democratic Governance and Education*, McGill University, 29 March 2007)
[1078] Cronin-Furman, *supra* note 22 at 450; Kastner, *supra* note 3 at 159; Friedman, *supra* note 889; Olsson and Siba, *supra* note 846 at 301; Barnes, *supra* note 859 at 1601

racial group.[1079] Prunier counters that it is a 'racial' war, defining race as 'first and foremost a perceived construct, based on…perceived cultural values',[1080] and a later ICC investigation found sufficient evidence to indict Al Bashir for genocidal crimes.[1081] The growth of an Arabization policy certainly contributed to the causes and events of the conflict, however, and to remove the ethnic element may be to grant a victory to the GoS 'who has been presenting the whole conflict as a low-level inter-ethnic dispute over land' since its commencement.[1082]

The GoS and its allies were certainly involved in a successful and 'massive 'cleansing' of civilian rebel tribe populations' from certain areas,[1083] echoed in the noted use of 'frenzied' dehumanizing racial epithets designating victims as 'slaves', 'donkeys', 'monkeys', and 'not human', and statements such as 'you make this area dirty' and 'we must get rid of you'.[1084] The policy of targeting non-combatant villages had the effect of displacing entire ethnic communities, with empirical studies concluding that 'the proportion of…rebel tribes…in the population before the conflict is a robust determinant of the probability and intensity of Janjaweed attacks'.[1085] There was also a clear long-term and entrenched use of racial framing which contributed to the successful mobilization of pro-GoS troops.[1086] Most disturbing is the existence of evidence that the GoS 'sought legal advice on how to calibrate criminal acts in order to fall just short of the *dolus specialis* of genocide'.[1087]

[1079] 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004', 25 January 2005, available online at http://www.un.org/news/dh/sudan/com_inq_darfur.pdf, last accessed on 05/08/2014, at 129
[1080] Prunier, *supra* note 844 at 162
[1081] *See* 'Second Arrest Warrant for Omar Hassan Ahmed Al Bashir', *supra* note 1068
[1082] Kastner, *supra* note 3 at 157
[1083] Olsson and Siba, *supra* note 846 at 301
[1084] Hagan and Rymond-Richmond, *supra* note 856 at 882
[1085] Olsson and Siba, *supra* note 846 at 311
[1086] Hagan and Rymond-Richmond, *supra* note 856 at 876
[1087] Asad G. Kiyani, 'Al Bashir & the ICC: The Problem of Head of State Immunity', 12 Chinese Journal of International Law (2013) 467 at 471 fn 13

2(iii) The Response of the GoS to the Indictments

Unsurprisingly, considering the open indictment of its President, the GoS expressed significant opposition to the ICC, and 'categorically rejected its jurisdiction and refused to cooperate with its investigation'.[1088] Sudan has denied any legal obligations to the ICC,[1089] has refused to arrest or otherwise incapacitate indicted individuals, and espouses the maintenance of Al Bashir's Presidential immunity *ratione personae*. Sudan subsequently restricted the access of investigators from the Office of the Prosecutor into key regions of Sudan, reducing evidence collection capability.[1090] The Sudanese representative to the UN Security Council in 2013 'reaffirmed that the Court had become a political rival of Sudan'.[1091] Further, in 'apparent retaliation' to the indictment against President Al Bashir, Sudan immediately expelled several aid agencies and humanitarian organisations from operation in Darfur,[1092] including Oxfam, Solidarities, and Mercy Corps, groups which predominantly supplied food, water, health and sanitation to IDPs.[1093]

2(iv) Critical Responses to the Indictment

The indictments initially received mixed responses from commentators and international organizations. Although the indictments 'revealed, documented and made known'[1094] GoS crimes to the wider community and exercised 'pressure on the key players of the conflict to stop violence and negotiate an agreement,[1095] the indictment has been attacked as imperialistic and an

[1088] Sheffield, *supra* note 1069 at 164
[1089] Niemann, *supra* note 876 at 147
[1090] Sheffield, *supra* note 1069 at 172
[1091] UNSC 7080th Meeting, *supra* note 1037
[1092] James, *supra* note 877
[1093] 'Sudan Orders Aid Agency Expulsions', CNN, March 4 2009, available online at http://www.cnn.com/2009/WORLD/africa/03/04/sudan.expel/, last accessed 29/9/2014
[1094] Kastner, *supra* note 3 at 172
[1095] Kastner, *supra* note 3 at 176

'attack by the west against Africa'.[1096] Fear for the burgeoning peace agreement was echoed by the AU and key UN States, which also criticised the interference with Al Bashir's Presidential immunity and Sudan's national sovereignty.[1097] In general, however, it appears that the referral of the situation in Darfur to the ICC and subsequent indictments offered 'hope for Darfur's victims: hope that there would be an end for their suffering; hope that there would be accountability for crimes'.[1098]

2(v) Response of the Wider International Community

Discontentment with Al Bashir's indictment was reflected in the ultimate lack of respect by the international community of the warrants and States' duty to arrest the President. Al Bashir's significant travel itinerary in the years since his indictment exemplifies states' violations of their duties under the Rome Statute and the UN.

Al Bashir has visited some seventeen countries since his two indictments, including at least four – Chad, Djibouti, Nigeria, and Kenya – which are Member States to the ICC. In 2009, shortly after the first arrest warrant was issued against him, Al Bashir travelled to at least Egypt, Libya, Eritrea, Qatar, Saudi Arabia, Ethiopia, and Nigeria.[1099] The subsequent year, after the second arrest warrant for genocide was issued, the President visited Kenya and Chad,[1100] the latter of which declined to arrest him despite vast international pressure from the European Union, Human Rights Watch, and Amnesty International.[1101] In 2011 he visited China, Malawi, Qatar

[1096] Barnes, *supra* note 859 at 1606
[1097] Barnes, *supra* note 859 at 1606
[1098] Bensouda, *supra* note 984 at 2
[1099] Sheffield, *supra* note 1069 at 170; Bashir Watch International, available online at www.bashirwatch.org, last accessed on 02/08/2014
[1100] Sheffield, *supra* note 1069 at 170
[1101] Barnes, *supra* note 859 at 1586-1587

and South Sudan,[1102] and attended inaugurations in Djibouti and Chad.[1103] In 2012 Libya hosted the wanted leader 'despite having just overthrown Muammar Qaddafi's regime',[1104] and Al Bashir also attended meetings in Egypt, Ethiopia, Iran, Qatar, Iraq, and Saudi Arabia.[1105] Al Bashir also attended an AU summit in Nigeria briefly in 2013, although the visit was cut short after only 24 hours.[1106] In addition, the leader travelled to Chad, Eritrea, Ethiopia, Kuwait, Qatar, Saudi Arabia, and South Sudan.[1107] Most recently, in 2014 Al Bashir attended a COMESA conference in the Democratic Republic of the Congo[1108] and has so far also visited Chad, Eritrea, Ethiopia, Kuwait, Qatar, and South Sudan.[1109]

Meanwhile, in addition to dispensing several statements of disappointment regarding Member States' failure to incapacitate Al Bashir as per their duties under the Rome Statute, the international community began to issue sanctions against Sudan and its leader. The UN Security Council Committee Established Pursuant to Resolution 1591 (2005) Concerning the Sudan has imposed arms embargoes, travel bans and the freezing of assets on certain individuals.[1110] Current 2014 sanctions in force include an embargo against the sale and supply of arms and related materials to Sudan, including technical training and assistance,[1111] and travel bans and

