The Office of the Prosecutor of the ICC and the Development of the Penal Objectives of International Criminal Justice

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For Jocelyn and Cora

You can do anything if you put your mind to it

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Introduction

Mass violence against civilians and the misery of aggressive war have been constant features of humanity's interactions. The twentieth century will be remembered for its genocides and world wars, but was only part of a long line of such events. That the twentieth century also saw the beginning of attempts to respond to at least some of these crimes marks a notable change in world behaviour. Criminal justice developed as one response to these events, only after other options such as punitive war, extrajudicial execution or inaction proved both undesirable and ineffective as resolutions.[1] The success of attempts to outlaw and control mass violence remains debatable. The twenty-first century opened with multiple ongoing conflicts and scenes of mass violence and alleged international criminality, for example in Iraq, Darfur, DRC, Uganda, CAR, Chechnya, Colombia, and Afghanistan amongst others.

Doing nothing in the face of such violence is no longer considered an option, but positive responses by the international community are also fraught with difficulties. Criminal justice measures to address international crimes have received a significant level of political and financial support.[2] However, many of those working in the field of transitional justice advocate a more pluralistic approach to dealing with conflict and post-conflict situations. This incorporates international and national criminal justice responses as well as other mechanisms aimed at generating truth, reconciliation and redress.[3] There is growing support for the idea that chosen measures should respond to the particular needs of each individual society in order to be legitimate and effective.[4] Yet, there is notable confusion over the objectives and outcomes of different courses of action and what constitutes an appropriate response to these complex situations.

This thesis contributes to ongoing debates by examining the extant and developing international criminal justice system, focussing on the International Criminal Court (ICC). The focus of this work will be to clarify the objectives, functions and impacts of criminal justice in the international context through analysis of the work of the ICC Office of the Prosecutor (OTP) in

[1] R Cryer, Friman, Robinson and Wilmshurst An Introduction to International Criminal Law and Procedure (3rd Ed Cambridge University Press 2014) 29.

[2] R Cryer Prosecuting International Crimes: Selectivity and the International Criminal Law Regime (Cambridge Studies in International & Comparative Law 2005); G Bass Stay the Hand of Vengeance (Princeton University Press 2000) 222-223.

[3] E Blumenson 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court' 44 *Colum. J. Transnat'l L.* (2006) 801; M Drumbl Atrocity, Punishment and International Law (University Press 2007); M Aukerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' 15 Harvard Human Rights Journal (2002) 39; UNSC The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (2004) UN doc s/2004/616; M Minow Between Vengeance and Forgiveness: Facing history after genocide and mass violence (Beacon Press 1998).

[4] J Alvarez 'Crimes of State/Crimes of Hate: Lessons from Rwanda' (1999) 24 The Yale Journal of International Law 365, 370; Drumbl Atrocity (n3) 181; J Iontcheva Turner 'Nationalizing International Criminal Law' 41 *Stan J Int'l L* (2005) 1.

operationalising the aims of the ICC. The analysis will subject the ICC to critical scrutiny, not only in its theoretical, legal form but in its actual practice.[5]

The state of academic inquiry

In its formative years, academic and professional inquiry into international criminal justice focussed on the substantive law and procedural issues required to ensure these institutions can carry out their functions effectively, while largely ignoring a deeper contextual inquiry into socio-legal, penological and criminological issues.[6] There are notable exceptions such as Drumbl's work on international penology and collective responsibility,[7] which analyses specific issues facing the international penal response to mass violence and stimulating debate as to how a new international penology may be developed. Contributions by Blumenson on penal theory and pluralistic responses to international crime, Sloane on the expressive capacity of international criminal law and Ohlin on retributivism in international criminal sentencing also incorporate sophisticated theoretical concepts into explorations of the objectives and functioning of punishment at the international level.[8] Larry May has contributed significantly to the philosophy of international criminal law.[9] More recently Anthony Duff has begun to apply penal philosophy to the international level, while Alexander Greenawalt has looked closely at the application of retributive theory in the international criminal context.[10] Osiel has furthered the debate over the social function of international criminal trials in his work on solidarity and collective memory.[11]

There has been attention to the application of criminological theory to international criminal justice processes regarding appropriate sentencing, the

[5] A Duff and D Garland 'Introduction: thinking about punishment' in Duff, A and Garland, D (eds) A Reader on Punishment (OUP 1994) 1 advocating such an approach to penal philosophy and sociology of punishment in analysing domestic criminal justice systems.

[6] A Cassese International Criminal Law (OUP 2003); MC Bassiouni (ed) International Criminal Law (2nd ed Transnational Publishing 1999) and Cryer et al (n1) for accounts of the development and the substance of international criminal justice. See inter alia M Drumbl 'Toward a Criminology of International Crime' (2003) 19 Ohio State Journal on Dispute Resolution 263 and P Roberts and N McMillan 'For Criminology in International Criminal Justice' (2003) 1 JICJ 315 calling for a more contextualised approach and a criminology of international criminal justice.

[7] Drumbl Atrocity (n3) and M Drumbl 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 Northwestern University Law Review 539.

[8] Blumenson (n3); R Sloane 'The expressive capacity of international punishment' Columbia Law School Public Law and Legal Theory Working Paper 06-112 (2006); J Ohlin 'Toward a Unique Theory of International Criminal Sentencing' in G Sluiter and S Vasiliev (eds) International Criminal Procedure: Towards a Coherent Body of Law (Cameron May 2009) 373

[9] L May Crimes Against Humanity (CUP 2005); L May War Crimes and Just War (CUP 2007); L May Aggression and Crimes against Peace (CUP 2008); L May Genocide (CUP 2010)

[10] A Duff 'Authority and Responsibility in International Criminal Law' in S Besson and J Tasioulas (eds) The Philosophy of International Law (OUP 2010) 589; A Greenawalt 'International Criminal Law for Retributivists' (2014) 35 University of Pennsylvania Journal of International Law 969.

[11] M Osiel Mass Atrocity, Collective Memory and the Law (Transaction Publishers 1997); cf G Bass 'War Crimes and the Limits of Legalism' (1999) 97 Michigan Law Review 2103.

role of victims and restorative justice.[12] Commentators from the transitional justice field have also applied theoretical frameworks to question the suitability of criminal justice approaches to transitional justice at national level.[13] Other legal theorists have begun to think about how to analyse criminal justice's contribution to preventing international crimes,[14] and the political implications of applying international criminal justice as it is currently structured.[15] While commentary on the role of international criminal justice was initially dominated by lawyers and legal scholars,[16] there has been increasing interest from politics and international relations scholars in the continued existence, role and impacts of international criminal justice institutions.[17]

This emerging body of analysis has begun to unpick the core functions and impacts of international criminal justice and provide justifications for its existence. However, such analysis needs to be supplemented and updated as the international criminal justice system itself grows and develops. Drumbl has suggested that a new international penology is needed to account for the specific context of international criminal law and suggests this may be beginning within the ICC.[18] A number of scholars have also recognised the need for a more criminological and victimological enquiry into international crimes.[19] Despite this burgeoning interest in analysing specific aspects of international criminal justice, there remains a need for an in-depth theoretical analysis of the aims, functions and potential consequences of establishing and

[12] D Van Zyl Smit 'International Imprisonment' (2005) 54(2) International and Comparative Law Quarterly 357; R Henham 'The Philosophical Foundations of International Sentencing' (2003) 1 Journal of International Criminal Justice 64; Findlay and R Henham Transforming International Criminal Justice: Retributive and Restorative Justice in the Trial Process (Willan Publishing 2005); R Henham 'Conceptualizing Access to Justice and Victims' Rights in International Sentencing' (2004) 13 Social and Legal Studies 27; P Roberts 'Restoration and Retribution in International Criminal Justice: An Exploratory Analysis' in Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms? (Hart Publishing Ltd 2004) 115.
[13] Aukerman (n3).
[14] P Akhavan 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 AJIL 7; H Olasolo Essays on International Criminal Justice (Hart Publishing 2012).
[15] I Tallgren 'The Sensibility and Sense of International Criminal Law' (2002) 13 European Journal of International Law 561.
[16] F Megret 'The Politics of International Justice' (2002) 13 EJIL 1261, 1262.
[17] G Bass Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton University Press 2002); Burke-White 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) 18 LJIL 557; E Leonard The Onset of Global Governance: International Relations Theory and the ICC (Ashgate 2005); R Henham and M Findlay (eds) Exploring the Boundaries of International Criminal Justice (Ashgate 2011).
[18] Drumbl Atrocity (n4).
[19] G Yacoubian 'The (in)significance of Genocidal Behavior to the Discipline of Criminology' (2000) 34 Crime, Law & Social Change 7; Roberts and McMillan (n6) 315; Drumbl 'Toward a Criminology' (n7); R Jamieson (ed) The Criminology of War (Ashgate 2014). The relatively few applications of existing theoretical frameworks have initially mainly focused on studies of genocide E Day and M Vandiver 'Criminology and Genocide: Notes on what might have been and what still could be' (2000) 34 Crime, Law and Social Change 43; E Kiza and H-C Rohne 'Victims' Expectation towards Justice in Post-Conflict Societies: A Bottom-Up Perspective' in R Henham and M Findlay Exploring the Boundaries of International Criminal Justice (Ashgate 2011) 75, 77.

implementing international criminal justice in light of the development, and implementation, of the legal regime of the ICC.

Contribution to knowledge

This work furthers this discussion by looking at the penality promoted by the ICC OTP. It provides a detailed analysis of the penal aims of the ICC as outlined in its founding documents and in detail as to how these were interpreted through the policy and practice of the OTP. Through analysis of public statements, policies and decisions of the OTP, it will identify which aims were emphasises and which implemented in practice. There has not yet been a detailed analysis of the work of the OTP through the prism of penal theory.

The lack of comprehensive analysis of the penal rationales of the ICC and the lack of questioning of the objectives highlighted by the OTP at a legislative level demonstrates the pressing nature of this research and the need for more theoretical development. There has been little institutional focus on the interaction between practice and theory. This work will shed light on the complexities of transposing theory to practice at international level and the practical implications of implementing and prioritising different penal theories.

In chapters 3 and 7, this work develops the under-theorised relationship between victims and penal theory – articulating a new perspective on the role of victims in the ICC's penality. In Chapter 7, there is a well theorised rejection of prevention as an aim for the ICC and suggestions for a re-orientation of the aims and practice prioritised by the OTP. This research extends the existing discussions in penal theory to the ICC and highlights the potential role for penal theorising in helping clarify aims and priorities and improve effectiveness.

The structure of the research

Chapters 1 and 2 give an overview of the state of penality of international criminal justice before the advent of the ICC. They explore the profusion of objectives and functions attributed to international criminal justice and the problems encountered fulfilling these objectives in the context of international criminality. Chapters 3 and 4 analyse the penality of the ICC as reflected in the Rome Statute and then as interpreted by the OTP in its policy and public statements, revealing a discrepancy between the two, with the emphasis of the first ICC Prosecutor on victims and prevention. Chapters 5 and 6 examine how these penal aims were implemented in practice and explain the competing factors affecting strategy. Chapter 7 puts the policy and practice of the OTP in theoretical perspective and evaluates the impact of the OTP's operational choices in its first years. The conclusions of the thesis highlight areas in need of further work and suggest alternative courses of action where appropriate.

Methodology

This thesis examines the first nine years of OTP operation under the ICC's first Prosecutor, Luis Moreno-Ocampo. This corresponds with the crucial first phase in the ICC's development. The decisions in these years have established the direction of the Court, interpreted the Statute and set-up both expectations

and perceptions of the ICC's legitimacy and potential reach. The first Prosecutor's tenure offers a bounded area of study for the initial development of the ICC's aims.

The research is document-based and draws heavily on the public documents of the ICC OTP. It does not seek to empirically prove the value of any particular penal objective, nor to definitively prove what the penal rationales were for the OTP. It intends to reflect how these rationales were publicly presented and whether the implementation phase reflected these presented rationales in theory and reality. It seeks to elucidate the existing theories of penality and how they have been interpreted by the other institutions of international criminal justice that influenced the development of the ICC and then to particularly analyse the ICC OTP as a key player in both the presentation and development of the rationales.

The narrative of the thesis is two-fold, a historical journey charting the development of attitudes to the penal aims of international criminal justice by the very institutions that are tasked with implementation and therefore have an important influence on how these rationales are shaped in reality. It is also a detailed examination of the OTP in its public presentation of the penal aims of international criminal justice and how these penal aims were reflected in actual implementation. It seeks to establish the links between practice and theory and begin to show the ways in which prosecutorial decision-making can contribute to, or in other cases undermine, the stated rationales.

The first chapter relies on historical documents and analyses of the work of primarily the post world war II tribunals and the two ad-hoc UN tribunals of the 1990s. It introduces the concepts of penality promoted in international criminal justice and charts the complicated history of the penal rationales and some of the confusion surrounding their association with international criminal justice. Chapter 2 draws on the existing academic literature on penal rationales and criminological analysis of their application in the settings of international criminal justice. This is an important aspect of the research as it reveals the flaws and particular obstacles to implementing these rationales in the context of international criminal justice and sets the groundwork for later critiques of the emphasis on certain rationales by the OTP Prosecutor. The twin focus on victims and prevention in the rhetoric of the OTP means that these areas are given particular attention in this early analysis and it is from the base of this theoretical analysis that later judgements on the appropriateness of the Prosecutor's interpretations are founded.

The discussion at this stage introduces victims as an 'aim' of international criminal justice. This thesis was an iterative process and it became clear at an early stage of the research process that commentators on the ICC, and to a large extent the OTP itself, have elevated victims to become part of the justificatory discourse for the existence of the ICC. The OTP has particularly highlighted 'victim-related objectives' in its decision-making. The early chapters, therefore, needed to begin the discussion on the role of victims, not in the traditional participatory sense that is usually examined in relation to the ICC, but in the sense of targeted 'recipients' of justice and victim 'satisfaction'

as a penal aim in itself. This has long been part of the discussion amongst penal philosophers regarding the 'place' of victims in penality, and is parallel to, but not always recognised in the more practical analyses regarding victim participation.

The aim of the early chapters therefore is to shed light on the history and theoretical basis behind the main rationales of international criminal justice and consolidate a description of attitudes to the penality of international criminal justice and problems associated with that penality at the advent of the ICC.

The aim of chapter 3 is to analyse the founding documents of the ICC itself, focusing on the ICC Statute and RPE as the key documents from which the OTP was to draw its guidance. This chapter does not analyse the OTP's interpretation of these documents but is a largely descriptive chapter that looks at the Statute in its pure form as the legal basis from which the OTP draws its mandate. It largely ignores later developments in caselaw as the focus of this work is the first 9 years and the OTP's interpretation and presentation of its role during this time. This chapter also develops the discussion regarding the 'place' of victims in the ICC's penality and whether the Statute clarifies their role, if any, in relation to the aims of the ICC.

It is in chapter 4 that the thesis begins to develop its analysis of how the OTP has interpreted its role vis-à-vis the rationales and aims for the ICC and moves from the legal documents to the practice of the ICC post 2002. This chapter is largely descriptive and draws on documents published by the OTP that give an indication of its own approach to the penal aims of the Court and to the implementation of those aims. This body of documents comprises mainly of speeches (by the senior members of the OTP, mainly the Prosecutor and deputy Prosecutor), press releases and OTP policies. All the documents produced in the period under study were researched. As an iterative study, analysing the documents themselves revealed the key themes being promoted by the OTP through various channels. As chapter 4 shows these were prevention and victims. The analysis of all public statements as well as policy documents is intended to reveal the public presentation of the rationales of the OTP and therefore the penal aims promoted and publicly associated with its work. These documents represent the public justification for strategy and decision-making and as a whole represent a picture of the direction the OTP presented for international criminal justice.

As one of the key findings of this thesis is that prevention and victims have been emphasised by the ICC OTP beyond the ability of the ICC or international criminal justice in general to deliver, it was central to the thesis to establish what was being presented by the OTP. As stated above, this thesis does not pretend to empirical analysis of the effects of these speeches, policy documents and press releases on the particular audiences to which they were directed. As a publicly available body of documents accessible to all on the OTP section of the ICC website they give a clear picture of the totality of the presentation of the OTP's vision for the ICC. It is not always easy to attribute certain strategies to each rationale and where a policy or strategy or approach may serve multiple rationales this is noted. The aim is to ascertain the direction

promoted by the OTP through its various methods of communication and try to identify the key messages it is communicating. The prevalence therefore of victims and prevention as justificatory motifs and rationales for action is gleaned from the totality of the documentation and key examples given. To this end, the relevant legal weight of the various documents does not impinge on the message communicated widely, across multiple forms of communication regarding the aims and rationales underpinning the OTP's work. The rhetoric is the key interest here, and its potential to associate, or continue the association, of certain rationales with the justification of international criminal justice.

The potential effects of the penal aims emphasised in these statements and policies is examined in the subsequent chapters which attempt to outline some of the areas where implementation has not lived up to the rhetoric of the OTP and the potential effect of emphasising certain penal aims over others. These chapters use examples from the implementation phase of the first nine years of OTP operation to elucidate areas of potential problem both in terms of operational choices conflicting with rhetoric or the conflict between different theories put forward. The thesis being that it is important for the OTP to know what theory it is promoting if it is to coherently implement and make operational decisions that support that theory. The thesis recognises that the problems inherent to prevention and victim satisfaction identified in chapter 2 are still not resolved by the work of the ICC. These chapters draw heavily on academic and NGO accounts of the operational aspects of the OTP's work including empirical work done with victims. It was not within the scope of this thesis to do empirical research with victims directly as this represents a small aspect of the penality of the ICC. However, the academic and NGO research highlights some of the areas of potential difficulty for the OTP approach and therefore areas for further detailed research.

The document-based approach is the most appropriate way to give an overview of the issues raised by the penality of international criminal justice and the publicly presented approach of the OTP. A study of this size can only hope to highlight the issues of such a vast subject area but by beginning to apply the theories of penal philosophy to the rhetoric and practice of the ICC OTP some of the persistent flaws and obstacles in international criminal justice become apparent. This modest study only hopes to contribute to the debates in this area and provide some indications of where problems lie and where further study, analysis and direction changes may be needed. The directions adopted in the years following the bounded time of this study show that some of this has already been recognised, as pointed out in chapter 7. However there remains little in the way of analysis of the impact of the penality supported by prosecutorial offices and this initial study hopes to begin to highlight the interplay between penal philosophy and practical prosecutorial decision-making and outcomes.

Key Concepts explained

A Criminal Justice Approach

This thesis conceives criminal justice as a whole process and not only criminal law. Criminal justice is a distinct field of study that refers to the complex of

practices and institutions that range from the construction of crimes and criminal jurisdiction; through the establishment of institutional practices to enforce the law including investigation, arrest and trials; to the determination of guilt or innocence and the imposition of punishment.[20] Garland coined the term "penality" for "the network of laws, processes, discourses, representations and institutions" constituting criminal process.[21] This research is based on the notion that punishment is the outcome of a complex set of interrelated processes, with penal objectives at their core.

A criminal justice approach therefore is concerned with institutions - their processes, the philosophical and theoretical justifications underpinning their functioning and how they interrelate in practice. As suggested by Roberts, "serious engagement with international criminal justice, whether in its predominantly theoretical or practical registers, requires sympathetic appreciation of the political, social and cultural contexts of legality, and therefore also of its historical and philosophical foundations."[22] This approach can be seen as part of the "second generation dialogue" initiated by Drumbl who sees international criminal justice as having developed to the stage of "reappraisal, maturation and self-improvement."[23]

By taking a criminal justice approach, this research contributes to the emerging analyses and debates within international criminal justice, clarifying key concepts and analysing the aims and impacts of the international criminal prosecutions already taking place. This will inform the development of theory relevant to the international context and the policy and practice of existing institutions attempting to interpret their operational role.

Relevance of institutional focus

The development of international criminal justice is inextricably linked to the history of the international criminal tribunals and courts responsible for building the legal framework and for enforcement. Without institutions to enforce the criminal law it is largely meaningless,[24] although, the institutional embodiment of international criminal justice has been exceedingly limited.

The advent of the International Military Tribunal (IMT) at Nuremburg and the International Military Tribunal for the Far East (IMTFE) at Tokyo following the Second World War represented a watershed. While power politics prevented the development of further institutions in the fifty years following these tribunals,[25] prosecutions at domestic level under international law continued until the advent of United Nations Security Council (UNSC)-created

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[20] N Lacey 'Introduction: Making sense of criminal justice' in Lacey N (ed) A Reader in Criminal Justice (OUP 1994) 1, 2 and 4.
[21] D Garland Punishment and Modern Society: A Study in Social Theory (OUP 1990) 17.
[22] Roberts 'Restoration and Retribution' (n13) 119 (emphasis in original).
[23] Drumbl Atrocity (n3) 22.
[24] MC Bassiouni 'The Philosophy and Policy of International Criminal Justice' in L. C Vohrah *Man's Inhumanity to Man: Essays on International law in Honour of Antonio Cassese* (Kluwer Law International 2003) 65, 98.
[25] MC Bassiouni The Legislative History of the International Criminal Court: Volume 1 Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2005) chapter 2.

ad-hoc international criminal tribunals for the former Yugoslavia and for Rwanda in the 1990s – the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). There have also been a number of specially constituted "hybrid" courts and tribunals at national level with international cooperation.[26] It was only with the establishment of the ICC in 2002 that a permanent institution for enforcing international criminal law came into existence and the continuity of international criminal justice was assured.

One of the main implementing mechanisms of international criminal law is national prosecutions under international criminal law.[27] National enforcement has been a relatively neglected area of international criminal law scholarship despite the prevalence and long history of such prosecutions.[28] This is lamentable as national criminal process is often considered "the primary vehicle for the enforcement of international crimes" and preferable to international prosecutions.[29] This preference is partly due to the need to connect with, and represent, local populations for the pedagogical functions of criminal justice to take effect and for legitimacy in the eyes of affected populations.[30] While national prosecutions are not the focus of this work, their important role in ensuring the prosecution of international crimes should be acknowledged at the outset.

The international institutions applying international criminal law remain central to the development and existence of international criminal justice and for this reason merit careful study. This is partly due to their historical and symbolic significance in developing and enforcing international criminal justice.[31] These institutions facilitate analysis of the characteristically international aspects of the aims, functions and effects of international criminal justice. From analysis of these institutions wider lessons can be drawn for the emergent permanent system of international criminal justice in the form of the legal regime developed through the ICC.

Relevance of the ICC as core institution of international criminal justice

The ICC was a product of many years of campaigning by legal and NGO lobbyists, and some States, which finally culminated in the Rome Conference where the Statute of the ICC was negotiated by 148 countries through their

[26] These include Special Court for Sierra Leone (SCSL), East Timor Special Panels; Extraordinary Chambers in the Courts of Cambodia (ECCC); Kosovo Special Panels; and, the War Crimes Chamber of Bosnia and Herzegovina.

[27] Drumbl Atrocity (n3) 68 says they form the bulk of the prosecutions for international crimes. Cryer et al (n1) 71-72.

[28] Drumbl Atrocity (n3) 68; Drumbl 'Punishing Genocide in Rwanda' Washington & Lee Legal Studies Research Paper Series (June 2006) 4; Cryer et al (n1) 70-71.

[29] Cryer et al (n1) 70; UNSC The Rule of Law (n3) para 40 "domestic justice systems should be the first resort in pursuit of accountability".

[30] Alvarez (n4) 482 "didactic functions of war crimes trials may best be furthered locally" in order to "truly resonate within a culture" and not to appear imposed by international community; Drumbl Atrocity (n3) 128; Iontcheva Turner (n4) 1.

[31] A Cassese 'From Nuremberg to Rome: International Military tribunals to the ICC' in Cassese A, Gaeta P and J Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Vol I (OUP 2002) 3, 8 notes their "symbolic significance" in terms of their "moral legacy".

diplomatic representatives. Representatives of 120 States voted in favour of the final version of the Statute adopted on 17 July 1998. The Rome Statute came into force in July 2002 and has currently been signed and ratified by 122 states across the world.[32] The ICC has jurisdiction over the countries and their citizens that are party to the treaty. However, this jurisdiction is potentially wider through the ability of the UNSC to refer any situation occurring in any country to the Court.[33] As acknowledged in the 2008 proposed budget for the ICC, its legal regime extends beyond the standard judicial remit:

> "Overall, the Court's activities are related not only to the functions of a court but also to a full international criminal justice system, including investigative, prosecutorial, defence, victim participation and reparation, cooperation, security and detention functions."[34]

The responsibilities of its governing body, the Assembly of State Parties (ASP), are over-seeing the strategic direction and the financial and general management of the court. This extends to a quasi-legislative role through the ASP's work in defining and developing crimes through the Elements of Crimes and the crime of aggression.[35] The ICC has been seen as having the potential to influence national criminal justice systems through the complementarity regime of the ICC exerting "conformist pressures on national and, in particular, local accountability mechanisms.".[36] The objectives emphasised by the ICC are consequently significant not only for the direction of the institution itself but for global attempts to respond to atrocities included as international crimes. It is equally imperative to analyse and understand the actual direction being taken by the ICC as a functioning institution, not just its theoretical blueprint as designed by the diplomats at Rome. Within the ICC one of the primary areas that influences its direction is prosecutorial decision-making.

Relevance of prosecutorial decision-making in shaping penal objectives

There is no single legislating body directing the system of international criminal justice. States play an important role in deciding the objectives and functions of the institutions they create and sponsor. This is achieved directly through treaty negotiations and indirectly through the UN, which has played a role co-ordinating and encouraging many institutions of international criminal justice.[37] States, therefore, as the architects of the international institutions and as direct implementers of international criminal justice through national legal systems, are the central agents of policy-making for international criminal justice and have the power to influence its objectives and functions.

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[32] ICC website 'The States Parties to the Rome Statute' <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx > accessed 30 Jun 2014.

[33] RS Article 13(b) stipulates that UNSC must be acting under chapter VII.

[34] ICC ASP Proposed Programme Budget for 2008 of the International Criminal Court (July 2007) ICC-ASP/6/8 para 7

[35] 'ICC - Assembly of States Parties' <http://www.icc-cpi.int/en_menus/asp/assembly/Pages/assembly.aspx > accessed 30 Jun 2014.

[36] Drumbl Atrocity (n3) 13.

[37] Infra chapter 1 section 1.1.4.

The second key influence over the developing penology of international criminal justice comes from the institutions themselves, or more precisely, their staff.[38] This is particularly relevant to the ICC where there were many vague provisions of the Rome Statute to be interpreted and "operationalised" by the OTP, Registry and judiciary. The judiciary has major influence in interpreting the Statute and managing victims' participation. The Prosecutor and the OTP have a primary role in shaping the work of the ICC in the early stages, through investigative strategy, selection of situations, cases and charges: "[t]hese decisions will fundamentally define the Court's role and purpose."[39] This pivotal position in the ICC institutional architecture makes the OTP's interpretation of the ICC's aims and objectives crucial in the development of the ICC's role and potential effectiveness.[40] The "crucial importance" of the Prosecutor was recognised from the outset: "the decisions and public statements of the Prosecutor will do more than anything else to establish the reputation of the Court, especially in the first phases of its work."[41]

The Prosecutor can also shape the penality of the ICC through its formal statements and actions. The OTP is often the first contact with victims and affected societies; before trials start the OTP is the main point of focus of activity and statements. Public statements by the Prosecutor are a key source of information about the Court, its role and intentions. This role was exaggerated in the first years of the ICC's operation, as the OTP's work was the main activity of the Court until the first trials were started.

The ICC's first operational decade has engendered expectations, entrenched objectives and consolidated moral authority and legitimacy. The ICC builds on a legacy of international criminal justice with both positive and negative aspects and a confusing mix of aims and objectives, not all immediately associated with justice. Chapter 1 sets the scene for this inquiry into the contemporary state of penality at the ICC through detailed analysis of the institutional antecedents of the ICC's development and the penal theories that informed that development.

[38] J Hagan Justice in the Balkans: Prosecuting war crimes in the Hague Tribunal (University of Chicago Press 2003) on the impact of individuals and organisational culture at the ICTY; P Roberts 'Comparative law for International Criminal Justice' in Orucu E and Nelken (eds) Comparative Law – A Handbook (Hart 2007) 39, 40 on 'soft law' and informal practices influencing operational decisions and strategies.

[39] A Greenawalt 'Justice without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) 39 NYU Journal International Law and Politics 583, 585.

[40] R Henham Sentencing and the Legitimacy of Trial Justice (Routledge 2012) the charging decisions of a Prosecutor whether at national or international level are one of the keys points of communication that convey messages about the system and its intentions.

[41] 'The Secretary-General of the UN Statement to The Inaugural Meeting Of Judges Of The International Criminal Court' (11 March 2003) 6.

Chapter 1

Penal aims in the history of international criminal justice

1.1 The Institutions of International Criminal Justice

This chapter analyses the penal aims of the institutions of international criminal justice extant prior to the ICC. The first section introduces the main institutions of international criminal justice. The second section analyses their founding documents and jurisprudence to outline the dominant trends in penal theory as applied to international criminal justice. This chapter also introduces the theories underpinning these penal aims.

1.1.1 The International Military tribunals post WWII

Before the post WWII international military tribunals there had only been minimal attempts at international prosecutions for war crimes and limited scholarship on the concept of international criminal jurisdiction.[42] The objectives highlighted for international criminal justice focused on the prevention of war; the maintenance of peace; and punishment as an end in itself.[43]

The Nuremberg IMT has particular historical and foundational significance as the first serious attempt to prosecute international crimes in an international forum. Its jurisdiction was limited to crimes committed by the Nazi leadership and it tried twenty-two Nazi leaders in person, indicting six organisations as criminal, of which three were found guilty.[44] The charges at Nuremburg included crimes against peace, war crimes, and crimes against humanity.[45] The crimes that made up the Holocaust were subsumed under the general category of crimes against humanity.[46] The emphasis of the Tribunal was on "organised justice"[47] and fair trials.[48] The notable legal principles established by the Nuremberg IMT were individual liability under international law[49] and the

[42] MC Bassiouni The Legislative History of the International Criminal Court: Volume 1 Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2005).
[43] J Alfaro 'Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro Special Rapporteur' A/CN.4/15 and corr. 1, extract from Yearbook of ILC vol II (1950) paras 17-21 and para 6.
[44] A Kochavi Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment (University of North Carolina Press 1998) 167 and 227.
[45] IMT Charter article 6 in *Nuremberg Trial Proceedings Vol. 1 London Agreement of August 8th 1945 and Charter of the International Military tribunal;* M Osiel Mass Atrocity, Collective Memory and the Law (Transaction Publishers 1997) 225-226.
[46] IMT Charter 6 (c).
[47] Alfaro (n43) paras 31-33.
[48] IMT Charter section IV 'Fair Trial' article 16.
[49] R Cryer, Friman, Robinson and Wilmshurst An Introduction to International Criminal Law and Procedure (3rd Ed Cambridge University Press 2014) 118; M Lippman 'Nuremberg: Forty Five Years Later' 7 (1991) Connecticut Journal of International Law 1.

introduction of "conspiracy as a basis for culpability".[50] The Charter of the Tokyo-based IMTFE followed closely that of the Nuremberg IMT.[51] The indictment contained fifty-five charges and covered events stretching back to 1927.[52] Commentators at the end of the twentieth century claim a range of justifications for the establishment of the IMT and IMTFE that reflect the breadth of goals that have continued to characterise international criminal justice initiatives ever since. They include retribution and deterrence;[53] preventing war and maintaining peace and security[54]; upholding the rule of law;[55] creating a historical record;[56] and fulfilling an expressive function educating both Germany and the wider world.[57]

There were no major institutional developments in international criminal justice until the early 1990s. Following the close of the military tribunals, the ILC, with the support of the UNGA, kept the idea of international criminal justice alive through work developing the principles and possible structures of a permanent institution with criminal jurisdiction.[58] This prepared the ground for the rapid evolution of the two ad-hoc tribunals – the ICTY and ICTR.

1.1.2 The UN ad-hoc tribunals

The institutional revival of international criminal justice came with the creation of the ad-hoc criminal tribunals for the former Yugoslavia and for Rwanda in 1993 and 1994 respectively.[59] These tribunals were established to address alleged perpetration of international crimes in the break-up of former Yugoslavia, which was still ongoing at the time, and the 1994 genocide in Rwanda. For this reason their respective jurisdiction was limited, both temporally and geographically.[60] Both tribunals were created by the UNSC under Chapter VII[61] of the UN Charter which linked their objectives to the

[50] Charter of the IMT Article 6; M Drumbl 'Pluralizing International Criminal Justice' (2005) 103 Michigan Law Review 1295, 1306.
[51] The Charter of the International Military Tribunal for the Far East; R J Pritchard (ed) 'A General Preface to the Collection' in The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East Volume 2 (The Edwin Mellen Press 1998) xix, xxvi.
[52] Pritchard (n51) xxxii – xxxiii.
[53] Kochavi (n44) 15, 34, 28, 33; Lippman (n49) 21; M Drumbl Atrocity, Punishment and International Law (University Press 2007).
[54] B Röling 'The Nuremberg and Tokyo Trials in Retrospect' in G Mettraux Perspectives on the Nuremburg Trial (OUP 2008) 604-605; Kochavi (n44) 228-229 and Alfaro (n43) paras 17-21.
[55] Lippman (n49) 21; D Luban Legal Modernism (The University of Michigan 1994) 335
[56] A Cassese 'From Nuremberg to Rome: International Military tribunals to the ICC' in Cassese A, Gaeta P and J Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Vol I (OUP 2002) 6-7; Lippman (n49) 21; G Simpson 'War Crimes: A Critical Introduction' in McCormack and Simpson (eds) The Law of War Crimes (Kluwer Law International 1996) 1, 20.
[57] Luban (n55) 345; Cassese et al Commentary Vol I (n56) 6-7.
[58] International Law Commission (ILC) http://legal.un.org/ilc/ilcintro.htm .
[59] ICTY http://www.icty.org/ and ICTR http://www.unictr.org .
[60] ICTR jurisdiction is limited to serious violations of IHL in Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, 1 January 1994 - 31 Dec 1994, ICTR Statute article 1. ICTY jurisdiction is limited to the countries of former Yugoslavia from 1991, ICTY Statute art 1.
[61] Chapter VII of the Charter of the United Nations (1945), articles 39-51 "Action with respect to threats to the peace, breaches of the peace, and acts of aggression."

UN's peace and security function from their inception. The UNSC resolutions for ICTY and ICTR contain similar wording, including that the UNSC was "convinced" that their establishment "would contribute to the restoration and maintenance of peace."[62]

Both institutions started with prosecutions of relatively low-level individuals before picking up momentum in the late 1990s. The ICTY eventually oversaw the prosecution of two national leaders – if not their conviction at trial. Plavšić entered a plea agreement while Milošević died before the end of the trial.[63] The ICTY has indicted 161 people and has concluded proceedings against 141 persons, 20 cases are ongoing and 13 have been referred to national jurisdiction for prosecution.[64] The ICTR also prosecuted high profile leaders, such as former Rwandan Prime Minister Jean Kambanda. The ICTR has completed 75 cases and transferred 10 to national jurisdiction, with 9 accused remaining at large.[65] In Rwanda, the majority of low-level perpetrators were dealt with through the national courts and a modified local accountability practice called gacaca.[66] The ICTY and ICTR were never intended as permanent institutions of international criminal justice. However neither fulfilled their original timetable to complete trials and appeals by 2008.[67] This meant a change in prosecutorial strategy and amendment of the rules of procedure and evidence to allow the transfer of cases to national courts.[68] The completion strategy for both the ICTY and ICTR is managed through the Mechanism for International Tribunals (MICT), established in 2010 to complete any outstanding work and manage the legacy of the tribunals.[69]

The objectives of the ad-hoc UN tribunals are alluded to in their constitutive documents and elaborated in jurisprudence.[70] The first Annual Report of the ICTY claimed the three main purposes of the tribunal: "to do justice, to deter further crimes and to contribute to the restoration and maintenance of peace."[71]

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[62] UNSC res 808 (1993) and UNSC res 827 (1993) for the ICTY; UNSC Res 955 (1994) for the ICTR.

[63] Biljana Plavšić (IT-39 & 40/1) "Bosnia and Herzegovina" 'Case Information Sheet' http://www.un.org/icty/cases-e/cis/Plavšić /cis-Plavšić .pdf and Milošević (IT-02-54) "Kosovo, Croatia and Bosnia" 'Case Information Sheet' http://www.un.org/icty/cases-e/cis/s*Milošević*/cis-slobodan*Milošević*.pdf .

[64] ICTY website http://www.icty.org/sid/24 accessed 30 May 2014.

[65] ICTR 'Status of Cases' http://www.unictr.org/Cases/tabid/204/Default.aspx accessed 30 May 2014.

[66] Drumbl Atrocity (n53) 72.

[67] Cryer et al (n49) 136; W Schabas The UN international criminal tribunals: the former Yugoslavia, Rwanda and Sierra Leone (Cambridge University Press 2006) 40-43.

[68] UNSC resolutions 1503 (2003) and 1534 (2004) on ICTY and ICTR completion strategy; ICTY Thirteenth Annual Report (2006) and ICTR Eleventh annual report (2006) 2; Cryer et al (n49) 134 on ICTY and 141-142 on ICTR.

[69] MICT website: www.unmict.org/ .

[70] This analysis of ICTY and ICTR jurisprudence owes a debt of gratitude to the judgments and documents available at www.icty.org and www.unictr.org. Other useful tools were the fully searchable database of the Netherlands Institute of Human Rights at the Utrecht Law School SIM Documentation Site http://sim.law.uu.nl/sim/Dochome.nsf/ [due to go offline 1 January 2015] and HRW Genocide, War Crimes and Crimes Against Humanity: A Topical Digest of the Case Law of the International Criminal Tribunal for the Former Yugoslavia (HRW 2006).

[71] ICTY 'Annual Report Of The International Tribunal For The Prosecution Of Persons Responsible For Serious Violations Of International Humanitarian Law Committed In The

In establishing the ICTY, the UNSC focused on the ability to obtain peace and justice primarily through the traditional rationales recognisable from national penal theory – retributive justice and deterrence.[72]

The *Mucić et al* (also known as Celebici) case seems to have set interpretational precedent, as quoted in the *Blaškić* trial judgment:

> "The Trial Chamber hearing the Celebici case noted four parameters to be taken into account in fixing the length of the sentence: retribution, protection of society, rehabilitation and deterrence."[73]

Nearly all subsequent sentencing pronouncements follow this template, focusing on retribution and deterrence with rehabilitation mentioned but not given significant weight.[74]

In establishing the ICTR, the UNSC emphasised the objective of justice through punishment and the goal of national reconciliation.[75] In the ICTR jurisprudence references to the general objectives of the tribunal and specific sentencing aims have generally been cursory and formulaic.[76] Nearly every judgment contains a version of the following summary of the objectives as determined by the UNSC resolution establishing the ICTR:

> "In determining the sentences, this Chamber is mindful that the Security Council […] established the Tribunal to ensure the effective redress of violations of international humanitarian law in Rwanda in 1994. The objective was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and promote national reconciliation and the restoration of peace."[77]

Territory Of The Former Yugoslavia Since 1991' (August 1994) A/49/342-S/1994/1007 para 11.

[72] UNSC Provisional Verbatim Record 3175th Meeting (22 Feb 1993) S/PV.3175; UNSC Res 808 (1993) and SC Res 827 (1993).

[73] *Blaškić* (IT-95-14) Trial 3 Mar 2000 para 761.

[74] *Deronjić* (IT-02-61) Appeal 20 Jul 2005 paras 136-137; *Kordić and Čerkez* (IT-95-14/2) Appeal 17 Dec 2004 paras 1074 and 1079; *Mucić et al.* (IT-96-21) Appeal 20 Feb 2001 para 806; Bralo (IT-95-17) Trial 7 Dec 2005 para 22; Limaj et al.(IT-03-66) Trial 30 Nov 2005 para 723 and footnote 2420; Strugar (IT-01-42) Trial 31 Jan 2005 para 458; *Deronjić* (IT-02-61) Trial 30 Mar 2004 paras 142-143; *Dragan Nikolić* (IT-94-2) Sentencing 18 Dec 2003 paras 132-133.

[75] UNSC Provisional Verbatim Record 3453th Meeting (8 Nov 1994) S/PV.3453 18 the President of the SC reiterates the theme of the whole discussion "to promote both justice and national reconciliation". Preamble to SC Res 955 (1994).

[76] R Sloane 'Sentencing for the 'crime of crimes': The evolving 'common law' of Sentencing of the International Criminal Tribunal for Rwanda' (2007) 5 JICJ 713, 716; G Mettraux International Crimes and the ad-hoc Tribunals (OUP 2005) 344 "more pro forma than in any way determinative of sentences."

[77] Kayishema and Ruzindana (ICTR-95-1-T) Sentencing 21 May 1999 para 1; Musema (ICTR-96-13-A) Trial 27 Jan 2000 para 985; Rutuganda (ICTR-96-3) Trial 6 Dec 1999 para 455; Ruggiu (ICTR-97-32) Trial 1 June 2000 para 32; Serushago (ICTR-98-39) Trial 5 Feb 1999 para 19; Kambanda (ICTR-97-23) Trial 4 Sep 1998 para 26; Serugendo (ICTR-2005-84) Trial 12 Jun 2006 para 31; Bisengimana (ICTR 00-60-T) Trial 13 Apr 2006 para 106; Kamuhanda (ICTR-95-54A-T) Trial 22 Jan 2004 para 753.

ICTR jurisprudence repeatedly refers to the traditional goals of sentencing as "deterrence, retribution and rehabilitation."[78] The most prevalent addition to this list is "protection of society".[79] The conventional goals of punishment and the Security Council goals have been repeated at the ad-hoc tribunals without shedding light on the complexities of fulfilling these objectives through a criminal process or how these objectives and the values they instantiate may conflict.

1.1.3 Internationalised and mixed courts

Internationalised or hybrid courts are national criminal justice processes with input from the international community, mainly through the UN. They follow the substantive and procedural law models of the ICTY and ICTR and are limited in temporal and geographical reach. Drumbl notes the "considerable homogeneity amongst [all] these international institutions", in terms of their procedure, basic legal principles and applied substantive law.[80]

Hybrid tribunals reflect varying levels of international and domestic participation and control. For example, the Special Court for Sierra Leone (SCSL), established by treaty between the UN and the Government of Sierra Leone, is closer to a nationalised international tribunal model.[81] It is linked to the ICTR and ICTY in its Statute, Rules of Procedure and Evidence (RPE), sentences, and binding Appeals Chambers decisions.[82] The Panels with Exclusive Jurisdiction over Serious Criminal Offences in Timor-Leste and Serious Crimes Unit (East Timor Special Panels) model is also dominated by international participation. The Special Panels were created by the UN temporary administration, but placed within the domestic judiciary.[83] Panels include national and international Judges and staff, applying international and "local law".[84] The War Crimes Chamber of the State Court of Bosnia and Herzegovina is a mixed tribunal, structured as "a court within a court".[85]

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[78] Rugambarara (ICTR-00-59-T) Sentencing 16 Nov 2007 para 11; Serugendo (n77) para 33; Aleksovski (IT-95-14/1-A) Appeal 24 Mar 2000 para 185; *Mucić et al.* (n74) para 806.

[79] Niyitegeka (ICTR-96-14-T) Sentence 16 May 2003 para 484; Kambanda (n77) para 28; Elizaphan and Gérard Ntakirutimana (ICTR-96-10 & ICTR-96-17-T) Trial 21 Feb 2003 para 882; Ndindabahizi (ICTR-2001-71-I) Sentence 15 July 2004 para 498; Nahimana, Barayagwiza and Ngeze (ICTR-99-52-T) Sentence 3 Dec 2003 para 1095; Simba (ICTR-2001-76-T) Sentence 13 Dec 2005 para 429; Semanza (ICTR-97-20-T) Trial 15 May 2003 para 554; Seromba (ICTR-2001-66-I) Trial 13 Dec 2006 para 376; Kayishema and Ruzindana (n77) para 2.

[80] Drumbl Atrocity (n53) 7

[81] See http://www.sc-sl.org/index.html; Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002; Special Court Agreement 2002 (Ratification) Act; and, S/2000/915 Report of the UN Secretary-General on the Establishment of a Special Court for Sierra Leone [to the Security Council] 4 October 2000.

[82] Arts 14(1), 18(1), 20(3) Statute of SCSL, Annex to Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002.

[83] UNTAET Reg 2000/15 (6 Jun 2000).

[84] S de Bertodano 'East Timor – Justice denied' 2 JICJ 911.

[85] UNSC The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (2004) UN doc s/2004/616 para 38; Cryer et al (n49) 194.

The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of Democratic Cambodia (ECCC), established by treaty between the national government and the UN, represents another variation on the hybrid court model. The court is dominated by Cambodian appointed Judges; however, no decision can be made without agreement from at least one of the international judges.[86] Other judicial initiatives involving international co-operation on a more modest scale include the role of international judges and prosecutors in the courts in Kosovo; the Commission for the Investigation of Illegal Groups and Clandestine Security Organisations in Guatemala;[87] the Iraqi Special Tribunal; and the War Crimes Chamber of the Belgrade District Court in Serbia. Both the Iraqi Tribunal and Serbian War Crimes Chamber have been established with some international support but are, in formal legal terms, "entirely national in nature".[88]

The stated objectives of these courts are similar to those of the ad-hoc tribunals, to the extent they are discussed at all. UNSC Resolution 1315 (2000) requesting the UN Secretary-General to negotiate the establishment of the SCSL explicitly states the goals of "bringing justice" (both procedural and substantive) and "ensuring lasting peace" through the specific objective that the SCSL "would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace."[89] The involvement of the international community through the UN was justified in formal legal terms by characterising the situation there as a threat to peace and security in the region.[90]

For the ECCC, both the Cambodian Government and the UN General Assembly emphasised the objectives of "justice and national reconciliation, stability, peace and security".[91] The relevance of peace and security in Cambodia so many years after the events may seem questionable. The emphasis of the Secretary-General in recommending the establishment of the Extraordinary Chambers is more nuanced and does not insist on peace and security but on accountability, national reconciliation and restoration of society.[92] Also highlighted is the "moral obligation" to do justice and the educative role of trials for prevention and the rule of law.[93] The ECCC aims were justice for victims and survivors; setting the historical record straight and educating new generations; strengthening the rule of law; serving a moral educative function for the Cambodian people and the global community; creating a deterrent effect; and social reconstruction.[94]

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[86] ECCC website at http://www.eccc.gov.kh/english/; United Nations Assistance to the Khmer Rouge Trials (UNARKT) website at http://www.unakrt-online.org.
[87] UNSC The Rule of Law (n85) para 38.
[88] Cryer et al (n49) 195-197..
[89] UNSC res 1315 (2000) Preamble.
[90] UNSC res 1315 (2000) Preamble.
[91] UNGA res 57/228 18 December 2002.
[92] UNGA 'Identical letters dated 15 March 1999 from the Secretary General to the President of the General Assembly and the President of the Security Council' (16 Mar 1999) A/53/850-S/1999/231 paras 2-3.
[93] Ibid para 2.
[94] FAQs section of ECCC website "Why are we going to have a trial now?" <http://www.eccc.gov.kh/english/faq.view.aspx?doc_id=40 accessed 30 August 2007>.

The objectives of the East Timor Special Panels are not stated in any of the regulations on its establishment. Commentators have summarised its aims as focused on prosecutions and retributive justice only.[95] In contrast, the Kosovo Special Panels' main purpose was "to support more peaceful relations between different groups in society and address a broader range of crimes".[96] It may be that there is less of a focus on creating a historical record and truth-telling at the SCSL and East Timor Special Panels, as both conflicts were also addressed by TRCs that fulfilled a wider truth-telling function and some reconciliatory aims.[97] The Iraqi High Tribunal website emphasises justice and deterrence of state crime through punishment and seems to imply a belief in strengthening the rule of law and pre-empting private vengeance through formal legal processes.[98]

1.1.4 The unifying role of the UN in International Criminal Justice

There is some debate as to the extent to which international criminal justice is a 'system' of justice with common aims. Roberts describes seven concentric circles radiating from the central institution of the ICC,[99] others have rather more generally described it as a mosaic of disparate initiatives.[100] Lacey proposed that, even at national level, criminal justice can be seen either as a system in that it is "an integrated set of processes all forming part of one overarching, coherent social practice" or as "a diverse array of agencies and activities, all operating with their own discrete values and goals and employing different kinds of discretionary power".[101] The institutions of international criminal justice share a common framework and approach. This includes a high level of consistency in the laws applied and the method to apply them, featuring adherence to due process and fair trials norms. Another common factor between these institutions is their jurisprudential method which was drawn from national criminal justice practices and basic principles of criminal law across various nations.[102] The validity of that transfer is debated, but it is the foundation for international responses to violations of international criminal law.[103]

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[95] S Linton 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' (2001) 12 Criminal Law Forum 185, 217; Drumbl Atrocity (n53) 61.
[96] Cryer et al (n49) 192.
[97] Sierra Leone TRC <http://www.trcsierraleone.org/drwebsite/publish/index.shtml> accessed 19 Sept 2007. East Timor Reception, Truth and Reconciliation Commission (known by its Portuguese acronym CAVR) incorporating the Community Reconciliation Process (CRP).
[98] The Iraqi High Tribunal: http://www.iraq-iht.org/en/aboutthecourt.html.
[99] P Roberts 'Comparative law for International Criminal Justice' in Orucu E and Nelken (eds) Comparative Law – A Handbook (Hart 2007) (n38).
[100] MC Bassiouni The Legislative History of the International Criminal Court: Volume 1 Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2005).
[101] N Lacey 'Introduction: Making sense of criminal justice' in Lacey N (ed) A Reader in Criminal Justice (OUP 1994) 4.
[102] MC Bassiouni 'The Philosophy and Policy of International Criminal Justice' in Vohrah et al (eds) *Man's Inhumanity to Man* (Kluwer Law International 2003) 65, 125.
[103] M Drumbl 'Toward a Criminology of International Crime' (2003) 19 Ohio State Journal on Dispute Resolution 263, 268. Critcising this transposition - I Tallgren 'The Sensibility and Sense of International Criminal Law' (2002) 13 EJIL 561, 565; T Farer 'Restraining the Barbarians: Can International Criminal Law Help?' (2000) 22 Hum Rts Q 90, 92-3. M Drumbl 'Toward a Criminology of International Crime' (2003) 19 Ohio State Journal on Dispute

The similarities and coherence between these organisations can be attributed largely to the strong coordinating role of the UN in developing and establishing international criminal justice initiatives. Much of this work has been carried out by the Secretary-General's office which has outlined the common objectives intended for these initiatives:

> "[T]he United Nations has established or contributed to the establishment of a wide range of special criminal tribunals. In doing so, it has sought to advance a number of objectives, among which are bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace."[104]

The UN's role has done much to give this loose network of initiatives coherence as a system and to validate key objectives of international criminal justice. These objectives have become the accepted justificatory discourse for criminal justice responses and are rarely questioned. Bassiouni reflects this apparent consensus when he describes "three essential value-oriented goals" of international criminal justice which "are reflected in almost all legal philosophies, irrespective of their differences".[105] These goals are: prevention (through deterrence and moral education); peace (through retribution and corrective justice ideally satisfying victim's desire for vengeance) and redress (for victims).[106]

1.2 The penal aims of the pre-ICC institutions of international criminal justice

1.2.1 Justice

Justice has a number of meanings in both everyday parlance and philosophical analysis – referring, for example, to social and economic, distributive, legal, procedural, restorative or retributive justice. Philosophers point out a basic asymmetry of justice and injustice in that it may be easier to recognise injustice than define justice itself.[107] Injustice reflects the feeling of not having been treated fairly or reasonably - this does not necessarily mean equally in the sense of strict parity of result, but having been given equal consideration and treated fairly in the evolution or resolution of the situation.[108] Justice is

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Resolution 315, 331 recognise theories developed at national level are relevant to international criminal justice.

[104] UNSC The Rule of Law (n85) para 38.

[105] MC Bassiouni 'The Philosophy and Policy of International Criminal Justice' in L. C Vohrah *Man's Inhumanity to Man: Essays on International law in Honour of Antonio Cassese* (Kluwer Law International 2003) 65, 125.

[106] Ibid 125.

[107] J Lucas On Justice (Clarendon Press 1980) 8; H McCoubrey and N White Textbook on Jurisprudence (3rd ed Blackstone Press 1999) 322.

[108] Justice and fairness are often seen as interchangeable, Lucas (n107) 2; Aristotle Ethics

essentially concerned with how people interrelate in society and how people are treated "relative to one another".[109] Lucas describes justice as an "essentially other-regarding virtue" that relates to the behaviour of others and what each deserves or feels they deserve.[110] Therefore there can be no neat formulation to define a state of justice or its abstract features as it depends on reason and the balancing of interests and rights between different parties.[111] However, the concepts of desert and balance are central to widespread perceptions of justice.

McCoubrey and White distinguish between 'justice according to the law' and "justice as an ideal form of dealing", which can also be seen in terms of procedural justice and the justice of outcomes.[112] Legal justice has certain values associated with it, notably equity (of treatment or consideration rather than of outcomes), fairness and impartiality.[113]

The post-WWII tribunals refer to both procedural and substantive justice. Their aim was "to do justice according to justice".[114] This dual conception of justice related to outcome (deserved punishment) and process (fair legal trials) runs through the discourse surrounding the establishment of the IMT.[115] The Special Proclamation establishing the IMTFE notes the intention "that war criminals should be brought to justice"[116] and that "stern justice shall be meted out to all war criminals."[117] Justice can be equated with punishment in this statement. That link between justice and the punishment of criminal wrongs is also indicated in the Judgment of the Nuremberg IMT:

> "To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[118]

(Penguin Books 1976) 172.

[109] J Gardner 'Crime in proportion and perspective' in Ashworth A and M Wasik (eds) Fundamentals of Sentencing Theory (Clarendon Press 1998) 35.

[110] Lucas (n107) 3.

[111] Ibid 18 and 67.

[112] McCoubrey and White (n107) 297-298. Lucas (n107) 2 distinguishes between procedural and substantive justice.

[113] Lucas (n107) 18 "being impartially partial to all parties"; M Loughlin Sword and Scales (Hart 2000) 56-57.

[114] Alfaro (n43) para 34 quoting Lord Simon's speech in the House of Lords in 1943 on the aims of proposed post-war international trials.

[115] *Nuremberg Trial Proceedings Vol. 1 London Agreement of August 8th 1945 and Charter of the International Military tribunal.*

[116] 'Special Proclamation: Establishment of an International Military Tribunal for the Far East' 19 January 1946 in The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East Volume 2 (The Edwin Mellen Press 1998).

[117] Ibid.

[118] The Nuremberg Judgment in Nuremberg Trial proceedings Vol 22 Two Hundred And Seventeenth Day Monday, 30 September 1946 (Avalon Project Yale 1997) at 462.

Justice was also invoked in UNSC discussions as one of the primary reasons for establishing the ICTY and ICTR.[119] The UNSC resolutions establishing the tribunals confirm their objectives as "to take effective measures to bring to justice the persons who are responsible".[120] ICTY jurisprudence characterises the aim of the Tribunal as "to bring justice to both victims and their relatives and to perpetrators."[121] What justice means to the victims, perpetrators or the wider international community is never clarified. ICTR Judges rarely invoked justice as an explicit aim.[122]

1.2.2 Retribution

The concepts of justice and retributive justice overlap considerably in international criminal justice theory and discourse. As Aukerman has pointed out, retribution is often "more politely described in terms of combating impunity or bringing perpetrators to justice. […] the underlying assumption of such statements is that such horrible crimes should not go unpunished".[123] Retribution has a long tradition as a justification of punishment. It has its origins in the Roman lex talionis and the brutal Old Testament notion of 'an eye for an eye'. While these vengeance-related antecedents can be somewhat misleading in regard to modern retributive theory, they share a basic relation to desert as the underlying principle. Retribution thus implies that those established to be guilty of wrongdoing deserve to be punished in much the same way that those who do something of merit deserve to be rewarded. Retributive theories are informed by a basic Kantian belief in respect for individuals and human dignity.[124] Roberts identifies "the dignity principle" that "subjects must at all times be treated with concern and respect to which they are entitled just in virtue of their humanity".[125]

As a principle of distribution, retribution demands punishment only in proportion to the culpability or blameworthiness of the offender and not in relation to any future social benefits,[126] nor purely to satisfy feelings of vengeance. Retributive theories constitute theories of justice by directly

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[119] For the ICTR - UNSC Verbatim Record 3453 (n75) at 3 (France), 7 (Czech Republic), 9-10 (Brazil), 11 (China), 16 Oman. For the ICTY - UNSC Verbatim Record 3175 (n72) 4 (Brazil), 8 (France), 12 (US), 19-20 (Hungary), 23 (Spain).

[120] UNSC res 955(1994) on ICTR; UNSC res 808 (1993) and UNSC res 827 (1993) on ICTY

[121] Dero*njić* Trial (n74) para 133; *Dragan Nikolić* (n74) para 4 and 120. Similar statement in UNSC Verbatim Record 3175 (n72) at 8 (France). *Blagojević and Jokić* (IT-02-60) Trial 17 Jan 2005 para 814.

[122] Only Ruggiu (n77) para 32 adds justice to the standard list of purposes.

[123] M Aukerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' 15 Harvard Human Rights Journal (2002) 39, 56-57.

[124] I Kant The Metaphysics of Morals ([1797] ed M Gregor (Cambridge University Press 1996) 209, J Hampton 'The retributive idea' in Forgiveness and Mercy (Cambridge University Press 1988) 124 underpinning all retributivist theories is the "Kantian theory of human worth, which makes people intrinsically, objectively and equally valuable".

[125] P Roberts 'Subjects, Objects, and Values in Criminal Adjudication' in Duff, Farmer, Marshall and Tadros (eds) The Trial on Trial Volume 2: Judgment and Calling to Account (Hart Publishing 2006) 37, 40-41.

[126] While theories of retributivism recognise there may be further social benefits or effects to punishment they insist that these should not be the basis for apportioning punishment, the amount and form of punishment can only be related to what the offender has done rather than potential consequences. This is seen as "a requirement of justice"; A von Hirsch Censure and Sanction (OUP 1993) 6.

addressing injustice through punishment imposed following a reasoned, fair process.[127] Retribution is about holding individuals to account for their actions and imposing punishment "as an intrinsically appropriate response to crime"[128] not contingent on its consequences or the effects it may engender.[129] In pure retributive theory, the good that is done to justify the harm of punishment is justice.[130]

Different versions of the retributive rationale exist, from the intuitive belief that criminals deserve to suffer for their wrongs and that there is a duty to punish all offenders,[131] through theories of unfair advantage[132] and re-establishing the balance of society that was unbalanced by the criminal act by repaying through punishment some kind of debt to society.[133] These versions of retributivism have not been particularly emphasised by the international institutions of criminal justice, which have either insisted on retributive punishment simply as achieving justice (rectification based on desert)[134] or as a form of censure, expressing condemnation and reprobation.[135] Later theories of retributivism have developed more sophisticated justifications of its worth, related to respecting the moral autonomy of the individual and revaluing the victim.[136] These theories largely depend on the expressive function of trials and punishments.

The expressive function of trial and punishment has been recognised by sociologists and philosophers as a way of explaining criminal justice practices and their effects.[137] Feinberg developed one of the most influential theories of the expressive function of punishment, attributing to punishment a form of "symbolic public condemnation" that involved authoritative disavowal; symbolic non-acquiescence; vindication of the law; and absolution of others.[138]

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[127] Lucas (n107) 67.
[128] Duff 'Penal Communications: Recent work in the philosophy of Punishment' (1996) Crime and Justice 1, 4.
[129] M Moore Placing Blame: A General Theory of the Criminal Law (Clarendon Press 1997) 91.
[130] Ibid 153.
[131] Moore Placing Blame (n129) Chapter 2.
[132] H Morris 'A Paternalistic Theory of Punishment' in Garland and Duff (eds) A Reader on Punishment (OUP 1994) 95; R Sloane 'The Expressive Capacity of International Punishment' Columbia Law School Public Law and Legal Theory Working Paper Group 06-112 (May 2006), 5 denies unfair advantage thesis for genocide finding it 'bizarre' to say a genocidaire accrues benefits others eschew by conforming to norms. Cf J Hatzfeld A Time for Machetes (Serpent's Tail 2005) claiming one motivation for genocidal killing in Rwanda, as well as group solidarity and fear, was stealing land and goods owned by Tutsi's, and other tangible benefits such as increased status and power.
[133] Sloane (n132) 51 sees this as "utterly misplaced" at international level as the vision of the state is warped by their involvement with the crimes; the societal debt may not be owed to the 'community' who authorises the punishment.
[134] Hampton 'The retributive idea' (n124) 238 "wrong occasions punishment not because pain deserves pain, but because evil deserves correction."
[135] Von Hirsch (n126).
[136] Von Hirsch (n126); Hampton 'The retributive idea' (n124); A Haque 'Group Violence and Group Vengeance: Toward a retributivist theory of international criminal law' (2005) 9 Buffalo Criminal law Review 273.
[137] A Duff and D Garland "Preface: Feinberg J 'The Expressive Function of Punishment' in Duff and Garland (eds) A Reader on Punishment (OUP 1994) 71.
[138] J Feinberg 'The Expressive Function of Punishment' in Duff and Garland (n137) 71 and 73;

Conceptualising punishment as communication cuts across a number of justificatory theories of criminal justice and punishment, both retributive and consequentialist.[139] The expressive function of criminal justice and punishment plays a key role in retributive theories of punishment such as moral education theories, theories of censure and victim vindication.[140] Expressivism is a mechanism or function of criminal justice not a substitute value for penal rationales - it is what you intend to express and why, that matters. The intended and the actual communicated messages may not be the same thing, however, their correspondence depends largely on how the communicating agent is viewed in terms of their moral authority and legitimacy.[141]

At the time of the WWII tribunals, there was little theorising related to retribution, which, along with deterrence, was accepted as one of the "proper goals of the system" of punishment at national level.[142] The Nuremberg IMT and Tokyo IMTFE Charters state the immediate aims of the tribunals as "the just and prompt trial and punishment of the major war criminals of the European Axis."[143] There is no justification of the need for trial and punishment beyond punishment itself. From 1941, British rhetoric asserted that retribution was one of "the major purposes of the war".[144] In 1942, the Soviet foreign minister announced that the Hitlerite government "must and shall suffer deserved stern punishment"; Stalin himself repeatedly insisted on retribution: "they will not escape responsibility for their crimes or elude the hand of retribution of the tormented nations."[145]

The US did not advocate retributivism, seeing it as "revenge" and "the least sound basis of punishment."[146] A strong retributive approach was not popular

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also Lucas (n107) 135 Lucas claims retributive punishment is about "the owning and disowning of deeds done in society".

[139] A Duff and D Garland "Preface: T Mathiesen 'General Prevention as Communication'" in Duff and Garland (n137) 218; I Primoratz 'Punishment as Language' (1989) 64 Philosophy 187

[140] Von Hirsch (n126); Duff Penal Communications (n128) J Hampton 'The Moral Education Theory of Punishment' (1984) 13 Philosophy and Public Affairs 208; Hampton 'The retributive idea' (n137) 131; N Roht-Arriaza 'Punishment, Redress and Pardon: Theoretical and Psychological Approaches' in N Roht-Arriaza Impunity and Human Rights in International Law and Practice (Oxford University Press 1995) 13.

[141] M Matravers 'Introduction' in M Matravers (ed) Punishment and Political Theory (Hart Publishing 1999) 1; D Ivison 'Justifying Punishment in Intercultural Contexts: Whose norms? Which values?' in M Matravers (ed) Punishment and Political Theory (Hart Publishing 1999) 88.

[142] D Garland Punishment and Welfare: A History of Penal Strategies (Gower 1986) 27; Radzinowicz 'The Present Trend of English Penal Policy' (1939) 55 Law Quarterly Review 273, 286 criminal sanction at the time of WWII was aimed at meting out justice and decreasing crime through retribution, deterrence and instrumental reformation.

[143] Charter of IMT article 1; the Charter for IMTFE article 1.

[144] Kochavi (n44) 15 quoting Churchill and at 34 statements by the US and UK.

[145] Stalin's Speech of 6 November 1942 cited in 'The Separate Opinion of the Member for the Netherlands, Bernard Victor Aloysius Röling 12 November 1948' in The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East Volume 109 (The Edwin Mellen Press 1998) at 37.

[146] 'Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders 30 April 1945' in Report of Robert H. Jackson United States representative to the international conference on military trials London, 1945 http://www.yale.edu/lawweb/avalon/imt/jackson/jack05.htm accessed 24 October 2007.

with the US public.[147] Instead, the US advocated a censure-based theory of punishment: "Punishment of war criminals should be motivated […], if the theory of punishment is broad enough, by the implicit condemnation of ruthlessness and unlawful force as instruments of attaining national ends."[148] The resulting Charters of both tribunals have an implicitly retributive conceptual framework for establishing individual responsibility and applying appropriate punishment on the basis of "desert".[149]

For the ad-hoc tribunals in the 1990s, the Security Council was determined that retributive punishment was the appropriate response to the crimes and a key aim of establishing the tribunals.[150] Retributive theory has been represented in the ad-hoc tribunals jurisprudence as a principle of distribution of punishment and as a general justifying aim. Retributive theories relating to "proportionate punishment" and just deserts can be inferred from the Statute requirement that just sentencing requires an assessment of the gravity of the crime. The Judges of the ICTY reflect retributive rationales in their interpretive practice.[151]

Retribution is also cited as a general justifying aim and rationale of punishment.[152] Early tribunal judgments rejected retribution as "an inheritance of the primitive theory of revenge" and found it to be "disruptive of the entire purpose of the Security Council"; the same Trial Chamber interpreted UNSC policy as being "directed towards reconciliation of the parties".[153] In fact, the overriding concerns of those at the UNSC meeting were justice, punishment, accountability and deterrence.[154]

Early judgments recognised the condemnatory and denunciatory force of punishment, which later became the accepted interpretation of the retributive role of the ICTY:

> "The International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators as one

[147] Kochavi (n44) 82-83, 89.
[148] 'Memorandum of Proposals 30 April 1945' (n146).
[149] 'Memorandum of Proposals 30 April 1945' (n146) Part II (3) "The extent of the guilt of the individual members […], should be determined and the individual members should be punished in a manner based upon the extent of their guilt.".
[150] UNSC Provisional Verbatim Record 3175 (n72) at 27 the President of the Security Council summarises the discussions as confirming "the will of the Security Council not to allow to go unpunished all the horrible crimes […]". UNSC Provisional Verbatim Record 3453 (n75) at 2 (Russia), 3 (France), 4 (New Zealand), 9 (Brazil), 13 (Nigeria), 11 (China).
[151] *Naletilić and Martinović* (IT-98-34) Trial 31 Mar 2003 para 739; *Simić et al*. (IT-95-9) Trial 17 Oct 2002 para 33; *Kordić and Čerkez* (n74) para 1075; *Brđanin* (IT-99-36) Trial 1 Sep 2004 para 1090; *Miodrag Jokić* (IT-01-42/1) Trial 18 Mar 2004 para 31-32; *Babić* (IT-03-72) Trial Judgment 29 Jun 2004 para 44 and Bralo (n74) para 22.
[152] Supra fn ref to Bla*škić* (n73) From section 1.1.
[153] *Mucić et al.* (IT-96-21) Trial 16 Nov 1998 para 1231.
[154] UNSC Verbatim Record 3175 (n72).

> of the essential functions of a prison sentence for a crime against humanity"[155]

This reflects developments in penal theory at national level where retributive theorising has also emphasised the condemnatory and denunciatory role of punishment.[156]

From late 2003, ICTY Judges adopted a more consistently expressive and denunciatory version of retributive theory: "[r]etribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes."[157] The limits of retributive punishment were also recognised: "A sentence, however harsh, will never be able to rectify the wrongs, and will be able to soothe only to a limited extent the suffering of the victims, their feelings of deprivation, anguish, and hopelessness."[158]

In ICTR jurisprudence, retribution is repeated as one of the standard aims of punishment.[159] The development of theories of retributive punishment as communication and censure really only briefly appears in the jurisprudence of the ICTR.[160] In fact, deterrence and reconciliation have a markedly more prominent role in ICTR jurisprudence.

1.2.3 Prevention

Justice and retribution are inherently backward-looking responses to crimes, in that they respond to the wrongs already done. However, international criminal justice has traditionally also been concerned with future-oriented outcomes, notably the prevention of future crimes. Prevention is made up of several different components, ranging from deterrence and incapacitation to theories of prevention through the educative and communicative role of punishment.

A deterrent effect is a particular variant of prevention that is based on the fear of the consequences threatened or imposed by a criminal justice system.[161] Its effects can be reinforced if those attempting to deter have moral legitimacy thereby increasing the social stigma attached to punishment and extending its extrinsic effects.[162] Deterrence works when rational calculation makes the

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[155] *Blaškić* (n73) para 763; *Erdemović* (IT-96-22) Sentencing 29 Nov 1996 para 65. Cf "moral admonition" is rejected as of limited relevance in *Banović* (IT-02-65/1) Sentencing 28 Oct 2003 para 35; *Mucić et al*. (n74) para 806.

