

Lubanga, child soldiering and the philosophy of international law

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ABSTRACT

International criminal law lacks a coherent theory suitable for its own context. This lacuna has left the International Criminal Court (ICC) – the most prominent global penal institution - without clear theoretical premise(s) to guide prosecution and punishment. In its current incarnation, international criminal law draws on Western liberal modalities founded on dominant domestic penal rationales of retribution and deterrence. However, these principles appear incongruous to the crimes the ICC prosecutes. The theoretical rationales of ICC have barely been interrogated against an extant case. In 2012, Democratic Republic of Congo (DRC) rebel leader Thomas Lubanga Dyilo became the first defendant to be convicted and jailed by the ICC for the conscription, enlistment and use of child soldiers. The use of child combatants for purposes of war is a pernicious global problem outlawed in international criminal law. However, of the crimes designated as ‘egregious,’ it has historically been under-enforced and inadequately articulated as a mass crime, and allocated lesser gravity. The seminal case of *Lubanga* provides us with a propitious opportunity, not only to locate child soldiering, but also inquire into the theoretical underpinnings of the ICC with regards to mass crime. Mass crimes are distinct from ordinary crimes. International courts charged with adjudicating them face constraints and can only prosecute a few of the suspected perpetrators. The overarching theoretical and analytic framework for this thesis is premised on the notion that international criminal law needs a plausible theory or rationale suitable for its context and crimes it prosecutes. It is important for the ICC to premise its work on a realistic rationale for it to be purposive. A more logical analysis of international penalty would draw on the conceptual underpinnings of the whole project of international law and specific features of the ICC. A good starting point is to note that international criminal justice is largely symbolic. A more plausible penal rationale would consider the inhibitions the ICC faces and the role it can still perform with regards to mass crime. The ICC symbolises contemporary standards of an ‘international community.’ It is this concept from which we can extrapolate viable rationales for ICC penology. How do the trial, conviction and punishment of Lubanga for the ‘mass crime’ of child soldiering serve the collectivist ethos of international law and society? The project that follows proposes a penal rationale that accounts for the ICC’s *sui generis* character, the nature of crimes it adjudicates and what the court can realistically achieve. The ultimate value of international criminal law may rest not in its functions of retribution or deterrence, but in its role in identity construction, in particular in constructing a cosmopolitan community identity. The overall argument for the thesis is that while retribution and deterrence are valid, the most plausible rationale for ICC penalty is the expressive function of law (expressivism). The few cases of mass crime the ICC can prosecute can achieve primarily more realistic aims of expression of global or ‘cosmopolitan’ norms, norm internalisation and the reinforcement of collectivism international law and society. *Lubanga* provides an illustrative exemplar for this argument.

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List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
AFRC	Armed Forces Revolutionary Council
ANSA	Armed non-state group
AP	Additional Protocol
CAR	Central African Republic
CDF	Civil Defence Forces
CRC	UN Convention on the Rights of the Child
DRC	Democratic Republic of Congo
ECCC	Extraordinary Chambers in the Courts of Cambodia
FPLC	Forces Patriotiques pour la libération du Congo (Patriotic Force for the Liberation of Congo)
ICC	International Criminal Court
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IHL	International Humanitarian Law
IHRL	International Human Rights Law
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
KLA	Kosovo Liberation Army
OPAC	Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict
OTP	Office of the Prosecutor
PTC	Pre-Trial Chamber
RUF	Revolutionary United Front
SCSL	Special Court for the Sierra Leone

SPSC	Special Panels for Serious Crimes in East Timor
TC	Trial Chamber
UDHR	Universal Declaration for Human Rights
UNICEF	United Nations Children's Fund
UPC	Union des Patriotes Congolais (Union of Congolese Patriots)

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CHAPTER ONE

Introduction

Following the Nazi atrocities, the trials at Nuremberg and Tokyo after the Second World War marked the birth of an international criminal law (ICL). This paradigm has focused on ‘mass atrocities’ such as war crimes, crimes against humanity, and genocide. Mass atrocities are distinct from ordinary crimes. The crimes are often considered to be a manifestation of collective pathologies and ‘structural or system criminality.’¹ These types of crime are ordinarily aided by the state bureaucracy, state functionaries and non-state actors. Nonetheless, individuals rather than states are held accountable.² The reason is that the ‘Western concept of criminal justice rejects collective responsibility and strongly emphasises individual criminal responsibility.’³ Further, while international criminal justice demarcates ordinary domestic crimes from these extraordinary crimes, its modalities of prosecution and punishment and theories mimic familiar municipal law principles. The departing point for this thesis is, thus, that ICL lacks a theory offering credible philosophical justifications for prosecution and punishment of individuals for these extraordinary mass crimes. Essentially, this thesis draws on the philosophy of international law, primarily international penology. The standard that shapes our conceptions of penology is ‘the philosophy of punishment.’⁴ Several tribunals have been established since Nuremberg and Tokyo, prosecuting and convicting individuals for mass crimes. However, philosophical justifications for the penology of these courts have been obscure or less plausible. As noted, the dominant penal rationales are retribution and deterrence. While this thesis contrasts these two to its favoured position, it also considers its proposition within the context of the whole melange of ICL goals that has since emerged. As one author observed, ‘the current views on the objectives of international criminal courts are in disarray.’⁵ One of the consequences is that the

¹A. Smeulers, ‘Punishing Enemies of All Mankind’ (2008) 21 *Leiden Journal of International Law*, 971, 971

²Ibid

³Ibid

⁴D. Garland, ‘Sociological Perspectives on Punishment’ (1991) 14 *Crime and Justice* 115

⁵M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 330

performance of international criminal courts cannot be assessed reliably.⁶

International penal objectives include incapacitation, rehabilitation, reconciliation, restoration and access for victims, among other purposes. Each of these theories may proffer some plausible justification, and their significance will vary according to the circumstances of particular cases. When deconstructed, however, the main goals of international criminal justice have been retribution and deterrence.⁷ These, as noted, derive from municipal law. A paradox arises. The crimes that international courts adjudicate are remarkably distinct from ordinary domestic crimes.

Criminologists, jurists and scholarship in international criminal justice caution against this transfer of rationales to the international plane. International criminal courts do not have the capacities to prosecute all offenders, nor can they exact sufficiently retributive punishments that also deter both the offender and potential transgressors from such mass, often passion-driven and organic crimes. This thesis focuses on the recent prosecution and punishment of Democratic Republic of Congo (DRC) rebel commander, Thomas Lubanga Dyilo (hereinafter 'Lubanga')⁸ by the International Criminal Court (ICC) for the conscription, enlistment⁹ and active use of child soldiers. Although mass criminality has often been discussed in terms of widespread killings, child soldiering¹⁰, while not always resulting in fatalities, is also a large scale activity with diffuse social and political dynamics. Agents have included state, non-state and community or/and individual social actors often driven by political and or ethnic motives. As noted, ICL approaches have been modelled on the liberal paradigm allocating individual guilt. This homogeneity has been the subject of

⁶ Ibid 330

⁷ See eg *Prosecutor v Kupreskic*, Judgment ICTY - IT-95-16-T [14 Jan. 2000] para 848; *Prosecutor v Kordić and Cerkez*, ICTY-IT-95-14/2-A [Appeals Chamber, 17 December 2004] para 1076 ('both individual [n.b. specific] and general deterrence serve as important goals of sentencing...') *Prosecutor v Popović*, ICTY-IT-05-88-T, Trial Judgment [10 June, 2010] para 2128; *Prosecutor v Lukić* IT-05-87 Trial Judgment, [20 July, 2009] para 1049; *Prosecutor v Milutinović* ICTY - IT-05-87-T, Trial Judgment [26 February 2009] para 1144; *Prosecutor v Delić* ICTY-IT-04-83-T, Trial Judgment, para 559 [ICTY 15 September, 2008]; *Prosecutor v. Milošević*, ICTY-IT-98-29/1-T, Trial Judgment, para 987; *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T Sentencing Judgment [9 October 2007] para 26, citing *Prosecutor v Aleksovisk* ICTY- IT-95-14/1-A Appeal Judgment [24 March 2000] para 185; *Prosecutor v Kambanda* ICTR-97-23-S Judgment and Sentence (TC) [4 September 1998] [Hereinafter 'Kambanda Trial Judgment'] para 28 and *Prosecutor v Nikolic* ICTY - IT-02-60/1-S Sentencing Judgment (TC) [2 December, 2003] para 86

⁸ *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 [hereinafter 'Lubanga']

⁹ Distinctions have been made between 'conscription' [coercive] and enlistment [voluntary] See Lubanga Judgment para 607, Chamber also citing R. Lee (eds.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* ((Ardsley, Transnational Publishers 2001) 205

¹⁰ In this study, I shall use 'child soldiering' or 'child soldiery' to mean the conscription, enlistment and use of children for purposes of warfare.

critique. The criticism has centred on what some scholars describe as the Western model's fixation on the individuation of guilt when such crimes involve multiple agents. The liberal model is thus deemed unsuitable for accounting for mass crime. These are valid contentions but perhaps even more difficult to effectuate. In this study, I seek to identify what the ICC can achieve from its present approaches and circumstances. The question that animates this thesis is: what is the most plausible philosophical justification for the prosecution and punishment of Lubanga by the ICC for the mass crime of child soldiering?

1.1 Background

This study attempts to make sense of the work of the ICC by examining the case of Lubanga and the criminal phenomenon of child soldiering as a reference point for the mass and core crimes the court adjudicates. The idea of establishing an effective independent international criminal court had been in the making for decades.¹¹ The establishment of the two international criminal tribunals, for the former Yugoslavia and for Rwanda, by the UN Security Council in the early 1990s and the work of these two tribunals, as well as the hybrid courts and mixed tribunals¹² which have been established since, resulted in the maturation of ICL into a putative and significant body of law. The creation of ICC through the Rome Statute of 1998 marked the zenith in the development of ICL. The Court came into effect on 1 July 2002¹³. In 2012 – 10 years after its formation - the ICC, in its very first case, convicted DRC rebel leader, Lubanga¹⁴ of the war crime of conscripting, enlisting and using child soldiers. Lubanga, a national of the DRC, was a founder of the Union des Patriotes Congolais (UPC) and served as commander-in-chief of its armed military wing, the Forces Patriotiques pour la libération du Congo (FPLC). The UPC is a rebel organization, established in 2000 and dominated by the Hema ethnic group, of which Lubanga is a member. Since the 1990s, armed conflict between governmental

¹¹ S. Anoushirvani, 'The Future of the International Criminal Court: The Long Road to Legitimacy Begins with the Trial of Thomas Lubanga Dyilo' (2010) 22 *Pace International Law Review* 213

¹² Hybrid and mixed courts have been established in Sierra Leone (2000), East Timor (2000), Kosovo (2000), Cambodia (2003) and Lebanon (2007). However, the latter has focused on cases of terrorism. Set up in 2009, its primary mandate is to hold trials for the people accused of carrying out the attack of 14 February 2005 which killed 23 people, including the former prime minister of Lebanon, Rafiq Hariri, and injured many others. For its limited mandate, this thesis does not include the Special Tribunal of Lebanon for analysis.

¹³ See the Rome Statute of the International Criminal Court., *opened for signature* 17 July, 1998, 2187 U.N.T.S. 3 [Hereinafter 'Rome Statute' or 'ICC Statute']

¹⁴ *Prosecutor v Lubanga* ICC-01/04-01/06

and rebel forces, and among rebel forces *inter se*, has been pervasive throughout the DRC - in particular, its north eastern Ituri region.¹⁵ On April 19, 2004, the DRC president referred to the ICC prosecutor (self-referral) the situation within the DRC for investigation in line with provisions of crimes of the Rome Statute establishing the court. Investigations began in June 2004. On February 10, 2006, Pre-trial Chamber I issued an arrest warrant against Lubanga. Lubanga was arrested by Congolese authorities on domestic charges relating to an attack on UN peacekeepers. Lubanga made his first appearance before that ICC on 20 March 2006. In line with procedure, a confirmation of charges hearing – to assess the prosecution case against him - was conducted in November of 2006. The Pre-Trial Chamber (PTC) issued its decision confirming the charges on 29 January 2007.¹⁶ The ICC also issued a warrant of arrest for Lubanga’s co-accused Bosco Ntaganda, former Deputy Chief of the General Staff of the FPLC, for a similar war crime.¹⁷

The trial began in 2009. Following three years of hearings, a three-judge panel found Lubanga guilty, as co-perpetrator, of ‘conscripting’ and ‘enlisting’ children under the age of fifteen years into the UPC/FPLC and ‘using’ them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) (co-perpetrator) of the Rome Statute from early September 2002 to 13 August 2003.¹⁸ Article 8(2) (e) (vii) outlaws ‘[C]onscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities.’ He was sentenced to 14 years in prison.¹⁹ On 3 October 2012, Lubanga appealed both the verdict and sentence, asking for an acquittal and annulment, or a reduction, of the sentence. On the other hand, the ICC prosecutor appealed for the sentence to be revised upwards. On 1 December 2014, the Appeals Court dismissed Lubanga’s appeal and upheld his conviction and sentence.²⁰

¹⁵See *Prosecutor v Lubanga* Decision on confirmation of charges, ICC-01/04-01106 [Pre-trial Chamber I [29 January 2007] [Hereinafter ‘Lubanga Decision on Confirmation of Charges [29 January 2007]’] para 1

¹⁶Lubanga Decision on Confirmation of Charges [29 January 2007]

¹⁷See ICC-01/04-02/06 *Prosecutor v Ntaganda*: Seven counts of war crimes: enlistment of children under the age of 15, conscription of children under the age of 15, using children under the age of 15 to participate actively in hostilities; murder, attacks against the civilian population, rape and sexual slavery, and pillaging; and three counts of crimes against humanity: murder, rape and sexual slavery, and persecution.

¹⁸See *Prosecutor v Lubanga* Sentencing Judgment ICC-01/04-01/06 [10 July 2012] [hereinafter ‘Lubanga Sentencing Judgment [10 July 2012]’] para 1358

¹⁹Ibid para 98

²⁰ See *Prosecutor v Lubanga* ‘Case Sheet’ ICC website http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20c

1.2 Argument and objectives of thesis

The prosecution and punishment of Lubanga was regarded as a milestone. However, for some time some scholars have asked questions on the justifications of prosecution of international criminals²¹ and the legitimacy of international tribunals.²² The ICC, as now the foremost global criminal court, has not escaped these crucial questions. Some authors suggest that an important focus would examine the broader criteria for assessing its impact, while others posit that the true test of the ICC's success will depend on whether it helps to combat impunity and deter future human rights atrocities across the globe.²³ The centrality of this latter proposition has rested on the philosophy of punishment in ICL. Can international courts exact retribution and effectuate deterrence? Are these the most appropriate or viable penal objectives? *Lubanga* provides a propitious moment and an extant case at a global penal flagship for ICL scholars to inquire into the philosophies of contemporary international criminal justice. *Lubanga* capped 'many 'firsts' in the young life of the first global permanent international criminal justice mechanism: the seminal verdict of the ICC, the first international trial to focus exclusively on child soldiering.²⁴ Another trial, later divided into two - against Congolese militia leaders Germain Katanga and Mathieu Ngudjolo Chui – had also been concluded by the ICC. On 18 December 2012, Ngudjolo, who had been charged with seven counts of war crimes, including using children under the age of fifteen to take active part in hostilities,²⁵ was acquitted.²⁶ The court ruled the Prosecutor had failed to prove a case against him beyond any reasonable doubt. On 7 March 2014, Katanga was found guilty the crime against humanity of murder and the war crimes of wilful killing, intentional attack against the civilian population, pillaging and destruction of

[ases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.iccnv.org/ases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx) (last accessed 15 December 2014)

²¹ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329

²² See eg A. Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice' (2012) 25 *Leiden Journal of International Law* 491

²³ L. Laplante, 'The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence' (2010) 43 *John Marshall Law Review* 635

²⁴ S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?' (2014) 3 *Penn State Journal of Law and International Affairs* 30, 32

²⁵ Apart from child soldiering, he was also accused of directing an attack against civilians; willful killing; destruction of property; pillaging; sexual slavery; and rape) and three counts of crimes against humanity (murder, rape, and sexual slavery) allegedly committed during an attack on the village of Bogoro, in eastern Democratic Republic of the Congo (DRC) on February 24, 2003.

²⁶ *Prosecutor v Mathieu Ngudjolo Chui* ICC-01/04-02/12 Judgment pursuant to Art. 74 of the Statute [18 December 2012]

property.²⁷ He was, however, acquitted of charges of sexual slavery and rape as well as using child soldiers.²⁸ The *Lubanga* verdict, as the court's first, focused solely on child soldiering, was thus hailed as a 'landmark ruling,'²⁹ and a 'great victory' for child soldiers in the DRC and elsewhere.³⁰ As a novelty institution adjudicating its seminal case, the ceremony that succeeded the conviction, from the 'international community', was unsurprising. Previous tribunals were localised and lacked international visibility. Significantly, the conscription, enlistment and use of children for military combat had not featured on the statutes of these tribunals – until the Rome Statute and first prosecution at Special Court for Sierra Leone (SCSL) established in 2002 - despite the fact that child combatants were used during conflicts that necessitated these judicial bodies. Of the crimes now deemed 'egregious' or to 'offend the international community as whole' and 'deeply shock the conscience of humanity,'³¹ child soldiering has historically been under-criminalised. It is within the context of this under-criminalisation that the *Lubanga* case was viewed as a milestone. Nevertheless, 'the successful prosecution of *Lubanga* is not likely to end the debate any time soon over the merits of the ICC and the role of international criminal justice mechanisms.'³² An important inquiry in ICL has been preoccupied with the plausibility of objectives or philosophies of international criminal courts.

Like domestic justice, ICL's central philosophical goals for punishment are retribution and deterrence.³³ These are, of course, not the only penological goals: ICL

²⁷*Prosecutor v Germain Katanga* ICC-01/04-01/07 Judgment pursuant to Art. 74 of the Statute [7 March 2014]

²⁸*Ibid.* The Chamber also ordered that the time spent in detention at the ICC – between 18 September 2007 and 23 May 2014 – be deducted from his sentence.

²⁹See 'ICC: Landmark Verdict a Warning to Rights Abusers' Human Rights Watch (14 March, 2012), <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers>; P Pruthi, 'In a Historic Judgment, the International Criminal Court Convicts Thomas Lubanga Dyilo of Recruiting Children Into Armed Conflict,' UNICEF [14 March, 2012] http://www.unicef.org/protection/57929_62002.html.

³⁰G. Mattioli-Zeltner, International Justice Advocacy Director of HRW, called the *Lubanga* verdict 'a victory for the thousands of children forced to fight in DRC's brutal wars.' 'ICC: Landmark Verdict a Warning to Rights Abusers' Human Rights Watch [14 March, 2012]

³¹ *ibid* Preamble

³² S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Sequentialist Aspirations?' (2014) 3 *Penn State Journal of Law and International Affairs* 30, 32-33

³³See eg *Prosecutor v Kupreskic*, Judgment ICTY-IT-95-16-T [14 January 2000] para 848; *Prosecutor v. Kordić and Cerkez*, ICTY-IT-95-14/2-A Appeals Chamber [17 December 2004] para 1076 ('both individual [n.b. specific] and general deterrence serve as important goals of sentencing...') *Prosecutor v Popović*, ICTY-IT-05-88-T, Trial Judgment [10 June, 2010] para 2128; *Prosecutor v Lukić*, ICTY-

has an array of objectives. But as the sentencing jurisprudence evolved, retribution and deterrence emerged as the primary rationales in ICL punishment.³⁴ Many judgments have held that retribution and deterrence are the dominant philosophical purposes of prosecution and punishment at the tribunals.³⁵ The Rome Statute created an institution whose purpose is the prosecution of those most responsible for the commission of genocide,³⁶ crimes against humanity,³⁷ war crimes³⁸ and the ‘crime of aggression.’³⁹ The Statute has also implied retribution and deterrence as primary justifications for the ICC’s work. The *Lubanga* judgment alluded to these classical and dominant presumptions of criminal justice.⁴⁰ The post-conviction jubilatory reactions to *Lubanga* were premised on, almost invariably, the notion that his conviction and sentence would ‘send a message’ to potential offenders.⁴¹ In both

IT-05-87 Trial Judgment, para 1049 [ICTY 20 July, 2009]; *Prosecutor v Milutinović*, ICTY-IT-05-87-T, Trial Judgment [26 February 2009] para 1144; *Prosecutor v Delić*, ICTY- 1T-04-83-T, Trial Judgment, [ICTY 15 September 2008] para 559; *Prosecutor v Milošević*, IT-98-29/1-T, Trial Judgment, para 987; *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T Judgment on Sentencing [9 October 2007] para 26, citing *Prosecutor v Aleksovisk* IT-95-14/1-A Appeal Judgment [ICTY 24 March 2000] para 185; *Prosecutor v Kambanda* ICTR-97-23-S Judgment and Sentence (TC) [4 September 1998] [‘Kambanda Trial Judgment’] para 28 and *Prosecutor v Nikolic* ICTY-IT-02-60/1-S Sentencing Judgment (TC) [2 December 2003] para 86

³⁴ S. Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3 *Penn State Journal of Law & International Affairs* 30

³⁶ See Rome Statute Art. 6

³⁷ Ibid Art. 7

³⁸ Ibid Art. 8

³⁹ Ibid Art. 5: The ‘crime of aggression’ was not defined in the Statute. On 11 June 2010, the Review Conference of Rome Statute adopted by consensus amendments to the Rome Statute which include a definition of the ‘crime of aggression’ and a regime establishing how the Court will exercise its jurisdiction over this crime. An act of aggression is defined as ‘the use of armed force by one State against another State without the justification of self-defence or authorization by the Security Council.’ The provisions of both article 15 provide that the Court will not be able to exercise its jurisdiction over the ‘crime of aggression’ until: (a) at least 30 States Parties have ratified or accepted the amendments; and (b) a decision is taken by two–thirds of States Parties to activate the jurisdiction at any time after 1 January 2017.

⁴⁰ *Lubanga Sentencing Judgment* [10 July 2012] para 16

⁴¹ For reactions by key actors on children’s welfare and rights, see Reactions to the first verdict of the ICC - ICC OTP Weekly Briefing Issue 115; 16 to 26 March 2012; See also UN News Centre ‘In landmark ruling, ICC finds Congolese warlord guilty of recruiting child soldiers’ 14 March 2012 <http://www.un.org/apps/news/story.asp?NewsID=41537&Cr=ICC&Cr1>; See also Civil Society Reflections on the Lubanga Trial’ International Coalition for the Right to Protect (14 March 2012) <http://icrtopblog.org/2012/03/16/civil-society-reflections-on-the-lubanga-trial/> See also ‘SRSG Coomaraswamy welcomes the International Criminal Court’s first verdict - the conviction of Thomas Lubanga for child recruitment’ [OSRSG/140312-4] Office of the Special Representative of the UN Secretary-General on Children and Armed Conflict 12 March 2012 The Special Representative of the Secretary-General on Children and Armed Conflict [SRSG] Rhadika Coomaraswamy pronounced: ‘...In this age of global media, today’s verdict will reach warlords and commanders across the world and serve as a strong deterrent.’ See ‘International Criminal Court’s Conviction of Thomas Lubanga for Conscripting Children ‘Important Step Forward’ in Ending Impunity, Says Secretary-General’: SG/SM/14155 AFR/2352 L/3187 [14 March 2012]; The UN Secretary-General’s Office stated: ‘Mr Lubanga’s conviction for the war crimes of enlisting and conscripting children under the age of 15 is

the jurisprudence and social reactions, it was presumed that Lubanga's trial and punishment would have both specific but more importantly, general deterrent effect on child soldier recruiters. From a deontological perspective, he also deserved to be punished proportionately. This mechanical transfer of domestic philosophical justification is at the centre of this inquiry.

Theorists are generally unenthusiastic about retribution and skeptical about deterrence, particularly when transposed to the international sphere where the crimes are distinct. Unlike domestic crimes such as robbery or burglary, international crimes are different in nature. While ICL premises itself on individual criminal responsibility, the crimes it prosecutes are mass crimes. These crimes involve large scale communal engagement often referred to as 'mass atrocities'. Differences between mass crimes and general crime exist in their form and also in their scope and severity. However, ICL still draws on the familiar penal principles of municipal law. This extension of 'western doctrines' onto the transnational plane is problematic because it tends to obfuscate the collective character of ICL crimes - a feature that distinguishes them from most similar crimes of violence in the national sphere.⁴² War, mass violence, and collective pathologies can distort the viability of the common cost-benefit calculus on which that model is predicated.⁴³ International courts can prosecute only a handful of defendants in situations of these mass crimes. The ICC thus needs a more plausible justification suitable for its own context and the crimes it adjudicates. A more cogent purpose for the prosecution of the few select defendants the courts prosecute needs to be established. Some excellent scholarly contributions in the field of ICL and mass atrocity have proffered alternative responses to collective crimes. It has been suggested that pluralistic responses 'such as truth commissions, civil liability (including of states or corporations), legislative and institutional reform, and lustration and commemoration, may be better suited to

an important step forward in realising the international community's commitment to ensuring that perpetrators of crimes against children in situations of armed conflict are brought to justice.'

⁴² R. Sloane, 'The Expressive Capacity of International Punishment' (2006) Columbia Public Law & Legal Theory Working Papers, citing *Prosecutor v Tadic*, ICTY- IT-94-1, Judgment [15 July 1999] para 191, stating that: 'Most of the time [ICL] crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.'

⁴³ Sloane, 'The Expressive Capacity of International Punishment' (2007) 43 *Stanford Journal of International Law* 39

the collective nature of mass atrocity.’⁴⁴ Such approaches are critical of the extant legal tradition which allocates individual guilt in cases of mass criminality. In this study, I do not depart from the current modalities on individual agency that guide the ICC’s work. Polycentric propositions offer alternative approaches to mass crime. These would help account for more perpetrators. However, implementation of such diverse modalities is nettlesome. Further, the ICC, as a global criminal institution, has a symbolic status which exceeds its instrumental function. What is important is whether the prosecutions it conducts can be justified to society. In this study, I attempt to establish the most plausible justification for prosecution of individuals by the ICC. While the study focuses on *Lubanga*, as a case study, what the thesis proposes may be applicable to the category of all mass crimes the ICC adjudicates.

It ‘is imperative that the ICC coalesces around a primary justification for its work and set modest expectations.’⁴⁵ Setting ambitious objectives can eviscerate its legitimacy and only generate disillusionment. Plausible theorisation should be founded on what the ICC can realistically achieve if its work is to be authentic and plausible. Apart from drawing on the features of mass crime, realistic theorisation would also consider the ICC’s situational constraints. Understanding *Lubanga* would call on us to be conscious of the environment in which the ICC operates. Organisational theory might assist us here. Several authors have argued that context effects are fundamental to an understanding of organisational phenomena that contextual analysis should become a distinctive feature of organisational scholarship.⁴⁶ The danger of context insensitive research theory is that it reinforces a pattern of context insensitive scholarship.⁴⁷ The ICC is ‘the emerging punitive arm of the *supra*-state of

⁴⁴ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127 citing eg M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge 2007); M Osiel, ‘The Banality of Good: Aligning Incentives against Mass Atrocity’ (2005) *Columbia Law Review* 1751; L. Fletcher and H. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ (2002) 24 *Human Rights Quarterly* 573

⁴⁵ S. Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3 *Penn State Journal of Law and International Affairs* 30

⁴⁶ D. Rousseau ‘Issues of level in organizational research: Multi-level and cross-level perspectives’ (1985) 7 *Research in Organizational Behaviour* 1-37; G .Johns ‘The essential impact of context on organizational behaviour’ (2006) 31 *Academy of Management Review* 385; R House, R., D Rousseau and M. Thomas-Hunt ‘The meso paradigm: A framework for the integration of micro and macro organizational behaviour’ (1995) 17 *Research in Organizational Behaviour* 71

⁴⁷ D. Whetten, ‘An Examination of the Interface Between Context and Theory Applied to the Study of Chinese Organizations’ (2009) 5 *Management Organisation Review* 29

international organization.⁴⁸ While it has generated high expectations, the court operates within a unique mix of complex and restrictive social, political, economic and other factors, associated with its *sui generis* character.⁴⁹ Firstly, states created the ICC to adjudicate ‘the most serious crimes of concern to the international community as a whole.’⁵⁰ However, they have been allocating the court budgets incommensurate with the work it needs to undertake. The ICC depends on financial contributions of states. However, for economic and other reasons, some states are unable to meet their obligations. Further, the ICC lacks a coercive authority or police force to account for suspects. On this, the ICC is also dependent upon the cooperation of states. In some cases, states have, however, refused to co-operate with the court. Where states have chosen to co-operate, they have done so for political expediency with the acquiescence of the ICC. The ICC has at times, in its selection of cases, sacrificed fairness for pragmatism, focusing on non-state actors, exempting state actors who co-operate in the arrest of rebels. The overall effect of these constraints is that the ICC can only prosecute a handful of defendants. These conditions do not help the court fulfil the objectives of retribution and deterrence upon which ICL has been traditionally predicated. Addressing the broader dynamics of mass crimes under these circumstances requires a more imaginative and realistic premise. A re-conceptualisation of prevailing legal theory and practice may be necessary for the work of the ICC to be purposive. A context sensitive approach to the work of the ICC would, instead, consider the value of prosecuting a few individuals by the constrained court. Such value can be identified in the foundational philosophy of the international law regime in its totality. The argument I seek to cultivate in this thesis is premised on communalism and shared values of international law. The ultimate value of international criminal law may rest not in its functions of retribution or deterrence, but in its role in identity construction, in particular in constructing and reinforcing a cosmopolitan community identity.

⁴⁸ M. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Northwestern University Law Review* 539, 541

⁴⁹ M. Arsanjani and W Reisman, ‘The Law-in-Action of the International Criminal Court’ (2005) 99 *American Journal of International Law* 385, 385 stating: ‘The drafters of the Rome Statute’ benefited from important previous experiments-the Nuremberg Tribunal and the International Criminal Tribunals for the Former Yugoslavia and for Rwanda. But once the Court is launched, the predecessors and prototypes that were so helpful in the drafting stages will be of less and less assistance. The ICC must operate in a substantially different context than the earlier efforts, and the problems it will encounter (and already is encountering) will be different from and may prove more formidable than those facing its prototypes.’

⁵⁰ See Rome Statute Preamble

1.3 Importance of the study

When the ICC was formed, it was hailed as a major development in international criminal law. UN Secretary General Kofi Annan described it as ‘[u]ndoubtedly, the most significant recent development in the international community’s long struggle to advance the cause of justice and rule of law.’⁵¹ According to the Preamble of the Rome Statute and Articles 1 and 5, its objectives are the prosecution and punishment of the most serious crimes of international concern.⁵² The Statute describes crimes prosecuted by the ICC as ‘unimaginable atrocities’, and ‘grave crimes’ that ‘deeply shock the conscience of humanity.’⁵³ The ICC was established ‘to these ends and for the sake of present and future generations.’⁵⁴ Apart from these assertions, the court lacked any clear theoretical guidelines when it was established. Koller noted, however, that:

The lack of theoretical reflection is not necessarily a negative. Had the participants in the Rome Conference or its predecessors focused on discussing abstract philosophical notions underlying international criminal law—let alone tried to agree upon a comprehensive theory for the field—such time and effort would likely have substantially delayed, if not prevented, realization of the practical objective of establishing an international criminal court.⁵⁵

Until today, the court lacks sufficiently clear goals and priorities to justify its decisions.⁵⁶ However, the provisions in the Preamble of the Rome Statute have been interpreted as meaning that retribution and deterrence are primary goals of the ICC.⁵⁷ Pronouncements at Lubanga’s trial appeared to confirm this. This unreflecting mimicry of domestic principles in ICL is problematic. For reasons already noted, municipal penal rationales are ill-suited for the crimes on the international sphere. This vexing disjuncture animates this treatise. The objective of this thesis is to

⁵¹See ‘The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies’, Report of the Secretary-General, para 49, delivered to the Security Council, U.N. Doc. S/2004/616 (23 August, 2004) cited in D. Koller ‘The Faith of the International Criminal Lawyer’ (2008)40 *New York University Journal of International Law and Policy*1019

⁵²See Rome Statute, Preamble, para 4 and Art. 1 and 5

⁵³ Ibid Preamble

⁵⁴ Ibid para 9

⁵⁵D. Koller, ‘The Faith of the International Criminal Lawyer’ (2008)40 *New York University Journal of International Law and Policy*1019,1020-1021

⁵⁶ M. deGuzman, ‘Choosing to prosecute: Expressive selection at the International Criminal Court’ (2012) *Michigan Journal of International Law* 265

⁵⁷ E. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Publishing 2010) 143

identify a philosophical rationale that is suitable for ICL and the ICC's own context. Identifying a primary justification for international criminal law, of course, does not mean that ICL cannot make a meaningful contribution to other goals.⁵⁸ This thesis attempts to establish the *most plausible* rationale for ICL, and the prosecution and punishment of Lubanga. The contention I make is that the other penal rationales are only less credible as principal justifications for ICC penology. Further, many of the other multifarious objectives that ICL has set for itself, such as, for example, 'achieving' reconciliation and peace, should be left to other institutions. In other words, the ICC should set modest and credible objectives suitable for its own context.

Genocide, crimes against humanity and other war crimes have been designated as the most egregious crimes. The paradigm of ICL has historically focused on these mass crimes. Over time, these crimes have established meanings in international jurisprudence. Some judges have arrogated legal significance to social meaning by situating genocide at the top of a hierarchy of international crimes.⁵⁹The 1998 opinion on *Kambanda* described genocide as 'the crime of crimes';⁶⁰ the International Criminal Tribunal for Rwanda (ICTR) invoked it in sentencing *genocidaires*, often to the maximum sentence, life imprisonment.⁶¹The use of children in armed conflict is as old as warfare.⁶² While child soldiering has been a historical phenomenon, the current trend in the use of children is unprecedented both in terms of scope and levels of abuse.⁶³ The UN estimates that the number of child combatants increased with 100,000 soldiers between 1988 and 2002.⁶⁴Though an exact number is difficult to establish, most analysts estimate the total number of

⁵⁸ S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?' (2014) 3 *Penn State Journal of Law and International Affairs* 30

⁵⁹D. Amann, 'Group Mentality, Expressivism, and Genocide,' (2002) 2 *International Criminal Law Review* 93,130

⁶⁰*Prosecutor v Kambanda*, ICTY-ICTR 97-23-S, Trial Chamber, Judgment and Sentence, [September 4, 1998] para 16

⁶¹ See *Prosecutor v Akayesu*, ICTR-96-4-T, Trial Chamber 1, Sentence [2 October 1998] (remarks of Justice Laty Kama, President), available at <http://www.ictor.org/> (visited 26 September 2014); See *Prosecutor v Kayishema*, ICTR-95-1-T, Trial Chamber II, Judgment [21 May 1999] para 9; *Prosecutor v Musema*, ICTR-93-13, Trial Chamber I, Judgment and Sentence [27 January 2000] paras 981, 1001; *Prosecutor v Rutaganda*, ICTR- 96-3, Trial Chamber 1, Judgment and Sentence, para 451

⁶² D. Francis, 'Paper protection' mechanisms: child soldiers and the international protection of children in Africa's conflict zones' (2007) 45 *The Journal of Modern African Studies*, 207

⁶³ M. Fox, 'Child soldiers and international law: Patchwork gains and conceptual debates' (2005) 7 *Human Rights Review* 1, 27

⁶⁴V. Achvarina and S. Reich, 'No Place to Hide: Refugee, Displaced Persons, and the Recruitment of Child Soldiers' (2006) 31 *International Security* 127, 128.

child soldiers to be approximately 300 000.⁶⁵ However, an analysis of the jurisprudence of international tribunals seems to show that, until the establishment of SCSL and the ICC, child soldiering had not ‘deeply’ shocked ‘the conscience of humanity.’ It has historically been under-criminalised and under-judicialised. It would appear international criminal justice had a fixation on mass murder crimes. This focus on the prevention of future deaths of civilians⁶⁶ appeared to have influenced, or perhaps, exaggerated penological assumptions about ICL institutions’ abilities to exact retribution and effectuate deterrence. The Holocaust, Sebrenica and Rwanda, for example, tend to readily evoke a sense of outrage. Mass murderers had to be punished to prevent this ‘radical evil.’⁶⁷ This ‘primacy of the massacre’, as it were, appeared to eclipse consideration of other immoralities and transgressions in conflict. Crimes against children were only mentioned as part of mass atrocities committed against the civilian population in general.⁶⁸ While conscription, enlistment and use of children for military combat was not regarded ‘atrocious’ or ‘shocking’ enough, the dynamics of child soldiering as a ‘mass crime’ also appear less salient in scholarly discourse, if not distinguished, from the murder crimes mentioned above. This is because, perhaps, child soldiering does not necessarily entail large scale murders of the victims. Child soldiers are at times demobilised back into their communities during or after hostilities. In this study, child soldiering is taken as a ‘mass crime.’ Ordinarily, children are conscripted, enlisted and used in armed conflict in large numbers.⁶⁹ One of the objectives of this thesis is to accentuate this diffuse nature of child militarisation often overshadowed by the horrors of widespread killings. *Lubanga* and child soldiering provide ICL scholarship an opportunity to assess theoretical approaches of the ICC to mass crime. Plausible justification and theorisation for the prosecution and punishment of Lubanga would

⁶⁵See UNICEF report ‘Child protection from violence, exploitation and abuse’ http://www.unicef.org/protection/index_armedconflict.html

⁶⁶ P. Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ (2001) 95 *American Journal of International Law* 7; J. Ku and J. Nzalibe, ‘Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?’ (2006) 84 *Washington University Law Review*, 777; E. Baylis, ‘Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks’, (2009) 50 *Boston College Law Review* 1

⁶⁷ H. Arendt, *The Human Condition* (University of Chicago Press 1958) 241

⁶⁸See ‘International Criminal Justice and Children’ (No Peace without Justice and UNICEF, 2002), 12

⁶⁹See eg Child Soldiers Global Report 2008, 319, stating ‘massive’ recruitment took place among the refugee and IDP communities in eastern Chad by Sudanese armed opposition groups in March and April 2006; See also eg M. Wessels, *Child Soldiers: From Violence to Protection* (Harvard University Press 2007) 40-41, referring to the LRA recruitment on one occasion of 139 girls from a school

thus take cognisance of the organic characteristics of child soldiering as a mass crime.

The thesis is situated within this broad theoretical framework with a view to furthering the discourse on mass crime and ICL. Though the objective of the treatise is more modest in its focus on *Lubanga*, the discussion hopes to supplement the debate and scholarship on all the mass crimes that the ICC adjudicates. Such reflection ought to recognise, first and foremost, that international criminal justice is largely symbolic; it has limited resources, faces political constraints, and thus cannot prosecute large numbers of defendants in cases of mass crime. The ICC can prosecute only a few select individuals. A subsequent and important question would rest on what the handful of prosecutions would 'symbolise.' As noted earlier, the most important value of the few international criminal prosecutions could lie in their identity construction. This thesis argues that, rather than retribution and deterrence, the most viable objective for the prosecution of Lubanga is the expressive function of law. Lubanga was only one of the perpetrators of the 'mass crime.' His prosecution can thus, at best, help disseminate global norms on the conscription, enlistment and use of children for purposes of war. An objective to disseminate global norms presumes the existence of a 'global community.' Since the establishment of the UN, a trajectory has emerged of political integration and shared norms. The rise of international organisations such as the ICC and the development of international law illustrate the existence of an 'international society.' Of course, this society is not perfect – most 'societies' are not. But a paradigm of shared norms has undeniably emerged across geographical and cultural spaces. The proposition I advance centres on the claim that the most valuable effects of international criminal law may be its contribution to the creation and affirmation of cosmopolitan identity. This argument is not based on sentimental idealism but on what the ICC, given its constraints, can realistically achieve.

Expressivism is an under-explored rationale of international criminal. Yet it proffers a more realistic rationalisation for international penology. In short, an expressive approach to ICL suggests that a principal goal of international criminal trials is to

express these global norms.⁷⁰Such an approach is cognisant of the limitations of international criminal justice and extrapolates value of penal process under constrained circumstances. Such prosecutions, few as they may be, would still symbolise the value of law, identity affirmation and foster the globally shared norms of international society. The major contribution to knowledge of this project is that it brings attention to, and advances, this alternative philosophical rationale for the prosecution and punishment for such crimes with reference to a seminal case of child soldiering at the world's first and foremost international criminal court. Retribution and deterrence as penal principles have been explored exhaustively. This study departs from these well-trodden theoretical paths to apply a lesser popular but credible rationale of ICL. As Amann notes, expressivism has been under-studied, yet much of international criminal law since Nuremberg was nothing but expression, in the form of treaty after treaty defining certain behaviour as criminal.⁷¹ Scholarship on expressivism and international law has been scant. However, more recently some commentators have begun to focus on expressivism as possibly the most viable rationale for the prosecution and punishment of international criminals. The project that follows attempts to contribute to the growing attention on an expressive or expressivist approach to international law by invoking a most recent case. While mass crime has been theorised with regards to tribunals since Nuremberg, it has not been explored adequately with reference to the ICC; that is because the court had not prosecuted defendants since its establishment in 2002. Lubanga thus has jurisprudential significance. At the core of expressivist scholarship is the socio-pedagogical function of law. Some scholars have concluded that *Lubanga*, as the first international proceeding involving only child soldiering crimes at the ICC, 'offered a first interpretation of the main features characterising these crimes...'⁷² and it 'more generally provided early clarifications on both procedural and substantive legal issues relevant to the international criminal justice system established by the Rome

⁷⁰ M deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal International Law* 265

⁷¹See D. Amann, 'Assessing International Criminal adjudication of Human Rights Atrocities' 2000-2003 *Third World Legal Studies* 169, 177 referring to M. C. Bassiouni and E. Wise *AutDedereAutJudicare: The Duty to Extradite or Prosecute in International Law*; (M. Nijhoff Publishers; Dordrecht/Boston/London, 1995)(compiling treaties defining behaviour that violates international criminal law)

⁷²T. Mariniello, 'Prosecutor v Thomas Lubanga Dyilo: The First Judgment of the International Criminal Court's Trial Chamber' (2012) 1 *International Human Rights Law Review* 137, 138

Statute.’⁷³ The case offered ‘interesting insights on the socio-pedagogical role of international criminal justice.’⁷⁴To the knowledge of this author, this is the first project to invoke expressivism to the work of ICC comprehensively. Other authors have made fleeting and general references to expressivism and *Lubanga*, or made lesser intensive explorations on it.⁷⁵ Some scholars have proposed the prioritisation of historically under-enforced norms by international criminal courts through ‘thematic prosecution’ in order to serve expressive objectives.⁷⁶ ‘Thematic prosecutions’⁷⁷ focus on preferential prosecutions in order to propagate undervalued norms and develop prosecutorial capacities for such crimes. This is apposite to this study considering the historical under-enforcement of child soldiering. Still, the literature on this interesting approach with regards to *Lubanga* has been sparse. The thesis will defer to some International Relations theories to cultivate a premise for expressivism. Since expressivism is predicated on the diffusion of global norms, the idea is to, first, illustrate collective normative developments.