[1102] Sheffield, *supra* note 1069 at 170; Bashir Watch International, *supra* note 1099
[1103] Barnes, *supra* note 859 at 1612-1613
[1104] Sheffield, *supra* note 1069 at 171
[1105] Bashir Watch International, *supra* note 1099
[1106] 'Bashir leaves Nigeria amid Calls for Arrest', Al-Jazeera, 16 July 2013, available online at http://www.aljazeera.com/news/africa/2013/07/201371674249998727.html, last accessed on 05/08/2014
[1107] Bashir Watch International, *supra* note 1099
[1108] 'Sudan President in DR Congo', Human Rights Watch, February 25 2014, available online at http://www.hrw.org/news/2014/02/25/sudan-president-dr-congo, last accessed on 2/8/2014
[1109] Bashir Watch International, *supra* note 1099
[1110] 'Security Council Committee Established Pursuant to Resolution 1591 (2005) Concerning the Sudan' website, available at http://www.un.org/sc/committees/1591/, last accessed on 27/7/2014
[1111] *Ibid.*

asset freezes against four individuals, including a high-profile General of the GoS military.[1112] Sudan, however, has been frequently accused of 'clearly violating the arms embargo,' including 'manufacturing ammunition in Khartoum as recently as 2013'.[1113]

The African Union has come out in increasing support of Al Bashir and in opposition to the actions and policy of the ICC. Sections of the AU were immediately vocally critical of the indictments, with Chairman Jean Ping decrying the appearance 'that Africa has become a laboratory test to the new international law'.[1114] As early as 2009, the Organisation published a request that the UN Security Council defer Al Bashir's prosecution,[1115] and in 2010 it defended Chad and Kenya in response to ICC statements that they had failed in their duty to arrest Al Bashir on their territory.[1116] In 2012, the Union reiterated its request for States Parties not to comply with the ICC demands.[1117] In 2013 the AU summit criticised the ICC for its focus on Africa, and debated the possibility of a mass withdrawal from the ICC.[1118] Attempts to try Al Bashir in an African court and thus vitiate ICC jurisdiction have occurred repeatedly since 2010,

[1112] 'List of Individuals Subject to the Measures Imposed by Paragraph 3 of Resolution 1591 (2005)', Security Council Committee Established Pursuant to Resolution 1591 (2005) Concerning the Sudan, available online at http://www.un.org/sc/committees/1591/pdf/Sudan_list.pdf, last accessed on 27/7/2014
[1113] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 3
[1114] BBC News, 'Vow to Pursue Sudan over 'Crimes', September 27 2008, available online at http://news.bbc.co.uk/1/hi/world/africa/7639046.stm, last accessed on 2/8/2014
[1115] African Union, 'Peace and Security Council 207th Meeting at the Level of Heads of State and Government, Report of the African Union HLP on Darfur', 29 October 2009, available online at http://www.peaceau.org/uploads/aupdreportdarfureng.pdf, last accessed 04/08/2014, at paragraph 242
[1116] African Union Press Release No. 119/2010 'On the Decision of the Pre-Trial Chamber of the ICC Informing the UN Security Council and the Assembly of the States Parties to the Rome Statute about the Presence of President Omar Hassan Al-Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya', Addis Ababa, 29 August 2010
[1117] African Union Press Release No. 002/2012 'On the Decisions of Pre-Trial Chamber 1 of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al Bashir of the Republic of the Sudan', Addis Ababa, 9 January 2012, available online at http://www.issafrica.org/anicj/uploads/Decisions_of_Pre-Trial_Chamber_I_of_the_ICC.pdf, last accessed on 02/08/2014
[1118] 'African Nations Meet over Possible ICC Pullout', New Vision (Uganda), October 11, 2013, available online at http://www.newvision.co.ug/news/648277-african-nations-meet-over-possible-icc-pullout.html, last accessed on 27/7/2014

most recently comprising the 2014 push towards the creation of an African Court of Justice and Human Rights, merging the African Court of Human and People's Rights with the African Union Court of Justice, which would have had criminal jurisdiction over international crimes[1119] however from which heads of state would likely be immune.[1120] An unnamed AU diplomat discussing the ICC at the 2014 summit purportedly stated "(w)e managed to shake off colonialism, and we'll shake this off too".[1121]

The Arab League, too, has stressed its solidarity with Sudan and its rejection of the ICC decision to indict him,[1122] while the Organization of the Islamic Conference condemned the arrest warrants as 'unwarranted' and 'totally unacceptable'.[1123]

Certain states have been vocal in their support of Al Bashir and disapproval of the continually African focus of the ICC, with Ethiopian Foreign Minister Tedros Adhanom Ghebreyesus stating that "(t)he Court has transformed itself into a political instrument targeting Africa and Africans".[1124] Kenya voted to withdraw from the ICC in September 2013,[1125] with President

[1119] 'African Union Moves Aggressively to Shield Bashir from Prosecution', Sudan Tribune, 29 July 2010, available online at http://www.sudantribune.com/spip.php?article35786, last accessed on 27/7/2014
[1120] 'African Leaders Grant themselves immunity from war crimes', RT News, July 3 2014, available online at http://rt.com/news/170084-war-crimes-immunity-african-union/, last accessed on 27/7/2014
[1121] Unnamed diplomat, quoted in 'AU Hits Back at 'Skewed' World Justice with African Court', New Vision (Uganda), July 19, 2014, available online at http://www.newvision.co.ug/news/657764-au-hits-back-at-skewed-world-justice-with-african-court.html, last accessed on 27/7/2014
[1122] Joint Statement by the Arab League, March 2009, quoted in 'Arab Leaders Back 'Wanted' Bashir, BBC, 30 March 2009, available online at http://news.bbc.co.uk/1/hi/7971624.stm, last accessed 29/9/2014
[1123] Organisation of the Islamic Conference Statement, March 2009, quoted in 'OIC Backs Sudan's Bashir, Slams ICC', PressTV, 28 March 2009, available online at http://edition.presstv.ir/detail/89840.html, last accessed on 29/7/2014
[1124] Ghebreyesus, quoted in Shane Hickey, 'African Union says ICC should not prosecute sitting leaders', The Guardian, 12 October 2013, available online at http://www.theguardian.com/world/2013/oct/12/african-union-icc-kenyan-president, last accessed on 27/7/2014
[1125] David Smith: 'Kenyan MPs vote to quit international criminal court', The Guardian, 5 September 2013, available online at http://www.theguardian.com/world/2013/sep/05/kenya-quit-international-criminal-court, last accessed on 27/7/2014

Uhuru Kenyatta stating that the ICC is a "toy of declining powers",[1126] although this likely has more to do with the ICC's intervention in Kenya than with Al Bashir. Finally, President Museveni of Uganda has stated (somewhat ironically, given his fractured relationship with Al Bashir and Museveni's own invitation of the ICC into Uganda) that the ICC was being used by the West to "install leaders of their choice in Africa and eliminate the ones they do not like".[1127]