[156] Von Hirsch (n 126).

[157] *Brđanin* (n151) para 1090; Aleksovski (n78) para 185; *Kordić and Čerkez* (n71) para 1075; *Deronjić* Trial (n74) para 150; *Dragan Nikolić* (n74) para 140 and *Banović* (n155) para 34; *Obrenović* (IT-02-60/2) Sentencing 10 Dec 2003 para 50; Bralo (n74) para 22; *Blagojević and Jokić* (n121) para 818.

[158] *Krajišnik* (IT-00-39 & 40) Trial 27 Sep 2006 para 1146; *Mucić et al.* (n153) para 1231

[159] supra n76 on ICTR formulaic sentencing.

[160] Condemnation is "la réprobation" in Seromba (n79) para 376 [only released in French as of 2007]; and linked to prevention in Gacumbitsi (ICTR-2001-64-T) Trial 17 Jun 2004 para 336

[161] D Beyleveld The Effectiveness of General Deterrents against Crime: An Annotated Bibliography of Evaluative Research (Institute of Criminology 1978) 1-2; A Von Hirsch et al Criminal Deterrence and Sentence Severity (Hart Publishing 1999) 5.

[162] H Grasmick and R Bursik 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24 Law and Society Review 837; Feinberg (n138) 85 on the

consequences through criminal justice outweigh the benefits of continuing with the criminal behaviour.

Incapacitation, based on policing and enforcement power, does not take away the desire to commit the criminal acts but takes away the ability through lack of freedom, access to political power or the resources (financial and material) needed to perpetrate crimes. It generally involves some aspect of policing power to control, detain or otherwise physically restrain those committing or contemplating international crimes. It can also be equated with curbing the political power of those who plan and instigate these crimes through the delegitimising effect of indictment or legal punishment.

"Positive prevention" is based on the educative and normative power of criminal justice processes, aimed at encouraging would-be perpetrators to internalise repugnance for criminality and thereby take away the desire to commit offences.[163] Criminal wrongs become internalised as social and moral norms that can be powerful influences on the psychology of international criminality. Positive prevention is linked to the expressive function of punishment[164] which can be seen as communicating various messages relevant to consequentialist theories of prevention such as deterrence and general prevention.[165]

The WWII Tribunals had deterrence, incapacitation and general prevention as their aims. The UNSC resolutions for the ICTR and ICTY highlight preventative aims, affirming their determination "to put an end to such crimes" and asserting that prosecution would "contribute to ensuring that such violations are halted and effectively redressed".[166] The Security Council discussions of the tribunals state that the crimes must be brought to an end through the deterrent effect and expressive prevention functions of prosecution and punishment.[167]

Deterrent effect

The deterrent effect of punishment was outlined in US proposals for the IMT.[168] The US implied that the leaders of these aggressive actions were rational actors making rational decisions based on self-interest where the threat of punishment may deter their actions: "Punishment following a judicial determination, […] will certainly induce future government leaders to think

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particular 'stigmatising symbolism' of crimes and penal punishment.

[163] J Andenaes 'The General Preventive Effects of Punishment' (1966) 114 U Pa L Rev 949

[164] Supra section 1.2.2 Retribution.

[165] T Mathiesen 'General Prevention as Communication' in Duff and Garland (n137) 221; Von Hirsch et al (n161) 7 communication is a pre-requisite for deterrence.

[166] Preamble to SC Res 827 (1993) and SC res 955 (1994) establishing the ICTY and ICTR respectively.

[167] ICTY: UNSC Verbatim Record 3175 (n72) at 4 (Brazil), 9 (France), 22-23 (Spain), 27 (President of SC), 16 (Russia), 21 (Hungary), and 8 (France). ICTR: UNSC Verbatim Record 3453 (n75) at 6 (UK) and 12 (Spain) re prevention and deterrence and at 2 (Russia) re the expressive function.

[168] 'Memorandum of Proposals 30 April 1945' (n146) "Punishment of war criminals should be motivated primarily by its deterrent effect."

before they act in similar fashion."[169] This was also the UK view and the impetus for establishing the UNWCC by the Allied Nations.[170] The IMTFE was more overtly interested in incapacitation of the Japanese leadership. However, the President of the tribunal in his Separate Opinion argued strongly for deterrence as the main purpose of sentencing.[171]

The ICTR has been unequivocal in its belief in the general deterrent effect of its trials and punishments:

> "As to deterrence, this Chamber seeks to dissuade for good those who will be tempted in the future to perpetrate such atrocities by showing them that the international community is no longer willing to tolerate serious violations of international humanitarian law and human rights."[172]

The deterrent effect of punishment was also accorded a central role at the ICTY.[173] The jurisprudence has established that individual deterrence[174] and general deterrence[175] are the aims of the tribunal. In certain specific cases individual deterrence was not deemed as relevant due to the small likelihood of recidivism of those particular defendants.[176] It has been noted that the deterrent effect of punishment was particularly directed towards commanders through command responsibility provisions.[177]

At the ICTY, support for deterrence as the principal method of prevention has diminished as the tribunal has developed its jurisprudence. In a significant number of judgments from 2000 onwards it was declared that deterrence "must not be accorded undue prominence".[178] This correction has been motivated by a concern to ensure fairness, based on desert, in criminal trials:

> "[I]t would be unfair, and it would ultimately weaken respect for the legal order as a whole, to increase the punishment imposed on a person merely for the purpose of deterring others. Therefore, in determining

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[169] Ibid.
[170] Kochavi (n44) 28 and 33.
[171] 'The Separate Opinion of the President of the Tribunal, Sir William Webb (The Member for Australia) 1 November 1948' in The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East Volume 109 (The Edwin Mellen Press 1998) at 17.
[172] Kayishema and Ruzindana (n77) para 2; Kambanda (n77) para 28 and Rutaganda (n77) para 456; Serushago (n77) para 20; Musema (n77) para 986.
[173] Banović (n155) para 34; *Deronjić* (n74) para 146.
[174] *Blagojević and Jokić* (n121) para 822; *Babić* (n151) para 45; *Mrđa* (IT-02-59) Trial 31 Mar 2004 para 16; *Miodrag Jokić* (n151) para 33; *Ćesić* (IT-95-10/1) Trial 11 Mar 2004 para 25. *Dragan Nikolić* (IT-94-2) Appeal 4 Feb 2005 para 45.
[175] *Brđanin* (n151) para 1091.
[176] *Babić* (n151) para 45; *Mrđa* (n174) para 17; *Miodrag Jokić* (n151) para 34; *Ćesić* (n174) para 26.
[177] *Blagojević and Jokić* (n121) para 822; *Mucić et al.* (n153) para 1234.
[178] *Tadić* (IT-94-1) Appeal 26 Jan 2000 para 48; *Mucić et al.* (n74) para 801; Aleksovski (n78) para 185. *Dragan Nikolić* (n174) para 46; *Kordić and Čerkez* (n74) para 1078: *Mucić et al.* (n74) para 801; Bralo (n74) para 22 ; *Deronjić* (n74) para 145; *Obrenović* (n157) para 52; *Momir Nikolić* (IT-02-60/1) Sentencing 2 Dec 2003 para 90; *Banović* (IT-02-65/1) Trial 28 Oct 2003 para 34.

> the appropriate sentence, the Trial Chamber does not accord undue prominence to deterrence."[179]

This is a notable rejection of the instrumentalisation of the individual seen in consequentialist theories of punishment. However, there is little consistency in the Tribunals' approaches to deterrence in sentencing.

Incapacitation

Incapacitation was a key aim of the IMTFE, though not explicitly at the IMT. Röling notes the Tokyo tribunal served the incapacitative function of limiting the opportunity of the leadership of Japan to wage further wars.[180] The IMTFE judgment underlines political incapacitation effects: "[t]here must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest."[181]

Incapacitation is generally referred to as social protection in the jurisprudence of the ad-hoc tribunals, and has frequently been repeated as an aim of sentencing, particularly at the ICTR.[182] An early ICTY judgment gives an explanation of the need for social protection:

> "The protection of society often involves long sentences of imprisonment to protect society from the hostile, predatory conduct of the guilty accused. This factor is relevant and important where the guilty accused is regarded as dangerous to society."[183]

Other judgments seem ambivalent about, or even dismissive of, incapacitation.[184] The fact that indictments by an international tribunal can lead to a form of political incapacitation has been recognised by the ICTY: "[t]he immediate consequence of such proceedings was the removal of those persons most responsible for the commission of crimes in the course of – and even in furtherance of – the armed conflict."[185] This was also recognised by Chief Prosecutor Carla Del Ponte: "[c]onvicted political and military leaders have been removed from power and cannot return to their previous posts and exert the same influence."[186]

Education theories of Prevention

The architects of the Nuremberg and Tokyo tribunals advocated overlapping educative aims. These can be categorised as moral education, historical/political (re)education and strengthening or re-introducing the rule of

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[179] *Babić* (n151) para 45.
[180] Röling 'The Nuremberg and Tokyo Trials in Retrospect' (n54) 603-604.
[181] 'Judgment of the IMTFE Proceedings Thursday 4 November 1948' in The Tokyo Major War Crimes Trial: The Records of the International Military Tribunal for the Far East Volume 101 (The Edwin Mellen Press 1998) at 48, 416.
[182] Supra n79.
[183] *Mucić et al.* (n153) para 1232.
[184] Kunarac et al. (IT-96-23&23/1) Trial 22 Feb 2001 para 843.
[185] Momi*r Nikolić* (n178) para 60.
[186] ICTY 'Address By Tribunal Prosecutor Carla Del Ponte To NATO Parliamentary Assembly – Belgrade 26 Oct 2007 The ICTY and the Legacy of the Past' Press Release 1193 http://www.un.org/icty/pressreal/2007/pr1193e.htm.

law (legal education). The lessons were aimed at the populations of the defeated nations and any future nations considering waging aggressive war. In their view, increasing understanding of the facts of the past and that these actions were morally, and now legally, wrong would contribute to prevention of international crimes:

> "[I]t would be extravagant to claim that agreements or trials of this character can make aggressive war or persecution of minorities impossible, […] But we cannot doubt that they strengthen the bulwarks of peace and tolerance. The four nations through their prosecutors and through their representatives on the Tribunal, have enunciated standards of conduct which bring new hope to men of good will and from which future statesmen will not lightly depart."[187]

The educational aims of the tribunals were also based on the moral truth that underpinned the new legal standards of international criminal law. Justice Jackson claimed in his opening speech at Nuremburg that they were prosecuting "conduct that involves moral as well as legal wrong".[188] At the conclusion of the trials he claimed that Nuremberg "may constitute the most important moral advance to grow out of this war".[189] For the US, moral lessons would stem partly from the example of fair process:

> "If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the Allied cause."[190]

This moral education function depended on the symbolic or expressive power of international trials. The US position during the negotiations for the IMT was in favour of one symbolic trial to reach the widest possible audience: "I have never thought of this as a permanent tribunal. […] The whole American plan which was proposed here was designed to reach a very large number of people at a single trial or at most, perhaps, a very few trials."[191] Jackson reiterated this aim in his final report: "the United States would expect one trial of the top criminals to suffice to document the war and to establish the principles for which we contended."[192]

The jurisprudence of the ad-hoc Tribunals also reflects theories of positive prevention in discourse about the use of educative messages to instil the rule of

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[187] International Conference on Military Trials : London, 1945 Report to the President by Mr Justice Jackson, October 7, 1946 at http://www.yale.edu/lawweb/avalon/imt/jackson/jack63.htm.
[188] Nuremberg Trial Proceedings Volume 2 'Second Day Wednesday 21 November 1945' (The Avalon Project 1997) 102.
[189] International Conference on Military Trials, Report by Mr Justice Jackson (n187).
[190] 'Memorandum of Proposals 30 April 1945' (n146).
[191] Minutes of Conference Session of July 17, 1945 http://www.yale.edu/lawweb/avalon/imt/jackson/jack32.htm.
[192] International Conference on Military Trials, Report by Mr Justice Jackson (n187).

law, under the term "affirmative prevention".[193] In these theories of general prevention the aim of prosecution and punishment is the reinforcement of the rule of law and the internalisation of the norms it embodies:

> "This sentencing purpose refers to the educational function of a sentence and aims at conveying the message that rules of humanitarian international law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules and the moral demands they are based on in the minds of the public."[194]

The ICTY acknowledged the difference between general prevention through education about moral norms and the deterrent effect of criminal sanctions employing fear to ensure compliance: "[I]t is hoped that the Tribunal and other international courts are bringing about the development of a culture of respect for the rule of law and not simply the fear of the consequences of breaking the law".[195]

1.2.4 Conflict-Specific Goals

The focus on the maintenance of peace and security through international criminal justice stems largely from the evolution of international criminal justice with the two world wars, and the specific focus on prosecuting aggressive war at the post WWII military tribunals. Prosecuting crimes against peace and the prevention of war were the main stated aims of the Nuremberg and Tokyo trials. The IMTFE Charter emphasises Crimes against Peace above the other crimes listed in Article 5 of the Charter.[196] The IMT judgment characterises war as the ultimate crime encompassing the other wrongs at issue:

> "War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."[197]

This central link between international crimes and aggressive war forged a strong connection between prevention of international crime through criminal trials and the maintenance of peace and security at this formative stage.

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[193] "Affirmative prevention" involves awareness raising and reassurance about the rule of law - *Kordić and Čerkez* (n74) para 1073; *Kupreškić et al.* (IT-95-16) Trial 14 Jan 2000 para 848; *Momir Nikolić* (n178) para 59; *Blaškić* (IT-95-14) Appeals 29 July 2004 para 278.

[194] *Kordić and Čerkez* (n74) para 1080; *Dragan Nikolić* (n74) para 139; *Brđanin* (n151) para 1091; *Deronjić* (n74) para 149; *Babić* (n151) para 45; *Mrđa* (n174) para 17; *Miodrag Jokić* (n151) para 34; *Ćesić* (n174) para 26.

[195] *Momir Nikolić* (n178) paras 89; *Obrenović* (n157) para 51.

[196] Charter of IMTFE, Article 5.

[197] Nuremberg Judgment in Nuremberg Trial Proceedings Vol 22 (n118) 427.

For the UNSC the restoration and maintenance of peace was also an important role for the ad-hoc tribunals.[198] This was partly due to their establishment under Chapter VII of the UN Charter.[199] In the ICTR, the focus was on reconciliation and restoration of society as well as peace.[200] In the final UNSC resolutions, the judicial process as a whole is deemed to contribute to the restoration and maintenance of peace. The Preamble of the resolution establishing the ICTY states that "the prosecution of persons responsible […] would contribute to the restoration and maintenance of peace".[201] The ICTR resolution contains the same wording, adding contributing "to the process of national reconciliation" as an objective.[202] The jurisprudence of the ICTY also recognised and emphasised the importance of contributing to peace as the mainstay of Security Council policy.[203]

Criminal trials are considered to contribute to maintaining peace and security in various ways. These include recording history, truth-telling, contributing to reconciliation, rebuilding the rule of law, forestalling private vengeance and preventing further or future conflict. These can be termed the conflict-specific goals of criminal justice. In the absence of prosecutions for the causes of the conflict itself, these are generally secondary or long-term outcomes of the justice process.

Truth and Reconciliation

The contribution of prosecutions to the process of peace and reconciliation is expected through the truth-telling and historical record-making functions. Establishing a historical record at Nuremberg and Tokyo was largely aimed at political re-education of the affected populations and prevention of a resurgence of the ideologies that had led to war: "Punishment following a judicial determination, […] will serve also to bring home the truth to those Germans who remain incredulous about the infamies of the Nazi regime."[204]

The US, in particular, wanted to shape collective memory by giving a historical overview of events that could only be shown through an international tribunal rather than a series of local trials.[205] This is equally true of the Tokyo trials

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[198] States establishing the ICTY and ICTR referred to peace see UNSC Verbatim Record 3175 (n72) at 24-25 (Spain); UNSC Verbatim Record 3453 (n75) at 2 (Russia); *Momir Nikolić* (n178) para 60.

[199] UNSC Verbatim Record 3175 (n72) and UNSC Verbatim Record 3453 (n75); W Schabas The UN International Criminal Tribunals: the former Yugoslavia, Rwanda and Sierra Leone (Cambridge University Press 2006) 68: UN involvement "must have some connection with the purposes and principles of the organisation, as set out in its charter".

[200] UNSC Verbatim Record 3453 (n75) at 2 (Russia), 6 (UK), 10 (Pakistan), 12 (Spain), 13 (Nigeria), 16 (Oman) and 14 (Rwanda).

[201] SC res 827 (1993).

[202] SC Res 955 (1994).

[203] Babić (n151) para 68; Bralo (n74) para 21; *Momir Nikolić* (n178) para 58 and 60.

[204] 'Memorandum of Proposals 30 April 1945' (n146).

[205] International Conference on Military Trials : London, 1945 Revised Draft of Agreement and Memorandum Submitted by American Delegation, June 30, 1945 'Memorandum to Conference of Representatives of the Union of Soviet Socialist Republics, the United Kingdom, the United States of America and the Provisional Government of France, Submitted by the United States To Accompany Redraft of Its Proposal' http://www.yale.edu/lawweb/avalon/imt/jackson/jack18.htm .

which are alleged to have been more concerned with the history of Japanese aggression than with the actual acts of those accused at trial.[206] The process of discrediting criminal regimes and re-educating the affected populations did not begin and end with the international trials. The tribunals were part of social, judicial, political and economic reconstruction that included measures such as lustration, and reorganising the education and judicial system specifically to "eliminate Nazi and militarist doctrines".[207] The wider project of reconstruction was in line with democratic principles and under the re-established rule of law.[208]

Truth-telling and creating an historical record also played an important role at the ad-hoc tribunals of the 1990s. The ICTY was "mandated to search for and record, as far as possible, the truth of what happened in the former Yugoslavia".[209] Tribunal jurisprudence reflects the belief that justice is a prerequisite for long-term peace and that the truth established during a trial can contribute to reconciliation.[210] Echoing the words of the UNSC meeting establishing it, an ICTY trial chamber asserted that "[d]iscovering the truth is the cornerstone of the rule of law and a fundamental step on the way to reconciliation"[211] The limits of criminal justice in this regard were nonetheless recognised. Recording history in general was not the aim of the tribunal: "it should be recalled that this Tribunal is not the final arbiter of historical facts. That is for historians. For the judiciary focusing on core issues of a criminal case before this International Tribunal, it is important that justice be done and be seen to be done."[212]

The importance of vindicating truth and combating historical revisionism can be seen most plainly operationalised in relation to the sentencing of those entering guilty pleas. Reduced sentences at the ICTY due to the defendant having entered a guilty plea have been criticised,[213] but they were justified as facilitating the work of the tribunal, since acceptance of full responsibility was seen as contributing to reconciliation as well as peace and security in general.[214]

Reconciliation also played a prominent role at the ICTY. The first ICTY Annual Report claimed the ICTY was "designed to promote peace by meting out justice in a manner conducive to the full establishment of healthy and cooperative relations among the various national and ethnic groups in the former Yugoslavia."[215] Jurisprudence has confirmed the role of reconciliation and truth:

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[206] Pritchard (n51) at xxxiv.
[207] The Berlin (Potsdam) Conference, July 17-August 2, 1945 (a) Protocol of the Proceedings, August l, 1945 points 4-8 http://www.yale.edu/lawweb/avalon/decade/decade17.htm.
[208] Ibid point 8.
[209] *Deronjić* Trial (n74) para 133; *Dragan Nikolić* (n74) para 120.
[210] Ibid; Stakić (IT-97-24) Trial 31 July 2003 para 901; *Obrenović* (n157) para 45.
[211] *Erdemović* (n155) para 21; Babic (n151) para 68.
[212] *Dragan Nikolić* (n74) para 122.
[213] M Harmon and F Gaynor 'Ordinary Sentences for Extraordinary Crimes' (2007) 5 JICJ 683
[214] Miodrag Jokić (n151) para 76; Dragan Nikolić (n74) para 4; *Deronjić* Trial (n74) para 134 and 234; *Babić* (n151) para 46; *Mrđa* (n174) para 19 and 78.
[215] ICTY Annual Report (1994) (n71) para 17.

> "It was anticipated that through criminal proceedings, the Tribunal would contribute to peace and reconciliation in the former Yugoslavia, and beyond, through the establishment of the truth and the promotion of the rule of law."[216]

UNSC Resolution 955 (1994) establishing the ICTR refers specifically to reconciliation as an aim.[217] However, reconciliation has not been mentioned by the judges beyond the perfunctory repetition of the aims of the tribunal.[218] As with the ICTY, furthering reconciliation has rationalised the acceptance of guilty pleas as a mitigating factor in sentencing.[219]

Strengthening the rule of law

The contribution of international criminal trials to strengthening the rule of law is achieved through the enforcement of laws and rules of behaviour that were not previously enforced and through the demonstration effects of fair trials and punishments.[220] At the post-WWII tribunals, a fair trial was expected to lead to new standards of behaviour and contribute to prevention of crimes and maintenance of peace and security, by preventing a backlash against the new order.[221] It was hoped these effects would "do something toward strengthening the processes of justice in many countries".[222]

By the 1990s, re-establishing and restoring confidence in the rule of law as the basis for long-term peace was considered a key facet of post-conflict reconstruction by the UN and those involved in international criminal justice.[223] ICTY Judges expressed the hope that "this commitment to end impunity in the former Yugoslavia would promote respect for the rule of law globally."[224] For the ICTY, this was to be achieved only through exemplary justice. Strengthening local judicial capacity was not one of explicit the aims of the ICTY. There has been criticism of the tribunal for its lack of efforts in this area.[225] Recent transfers of cases to national courts go someway towards counteracting this deficit but this activity remains marginal in comparison to the millions of dollars spent on administering criminal justice at The Hague.[226]

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[216] *Obrenović* (n157) para 45.
[217] UNSC Res 955 (1994).
[218] Supra n77-78.
[219] Serugendo (n77) para 32; Rutaganira (ICTR-95-1C-I) Trial 14 March 2005 para 146; Kambanda (n77) para 50; Bisengimana (n77) para 126 and 131; Joseph Nzabirinda (ICTR 2001-77-T) Sentencing 23 Feb 2007 para 65 and 71 [citing *Plavšić* (IT-00-39 & 40/1) Trial paras 80-81].
[220] J Stromseth 'Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?' (2007) 38 Geo. J. Int'l L. 251, 262.
[221] 'Memorandum of Proposals 30 April 1945' (n146).
[222] International Conference on Military Trials, Report by Mr Justice Jackson (n187).
[223] UNSC The Rule of Law (n85).
[224] *Momir Nikolić* (n178) para 59.
[225] M Weirda 'What lessons can be learned from the ad hoc criminal tribunals' (2002) 9 U.C. Davis Journal of International Law and Policy 13, 17; G Kirk McDonald 'Problems, Obstacles and Achievements of the ICTY' (2004) 2 JICJ 558; D Tolbert 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Success and Foreseeable Shortcomings' (2002) 26 Fall Fletcher Forum of World Affairs 7.
[226] Carla del Ponte described improvements in the ICTY legacy "aimed at strengthening the capacities of national judicial systems and the rule of law." in ICTY Press Release 1193 (n186).

The Security Council recognised the need to strengthen the Rwandan courts and to rebuild shattered confidence in the judiciary and the polity of that country.[227] Pressure increased to fulfil this aspect of the ICTR's work with the approaching completion date.[228] However, the ICTR has also been criticised for insufficient efforts in this regard.[229] The ad-hoc criminal tribunals were not part of a co-ordinated programme of economic, educative and judicial reconstruction for the conflict-affected areas nor did they have the financial or human resources to fulfil such a goal in isolation.

The SCSL trial chamber has emphasised the expressive function of punishment developed in the ICTY jurisprudence, highlighting its effect on strengthening the rule of law.[230] Those establishing the SCSL recognised the need for a parallel outreach campaign to implement this expressive agenda.[231] The reconstruction of the Sierra Leonean judiciary and strengthening the rule of law was strategically addressed through the legacy of the SCSL in terms of capacity building of the judiciary and professional development of personnel.[232]

Forestalling private vengeance

A further aim under the rubric of prevention is for international trials to forestall private vengeance, and thus interrupt the continuation of the cycle of violence and retaliation that fuels conflict. The UK and US in 1945 advocated swift justice to forestall private vigilantism.[233] This was the official line of the Allied nations establishing the Nuremberg IMT.[234] One method of breaking the cycle of violence was by focusing on the leaders only, diminishing collective blame of the German people.[235]

Forestalling private vengeance was raised at the ad-hoc tribunals of the 1990s. The first President of the ICTY insisted that the "only civilised alternative for revenge is to render justice".[236] The Security Council likewise expressed the hope that establishing the truth might prevent the cycle of violence and revenge that had been the impetus for the conflict.[237]

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[227] UNSC Res 955 (1994) and UNSC Verbatim Record 3453 (n75) inter alia at 6 (UK), 8 (Argentina), 10 (Pakistan) and 13 (Nigeria).
[228] Address to the UN General Assembly: 12th Annual Report of the ICTR, Dennis Byron, President 12 Oct 2007.
[229] ICTJ The Special Court for Sierra Leone: The First Eighteen Months (ICTJ Mar 2004) 8; R Zacklin 'The Failings of Ad hoc International Tribunals' (2004) 2 JICJ 541, 544.
[230] Fofana and Kondewa (SCSL-04-14-T) Sentencing 9 Oct 2007 para 30; Brima, Kamara and Kanu (SCSL-04016-T) Sentencing 19 July 2007 para 16.
[231] 'Report of the UN Secretary-General on the Establishment of a Special Court for Sierra Leone [to the Security Council]' (4 October 2000) S/2000/915 para 7.
[232] W O'Neill et al *The "Legacy" of the Special Court for Sierra Leone* (UNDP & ICTJ 2003); ICTJ The Special Court for Sierra Leone: The First Eighteen Months (2004).
[233] Kochavi (n44) 29, 30 similar arguments by the US at 111, 116.
[234] Punishment for War Crimes. The Inter-Allied Declaration signed at St James Palace, London on 13 January 1942 and related documents (HMSO 1942) cited in Alfaro (n43) paras 31-33.
[235] Nuremberg Trial Proceedings Volume 2 'Second Day Wednesday 21 November 1945' (The Avalon Project 1997) 102.
[236] ICTY Annual Report (1994) (n71) 10.
[237] *Momir Nikolić* (n178) para 60.

Rehabilitation

Rehabilitation is one of the conventional aims of punishment at national level, supported by international human rights norms.[238] Formulaic references to rehabilitation appear in a number of ICTR judgments.[239] The ICTY has recognised that the aim of rehabilitation needs to be taken into account in sentencing in order to conform to international human rights standards, but that "it is not one which should be given undue weight"[240] or "play a predominant role in the decision-making".[241] SCSL judgments have also downplayed the relevance of rehabilitation in the international context.[242]

Later sentencing jurisprudence promoted a theory of rehabilitation resembling retributive theories of penitence through punishment.[243] In this version of rehabilitation theory, punishment "provides the context for the convicted person's reflection on the wrongfulness of his acts and may give rise to an awareness of the harm and suffering these acts have caused to others. This process contributes to the reintegration of the convicted person into society."[244] Other ICTY judgments have seen rehabilitation being achieved through a process of reflection that "can inspire tolerance and understanding of 'the other,' thereby reducing the risk of recidivism. Reconciliation and peace would thereby be promoted."[245] The language here touches on elements of restorative justice, although in practice there is nothing particularly restorative about the trial process at the ICTY which follows a standard retributive model. In justifying the value of guilty pleas, the ICTY trial chamber also sees them as rehabilitative for the individual, and related to the further objectives of reintegration and reconciliation.[246]

1.2.5 Victims

A broad conception of international criminal justice might include victims as the beneficiaries of, or participants in, the criminal justice process. Victims feature in retributive theories as beneficiaries of the empowerment and vindication offered through the condemnatory punishment of the wrongdoer.[247] After all, it is the harm done to victims that constitutes the wrongdoing.[248] Future (potential) victims are spared further suffering by the prevention of crimes, consistent with consequentialist theories of deterrence, incapacitation and conflict-specific goals.

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[238] International Covenant on Civil and Political Rights (ICCPR) article 10(3).
[239] Niyitegeka (n79); Serushago (n77) para 39; Kayishema and Ruzindana (n77) para 2; Kayishema and Ruzindana (ICTR-95-1-) Appeal 1 Jun 2001 paras 389 and 390; Elizaphan and Gérard Ntakirutimana (n79) para 887; Ruggiu (n77) para 33; Ndindabahizi (n79) para 498
[240] *Dragan Nikolić* (n74) para 133; Bralo (n74) para 22; B*lagojević and Jokić* (n121) para 824
[241] Mucic et al. (n74) para 806; *Kordić and Čerkez* (n74) para 1079.
[242] Fofana and Kondewa (n233) para 28; Brima, Kamara and Kanu (n233) para 17.
[243] A Duff Punishment, Communication and Community (OUP 2001).
[244] *Babić* (n151) para 46; *Mrđa* (n174) para 18; *Miodrag Jokić* (n151) para 35.
[245] *Blagojević and Jokić* (n121) para 824; *Obrenović* (n157) para 53; *Momir Nikolić* (n178) para 93.
[246] *Ćesić* (n174) paras 27-28.
[247] Hampton 'The retributive idea' (n124); Von Hirsch (n126).
[248] Infra n534.

The institutions of international criminal justice that preceded the ICC paid little attention to the role of victims, either as active participants or passive recipients of their processes. Victims were conspicuously absent from the aims and processes of the post-WWII tribunals.[249] The tribunals were focused on state crime and criminals. There has also been a lack of attention paid to victims at the ICTY and ICTR.[250] There are minimal references to victims in their jurisprudence. Victims are viewed as recipients of "justice"; as having their suffering acknowledged; and as being reassured by the work of the tribunals.[251] In 2007, the Chief Prosecutor of the ICTY claimed that the tribunal aspired to bring justice to victims not only in the former Yugoslavia but "around the world".[252] This linked the tribunal's work to a kind of symbolic general vindication of victims' worth on a global scale.

Victims' interests have been acknowledged in the judicial justifications for guilty pleas. Both tribunals sometimes considered guilty pleas to be beneficial for the tribunal, in terms of saving money,[253] and for victims, in sparing their re-traumatisation[254] and giving them "a sense of relief".[255] The ICTY jurisprudence acknowledges that guilty pleas may also deny victims the opportunity to have their voices heard in a public trial.[256] There is no formal role for victims' participation in proceedings at the ICTY or ICTR other than as witnesses at trial. Both tribunals have been criticised for their treatment of victim-witnesses and limited communication and outreach with victims and affected populations.[257]

The UNSC resolutions establishing the ICTY and ICTR refer to violations being "halted and effectively redressed".[258] Redress could be interpreted in various ways, but is generally seen as victim-related.[259] It can be seen as retributive (punishment as redress) or compensatory in terms of financial or symbolic reparation to the victim or affected community. The Statutes of the ICTY and ICTR both contain provisions allowing for restitution.[260] These provisions have not been used by either court.[261] Reparations as a form of

[249] M Pena and G Carayon 'Is the ICC Making the Most of Victim Participation?' (2013) The International Journal of Transitional Justice 1, 2.
[250] S SaCouto and K Cleary 'Victims' Participation in the investigations of the International Criminal Court' (2008) 17 Transnational Law and Contemporary Problems 73, 81-82.
[251] *Miodrag Jokić* (n121) para 31-32, *Momir Nikolić* (n178) para 59; Regarding reassuring victims *Brđanin* (n151) para 109 citing *Dragan Nikolić* (n74) para 139.
[252] ICTY Press Release 1193 (n186).
[253] Serugendo (n77) para 32.
[254] *Dragan Nikolić* (n74) para 121; Bralo (n74) para 64; *Mrđa* (n174) para 78; *Banović* (n155) para 68; *Deronjić* (n74) para 134; *Ćesić* (n174) para 58. At ICTR: Rutaganira (n219) para 146; Kambanda (n77) para 50; Bisengimana (n77) para 126 and 131.
[255] *Ćesić* (n174) para 58.
[256] *Momir Nikolić* (n178) paras 61-63, 73.
[257] Pena and Carayon (n249) 1, 4.
[258] UNSC Res 827 (1993) and 955 (1994).
[259] I Bottigliero Redress for Victims of Crimes Under International Law (Martinus Nijhoff Publishers 2004) 4-5 includes "notions of reparation, remedy, compensation, restitution, recovery, rehabilitation [of victims] and apologies."
[260] Art 24 ICTY Statute; art 23 ICTR Statute; Rule 105 RPE.
[261] Bottigliero (n259) 202.

redress for victims could be viewed as a hindrance to the main objective of the tribunals, cited as bringing perpetrators to justice.[262]

1.2.6 Political aims

Satisfying public opinion and (re)writing history

One reason that victims were largely ignored in the post-WWII tribunals was because the primary motivation for the prosecutions was satisfying world public opinion. An international rather than national response was justified by the reasoning that such crimes as aggressive war and mass violence against civilians were of concern to humanity as a whole. This was given further impetus by the general clamour for justice and the fact that the world was demanding that something must be done "to satisfy the sense of justice of the civilised world."[263] Röling cites world public opinion as a motivating factor for both the Nuremberg and Tokyo IMTs.[264] In reality, it was the opinion of the public in the countries directly establishing the tribunals that really mattered.[265]

Healthy concern with public support in a functioning democracy is laudable. It implies a responsiveness to public concerns that is appropriate to representative government. For the US, this concern related to ensuring its version of historical events was reinforced by the trials and that its decision to join the war was vindicated:

> "[E]ach of us has the problem of making the results here acceptable in the sight of his people, and we shall have to consider procedure in that light. Our interest in the matter is to see that the representations that have been made to our people that this was a criminal war and was carried out in criminal fashion are followed by the procedure that is appropriate to trial of that kind of offense."[266]

The high moral tone of justice pronouncements was revealed, at least in part, to mask a more pragmatic and political aim. Neither the Tokyo nor Nuremberg tribunals allowed evidence to be admitted that "might appear to bring the wartime conduct of the Allied Powers into disrepute".[267] History was being written, but a controlled, limited version of history. The irony is that the lasting legacy of the Nuremberg and Tokyo trials became its authoritative record of the crimes committed during the Holocaust and the recognition of crimes against humanity.[268] Crimes against peace did not become a legal standard by

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[262] REDRESS 'Reparations law and cases – ICTR' http://www.redress.org/www.redress.org/ictr.html#bottom accessed 2 Nov 2007; Bottigliero (n259) 206-209.

[263] Punishment for War Crimes. The Inter-Allied Declaration signed at St James Palace , London on 13 January 1942 and related documents (HMSO 1942) cited in Alfaro (n43) paras 31-33; Kochavi (n44) 111-116, 29 and 30.

[264] Röling 'The Nuremberg and Tokyo Trials in Retrospect' (n54) 606.

[265] Kochavi (n44) 29 and Falk 'Accountability for War Crimes and the Legacy of Nuremberg' 121; Bass (n17) 279.

[266] International Conference on Military Trials : London, 1945 Minutes of Conference Session of June 29, 1945 http://www.yale.edu/lawweb/avalon/imt/jackson/jack17.htm

[267] Pritchard (n51) xxxviii.

[268] G Bass Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton University Press 2000) 204 quoting Richard Goldstone and Judith Shklar claiming CAH as the

which countries or individuals could be called to account criminally, although there are hopes for the revival of the crime of aggression after the ICC Review Conference in 2010.[269]

The political aims of the States establishing the ad-hoc tribunals were not explicit, if coherent policies existed at all. The Security Council discussions on the tribunals revolved around moral outrage and a seeming genuine desire to stop the atrocities and restore the affected societies.[270] If the aim was to vindicate the actions (or inaction) of Western states, as has been claimed,[271] this was not revealed in the moral rhetoric of the Security Council. It was only in the Security Council meeting on the ICTR dissenting voices were heard. The representative of the Czech Republic implied that criminal justice had been chosen only as the easiest option in dealing with the post-conflict situation.[272] The Rwandan representative raised a number of objections.[273] Rwanda questioned the political motives behind the establishment of the Tribunal, concluding that the international community was serving its own presentational or emotional needs:

> "My delegation considers that the establishment of so ineffective an international tribunal would only appease the conscience of the international community rather than respond to the expectations of the Rwandese people and of the victims of genocide in particular."[274]

This view has been echoed by other, less directly affected observers: "the reality is that the ICTY and the ICTR were established more as acts of political contrition, because of failures to swiftly confront the situations in former Yugoslavia and Rwanda, than as part of a deliberate policy, promoting international justice".[275] It may not have been explicitly stated, but it is fair to assume that the ad-hoc tribunals also partly wished to satisfy public opinion and vindicate the historical role of the "international community" that created them.

1.3 The penal aims and prosecutorial discretion

Prosecutorial discretion implies the freedom to use personal judgement to decide between different courses of action, all of which may be legally and morally acceptable.[276] Resources for criminal justice processes are not infinite

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main legacy of Nuremberg; Luban (n55) and Osiel (n45) 225-226.

[269] K Ambos 'The Crime of Aggression After Kampala' (2011) 53 German Yearbook of International Law 463; C Kres and L von Holtzendorff 'The Kampala Compromise on the crime of Aggression'(2010) 8 JICJ 117.

[270] UNSC Verbatim Record 3175 (n72) and UNSC Verbatim Record 3453 (n75).

[271] K Anderson 'The Rise of International Criminal law: Intended and Unintended Consequences' (2009) EJIL 331, 334.

[272] UNSC Verbatim Record 3453 (n75) (Czech Republic) at 7.

[273] Ibid14-16.

[274] Ibid 15.

[275] Zacklin (n229) 542; K Moghalu *Rwanda's Genocide: The Politi*cs of Global Justice (Palgrave Macmillan 2005) 2; Forsythe 'Politics and the International tribunal for former Yugoslavia' in Clark and Sann (eds) The Prosecutions of International Crimes (Transaction Publishers 1996) 185, 196.

[276] M Bergsmo and P Kruger 'Part 5. Investigation and prosecution: Article 53. Initiation of an

and choices have to be made as to which crimes to investigate, who to prosecute and, at international level, when to allow national jurisdictions to take primacy. Such choices ought to be reasoned and based on clear criteria if they are to meet the requirements of the rule of law and comport with other justice considerations.[277] Any prioritisations or selections will have a major impact on both perceptions of a criminal justice system and its ability to fulfil its objectives.

The key discretionary power of any prosecutor is the decision whether or not to investigate or prosecute a crime or alleged perpetrator. The Prosecutor can shape how criminality is portrayed to the public and play a pivotal role in the penal messages conveyed by the criminal justice process through his or her choices regarding the selection of perpetrators and incidents to pursue. Discretion can play an important role in dealing with complex situations and allowing criminal justice to be context-sensitive. To exercise discretion effectively there is a need for clear parameters within which to work and a shared understanding of the values and objectives that underpin the enterprise as a whole. The penal objectives and underlying values of any criminal justice system should structure and inform prosecutorial decision-making if it is to be legitimate. However, there is little concrete evidence of the extent to which the myriad aims and functions attributed to the institutions of international criminal justice guided the prosecutorial strategies of these institutions or were included in operational decision-making in the early years.

The post-WWII Tribunals were not a model of prosecutorial professionalism. The four Prosecutors were not independent from the governments that appointed them; to the contrary, they acted in their name and interests directly.[278] Furthermore, while there was no obligation to try all those responsible for crimes within their jurisdiction, there was no transparency regarding selection of accused nor apparently any guiding principles or agreement regarding selection criteria. Telford Taylor reported that "selecting the defendants was hastily and negligently discharged, mainly because no guiding principles of selection had been agreed on."[279] Judicial review of indictments was limited to the Judges' power to amend or add charges after they had been filed.[280]

The Statutes of the ad-hoc tribunals grant the Prosecutor powers to decide strategy, choose investigations, select accused for prosecution and decide

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investigation' in Trifterer O (ed) Commentary on the Rome Statute of the International *Criminal Court: Observer's notes, Article by Article* (Nomos Verlagsgesellschaft 1999) 701, 702; Nsereko 'Prosecutorial Discretion before National Courts and the International Tribunals - Symposium on Prosecutorial Discretion' (2005) 3 JICJ 124, 124 defines discretion as "determining in accordance with circumstances and what seems just, right, equitable, and reasonable".

[277] Lucas (n107) 67 decisions are just if they can be explained and made acceptable to all.

[278] M Bergsmo, C Cisse and C Staker 'The Prosecutors of the International Tribunals: The cases of the Nuremberg and Tokyo Tribunals, The ICTY and ICTR and the ICC Compared' in L Arbour, A Eser, K Ambos and A Sanders (eds) The Prosecutor of a Permanent International Criminal Court (Edition Iuscrim 2000) 121, 125.

[279] Ibid 134.

[280] Ibid 134-135.

charges with little or no judicial oversight and few guidelines as to the parameters within which they should proceed. The Security Council has provided limited guidance for prosecutorial strategy. For example, the ICTR Statute requires "serious" violations to be investigated and prosecuted, although seriousness is not defined.[281] The Security Council later sought to influence prosecutorial strategy in its Resolutions regarding the completion strategies of the ad-hoc tribunals, "to ensure such indictments concentrate on the most senior leaders".[282]

There is no legal requirement for Tribunal Prosecutors to make public the reasoning behind any decision-making.[283] In practice, the ICTY and ICTR have done so, issuing press statements explaining the reasons for charges being withdrawn.[284] Criteria for selection were shared in the ICTR revised completion strategy. These included: the extent of participation of the accused and their status; the nature and gravity of the offences; the prospects for the accused to be dealt with in another forum outside the ICTR; and the need for a geographical spread of prosecutions, in order to avoid accusations of bias and to enhance prospects for reconciliation.[285] This last criterion illustrates how both perceptions of legitimacy and the prioritisation of certain overall objectives for the proceedings can influence prosecutorial decisions. At the ICTY, factors considered legitimate in selecting cases included offence gravity, strength of the evidence, the effective allocation of OTP resources, the relation of the case to overall prosecutorial strategy, and "other similar considerations".[286] The ICTY Judges amended the RPE to ensure indictments concentrated "on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal".[287]

Analysis of ICTY prosecutorial strategy confirms that it targeted the main leadership groups, but also registers the influence of pragmatic concerns such as arrest opportunities and pursuing lower-level perpetrators in order to gain evidence and facilitate prosecutions of the higher echelons.[288] Lower level perpetrators were also pursued in order to prosecute crimes such as sexual violence as part of thematic prosecutions.[289] Agirre notes that some prosecutions were pursued with no reference to strategy or institutional aims

[281] H Jallow 'Prosecutorial Discretion and International Criminal Justice' (2005) 3 JICJ 145, 151.
[282] UNSC Resolution 1534 26 Mar 2004; Jallow (n281) 151.
[283] Jallow (n281) 152; Côté (n286) 185; Bergsmo et al (n278) 139.
[284] Bergsmo et al (n278) 139.
[285] Jallow (n281) 152-153.
[286] L Côté 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 JICJ 162, 168.
[287] Côté (n286) 185-186.
[288] X Agirre Aranburu 'Gravity of Crimes and Responsibility of the Suspect' in M Bergsmo (ed) Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd edition Torkel Opsahl Academic Publisher 2010) 205, 226; S Eliot Smith 'Inventing the laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences' (2008) 8 International Criminal Law Review 331, 343-344.
[289] Agirre Aranburu 'Gravity of Crimes' (n288) 227; Eliot Smith (n288) 343-344.

but because incriminating evidence was available and there was insufficient managerial oversight.[290]

1.4 Conclusions

The history of international criminal justice institutions pre-dating the ICC reveals a wide variety of objectives and functions attributed to international criminal prosecution and punishment. While these temporary and ad-hoc institutions have varied in their geographical, historical and substantive subject-matter and structure, their aims and objectives are quite similar, overlapping and invariably wide-ranging. Most refer in their objectives to traditional penal objectives recognisable from national criminal prosecutions such as justice and deterrence, while simultaneously aspiring to contribute in varying degrees to peace and reconciliation objectives specific to post-conflict situations. A key purpose of international criminal justice, as opposed to national justice mechanisms, is the powerful symbolic and expressive function of the trial for condemnation and re-education, moral and political. Importantly, none of these political and social goals were expected to be achieved through international trials alone. They are typically accompanied by comprehensive legal, social and financial rehabilitation efforts at national level. Notably excluded from the processes were victims, who were largely ignored in the institutions that preceded the ICC.

No set of goals or penal aims clearly predominates in animating institutional innovation. The ad-hoc criminal tribunals have been criticised for their "dizzying array of objectives" and a lack of coherence as to how these aims would be achieved through criminal process and punishment.[291] Continual repetition of orthodox objectives and expected functions of international criminal justice has served to reinforce the sense of their normative validity without establishing their empirical reality. It should be asked: to what extent does international criminal justice actually contribute to the attributed goals? How might they conflict? What does the context of international criminal justice imply for the viability and suitability of the approaches taken by these institutions? Philosophical and theoretical bases for these different approaches vary widely and have important practical implications for the direction of international criminal justice as a whole, and for the suitability of particular institutional designs for achieving their asserted ends.

The historical retrospective undertaken in this chapter reveals a markedly positive, progressive development of international criminal justice, focussing largely on expected and hoped for positive benefits of tribunals. As international criminal justice grows in both power and structural form, so the reach of its objectives and functions grow in the rhetoric of its creators and implementers. The next chapter will look beyond this positive rhetoric. Drawing on penal theory and the experience of the institutions of international

[290] Agirre Aranburu 'Gravity of Crimes' (n288) 227.
[291] Anonymous 'Developments in the Law: II. The Promises of International Prosecution' 114 Harvard Law Review (2001) 1957, 1974-1975; R Henham 'The Philosophical Foundations of International Sentencing' 1 JICJ (2003) 64; Drumbl Atrocity (n53) 60-61; W Schabas 'Penalties' in Cassese et al Commentary Vol I (n31) 1497, 1517-1519.

criminal justice thus far, the analysis will start to clarify some of the difficulties of trying to implement these objectives in the context of prosecuting international criminality and explore some of the criticisms of the aims of international criminal justice.

Chapter 2

Penal aims in action: the challenges of international criminal justice

The official purposes and intended functions of the institutions of international criminal justice preceding the ICC were underpinned by penal theory largely developed in domestic criminal justice systems. This discourse paints a positive picture of the contribution of international criminal justice to prevention, justice, peace and post-conflict reconstruction. However, the reality of the context and nature of international criminality and the social circumstances of its perpetrators, combined with geo-political factors affecting institutional responses, call into question some of these claims. This chapter analyses some of the critiques of the aims attributed to these institutions and highlights contextual factors which have proved problematic for their intended functions.

2.1 The context and content of international criminal justice

It is routinely assumed that the purposes and functions of criminal justice at national level will be equally applicable in the international context.[292] However, such transpositions or legal transplants are contested. The ability of penal law in its traditional form to contribute to its stated goals is questionable, given the complexities and differences of the international context in which it now functions.[293] Primary obstacles to the aims of international criminal justice relate to the social circumstances of the crimes and perpetrators, the inchoate nature of the international community and the perceived arbitrary politics of the establishment of institutions to enforce international penal law. The following analysis will highlight these complexities and draw out both the limitations and potential benefits of criminal justice in the context of responses to mass criminality.

2.1.1 Crimes and perpetrators

International crimes and perpetrators are not a homogenous or easily generalisable group. The three main examples of situations giving rise to mass international criminality discussed in Chapter 1 - WWII; the Rwandan genocide and the myriad conflicts that defined the break-up of the former Yugoslavia - highlight the diversity of causes, nature and outcomes. Given this complexity the following discussion is merely an initial indication of the issues

[292] M Drumbl 'Toward a Criminology of International Crime' (2003) 19 Ohio St J on Disp Resol 263, 268; MC Bassiouni 'The Philosophy and Policy of International Criminal Justice' in L C Vohrah *Man's Inhumanity to Man: Essays on International law in Honour of Antonio* Cassese (Kluwer Law International 2003) 65, 125.

[293] I Tallgren 'The Sensibility and Sense of International Criminal Law' (2002) 13 EJIL 561, 565; T Farer 'Restraining the Barbarians: Can International Criminal Law Help?' (2000) 22 Hum Rts Q 90, 92-3.

affecting international criminal justice and obstacles to successfully implementing existing penal theories.

Firstly, it is important to dispel the myth that crimes of mass violence are spontaneous, exceptional and inexplicable, "sporadic occurrences of bloodlust",[294] based purely on inter-tribal hatreds, historical ethnic divides or a lack of civilisation.[295] The prevailing opinion in research is that mass violence can often be explained from a "crimes of state" perspective, representing a well-planned, orchestrated manipulation of societal tensions and fears to produces an anticipated social or political reaction.[296] Akhavan states:

> "it is often assumed that mass violence is an inevitable human phenomenon. On the contrary, systematic mass violence and large scale atrocities require organisation, planning and preparation, often accomplished under the authority of government."[297]

While there is an acknowledged element of "hate crime" recognisable in some of this offending, most notably genocide and "ethnic cleansing", it is not the only or the fundamental defining characteristic of international criminality.[298] Analysis of the precedents and causes of mass violence shows it has long-term causes, typically based on a history of a potential for violence, generated over generations, and manipulated for instrumental political ends.[299]

Added to this is the accompanying breakdown of society, the rule of law and the reversal of conceptions of normal and deviant behaviour. As Farer notes "civil conflict is coterminous with the collapse of public order".[300] The chaos created by conflict is itself criminogenic – it can foster crime and facilitate behaviour normally perceived as unacceptable.[301] There are varying methods by which crimes of state are committed.[302] There are also varying motivations,

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[294] R Goldstone 'Bringing War Criminals to Justice during an Ongoing War' in Moore Hard Choices: Moral Dilemmas in Humanitarian Intervention (Rowan and Littlefield 1998) 195, 202-203 cites the ICTY exposing "a systematic and institutional pattern of gross human rights violations".

[295] P Roberts and N McMillan 'For Criminology in International Criminal Justice' (2003) 1 JICJ 324-325; P Akhavan 'Justice in the Hague, Peace in the Former Yugoslavia?' (1998) 20 Hum Rts Q 737, 741.

[296] Ibid; R Jamieson 'Towards a Criminology of War in Europe' in Ruggiero, South & Taylor (eds) The New European Criminology: Crime and Social Order in Europe (Routledge 1998); Tallgren (n15) 575; P Akhavan 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?' (2001) 95 AJIL 7, 10.

[297] P Akhavan 'Justice and Reconciliation in the Great Lakes Region of Africa: the Contribution of the International Criminal Tribunal for Rwanda' (1996-1997) 7 *Duke J Int'l* Law 325, 328.

[298] J Alvarez 'Crimes of States/Crimes of Hate: Lessons from Rwanda' (1999) 24 Yale Journal of International Law 365 acknowledging both State crimes and hate crimes as causal factors.

[299] Roberts and McMillan (n6) 325; Akhavan 'Beyond Impunity' (n296) 11.

[300] Farer (n293) 98.

[301] Jamieson (n296) 482-484; Roberts and McMillan (n295) 323-324.

[302] M Drumbl 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' 99 Nw U L Rev (2005) 539, 569 identifies three possible scenarios: "atrocity is perpetrated top-down, through occasional and targeted covert state operations"; "megalomaniac leaders may encourage and reward violence initiated through party bureaucracies involving broad networks of agents, informants, and sycophants"; "conflict entrepreneurs publicly exhorted violence and substantial numbers of ordinary people ordinarily disconnected from the political process actively committed the acts in question with the acquiescence or complicity of many more individuals".

engaging theories of "crimes of obedience" and revealing the influence of traditional criminological theories of "authorisation", "routinisation" and "dehumanisation".[303] While international crimes vary significantly, a recurrent characteristic is that activity normally seen as deviant is directly commanded or at least sanctioned by a legitimate or powerful authority,[304] normalised by its repetition and internally justified by dehumanising the victim.[305]

Further complications in the analysis of international crimes stem from the sheer numbers of perpetrators and the high level of societal mobilisation. The emphasis on state involvement in the planning of mass violence points to the existence of distinct levels of involvement in perpetration. Potential offenders can be categorised as those that plan, instigate and orchestrate the crimes, referred to by Tallgren as the "programmatic level",[306] and those who "mainly carry out the plans and have little or no influence on those features that actually make them international" such as the widespread and systematic nature.[307] This second group represents the low-ranking soldiers and civilians who perpetrate the individual crimes that constitute in its entirety genocide or crimes against humanity. Akhavan describes these mass participants as "unwitting" instruments of the "unscrupulous leaders";[308] while Drumbl emphasises that these perpetrators are essential in the commission of crimes en masse.[309]

Perceptions of victimhood also play a role in motivating mass violence. An ICRC study into the motivations for IHL violations by combatants in armed conflict claims that there are a number of "justifications" which allow the normally existing internal moral barriers to such violent actions to break down. One of these is the perception on the part of the perpetrator that they are themselves the true victim of the other group.[310] These feelings of victimhood are powerful motivators, easily exploited by conflict entrepreneurs. Other justifications that facilitate the moral disengagement necessary to commit violations of IHL are identified with the belief that the other side is committing similar or worse atrocities, termed as the concept of reciprocity which legitimises behaviour accepted as morally wrong. Combatants become caught up in the contingency of circumstances and "the morality of results" which authorises behaviour that is unacceptable in absolute terms but ostensibly justified by the special circumstances of the conflict.[311] High levels of victimisation as well as involvement in perpetration are factors in the spiral of

[303] W Morrison Theoretical Criminology: from modernity to post-modernism (Cavendish Publishing 1995) 205-209; L Day and M Vandiver 'Criminology and Genocide: Notes on what might have been and what still could be' (2000) 34 Crime, Law and Social Change 43, 44 and 50.
[304] Akhavan 'Beyond Impunity' (n14) 10; Jamieson (n296) 481-483.
[305] While the context may be slightly different in crimes by; the same influences can be seen as acting in rebel groups in internal conflicts and a similar social context on micro scale.
[306] Tallgren (n293) 572.
[307] Ibid.
[308] Akhavan 'Beyond Impunity' (n296) 9-10.
[309] Drumbl 'Collective Violence' (n302).
[310] D Munoz-Rojas and J-J Fresard The Roots of Behaviour in War: Understanding and Preventing IHL Violations (ICRC 2004) 9.
[311] Ibid 9-10.

violence recognised as the cycle of vengeance that results in further acts of violence by traumatised individuals.[312]

2.1.2 The social effects of group action on criminality

The collective or group nature of international crimes is significant in its effects on the perpetrators and on traditional notions of responsibility associated with criminal justice and punishment. The social effect of collective action has implications for attitudes to penal sanction and the reach of the moral and behavioural norms implicit in the criminal law. The context in which crimes of mass violence are committed is usually characterised by a reversal of notions of deviance. The idea of deviance is the essential trigger of the stigmatisation constituting the normative context in which the various effects of criminal norms operate.[313] This normative context can be created by the expressive function of the law in communicating society's condemnation of certain behaviour as deviant and therefore undesirable.[314] This is achieved through criminalisation of undesirable acts[315] and the punishment of such acts through the criminal justice process.[316] The offender is stigmatised for violating rules regarded as legitimate by society as a whole – either because they are the law or because the law represents existing norms.[317] Penal censure represents a form of social control and is brought about through the very public process of arrest and prosecution at trial.[318]

The collective nature of international crimes contributes to an erosion of this normativity. While "ordinary" crime at national level can be seen as deviating from the accepted social norm, "extraordinary crime has an organic or group component that makes it not so obviously deviant in place and time".[319] Not only is the sense that the action is morally wrong or socially unacceptable taken away but it may be lauded as exceptionally good behaviour.[320] In these contexts "those who refuse to commit the crimes choose to act deviantly".[321] The collective nature of the crimes is important to penal theory because of the impact it has on an individual's attitude towards the crimes; and the effect of group action on strengthening perpetrators' motivations and weakening internal

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[312] Ibid 8.

[313] Drumbl 'Collective Violence' (n302) 570 in Rwanda "the pre-existing normative structure was suspended and replaced with the normalisation of ethnic elimination"; Akhavan 'Beyond Impunity' (n296) 10 refers to an "aberrant context of inverted morality".

[314] B Hudson Understanding Justice: an introduction to ideas, perspectives, and controversies in modern penal theory (Open University Press 2nd ed 2003) 8; D Kahan D 'Social Influence, Social Meaning, and Deterrence' (1997) 83 Virginia Law Review 349, 383; J Andenaes 'The General Preventive Effects of Punishment' (1966) 114 U Pa L Rev 949, 950.

[315] Hudson (n314) 5-6; RA Duff Punishment, Communication and Community (OUP 2001) 56-57; Andenaes (n314) 950.

[316] J Feinberg 'The expressive function of punishment' in Duff and Garland (eds) A Reader on Punishment (OUP 1994) 71, 85; Andenaes (n314) 950.

[317] A Von Hirsch, A Bottoms, E Burney and P-O Wikstrom Criminal Deterrence and Sentence Severity (Hart Publishing 1999) 40.

[318] Andenaes (n314) 961 "the legal machinery, therefore, is in itself the most effective means of mobilising the kind of social control which emanates from community condemnation"; Sumner C (ed) Censure, Politics and Criminal Justice (Open University Press 1990) 26-27

[319] Drumbl 'Collective Violence' (n302) 567.

[320] Akhavan 'Beyond Impunity' (n296) 10.

[321] Tallgren (n293) 573 and Drumbl 'Collective Violence' (n302) 567.

moral repugnance at the activity.[322] Kahan explains how such perceptions are self-confirming: as criminality increases and spreads it becomes more difficult to extend punishment to all involved.[323] The impossibility, practically and financially, of extending international criminal justice to all the perpetrators within the groups involved may also foster such perceptions, aided by the breakdown of national state control and the maintenance of law and order.

Weakened social bonds or "stakes in conformity"[324] that render social stigma meaningful can also have the effect of weakening the desired effects of censure and punishment through the criminal justice system.[325] This weakening of the moral influence of society and the rule of law has found expression most clearly in "gang mentality" theories developed in relation to juvenile delinquency.[326] These are also linked to labelling theories[327] that highlight the potential "status-enhancing" effect of a criminal label if criminal behaviour is the norm amongst peers.[328] The "contribution of social influence is most obvious in "mob" offences such as looting and lynching"[329] and may be a decisive factor in evaluating criminal justice theories in the social context of international crimes. The concept of "conflicting group norms" is also apposite. As Andenaes points out "the motivating influences of penal law may become more or less neutralized by group norms working in the opposite direction".[330] A lack of social stigma associated with crimes may give a potential offender "diminished social or material reasons for compliance"[331] or may lead the offender to conform to norms prevalent in their immediate social surroundings that conflict with those applicable in a larger or more normalised social context.

2.1.3 International political context and limitations on enforcement

Most penal theory presupposes a particular political conception of the state as a central organising power with varying levels of authority, legitimacy and shared understandings that contribute to the effects of punishment. It is not possible to define the international criminal justice system as having such a centralising organising power.[332] There are different levels of political authority utilising criminal justice responses – local, national, international – and each has a different political conception of power, legitimacy and authority.[333]

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[322] Drumbl 'Collective Violence' (n302) 567-568, 570-571; Kahan (n314) 349.
[323] Kahan (n314) 349; D Wippman 'Atrocities, Deterrence, and the Limits of International Justice' Justice' (1999-2000) 23 Fordham International Law Journal 473, 478.
[324] Von Hirsch et al (n317) 35.
[325] Ibid.
[326] Kahan (n314) 364; Morrison (n303) 281-290.
[327] Morrison (n303) 321-328; Hudson (n314) 32; M Cavadino and J Dignan The Penal System: An Introduction (3rd ed Sage 2002) 35.
[328] Kahan (n314) 350-351.
[329] Kahan (n314) 354.
[330] Andenaes (n314) 959.
[331] Von Hirsch et al (n317) 40.
[332] Supra chapter 1, section 1.1.4.
[333] An example of the difficulties of transferring theories from a unitary state punishment system to a legally pluralistic system is discussed in D Ivison 'Justifying Punishment in Intercultural Contexts: Whose Norms? Which Values?' in M Matravers (ed) Punishment and Political Theory (Hart Publishing 1999) 88.

One notorious problem for criminal justice at the international level is the lack of consistent and effective enforcement. The international criminal justice system does not function in the same way as national legal systems, which "have established institutions, structures, and personnel carrying out the enforcement functions of the criminal justice system on a consistent and regular basis",[334] uncontested jurisdiction and the power and authority to enforce the law. Prior to the advent of the ICC, international criminal justice lacked a systematic, consistent and effective method of enforcement.[335] The institutions that did exist had no police force of their own and relied on nation states to enforce the international criminal law.[336] Farer claims "that law regulates behaviour only where it is backed by intimidating force. In the absence of police and troops to execute their orders, courts are impotent and law a dangerous illusion".[337]

Limited enforcement power is further complicated by the inevitable selectivity of prosecution and punishment, given the large numbers of perpetrators involved. International courts and tribunals will only ever be able to address a limited number of perpetrators and crimes. Such selectivity is also seen in national criminal justice systems where anything remotely approaching comprehensive apprehension and trial of all perpetrators remains beyond reach.[338] The issue of selectivity is complicated in the international sphere by the perceived arbitrary nature of enforcement and political motivations that are alleged to underpin the choice of conflicts to be judicialised and selections of perpetrators to be brought to justice. Drumbl describes this as "the intractable selectivity, pervasive discretion, and excruciating political contingency of the process of international criminal law",[339] which impacts heavily on perceptions of legitimacy and authority crucial to most justificatory theories of criminal justice.

2.1.4 Issues of legitimacy and authority

The problems of transposing criminal justice processes to the international context run deeper than the absence of physical apparatus for enforcement. If criminal justice compliance is based on enforcement power, it does not matter whether the censuring agent has the perceived authority or legitimacy to carry out punishment or coercive threats: it is simply the fear of their power to do so that, in theory, makes criminal prohibitions effective. However, if the theory of punishment relies on stigma and social censure, the legitimacy and authority of the punishing agent becomes more significant. If the criminal justice system is not perceived by the society it serves as representing their values, or legitimately formulating or enforcing accepted laws, there will be little or no stigma when those laws are broken or applied. In political terms, those sanctioned by a body perceived as illegitimate, politically biased or unfair in its application of the law may become heroes, martyrs or perceived as victims

[334] Bassiouni 'The Philosophy and Policy' (n292) 65, 101.
[335] Tallgren (n293) 564.
[336] Drumbl 'Collective Violence' (n302) 590; Farer (n293) 96-97; J Iontcheva Turner 'Nationalizing International Criminal Law' (2005) 41 *Stan J Int'l L* 1, 11-12.
[337] Farer (n293) 96-97.
[338] The jurisdiction of England and Wales claim only 3% enforcement rates for some crimes, Roberts and McMillan (n295) 330.
[339] Drumbl 'Collective Violence' (n302) 550.

themselves,[340] undermining the normative power of penal law. Furthermore, condemnatory, vindicatory and expressive theories of punishment rest on the moral legitimacy of the punishing agent to condemn certain behaviours and demonstrate appropriate responses to violence.

If the enforcement power of the international criminal justice system is weak, its legitimacy and normative power are questionable for a number of reasons. Firstly, consensus on enforcing criminal sanctions is weak between nations.[341] There is a credibility gap between rhetoric and reality when it comes to the political will to ensure enforcement.[342] Secondly, legitimacy is compromised by the non-universal application of international criminal law. This selectivity is partly due to political considerations and partly due to the barrier of sovereignty[343] which is still the fundamental mainstay of the international system. Politically-biased selectivity clouds the perception that an act is "indubitably criminal". Raising the question, for example, why forcing people from their homes is illegal in Bosnia and subject to international prosecution and punishment, but not in the Palestinian occupied territories?[344] Political selectivity sends mixed messages that impact on perceptions of the legitimacy of international law, not least on the likelihood that it will be enforced against them personally.

A further problem affecting perceptions of the legitimacy of the international criminal justice system is the complicity, or at least acquiescence, of other external actors in the crimes at issue. Akhavan points out how the strength of the international criminal justice system's impact is "diluted by unwillingness to intervene in a timely way to stop ongoing atrocities".[345] Drumbl calls this the "deep complicity cascade" that problematises "the moral legitimacy of pronouncements of wrongdoing by international tribunals when the international community itself is perceived as having failed to prevent the wrongdoing".[346] These problems of enforcement power and legitimacy highlight the difficulty of relying on theories of punishment based on the consistency and credibility of application of norms at national level.

The functioning of the international criminal justice system is further complicated by the introduction of the concept of individuals as subjects of a criminal law developed between nations.[347] Put simplistically, traditional international law controls states, whilst states control their own citizens. For international law to have an effect on these citizens by-passing the state, it would have to influence the citizens directly without the political or power

[340] Iontcheva Turner (n336) 25 on local reactions to the ICTY and ICTR; Roberts and McMillan (n295).
[341] Farer (n293) 97; Roberts and McMillan (n295) 325.
[342] G Bass Stay the Hand of Vengeance: The Politics of War Crimes Tribunals (Princeton University Press 2000) ch. 6.
[343] Farer (n293) 106-7.
[344] This question is posed by the Harvard Law Review 'II. The Promises of International Prosecution' (2001) 114 Harv L R 1957 note 42 and accompanying text.
[345] Akhavan 'Beyond Impunity' (n296) 10.
[346] Drumbl 'Collective Violence' (n302) 550.
[347] Ibid 570.

structures that would allow this to be effective.[348] Not only is such a law remote from the everyday experiences (and perhaps the values and priorities) of its audiences, it is the product of a community in which they play no direct part.[349]

Drumbl claims that international criminal justice has globalised Western legal systems, philosophies and approaches, undermining the value-neutral and universal claims of international criminal law, which is, in fact, culturally contingent. In this way, justice becomes "externalised" from the communities implicated in the conflict.[350] A lack of engagement with affected populations in the process of deciding post-conflict accountability responses can exacerbate feelings of alienation from "imposed" justice.[351] While the countries instrumental in establishing such institutions are often spurred into action by the outrage of their own populations,[352] attitudes to these institutions in affected countries remain mixed and are often not considered. The implications are serious, because without "political ownership or emotional investment" of key stakeholders the proceedings will "lack the moral authority to render judgment" or contribute to broader aims.[353]

The lack of participation of, or attention to, victims in processes or outcomes has further fuelled criticisms of the estrangement of international criminal justice from its subjects. The ad-hoc tribunals were criticised for "a disconnect between the tribunal's work and the victims of the atrocities these institutions were designed to address."[354] The ICTY and ICTR were accused of being too distant from affected populations, meaning justice was not properly seen or understood in context, nor communicated clearly.[355] Pena and Carayon report that the "lack of adequate and constant consideration of the interests of victims at the ICTR resulted in deep disappointment and frustration with international justice."[356] Similar experiences have been registered at the ICTY, where victims were instrumentalised without being given more meaningful roles.[357] Victims have participated in tribunals as witnesses rather than stakeholders in the outcome and have perceived the results as alien and external to their experiences – if they have connected with them at all.

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[348] This is partly the problem that has led to criticism of transposing notions of crime control from national to international level – see Tallgren (n293) 566-567; Farer (n293) 92; Bassiouni 'The Philosophy and Policy' (n292) 103.
[349] Hudson (n314) 13.
[350] Drumbl 'Collective Violence' (n302) 551.
[351] A Cassese 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Romano, Noellkamper and Kleffner (eds) Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia (OUP 2004) 3, 6; Alvarez (n298) 482.
[352] Bass (n342) 28.
[353] Roberts and Millam (n295) 332.
[354] S Sacouto and K Cleary 'Victims' Participation in the Investigations of the International Criminal Court' (2008) 17 Transnational Law and Contemporary Problems 73, 81.
[355] Ibid 81.
[356] M Pena and G Carayon 'Is the ICC Making the Most of Victim Participation?' (2013) The International Journal of transitional Justice 1, 4.
[357] C van den Wyngaert 'Victims before the International Criminal Courts: Some views and concerns of an ICC Trial Judge' (2011) *Case W. Res. J. Int'l L.* 475, 477.

2.2 Context and the penal aims of international criminal justice

We now consider how the contextual factors outlined above affect the viability and appropriateness of the penal rationales canvassed in Chapter 1 as a response to international criminality.