To be sure, this thesis is not intended to give a blind endorsement to expressivism with regards to *Lubanga*. The case was characterised by some omissions and commissions. The study can only add value if it critiques the approach of the ICC, analysing ways the expressive value of *Lubanga* could have been enhanced. For

⁷³Ibid 138

⁷⁴Ibid

⁷⁵See eg M. deGuzman, ‘Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda’(2011) 11 *International Criminal Law Review* 515; M deGuzman ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265; M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13(Torkel Opsahl Academic E-Publisher, Beijing, 2012); M. Drumbl, ‘The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law’ (2007) 75 *George Washington Law Review* 1165, 1195; D Amann ‘Group Mentality, Expressivism, and Genocide,’ (2002) 2 *International Criminal Law Review* 93, 121; R. Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,’ (2007) 43 *Stanford Journal of International Law* 39, M. Drumbl *Atrocity, Punishment, and International Law* (Cambridge University Press 2007)

⁷⁶See eg M. Bergsmo, A. Skre, C. Wui Ling and E Wood ‘Introductory remarks - Examining Thematic Prosecutions and the Challenges of Understanding and Proving International Sex Crimes’ FICHL Policy Brief Series No. 11 (2013) 1, stating that ‘In the *Lubanga* case – which results in the first trial judgment of the International Criminal Court (ICC) – the Office of the Prosecutor (OTP) in fact chose to focus on the recruitment and use of child soldiers. By focusing on these crimes, the ICC gave legitimacy to the practice of thematic prosecution.’

⁷⁷See eg S. Greijer, ‘The Thematic Prosecution of Crimes Against Children’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012) M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012)

instance, the Office of the Prosecutor (OTP) was heavily criticised for failing to include sex crimes charges against *Lubanga*. Insufficient charges can denude child soldiering of its full characterisation. Further, the tendency to exempt self-referring state actors and focus on non-state actors or rebels for prosecution does not comport with fairness and justice, and misses state targets whose prosecution could generate even more expressive mileage. Yet these prosecutorial indiscretions cannot deprive expressivism of its plausibility as a viable penal approach. As a basis for prosecution of international crimes, it remains viable. The other problem impacting on the expressive value of international criminal trials is the distance between locations for trials and affected communities. International proceedings, for security and other reasons, are at times conducted outside geographical spaces afflicted by hostilities. The ICC is situated in The Hague, Netherlands. This externalisation of proceedings may diminish the expressive value of law in the communities ravaged by hostilities. While their roles are largely symbolic, international criminal courts have adopted proactive programmes in order to engage with communities traumatised by human catastrophes. The work of international criminal courts would be inadequate if they did not conduct supplementary work to reinforce norms, especially in societies inclined to conflict. However, the court should only limit its work to informational provision. This engagement also has another important function: it denotes to the affected communities that they are part of the cosmopolitan or normative community. In this thesis, I discuss outreach programmes as a continuum of the socio-pedagogical expressivist project of international criminal justice. ‘Expressive’ outreach would help in the internalisation of norms, which should be the ultimate purpose of law and a cosmopolitan project of justice. These approaches, I argue, transcend precepts of retribution and deterrence.

1.4 Methodology

The thesis is principally a theoretical study focusing, broadly, on the philosophy of law. It brings together three branches on international law – international humanitarian law (IHL), international human rights law (IHL) and ICL. While the thesis draws broadly on the philosophies of international law, the study ultimately converges on ICL and penal justifications of the ICC because of the focus on the seminal case of *Lubanga*. The study premises itself on the contention that

international criminal law lacks a credible philosophical theory of its own. To this end, the study evaluates contemporary legal and penal theory through a critical look at historical jurisprudential practices and theoretical perspectives. The main research method used has been predominantly library-based. The thesis' approach has been identifying and utilising relevant literature ranging from books, journal articles, law reports, web materials, as well as monographs and papers of eminent scholars. The study naturally recognises literature on the dominant penal theoretical perspectives to juxtapose them to the proposition it proffers. Such use of multiple data and literatures ensures that the issue is not examined through one perspective. As well as recognising existing literature, the project attempts to build on and add to existing work.

The thesis relies on both primary and secondary sources. Philosophical theories must attend to the empirical actualities of that which they theorise.⁷⁸The study anchors itself on *Lubanga* as a case study. *Lubanga* as a seminal case is important for its procedural and jurisprudential legacy. The thesis focuses on the prosecutorial and judicial practices using primary documents which include trial, verdict and other transcripts. The study employs anecdotal and empirical evidence from research conducted in the DRC. Secondary analysis has allowed me, because of limitations of travel, to examine the issues without having to go through the process of collecting data in the field. Among the justifications for deploying a case study is the intention to cover contextual conditions because of their relevance to the phenomenon under study.⁷⁹This contextual nature of the case study is reflected in one definition of a case study as an empirical inquiry that 'investigates a contemporary phenomenon within its real-life context and addresses a situation in which the boundaries between phenomenon and context are not clearly evident.'⁸⁰ The ICC operates within a unique context. The court faces operational constraints; the crimes it prosecutes have certain gravity distinct from domestic or ordinary crimes. This study analyses these vexing 'contexts effects' with reference to the scholarly literature and documents on the ICC in an effort to posit the most plausible justification for the court's work.

⁷⁸ A. Duff, 'Theories of Criminal Law' *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), E NZalta (ed.), forthcoming URL = <http://plato.stanford.edu/archives/sum2013/entries/criminal-law/>.

⁷⁹ R. Yin, *Case study research: Design and methods* (Thousand Oaks, CA: Sage 2003)

⁸⁰ *ibid* 13

However, others argue that because of their focus ‘on a single unit, and a single instance, the issue of generalisability has been raised against them than with other types of qualitative research.’⁸¹ As such, single case studies cannot be of value because they are not generalisable into general propositions and theories.⁸² Others argue that the case study is subjective, giving too much scope for the researcher’s own interpretations. Thus the validity of case studies would be wanting.⁸³ However, other perceptions towards single case studies have been much more nuanced. For instance, Eysenck asserts that ‘sometimes we simply have to keep our eyes open and look carefully at individual cases - not in the hope of proving anything, but rather in the hope of learning something!’⁸⁴ The thesis attempts to highlight an alternative theoretical perspective to the traditional penal notions of international criminal justice. Flyvbjerg argues that single case studies have their ‘own rigor, different to be sure, but no less strict than the rigor of quantitative methods.’⁸⁵ There is no greater bias in a researcher’s preconceived case study toward confirming notions than in other forms of research.⁸⁶ Difficulty in summarising case studies into general propositions is due to properties of the reality studied than the research method.⁸⁷ This thesis exercises considerable rigour and eschews bias, by considering critiques of approaches of the ICC in the case study. A case can be made for the generalisability of the case study. Mass crimes constitute ICL and the ICC core crimes. As has been posited earlier, child soldiering is a mass crime. The distinction with other mass crimes only pertains to the nature of commission or perhaps, outcomes. While other crimes involve murder, conscription, enlistment and use of children for military combat does not always result in large scale fatalities. However, it often involves large numbers of children recruited to participate in armed conflict.

⁸¹See S. Merriam, *Qualitative Case Study Research in Qualitative Research: A Guide to Design and Implementation* (John Wiley & Sons, 2009) Chapter 3, summary found on <http://cgi.stanford.edu/~dept-ctl/tomprof/posting.php?ID=1013>

⁸² M. Dogan and D. Pelassy, *How To Compare Nations: Strategies in Comparative Politics*. (Chatham: Chatham House 1990); D. Campbell and J. Stanley *Experimental and Quasi-Experimental Designs for Research* (Chicago: Rand McNally, 1966)) 6-7, stating that ‘Any appearance of absolute knowledge, or intrinsic knowledge about singular isolated objects, is found to be illusory upon analysis...’

⁸³B. Flyvbjerg, ‘Five Misunderstandings About Case-Study Research’ (2006) 12 *Qualitative Inquiry* 219

⁸⁴H. Eysenck, ‘Introduction’ in H. Eysenck (ed.), *Case Studies in Behaviour Therapy*. (London: Routledge and Kegan Paul 1976) 9 cited in B. Flyvbjerg, ‘Five Misunderstandings About Case-Study Research,’ (2006) 12 *Qualitative Inquiry* 219

⁸⁵ Ibid 235

⁸⁶ Ibid 219

⁸⁷ Ibid 219

Some have argued that non-murder crimes are even more egregious. The seminal case of *Lubanga* could enhance our understandings on the purpose of prosecution of this group of diffuse crimes by the ICC.

1.5 Structure of thesis

The thesis argues that the most viable philosophical justification for the prosecution of Lubanga is expressivism. In order to elaborate on the principal argument of the thesis, the chapters, firstly, set out to examine a number of theoretical, and ancillary socio-legal issues that underpin expressivist discourse. These include conceptualisation of international relations and the creation and dissemination of norms. Following this introductory chapter, the thesis unfolds in nine subsequent chapters. Chapter 2 begins with an outline of the theoretical framework that animates the thesis. In order to gain purchase for expressivism, the chapter discusses the philosophies of retribution and deterrence. These have been the dominant goals in jurisprudence. The chapter then examines these rationales within the context of the Rome Statute. The overall objective is to highlight the limitations of these twin philosophies in ICL. To build on the proposition of the thesis, the chapter then locates the ICC within the collectivist standards of international law and society. International criminal law has developed as it has in part because of the individual and collective identities of those influencing the course of international law.⁸⁸ The ICC fits into the cosmopolitan normative developments in international law. The chapter places child law within cosmopolitan discourse. The thesis focuses on children and armed conflict. Chapter 3 thus focuses on the historical development of norms on child soldiering and agents of ‘meaning’ change. A socio-historical and legal approach is significant for our understandings of the development of social meanings (international, in this case) and the graduation of practices into grave crimes. The chapter traces the trajectory of the construction of the concept of child soldiering from a mundane practice to the present opprobrious social meaning, established through the work of transnational agents. This historiography would help us appreciate *Lubanga* as a contemporary criminological phenomenon. The chapter attempts to illustrate the dynamics of child soldiering as a ‘mass’ crime. As already noted, child militarisation has barely been depicted in its collective form. Without its

⁸⁸D. Koller, ‘The Faith of the International Criminal Lawyer’ (2008)40 *New York University Journal of International Law and Policy*1019, 1023

correct characterisation, we cannot accord it appropriate gravity or formulate viable penal justifications for mass crime. The chapter also refers to the debate on whether child soldiers are victims or perpetrators. International law generally perceives child soldiers as victims but this meaning has been contested. Chapter 4 discusses the legal architecture of child soldiering as instruments for the regulation of the established 'social meaning' that essentially deems children as victims and not perpetrators. This collective development of law ultimately aids our understandings and appreciation of the philosophical foundations of and justifications for international penalty. Chapter 5 then shifts to international criminal justice. International criminal law institutions reflect collectivism against egregious crime as reflected by the laws discussed in the previous chapter. The chapter discusses how the social meaning of child soldiering has been or not been expressed or regulated through criminalisation; it examines approaches of tribunals established to adjudicate crimes committed during the conflicts. The conclusion is that child soldiering has historically been under-judicialised. International criminal justice seemed infatuated with mass murder crimes. Chapter 6 discusses the ICC; it highlights the situational constraints on the ICC. Financial scarcity, controversial selectivity and the lack of an enforcement mechanism mean the court can prosecute only a handful of cases out of the mass crimes. Still, a realistic and imaginative penal rationale can be drawn from these limiting criminological and operational features. Taken together, the historicity of the grave mass crimes it prosecutes, the subsequent laws' community-creating effect, and constraints of the ICC can help us formulate a plausible theory for ICC's work. Chapter 7 introduces the case of *Lubanga* and discusses the ICC's dominant philosophical justifications of retribution and deterrence with regards to the case. The purpose is to first highlight how these principles may be ill-fitting to be primary penal objectives in the case. The chapter also briefly discusses other penal rationales of ICL. The observation here is that other objectives, like peace and reconciliation, are better left to other institutions. Chapter 8 firstly discusses 'prosecutorial discretion' focusing on the ICC's selection criteria for situations and cases. The OTP has the discretion to select and proceed or not with cases referred to the court. Of particular interest to the chapter is, given the inhibitions on the ICC, what would be the most viable premise for the OTP's selection of cases. The chapter discusses a proposition in an emerging body of scholarship on 'thematic prosecutions.' Such prosecutions would select and focus exclusively on

particular norms which have historically been undervalued or under-enforced. These prosecutions serve expressive objectives. Chapter 9 seeks to apply expressivism to the penal process in *Lubanga*. To begin with, the chapter attempts to highlight the unique position of the ICC and ‘mass’ organic nature of child soldiering. Because of its elevated status, the ICC is uniquely situated to perform, principally, an expressive role in relation to mass crimes. Thus, the chapter examines how this can be manifested through (a) the expressive effect of institutional status of the ICC as a, limited but comparatively, more visible court (b) the expressive function of trial and verdict ; and (c) the expressive function of sentence as both messaging tools for the reinforcement of social meaning and the law. The essence of this chapter is to illustrate that the few cases of mass crimes like Lubanga that the ICC prosecutes can achieve a primary objective of disseminating global norms more than it can effectuate ambitious aims of retribution and deterrence. Significantly, the chapter projects the importance of outreach programmes as a component of the expressive function of the ICC. Outreach programmes involve direct engagement with communities traumatised by human-sponsored calamities. Such approaches help bring afflicted communities into the cosmopolitan normative society through the process of norm internalisation. Chapter 10 concludes by harmonising and summarising key issues raised in the thesis. In particular, it reconciles the analysis in the previous chapters. It then draws conclusions on the importance of the findings and their implications. The study rounds off with a discussion on potential areas of future research.

CHAPTER TWO

THEORETICAL FRAMEWORK

Introduction

The notion that individuals may be criminally responsible for certain acts that constitute international crimes has since been established under international law. A legal paradigm has emerged in the post-World War II era focused on punishing a handful of egregiously evil crimes: genocide, crimes against humanity and war crimes. The trials at Nuremberg and Tokyo after the Second World War marked the birth of an international criminal law regime.⁸⁹ The Nuremberg and Tokyo Tribunals played a critical role in the development of ICL, particularly in terms of how courts currently understand war crimes, crimes against humanity, and the crime of aggression.⁹⁰ The International Criminal Tribunal for former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as well as the hybrid courts and mixed tribunals⁹¹ marked the maturation of international criminal law (ICL). Over the last decade defendants, including former senior state actors or leaders, have been charged and prosecuted, convicted and punished by these courts. Former Bosnian Serb leaders Radovan Karadžić⁹² and Ratko Mladić⁹³ have been charged with genocide, war crimes, and crimes against humanity at the ICTY. In March 2012, Charles Taylor, the former Liberian leader, was jailed for 50 years by the Special Court for Sierra Leone (SCSL) for aiding and abetting war crimes.⁹⁴ In 2010, the ICC issued an arrest warrant for President Omar al-Bashir for genocide committed in Darfur.⁹⁵

⁸⁹A. Smeulers, 'Punishing Enemies of All Mankind' (2008) 21 *Leiden Journal of International Law*, 971

⁹⁰ K. Heller *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (OUP Oxford; Reprint edition, 2012)

⁹¹ Hybrid and mixed courts have been established in Sierra Leone (2000), East Timor (2000), Kosovo (2000), Cambodia (2003), and Lebanon (2007). However, the latter has focused on cases of terrorism. Set up in 2009, Its primary mandate is to hold trials for the people accused of carrying out the attack of 14 February 2005 which killed 23 people, including the former prime minister of Lebanon, Rafiq Hariri, and injured many others. For its limited mandate, this thesis does not include the Special Tribunal of Lebanon for analysis.

⁹²*Prosecutor v Karadzic* ICTY- IT-95-5/18

⁹³*Prosecutor v Mladic* ICTY-IT -09-92-T; IT-09-92-T

⁹⁴*Prosecutor v Charles Ghankay Taylor* SCSL-03-1-T

⁹⁵*Prosecutor v Omar Hassan Ahmad Al Bashir* ICC-02/05-01/09 Warrant of arrest [12 July 2009]

Most of the jurisprudence has essentialised mass ‘atrocities,’ popularly conceived of as mass killings. This focus on fatalities has, historically, overshadowed other transgressions that do not necessarily cause mass fatalities. The use of children in military hostilities, for instance, only relatively recently became a pernicious global concern. Its roots are steeped in a history of reticence. Child soldiering and its mass nature have been under-represented in jurisprudence. Since the problem was brought to the fore by human rights organisations, the proliferation of child soldiers ‘has been matched only by the explosion of treaties outlawing the practice.’⁹⁶ To date, states have ratified the humanitarian and human rights laws protecting children during war.⁹⁷ The emergence of international criminal courts has provided fora for punishment for egregious crimes. In response to infractions of norms (for example against child soldiering), we prosecute and seek convictions against those who violate those laws.⁹⁸ The first prosecutions were conducted SCSL, a hybrid or mixed tribunal established in 2002, extrapolating its provisions from the Rome Statute of 1998. The acts of conscription, enlistment and use of children in armed conflict are now regarded as a war crime. The seminal trial and conviction of *Lubanga* by the ICC has been viewed as a triumph for child soldiers in the DRC and beyond.⁹⁹ However, what such prosecution can or ought to achieve in respect of these crimes remains unclear. International law has emerged as a thriving arena of philosophical inquiry.¹⁰⁰ The philosophy of international law is a special branch of jurisprudence, encapsulating both conceptual and normative questions about international law.¹⁰¹ In the philosophical debate about punishment, two main types of theories of punishment

⁹⁶ T. Webster, ‘Babes With Arms: International Law and Child Soldiers’ (2007) 39 *George Washington International Law Review* 227, 235

⁹⁷ On February 6, 2007, 58 states signed the Paris Commitments to stop the recruitment and use of children in armed conflict. Other international conventions and protocols protecting children during armed conflict before then are: Geneva Convention, Additional Protocol I (API) (relating to international armed conflicts), Article 77(2); Additional Protocol II (APII) (relating to non-international armed conflicts), Article 4(3)c; Convention on the Rights of the Child (CRC), Article 38; Rome Statute for an International Criminal Court (ICC), Article 8 (on war crimes), section 2 b) (xxvi); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), Article 4(1) and (2); and the African Charter on the Rights and Welfare of the Child (ACRWC).

⁹⁸ D. Kahan, ‘The Secret Ambition of Deterrence’ (1999) 113 *Harvard Law Review* 413, 419-421

⁹⁹ Géraldine Mattioli-Zeltner, International Justice Advocacy Director of HRW, called the Lubanga verdict ‘a victory for the thousands of children forced to fight in Congo’s brutal wars.’ ‘ICC: Landmark Verdict a Warning to Rights Abusers, Human Rights Watch (14 March 2012)

¹⁰⁰ S. Beeson and J. Tasioulas, *The Philosophy of International Law* (Oxford University Press 2010)

¹⁰¹ Ibid

dominate: utilitarian or deterrence theory and retributive theory.¹⁰² These rationales derive from classical domestic penal principles. Municipal courts adjudicate ordinary crimes such as robberies, burglaries and thefts. International crimes prosecute mass crimes which are organic and often widespread. As such, the replication of municipal theories to mass crimes on the international terrain presents vexing incongruity. The project that unfolds seeks to argue for a more cogent rationale for mass crime drawing on the ICC's first case on child soldiering. This chapter sketches out the theoretical framework for the study. As already noted, scholarship on mass criminality and penology has offered various perspectives. The thesis locates itself within this broad theoretical framework with a view to furthering the discourse on mass crime and international criminal law. The chapter is structured as follows. The first part discusses international criminal justice's penal philosophies with a focus on the two dominant rationales of retribution and deterrence. These are, of course, not the only objectives of ICL. However, jurisprudence evinces they are the most prominent. The second part illustrates how these rationales are reflected in international criminal justice. The third part discusses the Rome Statute which created the ICC. The fourth part analyses international criminal law's dominant rationales with regards to mass crime. The fifth discusses cosmopolitanism, international norms and foundational philosophies for international penology and places the Rome Statute within this context. The last part discusses the dynamics of norm diffusion.

2.1 Criminal justice and penal philosophy

This study locates itself, broadly, within the philosophy of international law. The subject matter of the study draws on the main branches of international law – International Humanitarian Law (IHL), International Human Rights Law (IHL) and ICL. A correlation ought to exist between this international legalism and objectives of punishment. The standard that shapes our understanding of penal issues is 'the philosophy of punishment' - a branch of moral philosophy that has led criminologists

¹⁰²See eg P. Robinson and J. Darley, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 43 *Georgetown Law Journal* 949, 956 (discussing the 'traditional view,' held by 'criminal lawmakers of the past four decades,' that criminal law can be justified by its significant deterrent effect'). See also J. Ohlin, 'Towards a Unique Theory of International Criminal Sentencing' in G. Sluiter and S. Vasiliev (eds) *International Criminal Procedure: Towards a Coherent Body of Law*, (London: Cameron, 2009) 396–401, arguing that the most coherent rationale for punishment of international criminals is retributivism.

and jurists to re-examine the normative foundations on which the penal system rests.¹⁰³ The central question that philosophers ask is why criminals should be punished. As in domestic law, this question preoccupies international criminal law. A central plank of this thesis is that international criminal law is bereft of a theory of its own.¹⁰⁴ International criminal law in its current incarnation, in Drumbl's words, 'cannibalises' domestic rationales,¹⁰⁵ mainly retribution and deterrence. These, as noted, have their philosophical foundations in municipal law. To be sure, retribution and deterrence are not the only penal philosophies that exist. The list of goals is very long.¹⁰⁶ The objectives include: reconciliation, rehabilitation, incapacitation, restoration, access to victims, historical recording building, preventing revisionism, crystallizing international norms, general affirmative prevention, establishing peace, preventing war, vindicating international law prohibitions, setting standards for fair trials, ending impunity, and expressive functions.¹⁰⁷ This manifold of objectives has led to the conclusion that the 'current views on the objectives of international criminal courts are in disarray.'¹⁰⁸[T]he normative structure of international criminal justice remains quite uncertain and confused when compared to domestic law. This is especially so from the point of view of the philosophy of punishment ...'¹⁰⁹This situation 'has several disquieting consequences, one of which is that the performance of international criminal courts cannot be assessed reliably.'¹¹⁰ In this thesis, my primary focus is on retribution and deterrence although some of the other penal philosophies are discussed in some detail in Chapter 7. To this extent, the thesis seeks to place *Lubanga* within this expansive idealism. When deconstructed,

¹⁰³ D. Garland 'Sociological Perspectives on Punishment' (1991) 14 *Crime and Justice* 115

¹⁰⁴ M. Drumbl, *Atrocity, Punishment an International Law* (Cambridge University Press 2007); M Drumbl, 'Collective Violence and Individual Punishment; The Criminality of Mass Atrocity' (2008) 99 *Northwestern University Law Review* 539, 544

¹⁰⁵ *ibid*

¹⁰⁶ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329

¹⁰⁷ See S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?' (2014) 3 *Penn State Journal of Law and International Affairs* 30, 37, footnote 25, citing other authors.

¹⁰⁸ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 330

¹⁰⁹ D. Zolo, 'Peace Through Criminal Law?' (2004) 2 *Journal of International Criminal Justice* 727, 728

¹¹⁰ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 330

however, international criminal justice's primary goals have been retribution and deterrence.¹¹¹

2.1.1 Retribution

Retribution (also called 'just deserts' theory) is aimed at providing a moral justification for the practice of punishing criminals.¹¹² Although there are many shades to retributive theory, these share in common the precept that the criminal deserves punishment and that this desert should be proportional to the gravity of the offence.¹¹³ Punishment would send the message that criminal responsibility will ultimately inflict moral blame which is followed by the harshest consequences any society has to offer: deprivation of liberty or assets or both.¹¹⁴ The defining character of deontological analysis is that the value of an action ought to be grounded in the action itself rather than in an external ends.¹¹⁵ Simply put, if there is a duty to punish, then that duty can only exist because the act of punishing is justified in and of itself, and not because some other external benefit is created because of the punishment.¹¹⁶ It is the claim that what makes the practice of punishment morally permissible is that criminals *deserve* punishment, regardless of whatever beneficial consequences might flow from imposing that punishment.¹¹⁷ As such, retribution is backward-looking. Retributive punishment is not a means to some external end such

¹¹¹See eg *Prosecutor v Kupreskic*, Judgment ICTY-IT-95-16-T [14 January 2000] para 848; *Prosecutor v. Kordić and Cerkez*, IT-95-14/2-A Appeals Chamber [17 December 2004] para 1076 ('both individual [n.b. specific] and general deterrence serve as important goals of sentencing...') *Prosecutor v. Popović*, ICTY- IT-05-88-T, Trial Judgment [10 June 2010] para 2128; *Prosecutor v Lukić*, ICTY-IT-05-87 Trial Judgment, [ICTY 20 July 2009] para 1049; *Prosecutor v Milutinović*, ICTY-IT-05-87-T, Trial Judgment [26 February 2009] para 1144; *Prosecutor v Delić*, ICTY-1T-04-83-T, Trial Judgment [15 September 2008] para 559; *Prosecutor v. Milošević*, ICTY- IT-98-29/1-T, Trial Judgment, para 987 ; *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T Sentencing Judgment [9 October 2007] para 26, citing *Prosecutor v Aleksovisk* IT-95-14/1-A Appeal Judgment ICTY [24 March 2000] para 185; *Prosecutor v Kambanda* ICTR-97-23-S Judgment and Sentence (TC) [4 September 1998] [Kambanda Trial Judgment] para 28 and *Prosecutor v Momir Nikolic* IT-02-60/1-S Sentencing Judgment (TC) [2 December 2003] para 86

¹¹²D. Dolinko, 'Three Mistakes of Retributivism' (1992) 39 *UCLA Law Review* 1623

¹¹³I. Kant, *The Metaphysical Elements of Justice* (John Lord trans., 1965). For discussion of retribution, see also M. Moore, 'The Moral Worth of Retribution' in *Principled Sentencing: Readings on Theory & Policy* 150, 150 (von Hirsch & Ashworth eds. 2000); J Dressler, 'Hating Criminals: How Can Something that Feels So Good Be Wrong?' (1990) 88 *Michigan Law Review* 1448; J. Hampton 'Correcting Harms versus Righting Wrongs: The Goal of Retribution' (1990) 39 *UCLA Law Review* 1659

¹¹⁴C. Safferling, 'Can Criminal Prosecution be the Answer to Massive Human Rights Violations?' (2004) 5 *German Law Journal* 1469

¹¹⁵I. Kant, 'Groundwork of The Metaphysics of Morals', in *Practical Philosophy*, the Cambridge edition of the works of Immanuel Kant 50 (Mary J. Gregor trans.) (2005) (1785) [Kant 4:394].

¹¹⁶Ibid 473

¹¹⁷D. Dolinko, 'Three Mistakes of Retributivism' (1992) 39 *UCLA Law Review* 1623

as the improvement of society, or the greater good of the community but that criminals deserve to be punished. The guiding penological principle has revolved around the gravity of the offence and sentencing.¹¹⁸The criminal is punished proportionately because he or she deserves such punishment. The principle of proportionality-that penalties be proportionate in their severity to the gravity of the defendant's criminal conduct- has traditionally been a basic requirement of fairness.¹¹⁹

2.1.2 Deterrence

Deterrence is often divided into *specific* and *general* deterrence. Specific deterrence presumes that a sentence will dissuade the particular offender from committing offences in the future. In jurisprudence, the focus is, however, largely on general deterrence, 'namely the notion that if one person is punished, this will reduce the likelihood that another person in that same place or somewhere else will offend in the future.'¹²⁰ As such, deterrence is forward-looking. Potential offenders are dissuaded from committing offences for fear of punishment.¹²¹Deterrence theory is, thus, generally premised on the assumption that the potential criminal is a rational actor. It is founded on the belief that people calculate the likely costs and benefits of any action before deciding what to do. Deterrence theorists depict the punishment of criminal offenders as morally justified because it deters the offender and other people from committing crime and thereby produces a net gain to society, with the suffering inflicted by criminals outweighed by the larger quantity of suffering that potential crime victims are spared.¹²²

2.2 International criminal jurisprudence and penology

International criminal law is premised on the prosecution and punishment of the crimes that offend the entirety of humanity.¹²³While international criminal law has

¹¹⁸See eg, *Prosecutor v Mucic* ICTY- IT-96-21-Abis Judgment on Sentence Appeal para 1225; 'Sentencing Judgment' *Prosecutor v Akayesu* ICTR-96-4, para.7

¹¹⁹ A. von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55, 55
¹²⁰M. Drumbl, *Atrocity, Punishment an International Law* (Cambridge University Press 2007) 417; See also *Prosecutor v Kordić and Cerkez*, ICTY-IT-95-14/2-A Appeals Chamber [17 December 2004], para 1076 ('both individual [n.b. specific] and general deterrence serve as important goals of sentencing...')

¹²¹ M. Drumbl *ibid*

¹²² D. Dolinko, 'Three Mistakes of Retributivism' (1992) 39 *UCLA Law Review* 1623

¹²³See Rome Statute Preamble

demarcated international crimes as most serious, the penal objectives above – which derive from domestic law principles - suffuse the jurisprudence of Nuremberg and Tokyo, the two international criminal tribunals, for the former Yugoslavia and for Rwanda, established by the Security Council in the early 1990s, the hybrid courts, mixed tribunals and the ICC.¹²⁴ Architects of international criminal law thus resort to these familiar domestic rationales for prosecution and punishment.¹²⁵ Robert Jackson, the chief US prosecutor at the first trial at Nuremberg told the judges: ‘The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilisation cannot tolerate their being ignored, because it cannot survive their being repeated.’¹²⁶ As such, from a deontological imperative, there was duty to punish the offenders.

In *Erdemovic*, the ICTY Trial Chamber discussed¹²⁷ deterrence within declarations of UN Security Council members at the time of Resolution 872.¹²⁸ One of the principal arguments made in favour of international criminal prosecutions is that they can serve to deter the commission of future atrocities.¹²⁹ Punishment deters because potential war criminals know and fear the pain of incarceration, and act to avoid it.¹³⁰ The Trial Chamber noted that the UN members saw the ICTY as a powerful means to promote the rule of law ‘as well as deter parties to the conflict in the former Yugoslavia from committing further crimes or to discourage them from further atrocities.’¹³¹ In punishing the defendants, the ICTR also invariably cited retribution and deterrence. The Tribunal wrote that its efforts must be aimed at dissuading ‘for good those who will attempt in the future to perpetrate such atrocities’ by showing them that the ‘international community was not ready to tolerate the serious

¹²⁴ Hybrid and mixed courts have been established in Sierra Leone (2000), East Timor (2000), Kosovo (2000) Cambodia (2003) and Lebanon (2007).

¹²⁵M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007) 23

¹²⁶See ‘Opening Statement of Justice Jackson (21 November 1945) in Trial of the major war criminals before the international military tribunal ((Nuremberg: IMT, 1948) 98-99 cited in D. Amann, ‘Assessing International Criminal Adjudication of Human Rights Atrocities,’ (2003) 16 *Third World Legal Studies* 169

¹²⁷*Prosecutor v Erdemovic* Case No IT-96-22-T Sentencing Judgment ICTY [29 November 1996] para 58

¹²⁸See United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia SC Res. 827UN DocS/RES/827 [25 May 1993], 1

¹²⁹See eg *Prosecutor v Tadic* IT-94--A, Appeals Chamber [15 July 1999] para 190

¹³⁰R. Posner, ‘An Economic Theory of the Criminal Law’(1985) 85 *Columbia Law Review*

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¹³¹*Prosecutor v Erdemovic* ICTY-IT-96-22-T Sentencing Judgment ICTY [29 November 1996] para 58

violations of international humanitarian law and human rights.’¹³² The sentencing judgment of *Kambanda*, aimed:

‘...on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on other hand, at deterrence, namely dissuading for good those who will attempt in the future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights.’¹³³

In the case of *Fofana*, for example, the SCSL declared that: ‘[T]he primary objectives must be retribution and deterrence.’¹³⁴ On specific deterrence, the ‘sentence should be adequate to discourage an accused from recidivism.’¹³⁵ Although the Trial Chamber in the *Dragan Nikolic* case also recognised that specific deterrence ‘has an important function in principle and serves as an important goal of sentencing,’¹³⁶ nevertheless found that specific deterrence had no relevance in the case before it.¹³⁷ In response to the Appeals Chamber’s affirmation of former Liberian president Charles Taylor’s sentence, SCSL Prosecutor Brenda Hollis stated that ‘[t]his sentence makes it clear that those responsible for criminal conduct on a massive scale will be severely punished.’¹³⁸ No sentence less than 50 years would be enough to achieve retribution and deterrence, the primary goals of sentencing for international crimes.¹³⁹ The ICC cited these traditional rationales of retribution and deterrence as primary goals in the prosecution of Lubanga.¹⁴⁰

2.2.1 Philosophical foundations of the Rome Statute (ICC)

The ICC was the first treaty-based court created to help ‘end impunity for the perpetrators of the most serious crimes of concern to the international

¹³²*Prosecutor v Kayishema and Ruzindana* ICTR 95-1-T [21 May 1999] para 2

¹³³See *Prosecutor v Kambanda* ICTR 97-23-S, Trial Chamber, Judgment and Sentence, para 28, 4 September, 1998) See also *Prosecutor v Rutaganda* ICTR-96-3-T [6 December 1999] para 456

¹³⁴*Prosecutor v. Fofana*, SCSL-04-14-A, Appeals Judgment [May 28, 2008] para 532

¹³⁵*Prosecutor v Nikolic*, IT-94-2A, Appeals Sentencing Judgment, [4 February 2005] para 45

¹³⁶*Prosecutor v Nikolic*, IT-94-2-S, Trial Sentencing Judgment, [18 December 2003] para 134

¹³⁷*Ibid* 135

¹³⁸ See ‘Prosecutor Hollis Welcomes the Historic Final Judgment in the Charles Taylor case’ Press Statement Special Court for the Sierra Leone, Office of The Prosecutor 26 September 2013 <http://www.sc-sl.org/LinkClick.aspx?fileticket=aZeuIE4mUa4%3D&tabid=53>

¹³⁹See ‘Prosecutor Hollis Welcomes the Historic Final Judgment in the Charles Taylor case’ Press Statement Special Court for Sierra Leone, Office of The Prosecutor 26 September 2013 <http://www.sc-sl.org/LinkClick.aspx?fileticket=aZeuIE4mUa4%3D&tabid=53>

¹⁴⁰Lubanga Sentencing Judgment 10 July 2012 [10 July 2006] para 16

community.¹⁴¹ Since these offences are deemed to offend humanity as a whole and ‘deeply shock the conscience of humanity’, it is such crime that can justify an internationalisation of their prosecution...¹⁴² The ICC represented the putative international criminal court, unlike the preceding hybrid models. Focus on its work, practices and philosophies would be inevitable. In terms of its penal philosophy, the ICC seemed to replicate the domestic penal traditions of its predecessors whose jurisprudence has been cited above. Supporters of the Rome Statute routinely urge ratification on deterrence grounds.¹⁴³ According to the Preamble of the Rome Statute and Articles 1 and 5, its objectives are the prosecution and punishment of the most serious crimes of international concern.¹⁴⁴ The Statute describes and seeks to end ‘unimaginable atrocities’, and ‘grave crimes’ that ‘deeply shock the conscience of humanity.’¹⁴⁵ These provisions have been interpreted as meaning that retribution and deterrence are primary goals of the ICC.¹⁴⁶ As noted, the ICC referred to the principles of retribution and deterrence as principal goals in the prosecution of Lubanga.¹⁴⁷

Several authors argue, however, that the correlation between international criminal justice and such aims is tenuous.¹⁴⁸ Just as in the domestic realm, in ICL, offenders or those who disturb social order are punished in proportion to the moral magnitude of their intentionally committed harms.¹⁴⁹ Critics of retributive justifications for international trials note, however, the inability of international courts to prosecute all or even most of the crimes committed in a given situation and the difficulty of

¹⁴¹See Rome Statute Preamble

¹⁴²See A. Pellet, ‘Internationalized Courts: Better Than Nothing’ in C Romano, A Nollkaemper, and J Kleffner in *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: OUP 2004) 437, 438

¹⁴³ G. O’Connor, ‘The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court’ (1999) 27 *Hofstra Law Review* 927, 972

¹⁴⁴See Rome Statute, Preamble, para 4 and Art. 1 and 5

¹⁴⁵ Ibid

¹⁴⁶ E. Mendes *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Publishing 2010) 143

¹⁴⁷Lubanga Sentencing Judgment [10 July 2012] para 16

¹⁴⁸See eg D. Wippman, ‘Atrocities, Deterrence, and the Limits of International Justice’ (1999) 23 *Fordham International Law Journal* 473, 474, stating that ‘the connection between international prosecutions and the actual deterrence of future atrocities, for instance, is at best a plausible but largely untested assumption’; M. Drumbl, *Atrocity, Punishment an International Law* (Cambridge University Press 2007), noting that any anecdotal research must take into account the reality that atrocity continues to occur, unabated, in many places following the creation of criminal tribunals to punish perpetrators.

¹⁴⁹K. Carlsmith, and J. Darley, ‘The psychological aspect of retributive Justice’ in M. Zanna (ed.), *Advances in Experimental Social Psychology* (San Diego, CA: Elsevier 2008)

inflicting retributively proportionate punishments such as genocide.¹⁵⁰ Also, the ‘massive nature of atrocity cannot be reflected in retributive punishment owing to human rights standards, which cabin the range of sanction.’¹⁵¹ These ‘standards limit the amount of pain institutions can inflict upon convicts.’¹⁵² Inconsistencies in the quantum of punishment also arise because of the discretion reposed on judges.¹⁵³

Deterrence is notoriously difficult to assess. It is impossible to prove categorically that the existence or the type of punishment has had any bearing on subsequent events.¹⁵⁴ Further, the belief that perpetrators make cost-benefit calculations before they commit crimes is extremely presumptuous.¹⁵⁵ But more significantly the crimes that international courts prosecute – mass crimes - are distinct from those adjudicated in domestic law. If the ‘rational-actor model of deterrence is suspect in the national context, it is exponentially so in the international, where war, large scale violence, and collective pathologies, as well as the institutional and resource limitations of ICL can be expected to distort the viability of the familiar cost-benefit calculus on which that model depends.’¹⁵⁶ Furthermore, it may ‘well be quixotic to expect ICL to exert a significant deterrent effect on war criminals and *genocidaires* merely through its potential to increase the perceived costs of international crime.’¹⁵⁷ These are often passion-driven crimes. The ICTY Appeals Chamber was circumspect about general deterrence as the most important sentencing purpose.¹⁵⁸ Although it was of ‘general importance’ no ‘undue weight’ should be given to deterrence as a sentencing factor.¹⁵⁹ In *Tadic*, the Appeals Chamber stated that it ‘accepts that [deterrence] must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.’¹⁶⁰In

¹⁵⁰ M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’)in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012)

¹⁵¹ M. Dumbbl *Atrocity, Punishment, and International Law* (Cambridge University Press 2007)15

¹⁵² *Ibid*15

¹⁵³ *Ibid* 15

¹⁵⁴G. Dingwall and T. Hillier ‘The Banality of Punishment: Context Specificity and Justifying Punishment of Extraordinary Crimes’ (2010) 6 *International Journal of Punishing and Sentencing* 6

¹⁵⁵See eg I. Tallgren, ‘The Sensibility and Sense of International Criminal Law’(2002) 12 *European Journal of International Law* 561, 584

¹⁵⁶ R. Sloane, ‘The Expressive Capacity of International Punishment’ (2007) 43 *Stanford Journal of International Law* 39, 40

¹⁵⁷ *Ibid* 39

¹⁵⁸*Prosecutor v Delalic et al.*, ICTY-IT-96-21-A, Judgment in Sentencing Appeals, Appeals Chamber [20 February 2001] para 803

¹⁵⁹ *Ibid* para 801-803

¹⁶⁰*Prosecutor v Tadic* ICTY-IT-94-1-A and IT-94-1-Abis [26 January 2000] para 48

Delalic [Celebici Case] it was noted that 'a consideration of retribution as the only factor in sentencing is likely to be counter-productive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia.'¹⁶¹ So the perception is that retribution does not spawn any benefits to the victims or society.

