

## DEBATE

# Debate: The role of international criminal justice in fostering compliance with international humanitarian law

**Chris Jenks and Guido Acquaviva**

*Much has been written about the “deterrent” role of international courts and tribunals in preventing potential atrocities. Since the establishment of the ad hoc tribunals and the International Criminal Court, the international community has sought to anchor the legitimacy of international justice in the “fight against impunity”. Yet recent studies have suggested that an overly broad characterization of international courts and tribunals as “actors of deterrence” might misplace expectations and fail to adequately capture how deterrence works – namely, at different stages, within a net of institutions, and affecting different actors at different times.<sup>1</sup>*

*The Review invited two practitioners to share their perspectives on the concrete effects of international criminal justice on fostering compliance with international humanitarian law. Chris Jenks questions the “general deterrence” role of international criminal justice, contending that the influence of complicated and often prolonged judicial proceedings on the ultimate behaviour of military commanders and soldiers is limited. Guido Acquaviva agrees that “general deterrence”, if interpreted narrowly, is the wrong lens through which to be looking at international criminal justice. However, he disagrees that judicial decisions are not considered by military commanders, and argues that it is not the individual role of each court or tribunal that matters; rather, it is their overall contribution to an ever more comprehensive system of accountability that can ultimately foster better compliance with international humanitarian law.*

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# Moral touchstone, not general deterrence: The role of international criminal justice in fostering compliance with international humanitarian law

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This article contends that international criminal justice provides minimal general deterrence of future violations of international humanitarian law (IHL). Arguments that international courts and tribunals deter future violations – and that such deterrence is a primary objective – assume an internally inconsistent burden that the processes cannot bear, in essence setting international criminal justice up for failure. Moreover, the inherently limited number of proceedings, the length of time required, the dense opinions generated, the relatively light sentences<sup>2</sup> and the robust confinement conditions<sup>3</sup> all erode whatever limited

1 See e.g. Kate Cronin-Furman, “Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity”, *International Journal of Transitional Justice*, 2013, pp. 1–21; Michael Broache, “The International Criminal Court and Atrocities in DRC: A Case Study of the RCD-Goma (Nkunda Faction)/CNDP/M23 Rebel Group”, September 2014, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2434703](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2434703); Geoff Dancy, Bridget Marchesi, Florencia Montal and Kathryn Sikkink, “The ICC’s Deterrent Impact – What the Evidence Shows”, *Open Democracy*, 3 February 2015, available at: [www.opendemocracy.net/openglobalrights/geoff-dancy-bridget-marchesi-florencia-montal-kathryn-sikkink/icc%E2%80%99s-deterrent-impac](http://www.opendemocracy.net/openglobalrights/geoff-dancy-bridget-marchesi-florencia-montal-kathryn-sikkink/icc%E2%80%99s-deterrent-impac) (all internet references were accessed in June 2015).

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2 Relative at least compared to the United States. See Jens David Ohlin, “Towards a Unique Theory of International Criminal Sentencing”, in Göran Sluiter and Sergey Vasiliev (eds), *International Criminal Procedure: Towards a Coherent Body of Law*, Cameron May, UK, 2009, p. 373: “When compared against sentences handed down in the United States for regular crimes, the sentences of international criminal tribunals are typically far lower, even though the crimes at these tribunals are far greater in both moral depravity and legal significance.”

3 See Doreen Carvajal, “Accused of War Crimes, and Living with Perks”, *New York Times*, 3 June 2010, available at: [www.nytimes.com/2010/06/04/world/europe/04iht-hague.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/06/04/world/europe/04iht-hague.html?pagewanted=all&_r=0), describing pre-trial confinement conditions at the International Criminal Court (ICC).

general deterrence international criminal justice might otherwise provide. Bluntly stated, thousands of pages of multiple *Tadić* decisions have not factored into any service member's decision-making on whether to comply with IHL.

International criminal justice can play many roles,<sup>4</sup> including fostering compliance with IHL, but not through general deterrence and the threat of punishment. Adherence to IHL is an indirect byproduct of international criminal justice as a moral statement, an explication of how the international community views certain actions in armed conflict. This statement, often translated by military legal advisers and conveyed to service members by military leaders through personal example, briefings, training exercises, and military manuals and regulations, reinforces behavioural norms of how to conduct oneself in the most immoral of circumstances: armed conflict. International criminal justice's moral statement aids service members in navigating the moral abyss which results from a State lawfully ordering them to intentionally direct lethal force against fellow human beings.<sup>5</sup> The result is service members who, in the aftermath of armed conflict, can live with themselves and the decisions they made during armed conflict. In the process, and in part as an indirect result of international criminal justice, the arc of service members' behaviour tends towards complying with IHL.<sup>6</sup>

This article first clarifies what is meant by "general deterrence" before reviewing how the claim that international criminal justice provides such deterrence is relatively new and stems from misunderstandings of what the International Criminal Court (ICC) can achieve. From there, the article explains how general deterrence is a challenging proposition for any criminal justice system and amounts to an unbearable burden at the international level. I then describe the indirect role that international criminal justice plays in providing if not moral clarity, then at a minimum, less moral ambiguity in defining by exception the bounds of permissible conduct during armed conflict.

## General deterrence?

The focus of this article is on general deterrence, understood as the theory that criminally punishing an offender for violating the law dissuades others from similar violations. I recognize that some commentators, to varying degrees, reject general deterrence in the context of international criminal justice.<sup>7</sup> Others claim

4 These roles include, but are certainly not limited to, contributing to peace and reconciliation and, as discussed in this note, derivatively and minimally providing general deterrence through active or positive complementarity.

5 On this point, see also Geoffrey S. Corn, "Contemplating the True Nature of the Notion of 'Responsibility' in Responsible Command", in this issue of the *Review*.

6 See American Public Media, "'Moral Injury': An Invisible Wound of War", available at: [www.wbur.org/series/moral-injury](http://www.wbur.org/series/moral-injury), detailing the moral challenges veterans face in returning home after having "been a part of something that betrays their sense of right and wrong" during combat.