The ICC has been fairly toothless in the face of such massive dissent, reduced to issuing several pre-trial decisions in response to Member State violations of their duty to arrest Al Bashir[1128] and to vocalising statements of 'deep frustration'.[1129] The UN Security Council, for its part, has since 2004 adopted '52 Resolutions, 17 Presidential Statements and 17 Press Statements on the Sudan situation as a whole'.[1130] Nonetheless the global community has largely had to come to terms with the fact that it 'is unlikely that Al Bashir will be arrested any time soon' in the face of such tenacious international dissent.[1131]

2(vi) More Optimistic Developments

It would be wrong, however, to say that the indictments of Al Bashir have not in any way altered his freedom and his ability to participate in international politics. There have been a substantial and growing number of instances where countries expressed their refusal to host the President in

[1126] Kenyatta, quoted in Elizabeth Evenson, 'Justice for Kenya Stumbles at the ICC', Human Rights Watch News, January 7, 2014, available online at http://www.hrw.org/news/2014/01/07/justice-kenya-stumbles-icc, last accessed on 27/7/2014
[1127] Museveni, quoted in Tom Maliti, 'Ugandan President Attacks ICC During Kenyatta Inauguration', International Justice Monitor, April 9, 2013, available online at http://www.ijmonitor.org/2013/04/ugandan-president-attacks-icc-during-kenyatta-inauguration/, last accessed 27/7/2014
[1128] See, e.g., Decision Pursuant to Article 87(7) of the Rome Statute on the failure by the Republic of Malawi to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir', ICC-02/05-01/09-3: Pre Trial Chamber 1 of the International Criminal Court 12 December 2011; Prosecutor v Bashir, ICC-02/05-01/09, Decision Informing the UNSC and Assembly of States Parties about President Bashir's Visit to Chad (August 27 2010); and Prosecutor v Bashir, ICC-02/05-01/09, Decision Informing the UNSC and Assembly of States Parties about President Bashir's visit to Kenya (August 27 2010)
[1129] Amnesty International 2014, *supra* note 1022 at 28
[1130] Bensouda, *supra* note 984 at 3
[1131] Niemann, *supra* note 876 at 147

response to pressure from the international community. While pursuing the course of warning Al Bashir not to visit,[1132] rather than permitting entry and then arresting him, might not be the most effective option for his ultimate arrest, this is nonetheless effective in reducing Al Bashir's reach and political potency. Several countries, including Botswana, France, Kenya, South Africa, and Zambia have pursued this course,[1133] which Prosecutor Moreno Ocampo insists is 'a positive development because it renders President Al Bashir more and more isolated'.[1134] Further, Al Bashir 'has avoided a number of conferences and celebrations in…Europe and the United States' due to fears of arrest.[1135]

Other countries have cancelled invitations or plans involving Al Bashir, including the CAR, Libya (in 2010, but subsequently permitted his entry in 2012), Malaysia, Turkey, and Uganda.[1136] More substantially, Malawi cancelled its status as host of the 2012 African Union summit at the last minute due to the reluctance to host Al Bashir amid ICC condemnation,[1137] Kenya refused an Intergovernmental Authority on Development meeting to prevent Al Bashir's attendance in 2010,[1138] and France moved the 2009 France-Africa summit from Egypt back to France to prevent the involvement of Al Bashir.[1139] More recently, Al Bashir's plane was denied passage through Saudi Arabian airspace in August 2013,[1140] and the leader was forced to leave Nigeria after 24 hours and before delivering his speech in the July 2013 AU Summit 'amid calls

[1132] *See* Barnes, *supra* note 859 at 1612
[1133] Bashir Watch International, *supra* note 1099
[1134] Barnes, *supra* note 859 at 1612
[1135] Simons, *supra* note 1013
[1136] Bashir Watch International, *supra* note 1099
[1137] *See e.g.* 'Ethiopia to host Africa Union Summit After Omar al-Bashir Malawi Row', BBC, 12 June 2012, available online at http://www.bbc.co.uk/news/world-africa-18407396 last accessed on 05/08/2014
[1138] Barnes, *supra* note 859 at 1612
[1139] Bashir Watch International, *supra* note 1099
[1140] 'Sudan President Blocked from Saudi Air Space', Voice of America, August 4 2013, available online at http://www.voanews.com/content/sudan-president-blocked-from-saudi-air-space/1723267.html, last accessed 29/7/2014 – although notably this may have had more to do with Saudi Arabia's tense relationship with Iran, the intended location of Al Bashir's plane.

for his arrest over genocide charges'.[1141] Zambian Foreign Affairs Minister Chishimba Kambwili made perhaps the most unequivocal statement against the continued international participation of the indictee, stating that Al Bashir would "regret the day he was born" if he attempted to step foot on Zambian soil.[1142]

2(vii) Possibilities for Future Arrest

Although the likelihood of Al Bashir either voluntarily or coercively being brought to the International Criminal Court to face the charges against him look substantially bleak, there are nonetheless some possibilities that might lead to his eventual arrest. It has been posited that the President might diminish in popularity in the African Union, particularly in the face of continued international disavowal of the leader, in which case 'the expediency of having him removed to The Hague increases exponentially'.[1143] Alternatively, it is always possible that Al Bashir might make a wrong step and visit a country which decides to arrest him, either of its own volition or in response to overwhelming international pressure.

Part Three: Incapacitation?

3(i) Indirect/'Political' Incapacitation

While the ICC is no closer to the physical arrest and incapacitation of Al Bashir, and indeed his case remains one of the most high-profile failures of the Court's enforcement lacuna, there is nonetheless some argument that the President's powers may have been indirectly curtailed as a result of the ICC's actions. Al Bashir is increasingly geographically isolated, with his ability to

[1141] 'Bashir Leaves Nigeria Amid Calls for Arrest', Aljazeera, 16 July 2014, available online at http://www.aljazeera.com/news/africa/2013/07/201371674249998727.html, last accessed 29/7/2014
[1142] 'Zambia Ready to Arrest Sudan's Al Bashir', Malawi Today, 20 May 2012, available online at http://www.malawitoday.com/news/125241-zambia-ready-arrest-sudans-al-bashir, last accessed 02/08/2014
[1143] Kiyani, *supra* note 1087 at 469

conduct his role as Head of State on the international stage significantly curtailed: Al Bashir has been forced 'to think twice before boarding any airliner now'.[1144] The leader has been forced to turn down high-profile invitations and the possibility to affect policy which his Presidential status should otherwise afford.[1145] The constant 'disinvitation' to international gatherings has caused both Al Bashir and the GoS diplomatic embarrassment and a reduced potency on the international stage.[1146]

The criticism of a respected international body such as the ICC also has more subtle effects on Al Bashir's legitimacy and the perspective of his subjects and enemies within Sudan. The 'mere denunciatory power' of the ICC has opened a space for dissent of Al Bashir's policies and political authoritarianism[1147]. This has resulted in 'diminishing support for the GoS among the Sudanese population', including a greater prevalence of critical voices within domestic media reports[1148]. Human Rights Watch praised the advent of the warrant against Al Bashir 'as it enabled them to denounce Bashir in legal as well as political and humanitarian terms';[1149] such a blow to his legitimacy can hardly have been created through any other means than an objective Court. As such, the ICC might, through 'showing the criminal face of the GoS', have contributed to 'weakening the regime in Khartoum in the long run'.[1150]