Retribution and deterrence are not only objectives of ICL. The list of goals is long. The task 'of fulfilling all these self-imposed demands is truly gargantuan.'¹⁶² This has led to the suggestion that 'some of the presently accepted objectives of international criminal courts should be altered - that is, scaled down, or even abandoned, and left to other mechanisms of public response to massive human rights violations.'¹⁶³ Criminal courts 'should play a more modest role in advancing the rule of law in the domain of international politics.'¹⁶⁴ There is no trellis, so to speak, to support the ivy of the courts' aspirations.'¹⁶⁵ In later chapters, I discuss some of these aims: the observation is that some of the objectives, such as establishing peace and reconciliation, should not be duties of international courts. These can be conducted by other organs, for example specialised UN institutions. The central proposition for this study is that ICL requires a modest theory of prosecution and punishment applicable to its context.¹⁶⁶ Theorisation of ICL thus far appears divorced both conceptually and practically from context. The goals of adjudication 'are simply too disparate to be susceptible to being ranked against a common measure.'¹⁶⁷ But 'this does not mean that one must accept the existing absence of orientation. An improvement over the present situation would be if a goal could be selected as central to the mission of international criminal courts in the sense of providing an argumentative advantage in balancing competing goals.'¹⁶⁸ It is imperative, for instance, 'that the ICC coalesces around a primary justification for its work and set

¹⁶¹*Prosecutor v Delalic*, ICTY-IT-96-21, Judgment [16 November 1998] para 1231

¹⁶² *Ibid* 331

¹⁶³ *Ibid* 330

¹⁶⁴ *Ibid*

¹⁶⁵ *Ibid*

¹⁶⁶ J. Ohlin, 'Towards a Unique Theory of International Criminal Sentencing' in G. Sluiter and S. Vasiliev (eds) *International Criminal Procedure: Towards a Coherent Body of Law* (London: Cameron 2009) 390

¹⁶⁷ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 344

¹⁶⁸ *Ibid*

modest expectations.¹⁶⁹ When unpacked, international criminal justice's principal goals have been retribution and deterrence.¹⁷⁰ The other objectives only surface sporadically in jurisprudence. Whereas the ICC predicates its work principally on these domestic theoretical propositions of retribution and deterrence, it operates in a different context. Context insensitive research and context insensitive theory lead to a self-reinforcing pattern of context insensitive scholarship.¹⁷¹ Mass crimes are distinct from ordinary crimes. Yet international criminal courts cannot prosecute all or most offenders. Historically, tribunals have failed to account for large numbers of perpetrators. Even after the Holocaust, the Allies' enthusiasm for criminal prosecutions dissipated rapidly.¹⁷² An 'implicit principle of Nuremberg and Tokyo was to hold highly publicised trials of a few leaders primarily responsible for a process of criminality in which hundreds of thousands had in fact been culpable in one way or another.'¹⁷³ The subsequent tribunals 'continuously struggled, with only partial success, to obtain the funding, personnel, and political support necessary to function even with relatively modest caseloads.'¹⁷⁴ It will 'rarely be possible to prosecute more than a representative sampling of those responsible for genocide, crimes against humanity, and war crimes.'¹⁷⁵ A consensus seems to have emerged that the ICC's Office of the Prosecutor (OTP) should negotiate the inherent limitations of

¹⁶⁹ S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?' (2014) 3 *Penn State Journal of Law and International Affairs* 30

¹⁷⁰ See eg *Prosecutor v Kupreskic*, ICTY-IT-95-16-T Judgment [14 January 2000] para 848; *Prosecutor v. Kordić and Cerkez*, ICTY-IT-95-14/2-A Appeals Chamber [17 December 2004] para 1076 ('both individual [n.b. specific] and general deterrence serve as important goals of sentencing...') *Prosecutor v. Popović*, ICTY-IT-05-88-T, Trial Judgment [10 June 2010] para 2128; *Prosecutor v Lukić*, ICTY-IT-05-87 Trial Judgment [20 July 2009] para 1049; *Prosecutor v Milutinović*, ICTY-IT-05-87-T, Trial Judgment [26 February 2009] para 1144; *Prosecutor v Delić*, ICTY-IT-04-83-T, Trial Judgment [15 September 2008] para 559; *Prosecutor v Milošević*, ICTY-IT-98-29/1-T, Trial Judgment, para 987; *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T Sentencing Judgment [9 October 2007] para 26, citing *Prosecutor v Aleksovick* ICTY-IT-95-14/1-A Appeal Judgment ICTY [24 March 2000] para 185; *Prosecutor v Kambanda* ICTR-97-23-S Judgment and Sentence (TC) [4 September 1998] para 28 and *Prosecutor v Nikolic* IT-02-60/1-S Sentencing Judgment (TC) [2 December 2003] para 86

¹⁷¹ D. Whetten, 'An Examination of the Interface Between Context and Theory Applied to the Study of Chinese Organizations' (2009) 5 *Management Organisation Review* 29

¹⁷² D. Wippman 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473, 481

¹⁷³ A. Roberts, 'The Laws of War: Problems of Implementation in Contemporary Conflicts' (1995) 6 *Duke Journal of Comparative and International Law* 11, 26-27

¹⁷⁴ D. Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473, 483

¹⁷⁵ *Ibid* 481

prosecutorial capacity by focusing investigations and prosecutions on those culpable individuals who occupied the highest levels of political or military authority.¹⁷⁶

2.3 International criminal law and mass crime

The tribunals established since Nuremberg have adjudicated genocide, crimes against humanity and war crimes. These crimes involve multiple actors. While these crimes have been discussed predominantly in terms of large scale murders,¹⁷⁷ conceptually, the category of 'egregious' crimes shares common organic characteristics. Of these crimes, the mass nature of child soldiering has been less salient in legal discourse, perhaps because it does not always induce the horror of mass eliminationism. However, 'mass' only denotes 'large numbers.' ICL 'crimes involve extraordinary collective dimensions and extensive communal engagement.'¹⁷⁸ Just as it is a crime to kill thousands of people, criminality in child soldiering should be perceived through the wide-scale conscription, enlistment and active use of children for purposes of war. Some, as noted, consider such non-murder crimes as more grave. The numerous agents in child soldiering include state actors, rebels, (or as groups), parents and guardians. Therefore, the conscription, enlistment and use of children for military combat should be considered as mass crime. Liberal traditions of ICL have approached mass crime by focusing on the individual as a unit of action and punishment. Lubanga was charged and found guilty as co-perpetrator¹⁷⁹ for the recruitment of child combatants. However, this individuation of guilt can obscure the *collective* character of ICL crimes - a feature that distinguishes them from most

¹⁷⁶ M. C. Bassiouni 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights' in M. C. Bassiouni (ed.), *Post-Conflict Justice* (Transnational Publishers, Ardsley, NY, 2002) 3, 27 ; stating, 'As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors. This policy does not and should not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals.'; see also A. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, 543 noting 'That the international justice forum should be reserved for high-level perpetrators has gained wide acceptance.'

¹⁷⁷ See eg M. Dumbul Atrocity, *Punishment, and International Law* (Cambridge University Press 2007); M. Osiel, 'The Banality of Good: Aligning Incentives against Mass Atrocity' (2005) *Columbia Law Review*, 1751D. Wippman 'Atrocities, Deterrence, and the Limits of International Justice' (1999) 23 *Fordham International Law Journal* 473, focusing more on mass murders

¹⁷⁸ D. Robinson, 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127, 128

¹⁷⁹ See *Prosecutor v Lubanga* 'Judgment pursuant to Article 74 of the Statute,' ICC-01/04-01/06 [14 March 2012] [Hereinafter 'Lubanga Trial Judgment'] para 1351

similar crimes of violence in the national sphere.¹⁸⁰ Perpetrators of ICL crimes often act in a normative universe that differs dramatically from the relatively stable, well-ordered society that most national criminal justice systems take as their baseline.¹⁸¹ Therefore we cannot simply project familiar national principles onto ICL. We must inspect and re-articulate those principles to take into account the special contexts encountered by ICL, which include massively collective action...¹⁸²

There are many other ways in which the special contexts raised by ICL may spawn new challenges, because they depart from the familiar context in which we normally conceive of criminal law. Some scholars have proposed a polycentric approach to mass crime, incorporating multiple judicial modalities, in order to encompass collective responsibility. Such an approach would account for a large number of perpetrators. A diverse of approach to mass atrocity is, ideally, appealing. However, it might be fraught with more impediments than the ICC contends with. In this study, I focus on the ICC in its present circumstances. The multi-pronged modalities 'would entail fragmentation of international criminal law: the multiplicity of its variations would be difficult to order in ways capable of preserving the system's coherence.'¹⁸³ Further, the liberal model the ICC uses is not alien to most countries which were colonised by Western regimes. What is important is to be able to justify the prosecution of an individual to society. The ICC as the foremost global penal institution, and indeed *Lubanga* as its seminal case, presents a focal point for discourse on theoretical challenges for ICL in cases of individuated guilt. The ICC receives numerous communications for prosecution of cases. Therefore, it has to exercise selective discretion, not least because of its limitations. Prosecutorial selection is vital because it determines the narrative for the judicial process. However, the ICC selection of situations and cases has been dogged by dispute. The prosecutor has been accused of targeting Africans and ignoring the excesses of Western countries, for example, British troops in Iraq. Ambos and Stegmüller point

¹⁸⁰ R. Sloane 'The Expressive Capacity of International Punishment' (2006) Columbia Public Law & Legal Theory Working Papers, citing *Prosecutor v Tadic*, IT-94-1, Judgment [15 July 1999] para 191 ('Most of the time [ICL] crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.')

¹⁸¹ Sloane *ibid* 3

¹⁸² D. Robinson, 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127, 129

¹⁸³ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 349

out that given ‘the high number of communications and referrals to the ICC, a focused strategy setting out the criteria for situation and case selection and prioritisation should be one of the priorities of the Prosecutor.’¹⁸⁴ The Rome Statute does not clearly outline the purposes of prosecution and punishment, except stating aims to end ‘unimaginable atrocities’, and ‘grave crimes’ that ‘deeply shock the conscience of humanity,’¹⁸⁵. These have been read as meaning retribution and deterrence are primary goals of the ICC.¹⁸⁶ The ICC also alluded to the principles of retribution and deterrence as principal goals in the prosecution of Lubanga.¹⁸⁷ For reasons discussed earlier - the limiting factors and the mass nature of the crimes the ICC prosecutes - this unreflective mimicry of domestic rationales to the international plane becomes problematic and may not be the best guiding principles for case selection. International criminal courts can prosecute only a handful of defendants. In that sense, international justice is largely symbolic. A subsequent question would centre on what the few cases the ICC prosecutes would symbolise. Such approach may help us establish not only the most plausible but a realistic justification for the court’s selection of cases and its work.

2.4 International collectivism and law

To appreciate the trajectory of this project, it is important to conceptualise the underpinnings of the whole body of international law. It is through a prism of the broader dynamics and normative developments that we can establish what the ICC symbolises and plausible penal justifications. The concept of ‘international’ in law presupposes a legal community that transcends state individualism. Unlike national criminal law, ICL ‘purports to serve multiple communities, and the figurative ‘international community,’ which, needless to say, is not monolithic.¹⁸⁸ Arguments about state sovereignty and international law have been well-rehearsed. The ‘Westphalian’ concept in the context of a nation-state’s right to monopolise certain exercises of power on its territory and citizens has been prized by those who maintain

¹⁸⁴ K. Ambos and I. Stegmiller, ‘Prosecuting International Crimes at the International: Criminal Court: Is There a Coherent and Comprehensive Prosecution Strategy?’ (2013) 59 *Crime, Law and Social Change* 415, 415

¹⁸⁵ See Rome Statute, Preamble

¹⁸⁶ E. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Publishing 2010), 143

¹⁸⁷ Lubanga Sentencing Judgment [10 July 2012] para 16

¹⁸⁸ R. Sloane ‘The Expressive Capacity of International Punishment’ (2006) Columbia Public Law & Legal Theory Working Papers, 2-3

‘realist’ views or who otherwise wish to prevent foreign or international powers and authorities from interfering in a national government’s decisions and activities.¹⁸⁹ Nevertheless, a new order of inter-state interaction in which states give up some of their decision-making authority to international organisations has emerged. Substantial increases in international and cross-national connections and institutions are challenging an international order dominated by the unitary state. According to Haas, ‘political integration is the process whereby actors shift their loyalties, expectations, and political activities toward a new center, whose institutions possess or demand jurisdiction over preexisting national states.’¹⁹⁰ Lauterpacht presented one of the earlier works on the function of law in the international community.¹⁹¹ For Lauterpacht, the international community was a reality which over time would progress towards greater legal and political integration.¹⁹² In a critique, Feichtner argues, however, that Lauterpacht’s work is sentimental ‘given the impossibility of adhering to a notion of progress of international society towards international solidarity and justice or the notion of legal logic as the foundation of a convincing argument.’¹⁹³ Despite our disillusionment, she notes however, that ‘Lauterpacht reminds us of what many of us international lawyers are missing today, but is needed now no less than it was needed then: a vision of global justice and global public ordering against which we may assess the current state of international law and legal practice.’¹⁹⁴ While not monolithic, the idea of a ‘universal community’ is more a reality today than at any time in the past.¹⁹⁵ The notion of an international society or *Civitas maxima*, a ‘supreme state’ into which individual states have been combined ‘because they wish to promote the common good’¹⁹⁶ might be dismissed as idealistic and sentimental.

¹⁸⁹ J. Jackson, ‘Sovereignty-Modern: A New Approach to an Outdated Concept’ (2003) 97 *American Journal of International Law* 782

¹⁹⁰ E. Haas, *The Uniting of Europe: Political, Social, and Economic Forces, 1950-1957* (Stanford, California Stanford University Press, 1958)10

¹⁹¹H. Lauterpacht *The Function of Law in the International Community* (Oxford: Oxford University Press, 2011) (first published in 1933) review, I. Feichtner ‘Sir Hersch Lauterpacht, The Function of Law in the International Community (2011) 22 *European Journal of International Law* 1177

¹⁹² Ibid

¹⁹³ Ibid

¹⁹⁴ Feichtner ibid

¹⁹⁵D. Held, A. McGrew, D. Goldblatt and J Perraton *Global Transformations: Politics, Economics and Culture*. (Stanford: Stanford University Press 1999) 327

¹⁹⁶C. Wolff, *Jus gentium methodo scientifica pertractatum* (Vol II, The Translation, Oxford, Clarendon 1934), Prolegomena § 12 (14) cited in M. Koskenniemi ‘International Community from Dante to Vattel’, in V. Chetail (ed), *Vattel’s International law from a XXI Century Perspective* (Leiden, Brill 2011) 49-74

However, the creation and existence of the United Nations, ratifications of international law instruments (IHL, IHRL, ICL), including the Rome Statute, present objective evidence of some integration, however imperfect. Not many can speak of our societies as perfect and all-inclusive.

2.4.1 Cosmopolitanism

Various philosophies have been proffered to explain international global ethics. The proposition I proffer is premised on the claim that ‘the most valuable effects of international criminal law may be its contribution to the creation of a sense of cosmopolitan identity, an identity which values all human beings equally, independent of their national or other ties.’¹⁹⁷ In this study, my approach interweaves two International Relations approaches, constructivism and cosmopolitanism, the latter as the primary framework mainly for its emphasis on the diversity of the collectivism, individual rights and duties towards one another. I shall enmesh these two approaches with Durkheim’s concept of the ‘collective conscience.’¹⁹⁸ Cosmopolitanism does not advocate the abolition of the state. The thesis takes ‘cosmopolitanism’, as the project which ‘searches for commonalities between cultures’ but ‘also recognises and respects differences, thus embracing pluralism and the building of a *modus vivendi*.’¹⁹⁹ One of the foremost writers on cosmopolitanism was Immanuel Kant. There are, of course, other philosophers who have articulated cosmopolitan ethos. However, Kant is regarded its most prominent proponent. In one of his essays, Kant noted that ‘the peoples of the earth have entered in varying degree into a universal community and it has developed to the point where a violation of rights in *one* part of the world is felt *everywhere*.’²⁰⁰ According to cosmopolitanism, ‘regard for others does not stop at the boundaries of a given state; we are rightly concerned with the global community of humans;...

¹⁹⁷ D. Koller, ‘The Faith of the International Criminal Lawyer’, (2008) 40 *New York University Journal of International Law and Politics* 1019, 1023

¹⁹⁸ E. Durkheim, *The Division of Labour In Society*, 108 cited in F Mégret, ‘Practices Of Stigmatization’ (2014) 76 *Law and Contemporary Problems* 287

¹⁹⁹ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 137 citing .K. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (New York: W.W. Norton & Company, 2006); xv, 96-99, 144, 151; S. van Hooff, *Cosmopolitanism: A Philosophy for Global Ethics* (McGill-Queen’s University Press, 2009) 164-69.

²⁰⁰ I. Kant, Kant: Political Writings 107–08 (H Reiss ed., H.B. Nisbet, trans., 2d ed. 1991), *quoted in* D Harvey, *Cosmopolitanism and the Banality of Geographical Evils*, 12 *Public Culture* 2, 529, 532 (2000).

emphasis is placed on humans rather than states...'²⁰¹ Central to cosmopolitan ethics are the rights of individuals over states. The human rights treaties, laws and declarations that have been generated since Universal Declaration of Human Rights (UDHR) seem to vindicate the growing pre-eminence of individual rights. Some criticise the UDHR for endorsing an inter-statal approach, but the truth is 'the treatment by states of its citizens and residents within their boundaries is no longer an unchecked prerogative.'²⁰² More recently, the principle of the individual as the subject of cosmopolitan law has been extended to minority groups within countries in the UN Declaration on the Rights of Persons Belonging to Nation, Ethnic, Religious and Linguistic Minorities.²⁰³ While 'states are hugely important vehicles to aid the delivery of effective regulation, equal liberty, and social justice, they should not be thought of as ontologically privileged. They can be judged by how far they deliver these public goods and how far they fail.'²⁰⁴ One of the cornerstones of Westphalian sovereignty, namely that states have ultimate authority over all objects and subjects has been delegitimised through international law.²⁰⁵ Even in Africa, often regarded as culturally insulated, the normative frameworks now increasingly recognise individual rights. A significant number of African countries has ratified the Rome Statute of the ICC. Cosmopolitanism 'resonates with the aspirations of ICL: a concern for human beings that extends beyond borders, a willingness to embrace alternative governance structures to supplement state structures, and inclusiveness of the concerns of the 'international community as a whole'.²⁰⁶ In ICL, 'the negotiation of the Rome Statute, for instance, delegates from all regions and legal traditions demonstrated a shared commitment to the fundamental principles of legality and personal culpability.'²⁰⁷

²⁰¹ D. Robinson 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127, 137

²⁰² S. Benhabib, *Another Cosmopolitanism* (Oxford University Press 2006) 31

²⁰³ D. Held, A. McGrew, D. Goldblatt and J Perraton *Global Transformations: Politics, Economics and Culture*. (Stanford: Stanford University Press 1999) Ch. 1, pp. 32-86; See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities UN General Assembly A/RES/47/135 [18 December 1992]

²⁰⁴ D. Held, 'Principles of cosmopolitan order' in G. Brock and Harry Brighouse (eds.), *The Political Philosophy of Cosmopolitanism* (Cambridge University Press 2005) 10

²⁰⁵ S. Benhabib, *Another Cosmopolitanism* (Oxford University Press 2006) 31

²⁰⁶ Art. 5 of ICC Statute referring to 'crimes of concern to the international community as a whole'.

²⁰⁷ D. Robinson, 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127, citing eg. P. Saland, 'International Criminal Law Principles', in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 189 at 194-195 ('never a contentious issue'); B. Broomhall, 'Article 22', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, 2008), 713, 715 ('widespread agreement' on need for clarity, precision and

2.4.2 Constructivism

Finnemore and Sikkink proffer a useful constructivist model on how collective standards of behaviour emerge.²⁰⁸ Norm influence may be understood as a three-stage process.²⁰⁹ The first stage of the norm cycle is ‘norm emergence’; the second stage involves broad norm acceptance, which follows a ‘norm cascade’; and the third stage involves ‘internalisation.’ The first two stages are divided by a threshold or ‘tipping’ point, at which a critical mass of relevant state actors adopt the norm (see Fig 1).²¹⁰

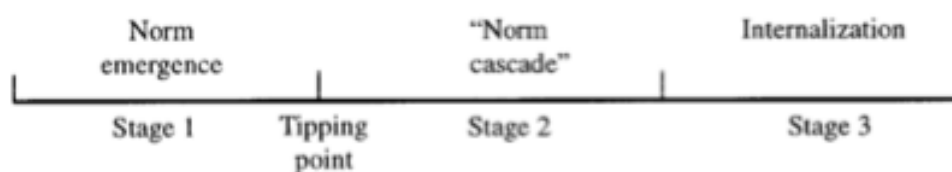


Fig 1 (Finnemore and Sikkink ‘norm life cycle’)

Social constructivists argue that the study of international relations must focus on the ideas and beliefs that inform the actors on the international scene as well as the shared understandings between them.²¹¹ Anarchy is not unavoidable; it is, in Wendt’s words, ‘what states make of it.’²¹² States may be self-interested but they continuously (re)define what that means. Their identities may change. To appreciate the influence under which collective norms are adopted, it is important to explore

specificity in accordance with principle of legality and that fundamental principles of criminal law should be clearly set out in the Statute); D. Piragoff and D. Robinson, ‘Article 30’ in O. Triferrer, *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing, 2008) *ibid.*, 849, 850 (general view that no criminal responsibility without *mens rea*); S. Lamb, ‘Nullum Crimen, Nullum Poena Sine Lege’ in A. Cassese et al (eds.), *Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), 733, 734 (viewed by most delegates as self evident) and 735 (relatively little controversy).

²⁰⁸ M. Finnemore and K. Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887

²⁰⁹ *Ibid*

²¹⁰ *Ibid* 895

²¹¹ R. Jackson and G. Sorenson, (eds) *Introduction to international relations: theories and approaches* (Oxford University Press 2008) 162

²¹² A. Wendt, ‘Anarchy is What States Make of It: The Social Construction of Power Politics,’ (1992) 46 *International Organization* 391

intersubjective meaning.²¹³ Constructivist epistemology considers shared international norms to have an impact because of their mutually constitutive nature: interacting actors construct norms; norms guide the actors' behaviour; and norms may change the definition of the actors' preferences and even identity.²¹⁴ Norms become 'a set of inter-subjective understandings readily apparent to actors that makes behavioural claims on those actors.'²¹⁵ Constructivism and cosmopolitanism have many parallels.²¹⁶ Both call for cooperation, negotiation, equal treatment between states for peaceful co-existence within the international community.²¹⁷ Villanueva has described 'cosmopolitan constructivism' as a method for the inter-subjective construction of norms, ideas and identities.²¹⁸ International penology cannot be divorced from these broader philosophies of collectivism. State interaction has resulted in international statutes protecting individuals against that which 'concern the international community as a whole.'²¹⁹ A sense of cosmopolitan 'duty' towards one another now abounds. Individuals are subjects of international law. International criminal trials would, apart from serving the interests of victims, serve the purpose of identity affirmation. Haywood notes:

As the word has 'shrunk' in the sense of people having great awareness of other people living in other countries, often at great distance themselves, it has become difficult to confine their moral obligations simply to a single political society. The more they know, the more they care. For cosmopolitan theorists, this implies that the world has come to constitute a single moral community.²²⁰

2.4.3 Collective conscience

ICL may also contribute to this change in politics by influencing our underlying conceptions of identity.²²¹ The construction of a shared global identity is a necessary

²¹³Z. Zehfuss, *Constructivism in International Relations* (Cambridge University Press 2002) 4

²¹⁴J. Ruggie, *Constructing the World Polity: Essays on International Institutionalisation* (London: Routledge, 1998)

²¹⁵M. Finnemore, 'Constructing Norms of Humanitarian Intervention' Paper presented at the Annual Meeting of the International Studies Association, Washington, D.C (1994), 2

²¹⁶L. Vidal Pérez, *Pop Power: Pop diplomacy for a global society* (Luis Antonio Vidal Pérez, 2014)

²¹⁷ *ibid*

²¹⁸C. Villanueva, *Representing Cultural Diplomacy: Soft Power, Cosmopolitan Constructivism and Nation Branding in Mexico and Sweden* (Växjö University Press 2007)

²¹⁹See Rome Statute, Preamble

²²⁰A. Heywood, *Global Politics* (Macmillan 2012)

²²¹D. Koller, 'The Faith of the International Criminal Lawyer' (2008) 40 *New York University Journal of International Law and Politics* 1019, noting that Martha Finnemore has argued that the participation of States in the International Committee of the Red Cross and the regime of

precept in the establishment of a cosmopolitan community.²²² The first and most fundamental way in which international law has an effect on identity creation is by contributing to building the particular community which identifies the need to respond to crimes.²²³ Most recently, this has been the development of a cosmopolitan community, reflected in the idea that crimes against humanity, war crimes and genocide are of universal moral concern.²²⁴ The recent emergence of attempts to exercise universal jurisdiction over such crimes is an explicit endorsement of their global moral concern.²²⁵ French sociologists Emile Durkheim, who is credited with the origins of expressivism, attributed the positive effects of ICL to a ‘collective conscience.’²²⁶ Cosmopolitans, constructivists and Durkheimian theorists share similar theoretical premise. Some authors find the roots of constructivism in Kantianism.²²⁷ Ruggie points out that contemporary social constructivists in international relations remain indebted to Durkheim for his concept of social facts, the centrality of social ideas and beliefs (*‘la conscience collective’*) in them, and for an ontology that steered clear of....individualism...’²²⁸ Durkheim defined the ‘collective conscience’ as ‘totality of beliefs and sentiments common to average citizens of the same society.’²²⁹ This totality, which today we consider as ‘identity’, transcends the individuals that compose it. However, Durkheim’s theories focused on domestic primitive communities. Some scholars, nonetheless, agree his postulation about

international humanitarian law has socialized States to accept and internalize the underlying humanitarian values. The development of international criminal law can be seen as a further evolution of this process. See M. Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell University Press 1996)

²²² D. Koller, ‘The Moral Imperative: Toward a Human Rights-Based Law of War’ (2005) 46 *Harvard International Law Journal* 231, 263-64.

²²³ Ibid 1057

²²⁴ J. Bohman, ‘Punishment as a Political Obligation: Crimes Against Humanity and the Enforceable Right to Membership’ (2002) 5 *Buffalo Criminal Law Review* 551, 567 discussing the moral justification for punishment in the context of international human rights violations.

²²⁵ D. Koller, ‘The Faith of the International Criminal Lawyer’, (2008) 40 *New York University Journal of International Law and Politics* 1019, 1058

²²⁶ H. van der wilt, ‘Crimes against humanity’ in B. van Beers, L. Corrias and W Werner (eds) *Humanity across International Law and Biolaw* (Cambridge University Press 2014) 36-37

²²⁷ See P. Karber ‘Constructivism’ as a method in International Law’ (200) 94 *Proceeding of the American Society of International Law* 189, footnote 5, noting that: Kant’s Constructivist ‘architectonic’ involves three layers of philosophical critique and reconstruction: 1). ‘Scientific Inquiry’ and the Construction of knowledge; 2). ‘Norm-related action’ (symbolically Constructed social rules ; and 3 ‘End-related configurations’ (Constructivist teleology). For Kant these layers form a vertical ‘edifice complex’ with knowledge as the foundation, upon which normative action builds a superstructure, capped by a teleological roof of end-related goals.

²²⁸ J. Ruggie, ‘What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge’ (1998) 52 *International Organization* 855, 858

²²⁹ E. Durkheim, *The Division of Labor in Society* (1893/1984:38–39), cited in F Mégret ‘Practices Of Stigmatization’ 76 (2014) *Law and Contemporary Problems* 287

collective identity and expression (expressivism) is applicable at international level.²³⁰ Durkheim's concept fits into the scope of Lauterpacht's thoughts and constructivism. The development of laws against the use of children in armed conflict would thus illustrate the creation of international or collective norms and standards against the militarisation of minors across the world. In contemporary penology, this legal cosmopolitanism has been demonstrated by the creation of the ICC to prosecute egregious crimes, including the conscription, enlistment and use of children in armed conflict. According to Durkheim, the criminal process is, fundamentally, a manifestation of the 'collective conscience.'²³¹ The specificity of modern criminal justice systems is that this collective reaction is exercised 'through the medium of body acting upon those of its members who have violated certain rules of conduct.'²³² Wise notes rather enthusiastically that 'this (Durkheim's) particular insight about the function of criminal law in affirming social solidarity and community seems particularly apt – indeed stunningly apt – when we consider the likely effects of the Rome Statute.'²³³ On this assumption, the outlawry of child soldiering attests to an identity that abhors the phenomenon or practice. The Rome Statute, which established the ICC as the medium for international criminal justice, refers to crimes that 'deeply shock the conscience of humanity.'²³⁴ If 'a law expresses and effectively communicates common or shared values and identities, it may have what might be called a positive symbolic function.'²³⁵ Thus, 'although the Rome Statute (establishing the ICC) is only one of a countless number of developments in the contemporary movement towards a more inclusive global community, it is a particularly significant development because of the constitutive symbolic function of criminal law as a community-creating, community-maintaining device.'²³⁶ To such theorists, this is also the ICC's most realistic function. Wise points out that the ICC, rather than raising expectations on deterrence, would instead, in the Durkheimian

²³⁰See F. Mégret 'Practices Of Stigmatization' (2014) 76 *Law and Contemporary Problems* 287 ; also E. Wise, 'The International Criminal Court: A Budget of Paradoxes,' (2000) 8 *Tulane Journal of International & Comparative Law* 261

²³¹E. Durkheim, *The Division of Labour In Society*, 108 cited in F Mégret, 'Practices Of Stigmatization' (2014) 76 *Law and Contemporary Problems* 287

²³²Ibid

²³³ E. Wise, 'The International Criminal Court: A Budget of Paradoxes,' (2000) 8 *Tulane Journal of International & Comparative Law* 261

²³⁴See Rome Statute: Preamble

²³⁵ W. Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20 *Law and Philosophy*, 31, 41

²³⁶ E. Wise 'The International Criminal Court: A Budget of Paradoxes,' (2000) 8 *Tulane Journal of International & Comparative Law* 261 , 268

thesis, serve as ‘a symbolic affirmation of the ties that hold a community together and by fostering a sense that one is a law-abiding citizen.’²³⁷ The ICC cannot prosecute large numbers of people involved in mass crimes. The focus on investigations and prosecutions on those culpable individuals who occupied the highest levels of political or military authority concedes to these realities.²³⁸ Thus, ‘the primary significance of the International Criminal Court will be its symbolic significance’²³⁹ and identity affirmation.

The Nuremberg and Tokyo trials cultivated the social meaning of widespread killings as ‘radical evil’²⁴⁰ and later, ‘the crime of crimes’²⁴¹ without prosecuting large numbers of defendants. Unlike genocide, the social meaning of child soldiering has historically been less salient. As Stuart Alford, co-chair of the International Bar Association’s war crimes committee stated: ‘Child soldiers are a ‘campaigning issue’ for human rights.’²⁴² Child soldiering is now ‘cresting in global awareness.’²⁴³ In the ICC Statute, child soldiering is now recognised as a war crime.²⁴⁴ The prosecution of Lubanga would be symbolic of not only the criminality of the conscription, enlistment and use of children for military combat but a community, and reinforcement of its shared norms against the phenomenon. A realistic and plausible

²³⁷ Ibid 267

²³⁸ M. C. Bassiouni ‘Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights’ in M. C. Bassiouni (ed.), *Post-Conflict Justice* 3, 27 (2002) (‘As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors. This policy does not and should not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals.’); see also A. Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *American Journal of International Law* 510, 543 noting ‘That the international justice forum should be reserved for high-level perpetrators has gained wide acceptance.’

²³⁹ E. Wise ‘The International Criminal Court: A Budget of Paradoxes,’ (2000) 8 *Tulane Journal of International & Comparative Law* 261, 268

²⁴⁰ H. Arendt, *The Human Condition* (University of Chicago Press 1958) 241

²⁴¹ *Prosecutor v Kambanda*, Case No ICTR 97-23-S, Trial Chamber, Judgment and Sentence, (September 4, 1998), available at <http://www.ictor.org/> (visited 14 June 2013) [hereinafter *Kambanda Trial Judgment*] para 16

²⁴² R. Marquand ‘Lubanga trial: Is an army of child soldiers a war crime?’ *The Christian Science Monitor* (8 October 2009) <<http://www.csmonitor.com/World/Global-News/2009/1008/lubanga-trial-is-an-army-of-child-soldiers-a-war-crime>>

²⁴³ R. Marquand ‘Lubanga trial: Is an army of child soldiers a war crime?’ *The Christian Science Monitor* (8 October 2009) quoting Nina Jorgensen, senior legal advisor to the Sierra Leone Tribunal at The Hague <http://www.csmonitor.com/World/Global-News/2009/1008/lubanga-trial-is-an-army-of-child-soldiers-a-war-crime>> (last visited 29 September 2013)

²⁴⁴ R. Marquand ‘Lubanga trial: Is an army of child soldiers a war crime?’ *The Christian Science Monitor* (8 October 2009) quoting International Bar Association (IBA) experts; <http://www.csmonitor.com/World/Global-News/2009/1008/lubanga-trial-is-an-army-of-child-soldiers-a-war-crime> (last visited 29 September 2013)

objective for international criminal justice would thus be informed by the precepts of collectivism.

2.5 Cosmopolitanism, constructivism and child law

At the core of cosmopolitan thought is dignity and equality of individuals across borders and cultures. The recent proliferation of human rights ideas constitutes ‘a new form of cosmopolitanism. This emerging cosmopolitanism exemplifies a dynamic through which global concerns become part of local experiences.’²⁴⁵ Cosmopolitan duties ‘to recognise individual equality apply to individuals as well as the global institutional/legal order.’²⁴⁶ Two major UN conventions, one declaring universal human rights as a new standard, the other declaring genocide an international crime, make up the foundation of human rights regimes.²⁴⁷

In constructivist discourse, transnational agents perform a critical role in norm emergence and cascades, persuading states to adopt new norms. By establishing, articulating and transmitting norms that define what constitutes acceptable and legitimate state behaviour, international organizations may be able to shape state practices.²⁴⁸ A ‘collective conscience’ has emerged over the rights of children. A plethora of legal instruments has been promulgated to protect the rights of children. The regime includes the Convention on the Rights of the Child (CRC); the Optional protocol on the involvement of children in armed conflict (OPAC); the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; African Charter on the Rights and Welfare of the Child , UNCHR Article 25 (2); the International Covenant on Civil and Political Rights (Article 24) International Covenant on Economic, Social and Cultural Rights (Article 10) as well as soft law instruments. ²⁴⁹ Thomas Pogge, one of the prominent writers

²⁴⁵ D. Levy and N. Sznajder, ‘The institutionalization of cosmopolitan morality: the Holocaust and human rights’ (2004) 3 *Journal of Human Rights* 143, 143-144

²⁴⁶ R. Shapcott ‘International ethics’ in J. Baylis, S. Smith and P. Owens (eds.), *The Globalization of World Politics: An Introduction to International Relations* (Oxford, UK: Oxford University Press 2013) 201

²⁴⁷ D. Levy and N. Sznajder, ‘The institutionalization of cosmopolitan morality: the Holocaust and human rights’ (2004) 3 *Journal of Human Rights* 143

²⁴⁸ E. Adler ‘Seizing the Middle Ground: Constructivism in World Politics’ (1997) 3 *European Journal of International Relations* 319, 345

²⁴⁹ For detailed analysis, see eg T. Buck *International Child Law* (Routledge 2014)

on cosmopolitanism, states three elements are shared by all cosmopolitan positions: first, *individualism*: the ultimate units of concern are human beings, or persons. Second, *universality*: the status of the ultimate unit of concern attaches to every living being equally; third, *generality*: This special status has global force.²⁵⁰ The universality of the rights suggests that a violation of children's rights 'in *one* part of the world is felt *everywhere*.'²⁵¹ Human rights instruments state that a child has the right to 'full and harmonious development of his or her personality'²⁵² and fully prepared to live an individual life in society.'²⁵³ At the centre of the child law regime is ensuring that the 'best interests of children are a primary consideration in making decisions that may affect them.'²⁵⁴ All adults should do what is best for children.²⁵⁵ When adults make decisions, they should think about how their decisions will affect children.'²⁵⁶

2.6 Expressivism

A significant step in the evolution of this 'global legal order is the crystallisation of universal norms as more than mere soft law provisions, but rather as binding law backed by punishment for violations, especially norms embedded in human rights treaties and international humanitarian law conventions.'²⁵⁷ The Rome Statute incorporates children's rights, punishing crimes committed against children, recognition that separate procedures are necessary to establish the criminal responsibility of children, special measures protecting children as victims and witnesses during judicial proceedings, and requirements that judicial staff have expertise on children's issues. The Statute criminalises the conscription, enlistment or active use in hostilities of child soldiers under the age of fifteen years, both in international and non-international armed conflicts.²⁵⁸ Lubanga was charged with and convicted of the crime. This thesis will argue that the most plausible

²⁵⁰ T. Pogge, 'Cosmopolitanism and Sovereignty' (1992) *Ethics* 45, 48–49

²⁵¹ I. Kant, Kant: Political Writings 107–08 (H Reiss ed., H.B. Nisbet, trans., 2d ed. 1991), *quoted in* D Harvey, *Cosmopolitanism and the Banality of Geographical Evils*, 12 *Public Culture* 2, 529, 532 (2000).

²⁵² See Universal Declaration of Human Rights, Preamble

²⁵³ See UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, Preamble

²⁵⁴ *Ibid* Art. 3

²⁵⁵ *Ibid*

²⁵⁶ *Ibid*

²⁵⁷ S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?', (2014) 3 *Penn State Journal of Law and International Affairs* 30, 59

²⁵⁸ See Rome Statute, Art. 8(2)(b)(xxvi), (e)(vii)]

philosophical premise for the prosecution and punishment of Lubanga is the expressive function of law. Expression denotes the ways that an action or a statement manifests a state of mind.²⁵⁹ Mental states require expression to be fully realised.²⁶⁰ More importantly, an expressive approach aims to reinforce the community-creating effect of law. Scholarship on expressive law starts with the understanding that legal actions - lawmaking, law enforcement, and court judgments - can make statements expressing values, and that these statements can affect behaviour.²⁶¹ The 'didactic' or 'socio-pedagogical' function 'translates into building awareness of the distinction between legal and criminal conduct during war or armed conflict, whether international or non-international in character.'²⁶² Punishment reaffirms and reinforces collective beliefs about what constitutes right and wrong.²⁶³ I have already outlined factors that limit the ICC from effectuating its goals of retribution and deterrence. Through the expressivist lens, the few trials the ICC conducts can primarily disseminate global norms on the crimes it selects. This, as stated, is what the court can realistically achieve within the constrained circumstances it functions but still reflect the community-creating impact.

In international criminal justice, expressivism occupies a subaltern place.²⁶⁴ As Amman noted, while expressivism has been under-explored, it has been a feature since Nuremberg in the form of treaties defining certain behaviour as criminal.²⁶⁵ The project that follows attempts to apply and argue for expressivism as the most plausible penal rationale for ICL. It is generally accepted that international criminal courts can prosecute only a handful of defendants. In the argument of this study, these prosecutions can only serve illustrative purpose of disseminating global norms.

²⁵⁹ E. Anderson and R. Pildes, 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Journal of International Law* 1503

²⁶⁰ Ibid

²⁶¹ M. Wittlin, 'Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law' (2011) 28 *Yale Journal on Regulation*, 419, 420

²⁶² S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?', (2014) 3 *Penn State Journal of Law and International Affairs* 30, 60

²⁶³ E. Wise 'The International Criminal Court: A Budget of Paradoxes' (2000) 8 *Tulane Journal of International & Comparative Law* 261

²⁶⁴ M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007)

²⁶⁵ See D. Amann, 'Assessing International Criminal adjudication of Human Rights Atrocities' 2000-2003 *Third World Legal Studies* 169, 177 referring to M C Bassiouni and E Wise *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*; (M. Nijhoff Publishers Dordrecht/Boston/London, 1995)(compiling treaties defining behaviour that violates international criminal law)

The works of Mark Drumbl,²⁶⁶ Richard Sloane,²⁶⁷ and Margaret DeGuzman²⁶⁸, which take an international perspective on expressivism, provide important theoretical springboards for this thesis. DeGuzman's contributions provide the base for this study in two ways. As already noted from the international relations paradigm, the constructivist thesis postulates shared norms. I take DeGuzman's proposition that an expressive approach to ICL suggests that a primary purpose of international criminal trials is to express these global norms²⁶⁹ as the basic premise for this thesis. Expressivism, therefore, presupposes a single moral community with shared standards. Expressivist writings have been reticent in articulating the dynamics and composition of such community. In this study, I advance the 'cosmopolitan' moral community as the source and recipient of criminal law normative messages. Due to the under-enforcement and limitation of the ICC, the handful of cases it prosecutes can serve the expressive function of law. Because of the few cases the ICC can prosecute, the cases of child soldiering can serve primarily as illustrative cases for norm expression. Norm expression does not require that multitudes of perpetrators be punished – only a small number of illustrative prosecutions would be sufficient to convey the necessary message.²⁷⁰ The ICC's selection decisions on the few cases would therefore be motivated primarily by international norm expression and identity affirmation. Secondly, DeGuzman's application of expressivism to the historically under-enforced norms on sex crimes by international criminal justice leaves room for an analogous criminological and philosophical exploration of an equally under-criminalised practice of child soldiering. Only in recent decades has international law made significant strides in defining and prosecuting rape as a war crime and crime against humanity.²⁷¹ Like rape, child soldiering has historically been

²⁶⁶ See M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007); M. Drumbl, 'Collective Violence and Individual Punishment; The Criminality of Mass Atrocity' (2008) 99 *Northwestern University Law Review* 539

²⁶⁷ R. Sloane 'The Expressive Capacity of International Punishment' (2007) 43 *Stanford Journal of International Law* 39; also R Sloane 'The Expressive Capacity of International Punishment' (2006). *Columbia Public Law & Legal Theory Working Papers* 38

²⁶⁸ M. deGuzman, 'Giving Priority to Sex Crime Prosecutions at International Courts: The Philosophical Foundations of a Feminist Agenda' (2011) 11 *International Criminal Law Review* 515; M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal International Law* 265; M. deGuzman 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012)

²⁶⁹ M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal International Law* 265

²⁷⁰ Ibid

²⁷¹ P. Weiner, 'The Evolving Jurisprudence of the Crime of Rape in International Criminal Law' (2013) 54 *Boston College Law Review* 1207

under-recognised. It is now ‘cresting in global awareness.’²⁷² As a war crime,²⁷³ falling within the crimes that shock the collective conscience, the stigma of child soldiering has been elevated from ordinary crimes. DeGuzman and others have argued for stigma-enhancing ‘thematic prosecutions’, the focused penology on particular crimes, an approach which draws from expressivist discourse. This approach recognises and elevates crimes as abhorrent to the ‘moral community.’