2.2.1 Prevention

As we have seen, prevention of future crimes and stopping ongoing crimes relates to deterrence theory, incapacitation and positive prevention / moral education.[358]

Deterrent effect

Deterrent effects come from the fear instilled by punishment itself,[359] but also fear of the social stigma and loss of status that accompany legitimate criminal sanction.[360] Deterrence depends on a rational calculation by the perpetrator carrying out a cost-benefit analysis where these factors are taken into account.[361] For this reason, certain offenders are considered inherently undeterrable due to their lack of rationality.[362]

The majority of those who abide by the law comply with internalised moral norms rather than fear of the consequences of disobedience,[363] although many recognise that where such internal resistance breaks down there may be a role for deterrence.[364] This is particularly true of the types of behaviours associated with international crimes where social circumstances militate against moral resistance and the influence of a clear rule of law may be greater.[365] Even if potential perpetrators fall into the category of those in principle deterrable through penal threat, in order for there to be a deterrent effect from punishment potential perpetrators need to be aware that certain acts are crimes under law and that sanctions will result from the violation of those laws. Communication therefore plays an essential role in deterrent theory. Furthermore, it has been seen at national level that it is the certainty of punishment rather than its severity that plays the most prominent role in deterring would-be offenders.[366]

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[358] Supra chapter 1 section 1.1.3.

[359] D Beyleveld The Effectiveness of General Deterrents against Crime: An Annotated Bibliography of Evaluative Research (Institute of Criminology 1978) 1-2; Von Hirsch et al (n317) 5.

[360] H Grasmick and R Bursik 'Conscience, Significant Others, and Rational Choice: Extending the Deterrence Model' (1990) 24 Law and Society Review 837 which discusses 'state-imposed costs' ie the threat of legal sanction and 'socially imposed costs' when norms which significant others support are violated. Kahan (n314) 357.

[361] This utility calculation forms the basis of the theory of deterrence without which there is no deterrent effect - D Beyleveld 'Identifying, Explaining and Predicting Deterrence' (1979) 19 The British Journal of Criminology 205, 219-220; Von Hirsch et al (n317); M Aukerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' 15 Harvard Human Rights Journal (2002) 39, 66.

[362] Beyleveld (n359) 220; Andenaes (n314) 959.

[363] Cavadino and Dignan (n327) 36 suggest "most people most of the time obey the law out of moral considerations rather than selfish instrumental reasons".

[364] A von Hirsch Censure and Sanctions (OUP 1993).

[365] Munoz-Rojas and Fresard (n310) 15.

[366] Von Hirsch et al (n317); Beccaria Of Crimes and Punishments (1764) preface Manzoni The Column of Infamy (OUP 1964) 57 "[o]ne of the greatest checks upon crime is not the cruelty of punishment but its inevitability".

Under-enforcement and Selectivity

The applicability of deterrent theory at the international level is questionable owing to problems of limited enforcement and selectivity in the international context, which significantly reduce the prospect of being punished. There is general agreement that, given the nature and functioning of the international criminal justice system, there is a very low likelihood of arrest and conviction for international crimes, whether as a leader, planner or a low-level perpetrator.[367] If a potential perpetrator does not perceive a likelihood of prosecution or punishment the deterrent effect is nullified. There are numerous factors that affect not only the actual certainty of arrest, conviction and punishment, but the perceived probability. The main factors can be summarised as deficient enforcement apparatus; lack of tribunals and courts; and the limited jurisdiction of those that do exist. This is exacerbated by the problem of political selectivity noted above.

These political factors mainly affect the perceptions of the civilian leaders and military commanders who are more likely to be affected by these macro-level influences on certainty of arrest and conviction. On the micro-level, the social conditions under which international crimes are typically committed also means that amongst those who commit the crimes en masse the perception that they will be caught and tried is low.[368] Furthermore, the actual probability of being tried is low due to the over-whelming number of participants, too many for a conventional criminal justice response.[369] The difficult balance to be struck is that, while not everyone must be prosecuted,[370] if you are too selective or are not perceived to be punishing enough perpetrators this may increase the perception that a probability of conviction is low and reduce the deterrent effect. Fair geographical and political spread of prosecutions is necesary for the certainty factor to reach all potential audiences.

Lack of perpetrator rationality

The targets of deterrence must carry out a rational calculation and decide that the greatest personal utility to them will be to refrain from the prohibited action. This calculation is strongly affected by the characteristics of the potential offender and their normative context and the social conditions. The assumption that perpetrators of international crimes follow a rational cost-benefit calculation is problematic in the context of international criminality. For example, the 'perpetrators en masse' may be largely undeterrable, owing to: the collective nature of the violence; the perpetrator's strong identification with the crimes linked to survival or national/ethnic identity; and, the power of immediate group norms over more distant international legal codes.[371] Even if participants in such violence are aware of the existence of the international norms, which may well have also been national norms in the pre-conflict

[367] Tallgren (n293) 575; Aukerman (n361) 67; Wippman (n323) 479.
[368] Kahan (n314) on the role of peer behaviour in perceptions of certainty of arrest; and infra section 1, B.
[369] P Roberts 'Restoration and Retribution in International Criminal Justice: An Exploratory Analysis' in von Hirsch et al (eds) Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms (Hart Publishing 2003) 115, 126.
[370] Aukerman (n361) 66 "deterrence theory does not require punishment of all the guilty".
[371] Tallgren (n293) 573.

society in which they are acting, they can be "overwhelmed in large part by the rules on the ground".[372]

Furthermore, the psychological pressures that accompany the breakdown of social norms in situations of international criminality produce many of the behavioural traits and motivations identified in deterrence theory as characteristics of those who are 'less deterrable' or, in combination, 'undeterrable'.[373] Group solidarity relies on an individual's notion of identity, such as ethnicity and nationality, often making international criminality a form of "high-commitment" crimes. Transferring or "projecting aggressiveness to the victims"[374] may lend to these acts of violence the self-justifying appearance of self-defence.[375] The propaganda often involved in instigating these crimes warps the cost-benefit calculations underpinning deterrent theory: "values are manipulated in such a way that the prohibited conduct starts to appear as a holy obligation, a positive achievement"[376] or a "civic duty".[377]

A further factor affecting the deterrability of the perpetrators of these crimes, which raises the issue of whether the cost-benefit calculation even occurs in the manner necessary for legal regulation to exert any effect, is a "lack of control" over one's own actions.[378] This can be seen through the less deterrable psychological state of "impulsivity"[379] generated by the group context, what Akhavan calls the phenomenon of "collective hysteria, allowing for no dissent".[380] The (full) relinquishing of personal control is also an element identified in theories of "crimes of obedience" and "authorisation" in which orders from an authority allow the person to view himself as "an instrument of another person's wishes" which lessens their sense of their own responsibility.[381]

These findings have recently been applied in conflict contexts by an ICRC study, which distinguished dilution of responsibility (in a sociological sense) through obedience to orders as a factor in the disengagement of morality essential to allow international crimes to take place.[382] This is relevant to deterrence theory, as orders from authority warp the calculations of rational actors such that "those subject to orders are not free actors in the fullest sense".[383] The immediate benefit of complying with the order may override the more distant prospect of future prosecution by a less proximate authority. This psychological dynamic can be extended to all crimes committed under duress or physical intimidation.

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[372] Wippman (n323) 487.
[373] Beyleveld Bibliography (n359) 26, 29, 38; G Pogarsky 'Identifying "Deterrable" Offenders: Implications for Research on Deterrence' (2002) 19 Justice Quarterly 431, 433; Cavadino and Dignan (n327) 35.
[374] Tallgren (n293) 574.
[375] Wippman (n323) 479; Farer (n293) 98 talks of the "gravity of interests at stake".
[376] Tallgren (n293) 574.
[377] Drumbl 'Collective Violence' (n302) 591.
[378] Drumbl 'Towards a Criminology' (n292) 269.
[379] Hudson (n314) 22 defines impulsive offences as acts that are "not of rational premeditation but out of particular circumstances and relationships".
[380] Akhavan 'Beyond Impunity' (n296) 10.
[381] Wippman (n323) 478.
[382] Munoz-Rojas and Fresard (n310) 2-3, 7.
[383] Wippman (n323) 478.

Deterring the leaders – those most responsible

Actors at programmatic level are seen as potentially more deterrable because of their high-status. They have more to lose through international punishment, and often have closer involvement with the international community from which the norms emanate. These individuals have instrumental objectives: "leaders may be desperate, erratic, or even psychotic, but incitement to ethnic violence is usually aimed at the acquisition and sustained exercise of power".[384] If that is indeed the case, then "[c]ertain dictators like Milosevic are manipulators, not fanatics, and might be restrained by credible threats".[385] As Ehrlich noted, "even the most reprehensible violations of moral and legal codes" are consistent with "self-serving choices".[386] If we see elite-induced mass violence as premeditated and instrumental for achieving personal utility, then the plausibility of influencing a cost-benefit analysis increases.

The "moral and political censure"[387] of the international community has a stigmatising or delegitimising effect on political leadership: "the stigmatisation associated with indictment, as much as apprehension and prosecution, may significantly threaten the attainment of sustained political power".[388] For example, sanctions on the state may lead to a loss of legitimacy amongst a leader's supporters, or being excluded from international negotiations which makes them unable to function effectively as head of state. Condemnation by the international criminal justice system may lead to political and diplomatic isolation. Thee could also be more tangible personal impacts for the particular leader, such as an inability to travel for fear of arrest and prosecution by a third state, or the freezing of personal assets.[389] While these are not all direct punishments imposed by the international criminal justice system, they issue directly from the stigma and international ostracisation that may follow an international indictment. Unfortunately, as discussed above, the legitimacy and political selectivity of the international community can weaken this stigmatisation and deterrence.

Incapacitation

Incapacitation at international level not only involves physical restraint from committing further crimes but potentially the political incapacitation of former leaders following their indictment, trial and conviction by an international criminal court.[390] Criminal punishment may serve to delegitimise the political ideologies and methods of those leaders who espouse mass violence or commit international crimes in realising their political aims, whilst conviction and imprisonment physically removes offenders from the field of conflict and political manipulation.

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[384] Akhavan 'Beyond Impunity' (n296) 12; Wippman (n323) 479 cites example of Milosevic who "deliberately fostered inter-communal hostility and conflict as a means to secure and maintain political power and personal wealth".
[385] Aukerman (n361) 68.
[386] Quoted in Akhavan 'Beyond Impunity' (n296) 12.
[387] Goldstone (n294) 202.
[388] Akhavan 'Beyond Impunity' (n296) 12.
[389] Farer (n293) 111; Bassiouni 'The Philosophy and Policy' (n292); Wippman (n323); Aukerman (n361) 69.
[390] Bass (n342).

However, while political incapacitation may be a welcome side-effect of international criminal justice, it is difficult to justify as an explicit objective of punishment. Punishment can only be justified as an appropriate response to crime and not as a convenient mechanism for promoting "regime change" or incapacitating undesirable leaders. The use of the criminal justice system to deal with political enemies is historically associated with ruthless authoritarian regimes, none of which is a desirable role model for a just and fair international community. If international institutions are perceived as manipulating national politics it can damage their moral authority and legitimacy.

Contextual issues arise. At the ICTR, for example, social protection was cited as an aim of punishment more often than in other tribunals. The threat of renewed hostilities and the history of recurrent genocides made recidivism a very likely prospect, particularly if encouraged by leaders strengthened by impunity. The idea of incapacitating perpetrators in the short-term to prevent a continuance or reoccurrence of genocide or war crimes assumes greater urgency in such situations.

Incapacitation depends on the enforcement power of international criminal justice institutions to locate and physically detain suspects and offenders. International criminal justice does not yet enjoy such effective powers of enforcement; international criminal courts lack dedicated police forces, and must generally rely on political negotiation with states and other international organisations to gain access to offenders.

Prevention through moral education

Moral education through punishment, as elucidated by Akhavan, is "a long-term process of social and political transformation, entailing internalisation of ideals in a particular context or 'reality' or the gradual penetration of principles into power realities".[391] In the international context such education is aimed at offenders, victims and the wider international community to educate and reassure regarding the rule of law. It aims to develop consensus on criminal behaviour and the moral norms that underpin criminal law through the symbolic power of punishment. Ideally, "[o]ver time, punishment by international criminal tribunals can shape as well as express social norms."[392]

Penal messages about moral norms, acceptable behaviour and legitimate authority can still theoretically be communicated even if only a small number of perpetrators are put to trial and punished. However, selectivity may weaken the moral authority of such messages and undermine their credibility should there be any suspicion of political bias in case selection. Further damage may be done to the power of moral education if the actions of educating authorities are perceived not to correspond with the lessons being taught. Prevailing societal attitudes to the punishing agent, the international community, and perceived legitimacy as moral authority and arbiter of social values can erode the efficacy of international tribunals as moral educators.[393]

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[391] Akhavan 'Justice in the Hague' (n295) 741.

[392] R Sloane 'The Expressive Capacity of International Punishment' Columbia Law School Public Law and Legal Theory Working Paper Group 06-112 (May 2006) 56

[393] Aukerman (n361) 76 "where prosecution is not grounded in moral consensus it will be seen as victor's justice. And if it is seen as victor's justice, it will lose its effectiveness as a tool for

Moral education relies on the expressive power of penal law and punishment to communicate certain messages about the moral unacceptability of criminal behaviour; and secondarily, on positive reinforcement by society at large through social stigma and condemnation. Local attitudes to crimes committed in violent and aberrant contexts of conflict and repression mean that societal attitudes to such violence cannot always be relied on to reinforce the moral norms in international legal codes. Group psychology and the warped justifications for criminal behaviour prevalent in the deviant contexts of international criminality produce moral disengagement that makes such crimes possible and means there is little societal disapproval when they do take place. Social reinforcement of the moral messages is lacking, weakening the educative effect of criminal justice interventions. This was reportedly the case in post war Germany. Over time, the Nuremberg tribunal and other trials, particularly in the American occupation zone, were perceived as imposed by an occupying power, which reduced the intended didactic impact.[394]

The expressive meaning of international trials is complicated by the conflicting moral messages being sent by the immediate social groups, including authorities sanctioning and authorising the crimes, and the more distant "externalised" forms of international justice condemning them. Besides, the complexity of the educative messages expected to be transmitted through penal processes is problematic. Punishment is expected to convey the wrongness of specific actions; the importance of proportionate legal responses and the rule of law; as well as the historical events underpinning the crimes. These complex messages are not necessarily mutually compatible, at least not within a single set of legal proceedings which aim to focus on, and ascertain the truth about, the actions of individuals in relation to particularised charges. Further complexities within the educative messages being communicated relate to the differentiation between combatants and civilians. Work by the ICRC shows that although there is common agreement about humanitarian values, the combatant/civilian differentiation is contested.[395]

Having an effect on individuals or the context?

A lack of perpetrator rationality does not negate the potential for moral education per se but it undermines the notion that strengthening internal moral norms will prevent violence perpetrated en masse. An ICRC study claims that internal moral resistance to crime does not function to inhibit criminality in conflict situations; only the existence of legal norms, clearly and consistently enforced, keeps combatants from entering a spiral of illegal violence.[396]

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creating moral consensus." Some commentators see lack of moral authority as undermining the moral standing of a community to judge or censure an offender, M Matravers 'Introduction' in M Matravers (ed) Punishment and Political Theory (Hart Publishing 1999) 5-6; others claim punishment should not be contingent on moral authority, while accepting that if an authority's moral standing were so compromised no conception of punishment might be justified, A von Hirsch 'Punishment, Penance and the State' in M Matravers (ed) Punishment and Political Theory (Hart Publishing 1999) 69, 81.

[394] M Koskenniemi 'Between Impunity and Show Trials' (2002) 6 Max Planck Yearbook of United Nations Law 1, 5-6 reports approval of the trials amongst German citizens falling from 78% at the time of the Nuremberg trial to only 10% in 1952, and that conviction by such trials was "no dishonour".

[395] Munoz-Rojas and Fresard (n310) 13.

[396] Munoz-Rojas and Fresard (n310) 15; the ICRC report concludes that one cannot hope to

Theories of moral education presuppose freedom of individual action, which is questioned in the aberrant contexts in which international crime is spawned and encouraged.

One conclusion of the ICRC's work on prevention is that appealing to moral standards is ineffective for combatants in a conflict situation. Akhavan likewise contends that in order to prevent such criminality it is the context itself which must be addressed and poses the question "whether and how punishment can prevent such aberrant contexts prior to their occurrence or prevent their reoccurrence in post-conflict situations".[397] It seems that while there are positive elements in theories of moral education that address long-term attitudes to international criminality, the actual effect on the complex and chaotic situations of mass violence that characterise international criminality is limited. Without enforcement power or strong internalised moral prohibitions, international criminal justice can have little impact in restraining ongoing incidents of mass violence.

2.2.2 Retribution

We saw in Chapter 1 that many positive effects of retribution, as well as its intrinsic worth, are highlighted by the institutions implementing international criminal justice. However, the practical implementation of the ideals of retributive justice is difficult to achieve given the "extraordinary" nature of international criminality and the complexity of the political environment within which international criminal institutions operate.

In the circumstances of limited institutional capacity and mass criminal participation, the inevitable selectivity of charges and prosecutions poses a continuing challenge to the legitimacy of international criminal justice. As Aukerman laments, "one cannot punish fairly, and one cannot punish enough".[398] That retributive punishment is only partially achievable can be seen to undermine its universalist messages of justice and fairness (to all) and the moral messages it purports to communicate regarding the principle that all wrongdoing deserves censure and punishment. In reality, selectivity is unavoidable in the context of international criminality, just as it is in national criminal justice systems. Such selectivity, if not arbitrary and biased in application, does not automatically negate the condemnatory and stigmatising effect of retributive punishment. International prosecutors have tended to follow a policy of selecting those most responsible for the most serious crimes, leaving lower level perpetrators to be held accountable in national processes.[399] However, these strategies were not formalised at the ad-hoc criminal tribunals and there has been some criticism of prosecutorial policy.[400]

Selectivity does pose a problem for the claims of victim vindication through retributive punishment. Victim vindication appears only fleetingly in the rationales of the institutions of international criminal justice that preceded the

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influence individuals in a combat situation but must change the organisation and chain of command to incorporate IHL.

[397] Akhavan 'Beyond Impunity' (n296) 12.

[398] Aukerman (n361) 63.

[399] M Drumbl Atrocity, Punishment and International Law (University Press 2007) chapter 4.

[400] Supra chapter 1 section 1.3.

ICC.[401] Whilst such vindication can only ever be symbolic, given the limited number of prosecutions possible at international tribunals, selectivity can be harmful to those whose crimes were not selected for representation at the international trial.[402] Aptel poses the question that if retribution is believed to vindicate and somehow empower the victims, restoring their value negated by the criminal act, then "what is the message sent to the victims of those appalling crimes which are left unpunished?"[403] Focusing on those most responsible is believed to be a way of combating this selectivity and symbolically reaching the largest number of victims.[404] Aptel suggests that victims may prefer to see lower-level perpetrators prosecuted, yet the strategy of targeting higher ranked individuals "may ultimately be in the best interests of the victims, all the victims, as it has the potential to launch broader accountability."[405] There is a tension here between the subjective interests of victims and the objective interests of victims as defined by the international community and presumed to be fulfilled by international criminal justice. While penal theories claim the objective interests of victims are fulfilled by the symbolic vindication and re-empowerment offered by the punishment of perpetrators, the wishes expressed and interests defined subjectively by victims themselves may be different. This kind of imposed response to victims suffering can have the counter-productive effect of being disempowering – the reverse of the supposed aims of punishment. It may exacerbate the problem of the "externalisation" of justice identified by Drumbl.[406]

Gravity of crimes and proportionality

Imposing a retributive punishment that is proportionate to the "extraordinary" crimes in question has also been seen as problematic for retributive theories in the international context.[407] For some commentators, there is a credibility gap for retribution between the enhanced gravity of extraordinary international criminality and the relative seriousness of punishments imposed.[408] This was Arendt's argument regarding the necessity but also the inadequacy of hanging Nazi war criminals, for crimes that almost seem beyond the scope of temporal punishment. However, proportionality of punishment can be seen as a conventional distinction, a symbolic social practice that signifies condemnation and expresses the moral outrage of a community in terms of apportioning punishment rather than having to increase exponentially with the number of victims or atrociousness of the crimes. The argument seems to be, not that retribution is inappropriate, but that punishments can never be severe enough to appropriately express the extent of the outrage and condemnation of the international community of international crimes. This represents a genuine challenge to the expressive value of punishment in terms of conveying the

[401] Supra chapter 1 section 1.2.5.
[402] D Taylor Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual? (Impunity Watch April 2014) 17.
[403] C Aptel 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the impunity gap' (2012) 10 JICJ 1357, 1358.
[404] Ibid 1371.
[405] Ibid 1371.
[406] Drumbl Atrocity (n399).
[407] Aukerman (n361) 57.
[408] Drumbl Atrocity (n399) 157.

extent of the wrong, but does not prevent expression of messages concerning the inherent wrong in criminality.

Not being able to adequately convey the relative seriousness of these crimes should not paralyse efforts to expose and condemn international crimes as such. Given the long history of impunity and denial that have characterised the acts now criminalised under international criminal law, authoritatively condemning at least the most culpable perpetrators is an important step on the road towards addressing the injustices which continue to result from international criminality. Perhaps the nuances of relative harm are to some extent lost. Yet, the fact that such acts are morally wrong and criminal still has to be conveyed. The argument that it cannot be conveyed with enough force to differentiate common murder from genocide does not negate the value and point of punishing in the first place, especially if the alternative is to do nothing.

Challenges to moral authority of international institutions

More telling critiques of retributive punishment at international level challenge the moral authority, if not the very existence, of the 'international community' as the censuring agent. Perceptions of the politicisation of judicialised responses to mass violence and the cultural and physical distance of the "international community" from the recipients of censuring messages (be they perpetrators, victims or the wider society) threaten to erode the credibility and authority of international penal justice institutions and by extension jeopardises the legitimacy of their verdicts and punishments.[409]

Garland highlights the difficulties of achieving successful denunciation through social rituals if the censuring agent does not have the required moral or normative power. The structural and contextual prerequisites he identifies include "that the prosecutor (the 'denouncer') be wholly identified with the ultimate values of the community, and be understood to speak in their name. For this to occur, the community must already share a common 'metaphysic', and a commitment to a 'legitimate order' from which the offender is to be estranged."[410] It is easy to see how the inchoate international "community" and the international criminal justice system, externalised from those it is aiming to influence and represent, may run into problems as the denouncer in this scenario.

Individual responsibility

Some commentators question retributivism's narrow focus on individual responsibility for international crimes. The focus on individual culpability can be interpreted as absolving the collectivity of blame. This indeed is traditionally seen as a positive virtue of retributive punishment.[411] The alternative of collective punishment without establishing culpability is contrary to the requirements of justice. Furthermore, collective punishment is often a feature of international crimes which indiscriminately target certain ethnic or national groups. However, from another perspective, the collective element of international crimes is crucial to their definition and absolving the remainder of

[409] See supra 2.1.4.
[410] D Garland Punishment and Modern Society: A Study in Social Theory (OUP 1990) 78.
[411] Supra chapter 1 section 1.2.4.

the collective from guilt is a denial of this context. When guilt is dispersed along a culpability-continuum, from active perpetrators to morally complicit bystanders and beneficiaries, focusing on the responsibility of a few identified perpetrators can create what Drumbl calls "the myth of collective innocence".[412] Symbolic international prosecutions arguably fail to address the problem of mass participation that allows these crimes to take place on a large scale.

Moreover, the collective context of international criminality may be regarded as eroding personal culpability. The extent of individual autonomy in situations of repression and mass violence may not be the same as for "ordinary" crimes due to the effects of social pressure. In certain situations, not committing such crimes may be seen as deviant or may expose individuals to social criticism or physical harm.[413] The notion of voluntary participation in criminal activity as a freely chosen course of action may start to appear problematic.

This is a legitimate moral concern. It is the impetus for the range of excusatory defences conceded to those whose freedom of action may have been unfairly compromised through coercion or duress.[414] However, these excuses do not act as a general defence to such crimes, as the attenuation of moral responsibility is a major factor in allowing these crimes to take place.[415] Although such crimes may feature mass involvement, there are those who choose not to commit the crimes, often at great personal cost.[416] Holding individuals accountable may be the only way to combat the blanket impunity offered by the group context, Formal condemnation sends strong messages about the immorality and wrongness of certain behaviours, even if widespread and accepted within an immediate social group. Arguably the group context calls even more urgently for the attribution of responsibility and condemnation. While there may be some moral ambiguity related to the psychologically-manipulated perpetrators en masse, the argument of reduced responsibility cannot easily be applied to the "programmatic" level of perpetrators, those who sanction and authorise these crimes. Expressive condemnation of top-level perpetrators is an important focus of international criminal justice.

2.2.3 Rehabilitation

Despite its prominence in human rights law as an aim of sentencing, rehabilitation of the individual has been largely ignored in international penality.[417] In national criminal justice systems rehabilitation pertains to the offender and attempts to "reform" them to prevent recidivism and allow their smooth transition back into the "normal" society. This poses obvious difficulties in light of the aberrant contexts of international criminality and the complex social environments from which such criminality springs. The focus instead has been on the potential of prosecution and punishment to contribute to collective rehabilitation of affected communities experiencing a high level of social rupture and trauma.

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[412] Drumbl Atrocity (n399) 3.
[413] Aukerman (n361) 59; Tallgren (n293) 574.
[414] D Ormerod *Smith and Hogan's Criminal Law* (12th ed OUP 2008) ch12.
[415] Munoz-Rojas and Fresard (n310).
[416] Sloane (n392) 27-28.
[417] Supra n239-242.

Social rehabilitation is thought to arise from the potential for prosecutions to relieve the collective guilt of the community by identification and punishment of a few individuals responsible for the crimes; restoration of the rule of law and justice mechanisms; and restoration of social relations and reconciliation through truth-telling and acknowledgement of past wrongs.[418] The contribution of criminal justice to these goals is limited due to its narrow focus on individual culpability rather than wider historical truths.[419] Fletcher and Weinstein have questioned the contribution of legal justice and individual accountability to social repair and reconciliation in situations of mass violence.[420] Furthermore, while fair trials may serve as a model for justice processes and the rule of law, they may have little impact if international criminal justice institutions are perceived to be geographically distant and not reflecting the values of the affected region.

Rebuilding legal structures and a rule of law culture involves a concerted commitment of funds and institution- and confidence-building that is beyond the remit and competence of international criminal justice institutions. The UN has acknowledged "the inherent limitations of criminal justice processes" and the need for other mechanisms to ensure victims obtain redress, to create a comprehensive historical record and to promote national reconciliation.[421] Rehabilitation may be more effectively achievable through other mechanisms such as reforming political and legal systems of affected countries; reducing wealth inequalities; public education; and promoting democratic processes.[422]

Retributive justice can contribute indirectly to rehabilitation in transitional societies through the effect of authoritative condemnation and disavowal of criminal conduct in "establishing the wrongfulness of past atrocities" and defining and strengthening the moral and legal norms of the affected society.[423] This unique contribution of penal justice to the process of rehabilitation of communities following violence needs to be built on by local initiatives. Carlen has proposed a "State-obligated rehabilitation model", comprising an obligation to society in the form of denunciation, obligations to the victim in the form of restitution and obligation to the offender in the form of rehabilitation.[424] While the rhetoric of international criminal justice institutions prior to the ICC largely ignored the latter two obligations, processes based on retributive justice principles can fulfil the need for denunciation.

2.2.4 Conflict-related aims

Controversy surrounds the role of international criminal justice in peace-building and conflict resolution. International criminal justice has been seen as a potential bar to successful peace negotiations, referred to as the "peace versus

[418] Sloane (n392) 59; Aukerman (n361) 72-76.
[419] M Minow Between Vengeance and Forgiveness: Facing history after genocide and mass violence (Beacon Press 1998)..
[420] L Fletcher and H Weinstein 'Violence and Social Repair: Rethinking the contribution of Justice to reconciliation' (2002) 24 Human Rights Quarterly 573 , 606.
[421] UNSC The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (2004) UN doc s/2004/616 para 47.
[422] Aukerman (n361) 76.
[423] Aukerman (n361) 75.
[424] P Carlen 'Crime, Inequality and Sentencing' in Carlen P and D Cook (eds) Paying for Crime (OUP 1989).

justice" dilemma.[425] Insisting on justice before, during or after negotiations, to the exclusion of amnesties and other negotiating tools, may tie the hands of negotiators, discourage alleged perpetrators from attending negotiations and generally contribute to a lengthening or deepening of the very violence they seek to prosecute.[426] This debate has been well-rehearsed in political, academic and aid circles. Not everyone sees peace and justice in opposition. Many academic commentators and NGOs have supported accountability as the response to mass violence, while recognising the complexities and the challenges that may arise.[427] The UN's view is that "[j]ustice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives."[428]

International criminal justice is expected to contribute to peace by deterring or incapacitating conflict entrepreneurs, by replacing vengeance with impartial justice, by the restoration and rehabilitation of victims and affected societies and by truth-telling and establishing a historical record as a basis for reconciliation. Many of these aims can be seen as secondary effects of an impartial criminal justice process, rather than its primary goal.[429]

Criminal trials have been associated with establishing an unequivocal record of events that are often contested in the turmoil of conflict. However, the selectivity and legalistic focus of criminal trials can produce narrow legal histories. Koskeniemmi notes that "[l]egal and historical truth are far from identical".[430] Focusing on the actions of individuals does little to shed light on the structural causes of conflict,[431] nor reflect the "deeper aspects of human experience" that may be needed to facilitate personal or societal recovery and reconciliation.[432] Akhavan suggests that while international tribunals such as the ICTY "can establish a factual record of what happened, it cannot contribute to national reconciliation if this record is not recognized and internalized by the people of the former Yugoslavia".[433]

The selectivity of international criminal justice can create a distorted picture of history if certain crimes or groups are excluded from prosecution. This was (deliberately) the case at Nuremberg and Tokyo where the actions of the Allies

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[425] W Schabas and R Thakur 'Concluding remarks: The questions that still remain' in Schabas, Hughes & Thakur (eds) Atrocities and International Accountability: Beyond Transnational Justice (United Nations University Press 2007) 275.
[426] A d'Amato 'Peace vs Accountability in Bosnia' (1994) 88 AJIL 500; Anonymous 'Human Rights in Peace negotiations' (1996) 18 Human Rights Quarterly 249.
[427] L Sadat The International Criminal Court and the Transformation of International Law: Justice for the New Millenium (Transnational Publishers 2002) 72; Akhavan 'Justice in the Hague' (n295) 737; M Osiel 'Why Prosecute? Critics of Punishment for Mass Atrocity' (2000) 22 Hum. Rights Quarterly 118; Coalition for the International Criminal Court (CICC) < http://www.coalitionfortheicc.org/?utm_source=CICC+Newsletters&utm_campaign=5ecca221ae-icc10&utm_medium=email>; Human Rights Watch < http://www.hrw.org/topic/international-justice>; FIDH < http://www.fidh.org/-International-Justice,181-> and NO Peace Without Justice (NPWJ) < http://www.npwj.org/>.
[428] UNSC The Rule of Law (n421).
[429] J Mendez 'The Importance of Justice in Securing Peace' Document submitted to ICC Review Conference of the Rome Statute, Kampala, 31 May – 11 June 2010 (30 May 2010) 7
[430] Koskenniemi (n394) 11.
[431] Ibid 13.
[432] Akhavan 'Justice in the Hague' (n295) 783.
[433] Akhavan 'Justice in the Hague' (n295) 770.

were not addressed. For Osiel, the WWII tribunals "seemed tendentiously selective, aimed at focussing memory in partisan ways".[434] Koskenniemi cites political realists who believed that "[b]ecause the legal process inevitably distorted the political context, it was not only useless but counterproductive for the purpose of providing a basis for peace and reconciliation."[435] Osiel claims that the limited number of prosecutions allows people to deny their own complicity and discourages the self-examination and honesty needed for reconciliation.[436]

By the same token, attempting to represent a complete picture of events in order to facilitate reconciliation or victim vindication may have a distorting effect on fairness. Arendt's criticism of the Eichmann trial was that trying to write a broad history of the Holocaust rather than addressing Eichmann's crimes and personal responsibility went against fairness and basic concepts of justice.[437] Akhavan suggests that vindicating the suffering of victims by relating the overall historical narrative must give way to fair trials rights of the accused.[438]

Akhavan also warns of the danger of having reconciliation as penal aim in that a prosecutor would have to select cases to construct "an overall picture of the conflict" providing "optimal cathartic and reconciliatory potential".[439] For Osiel, orchestrating trials for "pedagogic purposes" is not "morally indefensible" if done for liberal purposes.[440] However, he also notes that moral authority is needed to write history.[441] Such moral authority may well be undermined if it is perceived that trials are being geared to express messages of social or political transformation rather than focussing on the culpability and content of the individual's actions. While all trials can be seen as basically political and socially transformative in nature,[442] the question is the extent to which they are consciously tailored to that end and risk undermining the very justice processes which give them moral and normative power.

Information gathered and properly recorded through transparent procedures of legal due process can be used to build up a wider picture of historical events. Trial records can be used to combat future denials and distortions of events, as has been the case with the evidence gathered by the Nuremberg IMT, ICTY and ICTR.[443] Osiel notes that "surveys also suggest that only from the Nuremberg trial did a substantial majority of Germans learn about the existence of death camps".[444] A version of historical truth will be produced by

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[434] M Osiel Mass Atrocity, Collective Memory and the Law (Transaction Publishers 1997)123.
[435] Koskenniemi (n394) 12-13.
[436] Osiel Mass Atrocity (n434) 157 and 161.
[437] H Arendt Eichmann in Jerusalem (Faber and Faber 1963).
[438] Akhavan 'Justice in the Hague' (n295) 785.
[439] Ibid 775.
[440] Osiel Mass Atrocity (n434) 65.
[441] Ibid 125.
[442] A Greenawalt 'Justice without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) 39 NYU Journal International Law and Politics 583, 605 claims domestic justice aims to protect the existing social order and is 'preservational', international criminal justice is "transformational" in that it seeks to transform societies where the social fabric has been warped by mass violence and conflict.
[443] R Cryer, Friman, Robinson and Wilmshurst An Introduction to International Criminal Law and Procedure (3rd ed Cambridge University Press 2014) 40.
[444] Osiel Mass Atrocity (n434) 192.

international tribunals that will carry significant weight due to the process through which it was produced. The partial historical record established and the symbolic restoration of victims' dignity may go some way to promoting reconciliation, albeit marginal without further consolidating action.[445]

Another contribution to peace-building attributed to international criminal justice is rebuilding the rule of law, both for societies damaged by mass violence and in terms of the global rule of international law. The former is directly related to issues of maintaining peace and security, the belief being that a strong rule of law would combat impunity and make it harder for similar mass violence to emerge in the future. The latter refers to establishing, promoting and maintaining the fledgling rule of international criminal law. Establishing a strong rule of law has been seen as a crucial element in preventing future crimes and as more effective than appealing to moral values and an individual's internal resistance in times of mass violence.[446]

Fletcher and Weinstein reply that the effect of international criminal justice on national rule of law is "far more attenuated".[447] As Stromseth writes:

> "Holding key perpetrators criminally accountable - especially before international tribunals miles away - may advance international standards of justice. However, it may simultaneously have very little, if any, impact on strengthening the domestic rule of law in a post-conflict society."[448]

Stromseth argues that accountability processes can have long-term impact on building the rule of law by disempowering key perpetrators; by rejecting impunity and demonstrating fair process; and through domestic capacity-building.[449] Although accountability procedures on their own often do little to advance the rule of law in affected societies, locally-based initiatives can have lasting effects on capacity and the will for accountability and rule of law.[450] This echoes the UN's approach that a key role for the international institutions is helping build domestic justice capacities, rather than attempting to substitute international structures for national processes.[451] The principal way in which international tribunals can impact the domestic rule of law is through the "demonstration effects" of accountability proceedings.[452] Demonstration

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[445] Fletcher and Weinstein (n420) 593 and 599-601; R Teitel 'Transitional Justice Genealogy' (2003) 16 Harvard Human Rights Journal 69, 93; Minow Between Vengeance and Forgiveness (n419).
[446] Supra text n396.
[447] Fletcher and Weinstein (n420) 596.
[448] J Stromseth 'Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?' (2007) 38 Geo. J. Int'l L. 251, 255.
[449] Ibid 257.
[450] Ibid 257 "In a number of countries studied here, criminal trials have not been as influential as advocates had hoped and seem to have had little impact at all on forward-looking efforts to strengthen justice systems and the rule of law. But in other cases, accountability processes--particularly those located within affected countries that enjoy considerable public support and engage in systematic outreach--are contributing to national capacity-building and may be reinforcing both domestic expectations of accountability and demands for fairer justice processes in the future."
[451] UNSC The Rule of Law (n421).
[452] Stromseth (n448) 262.

effects, however, rest on the perceived fairness and impartiality of the proceedings and the moral legitimacy of the tribunals themselves.

2.3 Conclusions

This chapter has highlighted serious challenges to the effectiveness and viability of traditional penal aims in the context of international criminal proceedings. These challenges are particularly acute in relation to prevention, social rehabilitation and conflict-specific aims. Some of them may be addressed in time, as both international criminal justice and the international community establish themselves with greater enforcement power and legitimacy. However, some of the stated aims of international criminal justice represent unrealistic objectives that may be better satisfied by other modes of intervention. Even if institutions of international criminal justice are unlikely to have any significant impact on immediate conflict-related aims, they could contribute to longer-term efforts to rebuild societies and the rule of law after mass violence.

The main criticisms or challenges to international criminal justice come from the obstacles to effective deterrence and prevention given the weakness of enforcement mechanisms and the political contingency of criminal justice responses to mass violence. Imposition of a selective 'victor's justice' creates a perceived legitimacy deficit. Combined with the lack of consideration for victims in the process and outcomes of international criminal justice, this has led to an "externalisation" of justice that threatens both its credibility and the achievement of the penal aims.

A strong justification for criminal justice as at least one of the main accountability responses can be found in the condemnatory power of punishment through fair impartial process and retributive censure. While there are challenges for retributive justice in the international context relating to selectivity and substituting moral authority, the value of condemning the wrong, disavowing the conduct and vindicating the victim's dignity is an attractive component both of individual justice and of longer-term rehabilitation and repair of individuals and societies.

However, the group context and the social circumstances under which these crimes take place will tend to undermine the practical implementation of preventative theories and communicative theories of criminal justice alike. Furthermore, the moral status of the international criminal justice system may be eroded by the political nature of the creation of international institutions and a perceived hypocrisy in global governance that allows atrocities to take place. Detailed examination of theories of prevention, rehabilitation and retribution through the international criminal justice system reveals a gap between the rhetoric and the reality of criminal justice. This gap further widens when one looks at the conflict-specific goals often attributed to international penal institutions.

The founders of the ICC were able to draw on this rich historical legacy indicating the strengths and weaknesses of international criminal justice, potential risks to the achievement of its aims, and the validity of transposing traditional penal rationales to the international context. While undoubtedly

some lessons were learned, some beliefs and implicit faith in the capacity of the system may have been too ingrained from its inception to change. The next chapter analyses the founding documents of the ICC to assess how they reflect the penal aims.

Chapter 3

Law-in-books of the ICC: Penal aims in the Rome Statute

The ICC Rome Statute and RPE are central in determining the objectives and values of the Court and guiding their implementation.[453] Through close analysis of these documents, this chapter will identify the penal aims and values "officially" adopted by the ICC. It will analyse the role of the Prosecutor and the extent of prosecutorial discretion, focusing on issues relating to selection and prioritisation. It will then bring together any guidance from the Statute that the Prosecutor can draw on in developing policy and implementation strategies.

3.1 The overarching aims and penal rationales

3.1.1 Preamble

The Preamble can be seen as a guide to interpretation in terms of the purpose of the Statute and intention of the treaty-makers.[454] It also has a general role in outlining "basic principles" and explaining the "philosophical basis" of the Statute.[455] The Preamble states the motivating factors for the ICC's establishment and its aims,[456] reflecting key themes in penal theory: the importance of community (para 1); individual victims (para 2); and world peace and social order (para 3) without specifically framing them as objectives of the Court.

The language of the Preamble reflects the Statute's focus on retributive punishment. The punitive nature of the Court is revealed in the affirmative statements regarding the importance of prosecution and punishment. The preamble states that the most serious crimes "must not go unpunished," signatories were "Determined to put an end to impunity for the perpetrators of these crimes". The Court "must ensure effective prosecutions" either nationally or internationally, and States are reminded of their "duty" to exercise criminal jurisdiction over those responsible. The main aim of the Court is to "end impunity".[457]

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[453] O Trifterer 'Preliminary Remarks: The Permanent International Criminal Court – Ideal and Reality' in Trifterer O (ed) Commentary on the Rome Statute of the International Criminal *Court: Observer's notes, Article by Article* (Nomos Verlagsgesellschaft 1999)24.

[454] ILC 'Draft Code for an International Criminal Court with commentaries' (1994) II Yearbook of the International Law Commission part two, commentary to the preamble (1) and (3).

[455] T Neroni Slade and R S Clark 'Preamble and Final Clauses' in R S Lee (ed) The ICC: The making of the Rome Statute Issues, Negotiations, Results (Kluwer Law 1999) 421, 423 and 425

[456] 'Report of the Preparatory Committee on the Establishment of an International Criminal Court' in United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 1 7 July 1998 Official Records Volume II: Reports and Other Document (UN 2002) A/CONF.183/13 259 para 18 (Spain) the first paragraphs were "intended to underscore the basic motive for the creation of the Court".

[457] RS Preamble para 5.

Despite the retributive tone of the Preamble, there is some ambiguity in the relationship of the Court to the aim of prevention. The wording of the Preamble follows the exhortation to end impunity with: "and thus to contribute to the prevention of such crimes".[458] That prevention is specifically mentioned in relation to the aims of the Court is significant. Crime prevention is afforded an importance not extended to other aims of international criminal justice. The reference can be interpreted literally or teleologically. It could be read as a statement of fact, that prevention is an expected outcome of ending impunity, with the word "thus" chosen over "in order to" or "to ensure" - more clearly prescriptive choices. A different interpretation may be that that the prevention of crimes is the overarching rationale for the ending of impunity, or that ending impunity is only a valid aim if it results in prevention. The latter would imply a form of side-limited consequentialism prevalent in national penal philosophy.[459]

The inclusion of prevention in the Preamble gives credence to those who claim retribution alone is not sufficient justification for punishment at the ICC. Trifterer's view is that "prevention and deterrence, the first function of criminal law" are the "more effective method of protecting legal values in practice."[460] Trifterer's analysis is based on observer's notes of the Rome Conference. However, his deterrence-oriented interpretation does not accord fully with the official records of the Rome Conference or the final Statute.[461]

The Preamble is also important in highlighting the values underpinning the Court's work. The preamble reaffirms the principles and purposes of the UN Charter.[462] These values include national sovereignty and the principle of non-intervention;[463] the lack of authorisation to intervene in the internal affairs of any State;[464] and the complementarity principle.[465] The Court will address only "the most serious crimes of concern to the international community as a whole".[466] The international community is identified as the 'public' that is served by the ICC. There is no mention in the preamble of any restorative or rehabilitation aims of the Court, nor does it engage with peace-building,

[458] RS Preamble.
[459] A von Hirsch Censure and Sanction (OUP 1993).
[460] O Trifterer 'Preliminary Remarks: The permanent International Criminal Court – Ideal and Reality' in Trifterer (n453) 17; P Kirsch 'Introduction' in Trifterer (n453) xxiii expressed hopes that it can 'help deter' and 'help uphold stability and rule of law'.
[461] United Nations United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 1 7 July 1998 Official Records Volume II : Summary records of the plenary meetings and of the meetings of the Committee of the Whole A/CONF.183/13 (UN 2002) and <http://www.un.org/law/icc/rome/proceedings/contents.htm> The Court's deterrent effect was mentioned at least 25 times, either as general aim or factor in deciding a certain issue (eg the need for clarity of crimes, a permanent institution, independence, credibility or removing the defence of superior orders). There are a few references to prevention in general and the dual agenda of prevent and punish.
[462] RS Preamble para 7.
[463] RS Preamble para 7.
[464] RS Preamble para 8.
[465] RS Preamble para 4: "their effective prosecution must be ensured by taking measures at the national level", and para 10 "Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions".
[466] RS Preamble paras 4 and 9.

reconciliation or restoration. This is a departure from the founding documents of the ICTR and ICTY. The language of the Preamble focuses narrowly on the aim of ending impunity through prosecution and punishment.

3.1.2 Conflict-specific aims

The ICC's potential to contribute to peace was mentioned during the Rome Conference proceedings, mainly as a secondary outcome of other effects of prosecution.[467] However, there is no recognition of conflict-related aims in the Statute. The preamble recognises that "grave crimes threaten the peace, security and well-being of the world" but goes no further in defining the role of the Court in relation to peace and global security.[468] The Statute demarcates these powers as belonging to the UNSC, echoing discussions at the Rome Conference.[469] Article 16 outlines the Security Council's power to defer any ICC investigation or prosecution under its Chapter VII powers.[470]

While the adoption of a resolution requesting such a deferral makes deferring investigation or prosecution mandatory, it must be adopted under Chapter VII of the UN Charter, entitled: "Action with respect to threats to the peace, breaches of the peace, and acts of aggression". This clearly places the responsibility for peace and security with the Security Council, in accordance with the UN Charter. There is little scope for taking into account political effects in the clauses of the Statute. Even the ambiguous clauses such as "the interests of justice" indicate justice, not peace, as the goal of the Court.[471] Nor does the Statute mention the public interest as a factor to be balanced, as seen in common law national criminal justice systems.

Truth-telling as an aim is also absent from the Rome Statute. The Statute limits the role of the OTP to seeking truth relevant only to the retributive justice process, not a wider truth-telling role. Article 54 requires the Prosecutor to establish the truth and to investigate "incriminating and exonerating circumstances equally."[472] The search for truth must "cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute".[473] Plea bargaining has been seen as serving reconciliation and truth-telling.[474] These aims are not mentioned in the Statute, and may explain why article 65(5) states that any deals struck by the Prosecutor or defence will not be binding.

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[467] The Court's potential contribution to peace, raised at the Rome Conference at least 30 times, was to be through establishing the truth, breaking the cycle of violence and vengeance, through deterrence of future crimes, Supra n461.
[468] RS Preamble para 3.
[469] While contributing to peace, security, stability and international order were dominant themes regarding the function of the Court at the Rome Conference there was also considerable effort on the part of delegates to emphasise the primary role of the UNSC in maintaining peace and security, Supra n461.
[470] RS art 16.
[471] RS art 53(1)(c).
[472] RS art 54(1)(a).
[473] Article 54(1)(a).
[474] N Combs Guilty Pleas in International Criminal Law (Stanford University Press 2006); supra n214 and n219.

3.1.3 Retributivism

The Preamble can be read as suggesting an overarching retributive rationale, with a side-limiting aim of prevention or as prevention limited by retributive process. Retributive principles can be seen in the Statute's clauses on procedural law and sentencing. The Statute response to violation of international crimes is punishment through imprisonment based on desert. Schabas argues that punishment is "not at the heart of the Court's purpose".[475] He draws this conclusion from the lack of attention to sentencing rationales in the Rome Statute and questions the essential difference between the Court and a truth commission.[476] This seems misguided. Although the Statute may not pay significant attention to sentencing philosophy, it does clearly state its aims as prosecution and punishment and the outcome of trial at the ICC is punishment. Fines, forfeiture and reparation are additional and subsequent to this primary purpose of the trial process.[477] Even the clauses on complementarity, requiring deference to national procedures, seem to indicate a preference for retributive process and punishment.[478]

The Court appears to be primarily punitive in orientation. Reluctance to claim retribution as an explicit aim of the Court at the Rome Conference may be attributable to prevailing assumptions about punishment's aims and function taken from national level.[479] This reticence can also be explained as, although modern versions of retribution, particularly desert theory, have had an impact on national-level penal theory and policy, there remains some discomfort in placing excessive emphasis on the retributive aims of penal justice at international level.[480]

Henham recognises retribution as the "predominant rationale" of the ICC Statute and claims retributive aims are "clearly evidenced in the development of substantive and procedural norms".[481] ICC procedure is based on general principles of criminal law including individual responsibility, moral culpability, and clarity of crimes and punishments set out in advance.[482] The

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[475] W Schabas 'Penalties' in Cassese A, Gaeta P and J Jones (eds) The Rome Statute of the International Criminal Court: A Commentary Vol I (OUP 2002) 1497, 1520

[476] Ibid 1520.

[477] RS art 77(2). Schabas 'Penalties' (n475) 1502,1505.

[478] C Stahn 'Complementarity, Amnesties and Alternative Forms of Justice: Some interpretative guidelines for the ICC' (2005) 3 JICJ 695.

[479] Despite the repeated emphasis on the need for punishment and to fight impunity during the discussions, the retributive function of criminal justice was not overtly referenced and openly discussed. Supra n461.

[480] M Aukerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' 15 Harvard Human Rights Journal (2002) 39, 55-56 citing Nino and Murphy on retribution as vengeance and an inappropriate response to crime; M Minow Between Vengeance and Forgiveness: Facing history after genocide and mass violence (Beacon Press 1998); M Drumbl Atrocity, Punishment and International Law (University Press 2007) 61 notes international tribunals, particularly the ICTY, feared 'looking vengeful' by focusing on retribution.

[481] R Henham (2003) 'The Philosophical Foundations of International Sentencing' 1 JICJ 64 section 3(A).

[482] RS arts 25 and 28 'individual criminal responsibility' and 'responsibility of commanders and other superiors'; articles 30-31 the 'mental element' and 'grounds for excluding criminal responsibility'; arts 6-8 outline the crimes in the jurisdiction of the Court and a detailed elements of crimes is mandated by art 9; arts 22-24 cover key elements of fairness of Nullem

factors that may indicate retributive aims for the Court are the focus on the intrinsic characteristics of the crime and the culpability of the accused as the basis for selection of cases and the imposition of punishment. The jurisdiction and procedure of the Statute are rooted in crime seriousness and an assessment of the gravity of the crimes.[483]

The Rome Statute sentencing provisions do not specify penal rationales, but they do implicitly reflect the principles of desert theory in sentencing. The values animating desert theory are fairness and the focus on individual autonomy and respect for the dignity of the individual. This translates in practical terms as proportionality in sentencing, taking into account the seriousness of the crime and the level of culpability of the offender, including the level of harm to the victims. Article 78 of the Rome Statute requires that the "gravity of the crime and the individual circumstances of the convicted person" should be taken into account when determining sentence.

Pertinent factors in determining sentence are further elucidated in the RPE.[484] Rule 145 (1) (a) and (b) require a sentence to "reflect the culpability of the convicted person" and Judges consider mitigating and aggravating factors and consider the circumstances of the convicted person and the crime. Rule 145 (c) also requires consideration of "extent of damage caused, in particular the harm caused to the victims and their families, […] the degree of participation of the convicted person; the degree of intent". The sentencing factors of the RPE are also desert-based. There is acknowledgement of the importance of victims in the inclusion of compensation as a mitigating factor, but no mention of rehabilitation of the offenders or the general reconciliation of conflict affected populations.

The provisions of the Statute and RPE do not refer to deterrence or incapacitation as sentencing aims, nor are these aims implied in procedure. Einaar Fife reports discussion at the Rome Conference of the deterrent effect of fines for crimes motivated by financial gain. However, these were not reflected in the final text.[485] There was also a proposal that the "main purposes of punishment" for determining sentence should include "retribution, individual and general deterrence, reconciliation and rehabilitation", but again these were omitted in the final version of the Statute and Rules.[486] There is no mention in guidance to the Prosecutor, the Preamble or sentencing provisions that any future-oriented effect of prosecution and punishment should be taken into account in case selection, trial procedure or sentencing.

Retributive theories of punishment also accord with the approach to the autonomy and dignity of the offender seen in the Statute. Conceptually and normatively, retributivism is derived from liberal theories of respect for the dignity and autonomy of the accused. It is a reflection of these theories in the

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crimen sine lege and non-retroactivity.

[483] RS Preamble paras 4 and 9, and arts 1, 5 and 15(2). M El Zeidy 'The Gravity Threshold under the Statute of the ICC' (2008) 19 Criminal law Forum 35-39.

[484] R Einaar Fife 'Penalties' in Lee (n455) 555.

[485] Ibid 566-567.

[486] Ibid 563.

trial and punishment process. The bedrock of retributive theories is the Kantian view of human worth as an end in itself, rather than an object to be used in the furtherance of another aim.[487] A number of the clauses in the Rome Statute can be seen to reflect the values inherent in retributive justice. The provision on applicable law explicitly requires that all interpretations and applications of law must be consistent with "internationally recognised human rights".[488] Human rights principles have informed the Court's evolution and structure.[489] Kofi Annan, then UN Sec-Gen, hailed the Court as "a giant step forward in the march towards universal human rights and the rule of law."[490]

The values of the UN Charter are mentioned in the Rome Statute Preamble as underpinning the Court's work. The Preamble of the UN Charter references values such as peace, human rights, the dignity and worth of the human person, equal rights and justice. Chapter 1 of the Charter, covering the 'Purposes and Principles' of the UN, is dominated by issues of peaceful dispute resolution and cooperation and includes key values such as conforming with principles of justice and international law; equal rights; international cooperation; respect for human rights; and freedom from discrimination. Many of these values are reflected in the legal structure of the Court and may be considered to be guiding principles or a moral framework within which the Court is expected to function. These are essentially liberal, rule-of-law values.[491] For example, the increased role and importance of the victim at the ICC can be seen as recognition of victims' value as individuals, reaffirming respect for their dignity and autonomy in the process.[492]

The Statute respects individual autonomy by limiting prosecution and trial to those deserving of punishment due to the wrongfulness and culpability of their conduct. The adoption of fair trials procedure observing the highest standards of human rights, almost to the detriment of effective and expeditious process,[493] reveals that adherence to these standards is an important value underpinning the Court's work. The Statute includes extensive attention to fair trial provisions and protections of the rights of the accused, taken more or less directly from human rights standards developed in international and regional conventions.[494] Fair trial rights also feature at investigative and pre-trial phases, for example in Article 55 and Article 60(4), and the operational requirement for the Prosecutor to investigate exonerating as well as incriminating circumstances.

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[487] J Hampton 'The retributive idea' in J Murphy and J Hampton Forgiveness and Mercy (Cambridge University Press 1988) 111, 124 "Kantian theory of human worth, which makes people intrinsically, objectively and equally valuable".
[488] RS art 21(3).
[489] W Pace and J Schense 'The Role of Non-Governmental Organisations' in Cassese et al Commentary Vol I (n31) 105.
[490] K Annan 'Preface' in Lee (n455) ix.
[491] cf P Roberts 'Criminal Law Theory and the Limits of Liberalism' (forthcoming 2014).
[492] Infra section 3.2.2.
[493] M C Bassiouni The Legislative History of the International Criminal Court: Volume 1 Introduction, Analysis, and Integrated Text of the Statute, Elements of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2005) 173.
[494] Ibid 138; RS arts 63, 65, 66 and 67 seek to protect fair trials and the rights of the accused.

However, while these procedural clauses are entirely consistent with retributive values and the liberal moral principles from which they stem, they are not solely relevant to retributivism. The rationale behind establishing clarity of crimes and punishments and individual responsibility for culpable acts could equally be attributed to deterrence, moral education, or expressive theories of prevention. There can be an instrumental value to adherence to fair trials and desert theory in terms of effectiveness and legitimacy that contributes to deterrence and prevention aims. There is some evidence that deterrent theory drove the development of certain clauses at the Rome Conference rather than adherence to retributive values grounded in the Kantian worth of the individual.[495]

The punitive process outlined in the Statute is limited by clauses safeguarding the dignity and autonomy of stakeholders in the process, for the first time explicitly including victims The role and influence of victims potentially indicates a more enriched version of retributive punishment than seen at previous international criminal institutions.

3.2 Victims' 'rights' and the restorative nature of Rome Statute

Notwithstanding its predominantly retributive character, several clauses of the ICC Statute relating to the place and importance of victims in the process are suggestive of going beyond retributive justice to incorporate restorative justice aims and procedures.

3.2.1 Victims' clauses in the Rome Statute

Incorporating issues affecting victims into a criminal justice system is often characterised as rights and/or interests. These rights have been described in terms of "welfare rights" or "services", and procedural or participative rights.[496] Services relate to the provision of information to victims; their safety and protection; and, upholding their right to be treated with respect and dignity; they can be seen as neutral in respect of rationales for punishment or sentencing.[497] Many of the provisions in the ICC Statute and RPE relate to service rights such as protection[498] and the right to information about the case and key decisions.[499] The protection of victims during investigation and prosecution phases is a specific duty of the Prosecutor, which must be balanced against the rights of the accused and the imperative of ensuring fair and impartial trials.[500]

The second set of victims' 'rights' in the Statute relate to an expanded role for victims' participation or procedural involvement through a legal representative.[501] Victims may have their views and concerns considered at

[495] Supra n461.
[496] H Fenwick 'Procedural 'Rights' of Victims of Crime: Public or Private Ordering of the Criminal Justice Process' (1997) 60 Modern Law Review 317, 318; A Ashworth 'Victim Impact Statements and Sentencing' (1993) Crim. L. R. 498, 499.
[497] Fenwick (n 496) 322.
[498] RS art 68; art 57 (3)(c), art 64 (2) and (6)(e); art 87 (4) and Rules 86, 87 and 88.
[499] RPE Rule 92.
[500] RS art 68 (1).
[501] RS art 68 (3).

various stages of the pre-trial and trial process.[502] The Court determines at what stage of proceedings such participation is appropriate,[503] what is appropriate participation for the victim or their legal representative,[504] and the manner in which participation (if any) will take place.[505] There is an opportunity for increased victim participation in these clauses, but each instance must be balanced with the need for fair, expeditious and impartial proceedings and it must not impinge on the rights of the accused.[506] These reminders of the potential for victim participation to prejudice the rights of the accused or the fairness of proceedings reflect concerns with victim participation that have been seen at national level.[507]

There are several stages of the pre-trial process where the Prosecutor must consider victims' interests. Articles 53 1(c) and 2(c) state that if the Prosecutor decides not to proceed with an investigation "in the interests of justice" he must take into account the "interests of victims". During an investigation the Prosecutor is directed to "respect the interests and personal circumstances of victims and witnesses".[508] These provisions imply a duty on the Prosecutor to open up effective channels of communication with victims to establish and consider their interests.

A third aspect of victims' rights concern redress, in the form of reparation. The ICC Statute was the first time reparations had seen their "full expression at international level".[509] Reparations can be provided to victims under Article 75 (1), and has largely been left to judicial discretion.[510] Reparation, in the form of compensation, is included as a mitigating factor in sentencing[511] and as a potential factor to be considered by the Court concerning reduction of sentence.[512] These reparations can be financial, in the form of compensation, or other forms of reparation such as restitution or rehabilitation, as specified in article 75. Rule 94(1)(f) refers generally to "other forms of remedy" for victims, leaving plenty of scope for expansive interpretations, potentially opening up the restorative element of the Court's activities.

[502] RS art 68 (3); art 15; art 19.
[503] RS art 68(3).
[504] RPE Rule 89(1).
[505] RPE Rules 89(1), 90, 91 and 93.
[506] RS art 68 (1) and 68(3); Rules 89(4) and 91 (3)(b).
[507] J Gardner 'Crime: in Proportion and in Perspective' in Ashworth and Wasik (eds) Fundamentals of Sentencing theory (Clarendon Press 1998) 31-52; E Erez 'Who's Afraid of the Big Bad Victim? Victim Impact Statements as Victim Empowerment and Enhancement of Justice' Jul Crim. L. R. (1999) 545; A Sanders 'Victim Impact Statements: Don't Work, Can't Work' Jun Crim. L. R. (2001) 447.
[508] RS art 54.
[509] I Bottigliero Redress for Victims of Crimes Under International Law (Martinus Nijhoff Publishers 2004) 213.
[510] RS art 75 (1) and art 79.
[511] RPE Rule 145 (2) (ii).
[512] RS art 110 (4) (b).

3.2.2 Purpose and rationale of victim participation

There is no clear indication in the ICC Statute as to the rationale for victims' participation and redress.[513] The view from the Rome Conference seems to have been that the lack of a voice for victims in earlier tribunals needed to be addressed.[514] The rights and services accorded to victims in ICC proceedings reflect international standards on the treatment of victims in criminal processes that have been developed at international and regional level.[515] Some commentators have interpreted the expanded victims' clauses at the ICC as a shift from retributive to restorative aims for the Court. For example, Lee claims: "[t]his new Court has been transformed from an instrument initially designed for punishing individual perpetrators of atrocious crimes to an international court administering restorative justice."[516] Commentators have emphasised the "victim-oriented" nature of the Statute.[517] Funk ascribes "victim-oriented goals" to the ICC and claims it offers "victim-centric restorative justice to those who traditionally have remained voiceless outsiders to the legal process".[518] Blumenson describes a "victim-conscious retributivism" which he claims aims to address the "injustice done to victims when nothing is done" and to reaffirm the worth of the devalued victim and their rights as equals.[519]

These analyses attribute various restorative aims to the Statute, and varying levels of importance to victims, in the aims and procedure of the Court. These claims need to be unpicked in light of the purposes and procedure of the Rome Statute.

3.2.3 Restorative justice and the ICC Statute

Restorative justice is hard to pin down to one definition; the following summary encapsulates the main elements of standard restorative theories:

> "At the core of most restorative theories lies an emphasis on the significance of stakeholders in the offence (not just the state and the offender, but also the victim and the community), on the importance of process (bringing the stakeholders together in order to decide on the response to the offence), and on restorative goals. […] [T]heir political premise is that the response to an offence should not be dictated by the state but determined by all parties, placing compensation and

[513] D Taylor Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual? (Impunity Watch April 2014) 7.
[514] M Pena and G Carayon 'Is the ICC making the Most of Victim Participation?' 2013 The International Journal of Transitional Justice 1, 4.
[515] UN ODC Compendium of United Nations standards and norms in crime prevention and criminal justice (UN 2006) Part 3 II victims; 'Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime' (25 October 2012).
[516] Lee (n455) xiv; Bassiouni Legislative History (n2493) 44.
[517] G Sluiter 'Human rights protection in the ICC pre-trial phase' in C Stahn and G Sluiter (eds) The Emerging Practice of the International Criminal Court (Martinus Nijhoff Publishers 2009) 679.
[518] T Markus Funk Victims' Rights and Advocacy at the International Criminal Court (OUP 2010) 4.
[519] E Blumenson 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court' 44 *Colum. J. Transnat'l L.* (2006) 801, 838.

> restoration ahead of mere punishment of the offender, and encouraging maximum participation in the processes so as to bring about social reintegration."[520]

Taking this sketch of restorative justice as a basic model, it could be said that the victims' regime at the ICC reflects aspects of restorative process. The provisions relating to victims mark a shift in the status of the victim in international criminal justice from passive recipient of justice to valued stakeholder. The welfare rights clauses promote respect for the victim as deserving both protection and information. Participation clauses offer opportunities for victims' interests and views to be expressed and considered in decision-making, thereby recognising the importance of victims in the process. The reparations clauses orient the outcome towards more restorative goals. However, the power of victims to affect the outcomes is debateable. There is no obligation on the judiciary or the Prosecutor to act on the views of victims, despite requirements to consult and consider them. There is no evidence in the Statute that victims will have a role in deciding the response to international crimes, which is pre-determined as punitive. For this reason, Findlay and Henham claim these participative rights are largely "symbolic rather than concrete".[521]

The involvement of victims as active stakeholders in the trial process may address the problem of the externalisation of justice in the international context.[522] Recognition of their importance might also serve to re-empower victims and restore to some extent the value that was lost in the criminal act against them. While this is in line with restorative justice aims and principles, victims remain only one of many stakeholders in a pre-formed framework. The reparations regime at the ICC may accord more closely with those of restorative justice.[523] At the Rome Conference reparations were seen as "contributing to reconciliation of individuals and society more generally and creating conditions where the risk of further violations diminished."[524] Reparations have been characterised as a restorative "add-on" to an essentially retributive process.[525] Vasiliev sees article 75 as "an afterthought rather than the cornerstone of ICC procedure – the criminal proceeding takes place irrespective of whether or not requests for reparations have been made".[526] However, reparations can also be seen as an essential part of the ICC process, that can only be logically included after the trial and sentencing process. It is a fundamental component of the greater recognition of the needs of victims and affected societies for a broader response than punishment alone.

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[520] A Ashworth 'Sentencing' in A Ashworth and M Wasik (eds) Fundamentals of Sentencing Theory (OUP 1998) 1076, 1081.
[521] M Findlay and R Henham Transforming International Criminal Justice: Retributive and restorative justice in the trial process (Willan publishing 2005) 257.
[522] Supra chapter 2.
[523] See art 75 on aims of reparation as "restitution, compensation and rehabilitation" of the victim.
[524] C Muttukumaru 'Reparation to Victims' in Lee (n455) 262, 264.
[525] S Vasiliev 'Article 68(3) and the Personal Interests of Victims in the emerging practice of the ICC' in C Stahn and G Sluiter (eds) The Emerging Practice of the International Criminal Court (Martinus Nijhoff Publishers 2009) 635, 678.
[526] Ibid 678.

The Rome Statute provisions on victims incorporate international best practice in the formal recognition of victim's welfare, services and redress, however, in themselves they do not represent a decisive shift from retributive to restorative procedure. They represent restorative elements appended to a fundamentally retributive procedure, whose objective is the imposition of pre-defined forms of punishment. The Rome Statute limits the extent to which victims' interests can impinge on the core precepts of fair trials and their punitive outcome. The Statute requires that stakeholders (including victims) are valued, even if their participation is subordinate to the needs of the retributive trial process.

Rather than getting bogged down in disputed definitions of restorative justice, it is more profitable to examine the themes or values that underpin the restorative justice movement. These have been described by Roberts as "ideas of empowerment, democracy, community, autonomy, healing, reconciliation, and crime reduction."[527] Many of these values also underpin the ICC Statute. The emphasis on protection and welfare reiterates the intrinsic value of concern for victims' welfare, and bolsters respect for victims' personal dignity and autonomy. These latter concerns correspond with the standards of the UN Charter and human rights that express a respect for human dignity, autonomy and well-being. These clauses do not necessarily commit the Court to a predominantly restorative agenda. There are various pragmatic and principled reasons why better treatment and consultation of victims might be desirable. Welfare rights have been justified through their instrumental value to crime control in terms of securing victims' co-operation and to prevent secondary victimisation through the criminal justice process.[528]

Greater inclusiveness reflected in the increased service and participation rights for victims at the ICC can be principled as well as pragmatic, not only linked to effectiveness but also legitimacy and moral authority. The Rome Conference seemed to represent a shift to a more inclusive and consultative approach to institution-building that is likely to have a long-term effect on the way the ICC functions.[529] The Statute provided an opportunity to move away from traditional approaches to penal theory, where the needs and wishes of citizens, victims and society in general are assumed and the State acts on the behalf of these groups, to a more engaged, inclusive and democratic approach to criminal justice provision. However, such an approach is not always easy to balance with the requirements of fair procedure in practice, as later discovered by the OTP and the ICC.

3.2.4 Retributive theories of victim restoration

Restorative justice does not have a monopoly on the values and processes reflected in the ICC's victims' clauses. There is considerable overlap with existing penal theories and the values that inform them.[530] In the traditional

[527] P Roberts 'Restoration and Retribution in international criminal justice' in Von Hirsch, Roberts et al (eds) Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms (Hart Publishing 2003) 115.
[528] Fenwick (n496) 320.
[529] Pace and Schense (n489) 105, 107.
[530] Roberts 'Restoration and Retribution' (n527)115.

consequentialist utilitarian rationales for punishment, the focus is mainly on the offender and the future net community benefit rather than the individual victim. Consequentialist theories of deterrence, general prevention and rehabilitation of offenders have little to say about the worth of existing victims, even if an implicit aim is the protection of future hypothetical victims.[531] Roht-Arriaza notes that "[t]he notion of justice for victims would be excluded from the utilitarian calculus when discretion is exercised" in selecting cases for criminal prosecution.[532]

The implications for retributive justice theories are not so clear cut. There is an existing body of penal philosophy that claims retributive justice as restorative to the victim and in various ways affords the victim an important role in justifying rationales for punitive responses to crime. In "pure" retributive theory the victim is dealt with "indirectly and only to a limited extent", the primary relationship being between the offender and the offence (just desert theory).[533] However, even classic retributivists have theorised a central role for victims in retributive justice as implicit in the content of the norms, the violation of which justifies punishment.[534] Moore claims that all criminal norms are victim-relative and a penal response to their violation is therefore "victim-oriented".[535]

Other theorists have attempted to enhance the importance of victims in retributive penal theory. Haque's relational theory of retributive justice claims that the duty to punish is "owed" to the victim and arises due to the offender's violation of the victims' rights.[536] Lippke proposes, in a theory styled "victim-centred retributivism", that the imposition of legal punishment is justified as the most appropriate way to "restore the equality of condition, disrupted by criminal conduct, that all citizens are entitled to."[537] His theory is victim-centred in that it claims sentencing should be guided by "the extent of harms done to victims",[538] and involves imposing a loss on the offender in order to "equalize the realisation of the interests designated by rights."[539] Fletcher similarly bases his theory of the victim's place in "the framework of retributive theory" on the "significance of equal treatment in the theory of justice."[540] Fletcher considers this a foundational rationale for punishment in that

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[531] G P Fletcher 'The Place of Victims in the Theory of Retribution' (1999) Buffalo Criminal Law Review 51, 55 makes the distinction between "actual victims" and "the potential future victims of crime" and claims that victims are irrelevant to consequentialist theories.

[532] N Roht-Arriaza Impunity and Human Rights in International Law and Practice (Oxford University Press 1995) 165-166 "redress for victims is non-essential to a utilitarian justification".

[533] M Wasik 'Crime Seriousness and the Offender-Victim Relationship in Sentencing' in A Ashworth and M Wasik (eds) Fundamentals of Sentencing Theory (OUP 1998) 103, 104-105.

[534] M Moore 'Victims and Retribution: A Reply to Professor Fletcher' (1999) 3 Buffalo Criminal Law Review 65, 69.

[535] Ibid 72.

[536] A Haque 'Group Violence and Group Vengeance: Toward a retributivist theory of international criminal law' (2005) 9 Buffalo Criminal law Review 273, 278.

[537] R Lippke 'Victim-centred Retributivism' (2003) 84Pacific Philosophical Quarterly 127.

[538] Ibid 137.

[539] Ibid 127.

[540] Fletcher (n530) 62; he links this on the Aristotelian theory of justice as "seeking to bring about equality between victim and offender".

punishment counteracts the domination of the victim from criminal violence.[541] Fletcher insists that "doing justice to victims should be part of the theory of retributive punishment."[542]

Hampton placed restoration of the victim's value at the heart of the rationale for punishment in retributive theory. Hampton's theories revolve around concepts of victim vindication, reaffirming the equal worth of victims by acknowledging their suffering and recognising the wrongs done to them through trial and punishment of those responsible.[543] Punishment is justified by its expressive messages about the worth of the victim countering negative messages expressed by their criminal victimisation.[544] Hampton wrote that "[p]unishment affirms as a fact that the victim has been wronged, and as a fact that he is owed a certain kind of treatment from others."[545] This engages concepts such as restoring the dignity and the "moral status" of the victim which have been damaged by the crime. It can be seen as society reaffirming victims' worth in the face of atrocious violations of their integrity and value.[546]

The concept of victim vindication is closely linked to the expressive function of legal punishment, in that the official punitive response to the moral injury inherent in crimes is uniquely appropriate to express not only disapprobation but the value of the victim.[547] It is society's willingness to punish those who commit wrongs that communicates that the victim indeed has worth and value. Von Hirsch's account of punishment as censure is another expressive theory that claims a justification in punitive responses to crime as addressing the victim and acknowledging their "hurt".[548]

These theories of retributive justice reflect a concern for the dignity and autonomy of the victim and recognise the potentially beneficial consequences of legal punishment to restore victim value, dignity and empowerment. However, they fall short of a victim-centred approach that places victims at the heart of the accountability process. Such an approach would imply not only participation that could affect outcomes but may require particular outcomes for victims. For example, a victim-centred approach might require victim vindication as a limitation on the imposition of retributive punishment. Roht-Arriaza proposes just such a "goal-oriented" version of retributivism; her "victim-centred" theory of punishment is particularly relevant to discretion in case selection.[549] In this variant of retributivism, punishment would be imposed

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[541] Ibid 63.
[542] Ibid 55.
[543] J Hampton 'The retributive idea' in Murphy J and Hampton J Forgiveness and Mercy (Cambridge University Press 1988) 111, 124-128.
[544] Ibid 131.
[545] J Hampton 'The Moral Education Theory of Punishment' (1984) 13 Philosophy and Public Affairs 208, 217.
[546] J Hampton 'Correcting Harms versus Righting Wrongs: The Goal of Retribution' (1992) 39 UCLA Law Review 1659, 1666.
[547] Hampton 'The retributive idea' (n543) 128 "punishment is uniquely suited to the vindication of the victim's relative worth"; Hampton 'Correcting harms' (n546) 1686 "Retribution is a response to a wrong that is intended to vindicate the value of the victim […] in a way that confirms them as equal by virtue of their humanity."
[548] A von Hirsch Censure and Sanctions (OUP 1993) 9-10.
[549] N Roht-Arriaza Impunity and Human Rights – International Law and Practice (n532) 165.

only to "improve the victim's sense of self-respect and confidence".[550] There would be no duty to punish all crimes, only where "the victim's loss of purpose and of their own worth" could be redressed.[551] This represents a kind of side-limited retributive theory in which victim vindication justifies imposition of desert-based punishment. Roht-Arriaza's victim-centred punishment comes closest to making victim restoration the central justification for action and the main justifying aim of a criminal justice process, but doing so may sacrifice important aspects of retributivism.

There is a continuum between the exclusion of the victim in previous incarnations of international criminal justice and fully victim-centred approaches. This theoretical continuum is useful insofar as it sheds light on the approach taken in the Statute towards the penal aims and outcomes of the ICC's work, and in turn therefore provides guidance to the Prosecutor in how to exercise his discretion. The extremes of this continuum can be seen as "weak" and "strong" in terms of the place of the victim in the process and outcomes. Weak victim-based retributivism could also simply be termed retributivism, in that many retributive theories and expressive theories of retributive censure acknowledge the role of retributive punishment in vindicating victims' dignity and interests, and work these values into their justifications for punishment.

Further along the continuum are Haque and Lippke's theories, in which restoring the victim is the basis for the duty to punish. At the other end of the continuum are strong or victim-centred versions of retributivism, such as Roht-Arriaza's, which not only require a place for the victim in the process to acknowledge their value but demand consideration of outcomes for victims in the operation of the criminal justice process. In the "strong" versions, victim vindication or satisfaction becomes the primary criterion for selection of cases and charges and the whole process is designed and managed to achieve outcomes appropriate to victim restoration. Arguably, these approaches go beyond retributivism in developing a consequentialist goal that is as fundamentally future-oriented to a hypothetical outcome as prevention or deterrence.

3.2.5 Victim-conscious retributivism?

It could be argued that the ICC's aims accord with existing expressive theories of retributive justice. These theories claim an expressive value in legal punishment as being uniquely able to convey and restore the worth of the victim that has been diminished by the criminal act.[552] The ICC's immediate aims are punitive and punishment is the primary response to criminal violations exceeding the severity threshold. The link between the core punitive aim of the Court and victim vindication is not made in the Preamble, where the goals and underlying rationales for the ICC's work are set out. While the Preamble refers to the millions of "victims of unimaginable atrocities", the crimes against these victims are notable because they "shock the conscience of humanity" and

[550] Ibid 165-166.
[551] Ibid 165-166.
[552] J Feinberg 'The Expressive Function of Punishment' in in Duff and Garland (eds) A Reader on Punishment (OUP 1994).

"threaten the peace, security and well-being of the world".[553] There is no indication that the sentiments of victims, either of vengeance or self-worth, have played a part in the establishment of the Court.

The international community, acting through the Rome Conference, have assumed the "moral right to punish"[554] based on the wrong identified in international crimes by "humanity" and "the international community as a whole".[555] This wrong may be identified from pre-existing moral principles and based on the concern of the international community, which may include victims but does not specifically identify them as a recipient of, or rationale for, the justice process. The immediate institutional goal of ending impunity is not linked to any further good of restoring victim value, victim vindication or satisfaction. This is notable, as prevention was explicitly included as a potential further benefit, stemming from ending impunity.

The RPE include "particular cruelty" and "discrimination" as aggravating factors at sentencing and compensation to the victims as a mitigating factor.[556] These factors could imply that acts that particularly disempower or diminish the value and worth of the victim are considered more serious and worthy of the ICC's attention. The importance of the restoration of victim value might also be inferred from the procedural clauses relating to victims and the increased importance of the victim at every stage of ICC process.

The victims' clauses in the Rome Statute respect the worth of individual victims equally to other participants in the trial process by providing services to inform and protect them and by offering channels through which their views and interests can be expressed and considered. The requirement that the views of victims must be genuinely heard, even if not acted on, elevates victims from a passive role as recipients of justice to a respected, active, participant in the process. This can be seen as contributing to the re-empowerment of victims and restorative of their moral value. An inclusive role for victims at all stages of the ICC process can be seen as reflecting and operationalising what has always been an aspect of retributive justice.

At no stage of the trial or sentencing process are victims' views, interests, rights or value placed above any other stakeholder, nor indeed above the aims of justice itself. The Statute outlines the "rights of the accused" in article 67 but refers only to victims' interests; the language of rights in respect of victims is not used.[557] At every stage of the process, consideration of victims' views and interests must be balanced against the rights of the accused and against the requirements of "justice" (due process). It can be questioned whether the victims regime at the Court goes much beyond existing theories of retributivism that are conscious of the effect of justice on restoring victim value. The ICC consciously accepts the importance of victims as stakeholders

[553] RS Preamble paras 2 and 3.
[554] M Cavadino and J Dignan The Penal System: An Introduction (3rd ed Sage 2002) 42.
[555] RS Preamble paras 2, 4, 9; arts 1 and 5.
[556] RPE Rule 145(2)(a)(i), (b)(iv) and (v).
[557] Art 68(3); article 53.

and thereby empowers and goes some way to restoring their value, a process completed by a punitive response to the wrongdoing against them.

Blumenson's characterisation of the Statute as "victim-conscious retributivism" encapsulates this notion of implicitly recognising the restorative potential of criminal punishment and operationalising aspects of it in procedure. Long ignored, victims are now recognised and involved to a limited extent in the trial and punishment process. However, I would argue that this philosophical shift does not go as far as restorative justice properly so-called, nor a victim-centred process. Victims' rights must be balanced against other stakeholders' rights, the fairness of the procedure to the accused, and the interests of justice. Such "victim-conscious retribution" can be seen as a kind of "court-imposed presumptive 'restorative' punishment".[558] The Rome Statute does not go further than this into a consequence-limited victim-centred retributivism where retributive punishment is only justified by victim vindication. To claim a stronger role for a victim-centred process would be an exaggeration of the intention and process outlined in the Statute.

3.3 Role of the Prosecutor

Prosecutorial decisions are the primary channel through which the penal rationales are initially operationalised (or not). This section looks at the powers of the ICC Prosecutor and the extent of prosecutorial discretion in the Rome Statute and the RPE. The analysis will identify the positive powers of the Prosecutor relating to investigation and prosecution and the judicial limitations on this power. It will also identify the checks on potential prosecutorial abuse and any guidance the Prosecutor may draw upon in interpreting the Statute.

3.3.1 Responsibilities and discretion

The most significant power of the ICC Prosecutor is the authority to decide which situations, crimes and perpetrators should be investigated and prosecuted. There are three key decision-points under the Rome Statute: preliminary examination of information received (including by referral);[559] initiating a formal investigation of a 'situation' as a whole;[560] and deciding specific cases and charges within a 'situation'.

Situations can be referred to the ICC by a State Party under articles 13(a) and 14 or by the UNSC under article 13(b). The Prosecutor has to carry out a preliminary examination of the information received to determine whether to initiate a formal investigation.[561] The Prosecutor also has discretion to initiate investigations proprio motu under article 15.[562] Information relating to any potential investigation under article 15 is analysed subject to the same criteria

[558] J Dignan 'Towards a Systematic Model of Restorative Justice' in Von Hirsch, Roberts et al (eds) Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms (Hart Publishing 2003) 135, 147.
[559] The ICC refers to this information as 'communications', 'Preliminary examination' is the OTP title for the requirements under art 53(1).
[560] RS arts 13 and 14.
[561] RS art 53(1).
[562] RS art 15(1).

as the initiation of a formal investigation based on a referral. The Prosecutor must also "analyse the seriousness of the information received".[563]

Article 53 (1) seems to require that the Prosecutor initiate an investigation "unless he or she determines that there is no reasonable basis to proceed under this Statute."[564] The provision lists certain criteria that the Prosecutor must consider in deciding whether to initiate an investigation: firstly, whether "a crime within the jurisdiction of the court has been or is being committed";[565] and secondly, whether "the case is or would be admissible under article 17".[566] The two key criteria of admissibility in article 17 concern the complementarity principle, whether the case is genuinely being investigated or prosecuted at national level,[567] and whether "the case is not of sufficient gravity to justify further action by the Court."[568] How to determine gravity is not defined in the Statute. There are no agreed criteria regarding offence gravity and these were left to be developed by the Prosecutor and in the jurisprudence of the ICC.

The Prosecutor must also consider pursuant to article 53 whether there are "substantial reasons to believe that an investigation would not serve the interests of justice", taking into account "the gravity of the crime and the interests of victims".[569] How to assess the "interests of justice" or the interests of victims are not further defined by the Statute, and consequently remain at the discretion of the Prosecutor. To the extent that these phrases and the concept of gravity remain ambiguous, it could be the source of wide prosecutorial discretion. Once an investigation into a situation has been opened, the Prosecutor's decision to bring prosecutions should be based on the legal and factual basis to proceed, admissibility and the interests of justice.[570] Criteria for weighing the "interests of justice" relate directly to the conduct and characteristics of the accused and considerations of justice recognisable from regulatory frameworks in national jurisdictions.[571]

3.3.2 Judicial oversight

If all the criteria under article 53 (1) are fulfilled, then the Prosecutor will proceed to initiate an investigation without the need for review of his decision or judicial authorisation in the case of State or Security Council referrals. If the investigation was originated proprio motu, the Prosecutor must seek authorisation to open a formal investigation from the PTC.[572] The criteria for such judicial review are confined to establishing whether there is "a reasonable basis to proceed with an investigation, and that the case appears to fall within

[563] RS art 15(2).
[564] RS art 53(1); RPE Rule 104.
[565] RS art 53(1)(a) This criteria is really two-pronged as it involves identification of a crime according to the Statute and that it falls under the jurisdiction of the Court.
[566] RS art 53(1)(b).
[567] RS art 17(1)(a).
[568] RS art 17(1)(d).
[569] RS art 53(1)(c).
[570] RS art 53(2) (a)-(c).
[571] RS art 53(2)(c) "the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime".
[572] RS art 15(3).

the jurisdiction of the Court".[573] There is no judicial review if the Prosecutor decides not to act on information received under article 15. In the case of a State or Security Council referral under articles 13 or 14, the PTC "may review a decision of the Prosecutor" not to proceed to investigation at the request of the referring State or UNSC under article 53(3)(a) and "may request the Prosecutor to reconsider that decision".

If the Prosecutor decides not to proceed to investigation based solely on article 53(1)(c), that the investigation would not serve the interests of justice, then he must inform the PTC. In such a case, "the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber."[574] A referring State or the Security Council can request the PTC to challenge a decision not to proceed to investigation, although the PTC is under no obligation to do so.[575] Those submitting information to the Prosecutor under article 15 proprio motu powers have no such recourse; neither, it seems, do victims or affected populations.[576]

If the Prosecutor decides not to proceed to prosecution, a referral under articles 13 or 14 attracts the same rights to request the PTC to review the decision as does a decision not to open a formal investigation. The PTC may then request the Prosecutor to review the decision.[577] On its own initiative the PTC can also review a decision not to prosecute based solely on article 53(2)(c), the interests of justice clause, and such a decision will be effective only if confirmed by the PTC.[578] Parties supplying information leading to an investigation have no recourse to challenge a decision not to prosecute, although the ability of the PTC to review a negative outcome based solely on the interests of justice also applies to investigations initiated under article 15.

The criteria and procedures relevant to decisions to prosecute appear to mirror those related to investigations. However, in practice there is wider scope for the Prosecutor to exercise his discretion without judicial review or challenge. The fact that the investigations cover situations rather than particular incidents of criminality or individual perpetrators leaves the Prosecutor free to decide which alleged perpetrators within an identified situation should be prosecuted, for which crimes, and in relation to which incidents. The Statute does not obviously provide recourse for judicial checks or challenges related to decisions to prosecute a particular case over another; or to review why particular perpetrators have not been brought to justice. Theoretically, there is no accountability for decisions not to indict alleged perpetrators within a situation. The judicial review process under article 53(2) is only likely to be triggered if no prosecutions were brought forward, or if the Prosecutor informs the PTC or referrer of a particular decision not to prosecute.

[573] RS art 15(4).
[574] RS art 53(3)(b).
[575] RS art 53(3)(a).
[576] RS art 68(3) permits victims' views to be presented but does not represent the ability to mount a challenge to prosecutorial decisions.
[577] RS art 53(3)(a).
[578] RS art 53(3)(b).

There is also wide discretion for the Prosecutor in determining the extent of charges within a given situation under investigation. Any charges brought against an accused must be confirmed by judicial review during a confirmation hearing before the PTC.[579] The aim of this judicial review is for the PTC to "determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged".[580] Therefore, the confirmation of charges process addresses narrowly-defined issues of evidential sufficiency. The PTC does not look at wider factors relating to selectivity and it is questionable whether the PTC would be well-placed to review such decisions anyway. The PTC has the ability to request the Prosecutor to amend a charge "because the evidence submitted appears to establish a different crime within the jurisdiction of the court".[581] This provision could be used to challenge non-transparent charging decisions that do not reflect the breadth of criminality shown by the evidence submitted. Such a re-characterisation of the charges to reflect the facts of the evidence presented to the Court occurred in Akayesu before the ICTR, leading to ground-breaking charges and convictions of sexual violence.[582]

The ASP has managerial oversight of the Prosecutor's administrative functions.[583] However, this administrative mechanism does not provide an avenue for comment, let alone procedural oversight of strategic decisions or exercises of prosecutorial discretion arising from published strategy.

There are, therefore, limited mechanisms for review of prosecutorial decisions. If decision-making is left in abeyance there is little scope for engagement of the judicial review clauses. There is no time limit stipulated as to when a formal investigation should be initiated following a referral or proprio motu authorisation sought for investigations. The PTC has convened status conferences and requests for information in order to ascertain the status of certain referrals and ongoing investigations.[584] Yet, it has no power to force action from the Prosecutor.[585] There is no prescribed timetable between commencing an investigation and bringing prosecutions. Investigations could theoretically last for years and the time between a first prosecution and subsequent prosecutions could also be extensive.

It would seem arbitrary to impose time limits on the length of preliminary examinations or investigations. The Prosecutor needs to be allowed discretion to manage his or her caseload based on various factors, both pragmatic and

[579] RS art 61.
[580] RS art 61(7).
[581] RS art 61(7)(c)(ii).
[582] Pena and Carayon (n249).
[583] RS art 112(2)(b).
[584] 'Prosecution's Report Pursuant to Pre-Trial Chamber Ill's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic' (15 Dec 2006) ICC-01/05-7.
[585] W Schabas An Introduction to the International Criminal Court (3rd ed Cambridge University Press 2007) 246-247 in the PTC II ordered status conference for the Uganda situation, the Prosecutor took the position that "until he makes his decision not to proceed following a referral, the Pre-Trial Chamber is without authority to review or control his activities".

justice-related. Given the complexity and extent of international crimes, adequate time is required to develop cases, gather evidence and secure suspects. However, there is scope for abuse of the process in the lack of formal review of extended delays and the wide discretion accorded the Prosecutor with minimal effective oversight. The lack of accountability for delaying decisions to proceed allows the Prosecutor to sit on cases rather than making a formal decision that may lead to judicial review.

3.3.3 Transparency and requirements to give reasons

The Rome Statute emphasises transparency and requires the Prosecutor to provide information to relevant parties (such as case referrers or victims) and to give reasons for his or her decisions. If the Prosecutor decides not to act on information received under article 15 there is a requirement to "inform those who provided the information".[586] The Prosecutor must also inform the PTC and the body making the referral, either the State under article 14 or the Security Council under article 13, of a decision not to prosecute under art 53(2), and the reasons for it.[587] There is no obligation to inform those providing information under an article 15 initiated investigation of a decision not to prosecute under article 53; although Rule 92(2) of the RPE requires that victims who have become involved in proceedings, or applied to be involved, should be informed.

The RPE clarify that the Prosecutor must give "reasons for his or her decision" if deciding not to apply to the PTC for an investigation under article 15(6).[588] Rule 105 of the RPE requires that when notifying a relevant party of a decision not to investigate under article 53(1), written notification "shall contain the conclusion of the Prosecutor and the reasons for the conclusion".[589] Rule 106 requires the same for a decision not to prosecute under article 53(2) – written notifications to the PTC and referring State(s) or UNSC should include "the reasons for the conclusion". Rule 108 regarding the decision of the Prosecutor following a PTC requested review under Article 53(3)(a) also requires written notification of the decision and reasons for it. Rule 110(1) further stipulates that any decision under Article 53(3)(b) by the PTC to confirm or not to confirm a prosecutorial decision (regarding Article 53 (1)(c) or (2)(c) – "not in the interests of justice" cases) may be a majority decision "and shall contain reasons".

The requirement to disclose the reasons for decisions to investigate or prosecute, or not to proceed, opens the Prosecutor's discretion up to public and, in certain cases, judicial scrutiny. It therefore serves as an important check on potential abuses of prosecutorial power and provides an opportunity for interested parties to hold the OTP to account. Despite this transparency and openness, there are few effective checks on prosecutorial discretion to shape the approach of the Court through selection decisions. For this reason, the guidance contained in the Statute, including its explicit and implicit approach

[586] RS art 15 (6).
[587] RS art 53(2)(c).
[588] RPE Rule 49.
[589] RPE Rule 105(5).

to the penal aims of the Court, are vitally important in directing the OTP's work.

3.4 Guidance in exercising prosecutorial discretion

In terms of determining aims and implementation strategies, the ICC Prosecutor's first point of reference should be the Rome Statute. Article 21, detailing the applicable law regulating the Court's work, gives primacy to the Rome Statute and the provisions, rules and guidance provided by the basic documents of the Court.[590] The second level of applicable law is international law as evidenced in the principles and rules of international law and applicable treaties, including principles of the international law of armed conflict.[591] As a last resort, the Court may have recourse to national practice as represented by "general principles of law derived by the Court from national laws of legal systems of the world", although only if consistent with the Statute and internationally recognised standards.[592] The Statute sets the parameters of the role of the ICC Prosecutor, indicates the intended functions of the OTP and contains key provisions informing prosecutorial decision-making.

The Statute anticipates the Prosecutor consulting widely in his decision-making, while remaining independent and impartial. The concepts of dialogue and inclusiveness can be seen to pervade the Statute. The Preamble states that "international cooperation" should be enhanced in actions to prosecute international crimes. The Prosecutor's limited investigative powers, and the Statute's complementarity provisions, also require a high level of cooperation and dialogue with national governments.[593] In addition to the implied duty to consult and consider victims' views,[594] seeking expert advice is part of the Prosecutor's mandate under article 42(9).[595] This duty to consult is tempered by the need for independence and impartiality. The Prosecutor is barred from activities which will "affect confidence in his or her independence",[596] or "in which their impartiality might reasonably be doubted on any ground".[597] Article 42 states that the OTP should be independent of the rest of the Court. Presumably, this includes not only the administrative functioning of the Registrar and the judiciary, but also functional separation from the ASP.[598] This denotes a clear separation of powers between the judiciary, prosecutorial and legislative institutions represented by the different organs of the Court. Article 42(1) also stipulates that the members of the OTP "shall not seek or act on instructions from any external source".[599]

[590] RS art 21(1)(a).
[591] RS art 21(1)(b).
[592] RS art 21(1)(c).
[593] RS art 54 (2); arts 93(1) and 99.
[594] Supra text at n508.
[595] RS art 42(9).
[596] RS art 42(5).
[597] RS art 49(7).
[598] RS art 42(1).
[599] RS art 42(1).

The Statute provides guidance to the Prosecutor on the conditions under which cases should be selected for investigation and prosecution at the ICC. The clauses regarding admissibility, practical judgements on evidence, and potential non-prosecution in the interests of justice are also outlined, if not fully defined. However, there is a significant gap in guidance regarding the prioritisation of investigations and cases between competing justified claims for the attention of the Court.

3.4.1 Selection and prioritisation

The need for prioritisation of situations and cases at the ICC was inevitable, albeit not clearly envisaged in the Statute. Given the absence of guidance in the Statute regarding prioritisation, this is an area of wide discretion for the Prosecutor where interpretation of the penal aims of the Court becomes crucial in determining strategy and key selection decisions. These decisions, based on the OTP's interpretation of the aims and values of the Court, will in turn shape the penal aims of the Court through mutual influence and consolidation.

Retributive theories have little to say about selectivity beyond requiring prioritisation based on fair, transparent criteria, set out in advance and based on characteristics inherent to the crimes and accused – ie liberal principles of due process.[600] Crime seriousness, or gravity, is one potential criterion that may satisfy retributive requirements for fair prioritisation. It is based in an assessment of the crime itself and is a factor recognised in sentencing at national levels as an indicator of desert of greater punishment. The importance of gravity can be inferred from the numerous references to crime seriousness in the Statute.[601] The wording of the Statute is significant, referring to "the most serious crimes of concern to the international community as a whole".[602] One method of judging crime seriousness might then be to consult the views of the international community. However, identifying the international community and gauging public opinion are both notoriously difficult tasks.[603]

There is no hierarchy of crimes mandated in the Statute, nor agreed upon in wider policy circles, although attempts have been made to prioritise the Statute crimes based on gravity.[604] Certain crimes are identified in the Statute as meriting special attention. For example, sexual and gender violence and violence against children are explicitly mentioned in relation to the OTP's work in terms of appointing expert advisors[605] and taking account of the nature of the crime during investigations.[606] While these references do not mandate a categorical priority, they express special concern for these types of crimes and victims above others that do not merit specific consideration. A focus on

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[600] Supra chapter 2.
[601] RS Preamble paras 4 and 9, arts 1, 5 and 15(2); El Zeidy (n483) 35-39.
[602] Ibid.
[603] D Golash and J P Lynch 'Public Opinion, Crime Seriousness, and Sentencing Policy' (1995) 22 AM J CRIM L 703.
[604] A Carcano 'Sentencing and the Gravity of the offence in International Criminal Law' (2002) 51 ICLQ 583; A Marston Danner 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing' (2001) 87 Va. L. Rev. 415; M Frulli 'Are Crimes against Humanity more serious than War Crimes?' (2001) 12 EJIL 329.
[605] RS art 42(9).
[606] RS art 54(1)(b).

vulnerable victims is also reflected in the aggravating factors included in the RPE's sentencing provisions.[607]

Other factors that might fit with the retributive focus of the Statute relate to the culpability of the offender. The sentencing factors in the RPE refer to the "degree of participation" and "the degree of intent" of the convicted person.[608] Aggravating factors in sentencing include repeat offending, abuse of power or official capacity, particular cruelty or discrimination in commission of the crime, or multiple victims.[609] While these are factors to take into account in sentencing, they can be viewed as agreed factors that increase the gravity or seriousness of a crime in the eyes of the Court and therefore could logically, and by extension, inform an assessment of seriousness for the purpose of prioritisation.

Offence gravity is a viable candidate for criteria to prioritise investigations, cases and charges; albeit that the Statute does not direct the Prosecutor to positively select situations or cases based on gravity, or indeed to select the gravest situations. Sufficient gravity is one of the admissibility tests specified by the Rome Statute for accepting situations and cases for investigation and trial.[610] Article 53 directs the Prosecutor to consider whether "the case is or would be admissible under article 17", thereby requiring an assessment of sufficient gravity when deciding to initiate an investigation.[611] The Prosecutor must also take "into account the gravity of the crime" before deciding whether an investigation or prosecution would not serve the interests of justice.[612]

While retributive considerations can be inferred from the emphasis on crime seriousness and culpability in sentencing and from the procedure in the Statute, there are conflicting messages regarding the overall aims of the Court. The reference to prevention in the Preamble could indicate a requirement to select investigations and cases on the basis of the potential contribution to prevention that "ending impunity" might achieve. This is problematic, inasmuch as preventive effects are not guaranteed and are very difficult to judge beforehand.[613] Certain general elements of deterrence theory may be applied, such as focusing on the most senior leadership.[614]

The challenge for the Prosecutor was to determine the extent to which the overall aims of the Court and its values could, and should, translate into operational objectives. An important question to resolve was whether prevention should be operationalised. Furthermore, the Prosecutor had to decide the extent to which increased recognition of the role and importance of victims at the ICC should translate into greater influence on the aims and outcomes of the Court. References to crimes seriousness highlight the concern

[607] Rule 145(2)(b)(iii) where the victim is particularly defenceless.
[608] Rule 145(1)(c).
[609] Rule 145(b).
[610] RS art 17(1)(d).
[611] RS art 53(1)(b).
[612] RS art 53(1)(c) and article 53(2)(c).
[613] Blumenson (n519) 825 and 829 claims it is "impossible to make the accurate cost-benefit analysis needed for consequentialist argument".
[614] Supra chapter 2.

of "the international community as a whole", which may inidcate a role for the Court premised on an unspecified public good rather than as champion of victims per se. Chapter 4 analyses the Prosecutor's interpretations of the Statute as regards selection and prioritisation and looks in detail at policies and public statements to reveal the OTP's approach in this area.

Prosecutorial strategy at national and international levels is also influenced by pragmatic considerations. Any prosecutor must take into account the practical viability of pursuing a case and gaining a conviction. Côté proposes that pragmatism and the need to establish the courts as functioning, effective institutions drove early prosecutorial decisions at both the ICTY and ICTR.[615] Addressing criticisms of prosecutions of relatively low-ranking perpetrators, Côté notes that decisions were "taken by the Prosecutor primarily on the basis of the urgent need to prove to the international community that these first attempts at international justice after Nuremberg could work."[616] Establishing authority and legitimacy in the eyes of the "international community" became a pragmatic aim central to the survival of the Tribunals. Pragmatic decisions may be made selecting those who can be indicted, perhaps before those who should be indicted, in order to build up the reputation and authority which are essential preconditions of successful prosecutions. This approach recognises "arguably legitimate political considerations about the mandate of international criminal justice and the survival of the new judicial institutions."[617]

The influence of pragmatic considerations in prioritising cases is a reality of prosecutorial case management. It is glossed over by the Rome Statute, but the extent of the Prosecutor's discretion and minimal institutional checks on decision-making do allow for flexibility of the Prosecutor in case management. However, if pragmatism is too prominent in selection decisions it risks compromising the principled aims of the Court. Balancing pragmatism against the penal aims of the Court and the expectations of stakeholders would prove a significant challenge for the first Prosecutor of the ICC, as we will see in chapters 5 and 6.

3.5 Conclusions

The overall structure and procedure of the ICC is punitive, aimed at the imposition of punishment on the basis of individual responsibility for violations of specified international crimes. The explicit objectives of this punishment are largely retributive, to end impunity and fulfil a perceived duty to prosecute, but through this it is expected that prevention will also be achieved. The particular theory of prevention is not specified. Discussions at the Rome Conference indicate a vague notion of the deterrent effect of the Court and the potential for moral education. The values underpinning the Court's work point to a process that incorporates respect for the rights, dignity, autonomy and well-being of all concerned, especially victims and the accused.

[615] L Côté 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 JICJ 162, 169.
[616] Ibid 169.
[617] Ibid 169.

The Prosecutor's operational discretion is potentially wide. The main trigger for judicial review is a formal decision not to prosecute, leaving the timing of commencing investigations and prosecutions (or not) largely in the hands of the Prosecutor. There is freedom of decision-making over management of resources in order to allow the OTP to carry out its work. There are also significant areas of ambiguity relating to both the aims of the Court and the criteria upon which the Prosecutor should base his decisions.

A central ambiguity in the normative framework established by the Rome Statute concerns the extent to which prevention should be considered an operational aim as opposed to a justifying rationale for retributive punishment. There would be very different outcomes depending on whether the Prosecutor adopts prevention as his primary aim, or focuses on retributive punishment and ending impunity. The reference to prevention may assist in determining which cases to select from a number of deserving options but is fraught with its own problems regarding how to determine the preventative effect of ICC proceedings and the problems intrinsic to both the operationalisation of prevention and its philosophical clash with notions of respect for individual dignity and autonomy.

Prevention is also in tension with the respect for victims enshrined in the Statute. We have also seen that victim vindication or restoration is not an explicit rationale for the Court's work, but is implicit in the retributive aims, reparations and procedural role accorded victims. This framework implies that the Prosecutor will need to take a new approach to victims in comparison with previous international criminal tribunals. There is clear direction that victims' interests and wishes should be considered at all stages of the Court's work, including investigation and prosecution decisions. Whether this should amount to a wholesale re-orientation of the process towards victim vindication and satisfaction was not indicated by the Statute, but the new "victim-conscious" approach demanded different implementation strategies to be adopted, if only in ways of ascertaining and considering victims' wishes and interests.

These issues needed to be clarified and interpreted by the first ICC Prosecutor, particularly regarding his approach to prioritisation of investigations and prosecutions. There was no explicit guidance as to how to manage a prioritisation process and it remained completely at the discretion of the Prosecutor. However, there are many clauses and references contained in the Statute that were indicative of the approach that should be taken in line with the Statute's retributive procedure and underlying values. The keystone of this retributive approach is the evaluation of crime seriousness as a basis for decision-making, a consideration of victims' views and interests and adherence to the values of a retributive justice process.

While pragmatic factors such as the practical and political viability of pursuing certain cases and investigations were not addressed by the Statute, they were inevitably going to play a part in the Prosecutor's deliberations and would have to be managed in line with the purposes and procedures of the Statute. The following chapter will look in further detail at how this institutional framework was interpreted by the Prosecutor, as the work of the ICC began to take shape.

Chapter 4

Interpreting the Rome Statute: the OTP and the Penal Aims of the ICC

This chapter begins the exploration of the OTP's interpretation of the aims and objectives of the ICC during the tenure of the first ICC Prosecutor, Luis Moreno-Ocampo. It analyses the public statements of the Prosecutor to reveal the OTP's interpretation of its own work and build-up a picture of the aims that the OTP was communicating to its various audiences and stakeholders. The chapter will analyse the relative priority the OTP attributes to different potential goals. The second half of the chapter attempts to identify the penal aims and values underpinning policies elaborated in areas of wide discretion for the Prosecutor – selection criteria and investigative and prosecutorial strategy.

4.1 Main approaches to penal aims reflected in OTP Statements

4.1.1 Retribution

The discourse of the OTP as to the aims of the ICC's work and the goals guiding its strategy and decision-making often closely mirrors the wording of the Rome Statute itself. A typical statement claims "[a]s stated in the Preamble, the goal of the Rome Statute is to end impunity for the most serious crimes of international concern and to contribute to the prevention of such crimes."[618] The OTP has adhered loosely to the wording of the Rome Statute Preamble in its references to justice[619] and ending impunity.[620] These objectives are rarely mentioned alone without being associated with prevention, or characterised as an instrumental means of achieving prevention. [621]

[618] L Moreno-Ocampo 'The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law' (LSE 8 October 2008) 2 [All ICC OTP documents available at <icc-cpi.int> unless otherwise specified].

[619] ICC OTP 'Press Conference in relation with the surrender to the Court of Mr Thomas Lubanga Dyilo' (18 Mar 2006); ICC OTP 'Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo to the UN Security Council pursuant to UNSCR 1593 (2005)' (14 June 2006); IRIN 'Uganda: Kony will eventually face trial, says ICC prosecutor' (7 July 2006) <http://www.irinnews.org/Report.aspx?ReportId=59585> "We have a mandate to render justice."

[620] ICC OTP 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants' (14 Oct 2005) 7; ICC OTP 'Prosecutor receives list prepared by Commission of Inquiry on Darfur' (5 Apr 2007) ICC-OTP-20050405-97; ICC OTP 'ICC Prosecutor: Kenya Can Be an Example to the World' (18 Sep 2009) ICC-OTP-20090918-PR452.

[621] ICC OTP Report on Prosecutorial Strategy (14 September 2006) 3, "fight against impunity and the prevention of crimes"; ICC OTP Prosecutorial Strategy 2009-2012 (1 February 2012) 2; ICC OTP 'First Report of the Prosecutor of The International Criminal Court to the UN Security Council Pursuant to UNSCR 1970 (2011)' (4 May 2011); ICC OTP 'Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo to the Fourth Session of the Assembly of States Parties 28 November – 3 December 2005' (28 November 2005).

Both "ending impunity" and "doing justice" are often euphemisms for retributive aims,[622] but retribution itself is never directly referenced by the OTP. Even direct references to punishment as one of the outcomes of the OTP's work are rare,[623] although the Preamble clearly states that international crimes must not go unpunished. A notable exception is Moreno-Ocampo's inauguration speech, in which he stated:

> "Our common mission is to ensure that the most serious crimes of concern to humanity are investigated and punished thus contributing to the protection of millions of individuals."[624]

This statement foregrounds the direct functions of the OTP, but they are still linked with the indirect outcome of general prevention through the protection terminology characteristically employed by the OTP. Rare references to the core retributive functions of ending impunity and punishing wrongdoing tend to be in OTP policy papers rather than press releases, such as this illustration from the Policy Paper on the Interests of Justice:

> "Bearing in mind the objectives of the Court to put an end to impunity and to ensure that the most serious crimes do not go unpunished, a decision not to proceed on the basis of the interests of justice should be understood as a course of last resort."[625]

This reflects a tendency to emphasise prosecution and punishment, and retributive values, when explaining in detail the reasoning behind decisions, while employing more general statements about prevention in press releases to justify particular actions.

4.1.2 Prevention

Drawing directly on the Rome Statute, the OTP has established prevention as its key rationale and operational aim: "The Rome Statute establishes an overarching goal: to contribute to the prevention of future crimes."[626] The 2009-2012 Prosecutorial Strategy identifies as one of its five interrelated objectives to "[m]aximise the Office of the Prosecutor's contribution to the fight against impunity and the prevention of crimes."[627] This builds on the previous 3-year strategy document of 2006 which included the concept of maximising impact in its "three essential principles".[628] The principle of maximising impact is further clarified in terms of maximising the ICC's

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[622] M Aukerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' 15 Harvard Human Rights Journal (2002) 39, 56 "retribution is more politely described in terms of combating impunity or bringing perpetrators to justice."
[623] ICC OTP 'Statement of Fatou Bensouda, Deputy Prosecutor of the International Criminal Court, at the OTP monthly media briefing' (28 August 2006) "the abuse of child soldiers has gone largely unrecognized and unpunished for too long."
[624] L Moreno-Ocampo 'Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC' (16 June 2003) 2; ICC OTP 'Communications received by the Office of the Prosecutor of the ICC' (16 July 2003).
[625] ICC OTP Policy Paper on the Interests of Justice (September 2007) 9.
[626] OTP 'Statement to Fourth Session of ASP' (n621); OTP Interests of Justice (n625).
[627] OTP Strategy 2009-2012 (n621) 2, 13.
[628] OTP Strategy 2006 (n621).

contribution to prevention in accordance with the Preamble of the Rome Statute.[629]

The OTP has interpreted prevention as the principal strategic objective of the ICC: "The Rome Statute adopted a new strategy to control massive violence and to prevent future crimes."[630] Prevention is identified as an objective, and potential outcome, of every stage of the OTP's activities and is linked to both specific and general prevention:

> "The Office has to maximize the impact of each of its activities, from the analysis of the information, to the beginning of the investigation, to the trial and eventual conviction. Massive crimes are planned; the announcement of an investigation could have a preventative impact. The mere monitoring of a situation could deter future crimes from being committed. It increases the risk of punishment even before trials have begun. Interestingly, this effect is not limited to the situation under investigation but extends to different countries around the world."[631]

Even the value of connecting with victims and affected communities has been expressed in terms of its contribution to prevention, rather than intrinsically valuing victims and respecting them as participants in the justice process: "The Office's work must be relevant to victims, to affected communities, and more broadly to all relevant communities in order to foster conciliation and prevent future crimes."[632] The rhetorical and strategic importance placed on prevention was reflected in the appointment of a Special Advisor on Crime Prevention, Juan E. Mendez, one of only two such OTP advisors appointed at that time.[633]

Prevention has been emphasised as a specific goal for investigations and prosecutions. In relation to the investigation in Darfur, the Prosecutor stated that "[m]y mandate is to contribute to the prevention of future crimes."[634] On the opening of an investigation in CAR, the Prosecutor cited deterrence as a primary motivation: "[i]n the interests of deterring future violence and promoting enduring peace in the region, we have a duty to show that massive

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[629] Ibid.

[630] L Moreno-Ocampo 'Working with Africa: the view from the ICC Prosecutor's Office' (9 November 2009).

[631] OTP Strategy 2006 (n621) 6; OTP Strategy 2009-2012 (n621) 7; and at ICC OTP website FAQs page <http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Index.aspx?NRMODE=Published&NRNODEGUID={A6F14A19-D07F-4B3D-8B2A-E1ED0D29F434}&NRORIGINALURL=/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/FAQ/FAQ.htm&NRCACHEHINT=Guest#id_14 accessed 10 Aug 2009> .

[632] OTP Strategy 2009-2012 (n621) 16.

[633] ICC OTP 'ICC Prosecutor Appoints Juan E. Méndez as Special Adviser on Crime Prevention' (19 June 2009) ICC-OTP-20090619-PR425.

[634] L Moreno-Ocampo 'Remarks by Luis Moreno-Ocampo, Prosecutor of the ICC Conference on "Justice in Post Armed Conflicts and the ICC: Reduction of Impunity and a Support to International Justice"' (15 Jan 2009).

crimes cannot be committed with impunity".[635] In Libya, the OTP stated that "[t]he priority now is to stop any new crimes".[636]

In relation to the Kenya investigation, OTP statements implied an immediacy of preventative effect and that criminal proceedings were uniquely or best suited to obtaining such an outcome, claiming that combating impunity "is the only way to prevent the commission of new crimes during the next elections."[637] Additionally, it seems that the OTP viewed proceedings in Kenya as serving as a positive example for other African countries:

> "The investigations could support the process of structural reforms and can help to prevent violence during the next Kenyan elections in 2012. Additionally, the cases could have an impact on the entire region. Guinea and Côte d'Ivoire are good examples of the risks."[638]

In a statement to the ASP regarding the Uganda situation, the Prosecutor claimed: "This case shows how arrest warrants issued by the Court can contribute to the prevention of atrocious crimes".[639] In the prosecution's opening statement in the case of Germain Katanga and Mathieu Ngudjolo Chui the role of prevention is emphasised:

> "[T]his Office is determined to do justice for the Bogoro's victims and to contribute to stopping the cycles of violence in Ituri and the Great Lakes region, a region still unstable. It is time to apply the Rome Statute, to prevent genocide, to prevent another Congo War, to make the promise of 'never again' real."[640]

While this statement may be tinged with the hyperbole common to opening statements in high profile criminal trials, it contains a mixture of ambitious preventative aims. The trial was intended to affect both ongoing and future criminality in the DRC and the region as a whole, as well as linking prosecution of these two individuals to the prevention of future wars. The forward-looking nature of the prevention agenda prioritised by the OTP was again highlighted in the Prosecution's opening statement at the Bemba trial:

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[635] ICC OTP 'Prosecutor opens investigation in the Central African Republic' (22 May 2007) ICC-OTP-20070522-220.

[636] ICC OTP 'Statement of the Prosecutor on the opening of the investigation into the situation in Libya' (3 Mar 2011).

[637] ICC OTP 'Waki Commission list of names in the hands of ICC Prosecutor' (16 Jul 2009) ICC-OTP-20090716-PR439 "To contribute to the prevention of crimes during the next election we must proceed promptly. […] I want to understand them [the Kenyans] and analyze how my office and all Kenyans can work together to prevent […] future violence." ICC OTP 'OTP Press Conference on Kenya, Prosecutor Moreno-Ocampo's Statement, 1 April 2010' (1 Apr 2010): "The common goal is to ensure there is no repeat of violence in the 2012 elections". ICC OTP 'Prosecutor to visit Kenya to meet victims and listen to all Kenyans' (4 May 2010) ICC-OTP-20100504-PR521.

[638] L Moreno-Ocampo 'Address to the Assembly of States Parties Ninth Session of the Assembly of States Parties Speech' (6 Dec 2010) 4.

[639] L Moreno-Ocampo 'Fifth Session of the Assembly of State Parties Opening Remarks' (23 Nov 2006) 3.

[640] Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07) 'Opening Statement' 24 Nov 2009.

"the preventative aspect of this trial - its forward-looking aspect - has no precedent."[641]

The nuances of prevention – deterrence, incapacitation and positive prevention

Prevention of future crimes through the effects of criminal justice processes can be achieved in various ways, including positive prevention; incapacitation; and, classical deterrence.[642] The OTP has at various times referenced all of these aspects of prevention. Precise terminology, though significant, is often misused regarding the different aspects of prevention. Deterrent effect, prevention through incapacitation and positive prevention are often used interchangeably to reference the one all-encompassing goal of prevention. Yet these are distinct concepts, implying very different approaches to prevention in its implementation and effects as well as its underlying philosophies.[643]

While there is no specific reference to "deterrence" in the Rome Statute, the OTP has repeatedly referred to its goal and potential impact in terms of a deterrent effect. The Prosecutor has claimed deterrence as a core principle underlying the Rome Statute.[644] The then Deputy Prosecutor (and Moreno-Ocampo's eventual successor) has interpreted the ICC's contribution to prevention as a question of deterrence: "As stated in the Rome Statute preamble, by putting an end to impunity for the perpetrators of the most serious crimes, the court can and will contribute to the prevention of such crimes, thus having a deterrent effect."[645] Insistence on the general deterrent power of the ICC was still apparent in 2011:"the execution of the warrants will have a deterrent impact for other leaders who are thinking of using violence to gain or retain power."[646] The ICC claimed a deterrent effect for its preliminary examination work in Cote d'Ivoire.[647] This example reflects the OTP's belief that the mere threat of ICC involvement in a situation is strong enough to exert a deterrent effect.

OTP statements also reveal a belief in political and financial incapacitation as a method of operationalising prevention, announcing in 2003 that it planned to curb financial and political support to alleged criminals and armed groups:

> "The investigation of financial transactions, for example for the purchase of arms, may well provide evidence proving the commission

[641] Prosecutor's opening statement: Jean-Pierre Bemba Gombo (ICC-01/05-01/08) TC III 'Transcript ICC-01/05-01/08-T-32-ENG CT WT 22-11-2010 1-64 PV T' 22 Nov 2010 11.
[642] Supra chapter 2 S2.2.1 .
[643] Ibid.
[644] Moreno-Ocampo 'Fifth Session ASP' (n639).
[645] ICC OTP 'Statement of the Deputy Prosecutor of the International Criminal Court on an Overview of situations and cases before the ICC, linked with a discussion of the recent Bashir arrest warrant' (Pretoria 15 Apr 2009); F Bensouda 'Regional Roundtable Discussion on Implementation of the Rome Statute of the International Criminal Court Parliamentarians for Global Action' (Monrovia 9 Feb 2011) 7.
[646] ICC OTP 'Statement ICC Prosecutor Press Conference on Libya' (16 May 2011).
[647] L Moreno-Ocampo '"Building a Future on Peace and Justice"' (Nuremberg 24/25 Jun 2007) "deterrence has started to show its effect as in the case of Cote d'Ivoire, where the prospect of prosecution of those using hate speech is deemed to have kept the main actors under some level of control".

> of atrocities. […] Such prosecutions will be a key deterrent to the commission of future crimes, if they can curb the source of funding."[648]

By 2007, this strategy was described to the ASP as "marginalization of the individuals sought by the Court. No supplies, no financial aid should reach individuals subject of an arrest warrant. They have to be isolated within their own communities."[649] This form of political marginalisation and de-legitimisation of individuals as well as their actions was given as evidence of prevention in action.[650] The following year the OTP reiterated this message to the ASP, cognisant of the fact that it is the States Parties themselves who retain the power to implement this strategy effectively:

> "It is time to reduce the political and financial support that indicted persons are receiving, to isolate them, to control the networks supplying them with money and weapons, and to encourage demobilisation or defections of their combatants."[651]

This variation on "incapacitation" can be regarded as a form of prevention, but is also a method to secure arrests in the absence of direct police power, as acknowledged by the Prosecutor: "Arresting a serving head of State is neither a police operation nor a military intervention; it requires a process of marginalization both at the national and international levels."[652]

The OTP's statements additionally show that many facets of positive prevention were envisaged as goals for the Court's work. OTP statements acknowledge the aim of influencing norms and laws at national level and behavioural standards in general. The Prosecutor has stated that "the law clarifies what people should do."[653] He has also noted that states around the world have adjusted to the legal pronouncements of the ICC, and even non-state parties have reformed their laws in compliance with the Rome Statute.[654] This was reiterated in the prosecution's opening statement of the Bemba trial.[655] The 2009-2012 Prosecutorial Strategy recognised that preventive impact can

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[648] ICC OTP 'Paper on Some Policy Issues before the Office of the Prosecutor' (September 2003); ICC OTP 'Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo' (8 Sep 2003); OTP 'Communications received' (n624).

[649] L Moreno-Ocampo 'Address to the Assembly of States Parties Sixth session of the Assembly of States Parties' (30 Nov 2007); ICC OTP 'Report on the activities performed during the first three years (June 2003-June 2006)' (September 2006) 17 outlines strategies "to galvanise international cooperation and deter external supply and support to the LRA."

[650] Moreno-Ocampo 'Building a Future' (n647) "[T]he beneficial impact of the ICC, the value of the law to prevent recurring violence is clear: exposing the criminals and their horrendous crimes has contributed to weaken the support they were enjoying, to de-legitimizing them and their practices such as conscription of children".

[651] L Moreno-Ocampo 'Address to the Assembly of State Parties - Seventh session of the Assembly of States Parties, 14 - 22 Nov 2008' (14 Nov 2008) 8.

[652] L Moreno-Ocampo 'Address to the Assembly of States Parties Eighth Session of the ASP' (18 Nov 2009).

[653] L Moreno-Ocampo 'Commemoration of the 10th Anniversary of the Adoption of the Rome Statute of the International Criminal Court – Informal Meeting of the Assembly of States Parties to the Rome Statute: Statement' (17 Jul 2008) 6.

[654] Ibid 6.

[655] Jean-Pierre Bemba Gombo 'Transcript' (n641) 11.

be maximised through education. The OTP advocates a strategy of mainstreaming education about the Court's work into all levels of schooling across the world, as well as being disseminated widely to politicians, negotiators, the police and the military.[656] As knowledge of crimes and punishments is a pre-condition of any deterrent effect and one of the fundamentals of effective positive prevention, such policies and their successful implementation would seem to be essential components of an effective prevention strategy.

Education programmes can be seen as attempting to influence social attitudes and norms at a local level, which is an important aspect of prevention theory. This is particularly so in relation to international criminal justice where local norms have been shown to override more distant norms and laws emanating from the international community.[657] The OTP has attributed changes to national legislation to the preventative impact of its work.[658]

In an attempt to operationalise this aspect of positive prevention, the OTP developed a policy of 'positive complementarity'. The 2009-2012 Prosecutorial Strategy document outlines the "positive approach to complementarity" adopted by the OTP as "a proactive policy of cooperation aimed at promoting national proceedings."[659] The approach includes information-sharing with local judicial and investigative institutions and relevant international bodies and setting up networks of expertise.[660] While building local capacity is seen as an important part of re-establishing the rule of law for affected populations, the OTP recognises its own practical limitations. The OTP does not get directly involved in "capacity building or financial or technical assistance."[661] Through this policy, the OTP has nonetheless attempted to extend its reach and tried to encourage the spread of the rule of law to maximise the long-term preventative impact of the ICC's work. The policy reflects the emphasis placed on both complementarity and international cooperation in the Statute.

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[656] OTP Strategy 2009-2012 (n621) 17.
[657] Supra text n330.
[658] Moreno-Ocampo 'Address to Eighth Session of the ASP' (n652): "Already before any Court decision, armies all over the world, even those of non-States Parties, are adjusting their standards and rules of engagement to the Rome Statute. This is the way to prevent crimes." See also ICC OTP website FAQs: < http://www.icc-cpi.int/NetApp/App/MCMSTemplates/Index.aspx?NRMODE=Published&NRNODEGUID={A6F14A19-D07F-4B3D-8B2A-E1ED0D29F434}&NRORIGINALURL=/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/FAQ/FAQ.htm&NRCACHEHINT=Guest#id_14 accessed 10 Aug 2009>; Moreno-Ocampo 'Building a Future' (n647).
[659] OTP Strategy 2009-2012 (n621) 5; this builds on the OTP Strategy 2006 (n621) 5 and OTP Paper on Some Policy Issues (n648) 5. 'Positive complementarity' was discussed at the Kampala Review Conference in 2010 and while the final resolution did not directly refer to positive complementarity or create legal obligations it acknowledged and emphasised its existing role as reported in M Bergsmo, O Bekou and A Jones 'Complementarity after Kampala: Capacity Building and the ICC's Legal Tools Database' (2010) Goettingen Journal of International Law 791, 803-804. These developments did not impact the OTP strategy until after the period under analysis in this thesis.
[660] OTP Strategy 2009-2012 (n621) 5.
[661] Ibid 5.

The rhetoric of the OTP reveals prevention of international crimes as a major priority for its work. Prevention has become an integral part of the OTP's goals beyond its original role as a preambular sub-clause and a desired secondary outcome of ending impunity.[662]

4.1.3 Punishment as communication

The OTP evinces awareness of the expressive function of prosecution and punishment and has implied both instrumental and expressive denunciation as aims of its work.[663] The OTP's statements imply a potential role for the ICC in expressing condemnation and censure and communicating the nature of wrongdoing contained in legal norms: "[T]he law express[es] what is right and what is wrong for a community. […] the law clarifies what people should do."[664] In the CAR situation, the OTP clearly expected its attention to sexual violence crimes to express the extent of the wrong and its condemnation:

> "In particular, the OTP will pay close attention to the many allegations of sexual crimes it has received. Ending impunity of perpetrators of such crimes is crucial to emphasize their gravity and unacceptability. Acts of sexual violence are a serious crime that will be prosecuted."[665]

In the DRC situation, the OTP recognised the potential role of the case against Lubanga in educating people about the wrong represented by crimes related to child soldiers, a relatively new norm of international criminal law:

> "The conscription, enlistment and active use of children in armed conflict represents one of the most brutal and morally troubling legacies of war. […] the hearing represents an unprecedented opportunity to shine a spotlight on this abuse of children worldwide. Child conscription destroys the lives and futures of thousands of children around the world. This case will contribute to exposing the problem and in stopping these criminal practices."[666]

Such statements acknowledge the nature and seriousness of the wrong and consciously aim to fulfil the expressive function of educating the offenders and wider society as to the wrong involved in particular types of international criminality.

The expressive function of law and criminal justice processes can serve multiple penal aims, beyond retributive theories of moral education and communicative censure and condemnation. Penal communications also discharge the necessary communicative functions of deterrence theory. The OTP has highlighted its expectations that the ICC's attention to certain crimes would educate and serve as a warning to potential perpetrators in the DRC and

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[662] Supra text at n458.
[663] M Cavadino and J Dignan The Penal System: An Introduction (3rd ed Sage 2002).
[664] Moreno-Ocampo 'Commemoration of the 10th Anniversary' (n653) 6.
[665] ICC OTP 'Background: Situation in the Central African Republic (22 May 2007); ICC OTP 'Factsheet: Situation in CAR' <http://www.icc-cpi.int/NR/rdonlyres/B1CFB36E-6290-48C9-B618-6F0460756C91/277260/ICCOTPFSCAR20080121ENG5.pdf accessed 3 Jan 2012> .
[666] Bensouda 'monthly media briefing' (n623).

CAR situations.[667] It claimed it was putting suspects "on notice" in the Libya situation after an investigation was opened there.[668] The Prosecutor and Deputy Prosecutor have issued general warnings to potential perpetrators to reinforce the communicative function of their work:

> "There is no immunity for the crimes under the ICC jurisdiction and other arrest warrants will follow. While continuing our work in our two first investigations, we are selecting our third case in the DRC and the Prosecutor reiterated that perpetrators must know they will be prosecuted."[669]

This sentiment was repeated in relation to the Darfur situation:

> **"**The only realist solution today is to request the removal and arrest of Harun as a first step to any solution. It will send a signal to the perpetrators of crimes in Darfur that the international community is not only watching, but will hold them accountable for their actions."[670]

This statement recognises the fact that the expressive function of criminal justice is chiefly fulfilled by the communicative value of the actions of arrest, prosecution and, eventually, punishment.[671]

4.1.4 Conflict-specific or context specific goals

The position adopted by the Prosecutor in public statements and strategy reflects the Rome Statute's ambivalence regarding conflict-specific goals.[672] The Prosecutor has clarified that the interpretation of the art 53 "interests of justice" clause would not include considerations of peace and security. The OTP Policy paper on the "interests of justice" repeatedly asserts that peace is not the OTP's mandate but, a matter for other institutions,[673] referring to the UNSC's article 12 power to stop or delay an investigation considered to be interfering with its peace and security mandate.[674] Even when considering the interests of victims under this clause, the OTP interprets this as mainly "the victims' interest in seeing justice done",[675] rather than any more particularised conflict related goals.

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[667] ICC OTP 'Prosecutor's opening statement: Case of the Prosecutor v. Thomas Lubanga Dyilo' (26 Jan 2009) ICC-01/04-01/06: "If convicted, Thomas Lubanga's sentence will send a clear message"; OTP 'Overview of situations and cases' (n645): "The Lubanga case, […] is also a clear message to perpetrators." F Bensouda 'Update on Judicial Proceedings' (2 Mar 2010) 5: claiming Bemba could "have a tremendous preventative impact by reminding commanders of their responsibility for the conduct of their subordinates."

[668] OTP 'Statement on Libya' (n636).

[669] ICC OTP 'Statement by Fatou Bensouda, Deputy Prosecutor, during the press conference regarding the arrest of Germain Katanga' (19 Oct 2007) ICC-OTP-20071019-258.

[670] L Moreno-Ocampo 'Statement of Mr. Luis Moreno Ocampo to the United Nations Security Council pursuant to UNSCR 1593 (2005)' (5 Dec 2007).

[671] See discussion infra chapter 7.

[672] Neither of the OTP's major reports on prosecutorial strategy mentions peace concerns.

[673] OTP Interests of Justice (n625) 1 and 9.

[674] Ibid 8.

[675] Ibid 5.

Both the Prosecutor and Deputy Prosecutor have pointed out that peace is a secondary goal of the ICC, to be achieved in the long-term;[676] and that justice is "an essential component to effective peace and effective transition."[677] The OTP initially claimed to be sensitive to ongoing peace negotiations and to be adapting its practice accordingly,[678] later statements were more assertive, directly refuting the "peace versus justice" characterisation of its work;[679] and preferring to talk about the controversy over "appeasement or justice".[680] This became a repeated motif in later speeches by the Prosecutor.[681] The OTP public statements moved from acknowledgement and respect for peace processes to exhorting peace processes to ensure they take the ICC's Statute and judicial decisions into account.[682] This firmer line towards peace negotiations was reflected in statements referring directly to the situations under investigation in CAR[683] and Darfur.[684] It was also later included in UN guidelines for mediators.[685] The ICC's limited role in conflict-related aims represents a marked shift from previous institutions of international criminal justice.

The Prosecutor has also been at pains to affirm that political concerns of any kind will have no part in the OTP's decision-making.[686] He has repeatedly highlighted the importance of impartiality and independence to the OTP's work and by extension to the ICC's legitimacy.[687] The OTP's stated policy is not to prosecute all sides to a conflict in order to represent some kind of "equivalence of blame" between parties to the conflict.[688] This is portrayed as a marker of the

[676] Moreno-Ocampo 'Building a Future' (n647).
[677] L Moreno-Ocampo 'Address to the United Nations Security Council' (13 Dec 2005); ICC OTP 'Statement by Deputy Prosecutor Fatou Bensouda on receipt of the World Peace Through Law Award, given by the Washington University Law' in OTP Briefing Issue 100 14 September -10 October 2011 (20 Sep 2011).
[678] ICC OTP 'Fourth Diplomatic Briefing of the ICC: Statement by Serge Brammertz, Deputy Prosecutor of the ICC' (8 Jun 2005); OTP 'Report on activities 2006'(n649) 16.
[679] Moreno-Ocampo 'Building a Future' (n647); ICC OTP 'Eleventh Diplomatic Briefing Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the ICC' (10 Oct 2007).
[680] Moreno-Ocampo 'Working with Africa' (n630) 2 and 8.
[681] L Moreno-Ocampo 'Review Conference - General Debate: Statement' (Kampala 31 May 2010) 5; L Moreno-Ocampo 'Council on Foreign Relations: Keynote Address' (4 Feb 2010) 11.
[682] OTP Interests of Justice (n625) 4; Moreno-Ocampo 'Commemoration of the 10th Anniversary' (n664) 7-8; Moreno-Ocampo 'Council on Foreign Relations' (n681) 11; Moreno-Ocampo 'Review Conference' (n681) 6.
[683] L Moreno-Ocampo 'Address to the Assembly of States Parties Sixth session of the Assembly of States Parties' (30 Nov 2007).
[684] L Moreno-Ocampo 'Keynote address at Yale' (6 Feb 2009).
[685] Moreno-Ocampo 'Council on Foreign Relations' (n681) 11.
[686] "I should not, and I will not take into consideration political considerations." Moreno-Ocampo 'Address to ASP - Seventh session' (n651); Moreno-Ocampo 'Building a Future' (n647); Moreno-Ocampo 'Commemoration of the 10th Anniversary' (n664) 6.
[687] ICC OTP 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' (24 Oct 2005); ICC OTP 'Eighth Report of the Prosecutor of the ICC to the UN Security Council pursuant to UNSC 1593 (2005)' (3 Dec 2008) para 20; Moreno-Ocampo 'Address to ASP - Seventh session' (n651).
[688] ICC OTP Annex to policy paper: Criteria for Selection of Situation and Cases [draft policy paper on file with author] (2006) 2 "In the view of the OTP, impartiality or even-handedness does not mean "equivalence of blame" or that all groups must be prosecuted regardless of the evidence. […] impartiality may in fact require different outcomes for different groups".

ICC's impartiality and can be read as a rejection of factors associated with conflict-related or avowedly political aims.

4.1.5 Mixed messages regarding the ICC's role in conflict resolution

The message that the OTP's abiding concern is justice, rather than peace, is somewhat clouded by contradictory statements claiming a role for the ICC in immediate peace-building and implying expansive positive political effects. OTP statements have reinforced the view that the ICC has a mandate for peace through conflict management. The deputy Prosecutor has claimed that "[t]he ICC is a new instrument of peace in a world where conflicts transcend borders."[689] The Prosecutor has likewise emphasised the link between the ICC's work and peace and security, highlighting the ICC's innovative role to "manage international conflicts".[690] OTP statements emphasised the immediate impact of OTP interventions on managing the conflict and bringing peace in Uganda.[691] The Prosecutor also took credit for the political effects of the OTP's work on the conflict and peace process in Uganda.[692] In the Darfur situation, the Prosecutor claimed that arrest warrants "not only serve the interests of justice: they can help alleviate the humanitarian situation, facilitate the deployment and operation of UNAMID and reach lasting political agreements."[693] The OTP's work has been associated with spurring peace negotiations in the Prosecutor's more general statements and reflections:

> "[T]he beneficial impact of the ICC, the value of the law to prevent recurring violence is clear: […]; arrest warrants have brought parties to the negotiating table; have contributed to focus national debates on accountability and to reducing crimes"[694]

Appeals to prevention produce mixed messages regarding the ICC's role beyond the orthodox realms of criminal justice, extending to more long-term prevention efforts as wide-ranging as structural issues, conflict resolution and economic stability. In a discussion of the IMF and WTO, the Prosecutor shared his vision of the ICC as part of a general prevention mandate with a reach and remit transcending orthodox penal aims:

> "My Office has to know more about economic development. In the DRC, the control of gold and other mines is at the root of the violence. In the Sudan, the sharing of resources between the center and the periphery has historically driven violence. So as a Prosecutor mandated to prevent crimes, I shall be interested in your efforts to stabilize economies. […] WTO and the ICC will succeed because they are

[689] OTP 'Overview of situations and cases' (n645).
[690] L Moreno-Ocampo 'Opening Keynote Address' at 2009 Global Creative Leadership Summit: Global Futures, Global Risks: Trends, Needs, Opportunities, Crises (New York 23 Sep 2009) 3.
[691] OTP 'Uganda Arrest Warrants' (n620) 7; OTP 'Statement to Fourth Session of ASP' (n621)
[692] Moreno-Ocampo 'Fifth Session ASP' (n639) 2.
[693] ICC OTP 'Prosecutor's keynote address at the Council for Foreign Relations Symposium' (New York 17 Oct 2008).
[694] Moreno-Ocampo 'Building a Future' (n647).

providing an important service: to refine global rules, set limits and contribute to solving conflicts."[695]

While such contextual knowledge is part of the socio-economic background to the OTP's investigations, the rhetorical aspiration may outstrip the limited capacity of the ICC. Such statements can also send confused messages about the mandate and role of the ICC. In several of the Prosecutor's statements, he seems to have blurred the lines between the ICC's role preventing and punishing international crimes and a far broader role in preventing conflict.

The OTP has issued numerous general statements about stopping the violence in various situations, apparently referring to the conflicts themselves as well as to alleged criminal offences perpetrated in connection with them.[696] In the Libya situation, the Prosecutor's statements conflated the prevention of the international crimes dealt with at the ICC with avoiding armed conflict.[697] While the two objectives often go together in fact, they are crucially different in legal terms and in terms of the ICC's involvement and jurisdictional reach. OTP statements have not always been clear in differentiating between the two and clarifying the precise role of the ICC.

4.1.6 Victims

From the first speech made by Luis Moreno-Ocampo at his 2003 inauguration, victims have been identified in OTP statements as a main focus of the ICC's work.[698] This emphasis on victims as a central motivating and justifying rationale has continued as a theme through the OTP's statements, variously either reflecting the goal of victim protection or that of attaining (retributive) justice for victims.[699] Recalling his appointment as Prosecutor, Luis Moreno-Ocampo wrote in 2009: "I had one goal then, and I have one goal today: to build an institution to bring justice to the victims of atrocities."[700] In the same year, the Prosecutor emphasised: "I am on the victims' side. I will not apologize for that."[701] The focus on victims was still very much in evidence in the Prosecutor's speeches addressing the Kampala Review Conference in

[695] Moreno-Ocampo 'Global Creative Leadership Summit' (n690).
[696] ICC OTP 'ICC Prosecutor: The absolute priority in Darfur today is to stop the violence. All parties must accept peace, and justice' (5 Jun 2009) ICC-OTP-20090605-PR419; Moreno-Ocampo 'Building a Future' (n647).
[697] OTP 'Statement on Libya' (n636): "The priority now is to stop any new crimes. It is important to avoid an armed conflict in Libya."
[698] L Moreno-Ocampo 'Statement made at the ceremony for the solemn undertaking of the Chief Prosecutor of the ICC' (16 Jun 2003) 4: "Please allow me to conclude with a reference to the victims. To protect them is the objective of our mission."
[699] OTP Interests of Justice (n625) 5: "The Office considers that the 'interests of victims' includes the victims' interest in seeing justice done, but also includes other essential interests such as their protection, as indicated by the Rome Statute." Moreno-Ocampo 'Address to Eighth Session of the ASP' (n652): "to protect the victims and do justice." ICC OTP 'Fact Sheet: The Situation in Darfur, The Sudan' (27 February 2007): **"**Reaching the victims is a priority."
[700] L Moreno-Ocampo 'The International Criminal Court in Motion' in C Stahn and G Sluiter (eds) The Emerging Practice of the International Criminal Court (Martinus Nijhoff Publishers 2009) 13.
[701] Moreno-Ocampo 'Working with Africa' (n630) 3.

2010.[702] Victims were invoked as a credible justification for the OTP's interventions and as conferring vital legitimacy on the entire ICC project:

> "Victims have been the drivers and the pushers of the Court. We are their Court. […] All of them are contributing to the prosecution of perpetrators of massive crimes and to the legitimacy of the system."[703]

OTP statements on victims display a marked attention to justice and retributive concerns, as well as to prevention. Protection of victims is often related to prevention.[704] However, there is also a noticeable emphasis on justice for victims and victim satisfaction through the retributive justice process. For example, the OTP released the following statement on the transfer of Bemba in the CAR situation:

> "Justice is coming for the victims, for the victims of the Central African Republic, for the victims of massive sexual violence worldwide. We listened to them, and we transformed their painful stories into evidence."[705]

OTP statements incorporate various elements recognisable from retributive theorising relating to victims, such as reassuring victims,[706] acknowledging harms to victims, and recognising their suffering publicly.[707] Acknowledgement and reassurance of victims was again highlighted in the Prosecutor's opening statement in Katanga and Ngudjolo:

> "[T]his Office is determined to do justice for the Bogoro's victims […] No more will the victims of massive crimes be ignored. The people from such places as Bogoro, Bunia, Aveba and Zumbe must know that they are not alone; that they do not need to resort to violence again; the Hema, the Ngiti, the Lendu, the people from Ituri have to feel that they are a part of a global community, that we are their brothers and sisters.

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[702] Moreno-Ocampo 'Review Conference' (n681), the Prosecutor's speech at the Kampala Review conference repeatedly (at least 14 times in 7 pages) referred to victims as justification for, and recipient of, the ICC's work, for example "victims have rights, and their rights will be respected. […] Never again will victims of atrocities be ignored. […] The victims have no time. They are waiting to be rescued; they are calling to stop the rapes and the killings now. […] If we care about victims we need to implement the arrest warrants pending since July 2005. […] will protect the victims."

[703] Moreno-Ocampo 'Council on Foreign Relations' (n681) 12.

[704] Moreno-Ocampo 'Statement pursuant to UNSCR 1593 (14 June 2006)' (n619): "The concern of the ICC is to see that effective justice is delivered to the victims of the crimes in Darfur. […] Our justice efforts should contribute to their protection and to the prevention of further crimes." OTP 'Press Conference on Libya 16 May 2011' (n646); Moreno-Ocampo 'Fifth Session ASP' (n639) 4.

[705] ICC OTP 'OTP on Jean-Pierre Bemba surrender: this is a day for the victims' (3 Jul 2008) ICC-OTP-20080703-PR336.

[706] ICC OTP 'ICC Cases an opportunity for communities in Ituri to come together and move forward' (27 Jun 2008) ICC-OTP-20080627-PR332 "This case, and each of our cases, is a message to victims of crimes worldwide, that perpetrators will be held accountable".

[707] "The judicial process will put the suffering of the victims in the center of the public agenda." L Moreno-Ocampo 'Kenya National Dialogue and Reconciliation Two Years On: Where Are We?: Statement' (Nairobi 2 December 2010) 6; ICC OTP *Policy Paper on Victims'* Participation (April 2010) 2; OTP 'Jean-Pierre Bemba surrender' (n705).

> The Rome Statute is building one global community to protect the rights of victims all over the world."[708]

At various times the OTP has interpreted victims' interests as the normative grounding of retributive justice. In relation to the CAR investigation, the Prosecutor claimed: "These victims are calling for justice".[709] In relation to the transfer of Mbarushimana for alleged crimes committed in DRC, he stated "We will not deny justice to the hundreds of victims who suffered the horror of those attacks."[710] Policy documents have reinforced the view that the main interest of victims is the retributive justice offered by the ICC. In the Policy Paper on the Interests of Justice, the OTP derives its presumption that the interests of victims favour prosecution directly from the wording of the Rome Statute (though competing considerations are also acknowledged):

> "While the wording of Article 53(1)(c) implies that the interests of victims will generally weigh in favour of prosecution, the Office will listen to the views of all parties concerned."[711]

In every situation where the OTP has begun an investigation, the Prosecutor has announced that providing retributive justice for the victims is a primary aim. In Uganda, the Prosecutor stated: "[m]y responsibility is to work for the victims in Northern Uganda, in Teso and in South Sudan. I know them. We interviewed several of them. I know what happened and I believe if we do justice we will be helping the people of Uganda."[712] In relation to DRC, he claimed: "[t]here will be justice for Lubanga's victims"[713] and "[o]ur mandate is justice, justice for the victims. The victims of Bogoro; the victims of crimes in Ituri; the victims in the DRC."[714] OTP statements described Darfur as "a situation where all of us work for justice, work for the victims. My mandate is to contribute to the prevention of future crimes. The victims of the crimes are my main concern." [715] And again: "[a]ll victims in Darfur deserve justice."[716] Regarding CAR, the Prosecutor stated: "I am hopeful that we will bring justice for the victims."[717] In Kenya, he claimed: "[o]ur Office is doing what we

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[708] Germain Katanga and Mathieu Ngudjolo Chui (ICC-01/04-01/07) 'OTP Opening Statement' 24 Nov 2009 3.
[709] OTP 'Investigation in CAR' (n635).
[710] ICC OTP 'Statement by ICC Prosecutor on transfer of Callixte Mbarushimana to the Hague' (25 Jan 2011).
[711] OTP Interests of Justice (n625) 5 claims that victims' personal interests 'flow from' the right to truth, justice and reparation, but at 12 "must be more specific than the general interest of any victim in the progress and outcome of the prosecution." L Moreno-Ocampo 'Address to the Assembly of State Parties' (30 Nov 2007) 8.
[712] New Vision - Uganda "Uganda; ICC Prosecutor Louis Ocampo in His Office At the Hague," interview by Felix Osike (13 Jul 2007) <http://allafrica.com/stories/200707160105.html>.
[713] ICC OTP 'The Office of the Prosecutor supports the need for a fair trial and promises justice will be done for Lubanga's victims' (24 Jun 2008) ICC-CPI-20080624-PR329.
[714] ICC OTP 'ICC Cases an opportunity for communities in Ituri to come together and move forward' (27 Jun 2008) ICC-OTP-20080627-PR332.
[715] L Moreno-Ocampo 'Conference on "Justice in Post Armed Conflicts and the ICC: Reduction of Impunity and a Support to International Justice", Remarks by Luis Moreno-Ocampo, Prosecutor of the ICC' (15 Jan 2009) accessed 12 Aug 2009>.
[716] Moreno-Ocampo 'Eighth Report Pursuant To UNSCR 1593 (3 Dec 2008)' (n687) para 89.
[717] OTP 'Jean-Pierre Bemba surrender' (n705).

promised to do: Justice for the victims."[718] In Cote d'Ivoire, the Prosecutor promised that "Ivorian victims will see justice for massive crimes".[719]

The emphasis on victims as key recipients of ICC justice has also extended to some situations under preliminary examination. Prosecutor Bensouda, whilst still Deputy Prosecutor, referred to "victims who are expecting justice to be done" and stated: "[s]eeing justice is done for the victims of Guinea is my Office's mandate and a major personal priority for me."[720]

This approach seemingly reflects the traditional role of victims as beneficiaries of criminal justice or passive recipients of justice.[721] In this model, the Prosecutor is working on their behalf to provide them with, a presumably desired, measure of retributive justice for the wrongs they have suffered. This goes beyond the text of the Rome Statute.[722] The rhetoric of the OTP implies victims are at the heart of the OTP's aims and seems to move beyond the predominantly victim-conscious approach of the Statute, as outlined above.

4.2 Operational Policies and strategies

How did these general policy statements translate into prosecution decisions on a day-to-day basis? This section looks at how the stated aims and rationales were reflected in the policies developed to address the key areas of operational discretion accorded the Prosecutor, focussing on: (1) victim participation; (2) selection and prioritisation; and (3) investigative strategy.

4.2.1 Victim participation

The OTP evidently intended to take victims' participation seriously and to make efforts to incorporate this aspiration into the OTP's work in a meaningful way. The fourth objective in the OTP's 2006 Prosecutorial Strategy "is to continuously improve the way in which the Office interacts with victims and addresses their interests."[723] The document further clarifies that the OTP has "the obligation to assess the interests of victims as part of its determination of the interests of justice under article 53 and rule 48 [RPE]."[724] In the 2007 Policy Paper on the Interests of Justice, the OTP suggests that article 53 imposes a specific obligation on the Prosecutor to take into account the interests of victims before starting an investigation or prosecution.[725] By 2010, "addressing

[718] L Moreno-Ocampo 'Statement of the Prosecutor on the Situation in Kenya' (29 May 2011) 2.
[719] ICC OTP 'Ivorian victims will see justice for massive crimes: Mr. Gbagbo is the first to be brought to account, there is more to come' (30 Nov 2011).
[720] ICC OTP 'Press statement by Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court' (Conakry, 5 Apr 2012).
[721] C Jorda and J de Hemptinne 'The Status and Role of the Victim' in Cassese et al Commentary Vol I (n31) 1387, 1389 describe victims as having been "'the object-matter' of international criminal proceedings".
[722] Supra chapter 3.
[723] OTP Strategy 2006 (n621) 3 and 8.
[724] OTP Strategy 2006 (n621) 8.
[725] OTP Interests of Justice (n625) 5; the RS wording is the opposite -the interests of victims must be taken into account if the Prosecutor is considering NOT starting an investigation or prosecution.

the interests of victims" had become the fourth of four "fundamental principles" underpinning all of the objectives of the OTP strategy.[726]

While much of the OTP's policy in relation to victims reflects obligations under the Statute, the OTP seems to have interpreted its formal duties expansively. OTP policy states that the Rome Statute scheme of victims' participation is "a way of ensuring that their views and concerns are taken into account".[727] More specifically, it was deemed necessary to "systematically seek the views of victims and local communities at an early stage, before an investigation is launched, and to continue to assess their interests on an on-going basis".[728] The OTP's duties to consider victims' views were taken a step further in public statements. The Prosecutor claimed: "I have a special duty to listen to the victims."[729] OTP statements asserted that its work was "guided by the interests of the victims"[730] and that "paramount importance [was] being given to the interests of victims."[731]

The OTP promised to develop clear protocols to ensure that at every stage of investigation and trial "the Office will consult with the relevant victims and take their interests into account."[732] The process for implementing this strategy was elucidated in policy papers as involving "dialogue",[733] and "town hall meetings" in situation countries.[734] The strategy was codified in the Regulations of the OTP which state that the OTP shall "seek and receive the views of victims at all stages of its work in order to be mindful of and to take into account their interests."[735]

The OTP intended to assess victims' interests and interact with victims partly for instrumental reasons, in order to enhance "the understanding and impact of the Office's activities".[736] Beyond this, it was asserted that victims' views and interests would be taken into account in the OTP's decision-making. In 2010 the Prosecutor claimed: "Victims are critically important during the preliminary examination phase, helping my Office to select situations to investigate."[737] The OTP has consistently implied that victims' views would inform selection of prosecutions and charges: "the Office systematically

[726] OTP Strategy 2009-2012 (n621) 2 and 4.
[727] Ibid 4.
[728] OTP Strategy 2006 (n621) 8; OTP Strategy 2009-2012 (n621) 6.
[729] L Moreno-Ocampo 'Kenya National Dialogue and Reconciliation Two Years On: Where Are We?: Statement' (Nairobi, 2 Dec 2010) 2.
[730] OTP 'Uganda Arrest Warrants' (n620) 6; Moreno-Ocampo 'Informal meeting of Ministries of Foreign Affairs' (n687).
[731] ICC OTP 'Statement By The Prosecutor Related To Crimes Committed In Barlonya Camp In Uganda' (23 Feb 2004).
[732] OTP Strategy 2006 (n621) 8.
[733] OTP Interests of Justice (n625) 6 "In attempting to ascertain the interests of victims the Prosecutor will conduct a dialogue with the victims themselves as well as representatives of local communities."
[734] OTP Strategy 2009-2012 (n621) 16 "Visits to situation countries by representatives of the Office will continue to include town hall meetings with victims and meetings with key actors such as women's associations, community leaders, and '*chefs de quartiers*'."
[735] ICC OTP Regulations of the Office of the Prosecutor (Official Journal Publication 23 April 2009) ICC-bd/05-01-09 Reg 16.
[736] OTP Strategy 2006 (n621) 8; OTP Strategy 2009-2012 (n621) 16.
[737] Moreno-Ocampo 'Review Conference' (n681) 2.

interacts with victims to address, to the extent possible, the full range of criminality."[738] Victims themselves would ostensibly define investigative priorities by identifying the main types of victimisation:

> "We continue to assess views and interests of victims, in particular to ensure that the main modes of victimization as assessed by those who suffered are adequately covered in our investigative activities."[739]

In 2010 the OTP promised to "take their [victims'] interests into account when it defines the focus of its investigative activity". It was stated that victims' views had "contributed to the definition of incidents and charges brought forward by the Prosecution."[740] However, this claim was qualified to the extent that: "[t]he Prosecutor does not purport to represent and express all the views and concerns of victims".[741] Promises to systematically assess and take into account the views and interests of victims at all stages of the OTP's work and to attempt to represent victims' version of the range of criminality and victimisation in cases and charges implies a more victim-centred approach to the aims of the Court than might be gleaned from the Rome Statute.

4.2.2 Selection and prioritisation

We have seen that the Rome Statute contains minimal guidance regarding case selection.[742] In keeping with the consultative, inclusive approach taken at the Rome Conference and implicit in the Statute, the OTP undertook a series of expert consultations to inform policy in this area. The ensuing consultation emphasised the importance of formulating and communicating clear criteria for case selection.[743] The OTP has tried to be transparent about policies and factors included in decision-making, opening the development of policies to public debate and publishing its methodologies.[744] The OTP's 2009-2012 report contains a full lists the consultations it has undertaken in formulating its strategy, emphasising that this approach "allows the Office to be predictable and transparent."[745] Transparency is seen by the OTP as essential for fostering legitimacy, cooperation and support for the Court's work: "[t]hese efforts of transparency and consistency in our work will ensure our legitimacy, and help to increase other actors' commitment to, and cooperation with, the Court and

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[738] OTP Strategy 2009-2012 (n621) 6; OTP Strategy 2006 (n621) 7; OTP Report on activities 2006 (n649) 8; OTP *Victims' Participation* (n707) 4.
[739] Moreno-Ocampo 'Fifth Session ASP' (n639); OTP Strategy 2009-2012 (n621) para 22.
[740] OTP *Victims' Participation* (n707) 8-9.
[741] Ibid 13.
[742] Supra chapter 3.
[743] A Marsten Danner Prosecutorial Discretion and Legitimacy (13 June 2005 The Hague Guest Lecture Series of the ICC OTP) 512; A MacDonald and R Haveman Prosecutorial *Discretion: Some thoughts on 'objectifying' the exercise of prosecutorial discretion by the* prosecutor of the ICC (15 April 2003) Contribution to an expert consultation process on general issues relevant to the ICC OTP) 3.
[744] Moreno-Ocampo 'Informal meeting of Ministries of Foreign Affairs' (n687); ICC OTP 'Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps' (12 February 2004) "In the spirit of openness and transparency, we have published a statement of our policy, which was developed after public consultation." ICC OTP 'Public Hearings' http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/network%20with%20partners/public%20hearings/Pages/first%20public%20hearing.aspx.
[745] OTP Strategy 2009-2012 (n621) 4.

the OTP."[746] This striving for clear and consistent application of criteria and for transparency reflects the UN advice on establishing the rule of law in post-conflict societies set out in 2004: "prosecutorial policy must be strategic, based on clear criteria, and take account of the social context. Public expectations must be informed through an effective communications strategy."[747]

Selection criteria: gravity

In keeping with its professed policy of transparency, the OTP has publicised policies on selectivity. The main publicised criterion for situation, suspect and case selection alike is gravity. The OTP has stated that gravity is "central to the process of case selection" [748] and "[a]mong the most important"[749] of the selection criteria. The Prosecutor has further stated that "[g]ravity of crimes against victims is the single most important criterion in the selection process of situations and cases."[750]

The OTP uses gravity to refer compendiously to what can be called "sufficient gravity", the legal requirement for admissibility under article 17, and "comparative gravity", one of the OTP's criteria in selecting between potentially meritorious situations or cases. The distinction between the gravity threshold for admissibility under article 17 and gravity as part of prosecutorial discretion regarding situation and case selection is not always clear in the Prosecutor's public pronouncements.[751] Comparative gravity was invoked to justify the selection of certain cases and not others within the Uganda and DRC situations.[752] Regarding Darfur the OTP worked to identify "particularly grave events" and "incidents of particular gravity".[753] In the CAR situation, the OTP reported that its investigative aims were to identify the most serious crimes and those most responsible.[754] This was later developed into a policy of sequencing cases.[755] Sequencing was applied to investigations based on crime gravity and

[746] Moreno-Ocampo 'The Tenth Anniversary of the ICC' (n618).
[747] UNSC The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (August 2004) UN doc s/2004/616 15-16.
[748] Moreno-Ocampo 'Statement pursuant to UNSCR 1593 (14 June 2006)' (n619).
[749] Moreno-Ocampo 'Informal meeting of Ministries of Foreign Affairs' (n687); Moreno-Ocampo 'Review Conference' (n681) 2.
[750] Moreno-Ocampo 'Review Conference' (n681) 2.
[751] WCRO The Gravity Threshold of the International Criminal Court (WCRO 2008) 7; OTP Report on activities 2006 (n649) 2 "In selecting its cases, the Office is guided by the standard of gravity as mandated by the Rome Statute. The situations in the Democratic Republic of Congo (DRC) and Northern Uganda were the gravest admissible situations under the jurisdiction of the Court, and the situation in Darfur, the Sudan, also clearly met the gravity standard."
[752] OTP 'Statement to Fourth Session of ASP' (n621) - "In Uganda, we examined information concerning all groups that had committed crimes in the region. We selected our first case based on gravity." In DRC, "We are working in sequence, selecting cases on the basis of gravity."
[753] ICC OTP 'Second Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno-Ocampo, to the Security Council pursuant to UNSC 1593' (13 December 2005) 2 "involving, for example, high numbers of killings, mass rapes and other forms of extremely serious gender violence".
[754] ICC OTP Factsheet: Situation in CAR < http://www.icc-cpi.int/NR/rdonlyres/B1CFB36E-6290-48C9-B618-6F0460756C91/277260/ICCOTPFSCAR20080121ENG5.pdf accessed 3 January 2012>.
[755] OTP Strategy 2006 (n621) 5 "The Office also adopted a 'sequenced' approach to selection, whereby cases inside the situation are selected according to their gravity".

levels of culpability in Uganda.[756] In DRC, the sequential approach was applied as a dual filter, first to differentiate between different geographical areas and, secondly as between particular groups of potential defendants identified within those areas.[757]

Assessing gravity is potentially an area of wide discretion for the OTP. The vagueness of the term was pointed out by the Chilean delegate at the Rome Conference,[758] but otherwise seems to have passed largely without comment.[759] The factors that should be considered in assessing grave criminality are subject to dispute. There are points of convergence at national level regarding the more serious nature of crimes resulting in death and harm to physical integrity, which generally take priority over property crimes.[760] For international crimes, some jurisprudence and common factors for assessing gravity have been identified in academic literature.[761]

A detailed technical account of the gravity assessment written by a senior OTP Analyst indicates that the OTP interpretation is grounded in national practice, legal and sentencing theory and recognised techniques for data analysis.[762] The OTP focussed largely on numbers of victims and killings, factors drawn from an examination of "the sources of applicable law, the jurisprudence and practice of other international tribunals and national jurisdictions, and provisions of the Statute and Rules of Procedure and Evidence."[763]

Specific factors for assessing gravity include: "the nature or severity of the crimes; the scale of crimes (including number of victims); the degree of systematicity, where applicable; the impact of the crimes; and any particularly aggravating factors in the manner of commission of the crimes."[764] The main indicator of gravity for the OTP is a quantitative assessment based on the number of crimes committed, primarily looking at illegal killings (which are usually the most reliably reported offences).[765] The assessment focuses on the number of victims and is based predominantly on killings and on "the number

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[756] ICC 'Sixth Diplomatic Briefing of the International Criminal Court: Compilation of Statements: The Prosecutor' (23 March 2006).
[757] Moreno-Ocampo 'Informal meeting of Ministries of Foreign Affairs' (n687).
[758] UN Rome Conference Official Records Volume II (n461) para 29 Mr. Salinas (Chile) "Regarding article 15, there was a need to explain more clearly the vague reference in paragraph 1 (d) to sufficient gravity in regard to the justification of the Court's further action."
[759] El Zeidy (n483) 38.
[760] X Agirre Aranburu 'Gravity of Crimes and Responsibility of the Suspect' in M Bergsmo (ed) Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd edition Torkel Opsahl Academic Publisher 2010) 205, 210.
[761] Supra n604; K Jon Heller 'Situational Gravity Under the Rome Statute' in C Stahn and L Van der Herik (eds) Future Directions in International Criminal Justice (CUP 2009) http://ssrn.com/abstract=1270369; W Schabas 'Prosecutorial Discretion v Judicial Activism at the International Criminal Court' (2008) 6 JICJ 731, 748.
[762] Agirre Aranburu 'Gravity of Crimes' (n760) 205.
[763] OTP Annex to policy paper (n688) 5.
[764] Ibid 5.
[765] Moreno-Ocampo 'Informal meeting of Ministries of Foreign Affairs' (n687): "there are several factors that must be considered. The most obvious of these is the number of persons killed – as this tends to be the most reliably reported." Agirre Aranburu 'Gravity of Crimes' (n760) 210.

of victims of other crimes, especially those against physical integrity."[766] This is in line with sentencing practice of the ad-hoc tribunals.[767] In fact, these assessments contain both a quantitative element, numbers of victims, and a qualitative element in that killings, rapes and crimes against the person are considered at national and international level to represent a greater harm to the victim and to be more serious crimes. This is grounded in both national and international practice, stemming from the UDHR and the primacy of killing in crime definitions.[768]

In practice, the OTP has taken a quantitative approach as a starting point, expanded with qualitative factors. Aggravating factors in the OTP's gravity assessment were consciously taken from the RPE Rule 145(2) aggravating factors for sentence determination, and Article 8 (2)(b)(3) and Article 70.[769] These include criteria relating to the nature of the crimes and harms, and the nature of the culpability of the perpetrator: manner of commission of crimes – particular cruelty, defenceless victims, discrimination, deliberate targeting of civilians, vulnerable groups or those involved with humanitarian assistance or peacekeeping; abuse of de jure or de facto power; and, crimes to obstruct justice or with intent to spread terror.[770] Measuring the actual number of recorded crimes is a good indicator of scale, which is a factor reflected in the Elements of Crimes[771] and pertains directly to the widespread nature of the criminality which is a precondition qualifying such crimes as international.[772] Systematicity relates to the requirement for a plan or policy in war crimes and the systematic nature of crimes against humanity (emphasised in the offence definition requiring a higher State or organizational policy).[773] Schabas and Heller both argue that State involvement and the systematicity of the crimes should be indicators of greater gravity. Both are qualitatively important to the definition of international crimes and tend to imply greater potential for impunity for state actors perpetrating international crimes.[774]

Qualitative assessment of gravity links to the role of the Court in 'speaking truth to power' and acting where a national government cannot or will not take the initiative. Philosophically this links to the intrinsic nature of the criminal act, which itself is aggravated by abuse of trust or abuse of public office. The OTP's policy paper correspondingly refers to "abuse of de jure or de facto power" as an aggravating factor in assessing gravity, based on the Statute and RPE aggravating factors at sentencing.[775] State involvement as an aggravating factor may be reflected in the OTP's emphasis on prioritising those most

[766] Moreno-Ocampo 'Informal meeting of Ministries of Foreign Affairs' (n687): "we will not necessarily limit our investigations to situations where killing has been the predominant crime. We also look at number of victims of other crimes, especially crimes against physical integrity."
[767] Agirre Aranburu 'Gravity of Crimes' (n760) 211.
[768] Ibid 210.
[769] OTP Annex to policy paper (n688) 6.
[770] Ibid 6.
[771] Agirre Aranburu 'Gravity of Crimes' (n760) 208.
[772] RS arts 7(1).
[773] Agirre Aranburu 'Gravity of Crimes' (n760) 208-209 on the link between ICC elements of crimes and the OTP's policies re gravity.
[774] Heller (n761); Schabas 'Prosecutorial Discretion v Judicial Activism' (n761) 747.
[775] OTP Annex to policy paper (n688) 6.

responsible in case selection. The OTP has further defined gravity in terms of the gravity of the wrong and of the alleged perpetrator's culpability: "The concept of gravity should not be exclusively attached to the act that constituted the crime but also to the degree of participation in its commission." [776] This means the OTP "will investigate and prosecute those who bear the greatest responsibility for the most serious crimes";[777] in other words those "situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes."[778]

Focusing on those most responsible could equally be a corollary of the retributive notion of gravity in terms of culpability, and is also a key element of deterrent theory when applied in the context of international crimes.[779] While the main factors in determining gravity appear to be based in retributive notions of desert and culpability, certain aspects can be interpreted as aimed at prevention and deterrence. The "impact of the crimes" in the gravity assessment seems to cover the consequences of the crimes in terms of individual harms or social harm: "the OTP will consider the impact of crimes on the community and on regional security. The level of displacement is an indicator of impact. Where crimes are ongoing, this is also an indicator of impact."[780] OTP documents refer to "the impact of ICC investigations and prosecutions in the prevention of further crimes" as a factor in assessing gravity.[781] This might be viewed as an extraneous factor. Investigative impact does not logically belong under gravity, which is an assessment primarily of the crimes themselves and secondarily of the impact of the crimes, not a way of assessing the value of the investigation and prosecution or its viability as an expression of the Court's aims. The legitimacy of interpreting "impact" in this expansive way has since been questioned by a senior OTP staff member.[782]

Confusion between general factors affecting selection of situations or cases and the gravity assessment (as one of those factors) is not limited to impact or prevention. Other factors related to the practical viability of pursuing a case seem to have been subsumed under the gravity criteria. For example, the legal complexity of proving a case due to the construction of criminal law may be a practical obstacle to proving a case that may militate against selection of that case or those charges. The OTP appears to have subsumed such legal obstacles to prosecuting certain international crimes under an assessment of the gravity of those crimes:

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[776] OTP Paper on Some Policy Issues (n648)7 "as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible *for those crimes."* [italics in original].
[777] OTP Strategy 2009-2012 (n621) 5.
[778] Ibid 6.
[779] Supra chapter 2.
[780] OTP Annex to policy paper (n688) 5.
[781] Moreno-Ocampo 'Statement pursuant to UNSCR 1593 (14 June 2006)' (n619).
[782] P Seils 'The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court' in M Bergsmo (ed) Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd ed, Torkel Opsahl Academic Publisher, 2010) 76.

> "The fact that information indicates clear and egregious criminality is also a factor indicating greater gravity in comparison with allegations that would be the subject of genuine legal debate."[783]

However, these are not considerations related to the intrinsic gravity of the crimes, but rather the possibility of prosecuting them successfully. The fact that legal debate may hamper the progress of a case is not actually a factor in defining offence gravity, but a separate consideration related to the viability of pursuing a certain case over another.

In summary, the interpretation of gravity by the OTP is, generally, robust and easy to understand. Numerical gravity, in terms of the spread and extent of victimisation, coupled with a hierarchy of types of crimes focusing first on the right to life and attacks on physical integrity, accords with national approaches to gravity in sentencing and intuitive approaches to crime seriousness rooted in prevailing moral standards. Within this general framework, factors related to the severity, manner, intent and impact of offending have been considered.

Other factors in selection

Selection decisions have taken account of potential preventative effect under the rubric of 'impact' as part of the selection criteria for situations under investigation.[784] Prevention plays a more prominent role in defining selection criteria for cases for prosecution within any given situation. To identify and select "the cases most warranting prosecution […] the OTP will consider factors such as the policy of focussing on persons most responsible for the most serious crimes as well as maximising the contribution to prevention of crime."[785] The OTP has clarified that regions within situations may be prioritised "based primarily on the gravity of the crimes and potential preventative impact of investigation, as well as security considerations."[786] Assessments of preventative impact would also determine which groups would be investigated: "[t]he OTP will consider which groups are responsible for the gravest crimes as well as the potential preventative impact of investigation."[787] The OTP also signalled it would "consider issues of crime prevention and security under the interests of justice."[788] Calculations of preventative effect therefore could sway a decision in favour of one case or suspect over another.

The role of prevention in case selection was confirmed in statements relating to the Darfur investigation, where the assessment of gravity apparently included the impact on prevention of further crimes as a salient factor:

> "My Office looks at factors such as the scale and nature of the crimes, as well as the impact of ICC investigations and prosecutions in the

[783] OTP Annex to policy paper (n688) 5 Footnote goes on to clarify: "This does not mean that the OTP could never pursue borderline allegations to clarify the law, but simply that in general the OTP will focus on clear crimes, in accordance with its mandate and policy."
[784] Ibid 5: "where crimes are ongoing, this is also an indicator of impact."
[785] Ibid 11.
[786] Ibid 11.
[787] Ibid 11.
[788] OTP Interests of Justice (n625) 9.

> prevention of further crimes. In the context of Darfur, particular attention will be given to investigating crimes currently affecting the lives and safety of the two million displaced civilians in the region, in an effort to improve conditions for humanitarian assistance and protect victims from further attack."[789]

The OTP has indicated that certain themes or types of crimes might be prioritised in selection, based on its duties under the Rome Statute article 54(1)(b), and that it would therefore particularly take into account violence against children, sexual violence and gender violence. [790] This was crystallised in the 2009 OTP Regulations, which directed the OTP to select incidents based on "the most serious crimes and the main types of victimisation – including sexual and gender violence and violence against children".[791]

Another important factor in selection is impartiality.[792] A 2006 draft policy paper indicated that impartiality was important in case selection and that the OTP would apply "the same methodology and standards for all groups" in situations involving "multiple groups with potential responsibilities".[793] The OTP made it clear from the outset that it would not seek to prosecute all groups implicated in violence or conflict regardless of the gravity of the alleged acts:

> "In our view, impartiality does not mean that we must necessarily prosecute all groups in a given situation. Impartiality means that we will objectively apply the same criteria for all, in order to determine whether the high thresholds of the Statute are met and our policy of focusing on the persons most responsible is satisfied."[794]

Such statements indicate that the OTP did not intend to take contextual issues, such as ongoing political and conflict-resolution processes, into account when selecting cases. The OTP claimed its prosecutorial policy "focuses on the crimes, on the evidence, and on the individual responsibility of the most serious perpetrators."[795] It also made it clear that it would not attempt to "establish a complete historical record; this is not a role for which an international criminal court is well suited".[796] The lack of attention to political and immediate peace-building concerns seen in OTP statements is also reflected in the selection policy.

4.2.3 Investigative and Prosecution Strategy

An important operational objective of investigative and prosecution strategy was to carry out focussed investigations and prosecute narrowly specified cases at trial. Focussed investigations and prosecutions were one of the "three

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[789] Moreno-Ocampo 'Statement pursuant to UNSCR 1593 (14 June 2006)' (n619).
[790] OTP Annex to policy paper (n688) 5; F Bensouda 'Launch of the Gender Report Card on the International Criminal Court 2011' (13 Dec 2011).
[791] OTP Regulations (n735) Reg 34 (2).
[792] Supra n687.
[793] OTP Annex to policy paper (n688) 2.
[794] Moreno-Ocampo 'Informal meeting of Ministries of Foreign Affairs' (n687).
[795] Moreno-Ocampo 'Eighth Report Pursuant To UNSCR 1593 (3 Dec 2008)' (n687) para 20.
[796] OTP Annex to policy paper (n688) 10.

essential principles" developed in the first three years of the OTP's work.[797] This was "a policy of focusing its efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes."[798] Although this test initially appeared to be a version of the gravity assessment used for selection, it was developed to facilitate a number of aims, including expedited trials, cost-efficiency and witness safety.

The OTP expanded "that the Office selects a limited number of incidents and as few witnesses as possible are called to testify. This allows the Office to carry out short investigations and propose expeditious trials while aiming to represent the entire range of criminality."[799] Similar wording appears in the 2009-2012 Prosecutorial Strategy, although the emphasis changed to limiting "the number of persons put at risk by reason of their interaction with the Office" and to "representing the entire range of victimization."[800] The OTP also signalled its intention to place greater reliance "on new types of evidence, in particular, financial information to prove the role of those most responsible […] as well as forensic evidence".[801] This strategy is simultaneously aimed at reducing reliance on witness testimony to prove cases. Witness safety remained an ongoing concern: "[t]he approach used in the selection of incidents and charges assists the Office in reducing the number of witnesses called to testify. This is one of the measures taken to address the security challenge."[802] This policy flows directly from the OTP's duties to protect victims and witnesses under Article 68 of the Rome Statute.

The OTP's preference for expedited trials seems to have been based on the right "to be tried without undue delay",[803] included in the Statute under "rights of the accused".[804] The PTC has recognised that expeditiousness pervades the Statute.[805] A senior OTP figure has indicated that expedited trials were the principal motivating factor behind the focused investigation and trial policy.[806] Former Deputy Prosecutor Fatou Bensouda also implied that expedited trials, rather than witness safety, informed focused investigations and prosecutions:

> "Cognizant of the notoriety of international trials for being lengthy and slow, the Office of the Prosecutor is seeking to present each prosecution

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[797] OTP Strategy 2006 (n621) 4 "positive complementarity, focused investigations and prosecutions, and maximising the impact".
[798] Ibid 5; OTP Regulations (n735) Reg 33.
[799] OTP Strategy 2006 (n621) 5.
[800] OTP Strategy 2009-2012 (n621) 6.
[801] OTP Strategy 2009-2012 (n621) 9.
[802] L M-O Second public hearing of the Office of the Prosecutor Session 3: Interested States New York, 17 October 2006 <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Public+Hearings/Second+Public+Hearing/Session+3/Luis+Moreno_Ocampo_+Chief+Prosecutor.htm accessed 15 July 2010>.
[803] RS Art 67(1)(c).
[804] RS Art 64 (2) Trial chamber shall ensure trial is fair and expeditious".
[805] Expeditiousness pervades the Statute as pointed out by PTC in the discussion on prosecutorial discretion and opening an investigation in CAR.
[806] B Le Fraper du Hellen, a former OTP senior staff member quoted in K Glassborow 'ICC Investigative Strategy Under Fire' in IWPR Special Report: Sexual Violence in the Democratic Republic of Congo (IWPR October 2008) 10.

> case in less than six months. To this end, the Office plans to rely on the minimum necessary number of witnesses. In the Lubanga trial, this amounts to only 34 witnesses. The Katanga and Ngudjolo trial will feature a similar number."[807]

The OTP has acknowledged that practical constraints on its work have affected policy and strategy.[808] Challenges related to the difficulties of conducting investigations in situations of on-going violence contributed directly to the policy of focussed investigations: "Two critical measures to meet the challenges presented by these exceptional logistical difficulties were to reduce the length and scope of the investigation."[809] The 2006 Report on Prosecutorial Strategy mentions cost-efficiency and security (of witnesses and investigators) as motivating factors in policy and strategy development: "The approach used in the selection of incidents and charges is one of the measures taken to address the security challenge and assists the Court in operating cost efficiently."[810]

The pressing need for cooperation to carry out international investigations and secure suspects for prosecution has also been a major factor in the development of OTP policy. The OTP considers cooperation to be a fundamental aspect of its work,[811] not only to secure arrests but for "practical and logistical support that are indispensable when conducting investigations, such as transportation, security and accommodation, as well as performance of specific evidence-gathering measures."[812] The importance and centrality of cooperation to the OTP's work is highlighted in both of the main three-year strategy reports issued by the OTP in 2006 and 2010 and in the OTP's first policy paper of 2003.[813] Cooperation was considered particularly crucial at the investigation stage. The OTP has indicated that practical inability to investigate may preclude a situation from selection.[814]

It is clear that both considerations of principle and practical factors involved in running a successful prosecutorial office were drivers of OTP policy. The key factors in investigative strategy formation appear to be practical viability including cost-efficiency; victim and witness protection (as mandated by the Rome Statute); and expedited trials (as mandated by the Rome Statute and learning from the experience of previous international trials). Pragmatic factors inevitably have an impact in determining what is possible in terms of policy and strategy alongside what is desirable. However, pragmatic policy choices

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[807] F Bensouda 'Challenges relating to Investigation and Prosecution at the International Criminal Court' in International Criminal Justice: Law and Practice from the Rome Statute to its Review (Ashgate Publishing Group 2010) 162, 168.
[808] OTP Report on activities 2006 (n649).
[809] Ibid 2.
[810] OTP Strategy 2006 (n621) 6.
[811] Bensouda 'Challenges relating to Investigation' (n807) 162, 171 "International Cooperation is fundamental for the success of international courts and tribunals".
[812] Bensouda 'Challenges relating to Investigation' (n807) 171.
[813] OTP Strategy 2006 (n621): "The third objective is to gain the necessary forms of cooperation for all situations to allow for effective investigations and to mobilize and facilitate successful arrest operations." OTP Strategy 2009-2012 (n621); OTP Paper on Some Policy Issues (n648) 2 on the necessity of State support to bring investigations in situ.
[814] OTP Paper on Some Policy Issues (n648) it will take into account "the likelihood of any effective investigation being possible.".

would prove to be in tension with the Court's other professed goals and policies, as we shall see in the following chapters.

4.3 Conclusions

The main messages communicated through OTP public statements are that the OTP, and by extension the ICC, places victims and prevention at the heart of the criminal justice project. Statements and policies have trumpeted justice for victims as the justifying rationale for ICC interventions and victims' interests as a key factor in selection. Prevention has been emphasised as a key rationale and operational aim of the OTP's work. While featuring less heavily in selection criteria and operational policies, it was a professed criterion for the prioritisation of cases within situations. In the development of policy, the OTP seems to have largely taken its cues from Rome Statute. Areas of ambiguity, including the pivotal concept of gravity, have been defined in line with Rome Statute approaches and values and therefore focus on retributive justice. The OTP aimed to encourage complementarity and cooperation in line with the Rome Statute's approach, as well as upholding principles of impartiality and independence.

However, the OTP has set out an ambitious set of aims that seem to go beyond those indicated in the Rome Statute. The emphasis on prevention seems to have developed in OTP discourse beyond a facet of ending impunity to become a central operational aim. Furthermore, an expansive approach to victims ostensibly places their interests, subjectively defined by victims themselves, at the heart of the Court's goals and process to an extent not envisaged by the Statute. Rather than being merely "victim-conscious", the discourse of the OTP implies a victim-centric approach to process and aims. Meanwhile, the OTP has also presented the ICC's relationship with peace and conflict-related goals in an ambiguous way. Whilst officially eschewing such goals, the OTP has simultaneously sought to embrace the positive political effects of its work.

These myriad goals betray fundamental normative tensions, even before the complexities of practical implementation are engaged. These will be explored further in the following chapters, where the implementation phase of the OTP's work is analysed against its own rhetoric and goals, and against penal theory. Prominent tensions include the emphasis of the OTP on its global ambitions for international justice and global prevention and the very local aims related to victims, conflicts and affected populations. There are also some fundamental tensions between the essentially backwards-looking retributive approach, including victim vindication and empowerment, and the future-oriented preventative and conflict management aims. A third area of tension is between strategies developed due to the practical limitations on the OTP's work and its principled ambitions as laid out in policy and rhetoric.

The overall impression conveyed by OTP discourse, policy and professed aims is a relentlessly positive belief in the traditional aims and reach of international criminal justice in terms of prevention with an additional focus on beneficial outcomes for victims. The next two chapters will describe and evaluate the OTP's attempts to implement this ambitious rhetoric in the contextual realities

of international criminal justice. Chapter 5 considers the extent to which implementation decisions reflected the penal aims and strategies advocated by the OTP. Chapter 6 then discusses why the approaches taken by the OTP were adopted in practice, and considers the extent to which other factors detracted from the pursuit of the OTP's key aims. Drawing these threads together, Chapter 7 evaluates OTP discourse and practice in light of normative penal theory.

Chapter 5

Policies in Action: the Implementation of the OTP's Penal Aims

This chapter examines the law-in-action of the OTP's first years of implementation. The chapter will focus on the extent to which selection decisions were based on the retributive criteria outlined in policy documents and gauge the extent to which the OTP's professed emphasis on prevention and victims is reflected in implementation decisions.

5.1 Overview of OTP's work

The OTP has formalised the Rome Statute process for assessing international crimes in a transparent analysis system for communications and preliminary examination. By 2013, 10,470 communications had been received by the OTP under article 15 of the Rome Statute.[815] As of July 2014, ten situations remained at preliminary examination stage. Three situations were formally rejected following the preliminary examination phase – Iraq, Venezeula and Palestine.[816] Eight situations proceeded to formal investigation. Uganda and DRC were self-referred by the sitting Governments; Libya and Sudan were referred by the UNSC; and, the remaining four were opened under the OTP's art 15 proprio motu powers, following consultation with the governments concerned – Kenya, Cote d'Ivoire, CAR and Mali.

In the first nine years, twenty-seven warrants of arrest or summonses to appear have been issued. Of these, seven suspects are in custody or the confirmation of charges stage; the OTP has terminated cases against three deceased suspects, dropped charges against another due to the loss of key witness testimony, and had charges against a further four rejected by the Pre-trial Chamber. Four trials started during this period, leading to one full acquittal, one partial conviction and one full conviction on a single charge. This overview reveals an impressive body of work during the first ICC Prosecutor's tenure. The Prosecutor has established a functioning office and intervened in 18 sites of international criminality. The following sections consider the extent to which the implementation phase has faithfully reflected stated aims and principles.

5.2 Implementing gravity

5.2.1 Investigation and selection strategy: the role of retributive criteria

The OTP has frequently invoked gravity in its selection of situations for investigation.[817] The investigation in Iraq was declined because the crimes for

[815] ICC OTP 'Preliminary examinations' http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx accessed 9 February 2014.
[816] Ibid.
[817] Situation in the Republic of Côte D'Ivoire (ICC-02/11) PTC III 'Request for authorisation of an investigation pursuant to article 15' 23 June 2011 para 55; ICC OTP 'First Report of The Prosecutor of The International Criminal Court to The UN Security Council Pursuant to

which there was evidence and jurisdiction lacked gravity when compared to the other investigations and situations under preliminary examination.[818] The Prosecutor referred to the number of victims of crimes against physical integrity as the key indicator of gravity.[819] Within situations, gravity was advanced as the key criterion for prioritising and defining cases, perpetrators and charges.[820]

Applying the gravity criterion in Uganda

The alleged crimes of the LRA in Northern Uganda were referred to the ICC by the Government of Uganda (GoU).[821] The OTP then gave notice that all crimes under the Statute would be investigated in an impartial way.[822] In July 2004, an investigation was opened and, in less than a year, an application was filed for arrest warrants for five senior LRA members.[823] Since then there has been little activity related to the case.[824]

The OTP carried out focussed investigations, selecting six incidents for investigation; little was investigated outside these incidents.[825] The LRA leadership was charged with various counts of CAH and war crimes covering inter alia murder, enslavement, sexual enslavement, rape, attacks on civilians, cruel treatment, pillaging populations, forced enlistment of children, and inhumane acts. These charging decisions reflect the main modes of victimisation and the main types of crimes committed by the LRA. The main perceived gap concerns charges relating to sexual and gender violence.[826] The gravity of the crimes charged fits with the assessments of crime seriousness defined in OTP policy papers and the arrest warrants were issued for the most senior members of this offender group.

The main controversy in the Uganda situation concerned the lack of information regarding the investigation or prosecution of allegations against the UPDF and GoU. As late as 2013, the OTP continued "gathering and analysing information related to alleged crimes committed by the Uganda People's Defence Forces".[827] By early 2014, no arrest warrants had been unsealed for representatives of the UPDF or GoU. Having analysed all the

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UNSCR 1970 (2011)' (4 May 2011) 3; W Schabas 'Prosecutorial Discretion v Judicial activism at the International Criminal Court' 2008 JICJ 731; supra n751.

[818] L Moreno-Ocampo 'Letter to senders re Iraq' (9 February 2007) 9.

[819] Ibid.

[820] Supra n752, n755-756.

[821] ICC OTP 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' (29 Jan 2004) ICC-20040129-44.

[822] OTP 'Uganda Arrest Warrants' (n620) 2; ICC OTP 'Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps' (12 February 2004).

[823] Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen (ICC-02/04-01/05-53) PTC II 'Warrant of Arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005' 27 September 2005.

[824] Such as sporadic press releases: ICC OTP 'Prosecutor calls for renewed efforts to arrest LRA leader Kony in wake of new attacks' (6 October 2008) ICC-OTP-20081006-PR359-ENG.

[825] K Glassborow 'ICC Investigative Strategy Under Fire' in IWPR Special Report: Sexual Violence in the Democratic Republic of Congo (IWPR October 2008) 9.

[826] Infra section 5.2.3

[827] ICC 'Report of the ICC for 2012/13' (UNGA 68th session 13 August 2013) A/68/314 para 66.

alleged crimes in northern Uganda, the OTP concluded that "[c]rimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes by UPDF."[828] However, the OTP has not explained whether the UPDF's alleged criminality met the threshold test of sufficient gravity to be prosecuted at the ICC. Nor has there been a formal decision not to proceed to prosecution. There is no time limit on when the Prosecutor must decide to open an investigation after starting preliminary analysis or to commence prosecution after opening an investigation.[829] The OTP has reserved the right to decide whether to pursue further LRA or UPDF cases and there has been no decision not to prosecute further cases under article 53.[830] In view of the effective closure of the Ugandan investigation team, the lack of resources and the growing caseload across an increasing number of situations, further investigations or charges seems unlikely.[831]

There are credible allegations of crimes committed by the UPDF, and known to GoU.[832] HRW report "[v]iolations committed by the UPDF include extrajudicial killings, rape and sexual assault, forcible displacement of over one million civilians, and the recruitment of children under the age of 15 into government militias."[833] There are allegations of systematic torture and illegal detention by the GoU security service, which have been confirmed by the Ugandan Human Rights Commission.[834] The extent of these crimes may not exceed the numerical scale of the crimes alleged against the LRA.[835] The main allegations against the GoU within the temporal jurisdiction of the ICC relate to the alleged forced displacement of hundreds of thousands of civilians in northern Uganda in IDP camps where appalling conditions were, intentionally or otherwise, causing the deaths of thousands.[836] Commentators place the number of civilians affected by this displacement at between 1.6 and 2 million by 2006.[837]

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[828] ICC OTP 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants' (14 Oct 2005) 2-3.
[829] Supra chapter 3.
[830] Situation in Uganda (ICC-02/04-01/05) 'OTP Submission Providing Information On Status of the Investigation In Anticipation of the Status Conference To Be Held on 13 January 2006' 11 January 2006 para 7.
[831] HRW Unfinished Business: Closing Gaps in the Selection of ICC Cases (Sept 2011) 26-27; M Happold 'The International Criminal Court and the Lord's Resistance Army' (2007) 8 *Melb.J. Int'l L.* 159, 172.
[832] UNSC 'Report of the Secretary-General pursuant to resolutions 1653 (2006) and 1663 (2006)' (29 June 2006) s/2006/478 para 10; HRW Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda (Vol. 17, No. 12(A) September 2005) 24-36.
[833] HRW 'ICC: Investigate all sides in Uganda' (5 February 2004) <http://www.hrw.org/news/2004/02/04/icc-investigate-all-sides-uganda accessed 1 may 2014>
[834] HRW 'State of Pain: Torture in Uganda' (HRW 29 March 2004); HRW 'Uganda: Torture Findings Confirmed by Human Rights Commission 16 December 2004 <http://www.hrw.org/news/2004/12/14/uganda-torture-findings-confirmed-human-rights-commission>.
[835] T Allen Trial Justice: The Interna*tional Criminal Court and the Lord's Resistance Army* (Zed Books 2006); REDRESS Victims, Perpetrators or Heroes? Child soldiers before the International Criminal Court (REDRESS September 2006).
[836] N Grono and A O'Brien 'Justice in Conflict? The ICC and Peace Processes' in Waddell N and Clark P (eds) Courting Conflict? Justice, Peace and the ICC in Africa (Royal African Society London 2008) 13, 14; Allen (n835) 53-60; HRW Unfinished Business (n831) 23.
[837] REDRESS Heroes (n835) 9; Allen (n835).

Forced displacement is a crime under the Rome Statute.[838] However, these crime definitions contain exceptional clauses that may apply in the Uganda situation if the aim of the displacement is the security of civilians or military necessity.[839] Because the removal of civilians is said by the GoU to be for security purposes, and by critics to be a campaign against civilians and potential LRA supporters, there is genuine debate over the nature of the actions at issue.[840] A senior OTP figure, writing in a private capacity, has questioned whether the forced displacement in Uganda would qualify for prosecution at the ICC:

> "Much of the criticism in the Ugandan case relates to a failure to prosecute allegations of UPDF crimes. A large part of that argument depends on whether one considers that allegations relating to forced displacement actually constitute crimes within the meaning of the Statute."[841]

It has been suggested that the involvement of Government forces in international crimes should be indicators of greater gravity than the inherent nature of the crimes alone.[842] The OTP has also indicated it may be a qualitative factor in assessing gravity. If the 'abuse of power' inherent in Government backed crimes is seen as an indicator of greater gravity, then failure to pursue government crimes might also constitute a failure to apply gravity consistently.

The decision to focus primarily on the LRA can be justified based on number of killings and the range of alleged crimes, particularly those against physical integrity. There was a large disparity between the crimes of the LRA and those of the UPDF, based on the OTP's gravity criteria. Wider debates over responsibility, intention, comparative gravity, and the question of historical impunity of government forces and 'abuse of power' were frustrated by the OTP's reluctance to confirm whether or not the alleged crimes of the GoU or UPDF were of sufficient gravity to trigger ICC jurisdiction. The OTP must have made an assessment of comparative gravity but did not publish its reasoning. Accountability for selection decisions and development of the debate around the gravity criterion and comparable gravity of international crimes have consequently been stymied.

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[838] RS art 8(2)(e) and art 7 (d) or (e).

[839] RS art 8(2)(e)(viii) "Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand" or article 7 (d) or (e) which contains the exception "without grounds permitted under international law".

[840] Allen (n835) 100 discusses the difficulty of proving a case against the UPDF for forced displacement due the safety risks from serious LRA crimes and the UPDF duty to protect civilians.

[841] P Seils 'The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court' in M Bergsmo (ed) Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd ed, Torkel Opsahl Academic Publisher, 2010) 76, 78.

[842] W Schabas ' 'Complementarity In Practice' : Some Uncomplimentary Thoughts' (2008) 19 Criminal Law Forum 5, 30; K Jon Heller 'Situational Gravity Under the Rome Statute' in C Stahn and L Van der Herik (eds) Future Directions in International Criminal Justice (CUP 2009) 14.

In the absence of clear reasoning and explanations from the OTP, the application of the gravity criterion has been questioned. Selection decisions were not universally perceived as fairly based on the intrinsic nature of the crimes. In fact, the OTP was accused of being politically biased by its need to generate cooperation. Suspicions abound of "a tacit, if not explicit, deal" regarding non-prosecution of the GoU forces; allegedly worked out in return for self-referral and cooperation.[843] As HRW concludes:

> "In the absence of clearer, more widely available public explanations, it is easy to understand how some have reached the conclusion that the prosecutor has deliberately chosen not to target Ugandan military and civilian authorities for prosecution for political reasons. Considerable damage has been done to the ICC's reputation in Uganda due to these perceptions."[844]

DRC – not applying the gravity criterion

In July 2003, the Prosecutor announced he was closely following the situation in DRC. In April 2004, there was a self-referral by the Congolese government of "the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute".[845] An investigation was formally opened in June 2004, focussing initially on the Ituri region.[846] The first arrest warrant was unsealed on 17 March 2006 along with the transfer to The Hague of the first suspect, Thomas Lubanga Dyilo, the alleged President and founder of Union des Patriotes Congolais (UPC) and former Commander-in-Chief of Forces patriotiques pour la libération du Congo (FPLC).[847] In April 2008, a second arrest warrant was unsealed, having been issued in August 2006, against Bosco Ntaganda, Former alleged Deputy Chief of the General Staff of the Forces Patriotiques pour la Libération du Congo (FPLC).[848]

In 2007, arrest warrants in the second Ituri case were issued against Germain Katanga, alleged commander of the Force de résistance patriotique en Ituri (FRPI), and Mathieu Ngudjolo Chui, alleged former leader of the Front des nationalistes et intégrationnistes (FNI).[849] Katanga and Ngudjolo were transferred to the ICC in 2007 and 2008 respectively, and trials against Lubanga, Katanga and Ngudjolo were all completed by 2014. Lubanga was found guilty and sentenced to 14 years imprisonment in 2012; Ngudjolo was

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[843] This was suggested by Professor Schabas quoted in R Murphy 'Gravity issues and the International Criminal Court' 2006 17 Criminal law Forum 281, 307; the idea of an agreement between the OTP/GoU was also suggested in a public lecture at Oxford University in 2006 [details on file with author].

[844] HRW Unfinished Business (n831) 27.

[845] ICC OTP 'Prosecutor receives referral of the situation in the Democratic Republic of Congo' (19 April 2004) ICC-OTP-20040419-50-En.

[846] ICC OTP 'The Office of the Prosecutor of the International Criminal Court opens its first investigation' (23 June 2004) ICC-OTP-20040623-59-En.

[847] ICC website on the situation in DRC, www.icc-cpi.int; ICC OTP 'First arrest for the International Criminal Court' (17 March 2006) ICC-CPI-20060302-125-En; Situation in DRC (ICC-01/04-01/06-37) 'Decision to Unseal the Warrant of Arrest Against Mr. Thomas Lubanga Dyilo and Related Documents' 17 March 2006.

[848] ICC website on the situation in DRC, www.icc-cpi.int.

[849] Ibid.

acquitted on all charges and released the same year.[850] Katanga was found guilty of one count of crime against humanity (murder) and four counts of war crimes (murder, attacking a civilian population, destruction of property and pillaging) and sentenced to 12 years in 2014.[851] Ntaganda surrendered himself to the US embassy in 2013 for transfer to the ICC. As of 2014, he remained in custody awaiting confirmation of charges proceedings.

By 2008, a third DRC investigation was underway in North and South Kivus and the Prosecutor promised further cases and arrest warrants over a period of months and years.[852] By the end of 2011, two further arrest warrants had been made public. The arrest warrant for Callixte Mbarushimana, alleged Executive Secretary of the Forces Democratiques pour la Liberation du Rwanda – Forces Combattantes Abacunguzi (FDLR-FCA, FDLR), was issued in September 2010 and unsealed on the day of his arrest by the French authorities on 11 October 2010. He was transferred to The Hague in January 2011. In July 2012, a warrant of arrest was issued for Sylvestre Mudacumura, alleged Supreme Commander of the Forces Démocratiques pour la Libération du Rwanda (FDLR), for crimes allegedly committed from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus.[853] Mudacumara remains at large. According to OTP prosecutorial strategy for 2009-2012, investigation in the Kivus was expected to be completed within three years.[854] To date, no further arrest warrants have been unsealed. In December 2011, the only prosecution brought in the Kivus case had failed at the confirmation of charges stage, resulting in the release of Mbarushimana.[855]

OTP strategy has varied in DRC cases. A focused approach was taken for the Katanga and Ngudjolo cases, covering an attack on Bogoro village in 2003. The charges covered a number of categories of criminality and modes of victimisation in line with OTP policy. Despite the breadth of charges, the limited scope of the case provoked criticisms that it was neither representative nor sufficiently meaningful to many in DRC. [856] Other attacks allegedly "caused higher numbers of victims" with "a more significant impact."[857]

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[850] ICC website for a detailed timeline of events. <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200104/>.

[851] ICC 'Situations and cases' <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>.

[852] ICC OTP 'DRC: ICC Warrant of Arrest unsealed against Bosco NTAGANDA' (29 April 2008) ICC-OTP-20080429-PR311-ENG.

[853] "Mudacumura is allegedly criminally responsible for committing nine counts of war crimes, from 20 January 2009 to the end of September 2010, in the context of the conflict in the Kivus, in the Democratic Republic of Congo (DRC) on the basis of his individual criminal responsibility (article 25(3)(b) of the Statute) including: attacking civilians, murder, mutilation, cruel treatment, rape, torture, destruction of property, pillaging and outrages against personal dignity." www.icc-cpi.int.

[854] ICC OTP Prosecutorial Strategy 2009-2012 (1 February 2012) 8.

[855] Callixte Mbarushimana (ICC-01/04-01/07) PTC I 'Decision on the Confirmation of charges' 16 Dec 2011.

[856] International Refugee Rights Initiative (IRRI) Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri (IRRI / aprodivi-asbl Discussion paper No 2 January 2012) 26.

[857] FIDH The Office of the Prosecutor of the ICC – 9 years on (FIDH Dec 2011) 12; IRRI (n856) 26-27.

In the Lubanga and Ntaganda cases, the investigations were more wide-ranging. Evidence was gathered on a number of alleged crimes over 19 months. In the event, however, Lubanga and Ntaganda were charged only with the war crime of enlisting and conscripting children under the age of 15 years and their active participation in hostilities. There were widespread allegations of other crimes under the Statute, most notably sexual violence.[858] HRW research has uncovered evidence of additional grave crimes, including murder, torture and rape, and reports "a widespread belief that the charges against Lubanga and Ntaganda are too limited and do not reflect the gravity of the crimes that the UPC allegedly committed in Ituri".[859]

Lack of apparent consistency in charging between the two main Ituri rebel groups has attracted criticism.[860] The Lendu-affiliated group leaders, Katanga and Ngudjolo, were charged with a number of counts of war crimes and crimes against humanity including inter alia murder, killing, rape, sexual slavery, pillage and destruction of property. The Hema affiliated leaders, Ntaganda and Lubanga, were initially charged only with the crimes of enlisting, conscripting and using child soldiers. The OTP has stated that it will not reflect "equivalence of blame" between different parties to a conflict if the crimes were not sufficiently serious.[861] However, in the Ituri cases the allegations against these groups of suspects appear to be of comparable seriousness yet were not reflected equally in charging decisions. This seemingly contradicts the OTP's stated position that it would apply assessments of crime seriousness and levels of culpability as the main indicators of gravity and to inform case selection and charging.

Reports of victims' views suggest that the OTP did not pursue charges for the most serious crimes in Ituri. Criticisms of the narrow charges in Lubanga and Ntaganda have been relentless, both within DRC and internationally. Redress has reported local views of "incomprehension and some frustration as the crimes which are perceived as 'more grave', such as rape, large scale massacres and torture have not been included in the initial list of charges", which has "caused significant disappointment".[862] IRRI reported victims' questioning whether the "gravity of the range of abuses" committed was reflected in the charges.[863]

Criticism has also been levelled at the OTP's selection decisions regarding the lack of seniority of those charged.[864] Katanga, Ngudjolo and Lubanga are

[858] Women's Initiative for Gender Justice 'Open Letter to Mr Luis Moreno-Ocampo' (2006) http://www.icc-cpi.int/iccdocs/doc/doc252017.PDF; HRW Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference (HRW May 2010) 70; Glassborow (n825) 9.
[859] HRW Making Kampala Count (n858) 70; IRRI (n856) 20; FIDH (n857) 10-11.
[860] FIDH (n857) 1.
[861] Supra text at n688.
[862] REDRESS Heroes? (n835) 22.
[863] IRRI (n856) 22.
[864] FIDH (n857) 13; IRRI (n856) 23; P Kambale 'The ICC and Lubanga: Missed Opportunities' African Futures (16 March 2012) </African-futures/> accessed 22 January 2014.

widely regarded as "small fry"[865] and "small fish".[866] Although all three were acknowledged leaders of Ituri militia groups, interviewees in DRC saw them as "pawns for outside actors".[867] The question whether the most responsible were prosecuted in DRC is controversial. The Pre-Trial Chamber was satisfied that Lubanga was indeed a senior figure in the UPC and among those most responsible for the crimes charged.[868] Ntaganda was a senior figure in militias allegedly responsible for large numbers of international crimes in Ituri and Kivus.[869] Katanga and Ngudjolo held leadership positions in FRPI and FNI, respectively. While there may be others of equal seniority that ought to be brought to account,[870] starting with the senior leaders available for prosecution seems a sensible strategy. HRW confirm the seniority of those indicted so far in Ituri.[871] Both Mucadumara and Mbarushimana were alleged to have occupied senior roles in the FDLR, although the link between Mbarushimana and the alleged crimes could not be proven to the satisfaction of the Pre-Trial Chamber.[872]

While militia groups and their leaders are implicated in the most serious crimes alleged in DRC, HRW asserts that "key political and military figures in Kinshasa, as well as Uganda and Rwanda, also played a prominent role in creating, supporting, and arming" the militias led by Lubanga, Ngudjolo and Katanga.[873] There have been no arrest warrants or apparent investigation into allegations of international crimes committed by Government forces in either Ituri or Kivus, despite evidence that such crimes may have been widespread. The Government and its troops have been accused of supporting militias allegedly committing international crimes.[874] As late as 2011, Amnesty International reported on a number of potential international crimes committed by armed groups including government security forces as well as widespread impunity for "known perpetrators of crimes under international law".[875] The testimony of former militia leaders in the Katanga and Ngudjolo trial implicates DRC government officials in the Bogoro attack, leading to questions as to why this testimony has not been acted upon.[876]

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[865] FIDH (n857) 13.
[866] IRRI (n856) 23.
[867] IRRI (n856) 23-24.
[868] Thomas Lubanga Dyilo (ICC-01/04-01/06-803) PTC I 'Decision on the confirmation of charges' 29 January 2007 para 370.
[869] IRRI (n856) 23.
[870] IRRI (n856).
[871] HRW Courting History: *The Landmark International Criminal Court's First Years* (HRW July 2008) 60-61.
[872] Callixte Mbarushimana (ICC-01/04-01/07) PTC I 'Decision on the Confirmation of charges' 16 Dec 2011.
[873] HRW Courting History (n871) 60-61
[874] HRW Unfinished Business (n831) 16; HRW Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo (HRW 2009); Amnesty International The time for justice is now; new strategy needed in the Democratic Republic of Congo (Amnesty International 10 Aug 2011).
[875] Amnesty International Annual Report 2011 (2011): Democratic Republic of the Congo www.amnesty.org accessed 19 Dec 2011.
[876] IRRI (n856) 24.

It is apparent that, despite some efforts by the DRC government to address serious crimes under international law, such crimes are still widespread. However, perpetrators within the FARDC or allied to the government still enjoy extensive impunity.[877] This is compounded by selective cooperation of the DRC Government, which has not acted to arrest all those indicted by the ICC despite its perceived ability to do so.[878] Ntaganda remained at large in DRC for at least 5 years after the arrest warrants were unsealed, with a seeming lack of political will on the part of the Congolese government or UN forces to bring him to the ICC.[879]

The Government and its forces are not unanimously seen as the "most responsible". Burke-White asserts that the DRC government was able to manipulate the ICC process for political gain because they had the "lightest balance sheet" in terms of international crimes.[880] The subjects targeted so far were senior leaders within the militia. Even if there are more responsible perpetrators still at large, those who have been indicted may be among the most responsible. However, in DRC there is a gap in the selection of 'leadership groups' that played a key role in generating and perpetuating the criminality of these militias.

5.2.2 Selecting those most responsible within situations

As the Uganda and DRC case studies show, the policy of prioritising prosecution of "those most responsible" for international criminality has proved problematic in practice. The perception is that "the individuals currently being prosecuted at the Court are not representative of a wider selection of key perpetrators."[881] HRW has identified a particular gap in government-related prosecutions:

> "The ICC prosecutor has demonstrated his willingness to tackle crimes committed by government officials in the Darfur, Kenya, and Libya situations, but in the DRC situation- as in Uganda and CAR- there have been no investigations leading to charges against such officials. In these three situations, a total of 11 arrest warrants have been issued, but the target of these warrants are, in effect, all rebel leaders."[882]

The lack of prosecutions of sitting government officials, allegedly implicated in international crimes was also a feature of OTP interventions in CAR and Cote d'Ivoire. The former situation was referred to the Court by the CAR

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[877] Amnesty International The time for justice (n874) 13.
[878] T Murithi and A Ngari (eds) The ICC and Community-level Reconciliation: In-Country Perspectives Regional Consultation Report (IJR Johannesburg 21 and 22 February 2011) 7.
[879] D Smith 'Congo conflict: 'The Terminator' lives in luxury while peacekeepers look on' The Guardian (5 February) <http://www.guardian.co.uk/world/2010/feb/05/congo-child-soldiers-ntaganda-monuc accessed 18 Nov 2011>; US State Department 2010 Human Rights Report: Democratic Republic of the Congo (Bureau of Democracy, Human Rights, and Labor 8 April 2008) http://www.state.gov/g/drl/rls/hrrpt/2010/af/154340.htm .
[880] W Burke-White 'Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo' (2005) 18 LJIL 557.
[881] Murithi and Ngari (n878) 8.
[882] HRW Unfinished Business (n831) 16.

Government in 2004, and the investigation was officially opened in May 2007.[883] By 2014, only one public arrest warrant had been issued. This was unsealed on 24 May 2008, to coincide with the arrest of Jean-Pierre Bemba Gombo, a Congolese national and alleged President and Commander-in-chief of the Mouvement de libération du Congo (MLC). Bemba was accused of being active in the violence in 2002-2003 between the forces of then President Patassé and the rebel forces led by army chief of staff, General Francois Bozizé, later himself President of CAR. Bemba was charged with murder, rape and pillage in two counts of crimes against humanity and three counts of war crimes.[884] The irony of the Bemba indictment is that he was widely accused of being one of the architects of the violence in DRC and he apparently expected to be one of the first to be indicted in the DRC case.[885] Yet ICC charges were confined to alleged activities in CAR.

When the CAR investigation opened in May 2007, the OTP claimed to be conducting an evidence-led investigation with no particular suspects in mind at that time, although they had already identified a time-frame within which the worst of the violence had occurred, 2002-2003 and post 2005.[886] Apart from Bemba, there have been no further arrest warrants unsealed. Nor has further information regarding investigations, charges or arrest warrants for the post-2005 period been forthcoming.

Former President Patassé was implicated in the crimes alleged against Bemba. However, a public arrest warrant was not issued before his death in April 2011.[887] There is documented evidence of crimes under the Statute committed by Government forces and other armed groups after 2005 and widespread impunity.[888] The full story of the activities of Bozizé's rebel forces during the period 2002-2003 for which Bemba has been indicted, remains to be investigated.[889] HRW has called for the OTP to share more information regarding CAR and suggested a revised strategy to initiate further prosecutions.[890] Bemba has been identified as a senior commander of a group alleged to be involved in the most serious crimes in CAR and therefore could plausibly be considered among those most responsible. However, there is a large gap in terms of other senior members of the same side and the opposing side who may be responsible for the alleged international crimes. In 2013-2014

[883] See www.icc-cpi.int .
[884] See www.icc-cpi.int Mr. Bemba is allegedly criminally responsible, as military commander, of Two counts of crimes against humanity: murder (article 7(1)(a) of the Statute) and rape (article 7(1)(g) of the Statute); Three counts of war crime: murder (article 8(2)(c)(i) of the Statute); rape (article 8(2)(e)(vi) of the Statute); and pillaging (article 8(2)(e)(v) of the Statute).
[885] Burke-White 'Complementarity in Practice' (n880) 565.
[886] ICC OTP 'Background: Situation in the Central African Republic' ICC-OTP-BN-20070522-220-A_EN .
[887] HRW Unfinished Business (n831) 32.
[888] ICG Central African Republic: Anatomy of a Phantom State Africa Report N°136 13 Dec 2007 I; HRW State of Anarchy (HRW 2007) 44; HRW Central African Republic (CAR): Country Summary (January 2009).
[889] ICG Central African Republic (n888) 15-16.
[890] HRW Unfinished Business (n831) 33.

CAR again descended into violence. Following several verbal warnings from the new Prosecutor, a new preliminary examination was opened.[891]

The situation in Cote d'Ivoire has similarities to the self-referred situations of Uganda, DRC and CAR. Although the investigation was opened under the Prosecutor's article 15 proprio motu powers, there was extensive cooperation with the sitting government. As a non-State Party to the Rome Statute, Cote d'Ivoire accepted ICC jurisdiction in a declaration under article 12(3) of the Rome Statute on 18 April 2003. The situation was under preliminary examination until 2011,[892] when an investigation was opened following authorisation from PTC III. A warrant of arrest for Laurent Gbagbo was unsealed on 30 November 2011 to coincide with his transfer to The Hague from incarceration in Cote d'Ivoire. Two further arrest warrants have been unsealed for Simone Gbagbo and Charles Blé Goudé.[893] All of those so far indicted in the Cote d'Ivoire situation come from one side of the conflict – the defeated opposition of the current sitting Government.

Leading NGOs in Cote d'Ivoire have cautioned against double standards and the appearance of victor's justice.[894] International groups have similarly warned against one-sided justice and the damaging perceptions that prosecuting only Gbagbo and his supporters could generate.[895] The Prosecutor seemed sensitive to these concerns and has clarified that investigations of both sides are continuing: "[w]e will collect evidence impartially and independently, and bring further cases before the Judges, irrespective of political affiliation."[896] In practice, however, only Gbagbo and his supporters have been the subject of arrest warrants at the ICC. National and international inquiries have implicated both pro-Gbagbo and pro-Ouattara forces in crimes under the Rome Statute.[897] While those indicted by the ICC are alleged to have been among those most responsible for international crimes, at this stage there remains a disparity in treatment of leadership groups being investigated and prosecuted by the OTP.

The key criticism in the situations in DRC, Uganda, Cote d'Ivoire and CAR is a perceived failure to prosecute "those most responsible". The suspicion is that

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[891] ICC OTP 'Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic' (7 Feb 2014).

[892] It was mentioned as being under intensive analysis in ICC Report on the Activities of the Court (ASP fifth session 17 Oct 2006) ICC-ASP/5/15.

[893] ICC OTP Situation in Cote d'Ivoire webpage http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/ICC0211/Pages/situation%20index.aspx unsealed November 2012 and September 2013 respectively.

[894] A Ouattara 'Statement by the Ivorian Coalition of the International Criminal Court at the 10th Assembly of State Parties to the ICC' (New York 12-21 December 2011).

[895] HRW 'Côte d'Ivoire: ICC Seeking Militia Leader Government Should Clarify Stance on Surrendering or Prosecuting Him' (3 Oct 2013) http://www.hrw.org/news/2013/10/03/cote-d-ivoire-icc-seeking-militia-leader; ICG *Cote d'Ivoire: Continuing the Recover*y (Africa Briefing no83 16 Dec 2011) <www.crisisgroup.org accessed 16/12/2011>.

[896] ICC OTP 'Ivorian victims will see justice for massive crimes: Mr. Gbagbo is the first to be brought to account, there is more to come' (30 Nov 2011); Situation in the Republic of Cote *d'Ivoire* (ICC-02/11) PTC III 'Request for authorisation of an investigation pursuant to article 15' 23 June 2011 para 4 claims both sides to 2011 conflict are implicated in Crimes under the Statute.

[897] HRW 'Côte d'Ivoire: ICC Seeking Militia Leader' (n895).

gravity was not the main criterion for selection decisions. However, in two situations so far, Kenya and Darfur, the OTP has brought charges against figures from sitting governments, including a head of state, and has managed a more representative spread of indictees across opposing political groups.

The situation in Darfur was referred to the ICC by the UNSC on 31 March 2005.[898] On 1 June 2005 an investigation was opened. Just under two years later, arrest warrants were issued against Ahmad Harun and Ali Kushayb, and four years later a warrant of arrest was issued for Sudanese President Omar Hassan Ahmad al-Bashir on charges of war crimes and crimes against humanity. In 2010, a second arrest warrant for al-Bashir was issued containing three counts of genocide that had originally been declined by PTC I.[899] In 2012, an arrest warrant was issued for Abdel Raheem Muhammad Hussein on seven counts of crimes against humanity and six counts of war crimes. These four cases all relate to Government figures or militias associated with the Sudanese Government. The OTP also brought a case against the rebel commanders, Bahar Idriss Abu Garda and Abdallah Banda Abakaer Nourain as allegedly responsible for the Haskanita attack, comprising three charges of war crimes. While in the Darfur situation cases were brought against both 'sides' of the conflict, the rebels were indicted on significantly lesser charges, the gravity of which was justified by the fact that the victims were Peacekeepers.[900] The PTC declined to confirm the charges against Abu Garda, and the proceedings against Abakaer Nourain were terminated by his apparent death.[901]

In the Kenya situation, the OTP also started with cases that crossed the political divide that had sparked the violence. Following extensive consultations with the Kenyan Government,[902] the ICC Prosecutor initiated an investigation under article 15, confirmed by PTC II on 31 March 2010.[903] The OTP issued summonses to appear for six suspects in two separate cases being pursued concurrently. Case one concerned ODM members or supporters,[904] while case two concerned suspects either members or supporters of PNU.[905] While both

[898] UNSC Res 1593 (2005).
[899] Omar Hassan Ahmad Al Bashir (ICC-02/05-01/09) PTC I 'Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir' 12 July 2010.
[900] L Moreno-Ocampo 'The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law' (LSE London 8 October 2008) 5.
[901] ICC website <icc-cpi.int/>.
[902] ICC OTP 'ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya' (30 September 2009) ICC-OTP-20090930-PR456.
[903] Situation in the Republic of Kenya (ICC-01/09-19) PTC II 'Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya' 31 March 2010.
[904] William Samoei Ruto, suspended Minister of Higher Education, Science and technology of the Republic of Kenya; Henry Kiprono Kosgey, Member of the Parliament and Chairman of the ODM, and Joshua Arap Sang, head of operations at Kass FM in Nairobi, the Republic of Kenya. All three are charged with murder (article 7(l)(a)); forcible transfer of population (article 7(l)(d)); and persecution (article 7(l)(h)). ICC 'Situation in the Republic of Kenya'.
[905] Francis Kirimi Muthaura, Head of the Public Service and Secretary to the Cabinet of the Republic of Kenya; Uhuru Muigai Kenyatta, Deputy Prime Minister and Minister for Finance of the Republic of Kenya, and Mohammed Hussein Ali, Chief Executive of the Postal Corporation of Kenya. The charges for case two are more extensive covering, for all three defendants, murder (article 7(l)(a)); forcible transfer (article 7(l)(d)); rape (article 7(l)(g));

sets of defendants were charged with crimes against humanity, the time-scales and levels of criminality were different, which was reflected in the charges. Already there have been complaints from victims about the lack of high-level ODM suspects compared to the PNU case and that rape and destruction of property were not adequately represented in the charges.[906] In 2012 the PTC II declined to confirm the charges against Kosgey and Ali, and in 2013 charges were dropped against Muthaura; leaving only Ruto and Arap Sang from the ODM side, and Kenyatta from the PNU side facing trial.

In summary, practical implementation of the OTP's policy of prioritising the investigation and prosecution of "those most responsible" has been somewhat inconsistent. In Uganda, DRC, Cote d'Ivoire and CAR those indicted have been among those most responsible, but significant leadership groups accused of involvement in international criminality have not been prosecuted. Even investigations have been sequenced, and therefore delayed. This has been justified on the basis of the gravity criterion, both in terms of the seriousness of alleged crimes and the comparative culpability of those involved. In other situations, sitting Heads of State have been indicted, along with opposing groups; differences in the gravity of offending being reflected in the charges. Criticism has focussed on the omission of certain leadership groups, casting doubt on OTP claims that gravity was the main selection criterion.

5.2.3 Representing gender violence and violence against children

The OTP claimed it would aim to represent the main modes of victimisation and pay particular attention to crimes of gender violence and against children and vulnerable victims. These policies introduce qualitative dimensions into the OTP's assessment of gravity.

Sexual violence

The OTP has been criticised for not representing sexual violence in proportion to alleged evidence of its perpetration,[907] and for not providing enough evidence for such charges to be confirmed by the Pre-trial chambers.[908] There have also been criticisms regarding the focused approach in Uganda, where sexual violence charges were only brought against two of the five LRA

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persecution (article 7(l)(h)); and other inhumane acts (article 7(l)(k)). Taken from www.icc-cpi.int ICC 'Situation in the Republic of Kenya'.

[906] William Samoi Ruto, Henry Kiprono Kosgey and Joshua Arap Sang (ICC-01/09-01/11) ICC PTC II 'Request by the Victims' Representative for authorisation to make a further written submission on the views and concerns of the victims' 9 November 2011 para 10-11.

[907] Women's Initiatives for Gender Justice Gender Report Card on the International Criminal Court 2011 (November 2011) 122 ; IRRI (n856) 25.

[908] WRCO Investigative Management, Strategies, and Techniques of the International Criminal *Court's Office of the Prosecutor* (October 2012) 45-47; Women's Initiatives for Gender Justice Legal Eye on the ICC (March 2012); P Mubalama and E Nzigire 'ICC Still Facing Rape Case Challenges (International Justice - ICC ACR Issue 300) 8 Aug 11 http://iwpr.net/report-news/icc-still-facing-rape-case-challenges accessed 23 January 2014; N Hayes 'Sisyphus Wept: Prosecuting Sexual Violence at the International Criminal Court' in W Schabas, Y McDermott, N Hayes The Ashgate Research Companion to International Criminal Law: Critical Perspectives (Ashgate 2013) 7, 32.

indictees.[909] In the Bemba case in CAR 'sexual violence' was highlighted as central to the gravity of the case:

> "[T]he OTP will pay close attention to the many allegations of sexual crimes it has received. Ending impunity of perpetrators of such crimes is crucial to emphasize their gravity and unacceptability. Acts of sexual violence are a serious crime that will be prosecuted in accordance with the Statute of Rome."[910]

At the confirmation of charges stage, however, only two of the five counts relating to sexual violence were confirmed by the PTC.[911]

The absence of sexual violence charges brought in the initial indictments for Lubanga and Ntaganda shocked local populations in DRC and international observers.[912] High levels of sexual violence were alleged in the DRC situation, specifically against the groups represented by Lubanga and Ntaganda.[913] Sexual violence was comprehensively charged in Mbarushimana, but the PTC declined to confirm any of the charges on evidential grounds.[914]

The OTP seems to have recognised its own failings in this regard. It has indicated that sexual violence charges could be added at a later date in the Uganda situation.[915] The arrest warrant for Ntaganda was re-issued in 2012, with two additional counts of rape and sexual slavery charged as crimes against humanity and war crimes.[916]

Despite calls to expand the charges against Lubanga to include sexual and gender violence,[917] he was eventually tried and convicted solely on charges related to child soldiers. However, the OTP was not completely immune to criticism. A large part of the Lubanga trial was directed towards the gender

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[909] Glassborow (n825) "because the investigation was so narrowly focused, sexual crimes were not given special attention."; Women's Initiatives for Gender Justice Report Card 2011 (n907) 123.

[910] ICC OTP Background: Situation in the Central African Republic (22 May 2007) <http://www.icc-cpi.int/NR/rdonlyres/B64950CF-8370-4438-AD7C-0905079D747A/144037/ICCOTPBN20070522220_A_EN.pdf accessed 19 August 2009>.

[911] Women's Initiatives for Gender Justice Making a Statement: Review of Charges and Prosecutions for Gender-based Crimes before the International Criminal Court (2nd ed February 2010) 11 and 27.

[912] Kambale (n864) reports local and international NGOs expressing "deep regret" at the narrow charges in these cases and "disillusionment" and "bewilderment" that more serious crimes including "rape and sexual violence by the UPC" were not charged; Women's Initiatives for Gender Justice Making a Statement (n911) 21; REDRESS Heroes? (n835) 22.

[913] Women's Initiatives for Gender Justice Making a Statement (n911) 23-25; HRW Making Kampala Count (n858) 70.

[914] Callixte Mbarushimana (ICC-01/04-01/07) PTC I 'Decision on the Confirmation of charges' 16 Dec 2011.

[915] K Glassborow 'ICC Investigative Strategy under Fire' (IWPR ACR Issue 190 27 October 2008) <http://iwpr.net/report-news/icc-investigative-strategy-under-fire> quoting then senior members of the OTP, B Le Fraper du Hellen and Christine Chung.

[916] Bosco Ntaganda (ICC-01/04-02/06) PTC II 'Decision on the Prosecutor's Application under Article 58' 13 July 2012.

[917] Women's Initiatives for Gender Justice Making a Statement (n911) 25; REDRESS Heroes? (n835) 22; FIDH (n857) 11.

violence dimensions of crimes relating to child soldiers.[918] The deputy Prosecutor also highlighted this as a positive element of the trial:

> "In our first trial, against Thomas Lubanga Dyilo, although it was not charged directly as additional crimes, during the course of the trial, we explained the gender dimension of the crime of enlisting and conscripting children under the age of 15 years. The Office took note of the reactions of civil society and their preference for these aspects to be explicitly charged. Sexual and gender crimes were included directly in our charging […] in all other cases before the ICC today."[919]

However, this strategy has not mollified those wishing to see sexual violence charged explicitly as a separate crime.[920] The OTP's attempts to introduce a sexual violence element to Lubanga's trial and sentencing without introducing explicit charges were rejected and criticised by the ICC Trial Chamber in the Lubanga Judgement.[921]

Despite these criticisms, it does seem that the OTP is trying to improve its record on charging crimes of sexual violence when they form part of the pattern of criminality in a situation. NGOs have noted improvements in the OTP's approach to gender-based crimes, although obstacles remain.[922] The 2009-2012 OTP Prosecutorial Policy states the OTP plans to pay attention to charging practices "in particular in relation to gender crimes and crimes against children."[923] This continues to be balanced against "expeditiousness of proceedings".[924]

Violence against children

One interpretation of the prosecution of Lubanga (and, initially at least, Ntaganda) for offences related to the conscription and use of child soldiers in DRC is that the OTP was attempting to fulfil its specific role in relation to violence against children. However, if this was a motivating factor in the Prosecution's strategic aims it was not consistently applied in other situations where the use of child soldiers was also prominent. REDRESS reports higher incidents of the use of child soldiers in Northern Uganda. The pattern of recruitment in Uganda was largely attributed to coercion and kidnappings, whereas in DRC the sources of child recruitment were more mixed and some families apparently volunteered children for participation.[925]

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[918] S Merope 'Recharacterizing the Lubanga case: Regulation 55 and the consequences for gender justice at the ICC' (2011) 22 Criminal Law Forum 311, 315.
[919] F Bensouda 'Launch of the Gender Report Card on the International Criminal Court 2011' (13 Dec 2011) 3
[920] Merope (n918) 311.
[921] Lubanga (ICC-01/04-01/06) TCI 'Decision on Sentence pursuant to Article 76 of the Statute' 10 July 2012 para 60.
[922] Mubalama and Nzigire (n908).
[923] OTP Strategy 2009-2012 (n854) 8.
[924] Ibid 8.
[925] REDRESS Heroes? (n835) 8, 11-13, 17-18; Refugee Law Project Behind the Violence: Causes, Consequences and the search for solutions to the war in Northern Uganda (RLP Working paper no11 February 2004) 13 the UN estimates that between 20,000 and 25,000 children have been abducted since the LRA began operations.

In terms of impact and representing victimisation, it is notable that sexual violence was a key mode of victimisation in DRC but not comprehensively charged, while violence against children was a defining factor in victimisation in Uganda but not marked out for thematic or special attention, as it was in the initial DRC cases.

5.3 Implementing victims' policies

The OTP's stated approach to victim inclusion and victim satisfaction was expansive[926] and presented a number of problems for the implementation of OTP polices and promises.

5.3.1 Consultation and participation

The principal area where victim participation impinged on the OTP's work and prosecutorial discretion was at preliminary examination and investigation stage. In practice, it has been left to the discretion of the ICC judges to decide the extent of victim participation.[927] The PTC initially ruled that victims could participate at situation stage under article 68(3).[928] By 2008, only 22 of the 230 applicants who had applied to become situation victims had been granted that status, in relation to Uganda, Darfur and DRC.[929] This participation was eventually limited in decisions relating to participation in DRC and Darfur to "judicial proceedings" in the investigations phase.[930] Participation was further circumscribed by the PTC in decisions on participation in the Kenya and CAR situations.[931]

Notwithstanding the rhetoric of victims' participation, in practice the Prosecutor was opposed to victims' involvement at the investigatory and preliminary stages of proceedings. Early on in the procedural process of granting victims' participation, the OTP clarified its position that participation should apply only in specific cases, not at the situation stage of investigations.[932] The OTP appealed PTC decisions to allow victims to

[926] Supra chapter 4.
[927] S SaCouto and K Cleary 'Victims' Participation in the Investigations of the International Criminal Court' (2008) Transnational Law and Contemporary Problems 73, 75.
[928] Situation in DRC (ICC-01/04) 'Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6' 17 Jan 2006.
[929] SaCouto and Cleary (n927) 95; Situation in DRC 'Decision on the Applications' (n928); Situation in Uganda (ICC-02/04-101) 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06' 10 August 2007; Situation in Darfur (ICC-02105-110) Pre-Trial Chamber I 'Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS 5 and VPRS (public redacted version)' 3 Dec 2007
[930] REDRESS The Participation of Victims in International Criminal Court Proceedings: A Review of the Practice and Consideration of Options for the Future (REDRESS October 2012) 44.
[931] Ibid.
[932] Situation in DRC (ICC-01/04) PTC I 'Prosecution's Reply on the Applications for Participation 01/04-1/dp to 01/04-6/dp' 15 Aug 2005; SaCouto and Cleary (n927) 75.

participate at the situation stage in Darfur and DRC. [933] In Uganda, the Prosecutor sought leave "to appeal the issue of to what extent and in what manner victims may participate in an Investigation".[934] While much of the submission attempted to clarify the procedural role that had been allowed to victim participation, the OTP also advanced several arguments against victim participation at the investigation stage.[935]

OTP opposition to victim participation has generated criticism. FIDH claimed that "the OTP's general statements of support on victims' participation rights are meaningless if they are not followed by practical and concrete steps to facilitate the exercise of those rights."[936] The OTP was seen to have "opposed meaningful consultation with victims in Cote d'Ivoire" and to have been "reluctant to allow victims' legal representatives to access the confidential file of the case" in Ruto et al. [937] REDRESS reports that "victims have not significantly contributed during the investigative phase."[938] Their substantial exclusion is attributed to the limited access victims can have to information and an inability "to impact on what arguably impacts them the most – the nature and scope of the Prosecutor's investigation".[939] REDRESS also notes that the lack of a formal decision not to pursue investigations or prosecutions has effectively denied victims their Statutory right to contribute their views and concerns at that stage.[940]

While the OTP's approach may not be in the spirit of facilitating victims' participation, such participation must be balanced with the needs of justice. This compromise belies the OTP's expansive rhetoric that placed victims at the heart of the penal aims and processes of the Court, and the victim-centred retributivism implied in OTP discourse.

The OTP has also incidentally limited participation in cases by selecting narrow charges and by not pursuing all groups alleged to have committed international crimes in particular situations. The OTP itself has recognised the reduced opportunities for victim participation due to its policy of focused investigations.[941] The OTP's initially poor record on charging and prosecuting sexual violence effectively meant a large group of victims of serious crimes against physical integrity have not been able to participate formally in cases at the ICC. Furthermore, the reluctance of the OTP to bring cases against sitting governments in CAR, Cote d'Ivoire, Uganda and DRC has meant that victims

[933] Situation in DRC (ICC-01/04-454) 'Prosecution's Document in Support of Appeal against the 24 December 2007 Decision on the Victims' Applications for Participation in the proceedings' 18 Feb 2008; FIDH (n857) 16.
[934] Situation in Uganda (ICC-02/04-103) 'Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06' 20 Aug 2007.
[935] Ibid; infra Chapter 6.
[936] FIDH (n857) 17.
[937] FIDH (n857) 17.
[938] REDRESS The Participation of Victims (n930) 44.
[939] Ibid.
[940] Ibid.
[941] ICC OTP Policy Paper *on Victims' Participation* (April 2010) 8.

of State crimes were underrepresented in formal proceedings and unable to participate directly.

In the Ituri cases, opportunities for participation have been limited to one set of victims only, causing inequity in representation and in the benefits associated with participation in proceedings. The charges for Lubanga and Ntaganda were confined to use of child soldiers who were mainly drawn from the Hema communities and the victims of the Katanga/Ngudjolo cases are also Hema. Lendu victims consequently have no channel through which to access court proceedings, or its supposed benefits.[942] Pre-existing ethnic tensions between these two groups may be exacerbated,[943] inflected by the politics of victimhood and the connotations of 'victim' status in conflict ideologies.

5.3.2 Justice for victims

The OTP emphasised "justice for victims" as the main rationale and justifying aim for its work. However, its version of victim-centred retributivism was difficult to implement in practice.

Ascertaining victims' views and interests

The OTP made a number of statements claiming that victims' views will be assessed in order to inform selection and charging decisions. This was mainly to inform an assessment of the main modes of victimisation but also has been linked to assessments of gravity.

The 2006 Report on Activities reports on over 25 missions to Northern Uganda to engage in dialogue with local leaders and other civil society representatives, and to "assess the interest[s] of the victims".[944] Other missions to canvas victims' views were carried out in CAR, DRC and Kenya.[945] The OTP consciously attempted to mitigate some of the negative effects on victim participation of the policy of focused investigation by addressing victims' interests "more broadly" and in different ways.[946] These included "direct interaction", which goes beyond passively receiving information and includes "town hall meetings with victims groups".[947] This interaction was proposed "in order to take their interests into account when [the OTP] defines the focus of its investigative activity".[948] The OTP claims that this information had "contributed to the definition of incidents and charges brought forward by the Prosecution."[949]

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[942] HRW Courting History (n871) 66; IRRI (n856) 13-14; FIDH (n857) 11.
[943] FIDH (n857) 11.
[944] ICC OTP Report on Activities of the first three years (2006) 16; ICC OTP Policy Paper on the Interests of Justice (2007) 6.
[945] ICC OTP Policy Paper on the Interests of Justice (September 2007) 6; ICC OTP 'ICC Prosecutor to visit Kenya to meet victims and listen to all Kenyans' (4 May 2010) ICC-OTP-20100504-PR521; ICC OTP 'ICC Prosecutor visits Central African Republic to meet with victims and local population' (21 Jan 2008) ICC-OTP-20080121-MA002.
[946] OTP *Victims' Participation* (n941) 8.
[947] Ibid 9.
[948] Ibid 8.
[949] Ibid 9.

However, difficulties in both assessing and representing victims' views and interests, continued to be encountered as acknowledged by the OTP itself: "[t]he experience of the Court to date proves that understanding the interests of victims in relation to the decision to initiate an investigation is a very complex matter."[950] Later policy papers echo these concerns.[951] In particular it proved problematic for the OTP to represent victims' views when those views clashed with fundamental purposes of the ICC process or where narrow charges were selected over representing all types of criminality and modes of victimisation.

Victims in Uganda and DRC reported feeling "disappointed that the Court has failed to prosecute all those responsible or that the narrow scope of charges do[es] not reflect the reality of the conflict for them."[952] OTP decisions have not been perceived as supporting victim vindication: "[i]n Kenya, participants in several focus groups felt that the ICC has disregarded their suffering because violence against them is not part of the cases to be tried in upcoming trials."[953] Focus groups with victims in Kenya and Uganda report that victims did not seem to be a priority for the OTP: "participants claimed that certain decisions of the ICC — especially the choice of individuals to prosecute — would be changed had victims' interests been given priority."[954] In Bunia, victims advocates claimed "The Court has not paid attention to the victims."[955] IRRI reports that in general victims are "losing faith" in the ICC and "feeling abandoned".[956] Far from being at the centre of the OTP's priorities, many victims were left feeling "that they are in the shadows, faceless, voiceless… forgotten".[957]

Calls for alternative accountability mechanisms

One problem with purporting to represent victims' views is the extent to which the drive for accountability through prosecution aligns with victims' actual wishes in regard to accountability for the harms they have suffered. Victims' desire for formal prosecution and trial should not be taken for granted. Local justice mechanisms are often considered valid, and possibly more appropriate, alternatives.[958] Whether or not such processes can provide justice, (restorative or otherwise), some or many victims may prefer them. One cannot claim to be acting on victims' expressed desires or taking their views fully into account if such wishes for local accountability mechanisms are ignored.[959]

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[950] OTP Interests of Justice (n945) 5.
[951] OTP *Victims' Participation* (n941) 9.
[952] ICC 'Turning the Lens: Victims and Affected Communities on the Court and the Rome Statute system' (26 April 2010) 3.
[953] C Tenove International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda (AfricaPortal Research Paper September 2013) 14.
[954] Ibid 27.
[955] IRRI (n856) 12.
[956] Ibid 17.
[957] Ibid 17 quoting a Congolese activist from May 2010.
[958] Centre for Conflict Resolution (CCR) 'Peace versus Justice? Truth and Reconciliation Commissions and War Crime Tribunals in Africa' Policy Advisory Group Seminar Cape Town South Africa (17-18 May 2007); Allen (n835) on desire for local resolution in N Uganda.
[959] A Little 'Balancing Accountability and Victim Autonomy at the International Criminal Court' (2007) 38 *Geo. J. Int'l. L.* 363, 391 claims mixed messages are sent when prosecutors proceed against victims' wishes.

In Uganda, local leaders were not as convinced as ICC personnel about the desirability of accountability through criminal proceedings.[960] Fears of increased violence in Uganda translated into strong opposition to ICC intervention, with many actors in northern Uganda citing the potential for increased LRA violence against civilians.[961] It was also felt in some quarters that any threats of prosecution would undermine the ongoing attempts at peace talks and reduce incentives for the LRA to negotiate.[962] Other fears were rooted in objections to the western retributive values underlying the ICC process, which appeared at odds with local values promoting reconciliation and forgiveness.[963]

This is not a complete picture of attitudes to the ICC in Northern Uganda. Allen suggests that there was pressure from local religious leaders to accept the amnesty provisions and reintegration procedures and that not all northern Ugandans were as supportive of amnesty over justice and punishment as some accounts might imply.[964] No community is ever homogenous in its support for one option over another. Such differences reflect the complexities that must be negotiated by any intervention of this kind. An accurate approximation of victims' wishes, needs, desires or interests in relation to justice after massive violence is not easy to construct. Not only are there a multitude of victims, having suffered various harms to varying degrees, these victims probably do not have a unified view of exactly what they wish to gain from prosecution, or indeed if they want prosecutions at all.[965]

Such reactions are also context specific. Interviews with Kenyan and Ugandan victims indicate that, while alternative accountability mechanisms were important for some Ugandan victims, they did not feature strongly for Kenyan victims whose experience of ongoing impunity and corruption meant they expressed views more favourable to accountability through prosecutions.[966]

The OTP was not willing or able to respond to some victims' wishes for arrest warrants to be withdrawn and prosecutions abandoned. The presumption of prosecution being in victims' interests, implicit in the Rome Statute and in OTP policy papers,[967] was carried into practice. The OTP interpreted victims'

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[960] Ibid 366.
[961] Allen (n835) 108 and 110; Grono and O'Brien (n836) 15; M Otim and M Weirda 'Justice at Juba: International Obligations and Local Demands in Northern Uganda' in Waddell N and Clark P (eds) Courting Conflict? Justice, Peace and the ICC in Africa (Royal African Society London 2008) 21, 22.
[962] Allen (n835) 124.
[963] Allen (n835) 96 "it ignores and disempowers local justice procedures".
[964] Allen (n835) 138 and 147.
[965] OHCHR Making Our Own Peace: Victims perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda (UN OHCHR 2007); P Vinck, P Pham, E Stover, A Moss and M Wierda Research note on attitudes about peace and justice in Northern Uganda (ICTJ 2007); E Kiza, C Rathberger and H-C Rohne Victims of War: An empirical Study on War-*Victimization and Victims' Attitudes towards Addressing Atrocities* (Hamburger Edition 2006). None of these studies show a conclusive preference for international prosecutions.
[966] Tenove (n953).
[967] OTP Interests of Justice (n945) 1, the paper emphasises that "there is a presumption in favour of investigation and prosecution".

interests objectively and acted on their behalf. If victims' subjective views did not coincide with these preconceived ideas, they could not, and would not, be accommodated.

5.4 Implementing Prevention

The OTP's emphasis on prevention is reflected operationally in its selection decisions and in its strategies to maximise prevention.

5.4.1 The role of prevention in selection decisions

The OTP has frequently referenced prevention as the aim of investigations, and has sometimes specifically linked prioritisation of cases within situations to the prevention aim,[968] however, preventing crimes and preventing conflicts in general are not always disentangled.

Prevention was presented as one of the major factors driving selection in the DRC cases. For example, at the time of Mbarushimana's transfer, it was promised that: "The Office of the Prosecutor is preparing new cases and liaising with concerned partners in order to maximize the preventative impact of the Court."[969] OTP statements specify the prevention of further actions, both offence and conflict-related, by specific rebel groups in DRC as an aim for specific cases: "[t]he Court will eventually define the individual responsibility of Mr. Mbarushimana, but to prevent future crimes in the Kivus, there is a need to capitalize on the momentum and demobilize the FDLR." [970]

In the Lubanga and Ntaganda cases one of the primary motivations advanced as justification for the selection of narrow charges was communicating expressive messages.[971] The OTP presented its charging choices as highlighting and preventing a crime of extreme gravity that is not widely known and is prevalent throughout the world.[972] For prevention purposes, it does not matter if all the crimes are represented, as long as the message is conveyed. The OTP claimed that attention to the crime through indictment and trial can serve an educative purpose prior to, or even in the absence of, a conviction: "[r]egardless of the outcome of the proceedings, this case represents a huge step in the struggle against these serious crimes against children."[973] A 2006 OTP policy paper directly links thematic charges to the fulfillment of prevention through the expressive function: "consideration of impact may also lead to charges on matters such as the use of child soldiers, since this is a

[968] Supra chapter 4 s4.1.2.
[969] L Moreno-Ocampo 'Address to the Assembly of States Parties Ninth Session of the Assembly of States Parties Speech' (6 December 2010) 3.
[970] Ibid 3.
[971] ICC OTP 'Statement of the Deputy Prosecutor of the International Criminal Court on an Overview of situations and cases before the ICC, linked with a discussion of the recent Bashir arrest warrant' (Pretoria 15 Apr 2009) "The Lubanga case, beyond the guilt or innocence of Mr Lubanga, is also a clear message to perpetrators of crimes against children, such as enlisting them as soldiers, are very grave and will be prosecuted.".
[972] ICC OTP 'Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo' (17 March 2006) ICC-OTP-20060302-126-En; ICC OTP 'Child soldier charges in the first International Criminal Court case' (28 August 2006) ICC-OTP-20060828-157-En.
[973] ICC OTP 'Child soldier charges' (n972).

prevalent crime that is not widely prosecuted," the paper concludes that international prosecution and attention might help bring this crime to an end.[974] The aims of the Lubanga charges were often rationalised in terms of the global, expressive effect on general prevention:

> "The true relevance of the Court is its global impact. Even before any ruling in the Lubanga case, the issue of child recruitment gained new momentum, triggered debates in remote countries like Colombia or Sri Lanka and child soldiers were released in Nepal."[975]

According to a senior OTP staff member: "[t]his affair has allowed us to make major strides in terms of prevention."[976] She continued: "The ICC is a system, not just a tribunal. How do we ensure that the Lubanga case helps to prevent war crimes, further the United Nations' work to demobilize child soldiers, contributes to the peace process in Sudan?"[977]

Narrow charges can also satisfy prevention through incapacitation. If incapacitation is the aim the main consideration is to put the perpetrator "out of action". Like the mafia boss incarcerated for tax evasion, the international criminal is "off the streets" and incapacitated from committing further crimes irrespective of whether all, or even the most serious, crimes have been proven and justice done in a wider sense.

Although culpability and crimes seriousness were advanced as the key elements of the gravity assessment in the Ugandan situation, OTP statements imply that preventing the LRA's continuing operation in order to stop both crimes and conflict was a major factor in decision-making. Intervention to arrest and prosecute the LRA leaders was seen as key to ending the conflict.[978] The GoU requested the need for the help of the international community to end the conflict by apprehending the LRA.[979] The tone of early statements by the OTP suggested that it perceived its role as "supporting the efforts of the Ugandan authorities" to arrest the LRA by garnering international support against them.[980] The Prosecutor subsequently claimed success for his proactive role in marginalising the LRA:

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[974] ICC OTP Annex to policy paper: Criteria for Selection of Situation and Cases [draft policy paper on file with author] (2006) 12.
[975] L Moreno-Ocampo 'Council on Foreign Relations: Keynote Address' (4 Feb 2010) 9; L Moreno-Ocampo 'The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law' (LSE 8 October 2008) 3.
[976] Beatrice Le Fraper, quoted in T Cruvellier 'Lessons from the Lubanga Trial' International Justice Tribune (13 March 2012) <www.rnw.nl/ accessed 22 April 2014>.
[977] Ibid.
[978] ICC OTP 'Eleventh Diplomatic Briefing Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the ICC' (10 October 2007) "[A]rrest the sought criminals today, and you will have Peace and Justice tomorrow."; ICC OTP 'Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo to the Fourth Session of the Assembly of States Parties 28 November – 3 December 2005' (28 November 2005).
[979] C Ryngaert 'The Principle of Complementarity: A means of ensuring effective international criminal justice' in C Ryngaert (ed) The Effectiveness of International Criminal Justice (Intersentia 2009) 145, 156.
[980] ICC OTP 'President of Uganda refers situation' (n821).

> "Our efforts to render justice [will] help to restore peace in Uganda. I met the Sudanese foreign affairs minister in 2004 and he told me that Sudan was no longer supporting the LRA. Sudan reduced its support because we intervened. The Congo too has requested MONUC [the UN Peace keeping force] to arrest Kony because that country is party to the ICC. I think the court is helping."[981]

Intervention in Uganda has been characterised by some commentators as a preventative intervention against the LRA. Ryngaert points out "the danger of unjustifiable mission creep occurring when the ICC prosecutor assists States in clamping down on purportedly 'evil' rebel activity and hunting down ringleaders, without there being a finding of guilty by the Court".[982] On this view, case and suspect prioritisation were based on theoretical prevention and conflict resolution outcomes, rather than the gravity of crimes or responsibility of the perpetrators. Allen surmises that the OTP may have seen LRA offences as "a relatively simple case to start with, one that would help to establish the court's credentials",[983] underestimating the complexity of the Ugandan context.[984]

The impetus for action to prevent crimes may also have come from their ongoing nature. Ongoing criminality is mentioned as a factor in selecting cases from among those that are already deemed sufficiently grave: "[T]he Office may, for example, pay particular attention to groups of individuals responsible for ongoing serious crimes, since arrest and prosecution of such persons can put an end to crimes."[985] The fact that the alleged crimes of the LRA were ongoing, while many, but not all, of the allegations against the GoU and UPDF were historic may have influenced selection. The Prosecutor clarified that the ongoing nature of the criminality and the potential for prevention was a factor in decision-making regarding Darfur:

> "In the context of Darfur, particular attention will be given to investigating crimes currently affecting the lives and safety of the two million displaced civilians in the region, in an effort to improve conditions for humanitarian assistance and protect victims from further attack."[986]

It seems that despite emphasising retributive criteria for selection, a major motivating factor in decision-making was the perceived effect on prevention in terms of stopping ongoing crimes and the conflicts from which they arose. This

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[981] IRIN 'Uganda: Kony will eventually face trial, says ICC prosecutor' (7 July 2006) <http://www.irinnews.org/Report.aspx?ReportId=59585>; OTP 'Statement to Fourth Session of ASP' (n978) "The involvement of the ICC has produced a new dynamic in northern Uganda. Uganda, the DRC and the Sudan are now working towards the same goal, to execute the arrest warrants for Joseph Kony and the LRA leaders."
[982] Ryngaert (n979) 159.
[983] Allen (n835) 82.
[984] Allen (n835) 83.
[985] OTP Annex to policy paper (n974)12.
[986] ICC OTP 'Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo to the UN Security Council pursuant to UNSCR 1593 (2005)' (14 June 2006).

is particularly so in Uganda, but is also implied in the selection decisions for DRC and Darfur. Strategies to stop ongoing crimes and prevent future crimes may at times accord with prosecuting the most responsible for the most serious crimes, but they do not always do so. This approach allows for the non-prosecution of groups responsible for equally or more serious crimes that are not ongoing, with implications not only for the victims of those crimes, but also with a potentially adverse impact on the perceptions of the fairness and impartiality of the process, and the OTP's commitment to desert principles.

The selection of cases in the situation in Kenya also reflects prevention aims. The Prosecutor repeatedly stated that the Kenyan prosecutions were timed with the 2012 elections in mind.[987] Despite long delays in other cases before the Court,[988] and sequencing gaps in addressing different parties to the conflict, the investigation and indictment processes were expedited in the Kenya situation. The investigation was opened in March 2010. Within a year, all six suspects had been summonsed to appear. Confirmation of charges hearings were held in September 2011. The Prosecutor's drive to get the trials going quickly was led by a desire to prevent impunity fuelling further violence, at upcoming Kenyan elections as well as other scheduled regional elections.[989] The Prosecutor abandoned his previous policy of sequencing for the Kenyan case, bringing simultaneous prosecutions for representatives of both sides of the political divide considered responsible for the violence. That this was done despite some disparity in the gravity of the charges against them, may reflect the desire to avoid stoking further violence in the upcoming elections.

The overall motif of selective investigations is "coverage over depth". The OTP opened numerous investigations, but charged only a very limited number of alleged perpetrators in each situation. This has been described as the OTP's "hit-and-run" approach to investigations.[990] In CAR, only one prosecution has been brought in the Court's first decade. It is unclear whether prevention played a role in selection decisions in CAR and Cote d'Ivoire. Arrests there seemed based on availability of suspects rather than more principled factors. Although the OTP prosecuted only one foreign national in relation to CAR, it was repeatedly asserted in public statements that they were "monitoring" the situation.[991] Such monitoring supposedly had a preventative impact, according to OTP policy statements.[992]

The "coverage over depth" approach may reflect the OTP's belief, or hope, in the capacity of isolated interventions to act as a catalyst for complementary national proceedings. Or it could simply be an attempt to fulfil the requirements of the Rome Statute to proceed if the admissibility criteria under

[987] Supra n638.
[988] ICG Kenya: Impact of the ICC Proceedings Africa Briefing no 84 (ICG 9 January 2012) 6 delays from arrest warrant/summons to trials at the ICC are typically 2-3 years or longer.
[989] Moreno-Ocampo 'Address to the ASP Ninth Session (n969) 4.
[990] Kambale (n864).
[991] ICC OTP 'Prosecutor opens investigation in the Central African Republic' (22 May 2007) ICC-OTP-20070522-220; ICC OTP 'Background: Situation in the Central African Republic' ICC-OTP-BN-20070522-220-A_EN.
[992] Supra n631.

art 17 are fulfilled.[993] Whiting outlines the dilemma for the Prosecutor in choosing between gathering time-sensitive evidence in a new situation versus opening an investigation of new charges or perpetrators in an ongoing situation.[994] There is often intense time pressure to preserve evidence. The dynamics of international politics mean that opportunities to intervene may suddenly arise due to a Security Council resolution or the sudden deterioration of a situation. Examples include events in Ukraine in 2014 and the referral of the situation in Libya by the UNSC in 2011. While the OTP can keep emerging situations of international criminality on its radar, its work is by its very nature reactive. While part of this drive to react quickly may be driven by the necessities of evidence collection or even the opportunity to arrest a suspect, it is also at least partly driven by an apparent belief in the immediate and effective preventative effect of the ICC's intervention.

5.4.2 Maximising Prevention: Preliminary examinations and positive complementarity

The OTP has implemented initiatives to maximise the ICC's preventative impact prior to investigation, and to extend its reach beyond the small number of situations that will be investigated and cases that will be prosecuted. These include publicising the OTP's preliminary work and developing "positive complementarity". Prevention was the main rationale for transparency regarding preliminary examinations and the development of parallel work on positive complementarity.

The aim of preliminary examinations is "to collect all relevant information necessary to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation".[995] Initially, the OTP planned that preliminary examinations and investigations would be low profile and that trials would be "the most important moment for an elevated profile" that would "increase the impact of the Court, including its preventive and educational effects."[996] However, potential for prevention and deterrence in publicising its monitoring and analysis activities was also anticipated:

> "My Office is seeking to improve the transparency of its work during the preliminary phase in order to increase the predictability of the Court's action, to facilitate the cooperation of different stakeholders and in order to prevent or stop the crimes."[997]

Before the DRC investigation was opened, the OTP publicised the fact that the situation was under preliminary examination for explicitly deterrent purposes: "in some situations, such as the Ituri situation, we have made the decision

[993] This is implied in the statement on opening the investigation in Mali: ICC OTP 'ICC Prosecutor opens investigation into war crimes in Mali: "The legal requirements have been met. We will investigate"' (16 Jan 2013) ICC-OTP-20130116-PR869.
[994] A Whiting 'Dynamic Investigative Practice at the International Criminal Court' (2013) 76 Law and Contemporary Problems 163, 177-178.
[995] ICC OTP Policy Paper on Preliminary Examinations (November 2013) para 2.
[996] ICC 'Sixth Diplomatic Briefing of the International Criminal Court: Compilation of Statements: The Prosecutor' (23 March 2006).
[997] L Moreno-Ocampo 'Address to the Assembly of States Parties Eighth Session of the ASP' (18 Nov 2009).

public in order to mobilise support and, hopefully, to help create deterrence."[998] Prevention became the main rationale for transparency regarding situations under preliminary examination.[999] The OTP even claimed that its experience had shown that making this stage of its work transparent would "increase […] the preventative impact of the Rome Statute in general."[1000]

By 2009, preliminary examinations had also become a "key aspect of the complementarity regime".[1001] The integrated approach involved publicising when countries, conflicts or certain incidents were under preliminary examination, visits to affected countries, and receiving high-profile government delegations from those countries. In some instances, it has also involved working with governments to amend laws or address crimes through their own legal systems. There have been press releases from The Hague and a major investment of time and resources from the top echelons of the OTP for practical engagement with affected countries.

The most prominent of these preliminary examinations concerns Colombia where both publicity and positive complementarity have been part of the OTP's prevention strategy. The preliminary examination phase was made public in 2004.[1002] Since then, there have been two high-level OTP visits to Colombia involving the Prosecutor himself and other senior staff.[1003] Other preliminary examinations that were made public in the first nine years relate to Afghanistan (2007), Kenya (2008), Georgia (2008), Palestine (2009), Guinea (2009), Honduras (2010), Republic of Korea (2010) and Nigeria (2010).[1004] Of these, Guinea, Georgia, Nigeria and Cote d'Ivoire have received visits from high-level OTP delegations.[1005] These high-profile visits are part-and-parcel of a prevention strategy extending beyond simple evidence gathering. In relation to preliminary examinations, the OTP has received visits from Kenyan, Guinean and Georgian ministers and delegations from the Palestinian National Authority.[1006] Dialogue with affected Governments is in keeping with the statutory duty and practical need for cooperation with states, but has also been consciously part of the OTP's strategy for maximising prevention.

[998] ICC OTP 'Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps' (12 February 2004).
[999] OTP Preliminary Examinations (n995).
[1000] L Moreno-Ocampo 'Seventeenth Diplomatic Briefing: Statement' (4 Nov 2009) 3.
[1001] Ibid 3; this was confirmed in the OTP Preliminary Examinations (n995).
[1002] ICC OTP Report on Preliminary Examination Activities 2013 (November 2013) para 118.
[1003] ICC OTP 'ICC Prosecutor visits Colombia' (21 August 2008) ICC-OTP-20080821-PR347; Moreno-Ocampo visited Colombia in October 2007 and in August 2008; ICC President, Judge Sang-Hyun Song, made an official visit to Colombia in May 2011.
[1004] OTP Preliminary Examination Activities 2013 (n1002).
[1005] OTP Preliminary Examinations (n995).
[1006] ICC OTP 'Guinea Minister visits the ICC - Prosecutor Requests Information on National Investigations into 28 September Violence' (21 Oct 2009) ICC-OTP-20091021-PR468; ICC OTP 'OTP preliminary examination in Georgia: ICC Prosecutor receives Georgian Justice Minister' (17 March 2010) ICC-OTP-20100319-PR507; ICC OTP 'Visit of the Minister of Justice of the Palestinian National Authority' (22 Jan 2009); ICC OTP 'Visit of the Palestinian National Authority Minister of Foreign Affairs and Minister of Justice' (13 Feb 2009).

In 2009, the Prosecutor highlighted his Office's preliminary examination activities and their importance for its prevention strategy.[1007] It was now OTP policy to "increase reactivity to upsurges of violence potentially falling within the jurisdiction of the Court in order to promote timely accountability efforts at the national level and to maximize the preventative impact of our work".[1008] The OTP made eight visits to Guinea,[1009] during which a key aim was to support "the preventive mandate of the ICC Prosecutor".[1010] In Guinea, the OTP has pursued a prevention strategy combining visits, encouragement of national prosecutions and public statements warning of the consequences of further violence. This strategy was hailed by the OTP as part of its successful prevention strategy.[1011] A similar strategy was employed in Cote d'Ivoire.[1012]

Preliminary examination has become a key tool in the OTP's operations with an explicitly preventative rationale.[1013] There is significant behind the scenes effort to develop positive complementarity for the purposes of prevention:

> "The ICC has put forward an enormous and undervalued effort in terms of prevention in Colombia, in Georgia, in Guinea. We're looking at the tip of the iceberg."[1014]

The "tip of the iceberg" referred to investigations and prosecutions, implying that the bulk of the OTP's work and one of its priorities is behind-the-scenes crime prevention.

Despite its tangible investment in positive complementarity, an NGO report on complementarity in Colombia criticises the OTP for "applying double standards with regard to the criteria that activate the competency of the ICC."[1015] It is suggested that the Colombian authorities are unwilling to prosecute the crimes at issue.[1016] This is in contrast to the approach in Uganda, where the GoU was willing and able to prosecute LRA members who could be captured.[1017] Kleffner suggests that self-referrals such as Uganda's are a sign of

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[1007] L Moreno-Ocampo 'Seventeenth Diplomatic Briefing: Statement' (4 Nov 2009) 3; confirmed in OTP Preliminary Examinations (n995) paras 104-106.
[1008] Moreno-Ocampo 'Seventeenth Diplomatic Briefing' (n1007) 4; confirmed in OTP Preliminary Examinations (n995).
[1009] OTP Preliminary Examination Activities 2013 (n1002) para 196.
[1010] ICC OTP 'Statement to the press by Ms Fatou Bensouda, Deputy Prosecutor' (Conakry 10 November 2010); L Moreno-Ocampo 'Remarks to the Twentieth Diplomatic Briefing' (8 April 2011) 6.
[1011] F Bensouda 'Regional Roundtable Discussion on Implementation of the Rome Statute of the International Criminal Court Parliamentarians for Global Action' (Monrovia 9 February 2011) 6.
[1012] Ibid 7.
[1013] OTP Preliminary Examinations (n995) paras 104-106.
[1014] Quoted in Cruvellier (n976).
[1015] Advocats Sans Frontieres (ASF) Canada The Principle of Complementarity in the Rome *Statute and the Colombian Situation: A Case that Demands More than a 'Positive' Approach* (ASF Canada 2012).
[1016] Ibid. The report concludes that while the Colombian authorities are able to prosecute they seem "unwilling to investigate crimes for which it bears international responsibility – namely, crimes of the state.".
[1017] M Arsanjani and W M Reisman 'The Law-in-action of the International Criminal Court' (2005) 99 AJIL 385, 392; P Clark 'Law Politics and Pragmatism: The ICC and Case Selection

willingness to prosecute.[1018] There have also been suggestions that the OTP has overridden local willingness to prosecute in DRC, another self-referring state.[1019]

Clear criteria for keeping a situation at preliminary investigation stage and pursuing complementarity rather than proceeding to investigation where the legal thresholds are met, have not been forthcoming. There is some disparity in time scales. The time lag between the violence and the opening of an investigation in Kenya and Mali, for example, was considerably shorter than for Colombia and Guinea, where the situations have been under preliminary examination for a number of years with no sign of an investigation being opened but considerable efforts at positive complementarity. It can be inferred from the OTP's conduct and its public statements that its decisions were based on the potential for local accountability and the potential for prevention, rather than the gravity of the crimes or the potential impunity of senior responsible figures.

5.4.3 OTP communications strategy: Campaigning for prevention

Prevention is also pursued through the OTP's public relations strategies. This extends beyond individual crimes, to the underlying conflicts generating criminality. 'Campaigning for prevention' maximised prevention through the OTP's communications strategy; highlighting grave crimes and naming alleged perpetrators in order to encourage States and the international community to act against them.

A large part of the OTP's communications strategy is expressly based on prevention. The 2006 report on the first three year's activities invokes prevention to justify the OTP's outreach and cooperation strategies, claiming that the OTP "must communicate and engage with a variety of different audiences to achieve the cooperation needed and raise the preventative and deterrent impact of cases under investigation and prosecution."[1020] To contribute to deterrence, the OTP must communicate that an activity is legally wrong and that there are accountability mechanisms in place for bringing offenders to justice. This is specifically characterised in the 2009-2012 strategy as "mak[ing] preventive statements".[1021] The Paper on Preliminary Examinations

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in the Democratic Republic of Congo and Uganda' in N Waddell and P Clark (eds) Courting Conflict?: Justice, Peace and the ICC in Africa (Royal African Society 2008) 37, 40 and 43 questions the admissibility of the Ugandan cases describing the Ugandan judiciary as "one of the most proficient and robust in Africa".

[1018] J Kleffner 'Auto-referrals and the complementary nature of the ICC' in C Stahn and G Sluiter (eds) The Emerging Practice of the International Criminal Court (Martinus Nijhoff Publishers 2009) 41, 41.

[1019] C Ryngaert 'The Principle of Complementarity: A means of ensuring effective international criminal justice' in C Ryngaert (ed) The Effectiveness of International Criminal Justice (Intersentia 2009) 145, 154-155; Burke-White (n880) criticises the admissibility on the fact that DRC judiciary was functioning and willing; Clark (n1017) 40 and 43 notes the substantial local capacity in DRC.

[1020] ICC OTP 'Report on the activities performed during the first three years (June 2003-June 2006)' (September 2006) 33; ICC OTP Report on Prosecutorial Strategy (14 September 2006) notes the preventive benefits of cooperation.

[1021] OTP Strategy 2009-2012 (n854) 10.

describes the OTP as seeking "to perform an early warning function" and emphasises its role in issuing "public, preventive statements".[1022]

The OTP's communications strategy has two distinct strands. Firstly, public statements exhort States Parties and others to stop crimes and ongoing violence, with specific requests to make efforts to demobilise particular rebel groups. Secondly, there have been repeated calls to marginalise indictees. As well as facilitating suspects' arrests this tactic exploits the political marginalisation and delegitimisation that have been seen as effective forms of incapacitation in the contexts of international criminality.

OTP statements have encouraged specific actions to stop the conflicts and the armed groups involved in those conflicts. The communications strategy in Uganda targeted only the LRA and linked the arrest of the LRA leadership with the end of the conflict.[1023] Undermining international support for the LRA was claimed as one of the OTP's achievements in public statements.[1024] In DRC, the Prosecutor advocated the disarmament of groups in Ituri and action to prevent new armed groups being formed.[1025] In relation to Kivus in 2010 and 2011, OTP statements called for action against the rebel FDLR.[1026]

Such statements project an image of the OTP as the moral conscience of the international community, or at the least of the State Parties to the Rome Statute who have signed up to certain legal obligations and duties to assist the Court. They reveal the Prosecutor's adoption of an advocacy role regarding prevention of international crimes and the conflicts within which they arise. Calls for demobilisation of particular rebel groups can be seen as an elaboration of, or departure from, the Rome Statute mandate to contribute to prevention through ending impunity. The Prosecutor may have overstepped the mark in terms of impartiality. Rather than calling on all sides to stop international crimes, the statements specifically target one side; in Uganda and DRC, rebel groups fighting the incumbent government. Furthermore, rather than confining OTP statements to international crimes that have already occurred and are amenable to assessments of gravity, the Prosecutor's statements refer to general violence, potential future violence and conflict actors whose plans must be frustrated.

A 'campaigning' strategy can also be seen underlying OTP statements calling for support to marginalise those indicted by the ICC. Generalised appeals to

[1022] OTP Preliminary Examinations (n995) para 104 and 106.
[1023] ICC OTP 'Statement by Prosecutor Luis Moreno-Ocampo' (6 Jul 2006) ICC-OTP-20060706-146: "We believe the best way to stop the conflict and restore security to the region is to arrest the top leaders. […] Arresting the top leaders is the best way to ensure that these crimes are stopped and not exported to other countries"; L Moreno-Ocampo 'Fifth Session of the Assembly of State Parties Opening Remarks' (23 Nov 2006).
[1024] Supra section 5.2.3.
[1025] OTP 'Statement to Fourth Session of ASP' (n978) "new armed groups are being created. We have to stop this."
[1026] Moreno-Ocampo 'Address to the ASP Ninth Session (n969) 3; ICC OTP 'Statement by ICC Prosecutor on transfer of Callixte Mbarushimana to the Hague' (25 Jan 2011) - "the prosecution of the FDLR's leadership will provide the opportunity to demobilise this armed group. It is a step towards justice for all victims, peace for the region, hope for the populations."

work for prevention have latterly become more focussed on specific actions states can take to aid the Court's work, by facilitating arrests, assisting in the marginalisation of suspects and extending the reach of the Court's work.[1027] In 2008, the Prosecutor directly addressed the Security Council with his pleas for action: "If Security Council members can act together, the crimes will stop and millions of lives will be saved."[1028] In the run up to the Review Conference in June 2010, the OTP repeatedly called for states to reaffirm their commitment to executing their obligations to the Court.[1029] However, this seemingly more measured approach was pursued in tandem with the general "campaigning for prevention" targeted against certain groups, as previously mentioned.

5.5 Conclusions

The OTP has not consistently applied its own policies or reflected its stated penal aims in decision-making. While not every prosecutorial decision will be based directly on the penal aims, certain strategies that accord with different professed aims can be discerned in OTP practice. While the OTP has enthusiastically implemented policies on prevention, it has paid less attention to ensuring implementation decisions upheld its professed retributive criteria and allowed for victims' participation and vindication.

Prevention appears to have informed selection decisions to some extent, as well as strategies relating to preliminary examinations, complementarity and a 'campaigning' approach in public statements. In terms of applying retributive criteria to decision-making, in particular the professed main criterion of gravity, the OTP was inconsistent in its application and seemingly reticent to share its reasoning when it was applied. Lack of transparency and the dissonance between the professed criteria and their perceived implementation has fostered mistrust. Particular gaps have been identified relating to leadership groups associated with sitting governments, sexual violence and pursuing the most serious crimes in the Ituri cases. Lack of consistency, coupled with contextual factors, encouraged alternative explanations to replace the official OTP versions of its stated aims and policies.

In terms of victims, the OTP did attempt to consult victims but was less expansive in implementation than it was in its rhetoric. While there were some attempts to be responsive to victims' interests it was not clear that victims' views were considered in decision-making. The OTP took steps to exclude a formal role for victims in situations selection and investigations. Victims and victims' advocacy groups report a high-level of dissatisfaction and alienation from the ICC's processes because of disillusionment with OTP selection decisions. It is not even clear that victims' objective interests were considered in selection strategies as many decisions militated against victim vindication

[1027] ICC OTP 'ICC Prosecutor: States must gear up for arrests' (3 Dec 2008) ICC-OTP-20081203-PR379: "No political support, no financial aid should be provided to those individuals subject of an arrest warrant or those protecting them. For those assisting the indictees, individual travel bans and freezing of assets should be considered appropriate." See also OTP Strategy 2009-2012 (n854) 12 and 14.
[1028] ICC OTP 'States must gear up for arrests' (n1027) ICC-OTP-20081203-PR379.
[1029] L Moreno-Ocampo 'Eighteenth Diplomatic Briefing: Statement' (26 April 2010) 18.

and acknowledgement of victimisation. In practice, justice for victims was not at the heart of the OTP's implementation strategies, even if it remained central to its public statements.

The implementation phase of the OTP's work reflects the key aim of prevention, but has fallen short in terms of victim engagement, empowerment and vindication. It has also fallen short in terms of the application of consistent, fair criteria set out in advance and maintaining perceptions of its impartiality. The OTP's reluctance to share reasoning in tough decisions has perpetuated negative perceptions and undermined claims to transparency. It is clear that penal aims are not the full story in directing implementation and strategy. Several factors have already been identified that have the ability to influence decision-making and override principled penal objective. These include practical factors such as cost-efficiency, trial management, expeditious trials, and political cooperation. The next chapter looks at these competing concerns and how they have influenced the Prosecutor's decision-making. It attempts to identify why the OTP adopted its professed aims and the strategies for implementation.

Chapter 6

Beyond Penal theory: Competing factors in OTP decision-making

Penal aims are not the only motivating factors in decision-making, in practice there are a number of competing concerns and influences that affect implementation strategy. This chapter looks at the other factors affecting decision-making that can derail or undermine the implementation of the policies, strategies and aims of the OTP. Chapter 5 identified prevention as a key focus in implementation, while fulfilment of policies relating to victims and selection based on retributive criteria were less consistently followed. This chapter will look at the influence of other factors – practical and principled – that may derail predetermined strategies and approaches.

6.1 Competing factors in selection decision-making: cases and charges

Despite attempting to represent the main modes of victimisation and the most serious crimes in most situations, the previous chapter identified deficiencies in the OTP's implementation of its own policies and stated aims.

6.1.1 Gravity and representing victimisation in Ituri cases

A perceived failing in the OTP's first years was selection in the Ituri cases. The main areas of contention were the narrow charges in the Lubanga and Ntaganda cases that ignored crimes such as killings and sexual violence, and the narrow focus in the Katanga and Ngudjolo cases on one incident.[1030] The reasons these cases developed as they did highlights some of the competing concerns facing the Prosecutor in attempting to implement OTP policies and fulfil his stated aims.

The narrow focus of the Katanga and Ngudjolo trials reflected the OTP policy of focused investigations and expedited trials. Focused investigations are a type of sampling: "the choice of a subset of evidence able to represent the overall relevant scope".[1031] These narrowly 'symbolic' or representative trials can make it hard to prove higher level responsibility where it is the pattern of crimes over time that proves the case, and may not effectively represent the factors that make these crimes international, such as the widespread and systematic nature of the violence. The focused approach also does little to represent the scale and geographical spread of victimisation. There is therefore immediately a tension between the policy of focused investigations and promises to attempt to represent victimisation more fully to contribute to victim vindication.

[1030] Supra chapter 5.

[1031] X Agirre Aranburu 'Large-Scale Victimisation and Small-Scale Trials: Selection Criteria and the use of Sampling Techniques in the Investigation of International Crimes' in U Ewald and K Turkovic Large-Scale Victimisation as Potential Source of Terrorist Activities (IOS Press 2006) 151, 169.

Several factors informed the focused approach – cost-efficiency, security, manageable and expedited trials and institution-building.[1032] These are important considerations in the exercise of prosecutorial discretion. The OTP has cited focused investigations as the key to efficiency and reducing risks to witnesses in the Uganda investigation.[1033] Proving the facts and guilt of individuals beyond reasonable doubt, even in one large-scale attack by multiple perpetrators on multiple victims, is a complex and drawn out affair. Focussing on limited charges and specific events can make these trials more manageable and in the end more likely to result in a conviction. However, there are trade-offs in terms of victim vindication and distorting the record of violence and events in the conflict.

In the Lubanga and Ntaganda cases it was not the policy of focused investigations that led to narrow charges, as initially a wide number of crimes were investigated including killings and sexual violence.[1034] The OTP has acknowledged that its policy of representing the full range of criminality and victimisation may have to be deferred to other factors in case selection: "[s]ometimes there are conflicting interests which force the Office to focus on only one part of the criminality in a particular conflict."[1035] However, which "conflicting interests" influenced the narrow charging decisions is controversial.

For the OTP, a key factor was securing Lubanga from police custody in DRC: "[t]he decision on the timing and the content of the charges was triggered by the possible imminent release of Thomas Lubanga Dyilo."[1036] A former senior OTP staff member claims the OTP's position was partially "argued on the basis of […] the principle of opportunity".[1037] This principle is linked to the need to arrest suspects,[1038] a major obstacle due to the ICC's lack of enforcement power, as recognised by the OTP itself.[1039] The opportunity to arrest a priority suspect could not have been ignored, especially in light of the intense pressure at that stage to have suspects in detention and accused international criminals on trial.[1040]

[1032] Supra chapter 4; K Glassborow 'ICC Investigative Strategy Under Fire' in IWPR Special Report: Sexual Violence in the Democratic Republic of Congo (IWPR October 2008) 8; P Kambale 'The ICC and Lubanga: Missed Opportunities' African Futures (16 March 2012) </African-futures/> accessed 22 January 2014.

[1033] ICC OTP Report on the activities performed during the first three years (June 2003-June 2006) 12 September 2006, 15.

[1034] Glassborow (n1032) 9.

[1035] ICC OTP Report on Prosecutorial Strategy (14 September 2006) 5-6.

[1036] ICC OTP 'Report on the activities performed during the first three years (June 2003-June 2006)' (September 2006) 12; F Bensouda 'Challenges relating to Investigation and Prosecution at the International Criminal Court' in International Criminal Justice: Law and Practice from the Rome Statute to its Review (Ashgate Publishing Group 2010) 162, 168.

[1037] P Seils 'The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court' in M Bergsmo (ed) Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd ed, Torkel Opsahl Academic Publisher, 2010) 74.

[1038] Ibid 74, "the arrest of suspects is quite easily the greatest challenge facing the ICC – the efficacy of the Court depends significantly on suspects being brought to trial."

[1039] OTP Strategy 2006 (n1035) 2 executing arrest warrants was "perhaps the most critical and difficult issue of the system created by the Rome Statute."

[1040] In 2011, there were still criticisms of the ICC based on their lack of completed trials - David Kaye 'Who's Afraid of the International Criminal Court Foreign Affairs May/June

The opportunity to gain custody of a leading suspect determined the narrow charges. Despite having been investigating for 19 months when the opportunity to transfer Lubanga arose, the OTP claimed the charges were dictated by a lack of quality evidence, "including linkage of the accused to the crime".[1041] Then Deputy Prosecutor Bensouda acknowledged the OTP initially "investigated a wide range of crimes" but didn't have the evidence to prove other charges "beyond a reasonable doubt".[1042] The lack of evidence for other crimes has been reiterated by senior OTP staff members.[1043]

The OTP assertions regarding insufficient evidence to charge other crimes is controversial. Former OTP investigators claim they had sufficient evidence linking Lubanga with other crimes in Ituri, including sexual violence.[1044] The sudden decision regarding the narrowing of the charges led to a high level of dissatisfaction amongst investigators within the OTP.[1045] There has been a degree of disbelief among affected populations. IRRI reports victims' views that the OTP's argument that there was not enough evidence of other crimes is a "joke".[1046]

Insufficient evidence may not be the complete story. Other suggested reasons are the OTP's consideration of the "practical realities" of managing a case through trial successfully.[1047] The issue of "practical viability" was described by a senior OTP analyst as the obstacles which "may be legitimate reasons for precluding an investigation, no matter the gravity and relevance of the allegations."[1048] In early policy papers, the OTP alluded to these factors as the "practical realities" that will have to be taken into account in selection decisions including "the likelihood of any effective investigation being possible."[1049] These factors relate equally to deciding to pursue charges at trial as to the viability of an investigation. Former investigators at the ICC suggested that limiting charges was a pragmatic attempt to ensure the ICC's first trial would be manageable and successful.[1050] Responding to "practical viability" in this way has not proven popular with some victims in DRC who

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2011; Glassborow (n1032) 8-9 former OTP staff recounted the intense pressure to start trials quickly.

[1041] OTP Report on activities 2006 (n1036) 13.

[1042] Bensouda 'Challenges relating to Investigation' (n1036) 168.

[1043] Beatrice Le Fraper, senior OTP staff 2006-2010, quoted in T Cruvellier 'Lessons from the Lubanga Trial' International Justice Tribune (13 March 2012) <www.rnw.nl/ accessed 22 April 2014>; B Lavigne quoted in Glassborow (n1032) 11-12.

[1044] Glassborow (n1032) 11.

[1045] Glassborow (n1032) 9, HRW Courting History: The Landmark International Criminal *Court's First Years* (HRW July 2008) 48.

[1046] International Refugee Rights Initiative (IRRI) Steps Towards Justice, Frustrated Hopes: Some reflections on the Experience of the International Criminal Court in Ituri (IRRI / aprodivi-asbl Discussion paper No 2 January 2012) 22.

[1047] Seils (n1037) 75.

[1048] Agirre Aranburu 'Large-Scale Victimisation' (n1031) 162; includes 'operational difficulties' such an ongoing conflict, financial constraints, or distance in time meaning no witnesses or evidence available, age infirmity or death of suspects.

[1049] ICC OTP Annex to policy paper: Criteria for Selection of Situation and Cases [draft policy paper on file with author] (2006) 2-3.

[1050] Glassborow (n1032) 11.

have attributed the narrow charges to "laziness" by the court who wanted to start with "easier" charges to prove.[1051]

Further indications that the trial may have been orchestrated to be as simple as possible are that the charges against Lubanga were originally limited to war crimes committed in armed conflict not of an international character.[1052] This was challenged by the PTC which found that the UPDF and Govt of Uganda were an occupying power, supporting Lubanga and the UPC, and that Rwanda may also have had a role in supporting the UPC.[1053] This selective characterisation of the evidence has been attributed to a desire to maintain good relations with the GoU.[1054] Happold suggests the limited scope in Lubanga related to the availability of evidence and a desire for expedited trials consuming as little extra resources as necessary to secure conviction.[1055]

This explanation fits the general trend in OTP policy and strategy to secure a conviction in the least time possible, expending the least resources necessary. The desire for expedited trials was one of the main drivers of the policy of focused investigations.[1056] This policy in turn informed strategies to reduce the numbers of witnesses and carry out representative trials of key incidents. Cost-efficiency has been highlighted by the OTP as a key determinant of policy and strategy.[1057]

Another pragmatic explanation for the focus on crimes related to child soldiers may lie in the complementarity clauses of the admissibility test under article 17. The OTP has publicly referred to Lubanga's arrest in DRC as "in reaction to the killing of UN peacekeepers".[1058] However, the information the OTP supplied in support of the arrest warrants states that the detention of Lubanga in DRC was for charges related to crimes under the Rome Statute:

> "The warrant of arrest, dated 19 March 2005, issued by the competent examining magistrate in the DRC, and the provisional detention of Thomas LUBANGA DYILO are legally based on charges of genocide pursuant to Article 164 of the DRC Military Criminal Code and crimes against humanity pursuant to Articles 166 to 169 of the same code. On 29 March 2005, the DRC authorities issued another arrest warrant

[1051] IRRI (n1046) 22.
[1052] Thomas Lubanga Dyilo (ICC-01/04-01/06-803) PTC I 'Decision on the confirmation of charges' 29 January 2007.
[1053] Ibid paras 214-219, 221-226.
[1054] M Happold 'Current Developments: IV. Prosecutor v Thomas Lubanga, Decision of Pre-Trial Chamber I of the International Criminal Court, 29 January 2007' (2007) 56 ICLQ 713, 718.
[1055] Ibid "Realists […] might argue that it was a legitimate exercise of prosecutorial discretion."
[1056] Supra Chapter 4.
[1057] ICC OTP 'Paper on Some Policy Issues before the Office of the Prosecutor' (September 2003) 3 and 8 acknowledges that "[t]he Court is an institution with limited resources"; outlining cooperative strategies to "help to keep the Court cost-effective"; "operating a system of low costs" was a preoccupation of the OTP at this time. OTP Strategy 2006 (n1035) 6 cites cost-efficiency as a motivating factor in development of the strategy of focused investigations.
[1058] OTP Report on activities 2006 (n1036) 12.

against Thomas LUBANGA DYILO, alleging crimes of murder, illegal detention and torture."[1059]

The case was deemed admissible under the complementarity criteria because, although the DRC judiciary not necessarily "unable in the sense of article 17(a)to (c) and (3)" to prosecute,[1060] the DRC proceedings did not encompass the same conduct as that contained in the arrest warrant.[1061] One of the charges omitted was related to child soldiers, the other notably was sexual violence.

There could have been a valid admissibility challenge, or at least criticism, had the Prosecutor plucked a suspect from detention in a functioning judicial system to apply exactly the same charges as a country where the Government had shown at least some willingness to deal with such crimes.[1062] This is problematic as it seems to reveal a less than keen commitment to the principle of complementarity or the OTP's policy of "positive complementarity".

According to OTP senior staff, the decision to narrow the charges in Lubanga was primarily based on the aim of highlighting the seriousness of child-soldier crimes.[1063] The prevention-oriented factors in the decision, heavily emphasised by the OTP, have already been discussed.[1064] The OTP also retained the option to bring further charges.[1065] This would reflect victims' wishes to see a wider spread of victims experiences, and the most serious crimes, represented at trial.

The charges against Ntaganda were indeed expanded in 2012, but it seems unlikely that this will happen in the Lubanga case. The Prosecutor has said he will not investigate other crimes until after Lubanga's first trial.[1066] The increased workload of the OTP in the intervening years, and competing claims on limited resources, make a second investigation and trial unlikely. HRW suggests resource constraints may have prevented an expansion of the charges.[1067] This has added to criticism of the OTP for having resource-driven

[1059] Thomas Lubanga Dyilo (ICC-01/04-01/06) PTC 'Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Thomas Lubanga Dyilo' 24 February 2006 Annex I Thomas Lubanga Dyilo (ICC-01/04-01/06) 'Decision on the Prosecutor's Application for a warrant of arrest, Article 58' 10 February 2006 para 33.
[1060] Ibid para 36.
[1061] Ibid para 37, 38-39.
[1062] Commentators have claimed the DRC judiciary was functioning and willing to prosecute supra n1019. This view is not unanimous - Kambale (n864) though complaining there was a less than rigorous attention to positive complementarity in Ituri, implies the system was not up to scratch. REDRESS Victims, Perpetrators or Heroes? Child soldiers before the International Criminal Court (REDRESS September 2006) 22 suggests the ICC intervention was "applauded" in Ituri because the judicial system was seen as ineffective, biased and "subject to political interference".
[1063] Seils (n1037) 74.
[1064] Supra n975.
[1065] Seils (n1037) 74.
[1066] OTP Report on activities 2006 (n1036) 13.
[1067] HRW Courting History (n1045) 64, a lack of sufficient investigators and resources is suggested as one reason charges were not expanded.

policy rather than evidence driven policy,[1068] although the level of resources is determined by the ASP, not the Prosecutor.[1069]

Opportunistic and pragmatic factors in decision-making seem to have outweighed the principled approach promised by the Prosecutor in relation to victims. One problem is that while "practical viability" is a valid consideration in exercising prosecutorial discretion, it may have damaging implications for other aims. Agirre suggests that practical considerations should be acknowledged clearly:

> "For the sake of transparency and fairness it is important to avoid ex post facto rationalizations that would tend to hide such practical considerations behind a customized representation of the relevant facts." [1070]

The dissonance between justifications and actual decisions has proved problematic in the Lubanga and Ntaganda cases and contributed to a sense of mistrust in the OTP's work.[1071] IRRI reports there is "much speculation, and little, clarity" in Ituri over the choice of charges in Lubanga.[1072]

The controversy regarding the relative gravity of the narrow charges has added to the confusion over the OTP's motivation. There is no doubt that the recruitment and use of child soldiers is a serious crime, and the OTP undoubtedly considered it to be extremely grave.[1073] It is included in the Rome Statute, along with a specific direction to focus on children and vulnerable victims. It is also a crime recognised by international treaty and prioritised by the UN for actions.[1074] This highlights it as a crime of concern to the international community as a whole.

However, it was not universally perceived that the use of child soldiers was one of the gravest crimes allegedly committed by Lubanga's UPC forces.[1075]

[1068] HRW Courting History (n1045) 64.
[1069] A Whiting 'Dynamic Investigative Practice at the International Criminal Court' (2013) 76 Law and Contemporary Problems 163, 175.
[1070] Agirre Aranburu 'Large-Scale Victimisation' (n1031) 162.
[1071] The Beni Declaration by Women's rights and human rights NGOs from DRC reproduced in Women's Initiatives for Gender Justice Making a Statement: Review of Charges and Prosecutions for Gender-based Crimes before the International Criminal Court (2nd ed February 2010) 21 "The participants of this seminar are surprised by the limited charges brought and feel that, if no improvements are made, these charges risk offending the victims and strengthening the growing mistrust in the work of the International Criminal Court in the DRC and in the work of the Prosecutor specifically."; P Kambale 'The ICC and Lubanga: Missed Opportunities' African Futures (16 March 2012) </African-futures/> accessed 22 January 2014 saying NGOs and victims associations questioned the Prosecutor's motives and credibility of the Court.
[1072] IRRI (n1046) 22; VRWG The Impact of the Rome Statute System on Victims and Affected Communities (22 March 2010) 11.
[1073] ICC OTP 'Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo' (17 March 2006) ICC-OTP-20060302-126-En; ICC OTP 'Child soldier charges in the first International Criminal Court case' (28 August 2006) ICC-OTP-20060828-157-En.
[1074] See http://www.child-soldiers.org/international_standards.php and REDRESS Heroes? (n1062).
[1075] Supra chapter 5.

Reports from DRC show that the OTP's insistence that it was prosecuting the most serious crimes was not reflected in local attitudes to child soldiers in local populations. Many in DRC were not even aware that the recruitment and use of child soldiers was a crime.[1076] It was a serious concern for some Iturians, but was not considered the most serious offence amongst allegations of rape, murder and torture.[1077] A 2008 population survey found that only 16.5% of those interviewed in Ituri saw child soldiers as a priority issue for prosecution against 93.4% for killings and 68.8% for rape and sexual violence.[1078]

The lack of perceived gravity of child soldier offences was a double-edged sword for the OTP. On one hand, it can add to the justification for the OTP highlighting this serious crime and fulfilling its educative role through expressive trials. On the other hand, it adds to perceptions that the OTP was not following its own criteria of selecting cases and charges based on gravity. Furthermore, it belies the rhetoric that the OTP was listening to victims and using their views to assess gravity and the main modes of victimisation. When local attitudes to crimes do not accord with international approaches, it exposes the disconnect between local social norms and the international norms promoted by the ICC.

6.1.2 Not prosecuting the gravest crimes: Sexual violence

There are two aspects to the perceived deficiencies of the OTP in charging sexual violence. The first is the failure to bring any or sufficient charges (Lubanga, Ntaganda, LRA cases); while the second concerns not providing sufficient evidence for charges to be confirmed or successfully prosecuted at trial (Mbarushimana, Bemba, Katanga, Ngudjolo).[1079] It has been suggested that there was more the OTP could have done to investigate and successfully bring charges for sexual violence, especially if more resources were directed to this end.[1080]

The deficiencies in sexual violence charges may relate to evidential difficulties in proving rape and other types of sexual violence. Obstacles include: the difficulty of gathering evidence in ongoing conflict, the complexities of witness testimony when fear and shame mean that victims "are often reluctant to testify",[1081] and the difficulty of proving sexual violence in conventional

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[1076] HRW Courting History (n1045) 64; REDRESS Heroes? (n1062) 18 and 22 "most people in DRC are unaware that recruiting and using children in hostilities is a crime under international law".

[1077] IRRI (n1046) 23.

[1078] IRRI (n1046) 22.

[1079] The PTC failed to confirm charges of sexual violence in Mbarushimana and Bemba. Katanga acquitted on charges of sexual violence, Ngudjolo acquitted on all charges including sexual violence.

[1080] P Mubalama and E Nzigire 'ICC Still Facing Rape Case Challenges (International Justice - ICC ACR Issue 300) 8 Aug 11 http://iwpr.net/report-news/icc-still-facing-rape-case-challenges accessed 23 January 2014; Glassborow (n1032); Women's Initiatives for Gender Justice Gender Report Card on the International Criminal Court 2011 (November 2011).

[1081] K Glassborow 'ICC Investigative Strategy under Fire' (IWPR ACR Issue 190 27 October 2008) <http://iwpr.net/report-news/icc-investigative-strategy-under-fire> "Former investigators agree that sexual violence crimes are extremely difficult to prove."

ways.[1082] These factors can hinder the prosecution of sexual violence in international trials, although they can be overcome with focused efforts as seen at the ad-hoc tribunals.[1083] The ICTY pursued thematic prosecutions of lower ranked individuals specifically to secure convictions on rape and other crimes of sexual violence.[1084] There may be a tension between the policy of pursuing 'those most responsible' and securing convictions for sexual violence, due to the difficulty of linking senior leaders to crimes of sexual violence.

There are signs that the OTP may be responding to the criticisms. IRRI notes that while there was "a time lag for the Court in integrating a gender perspective", there have been improvements in the OTP's approach.[1085] For example, the expanded charges against Ntaganda and the extensive charging of sexual violence in Mucadumara.[1086] However, significant efforts and amendments to strategy may yet be necessary to prosecute sexual violence crimes successfully.

6.1.3 Not prosecuting those most responsible: Government impunity

Chapter 5 identified that, while "those most responsible" among rebel leaders have been pursued for investigation and prosecution, a gap has been perceived in the same policy being applied to alleged government and government-backed perpetrators.[1087]

OTP explanations – timing and sequencing

The OTP's main stated reason for the lack of prosecutions of certain leadership groups is simply that it hasn't finished its work yet. The OTP has not formally concluded the investigation stage in any of its situations. In Uganda, it is claimed that investigations of the UPDF are still ongoing, despite circumstantial evidence to the contrary.[1088] In 2008, the OTP promised investigations and prosecutions of those organising and financing illegal violence in DRC.[1089] As of 2014, they have not yet materialised. The investigations remain open in Cote d'Ivoire and CAR, although there is little evidence of further investigation in CAR.

One explanation for these timing gaps is sequencing, adopted on the Prosecutors own initiative, a prioritisation strategy that uses comparative

[1082] Mubalama and Nzigire (n1080) citing lack of medical evidence due to victims' lack of access to medical help, victims' shame; and danger to victims' safety if they testify.
[1083] Mubalama and Nzigire (n1080).
[1084] X Agirre Aranburu 'Gravity of Crimes and Responsibility of the Suspect' in M Bergsmo (ed) Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd edition Torkel Opsahl Academic Publisher 2010) 205,; S Eliot Smith 'Inventing the laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences' (2008) 8 International Criminal Law Review 331, 343-344.
[1085] IRRI (n1046) 25-26. ICC OTP Strategic Plan June 2012-2015 (11 October 2013) this later OTP strategy document focuses on gender violence and suggests that OTP may depart from the strategy of targeting those most responsible if necessary to pursue crimes of sexual violence.
[1086] Sylvestre Mudacumura (ICC-01/04-01/12) Pre-trial <www.icc-cpi.int/>.
[1087] Supra n882.
[1088] Supra n827.
[1089] ICC OTP 'DRC: ICC Warrant of Arrest unsealed against Bosco NTAGANDA' (29 April 2008) ICC-OTP-20080429-PR311-ENG; ICC OTP 'Report to the ASP' (14 Nov 2008).

gravity to determine who should be prosecuted first.[1090] This was the reasoning behind starting with rebel groups in DRC and Uganda.[1091] Sequencing was also used to explain one-sided prosecutions in Cote d'Ivoire.[1092] Sequencing can occur naturally as suspects become available for arrest – the OTP's "principle of opportunity".[1093] The principle of opportunity may have played a part in the swift arrest of Lubanga, Katanga and Ngudjolo, all senior rebel figures who had been in DRC custody or demobilised and therefore accessible for arrest.[1094] Sequencing based on the opportunity to arrest suspects, is an inevitable reality of international investigations and a lack of enforcement power. However, the OTP have elevated sequencing to a policy that purposefully delays the investigation of certain groups based on a comparative assessment of the gravity of crimes alleged against them.

There may be valid reasons for these comparative assessments favouring government leadership groups, based on limited temporal jurisdiction of the ICC and legal technicalities in the construction of international criminal law.[1095] However, the comparative gravity test for sequencing is not the same as the sufficient gravity test needed for admissibility, as Happold has pointed out, "[t]he real issue is perhaps not whether the crimes committed by parties to a conflict are equally serious, but whether they are sufficiently serious for the Prosecutor to intervene."[1096] The OTP has defended its selection policies on the grounds of impartiality:

> "In the view of the OTP, impartiality or even-handedness does not mean "equivalence of blame" or that all groups must be prosecuted regardless of the evidence. […] impartiality may in fact require different outcomes for different groups, if some groups did not commit crimes or their crimes do not meet thresholds to warrant prosecution before the Court"[1097]

However, such justifications say nothing about what happens if all parties to a conflict have been accused of crimes that are sufficiently serious for ICC attention. Sequencing means that such groups may be treated differently, even if sufficiently serious crimes have been committed.

Previous international tribunal have tried differing approaches to safeguarding impartiality and fairness in selection, either prosecuting only one side or bringing charges against all groups to the conflict implicated in illegal violence, irrespective of comparative gravity, all of which have been

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[1090] Supra n755.
[1091] Supra n756-757.
[1092] HRW 'Côte d'Ivoire: ICC Seeking Militia Leader Government Should Clarify Stance on Surrendering or Prosecuting Him' (3 Oct 2013) http://www.hrw.org/news/2013/10/03/cote-d-ivoire-icc-seeking-militia-leader.
[1093] Supra n1037.
[1094] IRRI (n1046) 7; Kambale (n1071).
[1095] In Uganda and DRC much of the violence pre-dates the Rome Statute - HRW Courting History (n1045) 42-43; VRWG (n1072) 12; supra chapter 5.
[1096] M Happold 'The International Criminal Court and the Lord's Resistance Army' (2007) 8 *Melb.J. Int'l L.* 159, 172.
[1097] OTP Annex to policy paper (n1049) 2.

controversial.[1098] One way to address the problem of perceptions of impartiality is to bring representative cases against all those implicated in illegal violence and allow the disparity in gravity to be reflected in the charges.[1099] The OTP itself has done this in Kenya and Darfur where all the parties to the conflict implicated in illegal violence have been charged but there is a notable disparity in breadth and gravity of charges.

Sequencing has not been applied consistently. The OTP has not offered an explanation as to why sequencing was applied in Uganda, DRC and Cote d'Ivoire, and not in Kenya and Darfur. The OTP has implied that sequencing was due to stretched resources in DRC.[1100] Its reasoning only explained why certain geographical areas were chosen as priority, not why groups within those areas were also sequenced. In other situations there has been no indication as to the origin of the sequencing policy and has not been effectively justified in terms of the OTP's principles and aims. There may be certain strategic advantages for the Prosecutor in not officially making a "decision not to prosecute", to allow for greater freedom of prosecutorial discretion. Firstly, it leaves the option open to prosecute at a later date, presuming sufficient gravity. Secondly it does not completely absolve alleged offenders of blame. Finally, avoiding a formal decision not to prosecute also means oversight by the Pre-trial Chamber is not engaged.

Alternative explanations – politics and pragmatism

One problem for the OTP is that sequencing can have negative political effects on the context. HRW asserts that the OTP's sequential approach in Ituri district has had "significant negative implications in the area."[1101] According to HRW field research, the gap between arrest warrants and between arrests of alleged perpetrators from Hema and Lendu affiliated groups in Ituri has led to perceptions of selective justice by the OTP.[1102] A former senior member of the OTP has acknowledged negative perceptions caused by sequencing cases in the same area: "some perception difficulties could have been avoided if the two cases had been brought simultaneously. As a matter of prioritization this is a legitimate point."[1103] However, he also insists that such perceptions were not a factor in selection decisions; it was only the assessment of sufficient gravity that informed decisions to proceed with cases.

> "[C]ases have been brought against leaders of the rival factions of the UPC and FNI. These cases have not been brought to show that all are in some way responsible, but because on an objective analysis of the facts

[1098] Agirre Aranburu 'Large-Scale Victimisation' (n1031) 167; P Akhavan 'Justice in the Hague, Peace in the Former Yugoslavia?' (1998) 20 Hum Rts Q 737,.
[1099] Agirre Aranburu 'Large-Scale Victimisation' (n1031) 166-167; cf Akhavan 'Justice in the Hague' (n1098) 782 questions this approach asking "at what point does ethnic parity distort rather than represent the truth?".
[1100] ICC OTP 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court Informal Meeting of Legal Advisors of Ministries of Foreign Affairs' (24 Oct 2005).
[1101] HRW Making Kampala Count: Advancing the Global Fight against Impunity at the ICC review Conference (HRW May 2010) 67 and 70.
[1102] HRW Making Kampala Count (n1101) 68; HRW Unfinished Business: Closing Gaps in the Selection of ICC Cases (Sept 2011) 20.
[1103] Seils (n1037) 77.

> it was considered that FNI crimes were of sufficient gravity to merit prosecution."[1104]

Although in reality it was the assessment of relative, not sufficient, gravity that determined priorities, regardless of the effect of sequencing on victims, conflict dynamic or on perceptions of the impartiality of the ICC.

The sequencing approach also ignores the beneficial effects of one-sided prosecutions to those not prioritised for prosecution. The delegitimising effect of criminal prosecution on one side of a conflict can act to confer legitimacy on the other side and benefit them politically as their opponents lose power and support.[1105] Many observers have noted the political benefits to the DRC and Ugandan Governments of OTP interventions against their rebel enemies, and have suggested these interventions have been instrumentalised and politically manipulated.[1106] A lack of prosecutions, or a long delay, can also give an aura of innocence to those not prosecuted immediately. The OTP has had to counter claims, prevalent in Uganda, that the ICC investigation had exonerated government officials.[1107] The narrow charges in Ituri have also led to false claims regarding relative levels of responsibility for criminality between Hema and Lendu groups.[1108]

The anomalies in the effects of OTP interventions, and the lack of coherent explanation from the OTP, have allowed other explanations for OTP strategy to develop. Critics of the OTP have discerned a pattern of avoidance of confrontation with governments providing access and support to the OTP:

> "ICC practice so far demonstrates that the OTP has not gone after state officials with respect to the situations that have been 'self-referred' to it, possibly because the crimes allegedly committed by State officials were not sufficiently grave so as to warrant an ICC investigation, but probably because, when going after the state side, the OTP would

[1104] Ibid.
[1105] Supra chapter 2.
[1106] T Murithi and A Ngari (eds) The ICC and Community-level Reconciliation: In-Country Perspectives Regional Consultation Report (IJR Johannesburg 21 and 22 February 2011) 8 on the general perception that "the ICC is being utilised in a politically motivated fashion to pursue the government's opponents"; A Cassese 'The International Criminal Court five years on: Andante or Moderato?' in C Stahn and G Sluiter (eds) The Emerging Practice of the International Criminal Court (Martinus Nijhoff Publishers 2009) 21, 25 suggests the self-referring states may be using the ICC "as a means of de-legitimizing and cornering their political and military opponents." W Schabas 'Prosecutorial Discretion v Judicial Activism at the International Criminal Court' (2008) 6 JICJ 731, 753 "Self-referral was cleverly exploited by Uganda in order to isolate the rebel leaders." C Ryngaert 'The Principle of Complementarity: A means of ensuring effective international criminal justice' in C Ryngaert (ed) The Effectiveness of International Criminal Justice (Intersentia 2009) 145, 156; J Kleffner 'Auto-referrals and the complementary nature of the ICC' in C Stahn and G Sluiter (eds) The Emerging Practice of the International Criminal Court (Martinus Nijhoff Publishers 2009) 41, 41; P Clark 'Law Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda' in N Waddell and P Clark (eds) Courting Conflict?: Justice, Peace and the ICC in Africa (Royal African Society 2008) 37, 42-43 reports the widely held view in Uganda that "Museveni has instrumentalised the ICC".
[1107] Ryngaert (n1106); HRW Unfinished Business (n1102) 27.
[1108] Ibid 21.

> squander the opportunities for cooperation which it has obtained from the State."[1109]

The perception that selection decisions have been manipulated is damaging:

> "The absence of charges against government officials has given credence to the perception that the ICC is powerless to take on those on whom it must rely for its investigation. Even if the problem is one of perception rather than actual compromised independence, it has nonetheless created a profound credibility gap for the ICC."[1110]

The OTP's need for Government cooperation to facilitate investigations and arrests is perceived as a key factor driving selection strategy. This has been exacerbated by the OTP's consensual approach, particularly in DRC and Uganda. The OTP favoured a cooperative approach in DRC from the very beginning, suggesting that "a consensual division of labour could be an effective approach."[1111] Self-referrals were seen as a way of gaining cooperation and support from affected governments,[1112] but did not seem to account for situations were the governments themselves were implicated in the violence.

In Uganda, this consensual approach led to presentational mistakes that have affected perceptions of OTP impartiality and independence. The announcement of the GoU self-referral at a press conference held jointly by the ICC Prosecutor and the President of the GoU, was seen as a major political mistake and fostered negative perceptions of the Uganda investigation.[1113] The associated press release focused only on the crimes of the LRA, referring to arresting the LRA leadership and "supporting the efforts of the Ugandan authorities".[1114] It also stated that a major source of information to inform the preliminary analysis would be provided by the Government of Uganda itself.[1115] These statements were made before the preliminary examination had been completed, and despite the fact that the efforts of the Ugandan authorities to curb the LRA were considered controversial.[1116]

Statements from 2006 onwards clarified that LRA crimes and alleged UPDF crimes would be included in further analysis.[1117] However, in 2007 the Prosecutor informed the ASP that he was "seeking information from the

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[1109] Ryngaert (n1106) 152.
[1110] HRW Unfinished Business (n1102) 16.
[1111] ICC 'Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo' (Second Assembly of States Parties to the Rome Statute of the International Criminal Court 8 September 2003).
[1112] Ibid.
[1113] HRW Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda (Vol. 17, No. 12(A) September 2005) 55; T Allen Trial Justice: The International Criminal *Court and the Lord's Resistance Army* (Zed Books 2006); REDRESS Heroes? (n1062) 16.
[1114] ICC OTP 'President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC' (29 Jan 2004) ICC-20040129-44.
[1115] Ibid.
[1116] Allen (n1113) 44-52; REDRESS Heroes? (n1062).
[1117] ICC 'Sixth Diplomatic Briefing of the International Criminal Court: Compilation of Statements: The Prosecutor' (23 March 2006).

Uganda Government on alleged crimes by the UPDF."[1118] This led many to see a fait accompli in the manner of the referral and the OTP's approach to the investigation. HRW imply that there was, at best, a lack of sensitivity in the handling of state cooperation.[1119] By aligning the OTP so publicly with the Government and its approach to the conflict in northern Uganda, the Prosecutor compromised perceptions of the OTP's impartiality and independence. Based on extensive field research, HRW contends that "[c]onsiderable damage has been done to the ICC's reputation in Uganda due to these perceptions."[1120] From the beginning, the OTP has been criticised for only investigating and bringing cases related to LRA crimes and its motives in doing so were widely questioned.[1121]

The main factors that have exacerbated negative perceptions of OTP selection decisions were the OTP's approach to cooperation with implicated governments; the decision to sequence investigations and prosecutions based on comparative gravity rather than pursuing allegations of sufficient gravity simultaneously; and the lack of transparency over reasoning which has created a vacuum which other explanations have filled. These factors generated negative perceptions of what may be genuine applications of the gravity criterion. The OTP appears to have believed that ignoring contextual issues relating to the "equivalence of blame" would safeguard impartiality. In fact, ignoring the unequal political effects of this approach, without the necessary attendant transparency of reasoning behind decision-making, has actually served to damage perceptions of impartiality.

Allen submits that the OTP is "not fundamentally compromised".[1122] However, its approach to selection decisions have undermined the perceived fairness of the stated retributive criteria and allowed inevitable misperceptions over political bias to be exacerbated.

6.2 Fulfilling the promises of a 'court for victims'

The OTP has tried to fulfil its promises regarding victims. It has worked on developing outreach and victim consultation more than the Prosecutors of previous international criminal tribunals. The OTP has also managed to bring a largely representative spread of charges in many of the cases it has prepared, mainly representing the modes of victimisation and bringing some of the most responsible to account. However, when the expressed wishes of victims have

[1118] ICC 'Address to the Assembly of States Parties, Mr Luis Moreno-Ocampo, Prosecutor of the ICC' (30 November 2007) 4.
[1119] HRW Courting History (n1045) 57 on the OTP using the assistance of the Ugandan Police to conduct investigations and the necessity of using Ugandan Armed Forces for escorts due to security concerns, while some of these actions were understandable they "may exacerbate the existing negative perceptions of the ICC in Uganda".
[1120] HRW Unfinished Business (n1102) 27.
[1121] VRWG (n1072) 11 "many victim communities negatively perceived the ICC as biased because it has only issued arrest warrants against the LRA"; HRW Courting History (n1045) 42 "the prosecutor's work in Uganda is perceived by many of those in affected communities as one-sided and biased."; Clark (n1106) 42 claims ICC perceived as "one-sided and heavily politicised"; REDRESS Heroes? (n1062) 15-16.
[1122] Allen (n 1113) 101.

conflicted with other aims of the Court or practical obstacles to the Court's work, the OTP have either not been able to, or have chosen not to, prioritise its promises to victims. Several interlinking factors have contributed to a 'perfect storm' of criticism against the Prosecutor regarding the OTP's role vis-à-vis victims, a storm partly of the Prosecutor's own making. The main criticisms are that the OTP's approach to victims in implementation did not match its rhetoric regarding inclusivity, incorporating victims' views and contributing to "justice for victims" – eg victim-centred retributivism. The OTP are also accused of contributing to disillusionment and alienation of victims from the process.

6.2.1 The selectivity of international criminal justice

International criminal justice is inherently selective due to the large numbers of perpetrators, incidents and crimes involved in international criminality.[1123] It is unlikely that international tribunals will ever satisfy the desires of all stakeholders to see justice done across a situation. Victimologists recognise that victims particularly may be left unsatisfied by the representative justice that international tribunals can provide.[1124] Some of the criticisms of the OTP must be seen in light of this core truth regarding the potential for a direct relationship between international tribunals and victims. Nonetheless, some of the effects of selectivity have been exacerbated by the OTP's own actions, or inaction, in regard to victims, and its prioritisation of other concerns.

6.2.2 Raised expectations

A key factor in the perception of OTP failings regarding its victims' policies is the raised expectations of victims regarding the ICC interventions. In many areas of international intervention, need outstrips the ability to provide solace or resources. However, recognising such expectations and managing them carefully is an important part of the responsibility of international organisations. It is not necessarily feasible to completely avoid raised expectations but they can, and should, be mitigated.

The high expectations associated with the Court have been widely noted by commentators. In Ituri local activists claim "a lot was expected" from the ICC and many expressed frustration with the OTP's limited engagement with victims and affected communities.[1125] Ugandan victims have claimed that "[t]oo much expectation [was] raised about the ICC by early outreach programme" and that victims were disappointed when the limitations of the ICC's work were understood.[1126] A REDRESS report on victims' views reiterates the importance of managing expectations, particularly in relation to the ICC's mandate and "limitations".[1127] The report describes victims' raised hopes in Uganda, DRC and Colombia which have not yet been fulfilled by the Court's

[1123] Supra Chapter 2.
[1124] C Aptel 'Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the impunity gap' (2012) 10 JICJ 1357, 1371; D Taylor Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual? (Impunity Watch April 2014).
[1125] IRRI (n1046) 8 and 29.
[1126] VRWG (n1072) 8; C Tenove International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda (AfricaPortal Research Paper September 2013).
[1127] VRWG (n1072) 7 ie temporal and jurisdictional reach and lack of enforcement power.

first ten years, with "only an 'appearance' of victims being heard".[1128] Based on analysis of submissions to the ICC from the victims' legal representative in Mbarushimana, the Victims Rights Working Group (VRWG) concluded:

> "[T]he document raises questions as to the ICC's capacity to respond adequately to the high expectations of victims. In terms of protection and reparation, one can wonder whether victims' hopes are not disconnected from what the Court can offer to them. In order not to be deceiving, it will be crucial that victims are informed clearly of what they can expect"[1129]

An explanation for these raised expectations is both an excess of, and a failure of, communication. The OTP's expansive rhetoric emphasising victim-centred retributivism has already been documented.[1130] OTP statements promoted expectations of consultation and participation, and that selection decisions would be geared towards victims' wishes and interests. The OTP also claimed preventative and protective effects for its interventions, even at preliminary investigation stage.[1131] When these effects have not materialised, and investigations and prosecutions have been delayed, the hopes pinned on these claims are not fulfilled.

The failure of communication of the OTP refers to the lack of adequate explanation of the Court's limitations and the competing concerns that may make victim vindication and responding to victims wishes hard to achieve. The lack of explanations regarding delays or the non-prosecution of certain groups have led to a mistrust of the OTP's motives and the ICC in general.[1132] Those receiving clearer information report more positive feelings towards the ICC despite disappointment in its limitations.[1133] The OTP has been reticent, despite promises of transparency, to share its reasoning. This has not allowed victims to form an honest picture of the factors hindering the fulfilment of OTP policies. The OTP may not wish to be completely honest about the obstacles affecting its work, in order to preserve the deterrent effect and the perceived efficacy and legitimacy of the Court. However, such reticence also has an effect on victims in not allowing them to form a true picture of what to expect from the Court.

6.2.3 Balancing victim participation with impartiality and fairness

One criticism of the OTP has been its unwillingness to turn the rhetoric of victims' participation and consultation into reality.[1134] The submissions from the Prosecution regarding victim participation in investigation stages reveal that the OTP may have been struggling to balance its victim-centred approach

[1128] Ibid at 12, see also 9, 11-12, 13, Note that many victims also report positive effects of the ICC's involvement in terms of psychological restoration of victims.
[1129] M Colin *Victims in the Mbarushimana case call for the International Criminal Court's* Justice (VRWG 18 Oct 2011). Subsequently the PTC declined to confirm the charges in the Mbarushimana case leading to further disappointment.
[1130] Supra chapter 4 section 4.1.6.
[1131] Supra chapter 4 section 4.1.2.
[1132] Supra n1071.
[1133] Tenove (n1126).
[1134] Supra chapter 5.

with the impartiality of the Prosecutor's role and freedom of prosecutorial discretion. The OTP argued that victims' participation would be inappropriate at investigation stage because "such participation has the potential to affect the appearance of integrity and objectivity of the investigation, the expeditiousness of the proceedings, and the ability of the Prosecution to investigate and prosecute."[1135] The OTP added:

> "Allowing victim participation in the investigation of a situation introduces an external factor into the investigative process, which could be perceived to impair independence and objectivity, and to open the door for future allegations that the inquiry was subject to undue influence and bias."[1136]

Victim participation might also affect the rights of the accused to fair and impartial trial by granting victims rights that the accused does not have prior to arrest or summons.[1137] These are valid concerns and the Prosecutor is not alone in voicing them.[1138] The Rome Statute reflects this concern by mandating the judiciary to balance victims' participation against fairness to the accused and expeditious trials.

The Prosecutor also seemed concerned about his free exercise of discretion when he argued that such participation "opens the door to victims intruding into the investigation process, the exclusive province of the Prosecutor."[1139] Aptel claims the approach of the Prosecutor reveals his conception of victims as outsiders to the process.[1140] This is in line with common law approach to victims but in contrast to the inclusive messages expressed in OTP statements. However, there is a valid argument that the independence of prosecutorial discretion and the freedom needed to make viable selection and trial-management choices should be preserved.

Prosecutorial discretion implies the freedom to use personal judgement to decide between different courses of action, all of which may be legally and morally acceptable.[1141] Such decisions need to be reasoned and based on clear criteria if they are to follow justice considerations.[1142] The introduction of the

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[1135] Situation in Uganda (ICC-02/04) 'Prosecution's Reply under Rule 89(1) to the Applications for Participation of Applicants a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06 in the Uganda Situation' 28 February 2007 para 31.
[1136] Ibid para 33.
[1137] Ibid para 33.
[1138] C Jorda and J de Hemptinne 'The Status and Role of the Victim' in Cassese et al Commentary Vol I (n31) 1387; C van den Wyngaert 'Victims before the International Criminal Courts: Some views and concerns of an ICC Trial Judge' (2011) *Case W. Res. J. Int'l L.* 475,
[1139] Aptel (n1124) 1365.
[1140] Ibid 1364.
[1141] M Bergsmo and P Kruger 'Part 5. Investigation and prosecution: Article 53. Initiation of an investigation' in Trifterer O (ed) Commentary on the Rome Statute of the International *Criminal Court: Observer's notes, Article by Article* (Nomos Verlagsgesellschaft 1999) 701, 702; discretion has been described in the Oxford Companion to Law as "determining in accordance with circumstances and what seems just, right, equitable, and reasonable in those circumstances" Cited in Nsereko 'Prosecutorial Discretion before National Courts and the International Tribunals - Symposium on Prosecutorial Discretion' (2005) 3 JICJ 124, 124.
[1142] Supra n743.

subjective interests of victims into this process could be a limitation on the discretion needed to make the OTP's interventions effective and relevant to the aims of the Court. There is potential, if victims were to have a formal role in the process of investigation, case selection and aspects of prosecutorial strategy, for victims' input to be in tension with the overall aims of the Court, fair procedure, or to act counter to perceived benefits for victims themselves. This raises a fundamental tension regarding the extent to which victims can ever be at the heart of the criminal justice process in any more than a symbolic way, given its internal logic and principles of fairness to all parties. This tension highlights the lack of clarity over whether the OTP is professing to work for the objective interests of victims as externally defined (and imposed) or for the wishes and interests of victims themselves, self-defined. The rhetoric is about empowerment, inclusiveness and engagement but the logic of the process also requires defined parameters and adherence to liberal moral principles that may not accord with the immediate needs of victims, or affected populations.

6.2.*4 Balancing victims' interes*ts and competing concerns

Many OTP decisions have been in direct tension with the expressed views of victims. The main controversies over the scope of investigations and prosecutions were due to other factors in decision-making being prioritised over the aim of broadly representing victimisation. These factors can be classified into two main groups. The first being pragmatics related to responding to the availability of suspects, the enforcement powers of the OTP and practical obstacles to investigations and evidence gathering such as security on the ground, access, and the complexities of proving international crimes. The second group of factors relate to a conflict between victim-related aims and other policies of the OTP. This second group includes the policy on focused investigations, expeditious trials, and maximising cost-efficiency.

The first group of factors relates to the complexities of running investigations and prosecutions and is linked to the "practical viability" of implementing international criminal justice. In this view, the OTP has prioritised managerial goals and pragmatic factors in focusing on establishing the Court, even at the expense of coherent strategy and victim-related outcomes. Côté claims that pragmatism and the need to establish the courts as functioning effective institutions drove early prosecutorial decisions at both the ICTY and ICTR.[1143] Côté notes that early selection decisions at the ad-hoc tribunals were "taken by the Prosecutor primarily on the basis of the urgent need to prove to the international community that these first attempts at international justice after Nuremberg could work."[1144] Establishing authority and legitimacy in the eyes of the international community was key to the survival of the tribunals and their ability to achieve their penal objectives. This accords with Bassiouni's prediction of the early years of the ICC, that principle would inevitably be sacrificed for pragmatism but that the balance would eventually be restored.[1145]

[1143] L Côté 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 JICJ 162, 169.
[1144] Ibid 169.
[1145] MC Bassiouni 'Introduction' in Bassiouni The Legislative History of the International Criminal Court: Volume 1 Introduction, Analysis, and Integrated Text of the Statute, Elements

Despite the foreseen practical and political constraints on the ICC's work, Bassiouni expected that in time the ICC's "moral authority will be established, and great expectations will be realised".[1146] In this explanation, these bumps in the road can be smoothed out as the organisation grows, learns and develops.

A more fundamental problem is the basic tension between OTP policies and stated aims related to victims. There were a number of areas of OTP policy that seemed to conflict directly with victims' interests. For example, focused investigations may be directly in tension with victims' desire to see their form of suffering represented; expressive symbolic trials may be in tension with the desire for the main types of victimisation to be represented; and expedited trials and a reduced number of witnesses and victims may be in tension with broader participation. Perhaps the most crucial tension is between strategies to maximise prevention and those maximising victim vindication and victim participation.

The OTP policies had the potential from the outset to severely limit the potential for 'justice for victims'. After ten years, the verdict of some commentators was that meaningful justice had been sacrificed to expediency and pragmatism.[1147]

6.2.5 Participation and representation

Some criticism of the OTP may be due to a misconception over the relationship between the OTP and victims, and the potential role of victims in the criminal justice process. This misinterpretation was not helped by early statements implying the Prosecutor was acting on behalf of, and for the benefit primarily of, victims.[1148] The OTP discourse implied that the subjective interests of victims, as expressed by the victims themselves would animate its actions. However, the Prosecutor also claimed the most important effects of the Court are global,[1149] and emphasised the importance of building a global justice system.[1150] While claiming to take subjective views into account, the OTP has taken a global approach and served what it considers the interests of victims to be, regardless of expressed views to the contrary. This approach highlights the tension between the ICC's global focus and the local effects of its work on victims and affected populations.

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of Crimes and Rules of Procedure and Evidence (Transnational Publishers 2005) xvii, xx.

[1146] Ibid xx.

[1147] HRW Unfinished Business (n1102) 4 on meaningful justice; Clark (n1106) 41 suggesting the Prosecutor has displayed a "self-serving pragmatism rather than pragmatism geared to the need of the Congolese population".

[1148] Supra text at n701 et seq.

[1149] L Moreno-Ocampo 'Council on Foreign Relations: Keynote Address' (4 Feb 2010) 9: "The true relevance of the Court is its global impact."

[1150] L Moreno-Ocampo 'Commemoration of the 10th Anniversary of the Adoption of the Rome Statute of the International Criminal Court – Informal Meeting of the Assembly of States Parties to the Rome Statute: Statement' (17 Jul 2008) 3 "we are contributing to the creation of a global community based on respect for the law." ICC OTP 'Statement of the Deputy Prosecutor of the International Criminal Court on an Overview of situations and cases before the ICC, linked with a discussion of the recent Bashir arrest warrant' (Pretoria 15 Apr 2009) "[t]he ICC is more than a court; it is a comprehensive and global criminal justice system."

The OTP later attempted to clarify its stance regarding victims – reasserting its role representing the "international community as a whole" and its independent, impartial role. In contrast to earlier statements, the 2010 Policy *Paper on Victims' Participation*: "[t]he Prosecutor does not purport to represent and express all the views and concerns of victims; the Statute acknowledges this through the key innovation of granting victims a separate and independent voice."[1151] The paper also clarifies that establishing guilt or innocence is "an overriding interest of the international community as a whole, and of the victims specifically".[1152] This was a departure from previous statements focusing solely on the specific victims of the affected situation. This distinction also appeared in statements relating to specific investigations: "[m]ost of the victims are Libyans, but the widespread and systematic attacks against them are affecting the international community as a whole. The crimes are crimes against humanity."[1153]

The OTP has returned to the position envisaged by the Rome Statute, which delineates separate roles for prosecution and defence, with victims to be represented by their own legal representative and to have their participation controlled by the Judges, according to rules of fair process.

6.2.6 External Pressures

Given the tensions in representing victims' interests in criminal justice processes at both national and international level, the expansive rhetoric of the OTP requires explanation.

Firstly, the Prosecutor is likely to have had a genuine commitment to victim participation and inclusiveness. The OTP has shown its commitment to interpreting the Rome Statute faithfully. Due to the discretion accorded to Judges in its implementation, victim participation was always going to be worked out as the Court evolved. The developing position of the Prosecutor can be seen as part of that evolution from promises of a fully inclusive process involving victims at all stages, to a more guarded approach to clearly delineated roles, preserving the integrity of fair process and the Prosecutor's own discretion.

Another explanation for the OTP's emphasis on victims is the pressure from external bodies to be seen to be championing victims' rights and interests. Victims' advocacy groups at the Rome Conference worked hard to put victims' needs and interests on the agenda and have kept them at the forefront during the first years of operation.[1154] It is part of the founding myth of the ICC that it is the Court for victims. Key figures in the Court's establishment, such as the President of the ASP and the President of the ICC, have repeatedly referred to

[1151] ICC OTP *Policy Paper on Victims' Participation* (April 2010) 13.
[1152] Ibid 13 and 12.
[1153] ICC OTP 'Statement ICC Prosecutor Press Conference on Libya' (16 May 2011); ICC OTP 'Press statement by Ms Fatou Bensouda, Deputy Prosecutor of the International Criminal Court' (Conakry, 5 Apr 2012): "[t]his investigation is of major importance, not only for the victims, but also for the Guinean people as a whole."
[1154] Jorda and de Hemptinne (n1138) 1400.

the importance of victims in the ICC's goals.[1155] In 1998, the then UN Secretary-General stated in his opening address to the Rome Conference that an "[o]verriding interest must be that of the victims and of the international community as a whole".[1156] Kofi Annan reiterated the importance of victims at the inauguration of the Judges of the ICC in 2003.[1157] The objectives for the ICC were not discussed in detail at the Rome Conference, and there is some ambiguity in the Rome Statute, therefore, the Prosecutor may well have inferred the ICC's objectives from the general trend of statements pointing to prevention and victims as priorities for the Court.

The Prosecutor's statements on victims can be seen as an attempt to fulfil the expectations placed on the Court and to garner support in the terms used by key political and financial backers. The OTP can be seen as projecting back to its stakeholders the image they want for the Court's work, irrespective of the realities of implementation. In this way, emphasising the relationship with victims becomes part of the justifying mantra of the new Court, forestalling criticisms that criminal justice ignores the victim and offers them only a passive role in achieving redress.[1158] The ICC then becomes the central hub for all the functions necessary in the wake of mass violence - prevention, protection, victim vindication, and re-empowerment.

However, the emphasis on victims goes beyond simply reflecting back the external view of the Court's justifying rationales. Victims, as aim and rhetorical motif, are a useful abstract (and relatively non-controversial) justification for the ICC's work.[1159] The OTP has been accused of representing an idealised, abstract version of victimhood rather than real victims.[1160] This is especially useful in OTP interventions in ongoing conflict or complex political emergencies. Justice, retribution and even prevention can be loaded terms. The impartial, abstract idealised notion of the victim is a useful motif to bring a "veneer of legitimacy" to proceedings.[1161] Kendall and Nouwen see victims at the ICC as a "rhetorical construct" that serves the aims of international criminal justice more than victims themselves.[1162]

[1155] ICC 'Statement by HRH Prince Zeid Ra'ad Zeid Al-Hussein, President of the Assembly of States Parties to the Rome Statute of the International Criminal Court at the Inaugural Meeting of Judges of the International Criminal Court' (16 Jun 2003); ICC 'Address by Mr Phillippe Kirsch at Commemoration of the 10th anniversary of the adoption of the Rome Statute of the International Criminal Court' (17 July 2008).

[1156] 'Summary Records of the Plenary Meetings A/Conf.183/SR.1 Monday 15 June 1998' in Bassiouni The Legislative History (n1145) 59; UNSC The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (2004) UN doc s/2004/616 13.

[1157] 'The Secretary-General of the UN Statement to the Inaugural Meeting of Judges of the International Criminal Court' (11 March 2003) 3-4.

[1158] Criticisms levelled at the ad-hoc criminal tribunals supra chapters 1 and 2; M Goetz 'The International Criminal Court and Its Relevance to Affected Communities' in Waddell N and Clark P (eds) Courting Conflict? Justice, Peace and the ICC in Africa (Royal African Society 2008) 65.

[1159] S Kendall and S Nouwen 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (University of Cambridge Legal Studies Research Paper 24/2013 August 2013) 29.

[1160] Taylor (n1124); Kendall and Nouwen (n1159) 29.

[1161] Taylor (n1124).

[1162] Kendall and Nouwen (n1159) 27 and 29.

The question is whether the OTP has instrumentalised victims in its quest for legitimacy and support. Victims have become an abstract symbol removed from the messy, everyday, non-homogeneous, complicated group of individuals who make up the real victims of international crimes.[1163] With varying desires, political opinions, and experiences these victims are not as easy to satisfy as the abstract version of victimhood invoked by the OTP's statements.

6.3 Prioritising prevention

Chapter 5 revealed how OTP strategy and its implementation decisions largely accorded with the prevention aim emphasised in its statements. This section explains how prevention came to dominate the OTP's approach and the effect its prioritisation has had on fulfilling stated aims.

6.3.1 Consensus on prevention as justifying aim of international criminal justice

The reasons for the dominance of prevention in the OTP's aims relate partly to the precarious support for international criminal justice, the historic connection of criminal justice with prevention, and prevailing themes in international organisations – lack of resources and a preference for managerial solutions.

The original motivation for the emphasis on prevention must come from the Rome Statute. The OTP has made concerted efforts to remain faithful to the Rome Statute and contributing to prevention is one of the few penal aims directly referred to in the preamble. One reason prevention became dominant in OTP discourse and implementation relates to the perceived need to maximise impact, driven by the emphasis on cost-efficiency and by the OTP's lack of enforcement power. Maximising the effects of the OTP's work has been one way to achieve its aims for minimum resource outlay, without exposing the key weakness in the ICC process – arrests.

Another factor is the perceived need to justify the utility of the ICC under pressure from external stakeholders and commentators. Emphasising prevention reflects the priorities of many of the ICC's supporters and stakeholders. Leading members of the ASP and the UN have made comments supportive of prevention, particularly deterrence.[1164] These were echoed by leading figures in the Court's presidency[1165] and the judiciary.[1166] This emphasis

[1163] Kendall and Nouwen (n1159) 29 also suggest this.
[1164] ICC 'Statement by HRH Prince Zeid Ra'ad Zeid Al-Hussein, President of the Assembly of States Parties to the Rome Statute of the International Criminal Court at the Inaugural Meeting of Judges of the International Criminal Court' (16 Jun 2003), UN Establishment of an International Criminal Court – Overview http://untreaty.un.org/cod/icc/general/overview.html last accessed 2 Mar 2012; ICC 'The Secretary-General of the UN Statement to the Inaugural Meeting of Judges of the International Criminal Court' (11 Mar 2003) 3-4, 5. The UN have supported prevention as a main aim, UNSC The Rule of Law (n1156) 13.
[1165] P Kirsch 'Strategy meeting "Protecting the Integrity of the International Criminal Court" Parliamentarians for Global Action' (New York 22 Apr 2003) 7.
[1166] ICC Judges interpreted gravity as strengthening the goal of deterrence rather than retribution: Thomas Lubanga Dyilo (ICC-01/04-01/06) 'Decision concerning Pre-Trial

on prevention from external and internal commentators has increased during the first nine years.[1167] Academics and NGOs, crucial supporters of the ICC, have also welcomed and embraced deterrence and prevention as goals.[1168]

Financial and diplomatic support, including cooperation with governments, is fundamental to the Court's survival. Debates about the philosophical justification of punishment at national level tend to take place in academic circles and in policy debates; the need for a criminal justice system is rarely questioned. Criminal justice is the accepted response to types of wrongdoing criminalised in national law.[1169] This is not the case in international criminal law. The establishment of the ICC requires justification, not least as there has been intelligent debate questioning whether criminal justice should be the preferred response.[1170] Therefore, criminal punishment needs to be justified as the best response to mass violence, meriting the massive input of funds and political will needed by the project. International criminal justice is "competing" against other potentially valid responses to the acts characterised as international crimes; including: restorative justice, local justice, traditional justice and truth and reconciliation commissions.

To make its work relevant the OTP has linked it to the current focus on the Responsibility to Protect (R2P), which has become a rallying point for those who favouring obligations for states to intervene and protect victims, often focusing on the ICC.[1171] The Prosecutor's has asserted that R2P "is the main concept, the cornerstone of the international criminal justice system: the rule of

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Chamber I's decision of 10 February 2006 and the Incorporation of Documents in the Record of the Case against Mr Thomas Lubanga Dyilo' 24 February 2006 Annex I 'Decision on the Prosecutor's Application for a Warrant of Arrest, Article 58 (under seal)' 10 Feb 2006 para 48

[1167] ICC '"From Punishment to Prevention: Reflections on the Future of International Criminal Justice", the Wallace Wurth Memorial Lecture delivered by President Song' (14 Feb 2012) 6.

[1168] FIDH The Office of the Prosecutor of the ICC – 9 years on (FIDH Dec 2011) 29 "emphasis on crime deterrence are welcomed"; Bassiouni 'The Philosophy and Policy of International Criminal Justice' in LC Vohrah *Man's Inhumanity to Man: Essays on International law in* Honour of Antonio Cassese (Kluwer Law International 2003) 65, 125, citing deterrence as the first 'philosophical premise' of international criminal justice; M Bergsmo and P Webb 'Some Lessons for the International Criminal Court from the International Judicial Response to the Rwandan Genocide' in Clark and Kaufman After Genocide (Hurst and Co 2008) 351, 352.

[1169] Duff 'Legal Punishment' in E Zalta (ed) Stanford Encyclopedia of Philosophy (Summer 2013 Edition) <http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/> The rise in interest in restorative justice has sparked debates about alternative responses but criminal justice remains the dominant paradigm.

[1170] M Auckerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 Harv. Hum. Rts. J 39; P Hayner Unspeakable Truths: Confronting State Terror and Atrocity (Routledge 2001); M Minow Between Vengeance and Forgiveness: Facing history after genocide and mass violence (Beacon Press 1998)

[1171] L Arbour 'The responsibility to protect as a duty of care in international law and practice' (2008) 34 Review of International Studies 445; H Olasolo Essays on International Criminal Justice (Hart Publishing 2012) 1-19; M Kersten 'A Fatal Attraction? The UN Security Council and the Relationship between R2P and the ICC' <http://lse.academia.edu/MarkKersten/Papers/1616306/A_Fatal_Attraction_The_UN_Security_Council_and_the_Relationship_between_R2P_and_the_International_Criminal_Court last accessed 18 May 2012> on R2P and ICC being on the same interventionist, protection continuum; F Mégret 'ICC, R2P, and the International Community's Evolving Interventionist Toolkit' (2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933111 last accessed 18 May 2012>.

law as a protection."[1172] Both the Prosecutor and his then Deputy have made speeches advocating the ICC's role in R2P.[1173] The OTP has used the international community's own rhetoric of prevention and protection to persuade States to discharge their moral and legal obligations to the ICC. By reflecting back this prevention discourse the OTP is acting as a moral conscience to the international community to act on its own rhetoric and reinforcing its own role in achieving their aims.

The emphasis on prevention can be seen as part of a canny prosecutorial strategy to secure compliance and support from states and other international institutions, such as the UN, by reflecting their own rhetoric and priorities.[1174] Emphasising the aim of prevention, and maximising the preventative impact of the ICC's work also reflects the increasing desire for managerial solutions to international problems.[1175]

6.3.2 Prevention as cost-efficiency

Prevention may also be an attractive aim for the OTP to prioritise as it fits comfortably within the overall drive for cost-efficiency and resource-effectiveness. Prevention has become the "working ideology" of the OTP that defines and informs its strategy and decision-making,[1176] however, in turn the focus on prevention may be partly driven by resource constraints and the OTP's lack of enforcement power. Strategy appears to have been informed by the practical and political obstacles to investigating, arresting and prosecuting alleged international criminals. The strategies of making preventive statements, preliminary examinations, positive complementarity and "monitoring" to generate a deterrent effect,[1177] allows the OTP to contribute to prevention without expending precious resources. "Campaigning for prevention" becomes a way that the OTP can be seen as a useful tool for prevention, and active in preventing crimes, even when not achieving tangible results in terms of prosecutions and convictions. The OTP itself has promoted prevention as key aspect of a cost-efficient approach:

> "The contribution to the prevention of crimes considered in the Statute and highlighted in Kampala, is the most important aspect of the Court's cost efficiency. It should not be ignored."[1178]

[1172] Moreno-Ocampo 'Council on Foreign Relations' (n1149) 4.

[1173] Kersten (n1171) quotes Bensouda as saying "the Court should be seen as a tool in the R2P toolbox". See Fatou Bensouda 'R2P in 2022' at R2P The Next Decade Conference (18 Jan 2012) <http://www.stanleyfoundation.org/r2p.cfm>; L Moreno-Ocampo 'Keynote Address' at The Responsibility to Protect: Engaging America Chicago, Illinois (16 Nov 2006) "the International Criminal Court could add legitimacy to the Security Council's decision to apply the Responsibility to Protect."

[1174] UN 'Preventive Diplomacy: Delivering Results Report of the Secretary-General' (26 Aug 2011) S/2011/552.

[1175] C Stahn 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?' (2012) 25 LJIL 251, 256.

[1176] D Garland Punishment and Modern Society: A Study in Social Theory (OUP 1990) 6 describes it as the framework within which the architects and implementers of institutions justify and measure their actions.

[1177] Supra chapter 5.

[1178] L Moreno-Ocampo 'Address to the Assembly of States Parties Ninth Session of the Assembly of States Parties Speech' (6 December 2010) 7.

Prevention, therefore, has not only become the principled aim of the OTP's work and its "working ideology" that informs much of its implementations strategy it is also an important tool for political support and managerial efficiency. However, as the next chapter describes, the focus on prevention can have a distorting effect on the operational decisions of the OTP and the penal aims.

6.4 Conclusions

The main explanations for the non-fulfilment of OTP policy and strategy regarding victims and retributive criteria relate to practical constraints on its work including lack of enforcement power and the need for cooperation; the focus on cost-efficiency and the pressure for reputation and institution-building. The OTP's reticence to share its reasoning has exacerbated the negative perceptions of fairness and impartiality in selection. This, in turn, has fuelled perceptions that the OTP departed from stated policy, even when this may not have been the case. Ignoring political effects has also damaged perceptions of impartiality and generated mistrust in OTP decision-making. Penal aims have not necessarily been the primary determinants of action.

The OTP, and the design of the ICC, has not found a satisfactory way to address the obstacles to implementation identified in chapter 2, and this has affected the potential to implement its aims. OTP staff have claimed the approach in Lubanga was an "aberration",[1179] but in fact the underlying factors driving strategy in Lubanga - opportunities to obtain suspects, lack of resources for investigations and the prioritisation of prevention - have not changed. This makes such decisions likely to reoccur without a change in strategic approach, and in levels of support for enforcement. Tensions have also been revealed between the OTP's global approach and the local needs of victims and affected populations; and between the subjective interests of victims self-defined and the objective interests of victims as defined by the international community.

There has to be some leeway for prosecutorial discretion but the implementation phase of the first Prosecutor's tenure appears to be lacking in strategic direction or a coherent sense of the main objectives and appropriate priorities for the Court. While to some extent the problems encountered by the OTP in implementing its policies are part of the "working out" of the Statute and implementation strategies, a large part of the problem is the tension between aims and the different strategies needed to achieve them. A fundamental problem for the implementation of the OTP's stated penal aims is that they conflict with each other, with implementation policies and at times with the internal logic of criminal justice processes. Notwithstanding the practical obstacles to its work, the OTP would struggle to fulfil its two priorities relating to victims and prevention and remain faithful to its policies relying on retributive values and criteria.

[1179] Seils (n1037) 74-75 claims the Lubanga case was not "a departure from the criterion of gravity as the determining concept for case selection" but an "exception" due to the context.

The next chapter will return to the theory underpinning the penal aims of international criminal justice and evaluate the chosen aims and approaches to implementation of the Prosecutor in terms of effectiveness and underlying philosophy to identify ways to resolve areas of tension and appropriate ways to address the confusion in rationales and strategy evidenced so far.

Chapter 7

Evaluating OTP penal aims: tensions between law-in-theory and law-in-action

This thesis has charted the development of the penal aims of international criminal justice from the first institutions, through the 1990s revival, to the permanent International Criminal Court. The focus of these institutions has developed from States and aggressive war, through reconciliation, to ending impunity and empowering victims. The link with the maintenance of peace and security remains, but is now, at best, a secondary aim, or a long-term effect of criminal trials. While ending impunity and 'justice' itself (ie retributive justice) have an importance in later manifestations of international criminal justice, it is the twin goals of prevention and recognising victims that have assumed a new prominence. The complexities of implementing these goals have been exposed in the OTP's efforts to implement its own policies and aims. There continues to be a lack of consensus over the ideal or actual role of international criminal justice in situations of mass violence and a wide range of aims and benefits are being promoted. This has led to confusion in implementation strategies and disappointment for stakeholders, particularly victims.

This chapter returns to penal theory to examine what the development of the rationales by the OTP in its discourse and implementation may mean for its penal aims and for the ICC itself. To what extent are these aims conflicting, achievable and appropriate for the ICC? To what extent might they be fulfilled? And what impact might the emphasis on these aims have on perceptions of the ICC and international criminal justice as a whole?

7.1 Tensions between aims: looking forwards and backwards at the same time

The experience of the OTP when prioritising cases and perpetrators for selection highlights complexities in attempting to serve its multiple aims. There are some fundamental tensions between policies aimed at managerial efficiency and expedited trials and the desire of victims for a full and fair hearing of their experiences. There are tensions between the global focus of international criminal justice serving the international community and the rule of international law and the local focus of specific victims and the need to strengthen local laws, norms and justice processes.

The key tension is between the OTP's two primary rationales of victim-centred retributivism and consequentialist-based prevention. Retributivism is essentially backwards–looking, basing decisions about prosecution and punishment on the seriousness of the crime, desert of the offender, culpability and the harm caused. The victim-centred approach and theories of victim vindication through expressive condemnation centre around the key themes of recognising the wrong and the harm done to the victim; re-establishing the value of the victim through authoritative condemnation and disavowal of the

wrong; and re-empowering the victim through recognition of the 'fact' and 'wrongness' of their suffering.[1180] These ends are achieved through impartial fact-finding and the imposition of punishment following fair process. It is only criminal justice processes that can provide the authoritative disavowal that comes from punishment and provide a rigorous process for proving the 'fact' of the victims' suffering.

This is reflected in the OTP's justificatory discourse on interventions. Victims' participation acknowledges a (part-)'ownership' over the harms done to them and their value in the process.[1181] The focus is on accountability for what has actually been done, not the harm to victims as a pretext for punishment in order to achieve other aims. While some might see these 'benefits' for victims as an outcome-oriented approach, it is still the fact of the victims' suffering that justifies punishment and determines its application, not the extent to which future benefits may accrue.

Consequentialist theories of criminal justice such as prevention, deterrence, incapacitation and even moral education are based on the idea that prosecution and punishment are justified by a future good or benefit, typically aimed at those not directly associated with the original crimes. Successful prosecution and punishment are then contingent on a beneficial outcome,[1182] either for humanity or society as a whole, or for specific hypothetical future victims or affected societies. It is not a moral response to the harms or wrongs done to the victims per se. The past acts become an entry point that allows punishment for future unknown events, harms and wrongs.[1183] This approach does not value those involved in the past events or harms, but simply uses them as a means to control future events.

Without rehearsing the enduring philosophical controversies over the merits of the main penal philosophies, if the OTP's priorities are fundamentally in conflict, either one will in reality take precedence over the other, or other factors will weigh into calculations. There is potential, then, for a lack of transparency over exactly what is being done through the justice process. This can foster a lack of trust in decision-making, disappointment and undermine expressive goals. There are mixed theories that suggest that both deontological and consequentialist aims can be achieved through criminal justice, but such theories subordinate the consequentialist preventative aspect of prosecution and punishment to the retributive, censuring function.[1184] The second flows from the first only if the moral response to wrongdoing of censuring punishment is carried out proportionately and fairly. Roberts recognises the value of moral

[1180] Supra Chapter 3.
[1181] Cf S Marshall and RA Duff 'Criminalization and Sharing Wrongs' (1998) 11 Can J. L. and Jurisprudence 7.
[1182] RA Duff and D Garland 'Introduction' in in Duff and Garland (eds) A Reader on Punishment (OUP 1994).
[1183] A Haque 'Group Violence and Group Vengeance: Toward a retributivist theory of international criminal law' (2005) 9 Buffalo Criminal law Review 273, 284; at 288 if one doesn't see violations or wrongs as part of the moral justification for punishment it implies that "the desert of the offender is not a reason to punish, but merely an enabling condition that empowers consequentialist reasons to justify punishment."
[1184] A Von Hirsch Censure and Sanction (OUP 1993).

pluralism in penal aims while reiterating the primary importance of retaining retributive values in the process.[1185]

The tension between these two main rationales is particularly acute in selection decisions. The Prosecutor has had to choose between a number of 'deserving' situations and cases. While he identified comparative gravity, a primarily retributive criterion related to the nature of the crimes, as the primary method of choosing between situations and cases that are admissible to the Court, he included prevention in the assessment of gravity. Such a future-oriented goal can undermine the purported focus on victims, and justify decisions that do not fit with the retributive basis of the gravity assessment. As Aukerman contends: "[r]etributive theory cannot support a form of prosecutorial selection that excuses more serious past crimes in order to address less serious current ones."[1186]

The question remains to what extent criminal justice can serve either aim effectively at international level. This discussion began in chapter 2 with the analysis of the penal rationales in the reality of the context of international criminal justice. This chapter analyses the OTP's penal aims in light of the first phase of implementation. Key issues relate to the extent retributive principles were upheld in implementation; the impact of the OTP's emphasis on consequentialist aims and issues regarding effectiveness; and, the tensions in attempting to implement the victim-centred approach promoted by the OTP.

7.2 Retributive justice

Retributive justice is the core aim of the process outlined in the Rome Statute and, to a lesser extent, was reflected in the OTP rhetoric and policies. In the implementation phase, the OTP's approach to prevention and cooperation has militated against achieving retributive goals and may have damaged this key function of the ICC's work.

7.2.1 Combating Impunity

The main goal of the ICC according to the Rome Statute is to end impunity. This is the primary goal of the institution and it is to be achieved through criminal trial and punishment. Impunity is the essential vice that the ICC seeks to address. From impunity springs a host of evils, including further violence, disempowered victims, and a sense of moral outrage that crimes have been perpetrated without accountability. There is a sense in which allowing atrocities to happen without response or condemnation diminishes us all as human beings. The OTP has not addressed the concept of impunity with the same fervour as it has shown for prevention and victims. This is particularly notable in cases of crimes whose perpetrators have historically enjoyed significant impunity, leading to further criminality and greater suffering of their victims.

[1185] P Roberts 'Subjects, Objects, and Values in Criminal Adjudication' in Duff, Farmer, Marshall and Tadros (eds) The Trial on Trial Volume 2: Judgment and Calling to Account (Hart Publishing 2006) 37, 59 on moral pluralism.

[1186] M Aukerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' 15 Harvard Human Rights Journal (2002) 39, 62.

The historic impunity of such perpetrators ought to make their prosecution a priority for an institution whose main aim is to end impunity. Focusing mainly on rebel crimes, in the cases of Uganda and DRC, where there is a willingness to prosecute those crimes nationally, does not address areas of noted impunity. The ICC's focus on impunity and complementarity reflect the importance placed on ensuring crimes are prosecuted and punished. The OTP has not had a clear strategy for the promised division of labour with national authorities to combat impunity, nor focused on areas where impunity is more likely and where the ICC could therefore contribute tangibly to promoting international criminal justice.

7.2.2 Selectivity and selection criteria

The selectivity of international criminal justice has been identified as a potential problem for retributive justice in that it undermines the universalist messages of justice and fairness (to all) and the moral messages it purports to communicate regarding the principle that all wrongdoing deserves censure and punishment.[1187] One way to combat this is to develop and share transparent criteria and apply them consistently.

Deviations from stated selection criteria, inevitable owing to the practical obstacles to the OTP's work or the legal limitations on its jurisdiction, need to be clearly reasoned. The OTP has failed to share its reasoning and by so-doing has not allowed public debate over the fairness of the application (or non-application) of its selection criteria. There will often be disagreement over the exercise of the Prosecutor's judgement in relation to defining gravity and in judging whether cases are viable for prosecution. As a former OTP staff member suggests, the OTP need not fear such discussions if the criteria have been applied "genuinely and faithfully".[1188] In fact, such discussions can advance both the definition and understanding of the gravity criteria and the priorities of the ICC, international community and the affected populations. Transparency can help with credibility and also serve as a standard for accountability to which the OTP can be held.[1189]

7.2.3 Gravity of crimes and proportionality

Given the seriousness of the crimes at issue in international criminal justice, one criticism of retributive justice has been that punishment can never be truly proportionate to such atrocities.[1190] The riposte to this is that there is still value in the expressive condemnation implicit in punishment, even if the comparative gravity to ordinary crime cannot be represented. The narrow charges in the first cases to reach sentencing stage at the ICC have been problematic for perceptions of proportionality at the ICC. The sentences handed down by the

[1187] Supra chapter 3 s2.2.2.
[1188] P Seils 'The Selection and Prioritization of Cases by the Office of the Prosecutor of the International Criminal Court' in M Bergsmo (ed) Criteria for Prioritizing and Selecting Core International Crimes Cases (2nd ed, Torkel Opsahl Academic Publisher, 2010) 78.
[1189] A Marsten Danner Prosecutorial Discretion and Legitimacy (13 June 2005 The Hague Guest Lecture Series of the ICC OTP) 512; C Angermaier 'Essential Qualities of Prioritization Criteria' in M Bergsmo (ed) Criteria for Prioritizing and Selecting Core International Crimes Cases (2010 2nd edition Torkel Opsahl Academic Publisher) 201.
[1190] Supra chapter 2.

ICC so far hardly reflect the gravity of the atrocities that have taken place, even if they are proportionate to the crimes for which these individuals were tried and convicted. The fact that the OTP could only manage to secure convictions for a minimal number of crimes resulting in a comparatively short sentences, implies incompetence on the part of the OTP. The ICC risks becoming seen as irrelevant, prosecuting around the margins rather than confronting the totality of mass violence.

The "expressive moment" of criminal justice is in a fair trial and imposition of proportionate punishment. The disparity in penal sanction being imposed between those being prosecuted in international processes and those at domestic level has been seen to distort expressive messages about relative gravity and guilt for the atrocities.[1191] The Court can convict only on the evidence before it. The failing here is in the lack of successful prosecutions and the selection of suspects who lack sufficient responsibility for the alleged crimes to merit higher sentences.

The disparity between these sentences and the scale of the violence and suffering of victims can be addressed in time by more ICC prosecutions and complementary national processes of accountability. Deficient national prosecutions may imply a greater need for international criminal justice, but while the Rome Statute promotes justice as necessary in the face of such violence, there does not yet seem to be a strategy for ascertaining which approach is needed and how to ensure that justice is served, through national or international means.

7.3 Consequentialist aims: prevention and peace

Despite the value identified in retributive principles, the OTP discourse has tied the value of the Court and indications of its effectiveness to the prevention of ongoing and future crime. This threatens to undermine key condemnatory messages from the process. There are threshold moral objections to consequentialist approaches; the associated penal aims also face practical obstacles to implementation.

7.3.1 *Prevention: Overreaching the OTP's ability to implement its own* objectives

There are undoubtedly potential preventative impacts of international criminal justice, including the work of the ICC. This is acknowledged even by those who may not advocate prevention as a morally appropriate or effective goal for criminal justice systems: "a system of deterrent punishments will deter at least some potential offenders from at least some offences."[1192] If certain conditions prevail, prevention may be an outcome of prosecution and punishment. There are several preconditions to creating a deterrent effect or generating positive prevention. These include enforcement power, normative/moral power, clear

[1191] L Dickinson 'The Promise of Hybrid Courts' 97 AJIL (2003) 295, 300; A Cassese 'The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality' in Romano, Noellkamper and Kleffner (eds) Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo and Cambodia (OUP 2004) 3, 6.
[1192] RA Duff Punishment, Communication and Community (OUP 2001) 5.

messages regarding the likelihood of arrest and punishment, and clarity over the behaviours that will trigger a criminal justice response.[1193]

It would need a detailed empirical study to gauge the actual effectiveness of the ICC's impact on prevention. The following analysis does not aim to prove or disprove the claim that the ICC is already having a discernible impact on prevention. There are anecdotal reports of preventative successes,[1194] although there is also evidence that some ICC interventions have had little impact.[1195] However, there are certain theoretical indications of likely effectiveness that can be drawn from theories of prevention. There are two main elements of this discussion. The first concerns the enforcement power needed to generate the realistic threat of arrest and punishment necessary for deterrence and the actual arrests needed for physical incapacitation. The second refers to the moral power and legitimacy that are needed to reinforce positive prevention and lend credibility to the political incapacitation promoted by the OTP.

Enforcement power

Much of the OTP's interpretation of prevention relies on an immediate preventative impact in deterring or incapacitating perpetrators. This presupposes a realistic threat of apprehending suspects for trial. The ICC has already encountered problems with the enforcement of arrest warrants and an inability to obtain suspects. This is a barrier to the most basic prerequisites for deterrence and incapacitation.[1196] Whole swathes of existing or potential perpetrators may perceive that the ICC does not have the power to reach them, at this stage, and possibly never will.

In 2009, the Prosecutor observed that:

> "In our countries, the Congress, the Police, the Prosecutors and the Courts are the basic institutions to establish law and order. The Rome Statute is building the same idea internationally: Judicial institutions are created to contribute to prevent and manage massive violence."[1197]

Yet the key component of these basic judicial institutions, the Police, is missing in the international structure. The lack of a reliable police force and

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[1193] Supra chapter 2.

[1194] N Grono 'The deterrent effect of the ICC on the commission of international crimes by government leaders' ICG 5 Oct 2012 http://www.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.aspx reporting anecdotal evidence that the ICC may have modified the behaviour of potential perpetrators; IRIN 'Analysis: Jury still out on ICC trials in DRC' (19 Jan 2011) http://www.irinnews.org/printreport.aspx?ReportID=91672 "anecdotal evidence suggests that at least some Congolese rebels voiced concern or modified their behaviour out of fear of being indicted and prosecuted by the ICC."

[1195] M Kersten 'The ICC in the Central African Republic: The Death of Deterrence?' (Justice in Conflict 11 Dec 2013) http://justiceinconflict.org/2013/12/11/the-icc-in-the-central-african-republic-the-death-of-deterrence/ in CAR there have been reports of child soldiers and debates as to whether the violence may constitute genocide; DRC violence has continued despite long involvement of ICC; LRA has moved locus of action from northern Uganda to neighbouring states.

[1196] Supra chapter 2.

[1197] L Moreno-Ocampo 'Council on Foreign Relations: Keynote Address' (4 Feb 2010) 2.

therefore the ability to carry out basic police functions seriously undermines many aspects of prevention. The OTP has tried to encourage states to fulfil their enforcement role, but to little effect. State sovereignty remains the prevailing power dynamic at international level. Delmas-Marty points out that "the ICC is weakened by a policy that remains dominated by a sovereign model, despite operating in a legal framework with universal aspiration."[1198] The implied immediate preventive effect of the ICC in stopping the violence or preventing a recurrence of violence is likely to be limited given its current structure.

The first nine years of the OTP's operation have highlighted other aspects of the enforcement conundrum. The selection choices of the OTP in its first cases have reinforced the perception that the ICC lacks power when faced with sovereign governments controlling access to sites of criminality and suspects. Ostensibly, OTP policy to prosecute "those most responsible" within a situation would contribute to deterrence as it targets the most deterrable class of perpetrator whilst sending a symbolic message to lower-level perpetrators.[1199] However, there have been two problems with this policy in implementation. Firstly, there has been a lack of prosecutions (or even public investigations) against both the DRC and Ugandan Governments and the lack of a convincing reasoned explanation as to why they have not been pursued by the OTP (valid arguments for non-prosecution notwithstanding). The lacuna in prosecutions of governments in certain situations has contributed to damaging suspicions that non-prosecution was based on the OTP's need for cooperation with investigation and arrest of rebel suspects.[1200] This perception of the limited extent of the OTP's enforcement power undermines the deterrent effect of the ICC, particularly for those potential perpetrators under the protection of Governments.

Secondly, when the OTP has initiated prosecutions against powerful government figures, including sitting heads of state (Sudan, Kenya), it has either been impossible to bring those government figures to account at the ICC (Sudan) or the OTP has been unable to gather evidence or witnesses willing to testify against them, leading to the collapse of cases (Kenya). The OTP's attempts to speak truth to power have highlighted both the lack of enforcement power of the ICC and the unwillingness, or inability, of other States and the international community to facilitate enforcement of ICC arrest warrants.

Significant deterrent effect or effective incapacitation will only be achieved if the international community supports the ICC's work through effective enforcement. Recognising this, the OTP have expended much effort to exhort States parties to act on its behalf and fulfil their duties to the ICC.[1201] In this way, the OTP acts as moral conscience to the international community, encouraging them to act on the principles they have promoted through the establishment of the ICC. However, without this support and its consistent and

[1198] M Delmas-Marty 'Ambiguities and Lacunae: The ICC Ten Years On' (2013) 11 JICJ 553, 555.
[1199] Supra chapter 2.
[1200] Supra chapter 6.
[1201] Supra chapter 5.

impartial application, then the deterrent power of the ICC will be weak and likely to diminish further over time.

The small number of prosecutions in each situation is also problematic. Recognising that the ICC is offering symbolic justice that needs to be complemented by national prosecutions and accountability initiatives, the question that arises is: how much is enough? How many symbolic prosecutions in each situation will achieve the aims of the Court? This question is not easily answered. In theory, deterrent messages will be undermined by a minimal number of prosecutions that give a rational actor the impression that there is a fair chance of escaping justice. That is not to say that the existence and potential for the ICC to act may not feature at all as a factor in potential offender's cost-benefit analysis in any conflict scenario.[1202] Arrest or prosecution just may not be a real enough prospect to deter.

The strategy of coverage over depth, prosecuting a very small number of perpetrators in each situation but covering all the situations presented to the OTP, may be inescapable owing to the Rome Statute mandate. However, in some situations it is clear that prosecuting one or two perpetrators will not be enough for ICC prosecutions to figure in a rational calculation of actions. This is particularly so in the absence of national accountability mechanisms. The CAR situation, is an example of how a single prosecution, without parallel initiatives, can do little in terms of deterrence.

There is no magic number of prosecutions that will produce preventative effects, but it is likely that more than one or two prosecutions from one side of a conflict will be necessary to have any kind of impact. The ICTY prosecuted 161 individuals across the countries of the former Yugoslavia for a period of criminality covering at least ten years. The ICTR prosecuted seventy-five individuals covering a period of twelve months, combined with a concerted national effort at complementary prosecutions. The SCSL had a more limited scope, prosecuting ten individuals for criminality covering crimes after 2006, but all sides were represented and the trials were accompanied by a structured TRC process. Compare this to the limited number of prosecutions by the ICC in its seven situations since 2002 (in the period covered by this thesis) and a combined death toll reaching into the hundreds of thousands.

As a permanent institution, the OTP has time to address the disparity in coverage if it chooses to expand the number of prosecutions in each situation. However, such an expansion will be severely hampered by the limited resources of the Court. The OTP is already balancing scant resources and will continue to have to manage large caseloads and a limited budget. International financial support is not endless; and the sheer scale of the task of international criminal justice means the budget may never fit the task. However, the question is whether the ASP and other funders have provided the OTP with adequate resources to prosecute a sufficiently representative and wide spread of alleged perpetrators to generate the desired preventative effect?[1203] The Prosecutor has

[1202] As suggested by N Grono (n1194).

[1203] A Whiting 'Dynamic Investigative Practice at the International Criminal Court' (2013) 76 Law and Contemporary Problems 163, questions the commitment of the international

already indicated that a lack of resources may stall the sequenced prosecutions in the Cote d'Ivoire situation.[1204] Even were the ASP to address the funding deficit, there are other factors that militate against achieving significant deterrent and preventative effects.

Moral/normative power and legitimacy

All theories of prevention rely to some extent on the normative power and perceived legitimacy of the punishing agent.[1205] Legitimacy is vital for positive prevention and the long-term educative and normative effects of criminal law. The fact that the ICC lacks practical enforcement power to achieve deterrence or incapacitation makes positive prevention a more credible aim for the Court, and one that is currently popular in theories of international criminal justice.[1206] While the OTP has recognised the potential for moral education and positive prevention as an outcome for the ICC, its emphasis has been largely on immediate deterrence. However, even the secondary aim of prevention through moral education is threatened if the normative power of the ICC to be a moral educator is undermined by a perceived lack of impartiality or a politicisation of the process.

Several factors have endangered the ICC's position as a morally legitimate punishing authority including: the perceived manipulation of the selection criteria to favour cooperating governments, and the perception that the OTP has been instrumentalised for national political gains.[1207] These perceptions fuel the idea that the ICC is just as politically contingent as previous incarnations of international criminal justice. This political contingency relates to who is selected for prosecution, and which suspects are made available for arrest. Furthermore, the referral of situations by the UNSC entrenches selective judicialisation of sites of criminality according to power politics in the Security Council. The contrast between the referral of Darfur and Libya and the refusal to refer alleged criminality in Syria is stark.

The perception of politicised and compromised justice has been exacerbated by the loose rhetoric of the OTP which has blurred the distinction between crimes of war (aggression) and crimes in war (war crimes, genocide and crimes against humanity). The exhortations of the OTP in public statements to stop conflicts, and to curtail the actions of certain rebel groups has given the impression that it is concerned with the conflicts themselves rather than specific behaviours of individuals within those conflicts. Coupled with OTP statements regarding its role in conflict management and as a tool for conflict resolution, this approach undermines claims to impartiality and insulation from political and conflict aims.

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community to the ICC given the scarcity of resources and political support. Note that the ICC OTP Strategic Plan June 2012 – 2015 (11 October 2013) makes generating more resources for the OTP's work a priority.

[1204] HRW 'Côte d'Ivoire: ICC Seeking Militia Leader Government Should Clarify Stance on Surrendering or Prosecuting Him' (3 Oct 2013) http://www.hrw.org/news/2013/10/03/cote-d-ivoire-icc-seeking-militia-leader.

[1205] Supra chapter 2 n331.

[1206] Supra chapter 2.

[1207] Supra chapter 6.

Given the pragmatic barriers to enforcement, the normative power of the ICC to affect positive prevention has greater potential. As long as the impartiality and political independence of the OTP, and implicitly the ICC, is not compromised. So far, the OTP's track-record on maintaining perceptions of impartiality is not very good. Increased information on selection decisions, sharing reasoning behind non-selection and being more honest about the obstacles to prosecutions could help enhance perceptions of independence and impartiality. However, the fundamental obstacles to enforcement may continue to hamper this key penal aim of the OTP.

7.3.2 The expressive moment of criminal justice

The OTP have focused its implementation of prevention in its interpretation of the expressive function of criminal justice. This informed the publications of preliminary examinations, efforts towards positive complementarity and the opening of a number of investigations followed by a minimal number of prosecutions.[1208] Merely "monitoring" activities was assumed to have deterrent effects.

Such an approach is in danger of "putting the cart before the horse" in deterrent terms. While there will always be an initial deterrent effect created by the establishment of a new institution to enforce criminal law, if this is not followed up with prosecutions and punishments, the initial deterrent effect will soon dissipate. It is the communicative power of punishment that underpins theories of the expressive function of law.[1209] Verbally condemning an act is not enough to communicate the censure implicit in punishment : "[c]ondemnatory pronouncements that carry no consequence initially may cultivate a norm, in time, however, chronic non-enforcement will strip the articulated norm of the moral authority on which effective criminal law depends."[1210] It is the fulfilment of the criminal justice process from investigation through to trial and punishment that communicates penal messages. Rhetoric alone is not an adequate substitute for action to fulfil the expressive functions of criminal justice.

Numerous international organisations and NGOs already condemn mass atrocities and international crimes with varying levels of authority. There is no added value to the OTP adding its voice to these advocacy and condemnatory discourses. A senior OTP analyst has questioned the appropriateness of advocacy by international criminal courts and tribunals:

> "[T]he logic of the investigation may differ from the logic of advocacy of social movements and others that may accompany the allegations. Those focused on affecting public opinion, such as the media or non-governmental organizations (NGOs), need to communicate clearly the

[1208] Supra Chapters 5 and 6.

[1209] J Feinberg 'The Expressive Function of Punishment' in in Duff and Garland (eds) A Reader on Punishment (OUP 1994) and I Primoratz 'Punishment as Language' (1989) 64 Philosophy 187 affirming that it is punishment that marks out certain behaviours as particularly serious and expresses the condemnation of society beyond mere words or other sanctions.

[1210] D Aman 'Group Mentality, Expressivism and Genocide' (2002) 2 International Criminal Law Review 93, 120.

> gravity of the crime and the urgent need to act. Those focusing on establishing the truth in accordance with due process will need a more impartial and rigorous handling of the facts."[1211]

The added value of the ICC, in other words, is its ability to impose sanctions based on the authoritative legitimacy of independent, fair process.[1212]

The OTP has issued statements and threats to those contravening international criminal law but is often unable to reinforce those statements with concrete action in the form of prosecutions and punishments. This is partly due to an inability to arrest suspects or the unwillingness or inability to pursue certain groups within situations. It is also partly due to the sheer number of situations in which the OTP is involved and insufficient resources to cover even a minimum of representative prosecutions in each. The lack of 'action' in such cases may then express, not the messages of censure and deterrence envisaged by the OTP, but a message of continued impunity for perpetrators and impotence on the part of the ICC.

A mis-reading of the expressive moment of criminal justice may also have contributed to the OTP's Lubanga strategy. The OTP tactic, of attempting to include sexual violence in the trial through its statements rather than amending the charges and adducing relevant evidence,[1213] reveals a fundamental misunderstanding of the expressive power of punishment. Despite the attempts to express condemnation or reflect experiences of sexual violence "by the back-door", victims continued to demand charges, prosecution and punishment on the basis of the actual crimes they had suffered. It was not considered satisfactory merely to pay lip-service to condemning sexual violence; it needed to be censured officially through trial and punishment.[1214]

7.3.3 Maximising prevention

The OTP's approach to maximising prevention at preliminary examination and investigation stages may also reflect an overestimation of the initial deterrent effect of ICC intervention and a misjudgement as to the appropriate moment for maximising prevention. This is seen, firstly, in the OTP's policy of positive complementarity, and secondly, in its firm belief in a pre-existing preventative effect.

I have argued that the OTP has put efforts into maximising an effect that has not yet been generated with a significant number of prosecutions. It is a valid, pluralist, penality to wish to maximise a positive effect of criminal trials and punishments. However, it must be done 'after', or there will be little or no prevention to maximise. Moreover, the OTP's involvement in this agenda is dubious. The job of the OTP is not to maximise prevention or even to prevent crimes but to end impunity, through the investigation and prosecution of

[1211] X Agirre Aranburu 'Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases' 23 LJIL (2010) 609, 612.
[1212] The content of legitimacy, actual or perceived, is worthy of a thesis of its own – in this case legitimacy comes from the authority of the punisher and the perceived fairness of the process.
[1213] Supra chapter 5.
[1214] Supra chapter 5.

international crimes that are not being adequately investigated and prosecuted nationally. The OTP needs to enforce the criminal law and provide examples of justice and retributive punishment that can then be used by others to generate a preventative effect. Prevention may then be generated in the long-term by the consistent enforcement of criminal law through demonstrably fair, impartial process.

7.3.4 Emphasising prevention, ineffectiveness and consequences

In many ways, the ICC's institutional design has locked it into pre-existing obstacles to effective prevention in international criminal justice. These barriers may prevent the OTP fulfilling its own stated objectives, risking a loss of faith in the international criminal justice project on its own terms and denying other routes to effective prevention. It also invites assessment of the ICC on a cost-benefit basis that may not be appropriate to an institution of this nature.[1215]

Exaggeration of the ICC's potential for prevention by the OTP may foster overblown expectations and false hopes that an ICC intervention will deliver on prevention of crimes and peace, in terms of removing alleged perpetrators and stopping ongoing violence. The OTP has emphasised prevention as its goal to the point where this has become the main standard by which the OTP, and implicitly the ICC, may be judged. Prevention is a worthy and widely supported aim. However, its importance as a goal for the international community and affected nation states should not cloud judgements as to the extent of the ICC's effectiveness in this area. Lack of tangible achievements may expose the ICC and the OTP to criticism by the standards of their own rhetoric, which is unnecessarily skewed towards prevention. Such criticisms can erode the very moral authority which is essential to achieve the long-term goals of the Court, including prevention.

A further risk of emphasising deterrence and prevention is that referring situations to the ICC to achieve these goals may deflect from "real action" that would be more effective in preventing or stopping international crimes. Given a blank slate, criminal justice would not be the first choice to achieve the aim of prevention or the immediate protection of civilians. This relates to the "action reason" function of international criminal justice.[1216] Referring situations to the ICC can act to salve the conscience of those who might otherwise be moved to act more effectively.[1217] It gives the appearance of something having been done while not requiring actual engagement on the part of States. While the ICC can act as moral conscience to the international community, exerting moral pressure to bring those identified as perpetrators to justice, it can also be a replacement for other more financially and politically costly action such as military intervention.

[1215] C Stahn 'Faith and Facts' (n1175) 264-265 "it is evident that not all goals of international criminal justice can be fully quantified into concrete indicators and measurable outcomes."

[1216] M Drumbl 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2005) 99 Northwestern University Law Review 539; RA Duff and D Garland 'Introduction: thinking about punishment' in Duff and Garland (n1209) 33.

[1217] Anonymous 'II. The Promises of International Prosecution' (2001) 114 Harv. L. Rev. 1957, 1977-1978; supra chapter 2.

A further consequence of the emphasis on prevention in OTP discourse, and in the discourse of its supporters and funders, is what might be called "false incentivisation" or a distortion in the operational aims and motivations of the OTP. The prevention agenda may skew the perceived operational aims of the OTP away from its core functions of prosecution and punishment, towards prevention in general.

7.3.5 Peace and conflict-related outcomes

The OTP's attitude to issues of peace and security has been mixed and somewhat confusing. While on the one hand, the OTP has remained faithful to principles of impartiality and independence and disavowed any interest in political or "peace" outcomes. On the other hand, the OTP has tried to claim a positive and immediate effect on conflict resolution.[1218] This implies both a level of protection for victims and impact on the conflicts that stretches credulity given the reality of the ICC's enforcement power and the OTP's selection strategy.

The OTP's lack of clarity in relation to affecting conflict outcomes has led to perceptions of a lack of impartiality and a politicisation of the justice process, whether consciously or unwittingly. This perception of events is damaging to the perceived legitimacy of the OTP, which diminishes the value of its pronouncements against certain sides in the conflict. The value of the ICC as an impartial arbiter of truth and justice will be compromised if it becomes just another political actor such as States, the UN, or NGOs. Negative effects on the long-term conflict-related outcomes (and the penal aims in general) might include damaging the potential contribution of the ICC's judgments to truth and reconciliation and rebuilding the rule of law.

OTP selection decisions have done nothing to mitigate the negative effects of the inevitably narrow legal histories created by criminal justice institutions. This not only neglects the victims of their crimes, but implies innocence for groups widely implicated in the violence.[1219] This has the power to fuel tensions between groups and empower one set of actors and victims over another. It does little to dampen the desire for vengeance of groups whose victims have been ignored and implicitly denied by the OTP selection choices. These partial histories also do little to encourage reconciliation or facilitate local initiatives to build on the Court's work for reconciliation efforts.

This is not to suggest that the OTP should have adopted truth and reconciliation as a key aim of its work. However, it could have been more mindful of the political effects of its activities. A greater awareness of context and the consequences of its work could have avoided the problems in Ituri. The OTP's strategies of sequencing and the choice of suspects and charges exacerbated, rather than mitigated, the negative political effects of its work. It is possible to take into account the conflict context and consequences within the bounds of a fair retributive process based on clear criteria. This approach

[1218] Supra chapter 5.
[1219] Supra chapter 6.

should have been applied more consistently across situations. The situation in Uganda paints a different picture. If it was clear to the Prosecutor that his selection criteria might result in only one side of a conflict being prosecuted, action to forestall and counteract negative perceptions could have been taken. As it was, the approach and rhetoric aligning the OTP with a discredited government itself implicated in international crimes only exacerbated the perceptions and the mistrust of the OTP, and by implication the ICC.

Association of the ICC with conflict outcomes raises expectations of the ICC's ability to have an immediate impact on the conflict. These hopes are unlikely to be fulfilled in any meaningful way leading to discrediting of the ICC in the eyes of affected populations and those providing funds and political support. This is damaging to its legitimacy, and may lead to withdrawal of support from those who have misunderstood its mandate or potential impact on peace. Furthermore, linking the ICC's effectiveness to conflict aims can make justice contingent on its political or peace outcomes, devaluing justice as an outcome itself and allowing it to be turned on and off as it is convenient for different actors. This could engender unacceptable manipulation of the justice process and inconsistencies in the application of justice.

The drive for a conflict resolution role for the ICC can be linked to the "action-reason", or diverting function, of international criminal justice,[1220] reassuring concerned electorates that something is being done particularly where previous inaction may have contributed to the atrocities at issue.[1221] The ICC becomes a symbol not only of the international community's efforts to prevent crimes but to address the conflicts that have caused outrage across the world. Tallgren summarises the attitudes to international criminal justice thus: "[e]verybody knows that prevention does not work […] everybody knows, but the knowledge has no consequences.[1222]

The best hope for the ICC and international criminal justice to have an impact on peace and security is through the long-term effect of justice, fairly and consistently applied affecting the legal, normative and social context from which conflicts arise. Its scope is too limited and narrow to be able to encompass all the factors that contribute to complex conflicts. Long-term peace-building rests on considerations that have little to do with criminal justice. As respected conflict mediator Martti Ahtisaari neatly encapsulates:

> "Crime and human rights violation emerge from causes deeply embedded in the structure of societies – poverty, deprivation, social injustice. When courts deal with massive human rights violation arising in connection with civil conflict, they are considering only the visible surface of underlying social problems. Criminal law, however effective, cannot replace the social policies needed to combat deprivation and

[1220] I Tallgren 'The Sensibility and Sense of International Criminal Law' 13 European Journal of International Law (2002) 561 whose analysis of the international system concludes that it cannot fulfil the aims set but does fulfil a kind of diverting function for the complicity of western states in atrocities.
[1221] Drumbl 'Collective Violence' (n1216); R Zacklin 'The Failings of Ad hoc International Tribunals' 2 JICJ. (2004) 541, 542.
[1222] Tallgren (n1220) 590.

> social injustice. The recent attention to developing a functioning international criminal justice system has to be warmly welcomed, but it should be accompanied by efficient international policies and structures to deal with those root causes."[1223]

Criminal justice is not expected to solve all the ills of society or all forms of conflict in social lives at national level. It certainly should not be expected to do so at the international level.

7.3.6 Emphasising prevention and peace: the corrosive effect of consequentialism

Objections to the emphasis on prevention can be made on more fundamental moral grounds. A misplaced focus on the consequentialist aim of prevention through punishment of individuals may negate the main expressive messages regarding moral and legal wrongs and affect victim vindication, as well as other important dimensions of censure and moral education. These arguments go beyond the basic criticisms of consequentialism, that it does not respect an individual's autonomy[1224] or procedural due process.[1225] These threshold objections imply that consequentialist aims such as deterrence and incapacitation may be undesirable as aims for an international criminal justice system.[1226] Emphasising prevention clouds the messages that are central to achieving the main aims of retributivist punishment such as censure, condemnation and victim vindication. Emphasising prevention can erode the intrinsic value of dispensing justice and valuing victims. It can also affect perceptions of the fairness of the process and justice of the outcome, by including considerations not associated with the culpability of the offender or actual harm suffered by victims.[1227] Having prevention as a central goal, obscures key expressive messages regarding the moral worth of individual.

Retributive theories engage with victims and offenders as moral agents worthy of value. This is an intrinsic part of their expressive function. Firstly, retributivism relates to the victim in terms of recognising the wrong perpetrated against them, reaffirming victims' rights, thereby to some extent restoring the moral worth of the victim. It is therefore owed to the victim to respond with condemnation and punishment to the wrongs committed against them. There is

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[1223] M Ahtisaari 'Justice and accountability: Local or international?' in R Thakur From Sovereign Impunity to International Accountability: The search for justice in a world of states (UN University Press 2004) xii, xv.

[1224] R A Duff 'Penal Communications: Recent work in the philosophy of punishment' (1996) Crime and Punishment 1, 9 objections to consequentialism include that it doesn't treat the guilty "with the respect that is their due as rational, responsible moral agents".

[1225] Ibid 6 claims consequentialism is criticised for failing to see persons as individuals with moral value or the importance of individual rights protecting us from "being sacrificed to social utility".

[1226] D Saxon 'The Legitimacy and Limits of "incapacitation": A response to Carsten Stahn' The Hague Justice Portal http://www.haguejusticeportal.net/Docs/Commentaries%20PDF/Saxon_The%20Legitimacy%20and%20Limits%20of%20Incapacitation_EN.pdf questions the appropriateness of 'political' incapacitation as an aim for international criminal justice.

[1227] J Mendez 'The Importance of Justice in Securing Peace' Document submitted to ICC Review Conference of the Roma Statute, Kampala, 31 May – 11 June 2010' (30 May 2010) 7.

a parallel duty owed to the offender to communicate this moral wrongness to give the offender a chance to internalise this wrong,[1228] to avoid treating the offender as a means to an end rather than an end of value in him- or herself.[1229] This is particularly pertinent where one of the main messages underpinning international criminal justice is the value of human beings and the sanctity of life and physical integrity. Prevention, and affecting conflict outcomes, as OTP goals undermine this message by making social utility the main motivation for prosecution and punishment, rather than valuing the individuals concerned and their rights.

Censure and victim vindication rely on the criminal justice process expressing messages about the moral wrongs inherent in the crimes committed and acknowledging these acts as wrong.[1230] This is one reason why selective prosecution is problematic for criminal justice as it "detracts from the likelihood that individuals will perceive offences as indubitably criminal".[1231] Messages may also become confused if selection is not based on the wrongness of the act but in order to affect some desired future outcome – be that preventing future crimes or affecting conflict outcomes. In that case, the offender is being censured in order to achieve some further aim, and not because of the wrong or harm of criminality. Messages about the nature of the wrong, and value of those wronged, consequently become diluted or even drowned out altogether.[1232]

If the OTP, and the ICC, continue to emphasise prevention as their primary objectives and underplay the moral wrongfulness of international criminality, they will not communicate appropriately censuring messages related to the crimes committed. The expressive function of the criminal justice process will not be served and the project will fail on its fundamental purpose.

7.4 Tensions in the relationship of the ICC to victims

7.4.1 Evaluating the consequences of OTP decision-making for victims

There have undoubtedly been benefits to victims from OTP interventions. These benefits include shining a light on events in situation countries, recognising the wrongs done and the harms to victims, and showing that the international community cares and is willing to act on their behalf. Anecdotal evidence suggests that "both participating and non-participating victims may feel that criminal and civil legal judgments acknowledge their suffering and condemn the abuses perpetrated against them. [..] trials can benefit victims

[1228] J Hampton 'The Moral Education Theory of Punishment' (1984) 13 Philosophy and Public Affairs 208.
[1229] A Von Hirsch Censure and Sanctions (OUP 1993).
[1230] RA Duff and D Garland "Preface: Feinberg J 'The Expressive Function of Punishment' in Duff and Garland (n1209) 71.
[1231] Anonymous 'II. The Promises of International Prosecution' (2001) 114 Harv. L Rev. 1957, 1964 n42.
[1232] P Roberts and N McMillan 'For Criminology in International Criminal Justice' 1 JICJ (2003) 315, 332 "It defies credulity to suggest that the subtleties of retributive justice are being conveyed effectively".

whose societies discourage discussion of the atrocities they suffered, by breaking the social silence that isolates them and denies their experience."[1233]

However, the manner of implementation and the decision-making of the OTP, along with the gap between the promises to victims and the reality of implementation, has militated against some of the victim-focused functions of criminal justice. The problem for the OTP is that, despite having expressed many positive messages regarding victim value and promising empowerment, its actions may have been disempowering and reinforced a sense of helplessness and a lack of victim value when faced with competing concerns and priorities.

Victims' disempowerment is partly attributable to inflated expectations of a meaningful role in identifying the main modes of victimisation and seeing their wishes reflected in selection strategies. Despite consultation and gathering victims' views, the OTP ignored victims' expressed wishes.[1234] This attitude not only denies opportunities for empowerment but highlights victims' general powerlessness in the process. Furthermore, if trials are seen as mechanisms for securing 'other' future-oriented aims, such as preventing electoral violence in other countries (as seen in Kenya), this only reinforces the sense that victims are pawns in a bigger political game, and that their suffering and experiences are not intrinsically important.

A consequence of narrow or selective charging can be negative messages expressed regarding the value or worth of the groups of victims who are left out.[1235] Ignoring certain crimes can be equated with a denial of victims' experiences. O'Connell contends that "insufficient trials"[1236] can have damaging impacts on victims' perceptions of wider attitudes towards the crimes against them:

> "Even partial victories may sometimes do more psychological harm than good. Guilty verdicts on only lesser charges, such as negligent treatment of a prisoner, may feel to survivors like a denial of the horrors the defendant has perpetrated, such as torture."[1237]

For example, the impact of the omission of sexual crimes in a conflict where sexual violence was one of its defining characteristics has been further marginalisation and stigmatisation of victims and undermining the importance of norms against sexual violence and the protection of women and girls. [1238]

[1233] J O'Connell 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 Harvard International Law Journal 295, 300; VRWG (n1072) 23.
[1234] Supra chapter 5 and 6.
[1235] Supra chapter 2 [Aptel].
[1236] O'Connell (n1233) 326 raises an important point regarding raised expectations in seeing "failed or insufficient trials as psychologically harmful", this can affect those who participate or not in trials.
[1237] O'Connell (n1233) 326.
[1238] VRWG The Impact of the Rome Statute System on Victims and Affected Communities (22 March 2010) 22 in DRC has increased awareness and reduced marginalisation of victims, at 23-24 about breaking social stigma of sexual violence.

This can also be true in instances of victimisation by government authorities. Such victims are historically less likely to find redress and may be particularly in need of recognition, due to the nature of state crime increasing the sense of powerlessness for victims. O'Connell notes the particular effects of torture and other forms of state violence on victims, such as fear, isolation, feelings of abandonment and loss of control and power.[1239] These effects can be exacerbated by the silence and lack of acknowledgment of society about what happened, that come with impunity.[1240]

However, a Prosecutor weighing the potential effect on victims in his decision-making, must also consider the effects of proceeding with insufficient evidence and the risk of failing to secure convictions. Failed cases can be damaging to victim vindication, especially after expectations have been raised: "[t]here is some evidence that failed trials or civil suits may cause survivors psychological distress that they would not have suffered if their hopes had never risen."[1241] This highlights the complexities facing the Prosecutor, given his limited resources and the extent of the criminality in these situations. The OTP must take into account the practical viability of a case to avoid the damage of failed cases and narrow charges can be one way to increase the chances of a conviction. Choosing to apply narrow charges to try to ensure a successful trial may result in limited opportunities for victim vindication. However, attempting more expansive trials, which carry a greater potential for charges to fail and the potential for long drawn out trials may be perceived as unfair on both victims and accused.

Faithful adherence to policies of pursuing the most serious crimes, those most responsible and attempting to represent the main modes of victimisation may have done more to enhance the psychological benefits of criminal trials for victims. While the actual experiences of many victims may not have been reflected, the type of criminality would have been condemned and punished, reducing the negative effects of selective symbolism.

The symbolic nature of international criminal justice can benefit victims if it reinforces key messages regarding victim value. Certain aspects of the prosecutorial approach may have diluted messages about the intrinsic worth of the victim and the implicit messages of international criminal law that violence against civilians for political aims is intrinsically wrong. This dilution is caused by the prioritisation of prevention and pragmatism over representing victimisation and the perception that politics was a factor in selection.

When the wrong done to victims becomes merely an entry point to achieve other aims, as in thematic prosecutions, this may be interpreted as diminishing the worth of those who have suffered. The choice to highlight crimes relating to the recruitment and use of child soldiers has been credited with increasing knowledge of this crime, affecting practices worldwide and thereby protecting potential child victims. However, such thematic prosecutions can erode messages of worth regarding the immediate existing victims of crimes in the

[1239] O'Connell (n1233).
[1240] Ibid 295.
[1241] Ibid 326.

affected locality. Annan has recognised the risks inherent in instrumentalising international criminal justice.[1242] While punishment does express certain messages regarding wrongs and societal attitudes to such wrong, attempting to manipulate the process to achieve these outcomes may be self-defeating. Osiel claims that the more a trial is designed to educate and convey moralising messages, the less it is likely to be perceived as legitimate.[1243]

Manipulation of the process to achieve other outcomes may undermine the fundamental messages that individuals have intrinsic worth and cannot be sacrificed to broader political or social goods. To achieve consistency of message and maintain fidelity to fundamental values, international criminal justice also has to uphold this principle. As Duff observes, if we truly want to respect and protect certain values then we need to employ methods that also respect those values.[1244] That the process is as important as the intended outcomes is reflected in Goldstone's reported claim that "the success of international courts should not be measured by the number of convictions, but by the fairness of the trials."[1245]

Choosing to continue with prosecutions against the wishes of victims reflects an objective view of victims' critical interests. The danger here is that the Court is sending mixed messages, on the one hand extolling victims' central role in motivating and directing the Court's work, yet on the other hand, when victims' wishes do not coincide with the retributive justice imperatives of the ICC Statute or the preference for prevention, these wishes are over-ridden. Little suggests that, as with domestic violence prosecutions at national level, there may be reasons to over-ride individual victims' wishes in order to condemn wrongs.[1246] However, even if there are valid reasons to do so, this should be clearly explained in order not to undermine the primary messages communicating victims' importance.

A recurrent criticism of the ICC is that it represents a form of neo-colonialism, the imposition of western values and forms of justice on communities who do not wish for it, particularly in the context of African traditional practices.[1247] While this argument has many debateable facets, it resonates as a critique unless the Court can credibly claim to be working on behalf of the victims themselves, or at least in conjunction with the desires of affected societies. By associating the ICC with positive responses to victims' desire for justice, the OTP can strengthen its moral position and counter allegations of neo-colonialism. However, this justification collapses if the ICC is then seen not to be acting for victims in any direct tangible sense.

[1242] Aman (n1210).
[1243] M Osiel Mass Atrocity, Collective Memory and the Law (Transaction Publishers 1997) 65 citing Ball and Harriman
[1244] Duff 'Penal Communications' (n1224)18.
[1245] Cited by C Stahn 'Between "Faith" and "Facts": By What Standards Should We Assess International Criminal Justice?' (2012) 25 LJIL 251, 267.
[1246] A Little 'Balancing Accountability and Victim Autonomy at the International Criminal Court' (2007) 38 *Geo. J. Int'l. L.* 363, 396-7; Duff 'Legal Punishment' (n1169).
[1247] Supra chapter 2.

7.4.2 Risks of the OTP Approach

The Court's supporters have taken the new approach to victim participation signalled in the Rome Statute and elevated it to unprecedented levels of victim focus and importance. This is echoed in the OTP's rhetoric implying that it was victims' subjective views that would inform and drive OTP assessments and decision. In reality, the OTP opposed victim intrusion on its decision-making and tightly controlled its influence. Victims' interests were actually perceived objectively, in terms of the benefits that would stem from prosecutions. Alternative options proposed by victims could not be accommodated. Furthermore, when victims' subjective or objective interests were in tension with practical considerations, the Prosecutor chose institution-building and pragmatics over victim vindication. While these may well have been the right choices for the ICC's aims to end impunity, prosecute those responsible for the most serious crimes, and build the rule of international law, those choices did not always accord with victims' immediate interests.

There is a limit to what can be achieved for victims through the selective, limited focus of the ICC. One view is that the ICC could never be a victims' court in the way implied in the OTP rhetoric.[1248] It is distant, selective, global in its outlook and mainly symbolic in intention. The Court can contribute to condemnation and vindication, but only in a generic symbolic way; and the messages it communicates can then be utilised by national processes to make them more meaningful. The criticisms of the OTP for not "serving victims" or not providing "meaningful justice"[1249] are misplaced, since it was not designed to serve those ends. The Prosecutor's expansive discourse has contributed to a distorted picture of the role of the Court.

Furthermore, this expansive rhetoric establishes false parameters by which the ICC will be judged, and the portrayal of the ICC as the victims' champion crowds out other initiatives that may provide more appropriate forums for victims to tell their stories; for reconciliation; and for re-empowerment. Victims are not all passively waiting for the ICC to provide solace. Some may seek their own remedies.[1250] While international criminal justice has a unique role to play in condemning wrongs through trial and punishment, victims' interests may be better served through local trials, truth commissions, reconciliation projects and other accountability measures. Psycho-social and economic help may also be needed. The tendency to feel that something has been done for victims can reduce the momentum for further initiatives. Conversely, enhanced international attention generated by an ICC intervention can bring greater efforts to address the wider range of victims' needs and highlight forgotten conflicts and forgotten victims. The onus is on the international community to build on the work of the ICC to provide the services that victims need in a timely manner, including supporting local accountability initiatives where appropriate. Creating the ICC was only the beginning of the solution to mass violence, not the solution itself.

[1248] M Rauschenbach and D Scalia 'Victims and international criminal justice: a vexed question?' International Review of the Red Cross (Vol 90, No 870 June 2008).
[1249] Supra chapter 6.
[1250] E Baines 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda' (2007) 1 The International Journal of Transitional Justice 91.

7.4.3 *What should the ICC's* relationship with victims be?

Beyond the specifics of the OTP's approach, there remains a lack of clarity in international criminal justice in general over the potential role of, and desired outcomes for, victims of international trials. Even if the Prosecutor had not emphasised victims as central to the ICC's work, confusion lingers over whether victims should be a central justification for international criminal justice and the extent to which outcomes for victims should guide decision-making.

There is a paucity of research over the consequences of various responses for victims.[1251] Advocacy groups often argue for greater involvement for victims and control over processes. Other research indicates victims do not necessarily want control of processes, but do want recognition, often simply in the form of information and open channels of communication.[1252] Victims in different contexts may want radically different things.[1253] Furthermore, approaches to accountability may change according to other factors like personal security, desire for reparations, or levels of stigma. More research is undoubtedly needed as to what victims want, what their needs are and how best to serve those needs.[1254]

The traditional precepts of justice requiring impartiality, fairness and proportionality have tended to favour replacing private self-help redress with public administration: "Criminal justice procedures are intended to turn hot vengeance into cool, impartial justice. … [They] interpose rationality, reflection, circumspection, balance and collective group interests as a brake upon the unrestrained expression of individual emotions."[1255] Criminal justice consciously recognises the objective needs of victims and eschews their subjective desires, be they vengeful or forgiving.[1256] At a fundamental level, criminal justice is a managed, imposed response to crimes which very specifically does not depend on the victims' wishes, as seen in prosecution of domestic violence at national level.[1257] It is not just for the good of the victim that prosecutions go ahead, but for "society" as a whole, to uphold the moral values implicit in the criminal law and for a general desire for justice that victims presumptively share.

[1251] J-A Wemmers 'Victims' rights and the International Criminal Court: perception within the court regarding the victims' right to participate' (2010) LJIL 629, 640-641; D Taylor Victim Participation in Transitional Justice Mechanisms: Real Power or Empty Ritual? (Impunity Watch April 2014) 19.

[1252] Wemmers (n1251) 641.

[1253] C Tenove International Justice for Victims? Assessing the International Criminal Court from the Perspective of Victims in Kenya and Uganda (AfricaPortal Research Paper September 2013).

[1254] Taylor (n1251) 29.

[1255] N MacCormick and D Garland 'Sovereign States and Vengeful Victims: The Problem of the Right to Punish' in A Ashworth and M Wasik (eds) Fundamentals of Sentencing Theory (Clarendon Press 1998) 11, 26.

[1256] J Gardner 'Crime: in Proportion and in Perspective' in Ashworth and Wasik (n1255) 31-52.

[1257] RA Duff 'Legal Punishment' in E Zalta (ed) Stanford Encyclopedia of Philosophy (Summer 2013 Edition) <http://plato.stanford.edu/archives/sum2013/entries/legal-punishment/> engages the domestic violence analogy to describe why wrongs inherent in criminal law are not the same as 'conflicts' to be resolved and should be addressed by a public impartial body and not left to the individuals involved, victims and perpetrators, to resolve.

There is an important public element to a prosecutor's role. This recognises that while the harm has indeed been perpetrated against an individual (or multiple individuals) it is also a crime against society more generally and, quite literally in international criminal law, against humanity. International crimes tend to do severe harm to the social fabric and affect the individual victim and the community "both physically and in terms of identity".[1258] Prosecutors act in the public good and for impartial justice. Before the ICC, there was little suggestion that institutions of criminal justice systems were set up to primarily serve the needs of victims. Victim satisfaction or vindication were partial justifications, but subordinate to the desire to satisfy humanity in general, to address a sense of moral wrongness and to satisfy a basic human desire for corrective justice by the constituencies of powerful nations with the means and the will to create such institutions for political and moral reasons of their own.[1259]

This global focus of international criminal justice and the ICC may be in tension with the local focus and needs of victims and affected populations. The global approach serves an abstract concept of victimhood that does not always accord with the needs and wishes of existing, actual victims and the context within which they exist. It is this abstract version of victimhood that is invoked in the repeated justificatory references of the OTP to justice for victims.[1260] Taylor claims that "invoking 'victims' in the abstract by claiming that they now 'have a voice' may well have the paradoxical effect of instrumentalising , essentialising, and even disempowering victims."[1261]

The tensions highlighted in this evaluative chapter are not easy for the Prosecutor to resolve. On one hand he is bound by the internal logic of criminal trials to respect fair trials, impartiality and retributive justice and represent the abstract values of justice and the society as a whole. His role is promoting and strengthening international criminal justice and ending impunity, on a global scale. On the other hand there has been pressure to connect in a more meaningful way with local affected populations, to respect and include victims and their interests and to contextualise his responses in a more locally appropriate way. The importance of the local context is further underlined by the focus on complementarity and local responses to mass violence. The effects of, and stakeholders in, the OTP's work are both global and local.

The aims of the ICC as outlined in the Rome Statute do not explicitly prioritise victims above retributive justice or prevention. A balance must be struck between providing a measure of justice at a symbolic level and not

[1258] M Rauschenbach and D Scalia 'Victims and international criminal justice: a vexed question?' (2008) 90 International Review of the Red Cross 441, 451; see L Fletcher and H Weinstein 'Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation' (2002) 24 Human Rights Quarterly 573, 576 on the societal effects of mass violence.
[1259] Supra chapter 2.
[1260] S Kendall and S Nouwen 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' (University of Cambridge Legal Studies Research Paper 24/2013 August 2013) 28.
[1261] Taylor (n1251) 7 [footnotes omitted].

disempowering victims by ignoring their interests and desires. This raises the question of how much 'justice' is enough to contribute to victim vindication? The analysis, in chapters 5 and 6, of narrow charging, sequencing and partial coverage of perpetrators suggests that such approaches are unsatisfactory. The paucity of prosecutions is problematic in light of the limited catalytic effect of the ICC on national proceedings and accountability mechanisms. There is a need for a genuine debate over priorities for the ICC and an analysis of the consequences of prioritising prevention over retributive principles and victims' interests. The OTP needs to be honest about the extent to which it is genuinely trying to serve victims or using them as a justification for its work and assuming their objective interests. Retributive justice may best serve victim vindication, but diverse expectations need to be managed regarding the extent of "justice for victims".

7.5 The Complementarity Conundrum

The problems of selectivity, externalisation of justice and conflicting group norms can be addressed by national prosecutions and accountability mechanisms. The Rome Statute envisages that domestic accountability exercises would address the impunity gap and connect the international prosecutions to local experiences and societies. The role of national prosecutions in addressing the impunity gap is often promoted in response to criticisms of the OTP over one-sided prosecutions, partial histories, and narrow charges. The OTP cannot be expected to prosecute everyone, nor is it designed to do so. National prosecutions could, in principle, fill the impunity gap and contribute to prevention, victim vindication, rebuilding the rule of law and maintaining social cohesion. However, relying on national prosecutions denies the reality that in most of these situations the ICC intervention has not yet sparked a meaningful range of national accountability initiatives or prosecutions, particularly for perpetrators linked to the authorities. This is not to say that the OTP interventions have had no effect on national accountability or on the incorporation of international crimes into national legislation.[1262]

However, the ICC and international community have not yet addressed the issue of complementary prosecutions satisfactorily. Furthermore, the OTP does not seem to have much flexibility in its strategy to respond appropriately in situations where there is little likelihood of complementary prosecutions. There is a serious lacuna in OTP strategy relating to complementarity. This gap relates to what the OTP should do if there are no complementary proceedings at national level. There needs to be contingency planning for situations where national proceedings do not materialise. Limited prosecutions by the OTP in these situations may produce negative effects which may not be corrected by national prosecutions closing the impunity gap. It may be appropriate for the OTP to act to ensure a more representative spread of prosecutions for the sake of victim vindication, fairness and perceptions of impartiality and legitimacy. The OTP may need to take into account the reality of delays in national accountability and develop its prosecutorial strategy accordingly.

[1262] O Bekou 'Crimes at Crossroads: Incorporating International Crimes at the National Level' (2012) 10 (3) JICJ 677-691.

A related gap in OTP strategy and policy relates to the criteria for recognising when positive complementarity is not working, a problem flagged in relation to Colombia.[1263] The OTP's efforts to promote positive complementarity have been inconsistent across its interventions. It has been suggested that the most positive approach the Prosecutor can take to promoting national prosecutions would be "to have a clear and consistent line on what he expects national prosecutions to produce within a reasonable time and 'to act without fear if what he expects does not materialize'."[1264]

The final question relating to positive complementarity is whether the OTP is best placed to be promoting and running such an initiative. Positive complementarity was an innovative and creative response to limited resources and the need to address widespread instances of impunity. Questions remain over its value in instances where the governments themselves are implicated in the violence, and in cases of cross-border government criminality that the ICC may be best placed to address.[1265] However, the biggest question mark remains over the capacity of the OTP to be carrying out this role consistently with its core prosecutorial functions. It should be considered whether such diplomatic and close cooperation efforts are best placed outside the Prosecutor's office.

Complementary prosecutions at national level are unlikely to take place on an adequate scale without a massive input of resources and expert help to the affected countries. Post WWII, the Allies expended significant resources and developed a clear strategic plan to rebuild the democratic, judicial and political functions of the defeated nations of which the symbolic trials at international tribunals was only one part.[1266] Without such efforts, the idea of the ICC as catalyst is in danger of becoming another faith-based myth that has little concrete embodiment in reality. The idea that a handful of prosecutions at the ICC will spur a national process of accountability, including prosecutions of sitting authorities, seems ludicrous without a concerted plan of action to address the obstacles to such prosecutions. The international community, working through the UN, or otherwise, needs a proper strategy for catalysing and supporting such national prosecutions.

7.6 Retributive justice as the least worst option?

The themes of victims and prevention have been emphasised by the OTP to the detriment of statements regarding retributive values and punishment itself which tend to be out of favour in the terminology of the international community and associated with negative responses to wrongdoing such as vengeance.[1267] Retributive punishment, often painted as blind vengeance, has something of an image problem in comparison to the popular themes of prevention ('we are doing something practical to stop this') and victims ('we

[1263] Supra chapter 5.
[1264] Stahn 'Faith and Facts' (n1175) 277 quoting Paul Seils, former senior OTP staff member.
[1265] UN OHCHR 'Democratic Republic of Congo 1993-2003: Report of the Mapping Exercise' (OHCHR August 2010) para 83.
[1266] Supra chapter 1.
[1267] Supra s 3.1.3.

care' and 'we're not neo-colonialists'). Unfortunately both of these statements are belied by the practical realities of implementation. Implementation of victims policies express the more realistic messages of 'we only care to the extent to which your needs don't get in the way of other goals' and 'we know what's best for you'. This has been the traditional approach to victims of international tribunals and the ICC, despite all the good intentions and positive rhetoric, has not moved much further than this, although they still have the means to improve things. In terms of prevention, the actual message expressed by implementation is 'we really want to do something practical to stop this but have neither the power nor the means.' The failure of immediate prevention and protection of victims through ICC intervention is not only a disappointment for victims but exposes one of the fundamental myths of the potential role of international criminal justice.

Doing nothing in the face of mass violence is not an attractive option. Impunity has been seen as leading to worse excesses, perpetuating the damage to victims and contributing to social and political instability. The internal moral sense of humanity demands wrongs on this scale to be condemned just as they are at national level. The most effective expression of authoritative condemnation and disavowal of such crimes is through retributive punishment; through a fair process of establishing the guilt or innocence of an individual for certain crimes, followed by the imposition of proportionate punishment of those found guilty. Such condemnation may also serve the purpose of providing a sense of justice for victims by acknowledging the harm done to them, recognising their value and re-establishing their importance in society. This is a desired outcome of censure through a criminal justice system, but the process is not dependent on such an outcome. Further benefits from censure and disavowal come through the potential for authoritative verdicts to contribute to the development of legal and social norms, demonstration effects of fair process, and the long-term impacts on positive prevention. However, these are secondary effects that depend specifically on the perceived fairness and justice of the process.

Focusing on retributive justice is the only way to ensure that the process and the outcomes respect the dignity and value of all those involved. Criminal justice is not a panacea to all social ills, and must be accompanied by a raft of resource-intensive initiatives to complement and develop its outcomes. Criminal justice also can have negative political and social effects, particularly due to a narrow legal focus and selective approach. However, to paraphrase Winston Churchill's famous pronouncement on democracy: criminal justice is the worst form of response, except for all the others that have been tried. Any aspect of transitional justice taken alone will only be a partial response. The condemnatory power of retributive censure is an essential part of the response to mass atrocity. International criminal justice offers a unique method of condemning wrongs through a legitimate authoritative process, but only if it maintains its commitment to fairness and retributive principles.

The ICC has undoubtedly contributed to censure, but some of the OTP's implementation approaches have undermined it. Yet, the approach of the OTP can be corrected, it is not fatal to either its legitimacy or its aims. The OTP needs to re-focus away from consequentialist aims onto its core function of

ending impunity through the investigation and prosecution of international crimes. Its criteria for selection based on gravity generally accord with retributive principles. If the OTP had followed its own policies of pursuing the most grave crimes, those most responsible and attempting to represent modes of victimisation it may have done more to achieve its core aims and respect the dignity and value of important stakeholders, as is implicit in the Rome Statute and retributive principles. Where it is not possible to follow policies faithfully, sharing reasoning behind decision-making is an important part of generating positive perceptions of justice, and respect for stakeholders. The OTP could improve in this area too. The wider aims of international criminal justice can be supported through the consistent and fair application of criminal justice over time. The OTP also needs to be more realistic in its discourse on what it can and should achieve. Modesty and consistency would go a long way towards achieving the long-term aims of the Court.[1268] Perhaps most importantly, the OTP and the ICC need to regard and promote justice itself, in process and outcomes, as a worthy aim.

7.7 Conclusions

The rhetoric of the OTP has outstripped the intention of the Rome Statute and the reality of implementation. The effectiveness and the moral basis for prioritising deterrence and immediate prevention are questionable. The ICC has not been able to address the obstacles to deterrence in international criminal justice, and the perceptions of its inconsistency in application of the OTP's own criteria and its lack of impartiality have damaged its credibility. The over-emphasis on prevention has distorted the operational focus of the OTP away from prosecution and ending impunity, towards more general preventative actions and statements. This has marginalised the key expressive moment of the ICC, the trial and punishment of those found guilty of international crimes. It is retributive punishment that conveys the condemnation of the wrong and expresses any deterrent warning to potential future perpetrators. There has also been some confusion in the OTP's approach to peace and conflict-related aims, simultaneously eschewing and embracing a role in conflict resolution and conflict prevention. A misconceived attempt to be all things to all people has conveyed confusing messages regarding the OTP's impartiality, the nature of wrongs, and the ICC's main purpose.

In terms of victims, the Prosecutor has also over-stated his case. The relationship of the ICC to victims is mainly one of providing symbolic vindication rather than being able to directly impact on justice for individual victims, much less satisfying subjective wishes and interests. International criminal justice offers an objective approach to what may be best for an abstract version of victimhood. There is some scope for limited participation for a small number of victims, but only as long as this does not interfere with the main aim of prosecuting and punishing the guilty, according to principles of justice. The implication that the Prosecutor could or would put victims at the heart of his work is overstated. Although there has been some improvement in

[1268] Stahn 'Faith and Facts' (n1175)

communication both from and to victims, much more remains to be done if victims are to be truly respected in the process.

This chapter has argued that the ICC is not the ideal forum to address victims' needs post-violence. While prosecution can fulfil a narrow role in terms of addressing legal guilt, there are a whole raft of other needs that can and should be addressed through other initiatives. The victim-centred approach implied by the OTP is not appropriate nor possible within the logic of criminal trials. However, the "victim-conscious" approach of the Rome Statute still offers a valuable opportunity to respect victims within the parameters of a fair justice process. The OTP could improve its engagement with victims by sharing the reasoning behind its selection decisions.

It should be possible to run criminal trials whilst respecting both due process and the individuals involved. The first years of the OTP have not fully achieved this, partly owing to the distractions of politicking, an over-emphasis on prevention and immediate results, and an exaggeration of the potential role for victims. These errors in strategy and direction can be corrected, but the OTP needs help from those outside the Court who are also pushing the prevention, conflict-resolution and victim-centred agendas through the ICC.

This chapter has identified the potential for focusing more narrowly on retributive justice as the immediate aim of the Court's work. This would not only be a more realistic goal for the Court; it would also be more likely to contribute to the pluralist long-term aims and normative environment that would simultaneously appropriately value victims and make the reoccurrence of such crimes less likely. The ICC can contribute to the plurality of aims attributed to it, but only if it focuses foremost on justice, fair process and desert principles. The ICC's achievements can then be built upon by others in pursuit of the long-term goals of prevention, victim vindication, reconciliation and the maintenance of peace and security. Criminal justice has a narrow but essential role, and if allowed to fulfil it properly, it can contribute to grander ambitions.

Conclusions

Institutionalising the penal aims of international criminal justice at the ICC: where are we now and where can we go from here?

This thesis has investigated how the penal aims of the ICC were interpreted through analysis of the policies and implementation decisions of the first ICC Prosecutor. It fills a gap in academic inquiry into the penality of international criminal justice, focusing on the ICC as the central institution of an emerging global justice system. The penal aims of international criminal justice were placed in historical context, analysed in terms of theory and practice and then traced through the constitutive documents of the ICC and the policies and practice of the OTP during the first Prosecutor's tenure. Problems of over-ambitious aims, confused priorities and obstacles to effectiveness were identified. The key questions addressed concern how the main penal rationales for international criminal justice were reflected in the Rome Statute and how they were interpreted in the policies and practice of the OTP as a key decision-maker and the first main actor in the ICC process. The thesis attempts to evaluate the extent to which these aims were served by the OTP's implementation decisions, and to identify implications of the OTP's choices for the ICC and international criminal justice in general.

This concluding summary will first synthesise the key findings of the research, and then briefly consider where we should go from here, in terms of the theoretical and policy implications of this analysis. It also identifies areas of future research that might inform debates as to the direction and philosophies that should be driving the ICC and international criminal justice at large.

Where are we now?

Historically, there has been some confusion over what the aims of international criminal justice should be and how they might be achieved. The Rome Statute seemed to build on past experience by focusing mainly on retributive process; eschewing conflict related aims; and attempting to incorporate a more inclusive role for victims, thereby correcting a past imbalance. The penality of the Rome Statute is actually relatively modest. It aims at ending impunity through prosecution and criminal punishment. However, this penal agenda is not without ambiguities and there was an important role for the Prosecutor in using his discretion to resolve these appropriately.

The first ICC Prosecutor interpreted the aims of the Court expansively, focusing primarily on prevention and providing justice for victims. The discourse of the Prosecutor implied an immediate effect on prevention, conflict resolution and victim vindication that went beyond that envisaged in the Rome Statute. The OTP's interpretation reflected the main themes promoted by supporters and funders of the Court. Prevention and victims became a legitimising motif that satisfied the need for practical managerial goals and to

counter accusations of externalisation of justice from a key stakeholder – victims. Despite this focus, many policies were rooted in retributive principles or shaped by pragmatic concerns over resource and trial management and limited enforcement power.

The OTP's key aims were hard to sustain through the implementation phase. It was inconsistent in its approach to implementing promises to victims and to applying retributive criteria for selection decisions. Besides resource issues and the perennial lack of enforcement power, a particular stumbling block was the tension between prevention, the future-oriented aim that seemed to drive much of the OTP's operational strategy, and the essentially backwards-looking nature of retributive justice and victims' needs and interests. Prevention not only distorted the OTP's frame of operation but threatened to undermine the key expressive messages of human dignity and worth that underpin the other goals.

Further problems were encountered in balancing pragmatic and institutional needs and in addressing the problem of enforcement, or lack of it. The latter issue was seen to drive strategies that generated negative perceptions of the impartiality of the OTP's decision-making and thereby threatened to undermine the moral legitimacy of the ICC as the punishing agent. This in turn endangered a number of the Court's key goals and its expressive messages. Perceptions of the Court's legitimacy and credibility was a theme that repeatedly arose in terms of politicisation of the process, enforcement power, unfulfilled promises to victims and the lack of clearly articulated rationales at difficult and controversial decision points. The OTP did not always choose the wrong path. Yet its flawed presentation of the messages communicated by its approach tended to undermine its stated goals and key aims of justice.

Particular tensions were identified between the global approach demanded by international criminal justice and the OTP's prevention agenda, and the local needs of victims and affected populations. These are not new tensions. In many areas, the ICC has failed to address the critiques and obstacles to fulfilling its potential that had already been identified before its establishment, as outlined in chapter 2. These include lack of enforcement power, political contingency, externalisation of justice, threats to the moral legitimacy of institutions of international criminal justice and the proliferation and confusion of aims without clear prioritisation.

Another key tension related to the extent to which victims should be seen as central to the process, or merely another stakeholder in a process aimed at impartial justice and the public (global) good. Chapter 3 developed a continuum of victim approaches which defined the Rome Statute as supporting a "victim-conscious retributivism". The discourse of the OTP implied a victim-centred approach, whereas its implementation strategies effectively marginalised victims in favour of other aims. This generated disappointment for victims, given their raised expectations, and criticism of the OTP for not taking victims' concerns seriously enough. A more measured approach that accorded with the Rome Statute's approach would be more realistic and desirable in order for victims to be engaged in the process but for that process to remain faithful to the internal logic of judicial processes. This may not

pander to global and national trends for the increased rights of victims, but would present an honest reflection of how criminal justice can and should function in order to benefit victims in the long run through the vindicatory role of retributive punishment and respectful trial procedures.

Given the patchy history of international criminal justice before the advent of the ICC and the myriad motivations and aims attributed to it, the Rome Statute and the establishment of the ICC were remarkable achievements. The first permanent institution for the enforcement of international criminal justice promised to supersede the political contingency of the previous institutions and offered the potential for more consistent enforcement and development of international criminal law. The ICC has already contributed to the development of crimes involving the recruitment and use of child soldiers and highlighted a number of sites of international criminality that were in danger of falling below the world's radar in terms of compassion and response. The Court has made advances in recognising greater rights and an increased role for victims in international legal processes and offered hope to victims across the world that their suffering will be recognised and addressed. Furthermore, it has advanced respect for human rights and the sanctity of the individual even in the midst of extreme political turmoil. The idealistic message of the ICC is that no-one is above the law nor anyone too lowly to be defended by it. The ICC represents a moral advance for the international community and has the potential to create a consensus around protection of civilians and fair process. In short to be a genuine force for good in the world.

This is the ICC in theory or in faith. There is no doubt that some or all of the above effects can be traced back to the ICC to some extent or other. However, closer analysis of the ICC in practice tells a different version of the ICC story. The ICC undoubtedly represents a force for moral good in the world and a great advance in universalising protection and respect for the value of individuals. However, the ICC project faces great risks if not implemented according to the internal logic of justice. The approach of the first Prosecutor has encouraged the existing unrealistic portrayal of benefits and effects of international criminal justice. This not only endangers the ICC project when assessed on its own terms but undermines the key expressive messages that generate its positive effects. It has a specific purpose – justice or, more specifically, retributive justice. This can be rationalised based on its condemnatory power and normative effects. Any benefits that flow from this process are secondary, and dependent on attention to the fair process and respect for rights implicit in retributive theories. Orienting the process towards these secondary aims, such as prevention, victim vindication, peace maintenance, reconciliation or truth, risks undermining those very aims.

Where should the ICC go from here?

These criticisms are intended to be constructive. There are a number of adjustments the ICC and the OTP can make to improve their performance and credibility. The Prosecutor should rein in excessive rhetoric regarding prevention and the use of victims as a legitimating motif for action. There is more than an element of the "faith of the international lawyer" in the attitude of

the OTP,[1269] rather than a realistic plan of action to present to traumatised societies. A re-focusing of the project on justice processes and outcomes and on the retributive criteria for action as originally laid out would help settle the ICC onto more modest, realistic aims and preserve the fairness of the process. More honesty from the OTP in appraising its own shortcomings, and sharing those limitations with affected societies, may be called for in a 'grown-up' account of international criminal justice and its contribution following mass violence.[1270]

In terms of selection, the OTP must reconsider its focus on prevention and re-orient the process towards retributive criteria. For example, gravity criteria need further development and faithful implementation in practice. There is already much guidance in the Rome Statute. However, the OTP needs to reconsider its focus on prevention and ongoing criminality as a factor in assessing gravity. State-sponsored crime should be an indicator of greater gravity. The numerical approach to defining gravity and the focus on crimes against physical integrity is a good start, but the more sophisticated qualitative elements in defining gravity, such as 'abuse of power' arguments made by the OTP, do not seem to have been followed through into selection decisions.

The OTP should rethink its implementation strategy. It was justified in developing new approaches to cooperating with governments and liaising with affected communities, but it did not accompany those close relationships with strict adherence to its own criteria for decision-making nor with openness and transparency in its reasoning. The OTP has developed novel approaches, but must not lose sight of its core aims and the principles of retributive justice and fair process that should guide its work.

Discretion plays an important role in dealing with complex situations and allowing criminal justice to be context-relevant. To exercise discretion effectively there is a need for clear parameters within which to work and a shared understanding of the values and objectives that underpin the work as a whole. The importance of clarity over aims and priorities cannot be underestimated. The ICC needs to gather consensus around its objectives and priorities.[1271] The ICC needs to decide where it sits on the continuum of victim-centred to victim-conscious retributivism; what principles should guide its work; and the extent to which the prevention agenda should drive its aims.

It has been argued that prevention is not an appropriate primary aim for the Court. The ICC must focus on its core aim of ending impunity through

[1269] Stahn 'Faith and Facts' (n1245) asserting it is time for less faith, more rational examination and more honesty in self-assessment regarding the potential contribution of international criminal justice to its variously attributed goals; F Megret 'Three Dangers for the International Criminal Court' (2001) XII Finnish Yearbook of International Law 193 warning of the dangers of faith and ideology underpinning international criminal justice instead of rational honest assessment.

[1270] Stahn 'Faith and Facts' (n1245); M Drumbl Atrocity, Punishment and International Law (University Press 2007) 22 on second generation analyses.

[1271] The need to redefine aims and priorities is reflected in a series of recent articles: P Akhavan 'The Rise, and Fall, and Rise, of International Criminal Justice' (2013) 11 JICJ 527; Stahn 'Faith and Facts' (n1245).

prosecution and adhere to retributive values in order to achieve this, if it hopes to have any positive impact on general prevention. Prevention is a desirable objective but should be pursued through other means than criminal justice processes. Victim-conscious retributivism and policies that aim to maximise the positive outcomes for victims of representative trials, are legitimate but need to be implemented within the bounds of retributive principles and criteria for decision-making. Criminal justice serves society as a whole, of which victims are an important stakeholder, but their needs must be balanced fairly with the needs of justice and the 'public good'. Crucially such balancing needs to be reasoned and transparent to avoid fuelling mistrust and disillusionment. It must also be recognised that the effects of the ICC on the maintenance of peace and security, reconciliation and truth can only be partial and secondary and must not dictate strategy.

Institutional tensions and conundrums remain unresolved. Impartiality is key and can be promoted and demonstrated by adherence to clear criteria and shared reasoning, especially where decision-making must depart from advertised approaches and principles. In terms of prosecuting across conflict groups, while parity for parity's sake is not recommended, there is a case for being more sensitive to context and running prosecutions simultaneously against defendants drawn from opposing groups for whom there is sufficient evidence. Evidence and assessments of gravity and culpability must lead decisions rather than politics, either the politics of peace or pragmatic co-operation. Talking about independence and impartiality is not enough: it must be seen in the OTP's actions and reflected in its public reasoning.

A greater understanding of the expressive function of international criminal trials is needed. Expressivism has grown in popularity as a rationale for international criminal justice, especially considering the obstacles to implementation and the limitations of selectivity. However, it is not always clear what is being expressed to whom and why. Expressivism is not a stand-alone penal theory but a function of criminal trials and punishment that serves other penal aims. It needs to be infused by coherent penal theory to give it content. Little work has been done on the dissonance between intended messages and actual messages received. This is an identified area for further research and development of theories of expressive communication in international criminal justice, particularly in relation to the ICC.[1272]

There is also an urgent need to regulate the assessment and application of "positive complementarity". Encouraging national prosecutions supports the positive outcomes of criminal trials but national trials will not happen on their own, or even with the diplomatic efforts of the OTP. There may be a conflict between the OTP's role as arbiter of complementary proceedings and its engagement with attempts to spur national prosecutions. There need to be clearer strategies over when positive complementarity is engaged and when it

[1272] M deGuzman 'Choosing to Prosecute: expressive selection at the International Criminal Court' (2012) 33 Michigan Journal of International Law 265 and B Wringe 'War Crimes and Expressive Theories of Punishment: Communication or Denunciation?' (2010) 16 Res Publica 119 have begun this process, but more work is needed to understand the expressive function and what it may be communicating to whom and why.

will be replaced with OTP intervention – what criteria engage investigation and prosecution and what the OTP selection strategy will be in the absence of national proceedings. While academic literature has begun to address this gap,[1273] more work needs to be done in developing strategies and theorising the interaction between the national and the international, particularly in relation to the ICC. It has become fashionable to promote national responses based on theories of the effects of localised penality, but it is not always possible or the ideal choice. Sometimes an international intervention will be desirable. Theoretical frameworks and practical options need to be developed to guide prosecutorial discretion and inform the development of holistic responses by the international community.

International criminal justice is not a panacea for the social and political ills of the world. Supporting action is needed for prevention, policing actions may be needed for conflict, initiatives developed to support victims and the rehabilitation of societies after conflict and to ensure the maintenance of peace and security. The focus of these efforts through the ICC is potentially crowding out other initiatives, as well as damaging the credibility of the ICC. There may be a role for the ICC in catalysing national prosecutions and proactively engaging with national level judiciaries and contexts to create a series of ICC-led hybrid courts.[1274] The potential for ad-hoc tribunals has recently been revived in light of the impasse over alleged international crimes in Syria.[1275] Van den Wyngaert has advocated a separate Reparations Commission for victims.[1276] There is always the potential for Truth and Reconciliation Commissions (TRC) to function in tandem with criminal trials. A role for TRCs was proposed at the Kampala Review Conference in 2010.[1277] There are numerous initiatives to incorporate ICC elements of crimes into national legislation and judicial practice.[1278]

However, there is a responsibility to develop a more joined-up approach to spurring national prosecutions in terms of a coordinating body outside the ICC. The UN needs to play a more proactive role in coordinating the series of initiatives needed to complement international trials and to use their processes and judgements to promote secondary aims such as prevention and reconciliation. This will require money and resources. It is not clear that the international community is willing to back up its fine words with actions. This

[1273] J Iontcheva Turner 'Nationalizing International Criminal Law' (2005) 41 *Stan J Int'l L* 1: Roht-Arriaza 'Just a Bubble? Perspectives on the Enforcement of International Criminal Law by National Courts' (2013) 11 JICJ 537; Advocats Sans Frontieres (ASF) Canada The Principle of Complementarity in the Rome Statute and the Colombian Situation: A Case that *Demands More than a 'Positive' Approach* (ASF Canada 2012).
[1274] Iontcheva Turner (n1273).
[1275] Al Arabiya News 'ICC's Bensouda would support Syria Special Tribunal if ICC path is blocked' (18 May 2014) http://english.alarabiya.net/en/News/middle-east/2014/05/18/Interview-ICC-prosecutor-to-examine-alleged-British-crimes-in-Iraq-war.html accessed 10 July 2014.
[1276] C Van den Wyngaert 'Victims before International Criminal Courts: Some views and concerns of an ICC Trial Judge' (2011) 44 *Case W Res J Int'l L* 475, 495.
[1277] M Delmas-Marty 'Ambiguities and Lacunae: The International Criminal Court Ten Years on' (2013) 11 JICJ 553, 557.
[1278] ICC Legal Tools database: <http://www.legal-tools.org/en/what-are-the-icc-legal-tools/>.

is apparent in its tight strictures on the ICC budget and its inability to support arrests.

Herein lies a fundamental problem for the ICC. Despite some operational mistakes, wrong turns, excessive rhetoric and poor judgements of the first Prosecutor, the fault for conflicting policies and aims cannot entirely be laid at the OTP's door. A major problem for the ICC lies in the equivocations of its mandate and the inconsistency of its supporters. The international community pays lip service to global criminal justice, but will not pay for it. Justice following mass violence is an expensive business even in just one situation, let alone across eight situations, and let alone when faced with the myriad needs of affected societies beyond criminal justice and in order to generate the positive effects of criminal justice processes. It belies the rhetoric of support for the ICC to have a zero-growth budget for an ever expanding work load.[1279]

The international community (or to be more precise the funders and supporters of the ICC and the UN) must be more ready to provide action to facilitate arrests. The OTP, even through its diplomatic and cooperative efforts, will not be able to surmount the obstacle of sovereignty. Besides, it endangers the OTP's impartiality and normative power to be seen as weak and dependent on the very States it should be investigating. The OTP's attempts to solve the enforcement conundrum have contributed to suspicions of politicisation, and to one-sided prosecutions and narrow charges with their attendant negative effects on perceptions of justice process and outcomes. A major asset of the ICC is in 'speaking truth to power' in situations where the authorities are implicated or where violence is directed by cross-border powers. It is only with the enforcement power of States that such a role for the ICC will be possible.

Finally, the international community needs to row back from its own rhetoric and expectations of the Court and seek out alternative and more appropriate ways of achieving prevention and conflict-related aims. Victims and affected societies may need more than the limited and symbolic offerings of the ICC to recover from their experiences. Whilst there is an essential role for authoritative condemnation of international crimes, victims may wish to contribute more fully to deciding a holistic package of transitional justice. More victim-centred processes can complement the work of the ICC. Justice does not begin and end with the ICC, it is an essential but small part of the picture, albeit one with a high profile. This profile should be used to develop a meaningful response across the board, so that the ambitious hopes currently erroneously pinned on the ICC have a chance of being realised.

Final remarks*: this is not the end…*

All is not lost for international criminal justice. The ICC has disappointed many, but delighted others. It still marks a significant advance on previous frameworks for responding to mass violence. Akhavan observes that the ICC may be in the "post-romantic phase of its historical evolution", but that "against an entrenched culture of impunity, even symbolic justice, let alone

[1279] M Delmas-Marty (n1277) 555.

selective and modest prosecutions, was an unprecedented moral triumph".[1280] Its aggrandisement at its inception was bound to lead to a reassessment of the ICC's potential. The tensions and complexities highlighted by this thesis and the criticisms of particular approaches "indicate normalization rather than structural decline."[1281]

The ICC represents a potential for a new approach. The first phase of its implementation under Prosecutor Moreno-Ocampo proved to be a steep learning curve, working out a compromise agreement in the form of the Rome Statute. The OTP and the ICC have not necessarily got everything right but the very existence of the ICC and its framework for action represents the possibility that things can, and will, be done differently. If the OTP can develop and follow core principles rooted in retributive justice and procedural fairness it will be a normative force for good. The effects may not be felt immediately, but there is the potential for unprecedented long-term benefits. In the words of a Ugandan civil society member:

> "To me it seems like the ICC is in a learning process. It's like a pilot project, which will be of very little relevance today, but probably beneficial for future generations."[1282]

International criminal justice has not fallen to an existential crisis, but there is still some soul-searching to be done.

[1280] Akhavan 'The Rise and Fall' (n1271) 527-528.
[1281] F Jessberger and J Geneuss 'Down the Drain or Down to Earth? International Criminal Justice under Pressure' (2013) JICJ 11 501, 503 draw this conclusion despite "well-justified criticisms of particular events".
[1282] Tenove (n1253).

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