It is also possible – although difficult to empirically verify – that the ICC indictments may have subtly changed some aspects of Al Bashir's internal policy, ultimately improving life for the

[1144] Julie Flint, 'Ocampo's Great Gamble', The Guardian (Comment), 15 July 2008, available online at http://www.theguardian.com/commentisfree/2008/jul/15/sudan.humanrights, last accessed on 05/08/2014
[1145] Sheffield, *supra* note 1069 at 171
[1146] Marlise Simons, 'Sudan's President One Step Ahead of a Suit and a Warrant', New York Times, July 16 2013, available online at http://www.nytimes.com/2013/07/17/world/africa/sudans-president-one-step-ahead-of-a-suit-and-a-warrant.html, last accessed on 26/07/2014
[1147] Sheffield, *supra* note 1069 at 170
[1148] Kastner, *supra* note 3 at 171
[1149] Sheffield, *supra* note 1069 at 169
[1150] Kastner, *supra* note 3 at 171

victimised masses in Darfur. That the Court's indictment alone 'has an inherent deterrence value'[1151] can be shown through the conclusion of some that '(i)nternational criticism has sometimes moderated the brutality of President Bashir', as in certain instances '(w)hen there's a spotlight on Darfur, killings and rapes tend to subside'.[1152] During the recent upsurges of violence in 2012-2013, there was at least some level of government response to attempt to alleviate or reduce GoS implication in crimes committed, possibly in part attributable to the indictments hanging over Al Bashir's head. The minimal attempts to quell fighting included SAF troops attempting to protect civilians (particularly in Abujeradil in April 2013), Sudanese troop deployment (belatedly) resulting in 'decreasing tension' in certain regions, and reconciliation efforts leading to short-term peace agreements in July 2013.[1153] However it is beyond the ambit of this paper to conclude whether these measures signalled an improvement of GoS policy, or to find a causal link between such an improvement and the ICC indictment of Al Bashir.

Alternatively, the participation of the ICC in international scrutiny of Al Bashir's internal policy may even have rendered him more democratic, calling the first truly democratic election in 2010 (during the previous 2000 elections Sudan was 'effectively a one-party state'[1154]) in the hope that 'a win in legitimate polls would help him defy the ICC warrant'.[1155] Such positive attempts may also be shown through the GoS's increasing attempt to improve domestic accountability mechanisms, for example by appointing a Special Prosecutor for Darfur to try at least nine cases of serious crimes and as of 2013 to investigate a further 57 cases.[1156] Notably, however, despite

[1151] Sheffield, *supra* note 1069 at 170
[1152] Kristof 2013, *supra* note 1018
[1153] Amnesty International 2014, *supra* note 1022 at 27
[1154] Rice, *supra* note 878
[1155] France24, *supra* note 1011
[1156] Amnesty International 2014, *supra* note 1022 at 28

this initiative '(m)ore than three years later no significant steps have been taken to hold to account those responsible for the most serious violations of human rights'.[1157]

There are other, less direct, ways in which the indictments issued against President Al Bashir may have improved the leaders' policy positions. One commentator notes that Al Bashir's cooperation with the USA through procuring intelligence about Al-Qaeda may be indirectly related to Al Bashir's indictment and his increasing need for allies in the international sphere.[1158] Similarly, as noted in Chapter Four, Al Bashir was eventually pressured into removing his support for the similarly indicted Joseph Kony, potentially partly in an attempt to absolve himself of some sins in the eyes of the Court.[1159]

3(ii) Countering the Argument of Indirect Incapacitation

In many ways, however, the above arguments may be seen as farcical: rather than heralding an era of success for the court, the experience with Al Bashir can be described as at least counterproductive, and at most as actively detrimental to the conflict and its victims. Al Bashir did not appear to lose his sense of impunity after their issuance, indeed notably 'his forces embarked on fresh rampages in Southern Kordofan and Blue Nile states in 2011, detaining United Nations Peacekeepers and subjecting them to a mock firing squad.'[1160]

The indictments' ultimate failure too was a clear demonstration of the international community's 'inaction and paralysis' in the face of Al Bashir's continuing power.[1161] Thus far the ICC and the wider international community have not contributed to Al Bashir's conviction or punishment:

[1157] Amnesty International 2014, *supra* note 1022 at 28
[1158] Zwier, *supra* note 516 at 312
[1159] *See* Zwier, *supra* note 516 at 308
[1160] Sheffield, *supra* note 1069 at 174
[1161] Bensouda, *supra* note 984 at 2

indeed the indictments led to reduced access of the ICC in the conflicted Darfur region. The ICC action, too, may have bolstered or even increased the domestic and regional support of Al Bashir and his regime. The President was able to successfully espouse the 'narrative of Western imperialism' in reaction to the indictments, attracting other anti-neocolonial powers in his support.[1162] States appeared to relish the opportunity to snub the ICC through showering Al Bashir with support, red carpets, and kisses from Emirs.[1163] His National Congress Party has 'closed ranks around their leader, knowing that if he falls, they will too'.[1164] The indictments have as such had the opposite effect than the desired creation of discord within the GoS regime. Externally, the failure of the indictments has constituted a blow to the legitimacy of the ICC, with Al Bashir taking 'every opportunity to flaunt his impunity from the Court's justice'.[1165]

There are also arguments that the indictments not only failed, but were counter-productive, actually worsening the situation for civilians in Darfur and for the peace process generally. The GoS's reluctance to permit a UN peacekeeping mission into Darfur was exacerbated by the apparent fear that such a mission might cooperate with the ICC, through gathering evidence or arresting indictees.[1166] As such negotiations for the establishment of a UN (and ultimately AU) force in Darfur were protracted. Further, some argue that in response to the warrants Al Bashir 'lashed out at his subjects out of sheer retaliatory spite',[1167] expelling crucial aid agencies. This lead to Doctors Without Borders stating with hindsight that 'at the time, few organizations

[1162] Sheffield, *supra* note 1069 at 171
[1163] Sheffield, *supra* note 1069 at 170
[1164] Sheffield, *supra* note 1069 at 173
[1165] Sheffield, *supra* note 1069 at 170
[1166] Kastner, *supra* note 3 at 180
[1167] Sheffield, *supra* note 1069 at 173

grasped how international judicial processes could come in direct conflict with providing humanitarian aid'.[1168]

Part Four: Lessons and Questions in the Attempted Incapacitation of President Al Bashir

4(i) Too Much, Too Fast

There is a very real criticism that the International Court pushed too far, too fast in the search for short-term success 'in a manner that compromises its long-term goals.'[1169] By standing against an opponent as strong as a sovereign President at such an early stage, the Court made a robust declaration about its intention to target those at the top of state hierarchy, but simultaneously created enemies and demonstrated serious flaws within the international criminal system. Some believe that the ICC 'did not yet have sufficient legitimacy' to assert universal jurisdiction over a non-state-party head of state at the time of Al Bashir's indictment.[1170] Even a strong and well-established international Court could only truly expect full cooperation with its request to incapacitate a head of state if it was backed by immense international support, or in the eventual event of a regime change within the targeted country.[1171]

The premature and continuing attempts to incapacitate Al Bashir have led to significant dissent among allies of the leader, particularly within the AU. This could potentially lead to the renunciation by these states of the ICC Statute, which would substantially diminish the ultimate ability of the Court to continue in its future project to hold leaders to account. Such a policy may also deter new states from ratifying the Rome Statute, which would result in a 'weakening of the

[1168] Christophe Fournier, 'Punishment or Aid?', New York Times, 27 March 2009, available online at http://www.nytimes.com/2009/03/28/opinion/28iht-edphelan.html, last accessed on 05/08/2014
[1169] Kiyani, *supra* note 1087 at 471
[1170] Sheffield, *supra* note 1069 at 175
[1171] Sheffield, *supra* note 1069 at 172

rule of law in the international system.'[1172] The real potentiality of such an eventuality was demonstrated in the recent movements of the AU in threatening a mass withdrawal from the Rome Statute.[1173] Since the realization of the court's aims is ultimately 'predicated upon co-operation at the national level', any loss of States Parties would constitute 'a tremendous blow to the symbolism and credibility of the court'.[1174]

4(ii) Challenging Head of State Immunity for a Non-State Party to the Statute

Another flaw in the ICC's pursuit of justice in Darfur is the (perceived?) existence of head of state immunity, even for international crimes, especially on the part of those States which are not Parties to the Rome Statute. Commentators are divided in the issue, though there is a strong contingent arguing that the ICC ought to 'honor the democratic wishes' of the region, particularly as Al Bashir is now a democratically elected leader.[1175] This would include not attempting to incapacitate him through an international legal system to which Sudan is not a signatory. Significant debate remains as to the legitimacy of the ICC's challenge to the President's leadership: it is fully possible that Al Bashir 'remains protected by his immunity as the head of a (Non-Party) State'.[1176] Meanwhile, Member States who either oppose the Court's decision to indict Al Bashir or want to express their own distaste at the Western-dominated system of international justice utilise the confusion around the immunity issue 'to make excuses not to cooperate' with the warrant's enforcement.[1177] While this issue is not easily remediable, considering the continuing international disagreement, possible solutions for the future include a

[1172] Kiyani, *supra* note 1087 at 470
[1173] 'African Nations Meet over Possible ICC Pullout', *supra* note 1118
[1174] Kiyani, *supra* note 1087, at 502
[1175] Zwier, *supra* note 516 at 312
[1176] Kiyani, *supra* note 1087 at 469
[1177] Barnes, *supra* note 859 at 1616

clarification by the Court or amendment of the Rome Statute to confirm the priority of the ICC 'in the hierarchy of a country's international obligations'.[1178]

4(iii) Lack of Enforcement Mechanisms

One of the clearest messages from the attempted indictment of Al Bashir was a demonstration of the extent to which the ICC lacks enforcement mechanisms, and how this lacuna can amount to a substantial detriment to the operation of the Court. The safe and repeated travels of the President throughout some seventeen states 'exemplifies the impotence of the ICC when its Member States refuse to cooperate.'[1179] This lack of cooperation has not only ultimately impeded the ICC from incapacitating Al Bashir, but has also contributed to the fact that the Office of the Prosecutor's activities in Darfur have been 'limited to preservation of evidence and maintaining contacts with witnesses.'[1180] The situation shows the drastic need for interaction and cooperation between the Court and its Prosecutor, on the one hand, and a cohesive and united international community on the other. The enforcement of warrants such as Al Bashir's 'is only conceivable if and when the advocates of international criminal justice will be able to exercise enough political pressure on the GoS to make cooperation with the ICC unavoidable.'[1181]

4(iv) Stagnation and Paralysis of the International Community: A Long Old Story

Responsibility for the ultimate failure to incapacitate Al Bashir cannot, therefore, be placed solely with the International Criminal Court, but must instead fall in great part to the international community, whose stagnation and paralysis permitted the continued suffering of victims in Darfur. This paralysis is long-term and in no way a recent phenomenon, and appears

[1178] Barnes, *supra* note 859 at 1616
[1179] Barnes, *supra* note 859 at 1587
[1180] Bensouda, *supra* note 984 at 4
[1181] Kastner, *supra* note 3 at 187

to be caused by a range of interrelating factors. First, there is the common theme of countries supporting their own economic interests in place of pursuing purportedly desired international justice. In the case of Darfur, this was the case for both China and Russia,[1182] for whom economic considerations in oil and trade interests frequently superseded the need to protect Darfur's victims. This is not to pile accusations on specific countries: protectionism is a near-universal trait, and in every situation one State or other will suffer from a blinkering conflict of interests.

Secondly, lengthy historical and ideological divisions pit States against each other even when domestic interests are not directly at stake. Anti-imperialist and anti-neocolonial states have fallen over each other to evoke their support for the GoS and their disgust for the burgeoning international criminal law. Part of this alliance consisted of the Arab League and other 'traditionally anti-US and anti-Israel organizations and states',[1183] united in their rejection of the West. Another aspect was the AU, reeling from perceived partiality and disproportionate targeting of African countries by the Court, many (although markedly not all) Members of which expressed their disappointment through obvious or muted support for Al Bashir.

In pursuance of whatever aim, the ultimate result of a disunited and inactive international community 'has not only prolonged the suffering of Darfur's victims, but has bolstered Mr Al-Bashir's resolve to ignore (the Security) Council'.[1184] It has also ultimately contributed to the failure of international justice to incapacitate a key violator of human rights. The justice lacuna in Sudan 'perpetuates the cycle of violence in Darfur'.[1185] In its place, ending impunity and holding Al Bashir accountable for his earlier crimes and these most recent events in Darfur in

[1182] Kastner, *supra* note 3 at 172
[1183] Kastner, *supra* note 3 at 172
[1184] Bensouda, *supra* note 984 at 3
[1185] Amnesty International 2014, *supra* note 1022 at 28

2012-2014 'would do much to…restore confidence in the rule of law',[1186] both within Sudan and in the international community as a whole. And it might ultimately reinforce the 'hope that lasting peace and security would return to Darfur.'[1187] Nevertheless, instead of action there has been silence, a 'silence (which) empowers Sudan's leaders to pick up where they left off in Darfur.'[1188]

However these divisions and issues do not preclude the existence of an International Criminal Court: instead they demonstrate exactly *why* such a court is necessary in a divided international system (and, to an extent, how unlikely it was that such a Court ever came into being). The Court's ability to transcend political, economic and ideological divides and provide some objective basis for pursuing a positive outcome is precisely the characteristic which renders it so unique and necessary to the international community. It is just that this community needs to allow the Court to do its job. Potentially in the not-distant future, with greater legitimacy, a set of precedent-creating cases, and an increase in the number of States Parties, the Court will truly be able to operate in a sphere substantially detached from the vicissitudes of international relations.

4(v) Poor Prosecutorial Decisions and a Lack of Realism

One criticism that can be landed directly in the plate of the ICC is the conduct of the OTP and, in particular, the (previous) Prosecutor himself, in the early handling of the case against Al Bashir. The first key flaw came with the choice of issuing unsealed indictments, effectively ending any realistic possibility of incapacitating Al Bashir before the pre-trial case even began. This 'ultimate high-stakes gamble'[1189] effectively 'guarantee(d) that the arrest and eventual

[1186] Amnesty International 2014, *supra* note 1022 at 29
[1187] Bensouda, *supra* note 984 at 2
[1188] Kristof 2013, *supra* note 1018
[1189] Sheffield, *supra* note 1069 at 164-165

punishment of the defendant will not be achieved.'[1190] The ICC became reduced to issuing 'a grand rhetorical statement at the expense of almost any chance of achieving justice'.[1191] There were successful precedents for issuing sealed warrants, and in the case of such a high-status and powerful defendant, such a course might have been far more rational and successful.

Secondly, commentators have accused Prosecutor Moreno Ocampo of making highly public 'conclusory and apparently biased statements'[1192] which presumed Al Bashir's guilt, both undermining the legitimacy of the court and fueling ever-growing disapproval from African and anti-West perspectives. Again this seems to be symptomatic of the Court's tendency to focus on short-term broad political statements and exhibitionism in place of the long-term goal of 'securing co-operation from States Parties' to actually effectuate such aims.[1193]

Louise Arbour, UN High Commissioner for Human Rights, criticised the OTP for not directly conducting investigations in Darfur itself, arguing that the Court 'placed too much emphasis on the possible risks to witnesses and victims' in contrast to the prospective benefits.[1194] Interestingly, the High Commissioner noted the 'potential deterrent effect of ICC investigations on…perpetrators',[1195] suggesting that the mere presence of delegates of the International Criminal Court 'can create an atmosphere in which the costs of abuse are more apparent to the perpetrators of violence against civilians'.[1196] This observation, although emphasising a failure in the case of Darfur, shows a positive possibility for the Court: again demonstrating that its

[1190] Sheffield, *supra* note 1069 at 169
[1191] Sheffield, *supra* note 1069 at 172
[1192] Sheffield, *supra* note 1069 at 165
[1193] Kiyani, *supra* note 1087 at 471
[1194] Louise Arbour, quoted in Bosco, *supra* note 2 at 189
[1195] Bosco, *supra* note 2 at 189
[1196] Bosco, *supra* note 2 at 189

incapacitative abilities can begin long before a case is brought to trial, to the extent that the actions of perpetrators are abated by the mere presence of the ICC.

4(vi) Unavoidable Geopolitical Factors:

A final factor that contributed to the failure of the ICC to incapacitate Al Bashir consists of the unavoidable political, geographic and economic factors inherent within the conflict itself. Commentators have noted that the 'geographical vastness' of Sudan separates the GoS from the epicentre of Darfur conflict, physically protecting Khartoum and separating pro-GoS voters from the conflict's effects.[1197] The de facto lack of internal opposition to Al Bashir's ruling party compounds his inviolable authority; even in 'Sudan's first multi-party elections in 24 years'[1198] in 2010, the 'two main challengers' to Al Bashir's regime withdrew their campaigns before the voting started.[1199] Finally, the existence of substantial oil revenues (though curtailed after the secession of South Sudan in 2011[1200]) along with international trade partners willing to purchase it secures 'a permanent income that serves to build up the army (of Sudan), which today is one of the strongest in the region'.[1201]

One conclusion to draw might be that the indirect incapacitation of leaders works best where the region has a climate of accountability, a healthy governmental opposition, diverse economy, political freedom, and decentralised government. Grand though this deduction may be, it is not, however, useful, considering that most such contexts are not hotbeds of international crime, rendering the Court probably redundant in the first place. This is one of the many problems of

[1197] Kastner, *supra* note 3 at 171-172
[1198] France24, *supra* note 1011
[1199] 'President Omar al-Bashir declared Winner of Sudan poll', *supra* note 1012
[1200] Tran, *supra* note 974
[1201] Kastner, *supra* note 3 at 171

attempting to operate a perfect system of international justice in an imperfect context of political obstructionism.

Part Five: The Need to Incapacitate and Hesitant Solutions

5(i) Why We Need to Incapacitate

The impediments above do not revoke the theoretical, symbolic, and morality-based reasons for the need to incapacitate Al Bashir in Sudan. Darfur remains embroiled in an 'ongoing campaign of violence',[1202] a situation in which international crimes continue to occur, and the international community continues to reject its responsibility to intervene. The persons against whom the earlier arrest warrants were issued are already 'allegedly implicated in the commission of these (new) crimes',[1203] including Al Bashir. The Ministry of Defence of Sudan is implicated,[1204] as are Janjaweed and other militia groups which 'continue to operate as proxies of the government'.[1205] The apprehension of such authors of international crimes will thus not only directly cause the termination of a significant portion of the violence, but also would contribute to the conclusion of the culture of impunity which currently remains widespread across the Darfur region.[1206] In the context where 'it is unquestionable that most (of at least the early) crimes in Darfur have been committed by the Sudanese army and the Janjaweed',[1207] a concerted apprehension of the key leader of the GoS would go a long way towards rebutting a boldly unaccountable culture.

[1202] Friedman, *supra* note 889
[1203] Bensouda, *supra* note 984 at 5
[1204] Bensouda, *supra* note 984 at 5
[1205] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 46
[1206] Report of the Panel of Experts on the Sudan 2014, *supra* note 1023 at 46
[1207] Kastner, *supra* note 3 at 174

Without prosecution of Al Bashir, 'the situation in the Sudan is unlikely to improve'.[1208] Victims will probably not receive accountability or reparation, divisions are unlikely to be assuaged, and the journey towards peace will be sluggish. As the stagnancy and inaction of the international community has shown, there are very few options outside of the ICC which can effectively pursue a positive outcome for Darfur. While its victims 'urgently need the support of every international player that has the potential to end their suffering and achieve long-lasting peace',[1209] the ICC must be viewed as a key actor towards that end, and must receive the full support of the international community in its work. As eminent commentator Gerard Prunier notes, '(g)reat wealth and power give its holders certain responsibilities, if the world "collective morality" is to have any meaning.'[1210] As yet, such responsibility has been violated in the case of Darfur.

5(ii) Solutions to the Lack of Incapacitation in Darfur:

Potential solutions to improve the ICC's record of incapacitation in Darfur might be myriad, and can hardly be contained in one paper. As noted above, one solution might be a clear statement from the ICC that immunity obligations fall lower in the priority ladder than requirements to cooperate with orders of the Court. This would at least negate the excuse of many states that Al Bashir's Presidential status vitiates their obligation to comply with ICC indictments in his case. Further, it would be useful to create 'defined repercussions for states that refuse to cooperate with the ICC's requests',[1211] including suspension from the Rome Statute, expulsion, or even UN Security Council sanctions against the violating country.

[1208] Bensouda, *supra* note 984 at 3
[1209] Kastner, *supra* note 3 at 146
[1210] Prunier, *supra* note 844 at 147
[1211] Barnes, *supra* note 859 at 1616

One of the other ingredients towards greater incapacitative success in the ICC might simply be time. With the slow building of a roster of successful cases, objective rulings, and diverse situations, faith in the Court's structure and processes might grow to the extent where its legitimacy is less at question in the international sphere. This will require a range of elements, not insignificantly including the expansion of the Court's remit to focus on situations in diverse regions of the world, negating the AU's fears of partiality and imperialism. It will also require the Court to maintain, as much as possible, a status apart from the political dissent and in-fighting which is near-universal in the international community. The further the International Court can render itself apart from ideological and historical fractures between States, the more likely that anti-West blocs such as the Arab League might eventually come to accept it as an acceptable form of justice. The court is undeniably born of the West, and Western perspectives of justice, so such an eventuality may require more than mere inaction. Instead it may constitute extending a hand of cordiality to nations which traditionally decry Western judicial and political institutions, and the increased representation of such views and voices within the every-day action of the court.

Conclusion

International Criminal Law has been criticised and vilified since before its inception, accused of everything from contradicting sovereign democracy, to excessive procedural legalism, to exhibiting overly political bias which violates the rule of law. The ICC is the 'Western' court which unfairly targets humble and vulnerable African warlords. International criminal law is toothless, pointless, and expensive. It intervenes too readily, or insufficiently, or in entirely the wrong way. It is not good enough at its job, and yet sufficiently effective to shake the nerves of leaders and spark high-level dissent. In sum, this new legal class is highly deficient, and frequently its flaws appear to outweigh any potential positive effects.

Yet international criminal law is merely an imperfect response to a highly complex and difficult problem. We as a species have not responded well to the perplexing tendency of our kind to annihilate each other. We stand, hopeless and voiceless, by the graves of our brothers, pawing at the air for an elusive solution far from reach. Our figureheads make wreathes of poppies and declare a sombre Never Again, while we turn to history books to try and explain to our children the justification for our bloodcurdled past. And still our screens and newspapers show new disasters, abandoned populations, napalmed civilians, children as pawns in perverse battle games. The latent, flickering, imperfect hope of a legal solution to such impossible horror must be pursued to the furthest feasible extent: there is a duty to do so. As an eminent commentator noted during the violent 2014 confrontation between Israel and Gaza, '(a)t a time when, yet again, both sides appear to be breaching the Geneva conventions and failing to observe the

minimum standards of humanity, the ICC offers the only prospect of any accountability…*there is no alternative*.'[1212]

The incapacitative perspective of international criminal law, too, brings new perspective to its potential ability to counter the despicable inclination of man to slaughter and torment fellow man. Law becomes another weapon which, wielded carefully, can render culpable and powerful war criminals toothless and alone. This is in large part because international crime is both more terrible, but more susceptible to legal responses, than ordinary domestic crimes of murder or violent abuse. A facet of international crimes is that they tend to be lengthy, logistically difficult, and requiring a significant deal of planning and preparation. Whereas in the context of most domestic crime, 'there is little that any government…can actually *do* to prevent single acts of murderous violence',[1213] this is not so in the international criminal context. The long-term planning, necessity to cultivate violent and discriminatory socialisation, and the mere time it takes to perpetrate offences upon a large group of people results in the potential ability to respond to and prevent the bulk of a crime during, or before, its occurrence.

Secondly, the public and highly exposed nature of international crimes render them more susceptible to incapacitative impacts of international criminal courts. Where both the world can watch perpetrators, and the perpetrators watch the world, the ability of an authoritative and respected legal institution to make ripples in the locale of crime is enhanced. Mere monitoring by an international criminal tribunal's prosecution office can cause potential international criminals to restrict or rethink their tactics, as attempted during fighting between Russian and Georgian forces in August 2008, where 'the (ICC) released a statement indicating that it was analysing

[1212] Geoffrey Robertson QC, 'Gaza: how international law could work to punish war crimes', *The Guardian*, 1 August 2014, available online at http://www.theguardian.com/commentisfree/2014/aug/01/gaza-international-law-war-crimes-security-council, last accessed 1/8/2014 emphasis in original
[1213] Reisman, *supra* note 447 at 58, emphasis added

alleged crimes' in order 'to use its influence to alter the conduct of hostilities'.[1214] Publicity is a highly effective tool that can be utilised by international criminal institutions in a way which would never be possible in domestic criminal contexts.

The above review of incapacitative criminal theory as viewed in the context of specific international crimes and perpetrators has demonstrated, however, that 'incapacitation' so called is a broader and substantively different concept in the international rather than national context. The review has brought to light new aspects of the much-understudied theory of incapacitation generally, and has also demonstrated how, at least in an international context, the theoretical distinction between theories of 'punishment' and theories of 'justice' is diminished.

A broadening theory of incapacitation

The unique context of international criminal law (particularly in ongoing conflicts) has provided new and expanded insights into incapacitation as a theory of punishment itself. In particular, incapacitation has emerged as a much broader and more encompassing theory than that which is usually espoused in the traditional or domestic context. Incapacitation has expanded temporally, spatially, and in potential scope.

In each context considered in this thesis, a new distinction between direct and indirect incapacitation has emerged. This distinction expresses the possibility of criminal law impacting the actions and freedom of the accused indictee before his or her institutional incarceration (even where such capture may be unlikely to occur). This may materialise, as in the cases of Karadzic and Mladic, in the form of an utter loss of personal liberty, political power, and even individuality. Instead, as in the case of Joseph Kony, it might be revealed through the loss if

[1214] Bosco, *supra* note 2 at 180

important international allies, as well as the reduction in freedom of movement and ability to coerce new recruits. For Al Bashir, such indirect incapacitation barely occurred at all, except through limiting the legitimacy of ties to international diplomatic allies, and as such slightly reducing the President's ability to influence policy on the international stage. The latter case's failings, however, shows merely the need for the international community to unite around the standard of international criminal law in order to provide the physical clout behind the Court's rulings.

This expansion of incapacitation beyond direct capture and incarceration into the realm of indirect coercion and imposition is probably reduced to the international context only, as the intricate power ties which constitute a leader's sphere of capability are uniquely acute at this level. International crimes are both typically more publicised, and therefore more open to accusation and scrutiny, and more connected to international partners and allies, through tenuous links which are liable to dissolution. The intangible tower of cards which constitute the pedestal of political leaders and perpetuate the ability to wield power are also susceptible to collapse through the similarly intangible winds of ally disloyalty and citizen disenchantment.

It is clear that the international criminal community ought to be more aware of this indirect incapacitative power when making decisions in the pretrial stage, and in particular note the requirement to scrutinise the significant authority such a reality provides the OTP. However such a power ought also to be explored to its fullest extent, such that the ICC should fully utilise the potential benefits of public awareness of its monitoring. One author has already noted that 'the prosecutor can employ monitoring as a form of targeted deterrence in situations where it appears

that a recurrence of crimes is likely'.[1215] Such mechanisms can also work to indirectly incapacitate, by isolating the perpetrator from allies, restricting their geographical and expressive freedom, or reducing the perpetrator to an apolitical unknown, on the run from the potential reach of justice.

Secondly, one author has noted the potential for the ICC to 'communicate targeted messages to senior government officials, military representtavives, or militia commanders about their responsibilities or the threat of punishment'.[1216] International criminal law is capable of bringing 'home to any political or military leader who considers taking an action that will foreseeably or inevitably involve the deaths of civilians that they must not merely be sure of military advantage: they must be certain of an acquittal when placed in the dock of an international criminal court.'[1217] Such attempts at outreach might be able to enforce both the dominance and omniscience of the court, while treating the perpetrator as a responsible, culpable, and morally substantive individual, capable of changing his or her methods. Eventually, the context will be such that '(e)ach and every political and military leader, and even every corporate and media tycoon who joins the killing cartels, is on notice of the actual and potential reach of atrocity law.'[1218]

The negative potential of incapacitation in international criminal law

The cases above have shown too, however, that incapacitation is neither an easy nor a certain outcome of the involvement of international criminal institutions. Various tensions exist in the attempt of international criminal law to incapacitate criminals and by such method end or reduce

[1215] Bosco, *supra* note 2 at 181
[1216] Bosco, *supra* note 2 at 197
[1217] Robertson, *supra* note 1212
[1218] David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (New Jersey: Princeton University Press, 2012) at 437

the occurrence of ongoing crime. There is an ongoing possibility that 'ICC involvement would itself be the cause of violations',[1219] or at least an exacerbating catalyst. This was demonstrated in the case of Al Bashir, where the ICC indictments sparked an immediate expulsion of aid agencies from the Darfur region, and in many cases bolstered the President's allies in their resolve to support him in opposition to the imperialist, 'Western' international legal system. Similarly, where international criminal courts have low support amongst citizens within the impacted community, declarations by such courts may increase the political support and capital of the perpetrating leaders. Finally, as might be the case in the long-running Presidency of Al Bashir, '(a)n existing indictment might make an accused leader more committed to staying in power, including through the use of violent repression and atrocities.'[1220]

There are also tensions where international indictments might hamper peace processes, as noted by opponents of the indictments against Joseph Kony in Uganda. Any incentive for a criminal party to pursue peace is diminished where a criminal indictment hangs over the head of their leaders. Under an incapacitative rationale, this might require scope for the criminal institution in question to avoid interfering or indicting in situations where peace processes are burgeoning. However it is noted that in most of the situations in which international criminal law has a role, peace processes are unlikely or impossible, and amnesties for the worst perpetrators are neither morally nor pragmatically appropriate. For the longer term, too, offering amnesty for an alleged criminal leader will revoke the ICC's criminal legitimacy for the future.[1221]

Finally, the clear issue with legal institutions stepping into incapacitative roles during ongoing conflicts is the easy critique of politicism. In order to maintain its legal legitimacy and

[1219] Bosco, *supra* note 2 at 182
[1220] Bosco, *supra* note 2 at 182
[1221] Kastner, *supra* note 3 at 151

international authority, the ICC 'should not be dominated by political issues',[1222] and should not be used, as many critics suggest, as a liberal Western mechanism for removing merely unpopular political leaders from their legitimate power.

'Theory of punishment' v. 'Theory of justice'

This growth of the incapacitative theory also leads to the conclusion that such a theory expands to a sphere broader than a punishment or post-incarceration-located phenomenon. Instead, incapacitation, in international criminal law, is a phenomenon that results from the existence and systematic operation of international criminal law as a whole.

We have seen how incapacitation occurs at several stages prior to capture or punishment. The situation in the former Yugoslavia demonstrated the impact of incapacitation even pre-indictment, as the phenomenon of sealed indictments led to those who feared prosecution changing their detrimental behaviour even before an international tribunal published its indictments. Key figures in international conflicts thus theoretically 'self-check' their actions, mitigating the worst aspects and acting to reduce the net violation of international criminal law. This aspect draws a very close line with the theory of individual deterrence. The marked difference, however, is that in the long-drawn-out crimes of the international sphere, pre-indictment incapacitation can operate in the midst of an act, before the lengthy process of law has begun its work, and thus mitigate deeds whilst they are in action.

Such a phenomenon complies with Kant's assertion that only the culpable be punished, for such hidden incapacitation would only target the culpable, or would-be culpable, who know by their own deeds that they are in violation of international norms. It is also a unique facet which

[1222] Kastner, *supra* note 3 at 146

responds to the high-status, individualised, and massive nature of international crimes and their perpetrators. Such a phenomenon continues in international criminal law with the advent of the International Criminal Court, particularly due to the court's ambiguous focus on 'situations', rendering each key player under the fear of scrutiny from international institutions. However it is hampered by the court's reluctance to use sealed indictments – this is an area which might be improved to increase the operation of pre-indictment incapacitation.

That incapacitation clearly occurs before punishment (or even trial) is evident in the above discussion regarding indirect incapacitation, demonstrated in the three case studies considered here. It is also noted that statements and declarations made by international criminal institutions during ongoing crimes can emphasize certain factors of a conflict, changing the way that military operations occur, and rendering them potentially less detrimental to the impacted community. One example is of charges brought against Thomas Lubanga for the use of child soldiers – '(b)y emphasizing, this theme, the prosecutor…help(ed) stigmatize a practice that is accepted as normal in some environments.'[1223] Pre-trial statements of international courts clearly could have wider impacts than directly measurable.

Ultimately, the knowledge that incapacitation applies long before any punishment might occur leads to the suggestion that a preoccupation with theories of 'punishment' are incapable of encompassing the true extent of how incapacitation can be achieved. Similarly, the punishment theory of deterrence requires a *system* of criminal law in order to operate (i.e., isolated and/or sporadic punihsments would not have the same general deterrent effect). General deterrent effects are felt by citizens long before a court or police system directly interferes in their life. Thus the term 'theory of punishment' appears to be a misnomer, and a broader term, such as

[1223] Bosco, *supra* note 2 at 191

'theory of criminal justice', might better explain how such notions operate, especially at an international criminal level .

Conclusion

Many of the positive outcomes of the incapacitative impact of international criminal tribunals that we have noted here are not guaranteed in the long term. It is highly possible that a constant stream of unenforced indictments such as that of President Al Bashir will eventually 'highlight the court's lack of enforcement power and, potentially…diminish its ultimate preventive…effect'.[1224] If the Court punches above its weight and does not use its powers carefully and tactfully, long-term, the Court may lose both its incapacitative power and its overall legitimacy. On the other hand, as the Court begins to successfully try, convict, and incarcerate known criminal offenders, and as accountability is seen to be done on an international stage, the opposite might occur. The ICC is very much in its early years, and a build-up of successful cases could have a real and positive impact on legitimising the institution such that it will become ever-more capable of targeting the biggest fish in the criminal arena. 'For all its rhetoric, the Court has only begun to explore systematically its preventive potential.'[1225]

The advent of international criminal law has comprised an astonishing event and should be praised for its potential ability to combat the worst crimes when nothing else appears to be a feasible response. 'Until now, when powerful men committed crimes against humanity, they knew that as long as they remained powerful no earthly court could judge them.'[1226] We now

[1224] Bosco, *supra* note 2 at 193
[1225] Bosco, *supra* note 2 at 200
[1226] United Nations, "Secretary-General Says Establishment of International Criminal Court is Major Step in March towards Universal Human Rights, Rule of Law" News Release, L/ROM/23, July 20 1998

operate in a unique new reality, where the reach of the law is truly universal, and where '(i)mpunity for atrocity crimes has been shorn of any legitimacy'.[1227] Such an outcome must be celebrated. However, many people justifiably caution against the ICC being 'used as an excuse by the international community not to take action'.[1228] Work needs to be done in order to maintain and realise international criminal law's potentiality, to make the new International Criminal Court as functional and successful as possible in pursuance of its incapacitative capability, and thus to render the ICC more than merely 'an instrument for appeasing the troubled conscience that yearned for absolution from responsibility.'[1229]

[1227] Scheffer, *supra* note 1218 at 414
[1228] Kastner, *supra* note 3 at 188
[1229] Payam Akhavan, 'Justice in The Hague, Peace In the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal', 20 Human Rights Quarterly (1998) 737 at 744

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