7 See Jens David Ohlin's claim that deterrence is only partially relevant to international criminal justice and Mark Drumbl's argument that it is irrelevant. J. D. Ohlin, above note 2; Mark Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity", *Northwestern Law Review*, Vol. 99, No. 2, 2005, p. 590.

that what is problematic is not general deterrence *per se*, but attempting to “ascribe deterrent aims to (or judge deterrence in the context of) single international criminal courts or tribunals”.<sup>8</sup> I don’t disagree. My point is that, as explained below, many influential figures began promoting international criminal justice’s general deterrent effects twenty years ago. They have not only retrospectively discovered general deterrent effects, but also claim these effects are the primary goal of international criminal law. Since this reconceptualization occurred in the mid-1990s, commentators – and international courts – have attempted to fit the square peg of general deterrence into the round hole of international criminal justice.<sup>9</sup>

Obviously, general deterrence is distinct from individual or specific deterrence – the theory that punishing an offender deters that particular offender from a future violation. Relatively speaking, the efficacy of a criminal justice system providing specific deterrence is easier to evaluate: it can be seen in the number of specific individuals who, having been punished for violating IHL, do or do not re-offend. Yet there is considerable debate on how well international criminal justice provides even specific deterrence.<sup>10</sup> That there is debate on the specific deterrence aspects of international criminal justice is (or should be) a harbinger of the system’s inability to provide the more abstract general deterrence.<sup>11</sup> If opponents of international criminal justice were behind the claims that the system provides general deterrence, the argument would be viewed as a straw man. Yet the unbearable burden of deterrent effect derives not from critics of international criminal justice but, as discussed below, from supporters.

8 See Guido Acquaviva’s response to this piece, “International Criminal Courts and Tribunals as Actors of General Deterrence? Perceptions and Misperceptions”, in this issue of the *Review*.

9 See Barbara Hola, “Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law”, *Amsterdam Law Forum*, Vol. 4, No. 4, 2012, explaining that at least in terms of the ICTY and ICTR, “judges clearly found inspiration in classic ‘domestic’ penal theories”, and that “[i]n general, deterrence and retribution are emphasized in the majority of cases”; Geoff Dancy and Florencia Montal, “Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions”, paper presented to the American Society of International Law Research Forum, 20 January 2015, discussing how the ICC may be achieving positive complementarity but “of a sort initially unintended by the Court”; Hyeran Jo and Beth A. Simmons, “Can the International Criminal Court Deter Atrocities?”, Working Paper Series, 18 December 2014, available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2552820](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552820), describing how the ICC may indirectly bolster prosecutorial deterrence at the national level.

10 Nick Grono and Anna de Courcy Wheeler, “The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders”, Presentation, *International Crisis Group*, 5 October 2012, available at: [www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx](http://www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx). Grono and Wheeler, while defending the idea that the ICC has deterred commission of crimes, concede that the ICC involves “the very situations where prosecutions are most unlikely to deter”.

11 Philipp Kastner, “Armed Conflicts and Referrals to the International Criminal Court: From Measuring Impact to Emerging Legal Obligations”, *Journal of International Criminal Justice*, Vol. 12, No. 3, 2014, p. 472. Helena Cobban called deterrence the “false hope of international justice”. See Helena Cobban, “Think Again: International Courts”, *Foreign Policy*, February 2006, available at: [www.foreignpolicy.com/articles/2006/02/17/think\\_again\\_international\\_courts](http://www.foreignpolicy.com/articles/2006/02/17/think_again_international_courts). Yet others claim that international criminal justice does provide a deterrent effect. See Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, *American Journal of International Law*, Vol. 95, No. 1, 2001, arguing that there is such a deterrent effect; Theodor Meron, “From Nuremberg to The Hague”, *Military Law Review*, Vol. 149, 1995, p. 110, arguing that if war crimes trials were “made a consistent reality, deterrence would be taken more seriously”.

Establishing that criminal prosecutions, at any level, generally deter others from committing the same or similar offences is challenging. It requires proving a negative: that the prosecution of person X for violating IHL deterred Y and Z in the future from similar violations. When Y and Z are not violating IHL, there is debate over the negative causation – proving why Y and Z are not committing violations. Rarely will individuals acknowledge general deterrence.<sup>12</sup> And when Y and Z do violate IHL in a manner similar to X, it would seem to present more straightforward evidence of the lack of general deterrence. Despite these challenges, or perhaps because of them, the idea that international criminal justice provides meaningful general deterrence is a relatively recent phenomenon.

## General deterrence and international criminal justice

Contemporary international criminal justice relies in large part on the International Military Tribunal (IMT) at Nuremberg following World War II. Yet the IMT's primary purpose was punitive – the “just and prompt trial and punishment of the major war criminals of the European Axis”.<sup>13</sup> The primary purpose of international criminal justice remained punitive up to and through the creation of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). As one commentator notes, the UN Security Council resolutions establishing the ICTY and ICTR were focused on

incapacitating specific offenders by removing them from the field of combat and preventing them from maintaining political power ... there is no clear language suggesting that the establishment of the ad hoc tribunals was intended to serve the purpose of preventing the commission of war crimes by potential offenders. *General deterrence does not seem to have been a primary goal of the architects of the ad hoc tribunals.*<sup>14</sup>

12 There are exceptions to that general proposition, however. For example, according to a UN official, the ICC convicting Thomas Lubanga for conscripting child soldiers has deterred others: “Let me that say that from my own experience the Prosecution and trials of the ICC are followed with great interest in the field. The deterrent effect of these proceedings is already being felt with regard to a large number of armed groups engaging with the United Nations to release children from their ranks and to cease all new recruitment.” ICC, *Prosecutor v. Thomas Lubanga Dyilo, Situation in the Democratic Republic of the Congo*, Transcript, ICC-01/04-01/06-T-223-ENG, 7 January 2010, paras 9–10. See also H. Jo and B. A. Simmons, above note 9, discussing the fear of ICC prosecution expressed by former Colombian president Andres Pastrana as well as by Colombian paramilitary leaders.

13 K. Cronin-Furman, above note 1.

14 *Ibid.*, p. 436 (emphasis added, internal citations omitted). Cronin-Furman contends that several years passed after the establishment of the ICTY and the ICTR before scholars began attributing to the tribunals the effect of general deterrence. This was around the same time that the international community created the Rome Statute and the ICC; *ibid.*, pp. 436 ff. See also Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal (IMT), 8 August 1945, UN Doc. A/CN.4/5, Art. 6, available at: <http://avalon.law.yale.edu/imt/imtconst.asp>, stating that the Allies established the IMT “for the trial and punishment of the major war criminals of the European Axis countries”.



Not until the “international epiphany”<sup>15</sup> of the 1998 Rome Statute did the international community formally embrace the idea that international criminal justice provided general deterrence. The Rome Statute itself reflects that the States Parties were “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the *prevention* of such crimes”, as they “threaten the peace, security and the well-being of the world”.<sup>16</sup> Ending impunity for perpetrators is specific or individual deterrence, but preventing others from committing crimes in the future is general deterrence. Indeed, general deterrence is “the most important goal of the ICC”.<sup>17</sup> The former president of the ICC claimed that “[b]y putting potential perpetrators on notice that they may be tried before the Court, the ICC is intended to contribute to the deterrence of these crimes”.<sup>18</sup>

While the States Parties adopted the Rome Statute in 1998, preparatory work began in 1995.<sup>19</sup> The idea that the ICC would generally deter the commission of atrocity crimes in the future “became a major selling point among advocates for the ICC’s establishment and ratification”.<sup>20</sup> At the same time as the Preparatory Committee for the ICC was drafting early versions of what would become the Rome Statute, scholars began to reassess the *ad hoc* tribunals in terms of general deterrence despite that not having been a focus at their inception.<sup>21</sup> In 1996, Cherif Bassiouni outlined a view which was later adopted prospectively in terms of the ICC and retrospectively for the *ad hoc* tribunals. Bassiouni argued that “[t]he relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent further victimization”.<sup>22</sup> General deterrence’s migration from the ICC to the *ad hoc* tribunals continued and expanded such that by 2004, prosecutors from the ICC, the ICTY, the ICTR and the Special Court for Sierra Leone had issued a joint statement expressing their commitment to general deterrence in preventing future atrocities.<sup>23</sup>

15 John Washburn, “The Negotiation of the Rome Statute for the International Criminal Court and International Law Making in the 21st Century”, *Pace International Law Review*, Vol. 11, No. 2, 1999.

16 Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183/9, Preamble (emphasis added).

17 David Hoile, *Justice Denied: The Reality of the International Criminal Court*, Africa Research Centre, 2014, p. 228, quoting both the first Prosecutor of the ICC, Luis Moreno Ocampo, and Christine Chung, the first senior trial attorney in the ICC’s Office of the Prosecutor.

18 Howard Salter (ed.), “Mr. Philippe Kirsch: President and Chief Judge of the ICC”, *Global Solutions Quarterly: The Newsletter of Citizens for Global Solutions*, Fall 2005, p. 2, available at: [globalsolutions.org/files/public/documents/Newsletter-2005-fall.pdf](http://globalsolutions.org/files/public/documents/Newsletter-2005-fall.pdf).

19 See J. Washburn, above note 15.

20 K. Cronin-Furman, above note 1, p. 438, quoting Diane F. Orentlicher, “Judging Global Justice: Assessing the International Criminal Court”, *Wisconsin International Law Journal*, Vol. 21, No. 3, 2003, p. 498.

21 K. Cronin-Furman, above note 1, p. 436, note 13, referring to Payam Akhavan, “Justice in The Hague, Peace in the Former Yugoslavia”, *Human Rights Quarterly*, Vol. 20, No. 4, 1998, pp. 737–816, and David Wippman, “Atrocities, Deterrence, and the Limits of International Justice”, *Fordham International Law Journal*, Vol. 23, No. 2, 1999, pp. 473–478.

22 M. Cherif Bassiouni, “Searching for Peace and Achieving Justice: The Need for Accountability”, *Law and Contemporary Problems*, Vol. 59, No. 4, 1996, p. 18.

23 Louis Moreno Ocampo, Carla Del Ponte, Hassan Bubacar Jallow and David Crane, *Joint Statement of the Prosecutors of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone*, 27 November 2004, available at: [www.iccnw.org/documents/JointDeclarationProsecutors26Nov04.pdf](http://www.iccnw.org/documents/JointDeclarationProsecutors26Nov04.pdf).

## General deterrence as an unbearable burden for international criminal justice

While providing (and proving) general deterrence is a challenge for any criminal justice system, the challenge is much greater in the international context given the limited jurisdiction of the ICC and the *ad hoc* tribunals. These fora have limited mandates and resources, which understandably results in their only prosecuting some of the most serious offenders. Yet current research indicates that it is the certainty of punishment which is most likely to produce general deterrence.<sup>24</sup> By definition, international criminal justice cannot offer anything close to certainty of punishment.<sup>25</sup>

Whatever vestige of general deterrence international criminal justice might claim dissipates along a spectrum of the inexorable time and length required. The greater the temporal gap between the offence and issuing the trial judgment, and the greater the length and opaqueness of that judgment, the less the deterrent effect. The case of Momcilo Perišić is, unfortunately, instructive on both points. Perišić allegedly violated IHL in 1995. The ICTY announced criminal charges against him in 2005. The ICTY then began the trial in 2008, yielding a trial judgment in 2011 requiring over 600 pages. In 2013, an appeals chamber granted Perišić's appeal, reversing the trial judgment and leaving the elements of aiding and abiding liability either in doubt or at least in confusion. Imagine a military legal adviser preparing to talk to senior military leaders and explain the "so what?" takeaway or lesson(s) learned from *Perišić*. What bright line, articulable rule or principle could the legal adviser say *Perišić* established or clarified? What actions does the *Perišić* judgment deter other senior leaders from taking?

I contend that military legal advisers would not even raise *Perišić* because they either (1) have not read the judgment, given its length and/or lack of clarity, (2) do not understand the judgment if they have read it (this barb is directed at the ICTY and not the military legal advisers), or (3) have read and understood the judgment but recognize that it cannot be meaningfully translated into anything resembling helpful legal advice. For the judgment to have even the potential of general deterrence, a military legal adviser would need to be able to finish the following sentence "Sir/Ma'am, in light of *Perišić*, you should avoid the following actions...". That a military legal adviser cannot do so means the judgment cannot possibly deter others. It is fine to speak of law in terms of expressive value and signalling effects, but at some point, to be of practical utility, the law must be able to be clearly articulated, distilled and conveyed to the category of individuals that the international community seeks to influence.

24 Valerie Wright, "Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment", Report, The Sentencing Project, Washington, DC, November 2010.

25 One study claims that the ICTR "might eventually prosecute approximately 0.005% of the pool of the likely humanitarian offenders" in the Rwandan genocide. Thus the ICTR would prosecute approximately half of one percent of offenders, or stated in the alternative, not prosecute 99.5% of the offenders. Julian Ku and Jide Nzebile, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?", *Washington University Law Review*, Vol. 84, No. 4, 2006, p. 808.

Thus, despite all the time, effort and resources that it entailed, *Perišić* confuses more than clarifies the law, precluding even *de minimus* general deterrence. Most international criminal justice cases do play a role in fostering compliance with IHL, but it's neither accurate nor helpful to think of that role in general deterrence terms.

For international criminal justice to generally deter IHL violations, there would need to be exponentially more cases and more easily understandable judgments issued closer in time to the underlying IHL violations. And that is fully at odds with the nature of international criminal justice. The idea of general deterrence is even more problematic at the ICC, as increasing the number of cases at the international level is at cross purposes from what should be the primary measure of the Court's effectiveness – domestic criminal justice capacity-building – rendering the Court if not unnecessary then seldom used.<sup>26</sup>

Arguing that international criminal justice provides general deterrence is akin to the tale of Sisyphus, who in Greek mythology was sentenced by the Gods to perpetually roll a boulder up a hill without ever being able to reach the top – only in this context it is worse, as proponents of general deterrence are seeking out the boulder.

## International criminal justice as a moral touchstone

Yet regardless of how long the process takes and how convoluted the judgments may be, international criminal justice constitutes a moral statement – the international community's expectations of how belligerents are to conduct themselves during armed conflict. Ultimately this leads to greater IHL compliance, but not because of the unbelievably remote prospect of being in the dock at an international criminal proceeding. Rather, international criminal justice fosters compliance because it aids leaders in their efforts to protect service members' morality, their ability to live with the emotional consequences of knowing they have killed other human beings. IHL, along with the international criminal justice institutions interpreting it, provides a moral touchstone, the significance of which should not be understated – or miscast as deterrence.

As Telford Taylor reminds us, “[w]ar is not a license at all, but *an obligation to kill* for reasons of state”.<sup>27</sup> We know that “most soldiers have a phobia-like resistance to using force and need to be specifically trained to kill”.<sup>28</sup> Thus a

26 See Election of the Prosecutor, Statement by Mr Moreno Ocampo, ICC-OTP-20030502-10 22, 22 April 2003, stating that “[t]he efficiency of the International Criminal Court should not be measured by the number of cases that reach the court or by the content of its decisions. Quite on the contrary, because of the exceptional character of this institution, the absence of trials led by this court as a consequence of the regular functioning of national institutions, would be its major success.”

27 Telford Taylor, *Nuremberg and Vietnam: An American Tragedy*, Quadrangle Books, Chicago, IL, 1970, pp. 40–41 (emphasis added).

28 Geoffrey S. Corn, Laurie L. Blank, Chris Jenks and Eric Talbot Jensen, “Belligerent Targeting and the Invalidity of a Least Harmful Means Rule”, *International Law Studies*, Vol. 89, p. 623, note 254, referencing Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society*, Little, Brown & Co., Boston, MA, 1995.



significant part of military training does just that – it breaks down the natural human instinct against killing a fellow human being. Overcoming the instinct against killing is but one half of the challenge, however; doing so within the bounds of IHL is the other.

## Conclusion

“War is, at its very core, the absence of order, and the absence of order leads very easily to the absence of morality...”<sup>29</sup> The absence of order is so profound that even delayed, long, and convoluted international criminal judgments are navigational lights, however dim, for service members traversing the moral abyss of armed conflict. The idea of international criminal law as a series of faint waypoints in a deep moral fog is distinct from its role (if it even has one) in providing general deterrence.

International criminal law in general deterrence terms essentially means that a soldier would avoid doing as, say, Tadić did because the punishment Tadić received had deterred the soldier. This simply doesn’t happen.<sup>30</sup> Instead, international criminal justice is a tether, an anchor in the good sense, which helps military leaders develop and preserve the good order and discipline necessary to be an effective fighting force. There is an exceedingly remote chance that a service member will face international criminal justice for violating IHL, but there is a 100% chance that a service member will have to live with the consequences of what they do in armed conflict.<sup>31</sup>

29 James R. McDonough, *Platoon Leader: A Memoir of Command in Combat*, Ballantine Publishing Group, New York, 1985, p. 78.

30 See J. D. Ohlin, above note 2, pp. 385–386, stating: “Those who kill and rape civilians are motivated by a variety of factors – genocidal hatred, war-induced rage, etc. – and most of these are not the types of motivations that can be altered by the knowledge that, possibly, just possibly, one might face criminal liability at an *ad hoc* or permanent international tribunal.”

31 For an example of the moral consequences of armed conflict, consider U.S. Army paratrooper Staff Sergeant Tom Blakely, who parachuted into France as part of Operation Overlord, the Allied forces’ invasion of Nazi-controlled Europe in World War II. Blakely’s unit was behind enemy lines and ordered to seize and hold a bridge to prevent the German military from reinforcing its positions at Normandy beach. While in defensive positions, Blakely’s platoon leader ordered each US soldier to identify not a direction to fire, but a specific German soldier. Blakely, now a docent at the World War II Museum in New Orleans, said: “I picked one out. I picked him out, got a site, hand on the trigger, and pulled it. I could see when the bullet hit him. He jumped up in the air, raised his arms above his head, and dropped his rifle and fell backwards.” This engagement was fully in compliance with IHL, but it nonetheless took a moral toll on Blakely. The German soldier he shot and killed haunted him: “He came to me from that day on every so often .... There was never any rhyme or reason when he came and when he left. Sometimes he would do that three or four times, sometimes he’d only do it once. But it was always somethin’. He was always there. And he came vividly in my mind often.” And this is a case where the service member followed IHL. The external validation and reinforcement that indirectly flows from international criminal justice that one’s actions in combat were permissible and legitimate is of significant utility. It is just not general deterrence. See CBS News, “A ‘Living Artifact’ of WWII Shares His Story”, 26 May 2013, available at: [www.cbsnews.com/news/a-living-artifact-of-wwii-shares-his-story/](http://www.cbsnews.com/news/a-living-artifact-of-wwii-shares-his-story/).

A US Army officer writing on his experience as a small-unit leader during the Vietnam war acknowledged that:

I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader. ... War gives the appearance of condoning almost everything, but men must live with their actions for a long time afterward. A leader has to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity.<sup>32</sup>

International criminal justice can help reinforce that link and, in so doing, indirectly fosters IHL compliance. It does so by disseminating societal norms by exception: from knowing how service members may not act, we indirectly reinforce how they should act in hostilities. This happens not necessarily because of the fear of a potential future international criminal prosecution that statistically speaking will almost never occur, but by helping to foster and maintain a moral sense of self with which the soldier can live, both during and in the years after armed conflict. However, we do international criminal justice a disservice by imposing the concept of general deterrence. International criminal justice cannot, and need not, bear the burden.

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## International criminal courts and tribunals as actors of general deterrence? Perceptions and misperceptions

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32 J. R. McDonough, above note 29, pp. 77–78.

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Deterrence as an aim of criminal law means discouraging future crime by effectively punishing crimes already committed. Since at least Cesare Beccaria, criminal policy generally has assumed that punishment – if certain and prompt – can deter the general public, as well as specific criminals, from committing crimes.<sup>33</sup> It is, however, probably still too early to definitively state how much this assumption holds true in the case of international criminal courts and tribunals. In fact, to evaluate such courts and tribunals *per se* as actors of general deterrence might miss the point, and result in misperceptions about their purposes and impacts.

Some context is important. Since the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, the international community has witnessed the establishment of numerous international courts and tribunals, as well as internationally assisted domestic institutions, to deal with specific situations. These include, most famously, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL), as well as a number of other domestic and regional institutions such as the War Crimes Chamber in the State Court of Bosnia-Herzegovina, the Special Panels for War Crimes in East Timor, the Extraordinary African Chambers and the “specialist chambers” foreseen by Kosovo to deal with allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo.<sup>34</sup> The ICC, whose Statute is not universally ratified but nonetheless enjoys considerable support, is clearly meant to be the flagship institution of this international criminal justice “system”.

Over the past twenty years, as the discipline has rapidly yet tumultuously developed, the purposes of international criminal law, and the related question of its effectiveness, have been widely debated.<sup>35</sup> It is often argued that international criminal law does not actually assist in preventing criminal conduct (general

33 “Would you prevent crimes? Let the laws be clear and simple, let the entire force of the nation be united in their defence, let them be intended rather to favour every individual than any particular classes of men, let the laws be feared, and the laws only.” Cesare Beccaria, *Of Crimes and Punishment*, 1764, Ch. 41, trans. Edward D. Ingraham, 2nd American ed., A. Walker, Philadelphia, 1819.

34 See, in this respect, Annex 1 to Kosovo Law 04/L-274, promulgated on 7 May 2014, pp. 2–3 of the English version, available at: [www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20a.pdf](http://www.kuvendikosoves.org/common/docs/ligjet/04-L-274%20a.pdf), related to Council of Europe Parliamentary Assembly Report, Doc 12462, 7 January 2011, and Kosovo Constitutional Court, Case No. KO26/15, Judgment, 15 April 2015, available at [www.gjk-ks.org/repository/docs/KO26-15\\_ANG.pdf](http://www.gjk-ks.org/repository/docs/KO26-15_ANG.pdf).

35 See, among others, Mirjan Damaška, “What Is the Point of International Criminal Justice?”, *Chicago-Kent Law Review*, Vol. 83, No. 1, 2008, pp. 329–365; Mark Drumbl, *Atrocity, Punishment and International Law*, Cambridge University Press, New York, 2007, pp. 149–180; Ralph Henham, “The Philosophical Foundations of International Sentencing”, *Journal of International Criminal Justice*, Vol. 1, No. 1, 2003, pp. 64–85; but also Jean Galbraith, “The Pace of International Criminal Justice”, *Michigan Journal of International Law*, Vol. 31, 2009, pp. 84 ff.

deterrence), with the implication that its institutions should be, if not disbanded, at least more focused on achieving other more attainable or “realistic” goals.<sup>36</sup> This proposition is, to a certain extent, and maybe paradoxically, both true and misleading.

Attempts to ascribe deterrent aims to (or judge deterrence in the context of) single international criminal courts and tribunals may rest on a fundamental misunderstanding. Each institution exercises jurisdiction over only a handful of cases, and these cases – though often well-publicized – likely do not have enough “strength” on their own to effectively function as deterrents. The same is true, to a degree, for the existing international criminal justice “system”. Instead, one should look at each of the international criminal institutions as parts of a *network* of intertwined, mutually reinforcing agencies dedicated to protecting and strengthening the rule of law and pursuing individual criminal responsibility for gross IHL and human rights violations. In this sense, they can increase awareness of the primary rules for the protection of human dignity among the general public and, together with other institutions, foster compliance with the law and therefore, indirectly, general deterrence. I will develop these considerations along two separate, though interconnected, lines of thought.

## **A preliminary caveat: The law applied by international criminal courts and tribunals**

Before discussing these lines of thought, it is useful to make a general remark. International criminal courts and tribunals are sometimes considered a sort of “branch” of the international community’s efforts to enforce IHL.<sup>37</sup> To be sure, we cannot (yet?) speak about a comprehensive international judiciary, at least if understood as a complete and hierarchical judicial system covering the globe. Nonetheless, over the past twenty years or so, in large part because of the proliferation of criminal institutions supported by the international community, the general public has to a certain extent come to expect enforcement of the laws of war at the international level. This expectation is based on a degree of awareness about international courts and tribunals and what they do, as well as an understanding that the most egregious IHL violations should entail serious punishment. International criminal institutions are therefore increasingly

36 See Chris Jenks, “Moral Touchstone, Not General Deterrence: The Role of International Criminal Justice in Fostering Compliance with International Humanitarian Law”, in this issue of the *Review*. See also European Council on Foreign Relations, *International Justice and Prevention of Atrocity*, Report, October 2014, especially pp. 34 ff., available at: [www.ecfr.eu/page/-/ECFR115\\_International\\_Justice\\_Report.pdf](http://www.ecfr.eu/page/-/ECFR115_International_Justice_Report.pdf). More generally on the history of the debate on deterrence in international justice, see Leslie Vinjamuri, “Deterrence, Democracy and the Pursuit of International Justice”, *Ethics and International Affairs*, Vol. 24, No. 2, 2010, pp. 191–211, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1747-7093.2010.00256.x/full>.

37 C. Jenks, above note 36. See also, in a more neutral way, Anne-Marie La Rosa, “Sanctions as a Means of Obtaining Greater Respect for Humanitarian Law: A Review of Their Effectiveness”, *International Review of the Red Cross*, Vol. 90, No. 870, 2008, pp. 221–247.

assessed, in practice, against this expectation; their effectiveness in countering criminal conduct during armed conflicts is measured, in the minds of most, by the degree of adherence by international actors to IHL. But this expectation is, in a sense, too restrictive. Thinking of international criminal institutions in this way can actually result in an under-appreciation of their work and in the application of inappropriate metrics.

International criminal courts and tribunals unquestionably often deal with IHL violations, but their jurisdiction and practice is by no means limited to these. The ICTY, the ICTR and the ICC undoubtedly have jurisdiction over serious IHL violations (not just those amounting to grave breaches). However, they also try individuals accused of other international crimes, such as crimes against humanity and genocide,<sup>38</sup> which have often been neglected by domestic legislators and prosecutors. It would therefore be reductive to consider international criminal justice as merely an enforcement mechanism for IHL.

Indeed, overall, IHL violations and war crimes are often well-regulated in domestic systems: national authorities have quite often prosecuted individuals for serious IHL violations since the end of World War II; this is much less the case for crimes against humanity and genocide. When discussing the deterrent effect of international criminal courts and tribunals, therefore, it is necessary to look at the general scope of their jurisdiction, and not limit the analysis to IHL violations.

Conceptually, while it might be true that IHL violations *stricto sensu* are not deterred by international courts and tribunals, one must at least contemplate the possibility that the activity of these *international* institutions in relation to crimes against humanity and genocide – where the import of domestic prosecutions is much more limited – justifies the resources expended on them.<sup>39</sup> This nuance is important, as the ICTR, for instance, has carried out most of its judicial activities in the areas of crimes against humanity and genocide, leading the way for other institutions (domestic or otherwise) working in this field – a field that is much wider than the prosecution of violations of the laws of war narrowly defined.

## General deterrence as an aim of international courts and tribunals?

### The role of general deterrence in sentencing

International criminal courts and tribunals must therefore be assessed for their relevance in fields beyond IHL *stricto sensu*. The issue remains, however, whether

38 The SCSL and the ECCC are further competent to try individuals for certain domestic crimes. The STL only applies domestic Lebanese law.

39 These institutions are certainly costly, but maybe not as much as generally thought. See, among others, David Wippmann, “The Costs of International Justice”, *American Journal of International Law*, Vol. 100, No. 4, 2006, pp. 861–880.



their aim is, or should be, to contribute to general deterrence in the areas in which they exercise their jurisdiction.

First, it should be recognized that it is far too simplistic to compare deterrence in domestic systems with that in international criminal law without properly taking into account the stages of evolution of the respective systems. The application of criminal law in domestic jurisdictions has a rich historical pedigree, and societies have internalized the law's tenets. Domestic legal systems and general deterrence itself are to a certain extent predicated upon the monopoly on the use of force by States. It is in an environment of constant repetition and enforcement that the deterrent value of criminal law in domestic systems has reached the point it is at today. The situation at the international level is, of course, very different. Considering that international criminal law, in the modern era, is just over two decades old, not to mention the various limitations placed upon its enforcement by the current system of international relations, it appears wholly unfair to test its general deterrence standard by reference to domestic systems.

Moreover, while it is true that there are pronouncements from these very courts and tribunals suggesting a role for general deterrence, most of these institutions were created not for the purpose of fostering general deterrence, but rather as a means to deal with threats to international peace and security,<sup>40</sup> as part of international efforts to support the rule of law in certain regions,<sup>41</sup> or more simply to ensure retribution for the crimes committed during specific historical periods.<sup>42</sup>

In practice, international criminal courts and tribunals – i.e., the judges issuing judgments of conviction or acquittal – do not appear to actively work towards the goal of general deterrence. Nowhere is this clearer than in the decisions on sentencing themselves. In fact, when the judges pen their written reasons for a specific sentence, they implicitly (and at times even explicitly) refuse to assign significant weight to general deterrence. Taking as an example the ICTY – the first of the contemporary international criminal tribunals, and the one that has issued the most decisions on guilt – two judgments elucidate the position in this respect. In *Jokić*, the judges acknowledged four main purposes of sentencing for international crimes: retribution, rehabilitation, special deterrence and general deterrence. In relation to the latter, they stated:

With regard to general deterrence, imposing a punishment serves to strengthen the legal order, in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of its penal provisions. Nonetheless, it would be unfair, and would ultimately weaken the respect for the legal order as a whole, to increase the punishment imposed on a person merely for the

40 This is the case for the ICTY, ICTR and STL, established through UN Security Council resolutions adopted under Chapter VII of the UN Charter.

41 For instance, in the cases of internationally supported domestic prosecutions in Bosnia-Herzegovina and Kosovo.

42 Consider the ECCC, where the serious violations of Cambodian law and IHL were considered “matters of vitally important concern to the international community as a whole”, requiring prosecution.

purpose of deterring others. Therefore ... the Trial Chamber has taken care to ensure that, in determining the appropriate sentence, deterrence is not accorded undue prominence.<sup>43</sup>

In *Deronjić*, the judges added the important remark that, in modern criminal law, this approach to general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into global society.<sup>44</sup> The judges importantly noted:

One of the main purposes of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.<sup>45</sup>

These pronouncements stand for at least two principles. First, international criminal courts and tribunals (the examples above include decisions signed by judges from a diverse set of legal systems and cultures all agreeing on these principles) do consider general deterrence within the aims of their work,<sup>46</sup> but refrain from assigning undue importance to this principle. Retribution, special deterrence and the rehabilitative purposes of punishment are also given consideration, and arguably play bigger roles than general deterrence when sentencing is assessed. Judges do not consider general deterrence of paramount importance when sentencing.

Second, even when general deterrence is taken into account in sentencing, it is often considered in the broader sense of influencing legal awareness, of fostering the internalization of the relevant rules in the minds of the general public. This function might be particularly strong in cases of guilty pleas, especially in proceedings against a high-level politician or military official. In such cases, the accused accepts his or her responsibility for certain crimes and therefore “sets the record straight”, so to say, thus arguably assisting in establishing the illegitimate and reprehensible character of the conduct in question.<sup>47</sup> In this sense, general

43 ICTY, *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Sentencing Judgment (Trial Chamber), 18 March 2004, paras 30 ff. (extract from para. 34).

44 ICTY, *Prosecutor v. Miroslav Deronjić*, Case No. IT-02-61-S, Sentencing Judgment (Trial Chamber), 30 March 2004, paras 142 ff., in particular para. 147, quoting with approval previous case law.

45 *Ibid.*, para. 149.

46 See, for example, SCSL, *Prosecutor v. Alex Tamba Brima, Ibrahim Bazzy Kamara and Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Sentencing Judgment (Trial Chamber), 19 July 2007, para. 16.

47 Strangely enough, however, international criminal tribunals do not explicitly consider general deterrence, even in this broader sense, to be relevant in sentencing judgments following guilty pleas; they rather seem to focus on the truth-seeking aspect and on the possibility that the process might lead to reconciliation. See, for instance, ICTY, *Prosecutor v. Biljana Plavšić*, Case No. IT-00-39&40/1-S, Sentencing Judgment (Trial Chamber), 27 February 2003, para. 80: “The Trial Chamber accepts that acknowledgement and full disclosure of serious crimes are very important when establishing the truth in relation to such crimes. This, together with acceptance of responsibility for the committed wrongs, will promote reconciliation. In this respect, the Trial Chamber concludes that the guilty plea of Mrs. Plavšić and her acknowledgement of responsibility, particularly in the light of her former position as President of Republika Srpska, should promote reconciliation in Bosnia and Herzegovina and the region as a whole.”

deterrence is understood by the judges as encompassing an expressive function of international criminal law, which gives effect to – and therefore develops – the normative value of the legal system as a whole among the general public. It is in this expressive context that the preamble of the ICC Statute refers to the determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”. In other words, there should be no illusion that the ICC on its own will achieve the aim of preventing future crimes – but the Court is meant to be one of the paramount instruments at the disposal of the international community to entrench the awareness that serious criminal conduct has consequences, and that military and political leaders should not expect impunity.

### The actual import of international jurisprudence in fostering compliance

Further, although the importance of international criminal courts and tribunals in fostering general compliance with IHL should certainly not be overestimated, we must be careful not to underplay the significant and, to a certain extent, decisive role that some of these institutions have in the development of the law of war writ large. It is probably unfair to say that, as Professor Jenks writes, thousands of pages of decisions by international criminal courts and tribunals have not factored into *any* service member’s decision-making on whether to comply with IHL.<sup>48</sup>

First, there is evidence that military commanders and lawyers take quite seriously legal and factual findings by international judges. To cite just one example, several military experts from various countries attempted to file an *amicus curiae* brief in the *Gotovina* appellate proceedings at the ICTY with the stated purpose of providing insights from military and civilian IHL experts who have studied, and in many cases undertaken, the process of targeting analysis in a populated area during hostilities. The experts in question submitted that it was “impossible to overstate the importance of the analysis and conclusions of any criminal adjudication of targeting decision-making in a context such as that reflected in the facts of this case”.<sup>49</sup> It seems hard to contend that the case and its legal significance have not given rise to keen interest among military experts. Similar attention has undoubtedly been paid to the judgments related to urban warfare during the siege of Sarajevo,<sup>50</sup> to the targeting of civilians in Zagreb<sup>51</sup> and to the shelling of Dubrovnik.<sup>52</sup>

48 C. Jenks, above note 36.

49 ICTY, *Prosecutor v. Ante Gotovina and Mladen Markač*, Case No. IT-06-90-A, Decision on Application and Proposed *Amicus Curiae* Brief (Appeals Chamber), 14 February 2012, para. 6.

50 ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29, Judgment (Appeals Chamber), 30 November 2006; ICTY, *Prosecutor v. Dragomir Milošević*, IT-98-29/1, Judgment (Appeals Chamber), 12 November 2009.

51 ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11, Judgment (Appeals Chamber), 8 October 2008.

52 ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42, Judgment (Trial Chamber), 31 January 2005.

Moreover, for the past twenty years, various military manuals have referred to international criminal tribunals' case law when discussing applicable law.<sup>53</sup> Needless to say, the seminal *Tadić* interlocutory appeal decision of 2 October 1995 is universally cited as a basis for the applicability of (certain) war crimes to non-international armed conflict. The same could be said for the test to establish the existence of an armed conflict.<sup>54</sup> The International Committee of the Red Cross (ICRC) itself based several of its findings on the customary status of IHL rules on ICTY and other tribunals' case law.<sup>55</sup> Even UNESCO, when addressing the implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, refers to ICTY case law.<sup>56</sup>

These are just a few examples of the import of international criminal case law on the elaboration and implementation of IHL rules for decision-makers at all levels, including military officials. Recent reports have highlighted that ICC investigations into possible crimes in Afghanistan made "U.S. military lawyers ... work ... to match up the incidents the court is interested in with the various internal investigations conducted by the U.S. military".<sup>57</sup> If true, these types of reports would signal a significant impact of the work of international criminal justice mechanisms on national compliance with international obligations. Although the ICC has been faulted for having little impact in practice on the "politics of impunity",<sup>58</sup> it appears too simplistic to deny *any* deterrent effect of international criminal courts and tribunals' judgments and decisions.

Of course, it should not be decisive whether the influence stems *directly* from a judicial decision, or, for instance, from a military manual that was amended following such a decision. Effectiveness can be defined as the ability to induce a change away from the *status quo* in a desired direction, even if the result

53 See, for instance, the UK Joint Service Manual of the Law of Armed Conflict, 2004, according to which "[c]ustomary international law is certainly not confined to 'wars' and applies to both international and internal armed conflicts" (p. 29) and "[h]eads of state and their ministers are not immune from prosecution and punishment for war crimes" (p. 440) (quoting *only* the ICTY case law for these propositions). Even more striking are the amount of references to international criminal case law in the recent US Department of Defence *Law of War Manual*, June 2015, available at [www.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf](http://www.defense.gov/pubs/Law-of-War-Manual-June-2015.pdf).

54 See, among others, Louise Arbour, "The Laws of War: Under Siege or Gaining Ground?", speech of 23 June 2011, available at: [www.crisisgroup.org/en/publication-type/speeches/2011/the-laws-of-war-under-siege-or-gaining-ground.aspx](http://www.crisisgroup.org/en/publication-type/speeches/2011/the-laws-of-war-under-siege-or-gaining-ground.aspx), and references thereof.

55 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Cambridge University Press, Cambridge, 2005. See also, among others, Michael N. Schmitt, "Precision Attack and International Humanitarian Law", *International Review of the Red Cross*, Vol. 87, No. 859, 2005, pp. 445 ff.

56 UNESCO, Report on the Implementation of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Two 1954 and 1999 Protocols, Report on the Activities from 1995 to 2004, UNESCO Doc. CLT-2005/WS/6, paras 46–49, available at: <http://unesdoc.unesco.org/images/0014/001407/140792e.pdf>.

57 David Bosco, "The War Over U.S. War Crimes in Afghanistan Is Heating Up", *Foreign Policy*, 3 December 2014.

58 See, for instance recently, Sarah Nouwen, "The Politics of Impunity Little Impacted by the ICC", *Open Democracy*, 27 November 2014, available at: [www.opendemocracy.net/openglobalrights/sarah-nouwen/politics-of-impunity-little-impacted-by-icc](http://www.opendemocracy.net/openglobalrights/sarah-nouwen/politics-of-impunity-little-impacted-by-icc).

is less than full compliance:<sup>59</sup> the effectiveness of international criminal courts and tribunals in regard to general deterrence should therefore be assessed in a more holistic way, as the ability to foster behavioural changes and reinforce the legal ban on prohibited conduct, even when it is “mediated” by other legal and social instruments and does not directly flow from the text of an ICTY or ICC judgment. After all, even in domestic systems, it is doubtful that individuals consider trial and appellate judgments discussing the applicable legal standards for, say, murder or rape when deciding whether to proceed with the commission of these crimes: such standards find their ways into the conscience of individuals – and of society as a whole – through a myriad of avenues, *including* formal court pronouncements. One can start expecting the same trend in the international arena, although with the caveats mentioned above related to this area of law’s early stages.

## Courts and tribunals as participants in the international criminal justice system

Most importantly, complementarity must also be accounted for when evaluating the deterrent effect of international criminal courts and tribunals. It would be wrong to view the various international criminal justice institutions as isolated structures, for it is generally misleading to single out judicial institutions and assess their value in relation to general deterrence in a society on their own. Individual institutions, whether at the international or the domestic level, form part of a wider network of judicial actors – including law enforcement agencies – that, together, aim at addressing criminal conduct from a variety of angles and perspectives. It would be improper, for instance, to assess the general deterrence effectiveness of a single US federal appellate court, or of the military court in a single district. Similarly, it would be strange to state that, because people are still murdered throughout the world, domestic courts have not had any deterrent effect on potential offenders over the past millennia.

A holistic assessment should be undertaken with respect to the role of international criminal institutions within the global criminal justice structure, just as one would do in relation to the whole justice system within a country. In reality, the Preamble of the ICC Statute recalls “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. The ICC has thus been hailed as an institution that does not intend to try a large number of cases: its primary purpose should rather be that of ensuring effective complementarity in action, i.e., domestic prosecution.<sup>60</sup> The ICTY and

59 Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights*, Princeton University Press, Princeton, NJ, 2014, p. 6.

60 “[T]he absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success”, as stated by Prosecutor Moreno Ocampo on 13 July 2003, available at: [www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616\\_moreno\\_ocampo\\_english.pdf](http://www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf).



ICTR have rightly been described as aiming at another type of complementarity, namely trying only the most serious cases, while assisting domestic courts that must deal with the significant caseload concerning accused individuals who were not political or military leaders.<sup>61</sup> The STL, when trying the cases within its jurisdiction, explicitly sees its task as assisting “the strenuous efforts of the Government and people of Lebanon to reinforce the rule of law through due process”.<sup>62</sup> In all of these examples, the institutions clearly shy away from claiming an ability to achieve, or even striving for, a goal as high (and lofty) as general deterrence: international criminal institutions instead clearly seek synergies amongst themselves and, more importantly, with domestic judiciaries to create a web of interrelated jurisdictions that together ensure an increase in the repression of serious violations of IHL and of human rights.<sup>63</sup>

This is why it is unrealistic to expect general deterrence from each one of these institutions by itself. Each of these courts and tribunals instead sees itself – and should be seen – as part of a developing system of international criminal justice, a system that is still clearly primitive and without “arms and legs”, but that has achieved much over the past couple of decades.<sup>64</sup> Even more relevant, these institutions, individually and collectively, appeal to policy-makers, NGOs and other actors such as the ICRC to share the burden of achieving legal compliance and of developing stricter standards for the protection of human rights, both in times of armed conflict and otherwise. They request funds, suggest new strategies and exchange expertise among themselves and with policy-makers, thus creating expectations and encouraging responses. They are actors in the international arena, which other actors, even those opposing them and their growing influence, must recognize and take into account. Over the past two decades, it is undeniable that these institutions, each in its own specific way, have contributed to fostering an environment where justice for mass atrocities is expected, and trials for serious violations of fundamental human rights have become part and parcel of the international discourse. The assumption at all levels is now that certain types of conduct demand effective prosecution, which

61 Fausto Pocar, “Completion or Continuation Strategy? Appraising Problems and Possible Developments in Building the Legacy of the ICTY”, *Journal of International Criminal Justice*, Vol. 6, No. 4, 2008, pp. 655–656. For the relevance of ICTY case law and practices, see also Diane F. Orentlicher, “Shrinking the Space for Denial: The Impact of the ICTY in Serbia”, Open Society Institute, New York, 2004, in particular pp. 15–16 and 38–39, available at: [www.opensocietyfoundations.org/sites/default/files/serbia\\_20080501.pdf](http://www.opensocietyfoundations.org/sites/default/files/serbia_20080501.pdf).

62 Special Tribunal for Lebanon, Fifth Annual Report, 2013–2014, p. 7, available at: [www.stl-tsl.org/en/documents/stl-documents/presidents-reports-and-memoranda/2984](http://www.stl-tsl.org/en/documents/stl-documents/presidents-reports-and-memoranda/2984).

63 In this respect, see also the findings of empirical research in G. Dancy, B. Marchesi, F. Montal and K. Sikkink, above note 1, as well as in Marlies Glasius, “‘It Sends a Message’: Liberian Opinion Leaders’ Responses to the Trial of Charles Taylor”, *Journal of International Criminal Justice*, Vol. 13, No. 3, forthcoming 2015, pp. 419–447.

64 This network, a growing justice system linking together international, hybrid, and domestic institutions, has also been described as part of a justice “cascade”. Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, W. W. Norton, New York, 2012. This description also shows the necessity of evaluating the ICC and other courts and tribunals as part of a wider concerted effort in which each part develops and feeds on the others.

was clearly not the case just twenty years ago.<sup>65</sup> This change of ethos must undoubtedly be seen as a first step on the path of general deterrence: it is only when individuals know that they may (or will) face justice for serious crimes that deterrence starts to meaningfully work.

## Concluding remarks

It is true that the international criminal law “project” as a whole – together with its most vivid incarnation, the ICC – is an exercise in what Antonio Cassese liked to describe as “realistic utopia”.<sup>66</sup> It is a complex attempt to implement in practice the grand and noble goal of achieving justice for the worst atrocities, amidst the huge practical challenges posed by a sovereign-centred world, a landscape in which legitimacy and control are largely in the hands of States. This means, for the purposes of this discussion, that international criminal law and institutions will only be able to achieve (more or less) what States and other subjects of international law allow them to achieve; while they can push ahead in certain areas, they must expect pushback. More importantly still, the resources at their disposal – and how they are prioritized – are determined by others.

Yet, as the ICTY has held, and as mentioned above, decisions of international courts and tribunals influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public, reassuring them that international criminal justice is implemented and enforced. International courts and tribunals have also represented a potent incentive for national courts to exercise criminal jurisdiction over serious human rights violations, within or outside armed conflicts.<sup>67</sup> Their decisions are not just moral statements. All of this, and the encouragement that States and other local actors receive from the ICC and other institutions to improve their capacity to reduce, detect and prosecute war crimes domestically,<sup>68</sup> contributes to deterrence, properly understood. When evaluating the purposes and efficacy of international judicial institutions, they must be seen as part of a wider system, a system that is having a significant impact on international law as applied by military and civilian actors around the world, both at the policy level and “on the ground”.

65 On this point, see also Payam Akhavan, “Can International Criminal Justice Prevent Future Atrocities?”, *American Journal of International Law*, Vol. 95, No. 1, 2001, especially pp. 27 ff. and references therein.

66 Antonio Cassese, “Introduction”, in A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford, 2012, p. xxi.

67 Antonio Cassese, *The Rationale for International Criminal Justice*, in A. Cassese et al. (eds), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 130.

68 See, most recently, H. Jo and B. A. Simmons, above note 9.