International criminal courts contend with limitations. Sloane, focusing on punishment (rather than prosecution), asserts:

‘The principal value of ICL punishment lies in its expressive dimensions, which more accurately capture the nature of international sentencing and ICL’s realistic institutional capacity to contribute to the ambitious objectives ascribed to it. International criminal tribunals can contribute most effectively to world public order as self-consciously expressive penal institutions: publicly condemning acts deplored by international law, acting as an engine of jurisprudential development at the local level, and encouraging the legal and normative internalization of international human rights and humanitarian law.’²⁷⁴

Like Amman, Drumbl notes that expressivism is only a tertiary goal that emerges intermittently in international jurisprudence.²⁷⁵ However, according to Drumbl, there is cause to believe that expressivism may be a more plausible justification for the punishment for egregious international crimes.²⁷⁶ Expressivism, he points out, is designed to strengthen faith in the rule of law among the general public;²⁷⁷ it transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical

²⁷² R. Marquand, ‘Lubanga trial: Is an army of child soldiers a war crime?’ *The Christian Science Monitor* (8 October 2009) quoting Nina Jorgensen, senior legal advisor to the Sierra Leone Tribunal at The Hague <http://www.csmonitor.com/World/Global-News/2009/1008/lubanga-trial-is-an-army-of-child-soldiers-a-war-crime>

²⁷³ *ibid* quoting International Bar Association (IBA) experts; <<http://www.csmonitor.com/World/Global-News/2009/1008/lubanga-trial-is-an-army-of-child-soldiers-a-war-crime>>

²⁷⁴ R. Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,’ (2007) 43 *Stanford Journal of International Law* 39, 44

²⁷⁵ Draft of M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) [authorization granted by author- hereinafter ‘Drumbl, [Draft] *Atrocity, Punishment and International Law*’] 11

²⁷⁶ M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007)

²⁷⁷ *Ibid* 173

dissemination to the public.²⁷⁸ Further, popular trials define debate, remind us of the content and value of law or serve as intergenerational signposts in history.²⁷⁹

To be sure, retribution and deterrence remain, to some extent, logical penal rationales. Retributive arguments, however, are much more vulnerable because of the backward-looking philosophy upon which they are predicated. Retribution does not seem to produce any benefits to the victim or society. On the other hand, deterrence theories posit that individuals will be dissuaded from committing extraordinary international crimes because of fear of getting caught.²⁸⁰ This could be true in some cases. Deterrence thus remains a partial justification. Expressivist theories, nonetheless, take more of an intergenerational approach that speaks to audiences beyond those already tempted to commit crimes.²⁸¹ Punishment may not simply frighten individuals who might themselves commit crimes but also play a role in communicating the standards of a community to its members, thereby influencing their moral and social development...²⁸² The ultimate objective is norm internalisation.

Like all theories, expressivism is, nonetheless, not unassailable. A concern about expressivism is that proceedings are often externalised from affected communities. Some international or internationalised courts²⁸³ have conducted proceedings away from communities ravaged by hostilities. The ICC is located in The Hague. This distal factor does not augur well for moral and social development and internalisation of norms in communities bruised by carnage. Indeed trials may achieve norm internalisation through expressivism, and media can perform the role disseminating global norms. However, international criminal trials stand to internalise norms more through proactive engagement, particularly in the affected communities. The work of international criminal courts would be inadequate without engagement with communities affected by social and political calamities. However, such engagement ought to be limited to providing information and clarification of the law to avoid burdensome extra-judicial activities. The ICC has formulated an outreach

²⁷⁸ Ibid

²⁷⁹ M. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law' (2007) 75 *George Washington Law Review* 1165

²⁸⁰ Ibid

²⁸¹ Ibid

²⁸² B. Wringer 'War Crimes and Expressive Theories of Punishment: Communication or Denunciation?' (2010) 16 *Res Publica* 119, 121

²⁸³ For example, the ICTY (The Hague, Netherlands), ICTR (Tanzania) and the ICC (The Hague)

programme. Such a programme has been implemented in, among other places, the DRC, the location of Lubanga's crime. As human rights lawyers put it:

'Outreach is needed all the more because the ICC may often hold trials far away from the scene of the alleged crimes, and apply law with which most people in the communities affected by the crimes are unfamiliar.'²⁸⁴

In this project, I incorporate outreach as a continuum of expressivism. The media perform a critical role in an expressive agenda. However, they may misrepresent or misinterpret events for sensationalist reasons or genuine lack of knowledge of the law and procedures. Outreach programmes can be conceptualised as the expressive function of law because such programmes can outline laws and reasons defendants were facing prosecution, directly to affected communities. Expressivism aims to clarify the law. The ultimate objective of law should be norm internalisation. Once a norm is institutionalised, 'internalisation usually follows somewhat automatically in the sense that institutionalization leads to habitualization, which would indicate internalization of the norm.'²⁸⁵ Unlike retribution and deterrence, which are empirically indeterminate, 'expressive' outreach can be evaluated to assess norm internalisation. Rather than seeking to deter the potential wrongdoer through alteration of his or her cost-benefit analysis, norm internalisation seeks to modify personal morality, thereby reducing the number of people willing to commit atrocities and the social acceptance of those who do.²⁸⁶ Outreach engagement serves the significant purpose of signalling to the affected community that they are part of the normative society. If international punishment is to have the cosmopolitan 'community-creating' effect around shared norms, outreach programmes would be an effective auxiliary means of achieving this goal.

²⁸⁴See 'Effective public outreach for the International Criminal Court' Lawyers Committee for Human Rights, January 2004, 1 <http://web.undp.org/comtoolkit/why-communicate/docs/Best%20Practices/EffectivePublicOutreachfortheInternationalCriminalCourt.pdf>

²⁸⁵ T. Risse, and K. Sikkink 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in T. Risse, S. R. Ropp and K. Sikkink (eds.), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, UK, Cambridge University Press 1999)1-38, 33

²⁸⁶V. Padmanabhan 'Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay' (2009) 3 *Journal of International Law* 427,37

2.7 Conclusion

The discipline of international criminal justice does not have its own theoretical foundations²⁸⁷; it ‘cannibalises’ the domestic principles for penology. Like domestic justice, in its current incarnation, international criminal law’s central goals are retribution and deterrence. The Rome Statute of the ICC appears to replicate these penal rationales as the principal goals of the ICC. However, the ICC is confronted by a number of inhibitions. It is impossible for international criminal justice systems to prosecute all involved for instance in mass criminality, and many individuals escape prosecution and punishment.²⁸⁸ Like the previous tribunals, the ICC has limitations and can only prosecute a few cases. International criminal law requires an imaginative and realistic philosophical justification applicable to its context. This chapter set out to establish the theoretical framework for the analysis of the ICC and its seminal case of Lubanga and child soldiering. Firstly, it discusses the dominant penal rationales of retribution and deterrence. However, studies are circumspect on the viability of such aims, particularly on the international plane, given the nature of crimes upon which international courts adjudicate. Given the limitations of tribunals and the ICC, it is unrealistic for courts to premise their work on these rationales as primary objectives. The ICC can achieve modest but important aims. It would appear that the most viable rationale for prosecution and punishment is the expressive function of law or expressivism. However, expressivism does not seem to be fully articulated. The chapter sought to formulate an expressivist framework that draws on cosmopolitanism, constructivism and the ‘collective conscience.’ The rise of international organisations, the formulation of laws and ratifications evince the international collectivism of shared norms that value individual rights. The formulation of laws against child soldiering symbolises and affirms the ‘collective conscience’ or legal cosmopolitanism against the practice. Secondly, prosecution and punishment can help in the internalisation of shared values thus enhancing the community-creating effect of law. However, international criminal courts, like the ICC, are often externalised from affected communities; these courts, considering the mass crimes that involve widespread communal engagement, would enhance norm

²⁸⁷ M. Drumbl, ‘Toward a Criminology of International Crime’ Washington & Lee Public Law and Legal Theory Research Paper Series Working Paper No. 03-07 (2003) 1, 8

²⁸⁸ M. Drumbl, ‘Collective Violence and Individual Punishment; The Criminality of Mass Atrocity’ (2008) 99 *Northwestern University Law Review* 539, 575

internalization through proactive engagement. Such engagement transmits to the afflicted communities the message that that they belong to the normative cosmopolitan society or 'moral community.' Rather than retribution and deterrence, ICL and more specifically *Lubanga*, would best serve the cosmopolitanism that underpins international law through expressivism by reinforcing communal norms.

CHAPTER THREE

FROM HEROES TO VICTIMS: THE HISTORICAL MUTATION OF THE 'SOCIAL MEANING' OF CHILD SOLDIERING

Introduction

The active recruiting or 'use' of minors - by persuasion or force - to fight in or otherwise provide support for state and non-state armed groups during hostilities is a challenging global phenomenon.²⁸⁹ Lubanga's conviction for the conscription, enlistment and use of children for military combat was regarded as a milestone because it was the first trial for the violation of norms against the use of children in armed conflict by the world's foremost criminal court. The last chapter set out a theoretical framework for this study based on expressivism. An expressive approach to international criminal law suggests that a primary purpose of such international criminal trials is to express global norms.²⁹⁰ However, '[N]orms do not appear out of thin air; they are actively built by agents (norm entrepreneurs) having strong notions about appropriate or desirable behavior in their community.'²⁹¹ A good starting point for formulating plausible philosophical foundations for Lubanga's penology is to analyze the genesis of collective norms against child soldiering. Constructivists place importance on shared norms, and expressivists, on 'social meaning.' Social meanings can create formal norms; norms create shared social meanings. Norms and social meanings can change or be altered until they are collectively shared. It is the collective ethos from which one can draw plausible rationales for international penology.

This chapter focuses on the history of child soldiering with the aim of locating normative developments within the socio-historical context, over time. Crucial links exist between the normative and socio-historical events. International crimes have particular meanings that have been acquired over time to become communal

²⁸⁹ M. Fox, 'Child soldiers and international law: Patchwork gains and conceptual debates' (2005) 7 *Human Rights Review* 27

²⁹⁰ M deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal International Law* 265

²⁹¹ M. Finnemore and K Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organisation* 887, 896

norms. As noted, social meanings and norms are alterable. For instance, the other mass crimes have experienced meaning-change. The concept of genocide, for example, was initially considered to ‘overlap with crimes of homicide and assault.’²⁹² Genocide, including the intentional killing, destruction, or extermination of groups or members of a group as such, was first assessed to be purely a sub-category of crimes against humanity.²⁹³ The social meaning of genocide changed to a separate international crime in earnest after World War II; the term ‘genocide’ was first used by Ralph Lemkin in his book published in 1944.²⁹⁴ Lemkin’s concept of genocide made it distinct from homicide. Similarly, through the work of transnational agents, the ‘international’ social meaning of child soldiering has mutated over the years to its current conception as an egregious mass crime. In these early chapters, the thesis devotes focus to the normative developments on child soldiering. The second objective of this chapter is to project the collectivism which underpins international law. The chapter traces the genesis of the current legal collectivism against the conscription, enlistment and use of children for military combat. In the Finnemore-Sikkink model, this chapter would be placed in the first stage – the emergence of norms against child soldiering.

The chapter is organised as follows. The first part foregrounds the discussion with a brief discussion on the concept of ‘social meaning.’ It then explores the historical meanings that underpinned the participation of children in military conflict. As the historiography will show, child soldiering had a particular discursive register around glorification of the child combatants. It examines constructivism and the change of such social conception of child militarisation, with particular reference to the work of transnational agents. The challenge to constructivism is relativism and rationalism. The second part discusses cultural relativism and contrarian constructions of childhood and child soldiering. Despite particularistic constructions of childhood and child soldiers, the social conception of militarising children has generally been transformed. The fourth section discusses ‘rationalism’ as an alternative explanation for child soldiering. Child militarisation may arise out of instrumental rationalisation removed from cultures. The fifth discusses the contemporary social

²⁹² W. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press 2009) 14

²⁹³ A. Cassese, *International Criminal Law* (Oxford University Press 2003) 97

²⁹⁴ R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress* (Washington DC: Carnegie Endowment for International Peace 1944)

meaning of child soldiering, examining factors contributory to the use of children in armed conflict and its nature as a mass activity. The sixth section examines arguments on whether child soldiers should be treated as victims of perpetrators.

3.1 Norms and ‘Social Meaning’

Society attaches meaning to social phenomena through social construction over time. War is a historical social phenomenon to which meanings have been arrogated. Social meanings are products of informal and formal norms. ‘Social meaning’ is defined as ‘the semiotic content attached to various actions, or inactions, or statuses, within a particular context.’²⁹⁵ Such meanings are used by ‘individuals, or groups to advance individual or collective ends...’²⁹⁶ Kahan and Meares, focusing on US society, argue that guns, for instance, have social meaning among youths. Gun possession ‘can confer status on the carrier because it expresses confidence and a willingness to defy authority.’²⁹⁷ However, norms and social constructions are not static. Social meanings reflect what ‘a society’s values, what it esteems, what it abhors’²⁹⁸ at a particular time. Social meanings are socially constructed and reconstructed. These meanings ‘are a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community.’²⁹⁹ And when an action creates a stigma, that stigma is a social meaning.³⁰⁰ For instance, slavery thrived because ‘norms about racial superiority, divine right, imperialism were once powerful because some groups believed in the appropriateness of the norm...’³⁰¹ Within an international context, social conceptions can change as a result of the work of transnational agents. The abolition movement against the slave trade began in 1688 when German and Dutch Quakers denounced the practice. Nadelmann describes the international agents as ‘transnational moral entrepreneurs’ who engage in ‘moral

²⁹⁵ L. Lessig, ‘The Regulation of Social Meaning’ (1995) 62 *University of Chicago Law Review* 943, 951

²⁹⁶ *Ibid*

²⁹⁷ D. Kahan and T. Meares, ‘Law and (Norms of) Order in the Inner City’ (1998) 32 *Law & Society Review* 805, 824

²⁹⁸ D. Amann, ‘Group Mentality, Expressivism, and Genocide’ (2002) 2 *International Criminal Law Review* 93, 118, 120

²⁹⁹ E. Anderson and R. Pildes, ‘Expressive Theories of Law: A General Restatement’, (2000) 148 *University of Pennsylvania Law Review* 1503, 1525

³⁰⁰ L. Lessig, ‘The Regulation of Social Meaning’ (1995) 62 *University of Chicago Law Review* 943

³⁰¹ M. Finnemore and K. Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887, 892

proselytism.’³⁰² Lessig describes them as ‘meaning managers’ or ‘meaning architects’ with the same kind of agency in the process of creating norms and larger contexts of social meaning.³⁰³ Within societies practising the slave trade, social constructivism eventually arrogated a negative meaning to slavery as sinful and immoral. Quakers saw the trade ‘as a violation of a fundamental belief that everyone is equal in the sight of God. No person has the right to own another.’³⁰⁴ Changing social meaning will have an impact on the acts that members of society sanction.³⁰⁵ In countries like the US, Quaker abolitionists mounted forceful campaigns to end the practice. By the 1830s, both African-Americans and whites were battling to end the institution of slavery in the US. Anti-slavery movements in Britain contributed to the outlawry of slavery through the Slavery Abolition Act on 28 August 1833.³⁰⁶ Slavery in the US eventually ended in 1865, with the passing of the Thirteenth Amendment to the US Constitution,³⁰⁷ which abolishes and prohibits slavery and involuntary servitude.

3.1.1 Early Meanings of Child Soldiering

The brief outline of the theoretical framework above can help us understand the social dynamics of meaning-making and change, the work of international agents, and can thus assist us contextualise the evolution of the social conceptions of child soldiering discussed herein. This thesis interests itself in the ‘social role of social norms and social meaning’ with regards to child soldiering. The use of children in war is not ahistorical. Minors have been used in warfare in one capacity or another since medieval times. The ‘problem’ of militarising children has come to the fore in recent years but like slavery, the practice was common and acceptable for many years. During this era, Aries argues, children were regarded as mini-adults who did not have any different needs than adults, and that they were not protected against

³⁰² E. Nadelmann, ‘Global Prohibition Regimes: The Evolution of Norms in International Society’ (1990) 44 *International Organization* 479; R. Price, ‘Reversing the Gun Sight: Transnational Civil Society Targets Land Mines’ (1998) 52 *International Organization* 613, also describes this as ‘moral persuasion.’

³⁰³ L. Lessig, ‘The Regulation of Social Meaning’, (1995) 62 *University of Chicago Law Review* 943

³⁰⁴ See ‘Quakers and the abolition of slave trade’ <http://www.quaker.org.uk/quakers-and-abolition-slave-trade> Quakers in Britain (last accessed 13 September 2013)

³⁰⁵ A. Geisinger, ‘Belief-Change Theory of Expressive Law’ (2002) 88 *Iowa Law Review* 35

³⁰⁶ Slavery Abolition Act 1833, 3 & 4 Will. IV c. 73 [28 August 1833] <http://www.saylor.org/site/wp-content/uploads/2011/05/Slavery-Abolition-Act-1833.pdf>

³⁰⁷ The House Joint Resolution proposing the 13th amendment to the Constitution, January 31, 1865; Enrolled Acts and Resolutions of Congress, 1789-1999; General Records of the United States Government; Record Group 11; National Archives.

any of the aspects of adult life, such as for example, labour, sex and violence.³⁰⁸ Young pages armed the knights of the Middle Ages and drummer boys marched before Napoleonic armies.³⁰⁹ In medieval Europe, children were seen as natural companions of adults, also in war.³¹⁰ The young boys that accompanied adult knights in battle on foot were called ‘*infante*’ by the Italians, and thus making up the ‘*infanteria*’ – the infantry.³¹¹ The civil war in the United States was ‘a war of boy soldiers’ who ‘often had support roles but quickly graduated into combat roles.’³¹² Child combatants fought most notably when a unit of 247 Virginia Military Institute cadets engaged Confederate Army in the battle of New Market (1864).³¹³ During the American Civil War or the First World War, ‘the participation of child combatants was promoted and perceived through a very specific discursive register, that of the child *hero*. The actions of these children were valorised and their eventual deaths seen as ‘sacrifices in the name of a greater good, often the nation’s.’³¹⁴ Van Emden’s account, *Boy Soldiers of The Great War*, offers a detailed account of the previously under-researched involvement and portraits of child soldiers during the First World War (1914-1918).³¹⁵ There were cases of boys as young as 13 who served in France. These children were said to have been motivated by patriotism. Also, thousands of under-18 British soldiers who fought in the First World War were (and are still) regarded as ‘*brave young men*’ who responded to their historical call.³¹⁶

The use of children in armed conflict was most widespread towards the end of World War II (1939-1945). Russian, German, Polish and Jewish children participated in the

³⁰⁸ P. Ariès, *Centuries of Childhood* (London: Pimlico, 1996)

³⁰⁹ P. Singer, ‘Young Soldiers Used in Conflicts Around the World’ (2006).

<http://www.brookings.edu/research/interviews/2006/06/12humanrights-singer> (last accessed 10 January 2013)

³¹⁰ D. Rosen, *Armies of the young: child soldiers in war and terrorism*. (New Brunswick, N.J.: Rutgers University Press, 2005) 7

³¹¹ A. Honwana, *Child Soldiers in Africa* (Philadelphia: University of Pennsylvania Press, 2005), 26

³¹² D. Rosen, *Armies of the young: child soldiers in war and terrorism*. (New Brunswick, N.J.: Rutgers University Press, 2005) 4

³¹³ P. Singer, ‘Young Soldiers Used in Conflicts Around the World’ (2006). <http://www.brookings.edu/research/interviews/2006/06/12humanrights-singer> (last accessed 10 January 2014).

³¹⁴ J. Jézéquel, ‘Child Soldiers in Africa: A Singular Phenomenon? On the necessity of a historical perspective’, (2006) (emphasis added) <<http://www.diplomatie.gouv.fr/fr/IMG/pdf/0605-JEZEQUEL-UK-2.pdf>> (last accessed 12 January 2013).

³¹⁵ R. van Emden, *Boys Soldiers of The Great War* (London Headline, 2005)

³¹⁶ A. Lee, ‘Understanding and Addressing the Phenomenon of ‘Child Soldiers’: The Gap between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People’s Military Recruitment’, The Refugee Studies Centre Working Paper Series No52 (2009)

fighting.³¹⁷ It has been suggested that approximately 200 000 German children aged 9–17 years were recruited as soldiers by the Nazi government; most of them were deployed as anti-aircraft auxiliaries at air force or marine bases.³¹⁸ Polish children who resisted Nazi occupation are still commemorated as heroes.³¹⁹ Customary international humanitarian law, as it traditionally related to children, was only premised on the two notions of the general protection of civilians in times of armed conflict, and the special protection of those groups regarded as being particularly vulnerable to the effects of war.³²⁰ The Geneva Conventions of 1949, promulgated four years after the Second World War, did not protect children who *participated* in war.

In Africa, the participation of children in liberation wars against colonialism did not induce outrage. During the wars for independence, child combatants were deemed to have answered the historical beckoning to liberate their countries against the yoke of colonialism and white minority rule. In Zimbabwe (then Rhodesia), minor combatants were involved in the struggle for independence. For instance, Margaret Dongo, a well-known politician, joined the war when she was 15 together with three friends; she intoned that at first they were ‘just four little girls’ with ‘childish ideas.’³²¹ Nonetheless, such female combatants have been celebrated in post-colonial discourse as women of resilience.³²² Similarly, the ‘children’ who fought in the Mozambican Liberation Front (FRELIMO)³²³ and the Africa National Congress

³¹⁷ M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 29

³¹⁸ H. Nicolaisen, *Flakhelfer: Airforce and Marine Auxiliaries in World War II* (Berlin, Ullstein, 1981) (cited in P. Kuwert *etal*, ‘Trauma and post-traumatic stress symptoms in former German child soldiers of World War II’, (2008) 20 *International Psychogeriatrics* 1

³¹⁹ D. Rosen, *Armies of the young: child soldiers in war and terrorism*. (New Brunswick, N.J.: Rutgers University Press 2005)

³²⁰ See Hague Conventions 1899 and 1907; Geneva Conventions, 1949; See also M. Mann, ‘International Law and the Child Soldier,’ (1987) 36 *The International and Comparative Law Quarterly* 32, 35

³²¹ See G. Geisler, ‘Women and the Remaking of Politics in Southern Africa: Negotiating Autonomy Incorporation And Representation (Nordic Africa Institute, 2004), 49; See also Zimbabwe Women Writers, eds. *Women of Resilience: The Voices of Women Ex-Combatants*. Harare: Zimbabwe Women Writers, 2000 (Review by T. Yoshikuni noting that among the ‘women was Marevasei Kachere, a daughter of a peasant farmer in Uzumba, Murewa (the north-eastern part of the country). She joined the war at the age of about 15’ <http://www.h-net.org/reviews/showrev.php?id=5573> (last accessed 13 January 2013)

³²² See eg Zimbabwe Women Writers, eds. *Women of Resilience: The Voices of Women Ex-Combatants*. (Harare: Zimbabwe Women Writers 2000)

³²³ See eg; H. West, ‘Girls with Guns: Narrating the Experience of War of FRELIMO’s Female Detachment’ in J. Boyden and J. De Berry, *Children and Youth on the Front Line*. (Oxford, New York: Berghahn Books 2004)

(ANC) military wing *Umkhonto we Sizwe* (South Africa), were not described as ‘child soldiers’, but venerated as ‘political activists’, ‘freedom fighters’ or ‘national heroes.’³²⁴

3.1.2 Child Soldiering: Social Meaning-Change

The brief historical account above illustrates that the social meaning of child soldiering did not elicit stigma; instead, it drew from the discursive prism of glorification. Nonetheless, social conceptions can change or are changed by the action of individuals or groups.³²⁵ Social meanings are aligned with social organization and social influence.³²⁶ Norms are deemed to enhance social organization or as reinforcing social organization. Social meanings are used by ‘individuals, or groups, to advance individual or collective ends...’³²⁷ Identity politics creates ‘new social movements,’ collective initiatives that are self-reflexive and sharply focused on the expressive actions of collective members.³²⁸ Collective agency is enacted in a moral space.³²⁹ Normative and ideational concerns have always informed the study of international politics.³³⁰ From a constructivist perspective, international structure is determined by the international distribution of ideas. ³³¹In short, ‘constructivism is about human consciousness and its role in international life... constructivists contend that not only are identities and interests of actors socially constructed, but also that they must share the stage with a whole host of other ideational factors that emanate from the human capacity...’³³² The agents for transmission of such ideas are transnational ‘entrepreneurs’. One major task for these moral entrepreneurs is to get the norms they advocate on the agenda, to get

³²⁴A. Lee, ‘Understanding and Addressing the Phenomenon of ‘Child Soldiers’: The Gap between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People’s Military Recruitment’, The Refugee Studies Centre Working Paper Series No 52 (2009) 1

³²⁵L. Lessig, ‘The Regulation of Social Meaning’, (1995) 62 *University of Chicago Law Review* 943, 962

³²⁶D. Kahan, ‘Social Influence, Social Meaning and Deterrence’ (1997) 83 *Virginia Law Review*, 349, 350-53

³²⁷L. Lessig, ‘The Regulation of Social Meaning’ (1995) 62 *University of Chicago Law Review* 943, 951

³²⁸ A. Melucci, *Nomads of the Present: Social Movements and Individual Needs in Contemporary Society* (Philadelphia, PA: Temple Univ. Press 1989) .60

³²⁹K. Cerulo, ‘Identity Construction: New Issues, New Directions’ (1997) 23 *Annual Review of Sociology* 385

³³⁰ M. Finnemore and K. Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887

³³¹ Ibid

³³² J. Ruggie, ‘What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge’ (1998) 52 *International Organization* 855,856

major actors to pay serious attention to the issue.³³³ In the first stage (norm emergence,) 'norm entrepreneurs' - international organisations, transnational advocacy networks or NGOs - attempt to socialise other States to become norm followers. While individuals usually have little control over norm-setting and social meanings,³³⁴ norm entrepreneurs help to achieve social change by: '(a) signalling their own commitment to change, (b) creating coalitions, (c) making defiance of norms seem or be more costly, and (d) making compliance with new norms seem or be more beneficial.'³³⁵ Over the years, social organisations have emerged around particular causes to influence behavioural change to establish a collective identity. As already noted, some norms now regarded as repugnant were once acceptable because some groups believed they were appropriate.³³⁶ It took almost a century of sustained effort by norm entrepreneurs and the use of a wide variety of diffusion mechanisms to abolish slavery.

Norm entrepreneurs are critical for norm emergence because they call attention to or... 'create' issues by using language that names, interprets, and dramatises them.'³³⁷ Lemkin was regarded an exceptional example of a 'norm entrepreneur'³³⁸ who helped stigmatise mass atrocity by characterising 'genocide.' Like slavery, it has also taken time to transform perceptions on the use of children during armed hostilities, create and propagate norms and stigma. As pointed out, if an action creates stigmatic effect, such stigma constitutes its social meaning.³³⁹ Today, slavery and mass killings are stigmatic acts. Like the Quakers with slavery, the International Committee of the Red Cross (ICRC) has been a key player in setting the agenda on appropriate conduct during warfare. Constructivist theorists view norms as shared understandings that reflect 'legitimate social purpose.'³⁴⁰ As meaning managers, transnational agents shape national policies by 'teaching' states what their interests

³³³ J. Kingdon, *Agendas, Alternatives and Public Policies*, (2nd edn, New York: Harper Collins, 1995), 3

³³⁴ C. Sunstein, 'Social Norms and Social Roles' (1996) 96 *Columbia Law Review* 903, 911

³³⁵ *Ibid* 929

³³⁶ M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' 52 *International Organization* (1998) 887, 892.

³³⁷ *Ibid* 896-97

³³⁸ A. Jones, *Genocide: A Comprehensive Introduction*, (Routledge/Taylor & Francis Publishers 2010) 8

³³⁹ L. Lessig, 'The Regulation of Social Meaning' (1995) 62 *University of Chicago Law Review* 943

³⁴⁰ R. Payne, 'Persuasion, Frames and Norm Construction' (2001) 7 *European Journal of International Relations* 37, 37

should be.³⁴¹ The ICRC succeeded in prescribing what was ‘appropriate behaviour’ for ‘civilised’ states involved in war.³⁴² Relatively new agents such as Child Soldiers International (previously Coalition to Stop the Use of Child Soldiers) and War Child have come on board to sustain the agenda against the use of children in armed conflict, among other generic human rights groups.³⁴³

As noted above ‘not only are identities and interests of actors socially constructed, but also that they must share the stage with a whole host of *other* ideational factors that emanate from the human capacity...’³⁴⁴ In some geographical, cultural and social spaces ideas contradict popular ideational movements. Part of the role of the transnational moral entrepreneurs is to suppress discredited or contrarian perceptions and behaviour. ‘Norm bandwagons,’ according to Sunstein, ‘occur when the lowered cost of expressing new norms encourages an ever-increasing number of people to reject previously popular norms...where it is adherence to the old norms that produces social disapproval.’³⁴⁵ Regardless of the perceived legitimacy of national military uprisings or popular revolutions today, the use of children in such causes generates disapprobation. Norm entrepreneurs focus on socialising not only states but non-state actors. The use of children in contemporary conflicts against ‘occupying’ or ‘oppressive’ regimes no longer elicits sentiments of bravery, heroism and patriotism in global humanitarian discourse. The Palestinian resistance to Israeli occupation, the Intifada, for instance, was fuelled by ‘the seductive power of the child hero bearing arms.’³⁴⁶ In March 2003 Hamas leader Abd al-Aziz al-Rantisi, declared, ‘[I]f a boy is 16, he is a man. He is a *mujahed*, a holy warrior, engaged in *jihad*.’³⁴⁷ Children have been used by Palestinian armed groups although the scale and issue of

³⁴¹ M. Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell University Press 1996)

³⁴² Ibid

³⁴³ See eg, UNICEF, Human Rights Watch and Amnesty International (See eg ‘From Cradle to War’ <http://www.amnestyusa.org/our-work/issues/children-s-rights/child-soldiers> (last accessed 15 January 2013))

³⁴⁴ J. Ruggie, ‘What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge’ (1998) 52 *International Organization* 855,856

³⁴⁵ C. Sunstein, ‘Social Norms and Social Roles’, Chicago Law & Economics Working Paper No. 36 (1996) 9

³⁴⁶ D. Rosen, *Armies of the young: child soldiers in war and terrorism*. (New Brunswick, N.J.: Rutgers University Press 2005) 126

³⁴⁷ A. Antonowicz, ‘Rantisi to Mirror Man: You're the Terrorist’, *Daily Mirror* (UK), 25 March 2004, cited in ‘Global Report 2004,’ Child Soldiers International <http://www.refworld.org/docid/4988063ac.html> (last accessed 25 November 2013)

whether their use has been systematic or not is disputed.³⁴⁸ Children, as young as 14, were also reportedly involved³⁴⁹ in the military uprising against the regime of President Bashar al-Assad in Syria from 2011. The Free Syrian Army (FSA) received moral and, reportedly, military support as a belligerent seeking to topple an unpopular dictatorship.³⁵⁰ The FSA was particularly identified for using children in the conflict.³⁵¹ However genuine the causes behind war may appear, humanitarian discourse has since sought to quash old conceptions ascribing bravery, heroism and patriotism to the participation of children in contemporary armed hostilities. Human Rights Watch, for instance, enjoined leaders of Syrian opposition groups, including the FSA, to immediately stop any recruitment or use of child soldiers, to discipline all those responsible, including commanders, and to cooperate fully with any investigation into the use of child soldiers.³⁵²

3.2 Cultural Relativism

For an action to convey a social meaning it must do so without appearing contingent or contested.³⁵³ As pointed out earlier, the international society is constituted of ‘multiple communities.’ Such communities may not be readily attuned to the collectivism that internationalism posits. The transnational legal process driven by norm entrepreneurs agitating against the use of children during warfare contends with contrarian ideational forces. In global ethical issues, cosmopolitanism contends with rationalism or realism – which is individualist - and pluralism, which underpins

³⁴⁸See ‘Global Report 2004,’ Child Soldiers International, ‘Occupied Palestinian Territories,’ <http://www.refworld.org/docid/4988063ac.html> [accessed 25 November 2013]; See also S Kiley, ‘In a war without heroes, this boy was no martyr’ The Guardian, London

<http://www.theguardian.com/world/2004/mar/28/israel1> (last accessed 25 November 2013)

³⁴⁹See ‘Syria: Opposition Using Children in Conflict’ (Human Rights Watch, 29 November 2012)

<http://www.hrw.org/news/2012/11/29/syria-opposition-using-children-conflict> (last accessed 20

January 2013) See also ‘U.N. gets reports of child soldiers with Syria rebels’ (Reuters, 26 March 2012)

<http://uk.reuters.com/article/2012/03/26/us-syria-un-idUSBRE82PoW220120326> (last accessed 20 January 2013)

³⁵⁰ The FSA was formally announced in July 2011 by defectors from the Syrian Armed Forces loyal to Assad. See M. Spetalnick and E. Solomon, ‘US to increase military support to Syria rebels’ Reuters 14 June 2013 <http://in.reuters.com/article/2013/06/14/syria-crisis-scenarios-idINDEE95D01620130614> (last accessed 13 November 2013)

³⁵¹ See R. Sherlock ‘Syria using child soldiers as young as 14’ The Telegraph UK 29 November 2012 <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9711971/Syria-using-child-soldiers-as-young-as-14.html> (last accessed 12 November 2012); A Bond ‘Tears of a Syrian boy soldier: Horror of Kalashnikov-toting child as he sees comrade die’ The Daily Mail Online 5 July 2012 (last accessed 12 November 2012)

³⁵²See ‘Syria: Stop Grave Abuses of Children’ Human Rights Watch, 2012

<http://www.hrw.org/news/2012/06/11/syria-stop-grave-abuses-children> (last accessed 20 January 2013)

³⁵³L. Lessig, ‘The Regulation of Social Meaning,’ (1995) 62 *University of Chicago Law Review* 943, 959

‘communitarian’ thought. Communitarians ‘value community and diversity; they recognise the many ways in which individuals are formed in different cultures is a good thing in itself.’³⁵⁴ Cosmopolitanism is deemed antithetical because it does not ‘include the specific contextual elements with which human individuals and groups make *rational and reasonable* decisions according to their specific values, identities and interests.’³⁵⁵ Cultural relativism ‘is an undeniable fact; moral rules and social institutions evidence an astonishing cultural and historical variability.’³⁵⁶ Cultural relativists argue that childhood is a social construct: ‘its meaning is negotiated between different individuals and groups, often with conflicting interests. Thus, childhood is relative.’³⁵⁷ Rituals, initiations, marriage and childbearing are more appropriate indicators of adulthood rather than chronological age.³⁵⁸ Cultural particularism has been associated with practices in Africa, among other places. In Sierra Leone, for example, Shepler found that a child might have to sweep the house and compound, get water for the household, find wood in the forest and bring it home, work on the farm or garden or help the adults with whatever work they are doing.³⁵⁹ Once a person is doing such ‘adult work’ or has completed cultural rituals that lead to manhood or womanhood, he or she is regarded as an adult.³⁶⁰ These rites of passage and ‘adult’ roles thus make the participation of children in warfare less stigmatic in such social spaces. Radical cultural relativism would suggest that ‘culture is the sole source of the validity of a moral right or rule.’³⁶¹ Child soldiering would thus be an emanation of accepted culture. This resistance can be understood through what Lessig terms the ‘defensive construction’³⁶² of social meaning. Societies would defend, for instance, child soldiering. A social meaning is challenged

³⁵⁴ R. Shapcott ‘International ethics’ in J. Baylis, S. Smith and P. Owens (eds.), *The Globalization of World Politics: An Introduction to International Relations* (pp. 199-210) (Oxford, UK: Oxford University Press 2013) 202-203

³⁵⁵F. Requejo, ‘Cosmopolitan Justice and Minority Rights: The Case of Minority Nations (or Kant again, but different)’ (2012) 3 *Ramon Llull Journal of Applied Ethics* 83, 85

³⁵⁶J. Donnelly, ‘Cultural Relativism and Universal Human Rights’ (1984) 6 *Human Rights Quarterly* 400, 400

³⁵⁷J. Fernando, ‘Children’s Rights: Beyond the Impasse’ (2001) 575 *The Annals of the American Academy of Political and Social Science*, 8, 18-19.

³⁵⁸See eg; D. Francis, ‘Paper Protection’ Mechanisms: Child Soldiers and the International Protection of Children in Africa’s Conflict Zones’, (2007) 45 *Journal of Modern African Studies* 207

³⁵⁹ S. Shepler, ‘The Social and Cultural Context of Child Soldiering in Sierra Leone’, Paper for the PRIO sponsored workshop on Techniques of Violence in Civil War Held in Oslo, 20-21 August 2004.

³⁶⁰S. Eisentrager ‘Exploring the Recruitment and Use of Child Soldiers’ e-International Relations <http://www.e-ir.info/2012/04/19/exploring-the-recruitment-and-use-of-child-soldiers/> 19 April 2012 (last accessed 10 November 2013).

³⁶¹J. Donnelly, ‘Cultural Relativism and Universal Human Rights’ (1984) 6 *Human Rights Quarterly* 400, 400

³⁶²L Lessig, ‘The Regulation of Social Meaning’ (1995) 62 *University of Chicago Law Review* 943, 999

by an emerging practice, and to preserve the old meaning, 'the emerging practice is prohibited or opposed. This resistance is a kind of social meaning construction because it aims to resist what would otherwise be an evolving social meaning.'³⁶³ In this sense, cultural relativism would, instead, be antithetical to the evolving cosmopolitan ideation. 'Radical universalism' would, on the other hand, posit that culture 'is irrelevant to the validity of the moral rights and rules which are universally valid.'³⁶⁴ In fostering the 'collective conscience', norm entrepreneurs would resort to 'offensive construction'³⁶⁵ 'where there is a new social meaning sought, or an old meaning to be changed.'³⁶⁶ Rosen puts it rather bluntly: 'International humanitarian law is not merely ethnocentric; it is indeed *intentionally* ethnocentric. Its concern is not to respect local norms but rather to systematically alter them.'³⁶⁷ Donnelly states that 'if human rights are the rights of every (one) simply because they are human beings, they would seem to be universal by definition.'³⁶⁸ A cultural relativist account appears to be guilty of logical contradiction, he argues. If human rights are based in human nature, on the fact that one is simply a human being, and if human nature is universal, how can human rights be relative in any fundamental way?'³⁶⁹ The source of the dissonance may not necessarily lie in the content of rights. An opposition to, say, the right to life or education would be difficult to advance in most societies. The resistance would perhaps stem from the exogenous origins of the doctrine (human rights).

3.3 Rationalism

Cultural relativism would be a readily appealing explanation for a practice in an alien geographical and cultural space. While child soldiering is not peculiar to Africa, the fact that the continent has had the largest concentration of child combatants in contemporary hostilities promotes a perception of cultural relativism as the sole and

³⁶³ibid 991

³⁶⁴J. Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400, 400

³⁶⁵L. Lessig, 'The Regulation of Social Meaning' (1995) 62 *University of Chicago Law Review* 943 999

³⁶⁶ibid 963

³⁶⁷ D. Rosen, 'Social Change and the Legal Construction of Child Soldier Recruitment in the Special Court for Sierra Leone' (2010) 2 *Childhood in Africa: An Interdisciplinary Journal* 48, 48

³⁶⁸J. Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400, 400

³⁶⁹ ibid 403

primary explanatory device. An alternative view, however, would suggest that recruiting children as combatants is actually linked to political realist or rationalist factors,³⁷⁰ not culture. Twum-Danso states, for instance, that:

‘The evidence suggests that the use of children in armed conflict is a socioeconomic phenomenon, often representing pragmatic and deliberate military strategies. It also suggests that the incorporation of thousands of children into conflicts across the continent is not a result of African tradition or a dysfunctional notion of childhood in Africa..’³⁷¹

At the core of rationalism is instrumentalism: the pursuit of advantage by calculating costs and benefits. The upshot of the rationalist position is utility maximisation: when confronted with various options, an agent picks the one that best serves its objectives and interests.³⁷² Civil wars have been much more frequent than international conflicts, and they last much longer.³⁷³ Many civil conflicts last for a decade or more. ³⁷⁴ Given these factors of frequency and duration, governments and non-state actors are seen as rational unitary actors with set preferences and a limited set of options. They will choose children, often from poor families, to replenish their ranks so that they can achieve military goals at the lowest cost. In war zones, there is ‘a ready supply of children who typically compose half or more of the populations.’³⁷⁵ These present a ready reservoir for recruitment. But the other reason for the utility of children is more sinister. On the battlefield, children are needed because they ‘sow disarray and confusion by confronting opposing troops, with the prospect of having to kill children, which most troops are reluctant to do.’³⁷⁶ Taken in this context, the acts of belligerents in armed conflict could merely be actuated by fixed preferences, often to gain power, rather than incommensurable cultural animus. It has to be

³⁷⁰ D. Rosen, ‘Child Soldiers, International Humanitarian Law, and the Globalization of Childhood’, (2007) 109 *American Anthropologist* 296; J. Andvig and S. Gates ‘Recruiting Children for Armed Conflict’, in S. Gates and S. Reich (eds), *Child Soldiers in the Age of Fractured States* (Pittsburgh: University of Pittsburgh Press 2010)

³⁷¹A Twum-Danso, *Africa’s Young Soldiers: the Co-Option of Childhood*, (Pretoria: Institute of Security Studies 2003) 11

³⁷² J. Checkel ‘The constructivist turn in international relations theory’ (1998) 50 *World Politics* 324, 327

³⁷³ M. Oberg and K. Strom, ‘Introduction: The meaning and importance of civil conflict’ in M. Oberg and K. Strom (eds.), *Resources, Governance and Civil Conflict* (Routledge 2008)

³⁷⁴ibid

³⁷⁵ M. Wessels, *Child Soldiers: From Violence to Protection* (Harvard University Press 2006) 34

³⁷⁶ M. Wessels, *Child Soldiers: From Violence to Protection* (Harvard University Press 2006) 34

noted too that while some children have *volunteered* to join armed groups, minors have also been *threatened, abducted and conscripted*.³⁷⁷

3.4 Cosmopolitanism

Contrary to conceptions of strict homogeneity, cosmopolitanism presupposes a single but diverse community of all ethnic groups premised on a *modus vivendi* of shared morality. Cosmopolitanism posits that despite the division in humanity into separate historically constituted communities, it remains possible to have a single moral community.³⁷⁸ Critics of cultural relativism have shown that pure cultures, ones uncontaminated by external influences, are mythical. Once it is accepted that the boundaries between social groups can never be absolute, it follows that cultures must always be fluid and that different groups will share common practices and institutions.³⁷⁹

‘The fact that a culture is not truly indigenous, however, does not necessarily imply that it is somehow unauthentic. Rather, the objectivity entailed in defending a culture and the existence of shared cultural practices suggest that cultural traditions are created and that the process of their creation may be contested. Deciding which elements will determine a culture involves choice. What is considered culturally typical can clearly never comprise the totality of a group’s ideas, material output or behaviour.’³⁸⁰

Whether the impetus is rationalist or cultural, transnational legal process is perhaps a more ‘complex process’ than Rosen’s forthright assertion, involving ‘institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalised by domestic legal systems.’³⁸¹ Domestic civil society groups have helped the ‘cultural software’ of individuals change through time.³⁸² Such processes can subsequently lead to alterations in municipal laws. African civil society movements concerned with child welfare have developed over the years,³⁸³

³⁷⁷ See eg; G. Machel, ‘The Impact of War on Children’ (UNICEF, 2001) pp.8-9; See also R. Maclure and M. Denov, ‘I Didn’t Want to Die So I Joined Them’: Structuration and the Process of Becoming Boy Soldiers in Sierra Leone, (2006) 18 *Terrorism and Political Violence* 119

³⁷⁸ R. Shapcott, ‘International ethics’ in J. Baylis, S. Smith and P. Owens (eds.), *The Globalization of World Politics: An Introduction to International Relations* (pp. 199-210) (Oxford, UK: Oxford University Press 2013)

³⁷⁹ T. Bennet, *Using children in armed conflict: a legitimate African tradition?* (Institute of Security Studies 1998)

³⁸⁰ Ibid

³⁸¹ H. Koh, ‘Why Do Nations Obey International Law?’, (1997) 106 *Yale Law Journal* 2599, 2602

³⁸² J. Balkin, *Cultural software: A theory of ideology*. (New Haven: Yale University Press, 1998)

³⁸³ See eg J. Sloth-Nielsen, *Children's Rights in Africa: A Legal Perspective* (Ashgate Publishing 2008) 68, noting ‘...less attention has been paid in the extant literature to the various roles that groups and

and launched campaigns resulting in the ‘boomerang effect’; that is, when domestic avenues of influence are closed off to local advocacy groups, they may mobilise international allies who then lobby their own government to put pressure on the target state.³⁸⁴ International norms are likely to be adopted when there is a cultural match, that is, ‘a situation where the prescriptions embodied in an international norm are convergent with domestic norms, as reflected in discourse, the legal system...and bureaucratic agencies.’³⁸⁵ The work of domestic civil society may have cultivated conditions for a cultural convergence. The fact that children’s rights have subsequently been widely incorporated into Africa’s domestic legal systems³⁸⁶ could be testament to a far-reaching legal ‘cosmopolitanism.’

3.5 Contemporary meaning of child soldiering

A theory premised on human beings’ incapability for ideational interaction and change is grossly anachronistic. Social conceptions are not inalterable. Social constructivism ‘aims to reconstruct the meaning of social phenomena by analysing their generative rules in dominant and embedded cultures’³⁸⁷: and the ‘reality’ which is taken to be objective knowledge and truth is understood as being ‘the result of perspective and ‘of the social processes accepted as normal in a specific context.’³⁸⁸ As Lee rightly concludes, ‘our perceptions regarding the legitimacy and morality of children’s military participation is a historical construct, shaped by particular social and political forces.’³⁸⁹ As such cultural notions may contrast with contemporary legal thought or current contexts. Further, no matter how genuine the motivations

movements role have played in children’s law reform...’ in Africa. For an analysis on the general development of civil society in Africa, see also J. Makumbe, ‘Is there a civil society in Africa?’, (1998) 74 *International Affairs* 305; M. Bratton, ‘Beyond the State: Civil Society and Associational Life in Africa’ (1998) 41 *World Politics* 407

³⁸⁴ M. Keck and K. Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca and London: Cornell University Press 1998)

³⁸⁵ J. Checkel, ‘Norms, Institutions, and National Identity in Contemporary Europe’, (1999) 43 *International Studies Quarterly* 83, 87

³⁸⁶ J. Sloth-Nielsen, *Children’s Rights in Africa: A Legal Perspective* (Ashgate Publishing 2008) 53-69

³⁸⁷ H. Jong-woo, *Power, Place, and State-Society Relations in Korea: Neo-Confucian and Geomantic Reconstruction of Developmental State and Democratization* (Google eBook) (Lexington Books 2013) 32 cited in *ibid*

³⁸⁸ T. Schwandt, ‘Constructivist, interpretivist approaches to human inquiry’ in N. Denzin and Y. Lincoln (eds.), *Handbook of qualitative research* (pp. 118-137). (Thousand Oaks, CA: Sage 1994) 125

³⁸⁹ A. Lee, ‘Understanding and Addressing the Phenomenon of ‘Child Soldiers’: The Gap between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People’s Military Recruitment’ The Refugee Studies Centre Working Paper Series No52 (2009) 5

for popular uprisings might be, contemporary humanitarian discourse seeks to eviscerate old meanings of bravery, heroism and patriotism previously associated with children's participation in war. The overarching contemporary 'cosmopolitan social meaning' of child soldiering attaches stigma to the practice. In recent years, the stigma of child soldiering was heightened in the international humanitarian and human rights field with the release of Graca Machel's *UN Study on the Impact of Armed Conflict on Children* in 1996³⁹⁰, which suggested that more than 300 000 under-eighteen year olds were fighting in 31 conflicts around the world. Her report outlines the scope of child soldiery, the methods of recruitment, and the reasons children enlist. Machel observed that child soldiering affected 'every aspect of a child's development – physical, emotional, intellectual, social and spiritual.'³⁹¹The Machel report became the global template for all humanitarian and human rights reporting on child soldiers.³⁹²

3.5.1 Causal factors and contested social meaning

Like genocide and crimes against humanity, child soldiering is often a mass crime with organic group characteristics.³⁹³ Children are rounded up 'like fish in nets'³⁹⁴ by groups of recruiters. Mass recruitment campaigns have also involved mass rallies.³⁹⁵

³⁹⁰ G. Machel, 'Report of Graca Machel, Expert of the Secretary General of the United Nations, *Impact of Armed Conflict upon Children*, UN Doc A/51/306, (1996), http://www.unicef.org/graca/a51-306_en.pdf

³⁹¹G. Machel, 'Report of Graca Machel, Expert of the Secretary General of the United Nations, *Impact of Armed Conflict upon Children*, UN Doc A/51/306, (1996), http://www.unicef.org/graca/a51-306_en.pdf, 80

³⁹² A. Lee, 'Understanding and Addressing the Phenomenon of 'Child Soldiers': The Gap between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People's Military Recruitment' *The Refugee Studies Centre Working Paper Series No 52* (2009) 1

³⁹³See eg M Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007) 24; 'Group 'crimes can be the aggregate of the participation of all involved individuals...'. D Robinson, 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127, 128 stating that ICL 'crimes involve extraordinary collective dimensions and extensive communal engagement.' A. Sepinwall, 'Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq', in T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 233, 'the collective nature of crimes of war escapes the bounds of the individualist paradigm of Western criminal law'.

³⁹⁴M. Wessels, *Child Soldiers: From Violence to Protection* (Harvard University Press, 2007) 40-41 referring to the LRA recruitment on one occasion of 139 girls from a school.

³⁹⁵See eg 'Children in the Ranks The Maoists' Use of Child Soldiers in Nepal; Human Rights Watch February 2007 Volume 19, No. 2(C), 18, noting: 'The Maoists have used a variety of techniques for recruiting children: kidnapping of individual children; abduction of large groups of children, often from schools or at mass rallies that they are forced to attend; and use of propaganda campaigns to attract children as 'volunteers.' See also 'Child Recruitment by Armed Groups in DRC period: 2012 –

While culture may have a part to play, children are recruited into military groups and state armies driven, as noted earlier, also by, or maybe purely, rationalist interests.³⁹⁶ The recruited children would be subscribing to group rather than cultural codes. Because of the duration of the civil conflicts, replenishments to the forces are often needed. There is also a simple argument of supply, in countries where fifty percent or more of the population is under eighteen, there is a ready supply of children for recruitment.³⁹⁷ Technological improvements and the proliferation of light-weight weapons like assault rifles and hand grenades have enabled child soldiers to engage effectively in warfare. Both governments and armed groups use children because they are easier to condition into fearless killing and unthinking obedience; sometimes, children are supplied drugs and alcohol.³⁹⁸ Girls are often given up for use in armed hostilities to increase their marriage prospects while some were abused. Girls were used as 'sex slaves' or 'bush wives'.

Factors such as poverty, education, war, refugee camp securitisation, religious or ethnic identity, family or its absence and friends all play a role in determining the children available for recruitment.³⁹⁹ According to a number of academics, activists, and intergovernmental organizations, poverty is a key factor in explaining the phenomenon of child soldier participation.⁴⁰⁰ Achvarina and Reich point out that the linkage makes intuitive sense. Rich countries, for example, generally do not employ child soldiers in battle, and many former child soldiers when interviewed gave

2013 (MONUSCO - 24 October 2013)' 5, referring to 'documented cases of child recruitment and reports of mass recruitment campaigns by armed groups, particularly in North Kivu'

³⁹⁶ J. Checkel, 'The constructivist turn in international relations theory' (1998) 50 *World Politics* 324, 327

³⁹⁷ S. Shepler, *Childhood Deployed: Remaking Child Soldiers in Sierra Leone* (NYU Press 2014) 22

³⁹⁸ See 'Coalition to Stop the Use of Child Soldiers' website, <http://www.child-soldiers.org>, (last accessed 1 June, 2013)

³⁹⁹ G. Goodwin-Gill and I. Cohn, *Child Soldiers: The Role of Children in Armed Conflict* (York: Clarendon 1994); R. Brett and I. Specht *Young Soldiers: Why They Choose to Fight* (Boulder: Lynne Rienner 2004); V. Achvarina and S. Reich, 'No Place to Hide: Refugees, Displaced Persons, and the Recruitment of Child Soldiers' (2006) 31 *International Security* 127

⁴⁰⁰ G. Goodwin-Gill and I. Cohn, *Child Soldiers: The Role of Children in Armed Conflict* (New York: Clarendon 1994) 23, 31, 38; See eg A. Twum-Danso *Africa's Young Soldiers: the Co-Option of Childhood, Pretoria*: (Institute of Security Studies 2003) 8, 10; L. Barnitz, *Child Soldiers: Youth Who Participate in Armed Conflict* (Youth Advocate Program International 1997) 23; Graça Machel, 'Impact of Armed Conflict on Children' 26 August, 1996, <http://www.unicef.org/graca/>, Coalition to Stop the Use of Child Soldiers, 'Child Soldier Use, 2003: A Briefing for the 4th UN Security Council, Open Debate on Children and Armed Conflict,' January 2004, <http://www.hrw.org/reports/2004/childsoldiers0104/childsoldiers.pdf>, p. 2; and 'Child Soldiers Global Report, 2001' Child Soldiers International, <http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5CSHGX?OpenDocument> (last accessed 20 October 2013)

poverty as a reason for their recruitment.⁴⁰¹ Many studies rely primarily on such interviews and therefore often cite the relationship between child combatants and poverty.⁴⁰² The NGO literature is also replete with anecdotal stories of gullible or frightened orphans being induced or coerced by belligerent forces to join their ranks.⁴⁰³ According to one report, '[C]hildren when interviewed made references to the situation of orphans in armed forces or groups. They spoke of orphans being taken in or finding their way to an armed group, in search of protection and a sense of belonging.'⁴⁰⁴ Other children are motivated by revenge for prior atrocities they endured. Often cultures glorify war and teach children to view fighting as prestigious.⁴⁰⁵ Some of these factors were at play in the DRC. Former UN Special Representative for Children and Armed Conflict Rhadika Coomaraswamy summarised the dynamics thus:

'The recruitment and enlisting of children in [the] DRC is not always based on abduction and the brute use of force. It also takes place in the context of poverty, ethnic rivalry and ideological motivation. Many children, especially orphans, join armed groups for survival to put food in their stomachs. Others do so to defend their ethnic group or tribe and still others because armed militia leaders are the only seemingly glamorous role models they know. They are sometimes encouraged by parents and elders and are seen as defenders of their family and community.....Children who 'voluntarily' join armed groups mostly come from families who were victims of killing and have lost some or all of their family or community protection during the armed conflict.'⁴⁰⁶

⁴⁰¹V. Achvarina and S. Reich, 'No Place to Hide: Refugees, Displaced Persons, and the Recruitment of Child Soldiers.' (2006) 31 *International Security* 127

⁴⁰²See eg A. Twum-Danso, *Africa's Young Soldiers: the Co-Option of Childhood*, Pretoria: (Institute of Security Studies, 2003)L. Barnitz, *Child Soldiers: Youth Who Participate in Armed Conflict* (Youth Advocate Program International, 1997)23; Graça Machel, 'Impact of Armed Conflict on Children' 26 August, 1996, <http://www.unicef.org/graca/>, Coalition to Stop the Use of Child Soldiers, 'Child Soldier Use, 2003: A Briefing for the 4th UN Security Council, Open Debate on Children and Armed Conflict,' January 2004, <http://www.hrw.org/reports/2004/childsoldiers0104/childsoldiers.pdf>, p. 2; and 'Child Soldiers Global Report, 2001' Child Soldiers International <http://www.reliefweb.int/rw/lib.nsf/db900SID/LGEL-5CSHGX?OpenDocument> (last accessed 20 October 2013)

⁴⁰³ For examples of narratives describing the recruitment of orphans that illustrate this point, see Human Rights Watch, 'Easy Prey: Child Soldiers in Liberia,' 1994, <http://www.hrw.org/reports/pdfs/c/crd/liberia949.pdf>, pp. 15–19; (last accessed 13 November 2013) and UNICEF 'Adult Wars, Child Soldiers -Voices of Children Involved in Armed Conflict in the East Asia and Pacific Region' (Hereinafter 'UNICEF: Adult Wars, Child Soldiers')

⁴⁰⁴UNICEF: Adult Wars, Child Soldiers, 30

⁴⁰⁵ J. Silva, 'Child Soldiers: A Call to the International Community to Protect Children From War' (2008) 31 *Suffolk Transnational Law Review* 681, 686; A. Abbot 'Child Soldiers: The Use of Children as Instruments of War' (2000) 23 *Suffolk Transnational Law Review* 499, 517

⁴⁰⁶Lubanga Trial Judgment para 611

3.5.2 Victims or perpetrators?

Global humanitarian discourse does not accord agency to child combatants; they are primarily regarded as victims not perpetrators. Child soldiers are characterised as almost entirely victims of adult malevolence. One could say that this is the dominant ‘cosmopolitan social meaning’ of child soldiering. However, some child soldiers have been known to commit horrific brutalities, often under the influence of drugs supplied to them by their recruiters. In his memoir, Ishmael Beah, a former child soldier in Sierra Leone, describes some of the unconscionable brutalities by young soldiers, including himself. He recalls a scene when young rebels with blood-stained clothes ‘laughing and giving each other high fives’ and boasting about what they had done that day with ‘one of them carrying a head of a man, which he held by the hair.’⁴⁰⁷In an interview with Amnesty International, a 12 year-old former child combatant, recounted: ‘When I was killing, I felt like it wasn’t me doing these things. I had to because the rebels threatened to kill me.’⁴⁰⁸ Both global humanitarian discourse and ICL have been reticent to allocate blame on the child soldiers. The ICC does not prosecute persons under 18. However, there has been debate about the culpability of child soldiers. Disagreements on the status of child soldiers in law were reflected in the establishment of the Special Court for Sierra Leone (SCSL). The UN Secretary-General noted:

‘The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It is said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objections to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved.’⁴⁰⁹

Child soldiers after often demobilised and rehabilitated. However, resettling people who may have perpetrated horrendous crimes back into the same societies to live

⁴⁰⁷See I. Beah, *A Long Way Gone: Memoirs of a Boy Soldier* (Sarah Crichton Books 2007) 96

⁴⁰⁸ Amnesty International, *Sierra Leone: Childhood – A Casualty of Conflict*, 31 August 31 2000 (AI Index: AFR 51/069/2000) at 2, available at:

<[http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510692000ENGLISH/\\$File/AFR5106900.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/AFR510692000ENGLISH/$File/AFR5106900.pdf)> [hereinafter Amnesty International Report] 4.

⁴⁰⁹The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (4 October 2000) paras 34-35

side by side with their victims has raised questions about the effects of exempting child soldiers. Ultimately, the SCSL, included a provision for prosecution of child soldiers. The Statute of SCSL gives the Prosecutor authority to indict children for crimes they committed between the ages of 15 and 18. The basis for including this ‘controversial provision’ was to give the Prosecutor legal authority to prosecute any child soldier he or she might consider as having borne the greatest responsibility for war crimes and crimes against humanity committed during Sierra Leone’s civil war.⁴¹⁰ However, the founding prosecutor, David Crane, made a decision he would not implement the provision. International law views child soldiers ‘as only relatively responsible for the crimes they commit because of their lack of psychological maturity and susceptibility to negative influences and external pressures.’⁴¹¹ Crane argued:

‘The Prosecution decided early in developing a prosecutorial plan that no child between 15 and 18 had the sufficiently blameworthy state of mind to commit war crimes in a conflict setting. Aware of the clear legal standard highlighted in international humanitarian law, the intent in choosing not to prosecute was to rehabilitate and reintegrate this lost generation back into society. It would have been impractical to prosecute even particularly violent children because there were so many.’⁴¹²

He further contended that ‘[L]egally, morally, and politically the international community... has separated out children from the horrors of combat, to protect and nurture, to rehabilitate and support, not to punish. No children found in combat should be held liable for their acts.’⁴¹³ However, Lee asserts that ‘if we accept that the discourse of ‘child soldiers’ exists as a historical construct’ (as discussed in this chapter) ‘we can begin to ask some critical questions regarding this construct and explore the possible gap between the global discourse and local realities.’⁴¹⁴ He argues that ‘child soldiering’ may have particular meanings in the local socio-cultural contexts⁴¹⁵ and ‘many young people had understanding of the causes and stakes of

⁴¹⁰ D. Crane, ‘Prosecuting Children in Times of Conflict: The West African Experience’ (2008)15 *Human Rights Brief* 11, 14

⁴¹¹ M. Happold, ‘Child Soldiers: Victims or Perpetrators’ (2008) 29 *La Verne Law Review* 56, 85

⁴¹² D. Crane ‘Prosecuting Children in Times of Conflict: The West African Experience’ (2008) *Human Rights Brief* 11, 15

⁴¹³ D. Crane, ‘Prosecuting Children in Times of Conflict: The West African Experience’ (2008)15 *Human Rights Brief* 11, 15

⁴¹⁴ A. Lee, ‘Understanding and Addressing the Phenomenon of ‘Child Soldiers’: The Gap between the Global Humanitarian Discourse and the Local Understandings and Experiences of Young People’s Military Recruitment’ *The Refugee Studies Centre Working Paper Series No 52* (2009) 4

⁴¹⁵ *Ibid* 20

their war and made conscious decisions to join fighting forces.’⁴¹⁶ Perhaps the most trenchant critique in recent years has been proffered by Mark Drumbl in his book *Reimagining Child Soldiers in International Law and Policy*.⁴¹⁷ He is critical of what he perceives as the international community’s tendency to ‘replay the same narratives and circulate the same assumptions’ about child soldiers.⁴¹⁸ In this discourse, child soldiers are presented as ‘faultless, passive victims.’ These narratives and assumptions relate to the ‘themes of vulnerability, frailty, victimisation and incapacity.’⁴¹⁹ Drumbl argues that this well-intentioned ‘reflexive response’ is nonetheless short-sighted and verging on the ‘palliative’.⁴²⁰ According to Drumbl, ‘activists have turned to the Machel report to justify portraying the victimisation, faultlessness and passivity in the manner and tone that exceeds that Machel herself adopted.’⁴²¹ This perception has suffused the ‘international legal imagination,’⁴²² which he defines as the ‘international and operational mix of international law, policy and practice – constituted as it directly and indirectly by a constellation of actors.’⁴²³ Child soldiers, he argues, should not be ‘cocooned’ from the reality of their possible involvement in mass violence by over-emphasising the faultless, passive, victim image.⁴²⁴ He proposes a more nuanced approach, suggesting what he calls ‘a model of circumscribed action’ which recognises children’s agency.⁴²⁵ He states: Presenting ‘circumscribed action’ in this dynamic fashion encourages procedural inquiry into the specific histories and experiences of the individuals located within its contours, while also prompting community involvement on questions of reintegration and restoration.⁴²⁶ This model would seek to effect culturally appropriate measures designed to genuinely involve former child soldiers, encouraging ‘more fine-grained modalities of restoration, conflict resolution, and justice.’⁴²⁷ Drumbl makes an excellent contribution to the discourse of children and armed conflict. He concludes, however, that ‘[t]ruly ameliorative reform will remain

⁴¹⁶Ibid 5

⁴¹⁷M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012)

⁴¹⁸Ibid) vii

⁴¹⁹2012) 1

⁴²⁰ Ibid 2

⁴²¹ibid 109

⁴²² ibid 9

⁴²³ ibid

⁴²⁴ ibid 22

⁴²⁵ Ibid 98-99

⁴²⁶ Ibid 99

⁴²⁷Ibid 215

elusive until the presumptive imagery shifts to something more dynamic and less controlling, such as circumscribed action'⁴²⁸ is well-supported. In this thesis I do not intend to venture into this important debate. Instead, I take the law as it is. An expressive approach focuses on the function of existing law and norms. Regardless of how much weight is placed on children's agency in different cultures and contexts, 'the laws regarding child soldiers were not developed with the involvement of children nor do they consider any framework for the understanding of children's agency other than extreme protectionist constructions of childhood.'⁴²⁹ While I take law as it is, in *Lubanga*, I also intend to critique prosecutorial and penal practices that can fluctuate at the behest of judicial officers, and the effect of such practices on an expressivist agenda.

3.6 Conclusion

We shall not be able to formulate cogent theories of penology unless we understand the generative processes of norms and creation of the international law regime against child soldiering. This chapter sought to accomplish two important objectives. Firstly, it aimed to offer a brief historiography of child soldiering. The chapter analysed the evolution or construction of the prevailing 'social meaning' of child soldiering. Social meanings are central to expressivist discourse because law has social meaning. The purpose was, ultimately, to establish the genesis of cosmopolitan law on child soldiering. The social meaning of child soldiering has changed over time. From the early expressions of 'bravery' 'heroism' and 'patriotism,' the conscription, enlistment and use of children for military combatis now perceived through a discursive register of revulsion. As we now understand it, child soldiering is a collective or mass activity; young men and women voluntarily join or are forcibly recruited into groups with rational interests, or propelled by cultural impetus. Secondly, the chapter sought to highlight the collective paradigm which underpins an international society of shared norms. To this end, it recognised the historical and current role of transnational agents in the mutation of the conception of child militarization. Such endeavours have to contend with contrarian or cultural relativist and rationalist meanings. 'Norm entrepreneurs' have influenced state and non-state

⁴²⁸Ibid 110

⁴²⁹D. Rosen, 'Child Soldiers, International Humanitarian Law, and the Globalization of Childhood' (2007) 109 *American Anthropologist* 296, 297

actors with some degree of success. Through agency of 'norm entrepreneurs', the social conception of child militarisation now draws social opprobrium almost globally. An important debate has emerged on the status of child soldiers.

International law is generally reticent about arrogating culpability on or agency to child soldiers. Drumbl has made some remarkable observations about 'reimagining' child soldiers, thus departing from existing portrayals of passivity, faultlessness and victimhood. This thesis, nonetheless, focuses on the function of extant law and penal practices.

CHAPTER FOUR

LEGAL FRAMEWORK ON CHILD SOLDIERING

Introduction

Norms form the basis upon which laws are formulated. In international normative dynamics, norms occupy one end of the continuum; on the other end exists international law. Norms are understood to be ‘a set of intersubjective understandings readily apparent to actors that makes behavioural claims on those actors.’⁴³⁰ There is general consensus on the definition of a norm as a standard of appropriate behavior for actors with a given identity.⁴³¹ What is important to the constructivist framework is the nexus between norms, law and social meaning.⁴³² As a result of the work of ‘norm entrepreneurs, a body of international law to protect children has since evolved over the years. It can be argued that, to use Drumbl’s phrase, this ‘legal imagination’ has shaped the predominantly accepted social meanings of child soldiering. From the Finnemore-Sikkink norm life cycle model, these developments would denote the second stage of ‘norm cascades’ which follows broad norm acceptance (diffusion).⁴³³ Since the problem child soldiering was brought to the fore by human rights organisations, numerous treaties against the phenomenon have been signed.⁴³⁴ The current legal orthodoxy consists of international humanitarian law and international human rights law and international criminal law embodying the values of child protection. These make up ‘hard law’; the framework includes ‘soft law.’ The objective of this chapter is to

⁴³⁰ M. Finnemore, ‘Constructing Norms of Humanitarian Intervention’ in P Katzenstein (ed.), *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press 1996) pp. 153-185, 154

⁴³¹ P. Katzenstein, ‘Introduction: Alternative Perspectives on National Security’ in P. Katzenstein (ed) *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press 1996); See also M. Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell University Press 1996); A Klotz, A (1995) *Norms in International Relations: The Struggle Against Apartheid* (Ithaca, N.Y: Cornell University Press 1995)

⁴³² A. Geisinger and M. Stein ‘A Theory of Expressive International Law’ (2007) 60 *Vanderbilt Law Review* 77

⁴³³ M. Finnemore and K. Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887, 892

⁴³⁴ T. Webster, ‘Babes With Arms: International Law and Child Soldiers’ (2007) 39 *George Washington International Law Review* 227

analyse this normative framework. Penal codes are part of the legal architecture for children and armed conflict. These will be discussed in later chapters.

An appreciation of the legal framework on child soldiering will help us understand the philosophy, processes and the ethos underpinning international law creation. This chapter is structured as follows: The first section foregrounds the chapter with a discussion on the 'logics' of law. The aim here is to establish the dominant foundational philosophy which influences the collectivism of international law. The second part discusses the process of law creation within the context of an international community. The section examines the development of international humanitarian law (IHL) instruments; and the third section, international human rights law (IHRL). These branches, constituting mainly 'hard law,' are examined within the expressive discourse of collectivism and norm diffusion. The fourth part analyses the process and meaning of ratification of international legal instruments through the expressivist perspective. The fifth section discusses 'soft law', and the last discusses the collective child soldiering norms as 'cosmopolitan' law. The last part assesses the effectiveness or otherwise of UN strategy of 'naming and shaming' suspected recruiters and users of child soldiers, again through the expressivist prism.

4.1 Logics of international law

In the field of international relations, various 'logics' - cosmopolitanism, communitarianism, realism or rationalism and so on - have been used to explain international law. On one hand, rationalists subscribe what March and Olsen term the 'logic of expected consequences.'⁴³⁵ Scholars committed to this consequentialism perceive an international system of interacting autonomous, egoistic, self-interested maximisers.⁴³⁶ On the other hand, social constructivists argue that the study of international relations must focus on the ideas and beliefs that inform the international actors and the shared understandings between them.⁴³⁷ This 'logic of appropriateness' sees actors driven by senses of identity.⁴³⁸ Within the tradition of a

⁴³⁵J. March and J. Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organization* 943

⁴³⁶Ibid

⁴³⁷ R. Jackson and G. Sorenson) *Introduction to international relations: theories and approaches* (Oxford University Press 2008) 162

⁴³⁸J. March and J. Olsen 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organization* 943

'logic of appropriateness', actions are seen as rule-based. Scholars committed to this identity position see political actors as acting in accordance with rules and practices that are socially constructed, publicly known, anticipated and accepted.⁴³⁹ Constructivists pose two questions; first a normative one, and second, descriptive. The normative question is whether one logic leads to a 'better' society than the other.⁴⁴⁰ The descriptive question is whether (or when) one logic is more likely than the other to be observed as the basis for actual behaviour.⁴⁴¹ A judgment on what constitutes a 'better' society is, of course, a subjective matter that has preoccupied many philosophers, including Kant. John Rawls, John Locke, H.L.A Hart, Martha Nussbaum, and others essentially also address this question more expansively than can be accommodated here. But the greater philosophic discourse has centred on the rights of the individual. The scholars who have propounded the idea of a better society not only recognise the rights of the individual – especially the weak - but also their protection. The themes have ranged from justice, equality and autonomy. History has shown us that the protection of individual rights cannot be left to governments alone. States acting without supranational oversight can be dangerous to their own citizens. The Holocaust and atrocities associated with the Nazi regime served as a catalyst for the human rights movement, propelling the issue into the international arena. After the Nazis attempted to systematically eliminate the Jewish population from Europe, as well as targeting gypsies, the handicapped, elderly, and homosexuals, the world's response was one of horror.⁴⁴² A 'logic of appropriateness' portends a 'better' society than individualist ethos. Since Nazi atrocities, an international regime has emerged placing emphasis on individual rights. Perhaps, there is no more ideal occasion for the 'logic appropriateness' than times of war. The measure of a commitment to a 'better' society would test the treatment of the weak and vulnerable during times of war. The logic of appropriateness comports with cosmopolitanism logic. In the rights-based articulations, cosmopolitanism is a theory of a 'better' society. Moral cosmopolitanism refers to accounts that retain a commitment to treating all human beings with equal concern within a global frame.

⁴³⁹ K. Cerulo, 'Identity Construction: New Issues, New Directions' (1997) 23 *Annual Review of Sociology* 385

⁴⁴⁰. J. March and J. Olsen, 'The Institutional Dynamics of International Political Orders' (1998) 52 *International Organization* 943, 950

⁴⁴¹ Ibid

⁴⁴²J. Harrelson-Stephens and R. Callaway 'What Are Human Rights? Definitions and Typologies of Today's Human Rights Discourse' in J. Harrelson-Stephens and R. Callaway *Exploring International Human Rights: Essential Readings* (Lynne Rainer Publishers 2007)

This is most cogently expressed in the idea of universal human rights, which underpin human freedom and are independent of legal or political status.⁴⁴³ Cosmopolitanism 'creates a larger community of states by providing a common vision and set of values; it is concerned with the global community of humans rather than states. Cosmopolitans posit that there should be an overriding universal moral code to which all states should adhere.⁴⁴⁴ A 'legal cosmopolitanism' would reinforce such rights and accountability. The rights of humanity and the individual should supersede those of the state.

The view that states entirely act out of self-interest in disregard for international law seems, nonetheless, overstated. I conceive of the development of international law through the prism of cosmopolitanism developed through a constructivist framework of the 'logic of appropriateness' as both desirable and possible. Chayes and Chayes point out that full membership in the international community and regional institutions requires engagement in a network of multilateral commitments.⁴⁴⁵ The objective evidence suggests that states do subscribe to international norms and obey law. This, of course, does not mean that rationalism is no longer a feature of international relations. On occasions, states do act out of kilter with normative standards. However, we cannot ignore the collectivism that has increasingly and progressively resulted in internationally shared values. As this chapter will seek to demonstrate, numerous states have assented to international legal instruments protecting the rights of children. The chapter will also illustrate that states have also responded to public humiliation by demobilising child soldiers. The chapter seeks to highlight the developing pre-eminence of individual rights of children. The second objective of the chapter is to discuss the functions of law. The traditional focus of law has been on the protective and instrumental functions which stress the role of law as protecting individuals and as an instrument for social policies, respectively.⁴⁴⁶ However, others note that this view is simplistic.⁴⁴⁷ The discussion of the legal framework that follows can thus be perceived through the prism of the humanistic

⁴⁴³N. Reilly 'Cosmopolitan Feminism and Human Rights' (2007) 22 *Hypatia* 180

⁴⁴⁴T. Webster, 'Babes With Arms: International Law and Child Soldiers' (2007)39 *George Washington International Law Review* 227

⁴⁴⁵A. Chayes and A. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Harvard University Press 1998)

⁴⁴⁶ *Ibid*

⁴⁴⁷ *Ibid*

and collective premise of ‘constructivism’ and the ‘logic of appropriateness,’ the ‘collective conscience’ under the overarching rubric of ‘cosmopolitanism.’

4.2 ‘Cosmopolitan law’ creation

Law consists of norms as meaning contents which form a normative system.⁴⁴⁸ There is ‘an unmistakable resurgence of interest in the social role of social norms and social meanings and also in the relationships among social norms, social meanings, and law.’⁴⁴⁹ A starting point for critical analysis may be found in the idea that the law should express ‘meanings’ on common values connected with a common political identity.⁴⁵⁰ International law is a largely consensual system, consisting of norms that states in sovereign equality freely accept to govern themselves and other subjects of law.⁴⁵¹ Since international law is ‘created’ by states, it is a discursive field. During treaty negotiations, for instance, drafters may advance several views, some of which they may abandon before adopting the final version of the treaty.⁴⁵² In international law, negotiation and discussions precede the finalisation of treaties. Such discourses aim at creating coordination among multiple equilibria, making certain outcomes focal; the law can coordinate expectations around the ‘good’ equilibrium.⁴⁵³ Because ‘legislation expresses certain values and communicates them effectively, these values can be taken as a common point of reference in interpretation and communication processes.’⁴⁵⁴ This, it will be recalled, fits snugly into the idea of a common *modus vivendi* for multifarious cultures that cosmopolitanism posits. The discourse preceding norms is often reflected in *travaux préparatoires*.⁴⁵⁵ It is impossible, given the space here, to explore the *travaux préparatoires* of the relevant

⁴⁴⁸ L. Alexy, ‘The Nature of Legal Philosophy’ (1994) 17 *Ratio Juris* 156

⁴⁴⁹ L. Lessig, ‘The Regulation of Social Meaning’ (1995) 62 *University of Chicago Law Review* 943, 951

⁴⁵⁰ Ibid

⁴⁵¹ D. Shelton, ‘Soft Law’ in *Handbook of International Law* (Routledge Press, 2008)

⁴⁵² M. Ris, ‘Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties’ (1991) 14 *Boston College International & Comparative Law Review* 111, pp. 112-113

⁴⁵³ R. McAdams, ‘A Focal Point Theory of Expressive Law’ (2000) 86 *Virginia Law Review* 1649

⁴⁵⁴ W. Burg, ‘The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues’ (2001) 20 *Law and Philosophy* 31, 41

⁴⁵⁵ M. Ris, ‘Treaty Interpretation and ICJ Recourse to Travaux Préparatoires: Towards a Proposed Amendment of Articles 31 and 32 of the Vienna Convention on the Law of Treaties’ (1991) 14 *Boston College International & Comparative Law Review* 111, 112. ‘Travaux préparatoires’ include materials which document the negotiations and other circumstances that culminated in the formal conclusion of a treaty.

international instruments relating to child soldiering. The significance of *travaux préparatoires* is that they offer the putative exemplars of competing and contradictory discourses or social meanings. The subsequent international statutes are considered as instruments for the regulation of global social meaning. The regulation of social meaning refers to ‘all of the ways in which the law creates and shapes information about the kinds of behaviour that members of the public hope for and value, as well as the kinds they expect and fear.’⁴⁵⁶ The negotiations and *travaux préparatoires* should be reflective of collective standards that guide behaviour.

4.2.1 International humanitarian law (IHL)

Law can provide a normative framework, a set of more abstract values and concepts.⁴⁵⁷ The development of IHL has been a result of the work of norm entrepreneurs to regularise behaviour during conflict after ‘norm emergence’. For example, the work of Henry Dunant, who published the horrors of warfare in *Memories of Selferino*, led to the establishment of the International Committee of the Red Cross, which has been one of the most instrumental agents in the development of IHL.⁴⁵⁸ The development of IHL has been accompanied by the formulation of principles and the adoption of multilateral treaties intended to be universal and applicable to war crimes.⁴⁵⁹ States sign and ratify treaties ‘to establish the identity of actors as ones who obey the law, and to develop the norms that become part of the fabric of emerging international society.’⁴⁶⁰ IHL is part of international law, designed to limit the effects of armed conflict. Universal codification of IHL began in the nineteenth century. Since then, States have agreed to a series of practical rules, based on the bitter experience of modern warfare⁴⁶¹ as those exposed by Dunant. Traditionally known as *jus in bello*, the law of war, or law

⁴⁵⁶D. Kahan, ‘Social Influence, Social Meaning and Deterrence’ 83 *Virginia Law Review* (1997) 349-395, 351

⁴⁵⁷ W. Burg, ‘The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues’ (2001) 20 *Law and Philosophy* 31, 31, 47

⁴⁵⁸See eg M. Finnemore and K. Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52 *International Organization* 887, 897 noting the work of Dunant.

⁴⁵⁹ H. Posse, ‘The relationship between international humanitarian law and the international criminal tribunals’ (2006) *International Review of the Red Cross*, 65, 68

⁴⁶⁰ H. Koh ‘Why Do Nations Obey International Law?’ (1997) 106 *The Yale Law Journal* 2599, 2656

⁴⁶¹See ‘What is International Humanitarian Law?’ ICRC Advisory Service on International Humanitarian Law, 1 http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf

of armed conflict, covers the binding rules and customs that govern militarised conflict between nations, civil war combatants, and conflicts among states and non-state belligerents.⁴⁶² The primary aims of IHL are to protect persons who are not, or are no longer, directly engaged in hostilities—the wounded, shipwrecked, prisoners of war and civilians; and to limit the effects of violence in fighting to the attainment of the objectives of the conflict.⁴⁶³ Cosmopolitan just war principles ‘can guide the actions of all individuals, including ordinary citizens and leaders of non-state movements. In particular, individuals *qua* cosmopolitan citizens of the world should, when reasoning about the use of armed force, take into account the perspectives of non-members of their community’.⁴⁶⁴ This chapter focuses on the formulation of protective laws for children during armed conflict.

4.2.1.1 Geneva Conventions (1949)

The protection of children in military conflicts was one of the earliest concerns of international law; the standard of protection was, however, minimal. Customary international humanitarian law as it traditionally related to children centred on the two notions of the general protection of civilians in time of armed conflict, and the special protection of those groups regarded as particularly vulnerable to the effects of war.⁴⁶⁵ Although these concepts were well recognised in humanitarian law, they remained largely un-codified until the adoption of the Fourth Geneva Convention in 1949.⁴⁶⁶ The Hague Conventions of 1899 and 1907⁴⁶⁷ did not make any reference to

⁴⁶² J. PolICASTRI and S Stone, ‘International Humanitarian Law’ American Society of International Law (ASIL)

[http://www.asil.org/sites/default/files/ERG_International%20Humanitarian%20Law%20\(test\).pdf](http://www.asil.org/sites/default/files/ERG_International%20Humanitarian%20Law%20(test).pdf)

⁴⁶³ See ‘Fact Sheet No.13, International Humanitarian Law and Human

Rights’ <http://www.ohchr.org/Documents/Publications/FactSheet13en.pdf>

⁴⁶⁴ J. Lango, *The Ethics of Armed Conflict: A Cosmopolitan Just War Theory* (Edinburgh University Press 2014) reviewed by A. Leveringhaus on London School of Economics ‘Book Reviews’

<http://blogs.lse.ac.uk/lsereviewofbooks/2014/06/04/book-review-the-ethics-of-armed-conflict-a-cosmopolitan-just-war-theory-by-by-john-w-lango/>

⁴⁶⁵ H. Mann, ‘International Law and the Child Soldier’ (1987) 36 *International and Comparative Law Quarterly* 32, 33

⁴⁶⁶ See Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, commonly referred to as the Fourth Geneva Convention; See also M Fox, ‘Child Soldiers and International Law: Patchwork Gains and Conceptual Debates’ (2005) 7 *Human Rights Review* 27, noting that with the exception of being identified among other categories of persons as qualifying for immunity during armed conflict, minors as a ‘special category’ of consideration within humanitarian law did not appear in any instruments of humanitarian law in the nineteenth and twentieth centuries until the Geneva Conventions of 1949.

the use of children in armed conflict; they focused principally on restrictions in the use of certain weapons and gases. The first three Geneva Conventions were intended to serve as an improvement and revision of selected previous conventions concerning the treatment of sick, wounded, or captured military personnel in the battlefield and at sea, and Convention IV was devoted exclusively to the protection of civilians. Notably, the Geneva Conventions were promulgated four years after widespread use of children in the Second World War.⁴⁶⁸ It is ‘apparent that the use of children in the army of the Third Reich..., and the participation of children in some of the partisan campaigns against the Nazis, were seen as aberrations...’⁴⁶⁹ The Fourth Geneva Convention only protected various categories of civilians ‘who by definition take no part in the fighting.’⁴⁷⁰

‘These various categories among the civilian population are based on a very simple criterion: they are persons who are taking no part in the hostilities and whose weakness makes them incapable of contributing to the war potential of their country; they thus appear to be particularly deserving of protection.’⁴⁷¹

The Convention did not offer protection for children who participated in warfare. Notably, none of the four Conventions provides a direct definition regarding who was to fall within the category of ‘children.’⁴⁷² It was not long before the Geneva Conventions were deemed to be insufficiently comprehensive. In the 1950s and 1960s, with inter-state wars on the decline, and conflicts related to independence movements and the new post-colonial states on the increase, the exigency existed for

⁴⁶⁷The Hague Peace Conferences of 1899 and 1907 marked the first significant attempts to codify the international law of war. At both conferences, limitations on armaments and expansion of armed forces were proposed. This did not succeed, but the Conventions did establish various points including a ban on types of war technology, and the adoption of the Convention for the Pacific Settlement of International Disputes, which created the Permanent Court of Arbitration. See D. Schindler and J. Toman, *The Laws of Armed Conflicts* (Martinus Nijhoff Publishers 1988) 69-93.

⁴⁶⁸ While children are protected persons under various provisions of the Fourth Geneva Convention of 1949, the provisions are too broad to be construed as specifically aimed at protecting child soldiers. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention of 1949].

⁴⁶⁹H. Mann, ‘International Law and the Child Soldier’, 36 (1987) *International and Comparative Law Quarterly* 32, 35

⁴⁷⁰J. Pictet, ‘Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War’ (ICRC, 1958) 119

⁴⁷¹Ibid 126

⁴⁷² M. Fox, ‘Child soldiers and international law: Patchwork gains and conceptual debates’ (2005) 7 *Human Rights Review* 27

the drafting of supplementary protocols to the Geneva Conventions.⁴⁷³ Expressivists point out that in order to provide a normative framework that is open to further interpretation and supports the emergence of new norms, legislation should focus on expressing basic values and principles.⁴⁷⁴ By ‘formulating a broad normative framework in which at least the basic values and principles are expressed the law may offer a point of orientation for this reflection.’⁴⁷⁵ This ‘process of reflection and discussion may lead to the emergence of new norms, to a consensus on central values and their meaning or on more concrete principles and rules.’⁴⁷⁶ By 1960, the assumption that children were affected by armed conflict only as ‘civilians’ could no longer be sustained owing to the deployment of child soldiers in various wars of liberation and self-determination.⁴⁷⁷ After several years of preparation and drafting, Geneva Protocols I and II were formally adopted in 1977. As the Protocols Additional to the Geneva Conventions, they were designed to serve as supplements to the Geneva Conventions, and covered both international and non-international armed conflicts.

4.2.1.2 Additional Protocol I (API)

The Additional Protocols of 1977 represented the first international legal documents to specifically address the subject of child combatants. API marked the first act of ‘criminalising’ of child soldiering in international law. API⁴⁷⁸ relates to international conflicts. The most important articles in regard to recruitment of minors are found under Chapter II, Measures in Favour of Women and Children, Articles 77, Protection of Children. Paragraphs 2 and 3 are especially relevant:

77(2): The Parties to the conflict shall take all *feasible measures* in order that children who have not attained the age of fifteen years do not take a direct part in

⁴⁷³ M. Fox, ‘Child soldiers and international law: Patchwork gains and conceptual debates’ (2005) 7 *Human Rights Review* 27

⁴⁷⁴ W. Burg, ‘The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues’ (2001) 20 *Law and Philosophy* 31

⁴⁷⁵ *Ibid* 49

⁴⁷⁶ *Ibid* 50

⁴⁷⁷ H. Mann, ‘International Law and the Child Soldier’ 36 (1987) *International and Comparative Law Quarterly* 32, 35-36

⁴⁷⁸ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) *opened for signature* 12 December 1977, 1125 U.N.T.S. 3 [hereinafter AP I]

hostilities and in particular, they shall refrain from recruiting them into their armed forces. In recruiting among persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.⁴⁷⁹

However, the provision does not offer much protection to children under fifteen and even less to those under eighteen. In fact, API clearly envisions that parties will continue to recruit children under fifteen as demonstrated by Article 77 (3): 'If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.'⁴⁸⁰In spite of the progress by API, Article 77 was regarded as disappointing as it was not as far-reaching as some might have wished. The three main shortcomings with Article 77 were: 1) a perpetuation of the Geneva Convention's division of minors into an under 18 and an under 15 age group; 2) the use of the term 'all feasible measures' rather than the stronger 'all necessary measures.' The choice of the term 'all feasible measures' has been a particular sticking point, since it puts a limited expectation on the state and; 3) limiting the prohibition to only those taking *direct* part in hostilities.⁴⁸¹

4.2.1.3 Additional Protocol II (APII)

Influenced by the events of the Second World War, it is hardly surprising that the Geneva Conventions were promulgated on a general assumption that it was to be a body of rules addressing relations almost exclusively between states in armed conflict. The weakness of the Geneva Conventions is that they applied to international (i.e. inter-state) and not national (i.e. intra-state) conflicts. Only perfunctory attention was given to 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,' in common Article 3, found throughout all four Conventions. Legislation can stimulate continuous process of interpretation, reflection and discussion.⁴⁸²In the past years, open warfare

⁴⁷⁹ AP I Art. 77(2)

⁴⁸⁰ Ibid Art. 77(3)

⁴⁸¹ M. Fox, 'Child Soldiers and International Law: Patchwork Gains and Conceptual Debates' (2005) 7 *Human Rights Review* 27, 34

⁴⁸² W. Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20 *Law and Philosophy* 31, 50

between States has given way to internal armed conflict.⁴⁸³ APII was a response to the need to establish or clarify the protection of victims in non-international armed conflicts.⁴⁸⁴As the Lubanga judgment noted,⁴⁸⁵ Article 4(3) (c) of Additional Protocol II to the 1949 Geneva Conventions includes an absolute prohibition against the recruitment and use of children under the age of 15 in hostilities (in the context of an armed conflict not of an international character): Children who have not attained the age of 15 years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.’ Article 4 (3) (d) also alludes to the ‘special protection’ for children. AP II, thus, provides an unequivocal and total prohibition on recruitment of under-15s into any type of armed forces (government or non-governmental) and any kind of participation by them in hostilities.

APP II does not limit the government obligation to taking only ‘feasible measures’ to prevent them taking ‘a direct’ part in hostilities, nor does it limit the state’s responsibility to not recruiting under- 15s into their own armed forces only. In this, APII represents an improvement in the protection for all children under-15 compared to previous treaties by not allowing states any room to manoeuvre away from prohibiting recruitment, whether it involved direct or indirect participation. Including even voluntary enlistment, all forms of participation in hostilities are proscribed by omitting the distinction between ‘direct’ and ‘indirect’ participation.

4.3 International human rights law (IHRL)

Being designed primarily for peacetime, human rights apply to everyone while IHL applies specifically to military conflict. Both human rights and *jus in bello* norms are central logics to the cosmopolitan project. While both IHRL and IHL have different historical and doctrinal foundations, both share the objective of protecting all persons and are grounded in the principles of respect for the life, well-being and

⁴⁸³G. Van Bueren, ‘The International Legal Protection of Children in Armed Conflicts’ (1994) 43*The International and Comparative Law Quarterly* 809

⁴⁸⁴See Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non -International Armed Conflicts *opened for signature 12 December 1977*, 1125 U.N.T.S. 609 [hereinafter APII].

⁴⁸⁵Lubanga Trial Judgment para 604

human dignity of the person.⁴⁸⁶International human rights norms are also *expressed* in numerous widely ratified treaties.⁴⁸⁷ Most of those norms also are embedded in customary international law.⁴⁸⁸ The number of binding human rights norms incorporated into international or regional law as well as the precision and delegation of those norms increased significantly between the mid-1970s and the mid-1990s.⁴⁸⁹Cosmopolitanism recognises the individual as the ontological centrepiece of human rights.⁴⁹⁰This section discusses both international and regional law instruments pertaining to the protection of children.

4.3.1 The UN Convention on the Rights of the Child (CRC)

Following the seminal 1996 report by Graça Machel on the impact of armed conflict on children,⁴⁹¹ the growing international concern for the welfare of children reached its climax in 1989 with the Convention on the Rights of the Child (CRC).⁴⁹²The most quickly and widely ratified international treaty in history, the CRC strongly condemned the recruitment of child soldiers. The CRC, however, adopted a more flexible approach to age in the realm of child soldiery.⁴⁹³The CRC defines a child as a human being below the age of eighteen years. But Article 38 of the CRC (one of the most controversial provisions in its drafting history) establishes fifteen as the minimum age for recruitment and ‘direct’ participation in hostilities. The rest of the provisions of the CRC, however, protect children up to the age of eighteen. The commitments enshrined in Article 38 of the CRC are familiar:

2. States Parties shall take all *feasible measures* to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

⁴⁸⁶ In *Prosecutor v Furundžija*, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia emphasized that the general principle of respect for human dignity was the ‘basic underpinning’ of both human rights law and international humanitarian law. Case No. IT-95-17/1-T, Judgment of 10 December 1998, para. 183

⁴⁸⁷ E. Lutz and K. Sikkink, ‘International Human Rights Law and Practice in Latin America’ (2000) 54 *International Organization* 633, 633

⁴⁸⁸ *Ibid*

⁴⁸⁹ *Ibid*

⁴⁹⁰D. Patterson, ‘Cosmopolitanism and Global Legal Regimes’ EUI Law Department

⁴⁹¹See report by Graça Machel, ‘Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children’, A/51/306, 26 August 1996

⁴⁹²See Convention on the Rights of the Child art. 1, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]

⁴⁹³ T. Webster, ‘Babes with Arms: International law and Child Soldiers’ (2007) 39 *George Washington International Law Review* 227, 237

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall *endeavour* to give priority to those who are oldest...

As can be noted, the above provision has the imprimatur of IHL. The CRC was, however, perceived as undermining existing standards contained in IHL, as it only prohibits 'direct' participation. It also contradicts the notion that children up to the age of eighteen years should not be used as child soldiers, and shown in 38 (3), recognises a State's right to recruit or conscript children between the ages of fifteen and eighteen years.

4.3.2 The Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (OPAC)

The concerns that were raised while drafting Article 38 of the CRC prompted the revisitation to the issue of children's rights and child soldiers by the international community as States were impelled to analyse further the provisions to protect the rights of the child soldier.⁴⁹⁴ The drafting and subsequent adoption of the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict (OPAC)⁴⁹⁵ illustrates that while baseline standards may be set, such as with the CRC, these standards will act as platforms from which further rules and rights may be derived and teased out.⁴⁹⁶ As I have noted earlier, the 'process of reflection and discussion may lead to the emergence of new norms, to a consensus on central values and their meaning or on more concrete principles and rules.'⁴⁹⁷

During the negotiations on OPAC, the majority of state representatives backed a 'straight eighteen' ban for both 'direct' and 'indirect' participation but a few countries resisted the proposal resulting in compromise language. The minimum age for compulsory recruitment or direct participation in hostilities was established at eighteen years. Article 2 stipulates that: 'States Parties shall ensure that persons who

⁴⁹⁴ C. Breen, 'When Is a Child Not a Child? Child Soldiers in International Law' (2007) 8 *Human Rights Review* 71

⁴⁹⁵ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54-263, U.N. GAOR, 54th Sess., Agenda Item 116 (a), U.N. Doc. No A/RES/541263 (2001) (hereinafter 'OPAC')

⁴⁹⁶ C. Breen 'The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict' (2003) 25 *Human Rights Quarterly* 453

⁴⁹⁷ *Ibid* 50

have not attained the age of 18 years are not compulsorily recruited into their armed forces.’⁴⁹⁸ This was an attempt to remedy the glaring problem inherent in the CRC in which the minimum age of recruitment was set at fifteen years. Under OPAC, armed groups that are distinct from the armed forces of a State are not allowed, under any circumstances, to recruit or use in hostilities persons under the age of 18 years.⁴⁹⁹ States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in Article 38 (3) of the CRC, taking account of the principles contained in that Article and recognising that under the Convention persons under the age of 18 years are entitled to special protection.⁵⁰⁰

However, OPAC too has several weaknesses. While it pronounces that persons who have not attained the age of eighteen years are not compulsorily recruited into their armed forces, voluntary recruitment below the age of eighteen is still permitted.⁵⁰¹ It has been commented that Article 3 (voluntary recruitment) weakens the protection provided by Article 2 and the Protocol on the grounds that it may be difficult to determine whether child soldiers have been voluntarily recruited or not.⁵⁰² It also stipulates that States Parties shall take all *feasible measures* to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities. While raising the age when members of the armed forces may take direct part in hostilities was welcomed, the obligations placed upon States Parties remains weak, given that they are required only to take ‘all feasible measures.’⁵⁰³ OPAC also failed to cover the ‘indirect’ participation of children under eighteen in armed conflict and participation in hostilities.

4.3.3 African Charter on the Rights and Welfare of the Child 1999

The African Charter on the Rights and Welfare of the Child ⁵⁰⁴ (ACRWC) is an ideal exemplar of the success of, to deploy Lessig’s term, ‘offensive construction’ of the social meaning child soldiering. Under particularistic conceptions, childhood is

⁴⁹⁸OPAC Art. 2

⁴⁹⁹ Ibid Art. 4 (1)

⁵⁰⁰ Ibid Art. 3 (1)

⁵⁰¹ Ibid Art. 3 (1)

⁵⁰²C. Breen ‘When Is a Child Not a Child? Child Soldiers in International Law’ (2007) 8 *Human Rights Review* 71

⁵⁰³Ibid

⁵⁰⁴See African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), entered into force 29 November 1999. [Hereafter African Children’s Charter (ACRC)], 1999]

viewed as a malleable social construct contingent upon geography and cultural spaces. In Africa and other places, rituals, initiations, marriage and childbearing are said to be more appropriate indicators of adulthood rather than age.⁵⁰⁵ These, according to this thesis, become determinants of whether one participates in war or not, because chronological age does not matter. However, these notions have altered, perhaps as result of ‘offensive construction.’ In general, the ACRWC conforms to the logic of international legal instruments, and in some cases, provides even stronger protections for children, a notable development on a continent associated with particularistic notions of childhood. The Charter is, therefore, an effort to universalise childhood and the protection of children, a precept of cosmopolitan ethos. Social structures are defined, in part, by the shared understandings, expectations, or knowledge. These structures constitute the actors in a situation and the nature of their relationships, whether cooperative or conflictual.⁵⁰⁶ Recognising that practicing influences outcomes, the social world is therefore seen as constantly constructed or reconstructed, not given.⁵⁰⁷ Expressivists point out that where multiple ‘equilibria’ exist, the law can coordinate expectations around ‘good’ equilibrium.⁵⁰⁸ The law can make certain outcomes focal, thereby creating expectations that others will conform to the strategies associated with the newly focal equilibrium.⁵⁰⁹ ‘Good’ is subjective but the fact that the ACRWC generally coheres with international legal instruments, suggests coalescence around widely-accepted norms. The ACRWC recognises the ‘good’ ‘principles of the rights and welfare of the child contained in...other instruments of...the United Nations and in particular the United Nations Convention on the Rights of the Child.’⁵¹⁰ It provides that state parties shall ensure the protection of the rights of the child as stipulated in international declarations and conventions.⁵¹¹

⁵⁰⁵See eg D. Francis, ‘Paper Protection’ Mechanisms: Child Soldiers and the International Protection of Children in Africa’s Conflict Zones’ (2007) 45 *Journal of Modern African Studies* 207

⁵⁰⁶ See A. Wendt, ‘Anarchy is What States Make of It: The Social Construction of Power Politics’ (1992) 46 *International Organization* 391

⁵⁰⁷ Ibid

⁵⁰⁸ R. Cooter, ‘Expressive Law and Economics’ (1998) 27 *Journal of Legal Studies* 585

⁵⁰⁹ R. McAdams, ‘A Focal Point Theory of Expressive Law’ (2000) 86 *Virginia Law Review* 1649

⁵¹⁰See Preamble: African Charter on the Rights and Welfare of the Child, OAU Doc.

CAB/LEG/24.9/49 (1990), entered into force 29 November, 1999.

⁵¹¹See Art. 18(3) African Children's Charter, 1999

Remarkably, the ACRWC was the first *regional* treaty in the world to address the issue of child combatants. Where some international instruments have vacillated on the form of participation of children during armed conflict, the African charter states unequivocally that: ‘States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.’⁵¹² Unlike the CRC⁵¹³ the ACRWC defines a child as anyone below 18 years of age without exception. While the CRC defines a child as a human being below the age of eighteen years, Article 38 establishes fifteen as the minimum age for recruitment and direct participation in hostilities. As such, the CRC, rather unhelpfully, creates two categories of ‘children.’ Article 4 (1) of the ACRWC states that: ‘In all actions concerning the child undertaken by any person or authority the *best interests* of the child shall be the primary consideration.’ This article is almost analogous to the provision in the CRC.⁵¹⁴ Neither the CRC nor the ACRWC offers a precise definition of ‘best interests.’ But it is a plausible assumption, given the provisions in both against the use of children in armed conflict, that child soldiery is not in the best interests of the child. The weakness of ACRWC is that it also does not cover indirect participation. Nonetheless, the ACRWC represents a major breakthrough in the universalisation and expression of the social meaning of child soldiering. Cosmopolitanism seeks out commonalities between such cultures, acknowledges differences, and embraces pluralism and the building of a *modus vivendi*.⁵¹⁵ The regard ‘for others does not stop at the boundaries of a given state; we are rightly concerned with the global community of humans;... emphasis is placed on humans rather than states...’⁵¹⁶

⁵¹²See Art 22(2) African Children’s Charter, 1999

⁵¹³See Convention on the Rights of the Child art. 1, *opened for signature* Nov. 20, 1989, 1577 UNTS 3 [hereinafter CRC]

⁵¹⁴See Article 3 (1) CRC, which interestingly uses the terminology ‘a primary consideration’ rather than ‘the primary consideration’ in Article 4(1) ACRWC.

⁵¹⁵D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 137 citing .K. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Penguin Books 2006); xv, 96-99, 144, 151; S. van Hooft, *Cosmopolitanism: A Philosophy for Global Ethics* (McGill-Queen’s University Press, 2009) 164-69

⁵¹⁶ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 137

4.3.4 The Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO Convention No. 182)

The Convention against the Worst Forms of Child Labour⁵¹⁷ is part of the ‘good’ and ‘newly focal equilibrium.’ It runs against the idea that the involvement of children in warfare is part of acceptable routine labour. The language of the Convention and obligations impose stricter obligations upon State Parties. Like OPAC and the ACRWC, it defines a child as any person under the age of 18 years.⁵¹⁸ It invites special attention to the situation of girls.⁵¹⁹ The Convention locates child soldiery within the context of ‘labour.’ Article 3 of the Convention defines ‘the *worst* forms of child labour’ as including ‘(a) ... forced or compulsory recruitment of children for use in armed conflict;⁵²⁰...and ‘(d) ... any other work that by its nature is likely to harm the health, safety and morals of children.’⁵²¹

It is evident from the above that the formulation of a protective framework has been problematic. The framework evolved as patchwork developments, resulting inconsistencies, contradictions, legal gaps, and lack of clarity.⁵²² According to Witteveen, ‘codified laws can be seen as imperfect articulations of common understandings, as more or less adequate responses to practical needs, or as embodiments of some relevant concern.’⁵²³ Through ‘a broad normative framework in which basic values and principles are expressed, law may offer a point of orientation for reflection.’⁵²⁴ Such discourse may eventuate in new norms, a consensus and more concrete principles and rules.⁵²⁵

⁵¹⁷ ILO Convention No. 182, as adopted by the ILC, is found in Report of the Committee on Child Labour, International Labour Conference, Record of Proceedings, 87th Sess; reprinted in 38 ILM 1215 (1999), [hereafter ILO Labour Convention]

⁵¹⁸ M. Dennis, ‘The ILO Convention on the Worst Forms of Child Labour’ (1999) 93 *American Journal International Law* 943

⁵¹⁹ 7 (2) (e)

⁵²⁰ Ibid Art. 3(a)

⁵²¹ Ibid 3(d)

⁵²² M. Fox, ‘Child Soldiers and International Law: Patchwork Gains and Conceptual Debates’ (2005) 7 *Human Rights Review* 27

⁵²³ W. Witteveen, ‘Significant, Symbolic and Symphonic Laws: Communication Through Legislation’ in Hanneke van Schooten (ed) *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, Liverpool 1999), 27

⁵²⁴ W. Burg, ‘The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues’ (2001) 20 *Law and Philosophy* 31, 49

⁵²⁵ Ibid 50

4.4 Treaties and ratification

In international law, ratification defines and reflects that common identity; it is the international act whereby a state indicates its consent to be bound to a treaty if the parties intended to show their consent by such an act, thus subscribing to the 'logic of appropriateness.' Except for soft law instruments, both IHL and IHRL treaties have to be ratified by consenting states. To date, states have ratified the humanitarian and human rights laws protecting children during war.⁵²⁶ Treaties are instrumental in that they create law that binds ratifying countries, with the goal of modifying nations' practices in particular ways. A cascade of norms occurs with 'a combination of pressure for conformity' and 'a desire to enhance international legitimation, and the desire of State leaders to enhance their self-esteem.'⁵²⁷ Treaties express to the international community the position of countries that have ratified. ⁵²⁸ For instance, governments that have ratified treaties above want to show that; 'children in all societies have a symbolic value and add to the credibility of politicians,' no government wishes to admit to their citizens and to the world it mistreats children.⁵²⁹ The governments declare to the world that the principles outlined in the treaty are consistent with their commitment to human rights,⁵³⁰ as opposed to the 'logic of consequences.' Chayes and Chayes state that the impetus for compliance with international law is not so much a nation's fear of sanction, as it is fear of diminution of status through loss of reputation.⁵³¹ Guzman also views reputation as a major, if not the primary, cause of States' decisions to follow international law in general.⁵³²

⁵²⁶On February 6, 2007, 58 states signed the Paris Commitments to stop the recruitment and use of children in armed conflict. Other international conventions and protocols protecting children during armed conflict before then are: Geneva Convention, Additional Protocol I (API) (relating to international armed conflicts), Article 77(2); Additional Protocol II (APII) (relating to non-international armed conflicts), Article 4(3)c; Convention on the Rights of the Child (CRC), Article 38; Rome Statute for an International Criminal Court (ICC), Article 8 (on War crimes), section 2 b) (xxvi); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (OPAC), Article 4(1) and (2); and the African Charter on the Rights and Welfare of the Child (ACRWC).

⁵²⁷ M. Finnemore and K. Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *International Organization* 887, 895

⁵²⁸ O. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935

⁵²⁹ J. Kuper, 'Children in armed conflict: the law and its uses', LSE Development Studies Institute Working Paper Series: No. 5, Children in Extreme Situations – Proceedings from the 1998 Alistair Berkley Memorial Lecture (2000).

⁵³⁰ O. Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935

⁵³¹ A. Chayes and A. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* .(Harvard University Press 1998)

⁵³² A. Guzman, *How International Law Works: A Rational Choice Theory* (New York; Oxford University Press 2009).

State actors are therefore to act in ways that ‘express appropriate attitudes toward various substantive values.’⁵³³The Geneva Conventions of 1949 received 195 ratifications. Additional Protocol 1 was ratified by 173 state parties while Additional Protocol II has 167 ratifications. The CRC is the most widely ratified human rights with 194 ratifications. OPAC has been ratified by 158 states parties.⁵³⁴ Out of the 54 members of the African Union, 41 have ratified the African Charter on the Rights and Welfare of the Child.⁵³⁵ Drumbl points out, however debatable, the ‘faultless passive victim image binds communities of conscience.’⁵³⁶ These developments present objective evidence of a ‘collective conscience’ rather than the individualistic and egoistic logic of consequences.

Ratification of a treaty may influence domestic norms, which in turn can affect both citizen behaviour and domestic policy.⁵³⁷ Primary mechanisms include *providing information* (social meaning) that changes individual preference, which may ultimately affect perceptions of majority belief, and providing information that leads one to infer an increased likelihood that the international norm will be socially enforced at a domestic level.⁵³⁸ Both IHL and IHRL have affinities with cosmopolitanism. Cosmopolitan ethos espouses universal rights, justice and positive and negative duties. Positive duties include aid to those who suffer during wartime.⁵³⁹ Held *et al* posit that the evolution of human rights law and rules of warfare are examples of a shift from state-centred law to supra-state law. While the notion of international law assumes a system of autonomous states, the concept of cosmopolitan law rests on the realisation that there exists a moral order and rights and duties that transcend state boundaries.⁵⁴⁰ The continuing ‘human rights revolutions’ at national and regional levels along with regional human rights and

⁵³³E. Anderson and R. Pildes, ‘Expressive Theories of Law: A General Restatement’ (2000) 148 *University of Pennsylvania Law Review* 1503, 1504

⁵³⁴See ‘ICRC Treaties and State Parties To Such Treaties’ <http://www.icrc.org/ihl>

⁵³⁵See ‘Ratification Table: African Charter on the Rights and Welfare of the Child’ <http://www.achpr.org/instruments/child/ratification/>

⁵³⁶M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press, 2012), 8-9

⁵³⁷A. Geisinger and M Stein, ‘A Theory of Expressive International Law’ (2007) 60 *Vanderbilt Law Review* 77

⁵³⁸Ibid

⁵³⁹R. Shapcott, ‘International ethics’ in J. Baylis, S. Smith and P. Owens (eds.), *The Globalization of World Politics: An Introduction to International Relations* (Oxford, UK: Oxford University Press, 2013)

⁵⁴⁰D. Held, A. McGrew, D. Goldblatt and J. Perraton *Global Transformations: Politics, Economics and Culture*. (Stanford: Stanford University Press 1999) Ch. 1, pp. 32-86

economic law regimes challenge state-centred ‘Westphalian traditions’ of power politics justifying treaties and international organisations by mere state consent.⁵⁴¹ The human rights obligations of all UN member states under the UN Charter, UN human rights conventions and under general international law continue to evolve and confirm that ‘(a)ll human rights are universal, indivisible and interdependent and interrelated’; ‘it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.’⁵⁴² Neither national governments nor international governance institutions have legitimate powers to unduly restrict ‘inalienable’ and ‘indivisible’ civil, political, economic, social and cultural rights of citizens, notwithstanding the diverse democratic preferences and scarcity of resources for fulfilling and ‘balancing’ these rights in national and international jurisdictions. ⁵⁴³

4.5 Soft Law

Apart from ‘hard law’ instruments discussed above, ‘soft law’ norms have gained increased significance in child law. Soft law is most commonly defined to include hortatory, rather than legally binding, obligations.⁵⁴⁴ These norms can emanate from state actors, governments, non-governmental organisations or international organizations. In 1997, the NGO working group on the CRC and UNICEF convened a symposium in Cape Town which adopted Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soldiers in Africa.⁵⁴⁵ The Cape Town Principles, *inter alia*, established 18 as the minimum age for any participation in hostilities and for all forms of recruitment into all armed forces and armed groups and urged governments to adopt and ratify OPAC raising the minimum ages from 15 to 18. Further,

⁵⁴¹E. Petersmann, Human Rights Require ‘Cosmopolitan Constitutionalism’ and Cosmopolitan Law for Democratic Governance of Public Goods, EUI Working LAW 2013/04 Department of Law 1

⁵⁴² Vienna Declaration and Programme of Action adopted at the UN World Conference on Human Rights by more than 170 states on 25 June 1993 (A/CONF.157/24, para.5). This ‘universal, indivisible, interrelated, interdependent and mutually reinforcing’ nature of human rights was reaffirmed by all UN member states in numerous human rights instruments such as UN Resolution 63/116 of 10 December 2008 on the ‘60th anniversary of the Universal Declaration of Human Rights’ (UN Doc A/RES/63/116 of 26 February 2009)

⁵⁴³ E. Petersmann, Human Rights Require ‘Cosmopolitan Constitutionalism’ and Cosmopolitan Law for Democratic Governance of Public Goods, EUI Working LAW 2013/04 Department of Law, 4

⁵⁴⁴A. Guzman and T. Meyer, ‘International Soft Law’ (2010) 2 *Journal of Legal Analysis* 171, 172

⁵⁴⁵See Cape Town Principles and Best Practice on the Prevention of Recruitment into the Armed Forces and Demobilization and Social Reintegration of Child Soldiers in Africa (Cape Town, 27-30 April 1997)

governments should ratify and implement pertinent regional and international treaties and incorporate them into national law, namely: the African Charter on the Rights and Welfare of the Child; the two Additional Protocols to the 1949 Geneva Conventions and the CRC, which currently establish 15 as the minimum age for recruitment and participation. The Cape Town Principles urged governments to adopt national legislation on voluntary and compulsory recruitment with a minimum age of 18 years and should establish proper recruitment procedures and the means to enforce them. Those responsible for illegally recruiting children should be brought to justice. All persons under the age of 18 should be demobilised from any kind of regular or irregular armed force or armed group; direct and free access to all child soldiers should be granted to relevant authorities or organizations in charge of collecting information concerning their demobilisation and of implementing specific programmes. Children should be given priority in any demobilization process. Norms on child soldiering are progressively evolving. The Paris Commitment and Principles of 2007⁵⁴⁶ updated the Cape Town Principles. The Paris Commitments are generally about compliance with international law.⁵⁴⁷ Significantly, the Paris Principles improved on the initial Cape Town definitional effort, by broadening the conceptualisation of a ‘child soldier’ as:

‘Any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.’⁵⁴⁸

As soft law, these principles have no legal force but show that the entire legal concept of the ‘child soldier’ has evolved to encompass a greater number of children engaged in a wider variety of activities than was previously the case.⁵⁴⁹ This

⁵⁴⁶See ‘Paris principles and Paris commitments to protect children’ ICRC

<http://www.icrc.org/eng/resources/documents/misc/paris-principles-commitments-300107.htm>

⁵⁴⁷ M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 141

⁵⁴⁸See ‘Paris principles and Paris commitments to protect children’ ICRC

<http://www.icrc.org/eng/resources/documents/misc/paris-principles-commitments-300107.htm> at p.7 This definition does not depart from that offered in the Cape Town Principles: ‘... as any child - boy or girl - under 18 years of age, who is part of any kind of regular or irregular armed force or armed group in any capacity, including, but not limited to: cooks, porters, messengers, and anyone accompanying such groups other than family members. It includes girls and boys recruited for sexual purposes and/or forced marriage. The definition, therefore, does not only refer to a child who is carrying, or has carried weapons.’

⁵⁴⁹D. Rosen ‘Social Change and the Legal Construction of Child Soldier Recruitment in the Special Court for Sierra Leone’ (2010) 2 *Childhood in Africa* 48, 49

expanded conception of child soldiering, beyond just direct involvement in combat, is now reflected in jurisprudence. A common understanding is emerging for protection of children from those under 15 to those under 18. What began as ‘a relatively narrow concern with protecting children under 15 years old who served as combatants in armed forces and armed groups has evolved into an international effort to serve a broad range of connections between all persons under 18 years old and the military.’⁵⁵⁰ In essence, the ‘Straight 18’ position attempts to define ‘childhood’ chronologically to broaden the scope of protection. As Drumbl points out, however, the global international humanitarian movement has been more receptive to this shift than international criminal law.⁵⁵¹ International criminal law has generally protected those under 15. The NGOs behind the soft law norms urge states to sign OPAC, which prohibits recruitment of children under the age of 18.⁵⁵² ‘Soft law’ instruments ‘often attract the wider participation of states and introduce new international norms through broad approval.’⁵⁵³ At least 105 states had endorsed the Paris Principles by 2011.⁵⁵⁴ This would reflect broad acceptance (diffusion) and norm cascades. The wide endorsement frequently exerts social pressure upon policymakers to comply with the norms included in these instruments.⁵⁵⁵

4.6 Naming and shaming

The Machel Report⁵⁵⁶ triggered a panoply of UN resolutions, the proposed appointment of a special representative on children and armed conflict and reports on abuses of children during armed conflict. As part of the drive to combat child

⁵⁵⁰ Ibid 48

⁵⁵¹M. Drumbl, *Reimagining Child Soldiers in International Law and Policy* (Oxford University Press 2012) 1135

⁵⁵²OPAC Art. 2

⁵⁵³ On the ‘soft law pathway’ to the development of new international regimes and its advantages, see K. Abbott and D. Snidal, ‘Transformation: Alternative Pathways to International Legalization’ in E. Benvenisti and M. Hirsch, (eds.) *The Impact of International Law on International Cooperation* (Cambridge University Press 2004) 59, 61; K. Abbott and D. Snidal, ‘Hard and Soft Law in International Governance’ (2000) 54 *International Organisation* 421; E Brown-Weiss, ‘Introduction’ in E. Brown-Weiss, (ed.), *International Compliance with Non-Binding Accords* (Washington DC: American Society of International Law, 1997) 1; C. Chinkin, ‘Normative Development in the International Legal System’ in D. Shelton, (ed.), *Commitment and Compliance* (Oxford: Oxford University Press 2000) 21

⁵⁵⁴See ‘Five new countries endorse the Paris Commitments to end the use of children in conflict’ 3 December 2012; Office of the Special Representative of the Secretary-General for Children and Armed Conflict <http://childrenandarmedconflict.un.org/press-release/five-new-countries-endorse-the-paris-commitments-to-end-the-use-of-children-in-conflict/> (last accessed 22 November 2013)

⁵⁵⁵ M. Hirsch ‘The Sociology of International Law: Invitation to Study International Rules in Their Social Context’ 55 (2005) *University of Toronto Law Journal* 891

⁵⁵⁶ See ‘The Impact of Armed Conflict on Children’ (1996), Graça Machel. UN A/51/306

soldiering, the UN devised a plan to ‘name and shame’ the ‘offenders.’ The UN Secretary-General would list parties to armed conflict that recruit or use children in violation of their relevant international obligations. The philosophical objective of the strategy is to inflict stigmatisation through public exposure. Because of the attendant reputational costs, the offenders would presumably, desist from violation of children’s rights during warfare. One longstanding notion, emphasized in the early anthropological literature is that shame is a public emotion. From this perspective, a disapproving audience – for example the ‘international’ or ‘moral community’ - is a key component of the shame experience.⁵⁵⁷ Shame is an affective reaction that follows public exposure (and disapproval) of some impropriety or shortcoming.⁵⁵⁸ As the label suggests, naming and shaming is a policy of punishment by publicity designed to inflict ‘reputational damage on moral grounds.’⁵⁵⁹ Public naming has the purpose of humiliation, social condemnation and punishment against those who have transgressed social norms. In domestic law, the system has been invoked to also provide a societal alert signal against potential recidivists. Like retribution and deterrence, the UN shaming strategy has its philosophical foundations, in part, in domestic practice. However, as the UN practice illustrates, the strategy of ‘naming and shaming’ is not applied as an alternative sanction on convicted offenders or to reduce costs of imprisonment. Naming and shaming has, in the international arena, been invoked against ‘unconvicted’ persons, fugitives or entities on the basis of reasonable suspicion of commission of offences. Naming and shaming is designed to ‘shine a spotlight on bad behaviour’⁵⁶⁰ in order to help sway abusers, in this case child abusers during armed conflict, to reform. Looked at from another angle, the resort to ‘naming and shaming’ is testament to the impotence of international law in some situations. In the absence of an international police force, international law depends on the co-operation of states. However, some state actors suspected of committing international crimes have not co-operated with international criminal justice systems. Further, some states are not parties to international treaties. Unable

⁵⁵⁷ D. Ausubel, ‘Relationships between shame and guilt in the socializing process’ (1955) 62 *Psychological Review* 378

⁵⁵⁸J. Tangney and R. Miller, ‘Are Shame, Guilt, and Embarrassment Distinct Emotions?’ (1996) 70 *Journal of Personality and Social Psychology* 1256

⁵⁵⁹ I. Kahn, ‘Understanding Corporate Complicity: Extending the Notion Beyond Existing Laws’ (2005) Paper Presented at the Business Human Rights Seminar, London, 8 December 2005, 4.

⁵⁶⁰ E Hafner-Burton, ‘Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem’ (2008) 6 *International Organization* 689, 690

to ‘name and arrest’, international law has turned to ‘naming and shaming’ parties suspected of abusing children during warfare.

The naming and shaming of child soldier abusers during armed conflict was catalysed by Resolution 1379.⁵⁶¹ Secretary-General Kofi Annan submitted the first ‘list of shame’ in his report of 2002.⁵⁶² Since then, the UN has produced such lists, containing mainly armed non-state groups (ANSAs.) Following the calls for a monitoring mechanism, the Security Council Working Group on Children and Armed Conflict was established in July 2005 pursuant to Security Council resolution 1612.⁵⁶³ A Monitoring and Reporting Mechanism (MRM) would report on six grave violations against children, including their recruitment or use in armed conflict.

It has been suggested that the rise in advocacy of shaming punishments has gone ‘hand in hand with an increased interest in the expressive dimension of the law.’⁵⁶⁴ The law ‘does not exist merely to allocate benefits and burdens; it also *says* things through its actions.’⁵⁶⁵ Some researchers, however, doubt that the strategy of shaming has any effect on armed groups, paramilitaries or warlords.⁵⁶⁶ It has also been argued that ‘naming and shaming’ may not deter because most offenders do not always value their self-esteem enough to be influenced by the threat of humiliation.⁵⁶⁷ Hamberg concludes that ‘most rebels fighting civil wars have nothing to lose. After all, they are willing to risk their lives for some more or less specific purpose. Thus being threatened with sanctions or moral shaming has limited effects

⁵⁶¹See United Nations S/RES/1379 [2001] para 16 ‘Requests the Secretary-General to attach to his report a list of parties to armed conflict that recruit or use children in violation of the international obligations applicable to them, in situations that are on the Security Council’s agenda or that may be brought to the attention of the Security Council by the Secretary-General.’

⁵⁶² See 3rd Annual Report of the Secretary-General on Children and Armed Conflict (2002) UN Security Council S/2002/1299 [26 November 2002]

⁵⁶³ UN Security Council, Security Council resolution 1612 [2005] [on children in armed conflict], 26 July 2005, S/RES/1612 (2005), available at: <http://www.refworld.org/docid/43f308d6c.html> (last accessed 21 November 2014)

⁵⁶⁴C. Flanders, ‘Shame and the Meanings of Punishment’ (2006) 54 *Cleveland State Law Review* 609, 611

⁵⁶⁵ Ibid

⁵⁶⁶ T. Börzel and T. Risse ‘Human Rights and Areas of Limited Statehood: Conceptual Challenges and Empirical Insights’ Paper presented at the Workshop ‘The Power of Human Rights – Ten Years After’, University of Wyoming, August 27-29, 2009

http://faculty.maxwell.syr.edu/hpschmitz/Human_Rights_2009/t&t%20hr%20woyo%20090821.pdf, (2.6.2010); See also H. Jo, ‘Taming of the Warlords. International Humanitarian

Organizations in Conflict Zones’ Paper presented at the Workshop ‘The Power of Human Rights – Ten Years After’ University of Wyoming, August 27-29, 2009.

⁵⁶⁷T. Massaro, ‘The Meanings of Shame’ (1997) 3 *Psychology, Public Policy & Law* 645, 648

on their cost-benefit calculations.’⁵⁶⁸ UN shaming sanctions target both State and non-State transgressors. Researchers suggest that States appear sensitive to shaming. Murdie and Davis conclude that States targeted by human rights organizations often do improve their human rights practices.⁵⁶⁹ Hafner-Burton, who examined the effects of campaigns on the human rights practices of 145 countries between 1975 and 2000, also finds that States’ political rights generally improve after being publicly shamed. Such studies find that it ameliorates subsequent physical integrity abuse.⁵⁷⁰ The idea that states always act under the ‘logic of consequences’ seem to be overstated. Jo Becker, child rights advocacy director of Human Rights (HRW), noted that ‘naming and shaming’ had some impact, but mostly on governments.⁵⁷¹ Such conclusions seem to be supported by the fact the governments of Afghanistan, Uganda, Chad, and Myanmar, which had been ‘named and shamed’ for some time, have since signed UN action plans stopping the use of children in armed conflict. Parties to the conflicts in Nepal and Sri Lanka were delisted after their successful completion of Security Council-mandated action plans to end the recruitment and use of children.⁵⁷² Rhadika Coomaraswamy, former Special Representative for the Secretary-General on Children and Armed Conflict, also concluded after the Afghanistan agreement that ‘States tend to move much quicker - they move with a purpose and usually they want to fall in line with international standards.’⁵⁷³

Scholars point to a number of motivations for State compliance. States cannot blithely ignore international norms because ‘there are too many audiences, foreign and domestic, too many relationships present and potential, too many linkages to

⁵⁶⁸ S. Hamberg ‘Transnational advocacy networks, rebel groups, and demobilisation of child soldiers in Sudan’ in T. Checkel (ed) *Transnational Dynamics of Civil War* (Cambridge University Press, 2013)156, stating that naming and shaming did not influence the decision of the SPLA/M to demobilise child soldiers.

⁵⁶⁹ A. Murdie and D. Davis, ‘Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs’, (2012) 56 *International Studies Quarterly* 1

⁵⁷⁰ E. Hafner-Burton, ‘Stick and Stones: Naming and Shaming the Human Rights Enforcing Problem’, (2008) 62 *International Organization* 689

⁵⁷¹ Cited in *Laws and Resolutions Dealing with Child Soldiers in Global Issues: Selections from CQ Researcher* (2009), 331

⁵⁷² See ‘52 Parties on Secretary-General’s List of Shame on Children and Armed Conflict,’ 11 June 2012, <http://childrenandarmedconflict.un.org/press-releases/52-parties-on-secretary-generals-list-of-shame-on-children-and-armed-conflict/>. (last accessed 22 November 2014)

⁵⁷³ See ‘Hopeful signs for UN action plans on child soldiers’ *IRIN*, 10 February 2011, <http://www.irinnews.org/Report/91882/GLOBAL-Hopeful-signs-for-UN-action-plans-on-child-soldiers>. (last accessed 22 November 2014)

other issues to be ignored.⁵⁷⁴ Franklin shows that human rights criticism leads to decreased repression in States that have strong economic ties with other countries, though this finding is time bound.⁵⁷⁵ Publicizing poor behaviour casts States as pariahs in the international community, leading to decreased aid and decreased foreign direct investment.⁵⁷⁶ A number of international relations theorists and international lawyers argue that States' reputational concerns are the principal motivational factor for high levels of international law and treaty compliance. The impetus for compliance with international law is fear of diminution of status through reputational loss.⁵⁷⁷ Guzman also views reputation as a major, if not the primary, cause of States' decisions to follow international law in general.⁵⁷⁸

However, while States appear to comply more, there has been, comparatively, little progress with getting 'named and shamed' ANSAs to agree to UN action plans towards ending recruitment and use of children.⁵⁷⁹ UNICEF realized, as did the Coalition to Stop the Use of Child Soldiers (now Child Soldiers International), that while progress was being made on State compliance with international standards to prevent the recruitment and use of children in hostilities, the news with respect to ANSAs is 'far less positive.'⁵⁸⁰ Some researchers doubt that the strategy of shaming has any effect on armed groups, paramilitaries or warlords.⁵⁸¹ Of the 32 parties

⁵⁷⁴ A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995).

⁵⁷⁵ J. Franklin, 'Shame on You: The Impact of Human Rights Criticism on Political Repression in Latin America' (2008) 52 *International Studies Quarterly* 187

⁵⁷⁶ J. Wright and A. Escriba-Folch, 'Are Dictators Immune to Human Rights Shaming?', *IBEI Working Papers* 25 (2009); See also V. Schneider, 'The Global Social Capital of Human Rights Movements: A Case Study on Amnesty International', in K. Ronit and V. Schneider (eds.), *Private Organizations in Global Politics* (London Routledge 2000); C. Barry *et al.*, 'Avoiding the Spotlight: Human Rights Shaming and Foreign Direct Investment', (in press) *International Studies Quarterly* (2013)

⁵⁷⁷ A. Chayes and A. Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* (Harvard University Press 1998)

⁵⁷⁸ A. Guzman, *How International Law Works: A Rational Choice Theory* (New York; Oxford University Press 2009)

⁵⁷⁹ See 'Security Council Report: Cross Cutting Report Children and Armed Conflict 2012, No. 3', 27 August 2012, http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_cac_2012.pdf (last accessed 5 November 2013), at 2.

⁵⁸⁰ See Child Soldiers International, 'Child Soldiers Global Report', 2008, at 12.

⁵⁸¹ T. Börzel and T. Risse, 'Human Rights and Areas of Limited Statehood: Conceptual Challenges and Empirical Insights', Paper presented at The Power of Human Rights – Ten Years After, 27-29 August 2009,

http://faculty.maxwell.syr.edu/hpschmitz/Human_Rights_2009/t&t%20hr%20woyo%20090821.pdf; H. Jo, 'Taming of the Warlords. International Humanitarian Organizations in Conflict Zones', Paper presented at The Power of Human Rights – Ten Years After, 27-29 August 2009.

branded as ‘persistent violators’ in the report of the Secretary- General of 2012,⁵⁸² the overwhelming majority is comprised of ANSAs.⁵⁸³ It has also been argued that naming and shaming may not deter because most offenders do not always value their self-esteem enough to be influenced by the threat of humiliation.⁵⁸⁴ Hamberg concludes that,

‘...most rebels fighting civil wars have nothing to lose. After all, they are willing to risk their lives for some more or less specific purpose. Thus being threatened with sanctions or moral shaming has limited effects on their cost-benefit calculations.’⁵⁸⁵

Such claims seem to find traction in the (non) response of, for instance, Joseph Kony, Ugandan rebel leader of the Lord’s Resistance Army (LRA). He was issued with a warrant of arrest by the ICC in 2004⁵⁸⁶; warrants of arrest, by their public nature, are, of course, a form of ‘naming and shaming’. Further, Kony was the subject of a viral video, produced by a human rights organisation, which attracted 100 million views on the internet.⁵⁸⁷ However, Kony remained at large (at the time of writing.) One commentator concluded: ‘Kony’s name was already muddy and could hardly get any worse.’⁵⁸⁸ DRC rebel commander Bosco Ntaganda had been ‘named and shamed’ for, among other reasons, the use of child soldiers. Public attention on him was heightened after the ICC also issued a first warrant for his arrest in 2006.⁵⁸⁹ Gert Rosenthal, a representative of Guatemala, argued at a UN meeting that ‘naming and shaming’ ‘had not affected the armed groups, nor were those groups accountable

⁵⁸² See Office of the Special Representative of the Secretary General for Children and Armed Conflict-List of Persistent Perpetrators, 26 April 2012, <http://childrenandarmedconflict.un.org/publications/persistentperpetrators.pdf> (last accessed 5 November 2013).

⁵⁸³*Ibid.*; See also Office of the Special Representative of the Secretary General for Children and Armed Conflict -Persistent Violators, <http://childrenandarmedconflict.un.org/our-work/persistent-violators-and-sanctions/> (last accessed 22 November 2014)

⁵⁸⁴ T. Massaro, ‘The Meanings of Shame’, (1997) 3 *Psychology, Public Policy & Law* 645, 648.

⁵⁸⁵S. Hamberg, ‘Transnational advocacy networks, rebel groups, and demobilisation of child soldiers in Sudan’ in T. Checkel (ed) *Transnational Dynamics of Civil War* (Cambridge University Press 2013)156 stating that naming and shaming did not influence the decision of the SPLA/M to demobilise child soldiers.

⁵⁸⁶*The Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05

⁵⁸⁷ See P. Carsten ‘Joseph Kony 2012: film passes 100 million views as it becomes most successful viral video of all time’ 14 March 2012 <http://www.telegraph.co.uk/news/worldnews/joseph-kony/9143781/Joseph-Kony-2012-film-passes-100-million-views-as-it-becomes-most-successful-viral-video-of-all-time.html>The video, put out by American charity Invisible Children, aims to raise awareness of Kony (last accessed 23 July 2013)

⁵⁸⁸ Cited in *Laws and Resolutions Dealing with Child Soldiers in Global Issues : Selections from CQ Researcher* (Pine Forge, 2009), 331 quoting Christopher Blattman, an assistant professor of political science and economics at Yale University who has done extensive research on Kony.

⁵⁸⁹Warrant of Arrest, *The Prosecutor v Bosco Ntaganda*, ICC, Pre-Trial Chamber I, 22 August 2006.

for their acts or in compliance with human rights or humanitarian law. In fact, they did not seem to care about their image or reputation.’⁵⁹⁰ Singer puts it more bluntly: ‘One cannot shame the shameless.’⁵⁹¹ Elsewhere, I have argued that the ‘confrontational’ approach which underpins the strategy of naming and shaming many not be efficacious.⁵⁹² Specialized NGOs can engage ANSAs, can facilitate contact with non-state actors, help reduce the violence and instability and promote adherence to international law. In the event of failure to achieve peace agreements, humanitarian engagement may aid norm internalisation, thus helping reduce atrocities against children.⁵⁹³

4.7 Expressivism and international child law

The body of children’s rights law carries symbolic meaning premised on the message that children are in need of special care and protection.⁵⁹⁴ ‘Naming and shaming’ is based on the symbolic rather than the instrumental value of law. Some authors have argued that reposing instrumental value to law alone is simplistic.⁵⁹⁵ We ‘need to understand other ways in which the law can function in society in order to be able to deal with legislation on moral issues.’⁵⁹⁶ In fields where moral dimensions are more explicit, and where citizens’ voluntary co-operation is necessary, instrumental function becomes inadequate.⁵⁹⁷ If ‘one focuses on the protective and instrumental functions, the reasons for wanting a law usually largely involve the content of that law. However, the expressive function of law is central here. It is important for our identity...’⁵⁹⁸ A statute is an authoritative text with a normative meaning.’⁵⁹⁹

Expressivists view law as a regulator of social meanings. An expressivist’s normative agenda includes both crafting law to express valued social messages and employing

⁵⁹⁰ See ‘Security Council Adopts Resolution Stating Readiness to Impose Sanctions on Armed Groups Persistently Violating Rights of Children Resolution 2068 (2012) UN Security Council SC/10769’ Security Council 6838th Meeting Department of Public Information, News and Media Division, New York <http://www.un.org/News/Press/docs/2012/sc10769.doc.htm> (last accessed 25 November 2014)

⁵⁹¹ P. Singer, ‘Talk is Cheap: Getting Serious about Preventing Child Soldiers’ (2004) 37 *Cornell International Law Journal* 561, 573

⁵⁹² C. Nyamutata, ‘Engaging or shaming? An analysis of UN’s naming and shaming of child abusers in armed conflict’ (2014) 4 *Journal of international humanitarian legal studies* 151

⁵⁹³ *Ibid*

⁵⁹⁴ C. Breen ‘When Is a Child Not a Child? Child Soldiers in International Law’ (2007) 8 *Human Rights Review* 71, 81-82

⁵⁹⁵ W. Burg ‘The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues’ (2001) 20 *Law and Philosophy* 31

⁵⁹⁶ *Ibid*

⁵⁹⁷ *Ibid*

⁵⁹⁸ *Ibid* 53, referring to domestic law

⁵⁹⁹ *Ibid* 49

law as a mechanism for altering social norms⁶⁰⁰ as discussed in this chapter. Hence, another view is that law is considered to have both expressive and communicative functions.⁶⁰¹ Over time, beliefs or preferences may be altered in some way that diminishes desire for undesirable conduct.⁶⁰² So ‘even international human rights law that is not highly legalized may be important for expressing and communicating international norms.’⁶⁰³ Legislation ‘is a form of communication which needs to be interpreted to serve as a point of orientation for responsible behaviour by citizens.’⁶⁰⁴ Expressivists assert that laws have an expressive function because they ‘make a statement’ about how much, and how, a good or bad should be valued’ and are efforts to change behaviour by constituting and affecting social norms.⁶⁰⁵ Unenforced law may have an ‘expressive effect’, if people act in accord with its understood message.⁶⁰⁶ Smith notes that a good deal of expressivist scholarship emphasizes that law works not only, or perhaps not even primarily, through direct coercion; rather, law affects and alters ‘social norms,’ which in turn influence the way people behave.⁶⁰⁷ On this account, IHL and IHLR discussed in this chapter would have expressive effect, unenforced. Expressive law examines law’s potential for changing the social meaning of particular behaviour by altering the social cost of undertaking that behaviour.⁶⁰⁸ When designed appropriately, law can cause individuals to alter their own behaviour because it either induces them to change their tastes, or it creates a fear of bearing social sanctions.⁶⁰⁹ Sunstein also observes that: ‘the function of law in expressing social values and in encouraging social norms to move in

⁶⁰⁰ C. Sunstein ‘On the Expressive Function of Law’ (1996) 144 *University of Pennsylvania Journal of International Law* 2021

⁶⁰¹ W. Burg ‘The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues’ (2001) 20 *Law and Philosophy* 31. I do not make any particular distinction between the expressive and communicative functions.

⁶⁰² M. Edwards ‘Legal Expressivism: A Primer’ (2009), 5 referring to smoking (Available at SSRN: <http://ssrn.com/abstract=1361101> or <http://dx.doi.org/10.2139/ssrn.1361101>) (last accessed 14 December 2013)

⁶⁰³ E. Lutz and K. Sikkink, ‘International Human Rights Law and Practice in Latin America’ (2000) 54 *International Organization* 633

⁶⁰⁴ W. Burg, ‘The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues’ (2001) 20 *Law and Philosophy* 31, 41

⁶⁰⁵ C. Sunstein, ‘Social Norms and Social Roles’ (1996) 96 *Columbia Law Review* 903, 964

⁶⁰⁶ R. Cooter, ‘Three Effects of Social Norms on Law: Expression, Deterrence, and Internalisation’ (2000) 79 *Oregon Law Review* 1

⁶⁰⁷ S. Smith, ‘Expressivist Jurisprudence and the Depletion of Meaning’ (2001) 60 *Maryland Law Review* 506, 517-18

⁶⁰⁸ A. Geisinger and M Stein, ‘A Theory of Expressive International Law’ (2007) 60 *Vanderbilt Law Review* 77

⁶⁰⁹ Ibid

particular directions' and to influence behaviour in that fashion.⁶¹⁰ McAdams posits that the expressive effect of law, specifically, that legislation changes behaviour by signalling the underlying attitudes of a community or society.⁶¹¹ Rules that state standards of behaviour and command categorically imply that actions violating them are wrong, and that such actions are to be condemned, denounced, and repudiated.⁶¹² Such values would symbolically express the humanistic values against child soldiering – 'a concern for human beings that extends beyond borders'⁶¹³ that cosmopolitanism expounds.

4.8 Conclusion

This chapter discussed the legal framework for child soldiering. Due the work of transnational agencies, a body of international law to protect children has been evolved over the years. Conceptually, how do we conceive of the development of laws against child soldiering? An analysis of the legal framework on child soldiering will, firstly, help us understand the processes and conceptual underpinnings of law creation. The chapter began by addressing the philosophical questions about international relations. Different 'logics' guide international interaction. However, a logic that envisions a 'better' society cannot leave protection of individual rights to states. Perhaps, the need for such oversight is that states do respond to chastisement and humiliation from supranational entities. The objective of the chapter was to illustrate the development of the social meaning of the practice in law. The evolution of these laws would suggest, in constructivist terms, broad acceptance and norm cascades or acceptance of the 'logic of appropriateness.' The traditional view perceives legal instruments as protective. However, this instrumental view of such statutes, according to expressivists, is much too simple; law is considered to have both expressive and communicative functions. The same philosophy frames the strategy of naming and shaming. Through the expressive value of law, perpetrators' beliefs or preferences may be altered in some way that diminishes desire for undesirable conduct. As such, unenforced law can have an expressive value. However, critics of the effect of unenforced law are sceptical about these claims. The

⁶¹⁰ C. Sunstein, 'Social Norms and Social Roles' (1996) 96 *Columbia Law Review*, 903, 953

⁶¹¹ R. McAdams, 'An Attitudinal Theory of Expressive Law' (2000) 79 *Oregon Law Review* 339

⁶¹² I. Primoratz, 'Punishment as Language' (1989) 64 *Philosophy* 187

⁶¹³ D. Robinson, 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127

response to 'naming and shaming' for instance has been mixed. What is apparent, nonetheless, is that, for anything, the development of laws expresses emerging and cresting cosmopolitan values against child soldiering. Despite it being a patchwork, the evolution of the architecture evinces a convergence on a universal sentiment that abhors the use children during armed conflict. Expressivists perceive the symbolic function of such statutes and public humiliation strategies, at least, as 'community-creating.' As noted in this chapter, cosmopolitanism seeks to build commonalities among various cultures and establish a *modus vivendi*. International law provides such a method.

CHAPTER FIVE

INTERNATIONAL CRIMINAL JUSTICE AND CHILD SOLDIERING

Introduction

The ‘idea that action by individuals, organizations, or states is driven by calculation of its consequences as measured against prior preferences has been subject to numerous criticisms.’⁶¹⁴ The ‘presumptions of anticipating consequences seem far from descriptive of actual human behaviour in actual organized systems.’⁶¹⁵ And ‘presumptions of stable, consistent, and exogenous preferences seem to exclude from consideration the many ways in which interests are changing, inconsistent, and endogenous.’⁶¹⁶ The objective of preceding chapters was to establish a foundational and conceptual understanding of the emergence and existing normative framework on child soldiering. States do submit to shared standards and norms. As the last chapter has shown, numerous states have assented to international legal instruments protecting the rights of children which they have obeyed. This, of course, does not make rationalism a redundant theoretical feature of international relations. On occasion, states do flout normative standards for individual interests. But compliance seems a more dominant trend than non-compliance.

Some research at domestic level has shown support for the expressive function of law (statutes), even where such laws remain unenforced.⁶¹⁷ For Scott, law can clearly work with norms to inform or to sanction; he is, however, unconvinced that it

⁶¹⁴J. March and J. Olsen, ‘The Institutional Dynamics of International Political Orders’ (1998) 52 *International Organization* 943, 950

⁶¹⁵ Ibid

⁶¹⁶ Ibid

⁶¹⁷M. Wittlin, ‘Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law’ (2011) 28 *Yale Journal on Regulation* 419, concluding that law has an expressive function on the use of seatbelts; P. Funk, ‘Is there an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines’ (2007) 9 *American Law and Economics Review* 135, 138 and 150, noting that regardless of the enforcement scheme, simply putting a compulsory voting law on statutes might have some positive impact on voter turnout, even if individuals were virtually never punished for not voting. Funk found that abolition of compulsory voter laws led to a decrease in voter turnout, even though the laws imposed a negligible amount of punishment on violators while the laws were in effect.

transforms beliefs.⁶¹⁸ Other scholars have also described the ascription of messaging powers to both hard law and soft law instruments as placing too much faith in ‘paper protection.’⁶¹⁹ Similarly, ‘naming and shaming’ has produced mixed results. Rebels or non-state actors in particular have often disregarded international law. A ‘plethora of global protocols, agreements and declarations attempting to protect children from both forced and voluntary recruitment has been flagrantly ignored since the end of the Cold War.’⁶²⁰ Critics of the presumed efficacy of unenforced law suggest, for example, that because of the continued use of child combatants, the framework around child soldiery alone has failed in its expressive function.⁶²¹ Singer argues that the crux of the problem is that groups deciding to use child soldiers have never been ignorant about whether it was the ethical thing to do or confused as to what exactly was allowed under international law or norms of proper behaviour.⁶²² The ‘shaming’ should thus manifest itself through punishment. Those who abduct children, send them into battle, and force them to commit rape and murder are unlikely to be persuaded by moral appeals.⁶²³ In other words, child combatant recruiters wilfully offend without due regard to the law or norms. Hamilton and Abu El-Haj concluded that neither humanitarian law nor human rights law had managed to reduce the suffering or involvement of children in armed conflict.⁶²⁴ Despite international law’s strong opposition to the practice, the child soldier doctrine spread widely in the 1990s.⁶²⁵ Exact statistics of child soldiers are difficult to establish; estimates, as reflected in the Machel Report, put them at 300 000. However, Achvarina and Reich, argue this rough approximation is now clearly outdated and potentially underestimates the gravity of the problem.⁶²⁶ Evidence drawn from individual conflicts since 2002 suggests that new wars are often characterised by an extreme

⁶¹⁸R. Scott ‘The Limits of Behavioural Theories of Law and Social Norms’ (2000) 86 *Virginia Law Review* 1603, 1631-33 (emphasis added)

⁶¹⁹See eg D. Francis, ‘Paper Protection’ Mechanisms: Child Soldiers and the International Protection of Children in Africa’s Conflict Zones’ (2007) 45 *Journal of Modern African Studies* 207

⁶²⁰V. Achvarina and S. Reich ‘No Place to Hide: Refugee, Displaced Persons, and the Recruitment of Child Soldiers’ (2006) 31 *International Security* 127, 128

⁶²¹V. Achvarina and S. Reich ‘No Place to Hide: Refugee, Displaced Persons, and the Recruitment of Child Soldiers’ (2006) 31 *International Security* 127, 128

⁶²²P. Singer ‘Talk Is Cheap: Getting Serious About Preventing Child Soldiers’ (2004) 37 *Cornell International Law Journal* 561

⁶²³ *ibid*

⁶²⁴See eg C. Hamilton and T. Abu El-Haj, ‘Armed Conflict: The Protection of Children under International Law’ (1997) 5 *International Journal of Children’s Rights* 1

⁶²⁵P. Singer *Children at War* (Pantheon 2005)

⁶²⁶V. Achvarina and S. Reich, ‘No Place to Hide: Refugee, Displaced Persons, and the Recruitment of Child Soldiers’ (2006) 31 *International Security* 127, 128

use of child soldiers.⁶²⁷ They also conclude that the growing use of child soldiers flies in the face of the claim that international norms and laws are exerting an increasing influence on the behaviour of state and non-state actors.⁶²⁸

Further, statutes and ‘naming and shaming’ lack the spectacle and dramaturgical effect that come with penal processes. It is perhaps plausible to conclude that legal texts, and perhaps ‘naming and shaming’ do have an expressive role but are inadequate as expressions of the function of law and norms. Some individuals do take social meanings into account when deciding what actions to take.⁶²⁹ Others do not. The effect of unenforced law, thus, remains contestable. But more significantly, ‘if a law expresses and effectively communicates common or shared values and identities, it may have what might be called a positive symbolic function.’⁶³⁰ Kelsen reminds us that the statement that a norm prescribing, permitting, or authorizing a certain behaviour is valid does not mean that this behaviour takes place or that it will take place in the future; it means that it ought to take place, that man ought to behave as the norm prescribes, permits or authorizes them to behave.⁶³¹ Norms can, therefore, be violated. Having discussed the legal framework, primarily statutes, this chapter now turns to ‘law in action’.

The principal objective of the chapter is to assess the approaches of international criminal justice towards ‘mass crimes’ and the conscription, enlistment and use of children as military combatants. An analysis of penal approaches on child soldiering can, firstly, help us locate the criminological and penal approaches towards the use of children for war ends. The universality of rights would prescribe respect for life and dignity. David Held, one of the most enthusiastic writers on cosmopolitanism, points out that recognition of ‘equal moral worth’ is important a precept of cosmopolitanism.⁶³² Mass crime, because of its diffusion, provides fertile ground for violation of such ‘moral worthiness’ on grand scales. It often involves multiple agents and widespread communal engagement. As discussed in Chapter 3, child soldiering

⁶²⁷Ibid

⁶²⁸Ibid

⁶²⁹D. Kahan, ‘The Secret Ambition of Deterrence,’ (1999) 113 *Harvard Law Review* 413, 419-421

⁶³⁰ W. Burg, ‘The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues’ (2001) 20 *Law and Philosophy* 31, 41

⁶³¹ H. Kelsen, ‘On the Basic Norm’ (1959) 47 *California Law Review* 107

⁶³² D. Held, *Cosmopolitanism: Ideals and Realities* (Polity Press 2010) 49

is a mass crime. This chapter tests the legal cosmopolitanism or ‘collective conscience’ that has so far been established on child soldiering. The aim of the chapter is to analyse jurisprudential approaches to children in armed conflict vis-a-vis other norms against mass criminality. The chapter is organised as follows. The first part focuses on the concept of ‘cosmopolitan justice.’ The second part discusses international criminal justice and mass crime, examining firstly approaches of the Nuremberg and Tokyo tribunals to conflict after the Second World War. The third section analyses the post-Cold War Tribunals. With the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the United Nations opened a new chapter in the development of international criminal justice which had stalled since the Nuremberg tribunals. The last section discusses hybrid tribunals. Following the perceived inadequacies of the ICTY and ICTR, a ‘third-generation’ of international criminal tribunals emerged, blending international and domestic law elements.

5.1 ‘Cosmopolitan justice’

Contemporary global politics is increasingly marked by conflicts that have occasioned violation of the ‘international society’s collective standards. As noted previously, a regime of standards protection the rights of children has emerged. This ‘logic of appropriateness’ has resulted in states ratifying treaties. While expressivists posit the value of these standards, they do not deny the value of prosecution⁶³³ or that sanctions have independent force; it simply adds another way that law can affect behaviour.⁶³⁴ The crucial test of a norm’s existence is not that members of the community never violate it. Rather, a norm’s strength is measured by the level of opprobrium community members attract from their peers for engaging in behaviour that violates the norm. ⁶³⁵Society responds through criminalisation of undesirable behavior that violates those norms. Therefore, international criminal justice has an

⁶³³R. Cooter, ‘Expressive Law and Economics’ (1998) 27 *Journal of Legal Studies* 585, citing analysis of Durkheim’s view, by D. Garland, *Punishment in Modern Society: A Study in Social Theory* (Chicago: University of Chicago Press, 1990)

⁶³⁴ M. Wittlin, ‘Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law’ (2011) 28 *Yale Journal on Regulation* 419, 420

⁶³⁵P Williams [‘From non-intervention to non-indifference: the origins and development of the African Union’s security culture’](#)(2007) 106 *African Affairs* 253

expressive function. Lacey posits that criminalisation should be seen as the overall framework for the study of criminal law and of criminal justice and penal processes.⁶³⁶ It is one of many ways of constructing social reality.⁶³⁷ ‘International criminalisation’ is quintessentially a related set of ‘intentional activities of attempting to control, order or influence the behaviour of others.’⁶³⁸ For Kant, the most important philosophical and political problem facing humankind was the eradication of war and realisation of a universal community governed by cosmopolitan law.⁶³⁹ The measure of his ‘categorical imperative’ was, not whether an action aligned with national or local law but whether it was universalisable.⁶⁴⁰ ‘The logic of cosmopolitan law,’ Hirsh states, ‘is to tie the idea of universal human rights to a legal structure that can give those rights some concrete reality independently of the state...[C]osmopolitan law is one strategy that aims to give the appeal to human rights some muscle.’⁶⁴¹ To recall Durkheim: the criminal process is, fundamentally, a manifestation of the ‘collective conscience.’⁶⁴² The specificity of modern criminal justice systems is that this collective reaction is exercised ‘through the medium of body acting upon those of its members who have violated certain rules of conduct.’⁶⁴³ Kant argued that a voluntary federation of nations, based on mutual co-operation and voluntary consent, would create the conditions necessary for the realisation of cosmopolitan order.⁶⁴⁴ One condition for such order is prosecution of egregious crimes particularly after the horrendous Nazi exploits. In the words of Arendt, in such order:

‘...human beings would assume responsibility for all crimes committed by human beings, in which no one people are assigned a monopoly of guilt and none considers itself superior, in which good citizens would not shrink back in horror at German crimes and declare ‘Thank God, I am not like that’, but rather recognise in fear and

⁶³⁶N. Lacey, ‘Contingency and Criminalization’ in I. Loveland (ed), *The Frontiers of Criminality*(Sweet and Maxwell 1995)

⁶³⁷L. Hulsman, ‘Critical criminology and the concept of crime’ (1986) 10 *Contemporary Crises* 63

⁶³⁸ J. Black, ‘Decentring Regulation: Understanding the role of Regulation and Self-Regulation in a Post-Regulating World’ (2001) 54 *Current Legal Problems* 103

⁶³⁹ R. Shapcott, *International Ethics: A Critical Introduction* (Google eBook) (John Wiley & Sons 2013)

⁶⁴⁰ Ibid

⁶⁴¹D. Hirsh *Law against Genocide: Cosmopolitan Trials*,(London: Cavendish/Glasshouse 2003) 11

⁶⁴²E. Durkheim *The Division of Labour In Society*, 70–108 cited in F. Mégret, ‘Practices Of Stigmatization’ (2014) 76 *Law and Contemporary Problems* 287

⁶⁴³Ibid

⁶⁴⁴ R. Fine, ‘Cosmopolitanism and violence: difficulties of judgment’57 (2006) *The British Journal of Sociology* 49, 54

trembling the incalculable evil which humanity is capable of and fight fearlessly, uncompromisingly, everywhere against it.’⁶⁴⁵

Several international tribunals or ‘mediums’ have been set up since Nuremberg. All, except for the Nuremberg tribunals, were set up at the instigation of or with the cooperation of the UN, no less a ‘federation of nations.’ The prosecution of international crimes ‘is often given pride of place within the new cosmopolitanism as the marker not only of the transition from classical international law to cosmopolitan law but of the emergence more broadly of a cosmopolitan consciousness that stretches across national boundaries.’⁶⁴⁶ Since Nuremberg, *realpolitik* has been replaced by a global legalism. As Amann states, ‘*ad hoc* tribunals are adjudicating international crimes - crimes that, even if they occur within one state’s borders, offend the international community.’⁶⁴⁷ Hirsh has described the prosecutions at these tribunals as ‘cosmopolitan trials,’⁶⁴⁸ for their preoccupation with universally condemned crimes. Since ‘these offences are constructed as being of concern to humanity as a whole, international institutions putatively representative of the global community become legitimated as appropriate conduits to dispense justice and inflict punishment.’⁶⁴⁹ While cosmopolitanism is not necessarily aimed at the elimination of States, the realisation of a cosmopolitan community implies at a minimum a fundamental transformation in the international order, which currently privileges the State as the unit of normative concern.⁶⁵⁰

5.2 International tribunals and mass crime

A preoccupation of contemporary international criminal justice has been the criminalisation of such ‘mass atrocity.’ The popular conception of mass atrocity has often denoted extensive human exterminations. The adjudication of atrocities at

⁶⁴⁵H. Arendt, *Essays in Understanding 1930-1954* (New York: Harcourt Brace and Company 1994) 132 cited in R. Fine and C Turner, (eds) *Social Theory after the Holocaust* (Liverpool University Press 2000)

⁶⁴⁶ R. Fine ‘Cosmopolitanism’(Routledge 2007) 96

⁶⁴⁷ D. Amann, ‘Assessing International Criminal Adjudication of Human Rights Atrocities’ 2000-2003 *Third World of Legal Studies* 169 2000-2003, p.170

⁶⁴⁸See D. Hirsh, *Law against genocide: cosmopolitan trials* (Routledge 2012)

⁶⁴⁹ M. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Northwestern University Law Review* 539, citing H. Arendt, *Eichmann in Jerusalem* (Viking Press 1965) 254, 269

⁶⁵⁰H. Bull, *The Anarchical Society: A Study of Order in World Politics* (3d ed., Columbia University Press 1977) 152; F. Tes’ ‘The Kantian Theory of International Law’ (1992) 92 *Columbia Law Review* 53, 54

Nuremberg and Tokyo after the Nazi atrocities during the Second World War marked the birth of an international criminal law regime.⁶⁵¹ The proceedings represented a substantial step forward in the development of the law of war crimes.⁶⁵² These post-Second World War tribunals served as an example to be imitated by the courts that came later.⁶⁵³ The modern international criminal tribunals have since indicted and prosecuted a number of high-level political and military figures – including former Heads of State – for egregious crimes, eroding the prospect of impunity for such offences.⁶⁵⁴ These modern tribunals set some ground-breaking legal precedents and have played an educational role in focusing world attention on fundamental rules of international law prohibiting genocide, crimes against humanity, and war crimes.⁶⁵⁵

5.2.1 Post-Second World War Tribunals

5.2.1.1 Nuremberg and Tokyo Tribunals

The Nuremberg Tribunal was the first international criminal tribunal in modern times. Its Charter and Judgment are among the most significant developments in international law.⁶⁵⁶ The international community was outraged at the extent of the cruelties of the Nazi regime during World War II. The Nazi regime was responsible for the destruction of approximately six million Jews in the worst genocide in history.⁶⁵⁷ The Holocaust was systematic and state-sponsored persecution and murder.⁶⁵⁸ Although no international framework existed for prosecuting these crimes, most international observers felt that Nazi leaders should be punished.⁶⁵⁹ On January 13, 1942, nine Nazi-occupied states came together at the St. James Palace in

⁶⁵¹A. Smeulers, 'Punishing Enemies of All Mankind' (2008) 21 *Leiden Journal of International Law* 971

⁶⁵²T. Meron, 'Reflections on the Prosecution of War Crimes by International Tribunals' (2006) 100 *American Journal of International Law* 551

⁶⁵³ Ibid

⁶⁵⁴J. Stromseth, 'Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?' (2009) 1 *Hague Journal on the Rule of Law* 87, 87

⁶⁵⁵ Ibid

⁶⁵⁶M. Scharf, 'Have We Really Learned the Lessons of Nuremberg' (1995) 149 *Military Law Review* 65

⁶⁵⁷ H. Rea, 'Setting the Record Straight: Criminal Justice at Nuremberg' (2007) 7 *Journal of the Institute of Justice and International Studies* 250-

⁶⁵⁸ See Holocaust Encyclopaedia 'Introduction to the Holocaust'
<http://www.ushmm.org/wlc/en/article.php?ModuleId=10005143>

⁶⁵⁹ M. Lippman, 'The Pursuit of Nazi War Criminals in the United States and in Other Anglo-American Legal Systems' (1998) 29 *California Western International Law Journal* 1, 8 ('The Allied Powers repeatedly condemned Nazi atrocities during World War II and warned that those who perpetrated these barbarities would be prosecuted and punished.')

London, to discuss retribution against Germany for invading their countries.⁶⁶⁰ These states affirmed their intentions to bring Nazi war criminals to justice through a judicial process. The United Nations War Crimes Commission was established the following year on October 20, 1943.⁶⁶¹ On August 8, 1945, the four major Allied powers in World War II signed the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and The Charter of the International Military Tribunal.⁶⁶²

The Nuremberg trials represented the first official twentieth-century model of imposing international injustice.⁶⁶³ There was debate among the leaders of the Allied Powers as to whether the trials should be conducted.⁶⁶⁴ Winston Churchill insisted on summary execution of the Nazi perpetrators, while Josef Stalin advocated 'show trials' followed by automatic sentences of execution, a common practice in Stalin's regime.⁶⁶⁵ The United States, however, insisted on a legalised modality, contending that conducting trials in accordance with international criminal law (ICL) would offer an important precedent for upholding the rule of law at the international level.⁶⁶⁶ But the Allied Powers agreed that, because of the extreme gravity of Nazi crimes, only Nazi perpetrators could be tried.⁶⁶⁷ The Nuremberg Tribunal proceeded under the relevant Hague⁶⁶⁸ and early Geneva Conventions,⁶⁶⁹ even though neither 'contained explicit penal provisions.'⁶⁷⁰ According to the charter, only three categories of crimes were to be punished: Crimes against Peace (planning, preparing and waging aggressive war; War Crimes (condemned in Hague Conventions of 1899 and 1907) and Crimes Against Humanity (such as genocide) which shock the

⁶⁶⁰ H. Rea 'Setting the Record Straight: Criminal Justice at Nuremberg' (2007) 7 *Journal of the Institute of Justice and International Studies* 250

⁶⁶¹ *ibid*

⁶⁶² See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, 8 August, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (entered into force 8 August, 1945)

⁶⁶³ S. Roach, 'Should the International Criminal Court Impose Justice?' (2012) 7 *Yale Journal of International Affairs*, 64, 65

⁶⁶⁴ *Ibid*

⁶⁶⁵ *Ibid*

⁶⁶⁶ *Ibid*

⁶⁶⁷ *Ibid*

⁶⁶⁸ See Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 (Hague Convention IV).

⁶⁶⁹ See Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 (Geneva Convention III).

⁶⁷⁰ T. Meron 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554, 564

conscience of humankind.⁶⁷¹ The International Military Tribunal for the Far East (IMTFE) was established in Tokyo ‘for the just and prompt trial and punishment of the major war criminals in the Far East.’⁶⁷² On October 18, 1945, twenty-four major Nazi war criminals were accused of conspiracy to commit Crimes against Peace, War Crimes and Crimes against Humanity.⁶⁷³ The ‘crime’ of using child soldiers did not feature in the statutes of the courts. The engagement of children by the Third Reich and underground movements fighting the Nazis in the Second World War were the first widespread uses of children in combat in modern conflicts.⁶⁷⁴ The use of children most notably the Hitler Jugend (Hitler Youth) became rampant in the closing weeks of the Second World War.⁶⁷⁵ It is apparent that the use of children during the military hostilities did not induce any sense of ‘shock’ to consciences to prompt criminalisation. This is despite the considerably large numbers of children involved in the Second World War. It has been suggested that approximately 200,000 German children aged 9–17 years were recruited as soldiers by the Nazi government; most of them were deployed as anti-aircraft auxiliaries at air force or marine bases.⁶⁷⁶ Ironically, almost a similar number of children now cited as involved in current armed conflicts today prompts international opprobrium. The crafters of the charters did not appear to regard the use of child soldiering during the Second World War as a crime worthy of judicialisation and punishment. As discussed in Chapter 3, the social meaning of child soldiering derived from discursive registers of heroism, patriotism and bravery.

⁶⁷¹B Ferencz ‘International Criminal Courts: The Legacy of Nuremberg’ (1998) 10 *Pace International Law Review* 203

⁶⁷²See Charter of the International Military Tribunal for the Far East (‘Tokyo Charter’); Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, 19 January, 1946, T.I.A.S. No. 1589

⁶⁷³See Charter of The International Military Tribunal, art. 6, (also reprinted in V Morris and M Scharf, *The International Criminal Tribunal for Rwanda* (Irvington-on-Hudson: Transnational Publishers, 1998, Volume 2) 473-79

⁶⁷⁴H. Mann, ‘International and the Child Soldier’ (1987) 36 *International & Comparative Law Quarterly* 32, 35

⁶⁷⁵P. Singer, ‘Western militaries confront child soldiers threat’ (2005) 17 *Jane’s Intelligence Review* 18

⁶⁷⁶H. Nicolaisen, *Flakhelfer: Airforce and Marine Auxiliaries in World War II* (Berlin, Ullstein 1981) cited in Kuwert P *et al* ‘Trauma and post-traumatic stress symptoms in former German child soldiers of World War II’ (2008) 20 *International Psychogeriatrics* 1

5.3 Post-Cold War Tribunals

5.3.1 The International Criminal Tribunal for the former Yugoslavia

Since Nuremberg, two international criminal tribunals as well as the hybrid courts and mixed tribunals⁶⁷⁷ have been established. The International Criminal Tribunals for the former Yugoslavia and for Rwanda reflected an increasing criminalization of international law.⁶⁷⁸ The horrendous atrocities committed by the Serbian forces after the breakup of Socialist Federal Republic of Yugoslavia by the Serbian forces associated with ethnic cleansing propelled humanitarian concern to the fore.⁶⁷⁹ In February 1993, the Security Council unanimously adopted a resolution requesting the Secretary General to submit for its consideration a report on the way in which to establish a tribunal, accompanied by specific proposals.⁶⁸⁰ On May 25, 1993, the ICTY came into existence in The Hague, Netherlands. The International Tribunal was empowered to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, genocide and crimes against humanity.⁶⁸¹ Several leaders were charged with these crimes, including the Srebrenica massacre. The concern of international lawmakers was the large scale human exterminations. Herman characterises the ‘fixation on the mass murders’ thus: ‘The Srebrenica massacre has taken on both symbolic and mythical properties, all in the service of political agendas. The symbol is of Serb evil, manifested in an alleged cold-blooded and unprovoked massacre of innocents reminiscent of Nazi behavior during World War II.’⁶⁸² Srebrenica has become the

⁶⁷⁷Hybrid and mixed courts have been established in Sierra Leone (2000), East Timor (2000), Kosovo (2000), Cambodia (2003), and Lebanon (2007). However, the latter has focused on cases of terrorism. Set up in 2009, Its primary mandate is to hold trials for the people accused of carrying out the attack of 14 February 2005 which killed 23 people, including the former prime minister of Lebanon, Rafiq Hariri, and injured many others. For its limited mandate, this thesis does not include the Special Tribunal of Lebanon for analysis.

⁶⁷⁸ T. Meron ‘Is International Law Moving towards Criminalization’ (1998) 9 *European Journal of International Law* 18

⁶⁷⁹ C. Joyner ‘Enforcing Human Rights Standards in the Former Yugoslavia: The Case for an International War Crimes Tribunal’ (1994) 22 *Denver Journal of International Law & Policy* 235, 236

⁶⁸⁰ The Security Council resolution on its establishment of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia, see S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute] 2.1

⁶⁸¹ See ICTY Statute Arts. 1-5

⁶⁸² E. Herman ‘The approved narrative of the Srebrenica Massacre’ (2006) 19 *Journal for the Semiotics of Law* 40, 409

emblem of the genocide in the former Yugoslavia. It is estimated that 7 000 to 8 000 Bosnian Muslims were murdered.

Under the ‘violation of the laws and customs of war’⁶⁸³, the statute does not mention the crime of child soldiering although children were used in the conflict. Serb paramilitaries had a reputation for using children as young as 10 during the wars in Bosnia and Croatia.⁶⁸⁴ Although it is difficult to put a figure on the number of children involved in the 1991-1995 Balkan wars, Croatia’s Association of Underage War Volunteers of the Homeland War estimates that some 3,000 boys fought in the conflict.⁶⁸⁵ The UN and other sources quote almost a similar figure: some 3,000 to 4,000 children participated in hostilities the vast majority in Bosnia and Herzegovina and Croatia.⁶⁸⁶ One source estimated that more than 20,000 children between 13 and 16 were involved in the conflict.⁶⁸⁷ The Kosovo Liberation Army (KLA) also enlisted child soldiers. The participation of children in the KLA was confirmed in October 2000 when details of the registration of 16,024 KLA soldiers by the International Organisation for Migration in Kosovo became known.⁶⁸⁸ Ten per cent of these were children. The majority of them were 16 and 17 years old. Around two per cent were below the age of 16.⁶⁸⁹

⁶⁸³Art. 3 Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. Doc. S/Res/827 (1993), (as amended 13 May 1998 by Resolution 1166)

⁶⁸⁴See Country case study conducted for the UN Study on the Impact of Armed Conflict on Children, 1995.

⁶⁸⁵See ‘Child Soldiers of The Balkans’ Radio Free Europe http://www.rferl.org/content/Child_Soldiers_Of_The_Balkans/1349516.html (last accessed 14 January 2014)

⁶⁸⁶ See ‘UN Study on the Impact of Armed Conflict on Children’ quoted in R Brett and M McCallin, *Children: The Invisible Soldiers* (Radda Barnen, Stockholm, 1998)

⁶⁸⁷ See Child Soldiers Global Report 2001 - Bosnia-Herzegovina http://www.unhcr.org/refworld/country,,CSCOAL,,BIH,,4988060e28,o.html#_ftn264 citing N. Dokovska, Journalists for the Rights of Women, Children and the Environment (last accessed 14 January 2014)

⁶⁸⁸See ‘Child Soldiers Global Report 2001 - Federal Republic of Yugoslavia’ Coalition to Stop the Use of Child Soldiers (now Child Soldiers International) <http://www.unhcr.org/refworld/country,,CSCOAL,,MNE,,498805fbc,o.html> (last accessed 22 January 2014)

⁶⁸⁹See ‘Child Soldiers Global Report 2001 - Federal Republic of Yugoslavia’ Coalition to Stop the Use of Child Soldiers (now Child Soldiers International) <http://www.unhcr.org/refworld/country,,CSCOAL,,MNE,,498805fbc,o.html> (last accessed 22 January 2014)

5.3.2 The International Tribunal for Rwanda (ICTR)

Like the ICTY, the ICTR did not recognise criminality of child soldiering. On April 6, 1994, a plane carrying Rwandan President Habyarimana, a Hutu, was shot down. Violence broke out almost immediately after that. Hutu extremists launched their plans to destroy the entire Tutsi civilian population. In the weeks after April 6, 1994, 800,000 men, women, and children perished in the Rwandan genocide. Acting under Chapter VII of the United Nations Charter, the Security Council created the ICTR⁶⁹⁰ for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda between 1 January 1994 and 31 December 1994. Article 4 of the Statute establishing the court addresses Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.⁶⁹¹ However, the ICTR statute is silent on the conscription, enlistment and use of child soldiers.

As in the previous conflicts, child combatants were involved in the Rwandan conflict. Some children participated actively in the genocide as members of the Rwandan army and the *Interahamwe* while others did so as part of the general mobilisation of the civilian population.⁶⁹² Children, because of their emotional and mental immaturity, were seen to have been more susceptible to manipulation by the same propaganda that moved adults. In a survey, Rwandans questioned for a 1995 study carried out in eight communes described the crimes they saw children commit in 1994.⁶⁹³ Almost all the participants said that children were involved in the crimes associated with the genocide: they committed murder, raped women and young girls, burned and destroyed houses, stole property, and pointed out people in hiding to the militias.⁶⁹⁴ Some groups also said children kept an eye on the people that were marked for death so they could not escape. In another group, participants said that some children worked as informers, posing as orphans and asking people in hiding for refuge. A few days later, the children would return to the militias and give them

⁶⁹⁰See United Nations Security Council Resolution 955 (1994) Establishing the International Tribunal for Rwanda art. 4, 8 November, 1994, S.C. Res. 955, U.N. S.C.O.R., 29th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994), 33 ILM 1398 ('ICTR Statute')

⁶⁹¹See ICTR Statute Art. 4

⁶⁹² See 'Children Attacked,' Chapter IV Human Rights Watch Report (undated) <http://www.hrw.org/reports/2003/rwanda0403/rwanda0403-03.htm>

⁶⁹³ Ibid

⁶⁹⁴ Ibid

the names and locations of those in hiding.⁶⁹⁵ Thirty-five per cent of the children interviewed for a 1995 UNICEF study said they saw children killing or injuring other children.⁶⁹⁶

Some who perpetrated these offences followed the example of their elders.⁶⁹⁷ Many children in detention interviewed by Human Rights Watch researchers said they had parents and older siblings in prison as well.⁶⁹⁸ Some simply joined in looting in hopes of profiting or because others were doing so.⁶⁹⁹ Still others acted under extreme duress and participated in the violence only in order to save themselves or family members from slaughter.⁷⁰⁰ In 1994, the Rwandan Ministry of Defence agreed to demobilise all child combatants – commonly referred to as *kadogo* or ‘little ones’ in Kiswahili.⁷⁰¹ A 1996 Rwandan government study identified 5,000 children who had been part of the Rwanda Patriotic Front (RPF) guerrilla forces, 2,600 of whom were under fifteen years of age at the time of their military service.⁷⁰² Other sources vary considerably, estimating the true number of former child soldiers to be 15,000-20,000.⁷⁰³ The government was also reported to have used child combatants. The government initially claimed *kadogos* were used primarily for menial work and did not go to the front lines during the genocide. However, a 1997 survey found that 725 children associated with the military had an army number, indicating that they were soldiers.⁷⁰⁴ While Rwanda addressed the integration of former child soldiers⁷⁰⁵, the ICTR did not punish the enlisters and recruiters. Cohen described the ‘Rwanda

⁶⁹⁵ Save the Children Federation - USA in collaboration with Haguruka, Kanyarwanda, and LIPRODHOR, *Children, Genocide, and Justice: The Rwandan Perspectives on Culpability and Punishment for the Children Accused of Crimes Associated with Genocide*, (Kigali, 1995) 9, cited in *ibid*

⁶⁹⁶ L. Gupta, *Exposure to War-Related Violence Among Rwandan Children and Adolescents*, 6 cited in *ibid*

⁶⁹⁷ See ‘Children Attacked,’ Chapter IV Human Rights Watch Report (undated) <http://www.hrw.org/reports/2003/rwanda0403/rwanda0403-03.htm>

⁶⁹⁸ *Ibid*

⁶⁹⁹ *Ibid*

⁷⁰⁰ *ibid*

⁷⁰¹ Information supplied by UNICEF (cited in ‘Child Soldiers Global Report 2001 – Rwanda,’ Child Soldiers International)

⁷⁰² Ministry of Labour and Social Affairs, *Children in Difficult Circumstances: Policy and Plan of Action*, (Kigali, March 1996) 10, cited in Human Rights Watch March 2003 Vol. 15, No. 6 (A) ‘Lasting Wounds: Consequences of Genocide and War for Rwanda’s Children.’

⁷⁰³ See Child Soldiers Global Report 2001 – Rwanda; footnote 1618

http://www.unhcr.org/refworld/publisher,CSCOAL,,RWA,498805d326,o.html#_ftn1618

⁷⁰⁴ Information supplied by UNICEF (cited in Child Soldiers Global Report 2001 – Rwanda)

⁷⁰⁵ For example, child soldiers released from the RPF guerrilla army were placed in a special school (the Kadogo School) created in 1995. The school was created by an agreement of the Ministry of Defence, Ministry of Rehabilitation and Social Integration, and UNICEF.

genocide as one of humanity's greatest failures...'706 while Lemarchand points out that Rwanda 'has become a synonym for one of the worst genocides of the 20th century.'707 However, it was the mass eliminationism, branded the 'crime of crimes,' that seemed to eclipse any other immoral acts that occurred during the conflict.

5.4 Hybrid Tribunals

From above, it is evident that child soldiering did not capture the attention of drafters of penal codes. The 'cosmopolitan trials' seemed fixated on murder crimes. It is hardly surprising that, despite their considerable achievements, the ICTY and the ICTR did not provide a definitive institutional model for the implementation of international justice.708 The UN Security Council and the international community noted a number of features of the ICTY and the ICTR that militated against using them as a model for further ad hoc international criminal courts.709 To address these, the UN responded to subsequent demands for accountability for war crimes, crimes against humanity, and genocide by developing a series of new 'experimental' courts. This 'third generation' of courts are the so-called 'hybrid' or 'mixed' tribunals.710 There is no precise definition of what constitutes a 'hybrid' tribunal, but 'hybridity' has been explained as existing when 'both the institutional apparatus and the applicable law [used in a judicial process] consist of a blend of the international and the domestic.'711 The following section discusses three hybrid tribunals: the Special Panels for Serious Crimes (SPSC) in Dili, East Timor; the Extraordinary Chambers in the Courts of Cambodia (ECCC) in Phnom Penh and the Special Court for Sierra Leone in Freetown. The main purpose here is again to assess the approaches of 'international' criminal justice to child soldiering.

706 J. Cohen, *One hundred day of silence: America and the Rwanda genocide* (Lanham MD and Plymouth: Rowman and Littlefield 2007) 9

707 L. Lemarchand, 'The Rwanda Genocide' in P Totten (ed) *A Century of Genocide: Critical Essays and Eyewitness Accounts* (Psychology Press 2004)

708 D. Cohen, 'Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future' (2007) 43 *Stanford Journal of International Law* 1

709 *ibid*

710 *ibid*

711 L. Dickinson, 'The Promise of Hybrid Courts' (2003) 97 *The American Journal of International Law* 295

5.4.1 The Extraordinary Chambers in the Courts of Cambodia

Cambodia, which gained its independence from France in 1954, was ruled by King Norodom Sihanouk until 1970 when he was toppled by a US backed coup. Between 1970 and 1975 multiple rebel groups battled against one another and the military government.⁷¹² The most prominent group was the Khmer Rouge, which vehemently opposed Cambodia's support of the US in Vietnam. ⁷¹³In 1975, the Khmer Rouge took control. Once the Khmer Rouge rose to power, there was no individual freedom, little or no social mobility, and a population that was undernourished and overworked.⁷¹⁴ In the mass-killings, disease, and famine that were to follow, more than 1.5 million of Cambodia's eight million people perished.⁷¹⁵

After nearly twenty years of international paralysis in the face of impunity, on 21 June 1997 the Cambodian government sought the assistance of the UN in dealing with the atrocities committed during the rule of the Khmer Rouge.⁷¹⁶ The UN Group of Experts travelled through Cambodia from July 1998 until February 1999, interviewing government and non-governmental officials, current Cambodian citizens and some survivors of the Khmer Rouge regime.⁷¹⁷ The Experts concluded that the Khmer Rouge had committed, *inter alia*, the international crime of genocide, crimes against humanity and war crimes.⁷¹⁸ Faced with Cambodia's refusal to accept an international tribunal, the UN eventually agreed to the establishment of a tribunal under Cambodian law controlled by Cambodians, but with international participation.⁷¹⁹ The Law on the Establishment of Extraordinary Chambers in the

⁷¹² A. Hinton (ed.), *Genocide: An Anthropological Reader* (Oxford: Blackwell Publishers 2002) 254

⁷¹³ Ibid

⁷¹⁴ Ibid

⁷¹⁵ Ibid

⁷¹⁶ S. Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' (2001) 12 *Criminal Law Forum* 185

⁷¹⁷ S. Ratner, 'The United Nations Group of Experts for Cambodia' (1999) 93 *American Journal of International Law* 948

⁷¹⁸ See 'The Report of the Group of Experts for Cambodia Pursuant to General Assembly Resolution 52/135, 53rd Sess., Agenda Item 110(b)', U.N. Doc. A/53/850, 5 (1999) [hereinafter Group of Experts Report] 16

⁷¹⁹ See 'Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution of Crimes Committed during the Period of Democratic Kampuchea' U.N. GAOR 3D Comm., 57th Sess., Annex, Agenda Item 109(b), U.N. Doc. A/57/806 (2003) See Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Cambodia (Law on ECCC) was initially passed by Cambodia's National Assembly on 2 January 2001 but amended later.⁷²⁰ The ECCC, also known as the Khmer Rouge Tribunal, only began its work in 2006 with a mandate to try those most responsible for the crimes and violations of Cambodian laws related to crimes, international humanitarian law and during the period from 17 April 1975 to 6 January 1979,⁷²¹ a period when the Additional Protocols came into force. The Law establishing the ECCC outlines its focus on genocide, crimes against humanity, and grave breaches against the Geneva Conventions.⁷²² Genocide as defined in Article 4 derives from Articles 2 and 3 of the 1948 Genocide Convention. The definition of crimes against humanity in Article 5 is taken from the Statute of the International Criminal Tribunal for Rwanda (ICTR).

Although the relevant humanitarian laws were in place, it was clear that the primary motivational factor for the establishment of the tribunal was mass deaths that had been occasioned by the Khmer Rouge. There is, however, evidence of widespread use of children, including girls, in combat by both the governmental armed forces and the Khmer Rouge during Cambodia's civil war.⁷²³ Tens of thousands⁷²⁴ of Cambodian children were indoctrinated and trained by the Khmer Rouge to serve as child soldiers.⁷²⁵ The children of that period make up Cambodia's current adult population, and the legacy of the armed conflict, particularly the widespread Pol

⁷²⁰ See Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

⁷²¹ See Chapter II Article 2 Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

⁷²² See Articles 4, 5 and 6 of the Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006).

⁷²³ Prince Sihanouk *War and Hope: The Case of Cambodia* (Pantheon Books, 1980); (In 1970, Prince Sihanouk was ousted, not by Pol Pot, but due to a US-backed right-wing military coup. An embittered Sihanouk retaliated by joining with Pol Pot, his former enemy in opposing Cambodia's new military government) L. Ung, *First They Killed My Father: A Daughter of Cambodia Remembers* Harper Collins, 2006) See also M. Cunha, A. Rego and S. Clegg 'Obedience and Evil: From Milgram and Kampuchea to Normal Organizations' (2010) 97 *Journal of Business Ethics* 291, discussing the process through which the Khmer Rouge regime created an army of unquestioningly obedient soldiers – including child soldiers.

⁷²⁴ See L. Barnitz, H. Path and R. Ctallia 'Case Study on the Impact of Small Arms on War-Affected Children', <http://yapi.org/wp-content/uploads/2014/01/report-cambodia1.pdf>, stating There has been no conclusive research into the total number of child soldiers trained by the Khmer Rouge during the Pol Pot years of 1975- 1979 or from the continued violence during 1979-1998. Tens of thousands is believed to be a conservative estimate based on the accounts of survivors of the Pol Pot years (footnote 2)

⁷²⁵ Ibid

Pot's Khmer Rouge turned to the youngest members of the poorest levels of Cambodian society.⁷²⁶ A Khmer Rouge member was quoted saying: 'It usually takes a little time but eventually the younger ones become the most efficient soldiers of them all.'⁷²⁷ Once they were enlisted in the revolutionary army, the children were separated from their families, removed from their villages to Pol Pot's indoctrination camps. They began their military careers at the age of 12.⁷²⁸ These young soldiers, were trained in 'cruel games' with the goal that 'they would end up as soldiers with a love of killing and consequently of war...'⁷²⁹ Evidence gathered by a human rights organisation from defectors in 1995 showed that cases of children being recruited as soldiers was particularly prevalent among the Khmer Rouge, who continued over a long period to recruit children under 15.⁷³⁰ Many young boys carried weapons to the front. Some were made to take part in the fighting, and there were cases of young boys (aged 13-15) being killed or wounded.⁷³¹ Cambodians interviewed in a survey conducted for a project of the International Committee of the Red Cross, explained why young children were sought out as armed combatants: 'It is...easy for the commanders to give orders [to young soldiers] because the children did not have a conscience and are illiterate...they do not know what is good, what is bad. So they will simply follow the orders the commanders give them.'⁷³² Very little research has focused on what happened to former child soldiers after they left the service of the Khmer Rouge. ⁷³³Child soldiers did not receive demobilization and reintegration services designed to meet their particular needs.⁷³⁴ Notably again, child soldiering did not feature in the statute of the tribunal.

⁷²⁶ K. Quinn, 'Explaining Terror' in K. Jackson (ed) *Cambodia 1975-1978 Rendezvous with Death* (Princeton University Press 1989) 236

⁷²⁷ G. Van Bueren, 'The International Legal Protection of Children in Armed Conflicts' (1994) 43 *International & Comparative Law Quarterly* 809, 813 (quoting N Boothby Children and War' (1986)10 *Cultural Survival Quarterly* 28

⁷²⁸ Prince Sinahouk, *War and Hope: The Case of Cambodia* (Pantheon Books 1980)

⁷²⁹ *Ibid* 27-30

⁷³⁰ See Child Soldiers in Cambodia: A Briefing Paper (Cambodia League for the Promotion of Human Rights June 1998) <http://www.licadho-cambodia.org/reports.php?perm=19>

⁷³¹ See Child Soldiers in Cambodia: A Briefing Paper (Cambodia League for the Promotion of Human Rights June 1998) <http://www.licadho-cambodia.org/reports.php?perm=19>

⁷³² See 'People on War: Country Report Cambodia,' a report of the People on War Project, Greenberg Research, Inc., commissioned by the International Committee of the Red Cross, October 1999, [report online]; available from <http://www.onwar.org/>; cited in See L. Barnitz, H. Path and R. Ctallia 'Case Study on the Impact of Small Arms on War-Affected Children', <http://yapi.org/wp-content/uploads/2014/01/report-cambodia1.pdf>

⁷³³ See L. Barnitz, H. Path and R. Ctallia 'Case Study on the Impact of Small Arms on War-Affected Children', <http://yapi.org/wp-content/uploads/2014/01/report-cambodia1.pdf>

⁷³⁴ See L. Barnitz, H. Path and R. Ctallia 'Case Study on the Impact of Small Arms on War-Affected Children', <http://yapi.org/wp-content/uploads/2014/01/report-cambodia1.pdf>

5.4.2 The Special Panels for Serious Crimes in East Timor

The Special Panels for Serious Crimes (SPSC) in East Timor, established by the UN, acting as the transitional authority between the end of the Indonesian occupation in 1999 and the independence of East Timor in 2002, did not adopt any radically different approach; it drew from the Cambodian model.⁷³⁵ After the announcement of the victory of the pro-independence movement, pro-Indonesian Timorese militias ran amok killing hundreds, destroying about eighty percent of the buildings in the capital, Dili, and drove more than a third of the population from their homes.⁷³⁶ The UN established an Investigative Commission, which reported that hundreds of civilian had been killed, property had been destroyed on a large scale, and thousands of people had been driven from their homes. The report also alleged that the militias were financed and equipped by the Indonesian military and civilian authorities in East Timor.⁷³⁷ In particular, the Commission focused on violence during 1999, especially the brutal rampage by Indonesian military and pro-Indonesian militias, following a referendum result in September 1999 in favour of East Timorese independence. While some crimes were committed by pro-independence forces as well, the overwhelming majority of the violence was perpetrated by pro-Indonesian forces.⁷³⁸

Like with the ECCC, a proposal by the Investigative Commission of Inquiry to establish an international tribunal, similar to those seen after the Yugoslav and Rwandan conflicts, was rejected in favour of courts established within the national legal system of East Timor. The UN Transitional Authority in East Timor (UNTAET) established the Special Panels under its mandate to establish law and order after the end of the hostilities. The UNTAET Regulation 2000/15, approved in July 2000, described the operation of the new Special Panels.⁷³⁹ Section 4 of Regulation

⁷³⁵ S. Linton, 'New approaches to international justice in Cambodia and East Timor' (2002) 84 *International Review of the Red Cross*, No 845

⁷³⁶ See 'Full Report of the Investigative Commission into Human Rights Violations in East Timor KPP-HAM' (31 January 2000) reprinted in H. McDonald *Masters of Terror: Indonesia's Military and Violence In East Timor* (2006)

⁷³⁷ Ibid 170-171

⁷³⁸ Ibid

⁷³⁹ UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences, UNTAET/REG/2000/15 (entered into force on 6 June 2000), *Official Gazette of East Timor*, UNTAET/GAZ/2000/Add. 3, 99 (Regulation 2000/15)

2000/15 replicates definition of genocide as codified by the 1948 Genocide Convention. Section 5.1 adopts the definition of crimes against humanity in the ICC Statute, with the subtle distinction that both the punishable act and the widespread or systematic attack must be directed against the civilian population. Section 6.1 stipulates the prosecution of war crimes, including child soldiering. Both pro-independence and pro-integration armed groups in East Timor recruited children.⁷⁴⁰ The age range on both sides was 10 to 18 although most children involved tended to be between 15 and 18. Accurate figures for both sides are impossible to obtain.⁷⁴¹ The regulation establishing the court proscribes the conscripting or enlisting of children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.⁷⁴² The tribunal had jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offences and torture.⁷⁴³ In October 2005 the Commission for Reception, Truth and Reconciliation in Timor-Leste submitted its final report to the Timor-Leste president.⁷⁴⁴ It contained a detailed account of human rights violations in Timor-Leste between 1974 and 1999, including abuses against children. It found that during Indonesia's occupation of Timor-Leste (1975–99) children, some as young as six years old, were used by the Indonesian armed forces, Indonesian-backed militia and, to a lesser extent, by the pro-independence armed group, Falintil, and its clandestine front.⁷⁴⁵ According to the report, children associated with Falintil were the victims of extrajudicial execution, arbitrary detention, torture and other human rights violations by the Indonesian occupying forces.⁷⁴⁶ Child members of the pro-Indonesian militias responsible for much of the violence that took place both before and after the August 1999 Popular Consultation on independence were reported to be among those who had suffered the greatest impact since Indonesia's withdrawal from the territory and its subsequent independence.⁷⁴⁷ No trials or convictions on the use of child soldiers were conducted. Following independence in May 2002, the Special Panels continued under the authority of the East Timor government, but in May 2005, with the

⁷⁴⁰See 'Child Soldiers Global Report 2001 - East Timor' Coalition to Stop the Use of Child Soldiers (now Child Soldiers International)

⁷⁴¹Ibid

⁷⁴² See UNTAET Regulation 2000/15, 6 June 2000 Section 6.1 (b) (xxvi)

⁷⁴³See UNTAET Regulation 2000/15, 6 June 2000

⁷⁴⁴See 'Child Soldiers Global Report 2001 - East Timor' Coalition to Stop the Use of Child Soldiers (now Child Soldiers International)

⁷⁴⁵Ibid

⁷⁴⁶Ibid

⁷⁴⁷Ibid

withdrawal of much of the United Nations infrastructure⁷⁴⁸, the Special Panels suspended operations indefinitely.

As can be noticed from the jurisprudence of the tribunals, the criminological culture of the ‘cosmopolitan justice’ disregarded the use of children in armed conflict. It would appear the principal concern was on the mass human exterminations. The trials for child soldiering were only first conducted by the Special Court for Sierra Leone established in 2002, after the crime had been introduced in the Rome Statute of 1998 establishing the International Criminal Court (ICC).

5.4.3 The Special Court for Sierra Leone

The Special Court for the Sierra Leone (SCSL) was set up jointly by the Government of Sierra Leone and the United Nations, mandated to prosecute those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.⁷⁴⁹ The SCSL marked a shift in jurisprudence. It was the first international or internationalised tribunal court to convict defendants for the crimes against humanity of sexual slavery and forced marriage (as an inhumane act).⁷⁵⁰ The SCSL also broke new ground when in 2007 it convicted three rebel leaders for, among other crimes, conscripting, enlisting and using children in armed conflict.⁷⁵¹ The legal ground had been laid for the SCSL by the Rome Statute of 1998 establishing the ICC. The Sierra Leone conflict is known for the widespread use of child soldiers in the Armed Forces Revolutionary Council (AFRC), Revolutionary United Front (RUF)

⁷⁴⁸See Security Council Resolution 1543 (2004), May 14, 2004, para. 8. The Security Council resolved that the Serious Crimes Unit (SCU) should complete all investigations by November 2004 and that it should conclude all other activities no later than 20 May, 2005.

⁷⁴⁹See Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone. 2178 UNTS 138, 145; 97 AJIL 295; UN Doc. S/2002/246, appendix II [16 January 2002] The Statute of the Special Court for Sierra Leone (2000) is annexed to this Agreement, available at <http://www.scsl.org/LinkClick.aspx?fileticket=uClnd1MJJeEw%3d&tabid=176> [hereinafter ‘SCSL Statute’]

⁷⁵⁰See Press Release, Special Court for Sierra Leone Office of the Prosecutor, Special Court Prosecutor Hails RUF Convictions (25 February 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=dupqs76CgyU%3d&tabid=196>; Press Release, Special Court for Sierra Leone Office of the Prosecutor, Prosecutor Welcomes Convictions in RUF Appeals Judgment (26 October 2009), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=UGDfoglFQ%3d&tabid=196> (last accessed 16 February 2014)

⁷⁵¹Sentencing in the trial of *Prosecutor v Brima, Kanu and Kamara* (SCSL-2004-16-T). The Trial Chamber imposed single ‘global’ sentences of 50 years for Brima, 45 years for Kamara, and 50 years for Kanu. On 22 February 2008, the Appeals Chamber dismissed appeals and upheld the sentences handed down by the Trial Chamber.

and Civil Defence Forces (CDF). The mass and organic nature of child soldiering was reflected by the large numbers of recruits. NGOs estimated between 5 000 and 10 000 child combatants were involved.⁷⁵²Article 4 (c) of the SCSL statute proscribes the ‘conscripting or enlisting of children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.’ It mirrors Article 8(2) (e) (vi) of the Rome Statute, (under which Lubanga was charged) ‘so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community.’⁷⁵³

One of the cases involved Norman Hinga, the Deputy Minister of Defence in the Government of Sierra Leone and National Co-ordinator of the CDF (‘Norman case’).⁷⁵⁴The CDF came into existence largely because the government and the civilians of Sierra Leone did not have faith in the Sierra Leone Army to defend them against the rebel RUF.⁷⁵⁵ However, the CDF committed atrocities against its opponents, and recruited child combatants. The defence had invoked the doctrine of *nullum crimen sine lege* ⁷⁵⁶(no crime without law) arguing that the recruitment of child soldiers was not a crime when the crimes were committed – before 1996 - until the Rome Statute of 1998 establishing the ICC, ratified in 2002. In May 2004, the SCSL, nonetheless, issued a landmark decision affirming that an individual may be held criminally responsible for the recruitment of child soldiers. Norman died in custody in 2007. In June 2007, the court issued its first trial judgment in the case of *Prosecutor v. Brima, Kamara and Kanu* (AFRC case). The Appeals Chamber upheld sentences of 50 years for Brima, 45 years for Kamara, and 50 years for Kanu. It was

⁷⁵² The exact number of child soldiers within the ranks of the fighting forces in Sierra Leone is/was impossible to calculate. Based on approximate numbers submitted by the factions, the National Committee for Disarmament, Demobilization and Reintegration (NCDDR) estimated there would be 45,000 combatants to disarm. Of these 12 percent or 5400 were forecast to be children. UNICEF Sierra Leone estimated 7000, and the Coalition to Stop the Use of Child Soldiers estimates 10,000.

⁷⁵³ Letter dated 22 December, 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 2 (22 December 2000) cited in M. Happold *Child soldiers: Victims or perpetrators* 29 (2008) *University of La Verne Law Review* 56

⁷⁵⁴ See SCSL *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No SCSL-2004-14-AR72 (E) (Special Court for Sierra Leone [31 May 2004] [hereinafter Norman Decision on Child Recruitment) Sam Hinga Norman was indicted on 7 March 2003. On 28 February 2004 the Trial Chamber ordered the joint trial of Norman, Fofana and Kondewa, and on 5 March prosecutors issued a consolidated indictment. The CDF trial began on 3 June 2004. On 14 July 2005, the Prosecution concluded its case. On 22 February 2007, Norman died of natural causes while in Dakar for medical treatment and the case against him was closed.

⁷⁵⁵ See Sierra Leone Truth and Reconciliation Commission Report, 27 October 2004, Vol. 2, ch. 2, para 331

⁷⁵⁶ *Prosecutor v Sam Hinga Norman* Case No. SCSL-2003-08-PT *nullum crimen sine lege* (‘no crime without law’)

followed in August 2007 by the judgment in the case of Norman's co-accused *Prosecutor v. Fofana and Kondewa* (CDF case). Fofana and Kondewa were sentenced to 15 and 20 years' imprisonment, respectively, with the Appeals Chamber determining that the original sentences of six- and eight-years' imprisonment⁷⁵⁷ were manifestly inadequate.⁷⁵⁸ The judgment in *Prosecutor v Sesay, Kallon and Gbao*, (RUF case)⁷⁵⁹ was issued in March 2009. The Appeals Chamber also upheld the sentences imposed by the Trial Chamber of 52 years for Sesay; 40 years for Kallon; and 25 years for Gbao.⁷⁶⁰ All their crimes included the use of children in military conflict. Charles Taylor, the former President of Liberia, was indicted on 7 March 2003 for his role in the Sierra Leone conflict.⁷⁶¹ He faced eleven counts of aiding and abetting the RUF and the AFRC, including rape, murder, sexual slavery, enlisting children under the age of 15 into the armed forces, and pillage. Taylor was convicted and sentenced in 2012 to 50 years in prison.⁷⁶² The sentence was upheld by the Appeals Chamber.

While some of the sentencing took an expressivist tone about sending a strong message about the international norm being upheld,⁷⁶³ the judgments held that the most important goals for sentencing were retribution and deterrence.⁷⁶⁴

5.5 Conclusion

Legal scholars agree that without specific criminal statutes, then acts are not crimes. The Nuremberg Tribunals did not include child soldiering. The recruitment of children for purposes of armed conflict was proscribed by the Additional Protocols to the Geneva Conventions in 1977. Several legal instruments and soft laws were promulgated since. Over the years several tribunals of different kinds have been set up. This chapter analysed the approaches of this international criminal justice regime towards child soldiering. An analysis of penal approaches to child soldiering can, firstly, help us locate perceptions of penology towards the practice. Secondly, it will also assist us contextualize *Lubanga*. It is evident from the jurisprudence that,

⁷⁵⁷ Trial Chamber 1 Special Court of the Sierra Leone Judgment on the sentencing of *Prosecutor v Fofana and Kondewa*, SCSL-04-14-T [9 October 2007]

⁷⁵⁸ *Prosecutor v Fofana and Kondewa* SCSL-04-14-A, Appeals Judgment [May 28 2008]

⁷⁵⁹ *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-T, Trial Chamber I, Judgment [2 March 2009]

⁷⁶⁰ *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-15-A [26 October 2009]

⁷⁶¹ See *Prosecutor v Charles Ghankay Taylor* SCSL 03-01-T [29 May 2007]

⁷⁶² See *Prosecutor v Charles Ghankay Taylor* SCSL 03-01-T [30 May 2012]

⁷⁶³ CDF Appeals para 530-33

⁷⁶⁴ *ibid* para 532

despite the triumphalism about the establishment of tribunals, child soldiering has historically been under-criminalised and under-judicialised. The criminological and penal practices did not reflect the cosmopolitanism or collective conscience that had built around the abhorrence of child militarisation. It would seem the culture was influenced by a 'fixation on the massacre' that has resulted in the predominant adjudication of mass violence or atrocities, relegating or ignoring other wide-scale phenomena like child soldiering. The SCSL broke new jurisprudential ground with prosecutions for the conscription, enlistment and use of children in armed conflict.

CHAPTER SIX

INTERNATIONAL CRIMINAL COURT IN CONTEXT

Introduction

Assuredly, the emergence of international tribunals as a response to cataclysmic conflicts has been a remarkable development in international criminal law. The proliferation of these international criminal courts ‘inspired human rights activists and votaries of international criminal justice to make triumphant gestures.’⁷⁶⁵ As Koller noted: ‘The Nuremberg precedent addressed the worst that man can do to man, but it is also about the possibility of hope for a better future through law. It is, in its essence, the manifestation of the idea that we can and we should respond to mass atrocity through law. It is a moment pregnant with belief in the need for justice, and also in the possibilities and prospects of law.’⁷⁶⁶ Several defendants were prosecuted and punished for mass crimes by subsequent tribunals. Perhaps, the triumphalism of ‘cosmopolitan justice’ is expressed emphatically by Hirsh:

‘Against those who argue that international relations are only determined by power, I have argued that processes of decision making that rely on the authority and due process of law can also have an influence. Against those who argue that the only legitimate sovereign is the national state, I have argued that crimes against humanity have been recognized as the business of all human beings and therefore global institutions may develop that have jurisdiction within all states to prosecute such crimes. Against those who argue that individual responsibility for these crimes is just a legal fiction, I have argued that those who perpetrate crimes against humanity have had alternatives and that, while their alternatives may have been severely constrained, they still made free choices. Against those who argue that cosmopolitan law is utopian, I have shown that in the ICTY and the ICTR, as well as in national courts, it is coming into being. Against those who argue that the practical difficulties of organizing fair trials for such crimes are insurmountable, I have presented evidence that fair trials are indeed being held. Against those who argue that cosmopolitanism cannot hope to pull people away from their own sacred myths of nationhood, I have shown one mechanism by which a cosmopolitan social memory is being forged.’⁷⁶⁷

⁷⁶⁵ M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 329

⁷⁶⁶D. Koller, ‘The Faith of the International Criminal Lawyer’,(2008) 40 *New York University Journal of International Law and Politics* 1019, 1059

⁷⁶⁷ D. Hirsh, *Law against Genocide: Cosmopolitan Trials*,(London: Cavendish/Glasshouse 2003) 159

The International Criminal Court (ICC) was the first treaty-based putative international criminal court. Procedurally, ‘the Rome Conference which established the court can be considered as a cosmopolitan performance. After all, 160 countries came together to establish a mechanism to adjudicate grave crimes.’⁷⁶⁸ There were conversations across cultures, languages and jurisdictions.’⁷⁶⁹ In the Preamble of the Statute, States Parties affirm that they are ‘conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and (are) concerned that this delicate mosaic may be shattered at any time.’⁷⁷⁰ The Court has jurisdiction over the nationals and territories of the 122 States Parties to the Rome Statute and other States accepting the ICC’s jurisdiction, as well as over situations referred by the UN Security Council. We have learnt from Durkheim that the criminal process is, fundamentally, a manifestation of the ‘collective conscience.’⁷⁷¹ UN secretary general Kofi Annan used a similar term describing the judges of the newly-formed court as the embodiment of our ‘collective conscience.’⁷⁷² The President of the International Criminal Court, Sang-Hyun Song, referred to the Court as a ‘moral imperative for humankind,’⁷⁷³ perhaps borrowing from Kant’s ‘categorical imperative’ (on moral obligations that are universally and unconditionally binding). The Statute of the Court outlawed child soldiering as a binding obligation. It has been suggested that the true test for the ICC’s success will depend on whether it helps to combat impunity and deter future human rights atrocities across the globe.⁷⁷⁴ Certainly, the ‘millions of children, women and men [that] have been victims of unimaginable atrocities that deeply shock the conscience of humanity motivated the many academics and advocates who spent years dedicated

⁷⁶⁸ G. Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Google eBook) (John Wiley & Sons 2013)

⁷⁶⁹ Ibid

⁷⁷⁰ See Rome Statute, Preamble

⁷⁷¹ E. Durkheim, *The Division of Labour In Society*, 70–108 cited in F. Mégret, ‘Practices Of Stigmatization’ (2014) 76 *Law and Contemporary Problems* 287

⁷⁷² Secretary-General Kofi Annan’s to the inaugural meeting of judges of the International Criminal Court in The Hague on 11 March 2003 <http://www.un.org/press/en/2003/sgsm8628.doc.htm-o> (last accessed 20 November 2013)

⁷⁷³ See S. Song ‘Keynote remarks at Human Rights Council side event ‘The International Criminal Court after 15 Years: Prospects for the Future,’ 4 www.icc-cpi.int/iccdocs/presidency/130910-President-Speech-Eng.pdf,

⁷⁷⁴ L. Laplante, ‘The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court’s Sphere of Influence’ (2010) 43 *J. Marshall Law Review* 635

to realising the dream of creating an international forum to assure that the ‘enemies of mankind’ would not escape justice.’⁷⁷⁵

This thesis attempts to rationalise the work of the ICC with reference to the case of Lubanga as an exemplar for mass crimes the court adjudicates. What can the ICC realistically achieve with regards to such crimes? Despite ‘the justified glee of devotees of international justice, however, it would be wrong to close our eyes to the shortcomings of international criminal courts. Some of these shortcomings are, at present, inevitable.’⁷⁷⁶ International criminal justice has weaknesses. For purposes of this discussion, I will divide international criminal justice’s challenges into two categories of: a) ‘practical/institutional’ and b) ‘idealistic/goal-related.’ For purposes of theorisation, the two are not mutually exclusive. The effects of both reinforce the theoretical proposition advanced in this thesis. ICL idealism manifests itself in the belief that international criminal prosecutions can achieve a wide range of aspirations and goals.⁷⁷⁷ As a permanent court, the ICC was created with the lofty aspirations to achieve justice for all, end impunity, help end conflicts, remedy the deficiencies of ad hoc tribunals, take over when national criminal justice institutions are unwilling or unable to act, and deter future war criminals.⁷⁷⁸ The idealism of ICC seems to replicate the domestic penal traditions of its predecessors. Supporters of the Rome Statute routinely urge ratification on deterrence grounds.⁷⁷⁹ According to the Preamble of the Rome Statute and Articles 1 and 5, its objectives are the prosecution and punishment of the most serious crimes of international concern.⁷⁸⁰ The Statute describes and seeks to end ‘unimaginable atrocities’, and ‘grave crimes’ that ‘deeply shock the conscience of humanity.’⁷⁸¹ These provisions have been interpreted as meaning that retribution and deterrence are primary goals of the ICC.⁷⁸² As noted, the ICC referred to the principles of retribution and deterrence as principal goals in

⁷⁷⁵See Rome Statute, Preamble

⁷⁷⁶ M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329

⁷⁷⁷S. Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3 *Penn State Journal of Law and International Affairs* 30

⁷⁷⁸See ‘Rome Statute of the International Criminal Court: Overview’
<http://untreaty.un.org/cod/icc/general/overview.htm>

⁷⁷⁹ G. O’Connor, ‘The Pursuit of Justice and Accountability: Why the United States Should Support the Establishment of an International Criminal Court’ (1999) 27 *Hofstra Law Review* 927, 972

⁷⁸⁰See Rome Statute, Preamble, para 4 and Art 1 and 5

⁷⁸¹See Rome Statute, Preamble

⁷⁸² E. Mendes *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Publishing 2010) 143

the prosecution of Lubanga.⁷⁸³ International criminal courts pursue other goals: these other objectives, such as reconciliation and peace, have tended to be extra-judicial and socio-politically motivated, departing from the core functions of courts. I discuss the ‘idealistic/goal-related problems in the next chapter.

The second weakness to which I devote this chapter relates to practical and institutional difficulties. The ICC ‘is caught between the cosmopolitanism that its constitutive offences posit, and the reality in the legal international legal system in which it operates.’⁷⁸⁴ Plausible theorisation or rationales should consider what the ICC can realistically achieve. Several authors have argued that context effects are so central to an understanding of organizational phenomena that contextual analysis should become a distinctive feature of organizational scholarship.⁷⁸⁵ I consider here ‘context effects’ as the positive or negative impact that results from an organisation’s special context. The *sui generis* character of the ICC means it operates within a mix of complex social, political, economic and other factors. If ‘...we aren’t looking for context effects, we won’t seek out context sensitive theoretical perspectives.’⁷⁸⁶ Sensitive theorisation would take cognisance of the ICC’s dependency on the ‘largesse’ of states in its work. The court is funded by contributions from states parties. However, the funding has not matched the workload of the court. The ICC does not have a coercive mechanism such as a police force. It also relies on states for effecting warrants of arrest. However, such co-operation is not always guaranteed. The reliance on state co-operation has led the court to focus on non-state actors or rebels. The principal objective of this chapter is to highlight these constraints of the ICC and ultimately advance a working rationale sensitive to these ‘context effects.’ For purposes of the rationale that this thesis ultimately proposes, the practical/institutional challenges are not exclusive to the ‘idealistic/goal-related’ weaknesses. This chapter unfolds as follows. The first part discusses the ICC and its

⁷⁸³*Prosecutor v Thomas Lubanga Dyilo* Sentencing Judgment ICC-01/04-01/06 [10 July 2006] para 16

⁷⁸⁴ F. Megret ‘International Criminal Justice: A Critical Research Agenda’ in C. Schwöbel (ed), *Critical Approaches to International Criminal Law: An Introduction* (Routledge 2014) 31

⁷⁸⁵ D. Rousseau, ‘Issues of level in organizational research: Multi-level and cross-level perspectives’ (1985) 7 *Research in Organizational Behaviour* 1; G. Johns, ‘The essential impact of context on organizational behaviour’ (2006) 31 *Academy of Management Review* 385; R. House, D. Rousseau and M. Thomas-Hunt, ‘The meso paradigm: A framework for the integration of micro and macro organizational behaviour’ (1995) 17 *Research in Organizational Behaviour* 71

⁷⁸⁶ D. Whetten, ‘An Examination of the Interface Between Context and Theory Applied to the Study of Chinese Organizations’ (2009) 5 *Management Organisation Review* 29, 31

financial resources. The second section examines the political factors, focusing on the 'constraints' associated with self-referrals. The last part discusses the ICC's lack of an enforcement mechanism.

6.1 Resource limitations

The term 'context effects' is broadly defined as the set of factors surrounding a phenomenon that exert some direct or indirect influence on it.⁷⁸⁷ The performance of an organisation depends on a number of factors, including the availability of resources for it to achieve its goals. Secondly, the efficiency will depend on the environment in which the institution operates. Situational constraints are hypothesized to directly affect performance.⁷⁸⁸ The ICC is dependent on the cooperation of states. The court 'has no policing power or enforcement agencies and cannot seize evidentiary material, execute arrests, make searches or compel witnesses to give testimony without the co-operation of national authorities.'⁷⁸⁹ Further, states created the ICC to adjudicate 'the most serious crimes of concern to the international community as a whole.'⁷⁹⁰ However, the court does not receive enough financial support to conduct its operations. The Rome Statute includes a provision for the establishment of an Assembly of States Parties (ASP). According to the treaty, 'each State Party shall have one representative in the Assembly who may be accompanied by alternates and advisers' and each State Party shall have one vote. All other States which have signed the Rome Statute or the Final Act of the Rome Conference may attend as an observer. Currently, 122 countries are States Parties to the Rome Statute. Out of them 34 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States,⁷⁹¹ reflecting a cosmopolitan outlook. States parties are responsible for funding the court apart from voluntary contributions by

⁷⁸⁷ P. Cappelli, and Sherer, 'The missing role of context in OB: The need for a meso-level approach' (1991) 13 *Research in Organizational Behavior* 55, 56

⁷⁸⁸ L. Peters and E. O'Connor, 'Situational Constraints and Work Outcomes: The Influences of a Frequently Overlooked Construct' (1980) 5 *Academy of Management Review* 391

⁷⁸⁹ M. Brubacher, 'Prosecutorial Discretion within the International Criminal Court' 2 *Journal of International Criminal Justice* 71, 74

⁷⁹⁰ See Rome Statute, Preamble

⁷⁹¹ See 'Assembly of States Parties' ICC website http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

other organisations. However, some states have been unable to meet their financial obligations. The only available sanction for defaulters is suspension of their voting rights. According to Article 112, paragraph 8 of the Rome Statute, ‘a State Party which is in arrears in the payment of its financial contributions toward the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years.’ This would appear a light sanction to deter defaulters.

In December 2011, the states parties allocated the court €108 million with possible access to a contingency fund of up to €7 million. The ICC had requested a budget of approximately €117 million for 2012. The ICC’s budget has hardly increased in recent years, even though the addition of new cases in more countries has given it a much heavier workload. Four years ago, the ICC was investigating just four situations, in the Democratic Republic of Congo, Uganda, Darfur and the Central African Republic. