

BACK TO BASICS: SENTENCING OBJECTIVES AT THE INTERNATIONAL
CRIMINAL COURT

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*“Men are unable to forgive what they cannot punish and are unable to
punish what turns out to be unforgivable.”¹*

*J.D., University of Toronto, 2015. The author’s opinions are his own and do not reflect those of his employer.

¹ HANNAH ARENDT, THE HUMAN CONDITION 241 (1958).

INTRODUCTION

As the International Criminal Court (“ICC”) embarks on the promise of defining and enforcing international criminal law (“ICL”), now is a salient time for it to fully explain its sentencing philosophy and objectives. Unfortunately, despite delivering its first two sentences, the Court has yet to close the door on errant sentencing philosophies of the past that led to disproportionately light punishments for the worst crimes known to humankind. In fact, the 2014 *Katanga* sentencing decision threatens to drag the ICC down the same path of the confusing and seemingly arbitrary sentencing practice that dogged its predecessors.²

If the ICC is to retain its legitimacy and further the international justice project, its ability to articulate the aims of sentencing clearly and consistently is paramount. The lack of a clear thread tying past ICL sentencing jurisprudence together made the practice seem arbitrary. ICL sentencing has become amorphous, in large part, due to the proliferation of sentencing objectives that emerged after the WWII tribunals. These diverse objectives pull courts in opposing directions. The sentence that tries to give credence to each objective ends up doing a poor job at fulfilling any.

The primary focus of this paper will be to explore various sentencing objectives and how they may or may not scale up to *sui generis* atrocity crimes.³ Current debates around the deterrent effect are canvassed in depth. Domestic criminal sentencing objectives that focus on rehabilitation and reconciliation are ill suited for the demands thrust upon them in the ICL arena. Several other utilitarian objectives of punishment are inapplicable in ICL and should be discarded or given very little weight.

I conclude that the ICC should adhere to an emphasis on the two sentencing objectives that it is best equipped to achieve: denouncement and deterrence. This approach will ensure coherence and consistency in sentencing. Making the sentencing analysis simpler reduces arbitrariness. This facilitates respect for the fair trial rights of the accused by increasing clarity and predictability while better serving the chosen sentencing goals. Sentencing has an important, yet modest role to play in international peace. The approach should also realign ICL sentences to be more proportionate to the crimes they seek to punish and avoid the past practice of unduly lenient prison terms.

² *Prosecutor v. Katanga*, ICC-01/04-01/07-3484, Judgment on Sentencing (May 23, 2014).

³ Atrocity crimes are defined as genocide, crimes against humanity and war crimes.

I. PAST ICL SENTENCING PRACTICES

Not one of the eight international criminal tribunals explicitly codified the objectives of sentencing.⁴ This is likely because not only are the aims of sentencing a matter of debate at the domestic level,⁵ but different legal regimes place vastly different emphases on punishment rationales.⁶

Given the fervent rate that executions and life sentences were doled out at the Nuremberg and Tokyo Tribunals, it is clear that ICL gave little consideration to rehabilitation at that time.⁷ Instead, punishment almost exclusively channeled retribution and sought to denounce.⁸ Deterrence was not fully applicable, in a technical sense, because the Tribunals actually adjudicated crimes neither codified nor definitively established in customary international law at the time of commission.⁹

After the WWII Tribunals, ICL was reborn into a culture of idealism. In the 1990s, the *ad hoc* Tribunals formed: the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda. A canvas of their jurisprudence reveals that ICL sentencing was called on to advance a myriad of goals: “retribution, deterrence, reconciliation, rehabilitation, incapacitation, restoration, historical record building ... expressive functions, crystalizing international norm[s], general affirmative prevention, establishing peace, preventing war,

⁴ KARIM A. KHAN, RODNEY DIXON & ADRIAN FULFORD, ARCHBOLD: INTERNATIONAL CRIMINAL COURTS PRACTICE, PROCEDURE AND EVIDENCE, § 18–40 (4th ed. 2014) [hereinafter Archbold] (this includes the International Criminal Court (“ICC”), International Criminal Tribunal for the Former Yugoslavia (“ICTY”), International Criminal Tribunal for Rwanda (“ICTR”), Special Court for Sierra Leone (“SCCL”), Special Tribunal for Lebanon (“STL”), Extraordinary Chambers in the Courts of Cambodia (“ECCC”), Nuremberg and Tokyo Tribunals).

⁵ See e.g. CLAYTON C. RUBY, GERALD J. CHAN & NADER R. HASAN, SENTENCING § 1 (8th ed. 2012) (discussing the debate around Canadian sentencing theories).

⁶ MARGARET M. DEGUZMAN, PROPORTIONATE SENTENCING AT THE INTERNATIONAL CRIMINAL COURT, IN THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 932 (Carsten Stahn, ed., 2015).

⁷ Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT’L CRIMINAL JUST. 683, notes 2–3 (2007) (92% given life or death at Tokyo, 79% at Nuremberg); see TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR, 559–611 (1992).

⁸ Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOYOLA LOS ANGELES INT’L & COMP. L. REV. 123, 130 (1997); WILLIAM A. SHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 331 (4th ed. 2011).

⁹ Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 182 (2001).

vindicating international law prohibitions, setting standards for fair trials, and ending impunity.”¹⁰

Legal scholars criticized the “under-theorization and lack of clarity among international judges regarding the purpose of international criminal prosecution”.¹¹ They felt that this was becoming damaging to ICL’s integrity and credibility.¹² An analysis of two decades of *ad hoc* jurisprudence identifies no consistently predominant sentencing philosophy.¹³ However, retribution and deterrence emerge as the two principal aims with rehabilitation and reconciliation occasionally playing a role.¹⁴

It appeared that international judges were choosing their result and then applying whatever sentencing theory buttressed it. This conclusion comes from the observation that from case to case, sentencing ideologies were abandoned, marginalized or inflated depending on whether they went against or advanced the target sentence.¹⁵ The plethora of sentencing aims tended to distort the sentencing analysis and led to disproportionately light punishment for high-ranking perpetrators of mass atrocities. While many of these utilitarian goals have laudable aspirations, so far in ICL they have perversely influenced sentencing to the point that the punishments do not reflect the culpability and gravity of the crimes.¹⁶

II. SENTENCING PURPOSES AT THE ICC THE ROME STATUTE

The *Rome Statute* does not explicitly describe any purposes or objectives of sentencing.¹⁷ The ICC is tasked with representing all peoples in the current 124 states party to the *Rome Statute*—representing nearly every major legal system in the world. The lack of sentencing guidance was likely a consequence of a failure to square disagreements between delegates representing these various legal traditions. Within the West alone, there are

¹⁰ Shahram Dana, *The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?*, 3:1 PEN. ST. J.L. & INT’L AFF. 30, 37 (2014).

¹¹ Dana, *supra* note 10, at 63; PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 167 (Andrew J. Ashworth et al. eds., 3d ed. 2009).

¹² *Id.* at 63; Ashworth, *supra* note 11.

¹³ Dana, *supra* note 10, at 111.

¹⁴ DEGUZMAN, *supra* note 6, at 946.

¹⁵ Dana, *supra* note 10, at 111.

¹⁶ *Id.*; *see also* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 1420 (Otto Triffterer ed., 2d ed. 2008).

¹⁷ Compare Rome Statute of the International Criminal Court, Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*], with *Criminal Code* § 718, R.S.C. 1985, c. C-46 (Can.) (explicitly stating the purpose and objectives of Canadian sentencing).

sharp disagreements on sentencing aims between common law and civil law countries and likewise between different legal cultures.¹⁸ A compromise solution overcame the impasse: the *Rome Statute* is largely silent on the matter, giving broad discretion to judges.¹⁹ Each of the ICC's three-judge panels draws from states party to the *Rome Statute*.²⁰ Therefore, their reasoning may very well be colored by domestic sentencing philosophies.²¹

ICC INTERPRETATION

In the ICC's first sentencing decision, *Lubanga*, the Trial Chamber dedicated a single paragraph to the purposes of sentencing. The Chamber turned to the *Rome Statute*'s preamble to find sentencing purposes.²² It states that the ICC is founded on the idea that "the most serious crimes of concern to the international community as a whole must not go unpunished".²³ It also affirms that the States party to the ICC are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".²⁴ Although the Chamber did no more than quote the text of the preamble, discernable from these two passages, are the sentencing goals of denouncement and deterrence.

In the ICC's second sentencing decision, *Katanga*, the Chamber was more explicit. However, its sentencing philosophy also grew muddled by introducing additional objectives without being clear about where they fall within the hierarchy of sentencing purposes. Quoting the same preamble passages, the Chamber held that in sentencing, its task was to "punish crimes" and "ensure that the sentence truly serves as a deterrent."²⁵ The Chamber began to lose analytical clarity when it affirmed that its task was "also [to] respond to the legitimate need for truth and justice expressed by the victims and their family members. Thus, the Chamber is of the view that the sentence has two major functions: [punishment and deterrence]."²⁶ The Chamber used the word "punishment", describing it as "express[ing]

¹⁸ Pickard, *supra* note 8, at 127.

¹⁹ *Id.* at 128.

²⁰ *Rome Statute*, *supra* note 17, art. 39(i)–(ii) (representing the principal legal systems of the world and geographic diversity are primary considerations in judicial appointments).

²¹ *Id.* at art. 21(1)(c) (in certain circumstances, the Court may apply national principles of law if they are not in conflict with the *Rome Statute* or international law).

²² *Prosecutor v. Lubanga*, ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 16 (Jul. 10, 2012).

²³ *Rome Statute*, *supra* note 17, preamble.

²⁴ *Id.*

²⁵ *Prosecutor v. Katanga*, *supra* note 2, at 37.

²⁶ *Id.* [emphasis added]; *Accord* ARCHBOLD, *supra* note 4, §18-41; GIDEON BOAS ET AL, INTERNATIONAL CRIMINAL PROCEDURE 393 (2011).

society's disapproval".²⁷ Common law lawyers prefer the term denouncement, used throughout this article.

How truth and justice fit into the purposes of sentencing is unclear. The word "also" indicates that they are additional or subsidiary goals of sentencing. In the next sentence, "thus" indicates that the two "major functions" of sentencing—punishment and deterrence—are somehow logical consequences of truth and justice. A third reading suggests that truth and justice are derivatives of the trial and judgment phases. Hence, truth and justice provide the raw ingredients necessary—i.e. the facts—for fashioning an appropriate sentence. This is the most likely reading. The confusion arises because "truth" and "justice" are loosely inserted into the middle of a discussion on sentencing philosophy without much precision or explanation. What is clear, however, is that the concepts of truth and justice lie outside of the two "major functions" of sentencing as indicated by the word "also."

The *Katanga* Trial Chamber then discussed what its understandings of punishment and deterrence are with more precision. Punishment (what others might call denouncement) is the expression of societal condemnation and recognition of the harm suffered by victims.²⁸ Thus, the concept of gravity couples with the purpose of denouncement. In discussing deterrence, the Chamber noted that the punitive nature of the sentence serves to quench the thirst for vengeance.²⁹ The Chamber tempered the deterrent objective by emphasizing that the inevitability of punishment is important for this objective, not the harshness.³⁰

After noting the principle of proportionality, the Chamber adds on the sentencing goals of promoting reconciliation and the offender's reintegration into society (rehabilitation).³¹ However, the Chamber minimized the applicability of rehabilitation in ICL because it questioned whether a sentence alone could ensure a successful return to society.³² The Chamber did end up considering the rehabilitation objective: it noted the fact that Katanga had a young family and many dependents. The Chamber noted that this would help him reintegrate into society.³³ However, it gave very little weight to this factor, given the gravity of Katanga's crimes.³⁴

²⁷ *Prosecutor v. Katanga*, *supra* note 2, at 37.

²⁸ *Prosecutor v. Katanga*, *supra* note 2, ¶ 38.

²⁹ *Id.*

³⁰ *Id.* (full discussion on this will be found at pages 15–17, below).

³¹ *Id.*

³² *Id.*

³³ *Prosecutor v. Katanga*, *supra* note 2, ¶ 88.

³⁴ *Id.*

In summary, the ICC jurisprudence so far has espoused the major sentencing goals of denouncement and deterrence. Other subsidiary goals include reconciliation and to a lesser extent, rehabilitation. It is unclear what role truth and justice play in sentencing goals.

III. THEORIES OF PUNISHMENT

Punishment theories fall into two broad categories. The first is retributive, which seeks to represent communal disapproval for the criminal behavior. The second is utilitarian, which seeks to maximize utility to society through the imposition of sentences. Retributionists tend to favour *ex ante* determinations of gravity. They prefer strict sentencing guidelines, statutory minimum and maximum sentences. The emphasis is that punishment ought to mirror the crime rather than the individual accused.³⁵ For them, consistency in sentencing is paramount. Utilitarians seek greater flexibility, tailoring sentences to pursue the greater good of society in various ways.³⁶

Retribution expresses communal contempt for the criminal's breach of society's norms.³⁷ It is said that great crimes cry out for great punishment; if this demand is not satisfied, victims may resort to vigilantism.³⁸ However, retribution is not to be confused with vengeance.³⁹ As the ICTY Appeal Chamber held in *Aleksovski*, retribution "is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes ... show[ing] that the international community [is] not ready to tolerate serious violations of international humanitarian law and human rights."⁴⁰

The ICC implicitly follows the utilitarian model. First, judges have broad discretion in sentencing ranges. The court can fashion an appropriate sentence in the range of one to 30 years or, if meeting a higher gravity threshold, more than 30 years, which is highly tailored to both the crime and the offender's circumstances.⁴¹ In addition, it can impose fines and forfeiture.⁴² Some mitigating factors that the Court is obliged to consider

³⁵ DEGUZMAN, *supra* note 6, at 941–942.

³⁶ *Id.*

³⁷ RUBY, *supra* note 5, §1.5–1.6.

³⁸ SCHABAS, *supra* note 8, at 501.

³⁹ RUBY, *supra* note 5, §1.5–1.6; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at ¶ 80 (Can.).

⁴⁰ *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgment, ¶ 185 (Int'l Crim. Trib. For the former Yugoslavia Mar. 24, 2000) (footnotes omitted).

⁴¹ *Rome Statute*, *supra* note 17, art. 77(1); International Criminal Court, Assembly of States Parties, *Rules of Procedures and Evidence*, ICC-ASP/1/3 (Part.II-A), rule 145 (Sept. 9, 2002) [hereinafter *ICC Rules*].

⁴² *Rome Statute*, *supra* note 17, art. 77(2).

focus on the offender's attempts to make amends, through compensating victims and aiding the Court.⁴³ This tends to suggest that the ICC's sentencing philosophy focuses on proportionality and aims to produce socially beneficial consequences.

IV. SENTENCING OBJECTIVES DENOUNCEMENT

Denouncement is a sentencing objective closely associated with retributive justice. A sentence should sufficiently convey society's condemnation for the breach of social values.⁴⁴ Denouncing the crime through sentencing rebuilds the moral order by punishing the perpetrator for punishment's sake—to give the offender his or her just deserts.

Some judges caution against the use of retribution as a sentencing philosophy in ICL. For instance, Judge Mumba in her separate opinion in *Deronjić*, made an eloquent argument against overemphasis on retribution: “[i]nternational justice ... is not about unfair retribution; if that were the case, humanity should forget about reconciliation and its off-shoot, peace. It is my humble view that this Tribunal is not about vengeance, using the pen as the firearm, ... [this] would amount to accepting the erroneous view that you can conquer hatred with hatred.”⁴⁵

A common criticism of retribution is that the task is near impossible. At best, it involves taking the temperature of community standards. ICL amplifies the difficulty of this task. How can a three-judge panel sufficiently represent the communities of the currently 124 countries party to the *Rome Statute*? It certainly cannot represent those states' infinite communities and cultural subdivisions.⁴⁶ The response is that the ICC does not purport to represent any one state.⁴⁷ Rather, it represents the international *community* as a whole. Thus, the ICC channels baseline moral norms inherent in every human society.

⁴³ *ICC Rules*, *supra* note 41, rule 145(2)(a)(ii).

⁴⁴ *See e.g., R v. M. (C.A.)*, *supra* note 39, at ¶ 81.

⁴⁵ *Prosecutor v. Deronjić*, Case No. IT-02-61-S, Separate Opinion of Judge Mumba Dissenting, ¶ 3 (Int'l Crim. Trib. For the former Yugoslavia Mar. 30, 2004).

⁴⁶ *See* DEGUZMAN, *supra* note 6, at 950–53.

⁴⁷ *Id.* at 3; *see* Triffterer, *supra* note 16, at 732–34 (considering the sentencing practices of the locality of the crime or the nation state of the offender were rejected at the *Rome Statute's* drafting conference).

DETERRENCE

The word deterrence comes from the Latin phrase, *de terrere*—meaning ‘to frighten from’ or to ‘frighten away.’⁴⁸ Deterrence is based on the theory that one will make the choice not to commit a crime for fear of punishment. The notion that criminal sentences have a deterrent effect is debatable, speculative and difficult to empirically measure. Nonetheless, it is a generally accepted goal of sentencing.⁴⁹ ICL compounds the problem of measuring the deterrent effect because the target audience spans across cultures and continents. Furthermore, atrocity crimes often occur during temporary and *sui generis* circumstances of acute social strife or armed conflict.⁵⁰

A CULTURE OF INVERSE MORALITY

In order to assess whether the deterrence objective is applicable to ICL, the nature of the crimes must be considered. The line between criminal and legal behavior may seem rather obvious and intuitive, at first. This holds true for most serious crimes against the person: murder, rape, torture and the like. However, some argue that the context of armed conflict bring fresh considerations to criminal behavior and the criminal psyche.

Atrocity crimes are often committed against victims who are systematically de-humanized through the imposition of abjectly squalor living conditions and vilification in propaganda.⁵¹ Prejudices and hatreds are inflamed. Perpetrators are indoctrinated with a belief that their group is superior, the great protectors, and the real victims, while their victims are treated as a threat.⁵² This converges with the knowledge that atrocity crimes largely go unpunished to produce a criminal psyche of what one scholar termed “inverse morality”.⁵³ At the time of the first criminal act, an individual may be aware that his or her behavior is unlawful. However, in a culture of impunity that person becomes desensitised to this concern.⁵⁴ Under this ethos, terrorizing civilians becomes normalized, encouraged by superiors, and an accepted part of warfare. Professor Dana writes,

⁴⁸ Smidt, *supra* note 9, at 166–7 (citations omitted).

⁴⁹ RUBY, *supra* note 5, at §1.21–1.22, 1.27, 1.31.

⁵⁰ Mark Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 N.W. U.L. REV. 510, 539 (2005).

⁵¹ See, DANIEL JONAH GOLDHAGEN, *WORSE THAN WAR: GENOCIDE, ELIMINATIONISM, AND THE ONGOING ASSAULT ON HUMANITY* 194–231, 309–30 (2009).

⁵² *Id.*

⁵³ Dana, *supra* note 10, at 60 [internal citations and quotations omitted].

⁵⁴ Dana, *supra* note 10, at 62; GOLDHAGEN, *supra* note 51.

[a]n individual's inner sense of morality and repulsion towards such brutality is overridden by peer pressure from immediate comrades and superiors, and reinforced by inflammatory rhetoric of national leaders. The perversity can reach a point where, far from being considered wrongful, violence against "the other" is considered a righteous deed.⁵⁵

SUPPORT FOR THE DETERRENCE EFFECT

LAW AND ECONOMICS ARGUMENT

From a law and economics perspective, tough sentences may increase the costs of criminal activity enough to make it prohibitive.⁵⁶ Atrocity crimes are often orchestrated by political and military elites who seek to inflame ethnic hatred to acquire or preserve power. For them, these acts are just part of a rational (although morally devoid) cost-benefit analysis. Atrocities are a viable way of achieving their ends. The law and economics theory rests on the premise that even extreme willful violations of the legal and moral order do not preclude the ability of the perpetrator to make a self-serving decision.⁵⁷

The economic perspective provides a unique role for ICL sentencing: keeping a culture of inverse morality from taking root. Long sentences advance the project of having actors internalize norms, values and interests protected by international law.⁵⁸ The hope is that leaders will pay attention to ICL sentences and this knowledge will trickle down to the foot soldier. Criminologists and criminal law scholars generally embrace this function.⁵⁹ Thus, deterrence may prevent atrocities by tipping the scales of the cost-benefit analysis undertaken by high-level organizers. A lack of support or

⁵⁵ *Id.* at 60 [internal citations and quotes omitted].

⁵⁶ Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 12 (2001).

⁵⁷ Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 43 (1996); Jan Klabbbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FINNISH Y.B. INT'L L. 249 (2001).

⁵⁸ Dana, *supra* note 10, at 59.

⁵⁹ Akhavan, *supra* note 56, at 7; Mirjan R. Damaska, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 334–35, 339, 345 (2008); J.C. Nemitz, *The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence*, 4 Y.B. INT'L HUMANITARIAN L. 87 (2001).

even active discouragement from the top prevents a culture of inverse morality from taking root within the ranks of armed forces.⁶⁰

EVIDENCE OF THE DETERRENT EFFECT

It must be conceded that no crazed ultranationalist will be deterred by a sentence in The Hague, nor the warlord who has a more legitimate and immediate fear of being killed by the enemy. However, there is evidence that at least Western military commanders pay close attention to ICL judgments. Military commanders are now leaning closer than ever on their legal advisors when selecting bombing targets and war tactics.⁶¹ To the begrudging admission of some generals, military lawyers have now become *de facto* tactical commanders—often analyzing and approving each bombing mission for conformity with international law.⁶²

Not only are commanders paying attention, but ICL is actually changing how powerful nations wage war. In declining to open an investigation in Iraq against the UK in 2006, the ICC's Chief Prosecutor noted that the UK (who is under the ICC's jurisdiction) dropped 85% precision-guided munitions.⁶³ On the other hand, the rest of the US-led coalition only used on average 66% precision-guided munitions.⁶⁴

This finding is significant for two reasons. First, the same laws of war bind both the UK and its allies, yet they behave differently. These laws derive from a collection of international treaties and customary international law that the *Rome Statute* largely adopts. The difference is that the ICC serves as a tangible enforcement mechanism for signatory states.

Second, the cost-benefit analysis is indeed changing. Guided munitions are considerably more expensive than unguided ones, yet produce far less

⁶⁰ Dana, *supra* note 10, at 80.

⁶¹ Harmon & Gaynor, *supra* note 7, at 695–6; see GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 270–80 (2010); see e.g., MICHAEL R. GORDON & GEN. BERNARD E. TRAINOR, *CORBA* II 89, 110 (2006) (discussing the elaborate U.S. targeting decision process in the Iraq wars).

⁶² J.E. Baker, *When Lawyers Advise Presidents in Wartime: Kosovo and the Law of Armed Conflict*, 55 *NAVAL WAR C. Rev.* 11 (2002); W.K. CLARK, *WAGING MODERN WAR: BOSNIA, KOSOVO, AND THE FUTURE OF COMBAT* 208 (2001).

⁶³ LETTER FROM LUIS MORENO OCAMPO, ICC PROSECUTOR, "LETTER TO SENDERS CONCERNING IRAQ", at 7 (Feb. 9, 2006), [www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-](http://www.icc-cpi.int/NR/rdonlyres/FD042F2E-678E-4EC6-8121-690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf)

690BE61D0B5A/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

⁶⁴ *Id.*

collateral damage.⁶⁵ Expected collateral damage is relevant to the core ICL analysis of whether a war crime was committed, namely whether the expected military advantage of the attack was disproportionate in relation to its expected damage to civilians and civilian objects.⁶⁶ Despite the considerably higher cost, the UK opted to use weapons that cause less damage to civilians. This shows that the economic calculus has begun to change in the context of war crimes.

Finally, there are encouraging examples of even low-tech, non-Western militaries modifying their behavior under the shadow of ICC prosecutions. The ICC's prosecution of the recruitment and use of child soldiers in the Congo has been linked to the successful demobilization of over 3,000 child soldiers in Nepal and more in Sri Lanka.⁶⁷ Furthermore, charges brought against Kenyan leadership preceded a notable decrease in perennial post-election violence in that country.⁶⁸

THE UNEVEN DETERRENT EFFECT PROBLEM

Some have argued that the deterrent effect of ICL is uneven and therefore creates an unfair burden on more sophisticated and wealthy professional armies as opposed to low-tech or irregular forces.⁶⁹ While ICL may incentivise advanced Western militaries to modify their behavior in order to limit criminal liability, the same cannot be said for their enemies. This argument contends that ICL does not fetter the conduct of many modern irregular armed groups—for example, the Taliban, Boko Haram, and the Islamic State of Iraq and the Levant.

There are several responses to this line of thinking. First, no legal system is so hubristic as to believe it can achieve universal adherence or burden all members of the community equally. The hope is for a trickle-down effect. If commanders who face the most liability for atrocity crimes modify their behavior, the behavior of the foot soldier should follow. Just because there will inevitably be some breaches of the law or it becomes

⁶⁵ Geoffrey S. Corn & Lieutenant Colonel Gary P. Corn, *The Law of Operational Targeting: Viewing the LOAC Through an Operational Lens*, 47:2 TEX. INT'L L.J. 337, 369–372 (2012).

⁶⁶ SOLIS, *supra* note 61, at 273–80; *Rome Statute*, *supra* note 17, art. 8(2)(b)(iv) (“[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would clearly be excessive in relation to the concrete and direct overall military advantage anticipated”).

⁶⁷ FATOU BENSOUDA, CHIEF PROSECUTOR, ICC, ADDRESS AT THE LAUNCH CONFERENCE FOR THE INST. FOR THE 21ST CENTURY QUESTIONS “21CQ”, Univ. of Toronto, “ACCOUNTABILITY AND WHY AFRICA WILL RISE THIS CENTURY” (Nov. 14, 2014).

⁶⁸ *Id.*

⁶⁹ *See* Smidt, *supra* note 9.

more costly for some members of society to bear than others does not mean the entire project should be abandoned.

Second, the international community in ratifying human rights standards and the laws of war *chose* to subscribe to a higher standard. The alternative leads to the dangerous thinking that if an opponent breaks the rules, it gives the opposing force license to do the same. This leads to a race to the bottom where nearly anything can be justified. This thinking jettisons the bedrock principle of the laws of war: breaches of international law by one side cannot justify another's breach.⁷⁰

Third, claims that the world is in a new war paradigm are overblown and ignore centuries of warfare history. Many modern commanders overromanticise the "good old days": when armies chivalrously lined up in open fields and waged pitched battles far away from civilians. This is a false conception of history. For example, Christian Crusaders massacred civilians with zeal in mediaeval times,⁷¹ French-Canadian forces committed barbarous atrocities against English settlements in the mid-18th century⁷² and the allies bombed German and Japanese cities into oblivion with the intent of killing civilians, destroying the necessary infrastructure to sustain life and spreading terror among civilians in WWII.⁷³ All this is to say that excesses are nothing new in warfare, and not confined to one category of combatant. The codification of ICL in the 20th and 21st centuries promised to keep this kind of behavior in check.

Fourth, as mentioned earlier, there are encouraging examples of less sophisticated militaries modifying their behavior, and the anti-impunity message taking root in civil society.

CONCLUSIONS ON SUPPORT FOR THE DETERRENCE EFFECT

Just because deterrence is difficult to measure does not mean it does not exist. Given the predominant lack of international will to intervene to prevent atrocities—for example, Srebrenica, Rwanda, Darfur and Syria—

⁷⁰ Francois Bugnion, *Just Wars, Wars of Aggression and International Humanitarian Law*, INT'L REV. Red Cross no. 847, 3–18 (2002); PHILIP ALSTON, *SOVEREIGNTY ISSUES AND STATES' INVOCATION OF THE RIGHT OF SELF-DEFENCE*, IN U.N. SPECIAL RAPporteur ON EXTRAJUDICIAL, SUMMARY, OR ARBITRARY EXECUTIONS, *STUDY ON TARGETED KILLINGS*, ¶ 37–45, U.N. Doc. A/HRC/14/24/Add.6 (2010).

⁷¹ JOHN FRANDE, *VICTORY IN THE EAST: A MILITARY HISTORY OF THE FIRST CRUSADE*, 92, 314 (1994).

⁷² IAN K. STEELE, *BETRAYALS: FORT WILLIAM HENRY & THE 'MASSACRE'* 144 (1990).

⁷³ GOLDHAGEN, *supra* note 51, at 201–3.

ICL remains one of the only tools with the potential to limit impunity.⁷⁴ As one New York Times editorialist put it, “short of the international military interventions that never seem to come in time, the incremental enforcement of international law is one of the most important tools available for establishing accountability and deterring future genocides”.⁷⁵ From a law and economics perspective, even if the deterrent effect is at best negligible, the costs of atrocity crimes are so grave, that the deterrence objective cannot be abandoned entirely.⁷⁶ In fact, general deterrence should play an even greater role than at the national level. This is especially true where armed groups lie in wait with the potential of resuming further criminal acts—for example, in East Timor, the Congo, Columbia and many other conflicts.⁷⁷

CRITIQUE OF THE DETERRENCE EFFECT NORMATIVE ARGUMENTS

Deterrence theory is not without its critics. The theory rests on two fundamental, yet debatable assumptions. First, the wide dissemination of information about particular sentences is possible.⁷⁸ Second, the targeted audience actually listens. The response to the first assumption is that, unlike domestic trial decisions, ICL judgments make international headlines. They are readily available online in multiple languages. Furthermore, discussion on each decision is extensive within military, political and academic circles.⁷⁹

Some argue that it is precisely because mass violations of human rights are orchestrated for political purposes, they are beyond deterrence.⁸⁰ The potential political gains are so tempting and the consequences of failure are so catastrophic, that no potential jail time could deter an individual. Another attack on the deterrent effect is that it targets those already not in need of social control. For most individuals, the influences of upbringing and life experiences are enough to prevent serious crime.⁸¹ This argument is persuasive on the national level, but with ICL, it is not.

⁷⁴ Harmon & Gaynor, *supra* note 7, at 694; Smidt, *supra* note 9 (arguing ICL is an important component of system-wide deterrence for atrocity crimes, but is insufficient on its own without the credible threat of military force).

⁷⁵ *Taking Genocide to Court*, N.Y. TIMES, Mar. 5, 2007.

⁷⁶ Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide*, 99:4 AM. J. INT’L L. 747, 758 (2005).

⁷⁷ ARCHBOLD, *supra* note 4, at §18–42.

⁷⁸ RUBY, *supra* note 5, at §1.25.

⁷⁹ *See* notes 62–65.

⁸⁰ Klabbers, *supra* note 57.

⁸¹ RUBY, *supra* note 5, at §1.25.

ICL tribunals and the ICC in particular, do not generally indict lower ranking soldiers. Rather, they target top military and political leaders most responsible for orchestrating atrocity crimes. These individuals do not match the typical profile of a national-level violent criminal. Their crimes are not crimes of passion but of cool calculation. They are often highly educated and intelligent individuals in formal positions of power.⁸² Despite this, they still commit crimes. These kinds of people are used to weighing risks and benefits. Education and good upbringing are clearly not sufficient factors to deter this species of criminal behavior. Therefore, ICL is speaking to the right audience.

Even those questioning the deterrent effect at the national level concede that it may be appropriate in certain circumstances. For instance, when the crime is premeditated, large-scale, committed against the public and its consequences are highly publicised, others may well be deterred by lengthy jail sentences.⁸³ Breaches of international criminal law typically meet all of these preconditions.⁸⁴

Other opponents of deterrence claim that the presence of ICL actually exacerbates atrocities.⁸⁵ The theory is that combatants who face indictments for one instance of criminal behavior will lose all incentive to follow the rules. Their calculus hardens to win at all costs, therefore acting like a catalyst for atrocity crimes. An analogous phenomenon occurs in the United States. So-called three-strike laws incentivise violent crimes against witnesses and police officers. This happens as individuals become desperate to evade capture and a third conviction that carries an automatic life sentence.⁸⁶

EXAMPLES OF FAILED DETERRENCE

The historical record is rife with instances of ICL seemingly having no practical deterrent effect on perpetrators.⁸⁷ Nuremburg and Tokyo did not deter Stalin's oppressions in the USSR, Mao's Cultural Revolution in

⁸² See text accompanying notes 121–124 (for example, Libya's Saif al-Islam Gaddafi, accused of war crimes, holds a PhD from the London School of Economics and The Democratic Republic of the Congo's Thomas Lubanga, convicted of war crimes, holds a degree in psychology).

⁸³ *R. v. Drabinsky*, 2011 ONCA 582, 107 O.R. (3d) 595 (Can. Ont. C.A.) at ¶ 159–160.

⁸⁴ Compare *R. v. Karigar*, 2014 ONSC 3093 at ¶ 21, 25, 30, [2014] O.J. no. 2490 (Can. Ont. S.C.) (discussing a need to emphasize denunciation and deterrence for large-scale premeditated white collar crime); *id.*

⁸⁵ DEGUZMAN, *supra* note 6, at 959, note 160; Smidt, *supra* note 9, at 186.

⁸⁶ Jeffrey L. Johnson & Michael A. Saint-Germain, *Officer Down: Implications of Three Strikes for Public Safety*, 16:4 CRIMINAL JUST. POL'Y REV. 443 (2005).

⁸⁷ BOAS, *supra* note 26, at 393, note 91; see Harmon & Gaynor, *supra* note 7.

China, Pol Pot's genocide in Cambodia, Idi Amin's atrocities in Uganda, or Hussein's massacres of the Kurds and Shiites in Iraq. The relative peace experienced in Rwanda after the 1994 genocide may be more attributable to the policies of the presiding government than fear of future ICL prosecutions. Despite its 1993 establishment in the midst of an ongoing conflict, several ICTY prosecutions and sentences failed to dissuade perpetrators of the Srebrenica genocide in Bosnia, war crimes in the Krajina region or the grave human rights abuses in Kosovo.⁸⁸ Nor have the ICC indictments and convictions of several Congolese warlords ended the violence and human rights abuses in the region.

INAPPLICABILITY OF DETERRENCE

Some argue that two types of perpetrators are beyond deterrence. First, is a category of psychologically unstable perpetrators for whom reason cannot reach: psychopaths. Hitler, Gaddafi and many others may fit this profile. No body of law or morality can deter crazed megalomaniacs believing that they are invincible.⁸⁹ Another breed of the psychologically unstable is a religious or ideological extremist. This kind of combatant has no historical connection to the rules of war. They conduct asymmetrical warfare using brutal tactics that know no bounds or recognizable morality. Deterrence may also be useless against such extremists.⁹⁰

The second category is perpetrators who believe they are in a "total war" struggling against annihilation. Thus, the line between civilian and combatant is blurred. Former Yugoslavia combatants reportedly "felt they were in a life and death struggle and the limits on warfare had to be suspended."⁹¹ Legal systems struggle to respond to the human instinct of self-preservation. Some examples are the strict doctrines of self-defence, duress, and necessity.⁹²

SPECIFIC DETERRENCE AND INCAPACITATION

Most of the discussion in this article so far has centred on general deterrence—detering others from committing crime. Many commentators and ICL judges agree that specific deterrence—detering the actual offender

⁸⁸ Smidt, *supra* note 9, at 187; Mary Margaret Penrose, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 325 (2000).

⁸⁹ See STANTON E. SAMENOW, *INSIDE THE CRIMINAL MIND* (rev. ed. 2004); ROBERT D. HARE, *WITHOUT CONSCIENCE: THE DISTURBING WORLD OF THE PSYCHOPATHS AMONG US* (1999).

⁹⁰ Smidt, *supra* note 9, at 222–234.

⁹¹ *Id.* at 188.

⁹² *Rome Statute*, *supra* note 17, art. 31(1)(c)–(d).

from perpetrating again—is usually not applicable to ICL.⁹³ This is because often offenders lose their military and political power, which enabled the commission of the crimes. Furthermore, by the time of release, the *sui generis* conditions of civil strife or war have often subsided. This makes it unlikely that offenders will even be capable of committing further breaches of ICL. Only in rare cases, a conflict persists even after the sentence is served, allowing criminal behavior to resume.

SHOULD SEVERITY OR INEVITABILITY DRIVE DETERRENCE?

In *Katanga*, the Trial Chamber adopted the concept that for deterrence, it is the inevitability of the sentence that matters, not its severity.⁹⁴ An early ICTY Trial Chamber decision borrowed this principle from the 18th century Italian jurist and criminologist Cesare Beccaria.⁹⁵ In denouncing the death penalty and torture as forms of punishment, Beccaria wrote, “punishment should not be harsh, but must be inevitable.”⁹⁶ That Trial Chamber made the dubious assertion that this theory is particularly true in ICL because “penalties are made more onerous” by internationalization of the crime, the moral authority the Court holds and its judgments’ impact upon world public opinion.⁹⁷ There are several problems with this reasoning.

To start, it is debatable whether those orchestrating atrocity crimes have any particular concern for the ICC’s moral authority or regard for global public opinion.

Next, the Court took Beccaria’s comments out of context. He wrote during an age when hard labor, corporal and capital punishment were commonplace. The harshness he decried was punishment that entailed calculated physical suffering. He was not speaking of the length of custodial sentences served in prisons meeting 21st century international standards.

Finally, the strength of Beccaria’s proposition rests on a high probability of facing consequences for criminal acts. The truth is, the likelihood of receiving punishment for breaches of ICL is actually quite low. First, perpetrators benefit from the ICC’s spotty jurisdiction. Nationals of non-

⁹³ DEGUZMAN, *supra* note 6, at 960.

⁹⁴ *Prosecutor v. Katanga*, *supra* note 2, at 3.

⁹⁵ *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgment, ¶ 290 (Int’l Crim. Trib. For the former Yugoslavia Dec. 10, 1998).

⁹⁶ *Id.*; Compare RUBY, *supra* note 5, at §1.32 (echoing the same argument in Canadian law).

⁹⁷ *Id.*

signatory countries can often avoid ICC prosecution if crimes were committed in a non-signatory state or if they flee to one.⁹⁸

Second, prosecutorial policy makes the threshold for an ICC indictment quite high. The ICC seeks to indict the narrow band of those “most responsible” for crimes—namely, top leadership.⁹⁹ It steps in only when domestic systems are unwilling or unable to bring those most responsible to justice. In addition, investigations only proceed for crimes of sufficient gravity.¹⁰⁰ For instance, the ICC Prosecutor recently declined to proceed with a further investigation into Israel’s attack of a humanitarian flotilla that left ten dead and more than 50 wounded citing the case was not of sufficient gravity.¹⁰¹ This was despite acknowledging that Israel likely committed war crimes.¹⁰²

Third, the Court faces considerable institutional constraints that hinder prosecutions. The ICC is dependent on state cooperation and lacks a robust enforcement mechanism. Unless there is a regime change, it can prove difficult to hold a current leadership to account. ICC indictments against Sudanese and Kenyan leadership have led to entrenchment and a lack of cooperation with the Court.¹⁰³ For instance, in December 2014, the Prosecutor was forced to drop her office’s case against Kenyan President Uhuru Kenyatta due to a lack of cooperation and loss of witnesses.¹⁰⁴ Those indicted often hold such powerful positions that they can easily interfere in the judicial process.¹⁰⁵ Even with a regime change, ending impunity is no simple feat. Saif Gaddafi’s captors have still not surrendered him to the ICC to face charges.¹⁰⁶

Fourth, the accused benefits from the full suite of fair trial rights. Accused persons receive full procedural protections and fair opportunity to meet the case against them. Indeed, an indictment in the ICC is not synonymous with conviction. Several accused have successfully challenged

⁹⁸ *Rome Statute*, *supra* note 17, art. 17 (on admissibility).

⁹⁹ *Id.*, preamble, art. 53(2)(c).

¹⁰⁰ *Id.*, art. 53(1)(c) (gravity must be taken into account before opening an investigation).

¹⁰¹ SARAH LAZARE, *OUTRAGE AS THE INTERNATIONAL CRIMINAL COURT (ICC) DROPS CASE AGAINST ISRAEL FOR DEADLY ATTACK ON HUMANITARIAN FLOTILLA*, Global Research (Nov. 7, 2014).

¹⁰² *Id.*

¹⁰³ *International justice: You and what army?*, THE BOSTON GLOBE (Oct. 15, 2014).

¹⁰⁴ Olivia Ward, *International Criminal Court drops charges against Kenyan president*, THE TORONTO STAR (Dec. 5, 2014).

¹⁰⁵ Stella Dawson, *Kenyatta trial must probe witness tampering says activist*, REUTERS (Oct. 1, 2014).

¹⁰⁶ Associated Press, *International Criminal Court calls on Libya to hand over Gaddafi’s son*, SOUTH CHINA MORNING POST (Nov 12, 2014).

charges. All of this is to say, that punishment for atrocity crimes is far from certain.¹⁰⁷

The Chamber in *Katanga* was wrong to transplant Beccaria's reasoning into the unique field of ICL. It would have made more sense in a world where judicial punishment for breaches of ICL is far more likely. In addition to channeling Beccaria, the Chamber in *Katanga* held that the aim of deterrence was to "ensure that the sentence *truly* serves as a deterrent."¹⁰⁸ Given the current state of ICL, sentences should err on the side of severe if they are to serve as a true deterrent.

THE PROBLEM OF PROPORTIONALITY ICL: LIGHT SENTENCES

Some ICL judges justify punishment in terms of a breach of the social contract, some in terms of the damage done to the individual victim. All tend to apply more punishment as the gravity of the crime and moral culpability increases.¹⁰⁹ Denouncement and deterrence necessarily imply proportionality—it would be useless if the punishment for premeditated murderer were a single days' incarceration. The length and quality of the sentence must map onto the gravity of the offense and moral culpability of the offender.¹¹⁰ This raises a difficult concern with proportionality in ICL.

Atrocity crimes are often committed on such a massive scale and with such savagery that they are hard to comprehend. ICL courts have had to admit, absent capital punishment, it is impossible to make the punishment proportional to the severity of the crime.¹¹¹ Quite simply, no sentence will alleviate the suffering of whole communities or bring victims back to life.

For example, Krstić participated in the Srebrenica massacre of Muslim men and boys. If he serves the typical two-thirds of his 35-year sentence, using a conservative estimate of 7,000 victims, he will spend 1.205 days in prison for the life of each.¹¹² The ICC sentenced Lubanga to 14 years imprisonment for assisting in the enlistment and use of hundreds of children in armed conflict.¹¹³ The Chamber noted the egregious treatment of

¹⁰⁷ Dana, *supra* note 10, at 70.

¹⁰⁸ *Prosecutor v. Katanga*, *supra* note 2, at 3 [emphasis added].

¹⁰⁹ DEGUZMAN, *supra* note 6, at 936.

¹¹⁰ Ohlin, *supra* note 76; *Rome Statute*, *supra* note 17, art. 76–8; International Criminal Court, Assembly of States Parties, *ICC Rules*, *supra* note 41, rule 145.

¹¹¹ *Prosecutor v. Babic*, IT-03-72-S, Sentencing Judgment, ¶ 44 (Int'l Crim. Trib. For the former Yugoslavia Mar. 24, 2000); Robert D. Sloane, *The Expressive Capacity of International Punishment: the Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 82 (2007).

¹¹² Harmon & Gaynor, *supra* note 7, at 692 (releasing after two-thirds time served was customary at the ICTY).

¹¹³ *Prosecutor v. Lubanga*, *supra* note 22, at ¶ 98.

vulnerable children while within the forces and the severe and debilitating psychological scars their use left on the victims, families and communities.¹¹⁴ Katanga received a 12-year sentence for being an accessory to an attack on a village that left it pillaged, burden and killed nearly 200.¹¹⁵ Civilians were systematically “hunted down” and slaughtered.¹¹⁶ Attackers targeted a specific ethnic group, “literally carving victims up limb from limb before killing them”, despite desperate pleas for mercy.¹¹⁷

First, “a day or two in prison for the murder of a human being is inconsistent with any serious notion of human dignity.”¹¹⁸ Insignificant punishments are a slap in the face of victims. These sentences are grossly and disproportionately lenient considering that in many countries, individuals receive life sentences for a single murder.¹¹⁹

The measure of gravity will change depending on what sentencing goal animates the analysis.¹²⁰ Often the concern with disproportionate sentences is that the punishment is more severe than the crime warrants. In ICL, the inverse seems to be true. A partial cause of inadequate sentences comes from undue weight placed on inapplicable and inappropriate sentencing objectives, like local justice efforts and rehabilitation of the offender.

REHABILITATION

There is serious doubt as to the proposition that the ICC ought to be in the business of rehabilitating offenders. ICL has not traditionally placed much weight on rehabilitation as a sentencing objective.¹²¹ ICL criminals do not often commit their acts because of inherent character flaws that are curable. The stronger influence seems to be perceived impunity and extreme circumstances—namely, armed conflict or civil strife.

Those indicted by the ICC are not typical criminals. The dominant contemporary view of psychiatrists and criminologists is that perpetrators of atrocity crimes are normal people—not displaying any abnormal or deviant

¹¹⁴ *Id.* at ¶ 37–44.

¹¹⁵ *Prosecutor v. Katanga*, *supra* note 2, at 7–8, 12, 20.

¹¹⁶ *Id.* at 6.

¹¹⁷ *Id.* at 7–8, 12.

¹¹⁸ Harmon & Gaynor, *supra* note 7, at 692.

¹¹⁹ Pickard, *supra* note 8.

¹²⁰ DEGUZMAN, *supra* note 6, at 941–942.

¹²¹ ARCHBOLD, *supra* note 4, at §18–43; Dana, *supra* note 10, at 53; *Prosecutor v. Katanga*, *supra* note 2, at 3; *Prosecutor v. Delalić*, IT-96-21-T, Appeals Judgment, ¶ 805–6 (Int’l Crim. Trib. For the former Yugoslavia Feb. 20, 2001) (the Chamber mentioned rehabilitation but failed to give it any weight).

psychological predispositions or mental illness.¹²² A Swedish report into conditions of confinement at the United Nations Detention Unit in The Hague observes that most political and military leaders housed there exhibited traits that would be abnormal in a typical violent criminal population.¹²³ They are well educated and well adjusted, have a higher average age, display relatively high social skills, have strong internal discipline (a lack of impulsiveness), and are typically non-violent individuals for whom there is no need for solitary confinement or physical restraint.¹²⁴

INCAPACITATION

Arguably incapacitation takes on unique importance in ICL. Most of those charged in ICL occupy important leadership roles in military or political organizations. These leaders have proven to be apt at leveraging their leadership capital to either exploit ethnic animosities or conduct war without regard to civilians. Their removal from society may arguably contribute to peace and security in post-conflict societies.

TEACHING

The teaching objective of sentencing strives to have an educative effect on combatants and civilians alike about what kind of force is legal and which is illegal—even during times where it must seem like the locality is entirely devoid of law.¹²⁵ Teaching differs from deterrence because it seeks to normalize behavior not through fear of consequences but through education.¹²⁶ Proponents say that if something is criminalized, it becomes more immoral and this helps to build empathy.¹²⁷ This teaching effect operates on peoples who may not be fully aware of the protections afforded by international human rights and international humanitarian law.

¹²² See GEORGE M. KREN & LEON RAPPOPORT, *THE HOLOCAUST AND THE CRISIS OF HUMAN BEHAVIOR*, 70 (1980); ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST*, 19 (1989); DONALD G. DUTTON, *THE PSYCHOLOGY OF GENOCIDE, MASSACRES AND EXTREME VIOLENCE*, 135 (2007); Olaoluwa Olusanya, *Excuse and Mitigation Under International Criminal Law: Redrawing Conceptual Boundaries*, 13:1 *NEW CRIMINAL L. REV.* 23, 24–9 (2010).

¹²³ *Independent Audit of the Detention Unit at the International Criminal Tribunal for the Former Yugoslavia*, Commissioned by the Government of Sweden (May 4, 2005), www.icty.org/x/file/Press/PR_attachments/DU-audit.pdf; Julian Mortenson, *Inside the United Nations Detention Unit*, *SLATE* (Jan. 10, 2006) (offers a personal account of the lack of tension among detainees); Harmon & Gaynor, *supra* note 7, at 692–93.

¹²⁴ *Id.*

¹²⁵ Dana, *supra* note 10, at 59–60.

¹²⁶ RUBY, *supra* note 5, at §1.8–1.9.

¹²⁷ Dana, *supra* note 10, at 59–60.

Teaching is indeed a derivative of the ICL process in general, but it should not be an independent consideration in determining sentences. Adequate regard for teaching happens throughout the trial with the presentation of evidence, witness impact statements and at the judgment stage where the court makes findings of fact. It seems counter intuitive that a sentencing decision's capability of educating the global public should have any bearing on the severity of a sentence.

RECONCILIATION AND THE PEACE PROCESS

Reconciliation has played a role in ICL because the *ad hoc* tribunals had mandates to further the peace process.¹²⁸ Ending impunity clears the way for dialogue that leads to lasting peace. In *Katanga*, the Court held that a “real and sincere” attempt to promote peace and reconciliation after the criminal act may be taken into account as a mitigating factor.¹²⁹

Unlike the *ad hoc* tribunals, the *Rome Statute* makes no explicit reference to local reconciliation in the ICC's purposes.¹³⁰ The Statute does however provide for a reduction in a sentence already two thirds served if the offender helps facilitate the Court's work or if “other factors establish[] a clear and significant change in circumstances”.¹³¹ However, this provision considers post-sentencing circumstances.

Making considerations for local reconciliation at the sentencing phase overreaches and allows political considerations to enter into the equation. Once the wheels of justice have started to turn, it must take its course—political considerations should be irrelevant at this stage. Indeed, Louise Arbour, former Chief Prosecutor for the ICTY, made the valiant choice to indict Serbian leader Slobodan Milošević despite him being a sitting head of state and having the potential to derail the peace process. Thus, ICL strove to occupy a domain free of political decision-making, clothing itself in the rule of law. If politics ought to be considered at all, it should be before the indictment is made. However, peace versus justice is still hotly debated.

Some argue that reconciliation itself should not be a mitigating factor. The limits of the justice system need to be recognized. “[R]econciliation is better understood as a slow rebuilding process, not an event,” writes

¹²⁸ ARCHBOLD, *supra* note 4, at §18–44.

¹²⁹ *Prosecutor v. Katanga*, *supra* note 2, at 16.

¹³⁰ *Rome Statute*, *supra* note 17, art. 53(1)(a) (local peace considerations could be read into the Prosecutor's obligation to consider “the interests of victims” before opening an investigation); *Compare* art. 76–78; *Rules of Procedure*, *supra* note 110, rule 145 (the sentencing phase demands no such considerations aside from a *post factum* assessments of damage).

¹³¹ *Rome Statute*, *supra* note 17, art. 110.

Professor Dana.¹³² Reconciliation inherently involves predicting future events. This is something courts are ill-equipped to do. Courts are most apt at making determinations of past fact. Whatever an accused has contributed to reconciliation and the peace process is not easy to measure with legal certainty.¹³³

For example, Bosnian leader Biljana Plavšić received a mitigated sentence following her crimes against humanity conviction for contributing to local reconciliation through a heart-felt public apology, making a remorseful admission and playing a substantial role in the peace process.¹³⁴

Two years later, Plavšić gave media interviews where she unravelled the foundation of her mitigated sentence. She said, “I sacrificed myself. I have done nothing wrong. I pleaded guilty to crimes against humanity so I could bargain for the other charges [of genocide]. If I hadn’t, the trial would have lasted three, three and-a-half years. Considering my age that wasn’t an option.”¹³⁵

She went on to indicate that her side did nothing wrong during the conflict and the victims deserved what they got.¹³⁶ This raises the paradox that those who are most responsible for atrocity crimes, by virtue of their positions, are also most capable of contributing to local reconciliation and thus angling for a mitigated sentence.¹³⁷

This example demonstrates that the emphasis of ICL sentencing should be on denouncement and global crime prevention rather than local justice objectives.¹³⁸ Reconciliation is a slow process built of many moving parts. Countless organizations work on the ground or at diplomatic levels to achieve it. Justice through ICL prosecution is an important part of it, but a modest one.

Louise Arbour told the United Nations Security Council at the ICTY’s formation, “[t]ruth is the cornerstone of the rule of law ... it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process.”¹³⁹ Thus, reconciliation is one ultimate purpose of ICL, in general. This is just as true as creating a safe and peaceful society is the ultimate

¹³² Dana, *supra* note 10, at 96.

¹³³ *Id.*

¹³⁴ *Prosecutor v. Plavšić*, IT-00-39&40/1-S, Sentencing Judgment, ¶ 71–81 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003).

¹³⁵ Biljana Plavšić quoted in JELENA SUBTONIĆ, THE CRUELTY OF FALSE REMORSE: BILJANA PLAVŠIĆ AT THE HAGUE, 36 *Se. Eur.* 39, 48–49 (2012).

¹³⁶ Dana, *supra* note 10, at 98–9.

¹³⁷ *Id.* at 100–3; SUBTONIĆ, *supra* note 135.

¹³⁸ DEGUZMAN, *supra* note 6, at 962.

¹³⁹ U.N. SCOR, 48th Sess. 3217th mtg. at 12, U.N. Doc. S/PV.3217 (May 25, 1993).

purpose of any criminal justice system.¹⁴⁰ However, its consideration clouds the more immediate aims of sentencing. Guilty verdicts and facts found by the Court set a ground floor, a common narrative, from which communities may begin dialogue. This is an inevitable consequence of the trial process, but is incompatible with the sentencing aims of denouncement and deterrence.

V. Prescription Going Forward

The German-born political theorist and Holocaust survivor Hanna Arendt concluded after observing the prosecution of a former Nazi SS Lieutenant Colonel for mass atrocities, “[t]he purpose of a trial is to render justice and nothing else; even the noblest of ulterior purposes ... only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.”¹⁴¹

Some call on ICL sentencing to achieve a plethora of aggrandized tasks. These expectations are unrealistic and often conflicting. Many sentencing rationales—e.g. rehabilitation, teaching, reconciliation—may apply at the national level but do not scale up to *sui generis* atrocity crimes. These romanticized ideals of what ICL sentencing can accomplish should be reined in. ICL should focus on what it is best positioned to do and historically has always done: denounce and deter. These humble objectives promise to help prevent old grievances from festering and turning into renewed cycles of violence.

Prussian general Carl von Clausewitz wrote in the early 19th century, “[t]o introduce the principles of moderation into the theory of war itself would always lead to a logical absurdity.”¹⁴² Likewise, to introduce mitigating sentencing objectives like reconciliation, teaching and rehabilitation into ICL leads to not only logical absurdity but also disproportionate sentences. ICL sentences cannot fix broken societies or rehabilitate those that do not need it. ICL sentencing and the punishment of individuals are inappropriate tools for social engineering in post-conflict societies: their roles are far more modest. Judicial humility should recognize that these goals are best left to other institutions and processes. Legalism, after all, has its limits.

¹⁴⁰ See e.g., *Criminal Code*, *supra* note 18, § 718 (in Canada, the purpose of sentencing is *inter alia*, “to contribute [...] to respect for the law and maintenance of a just, peaceful and safe society”).

¹⁴¹ HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 253 (1964).

¹⁴² KARL VON CLAUSEWITZ, *ON WAR*, 76 (ed. and trans. Michael Howard & Peter Paret 1976).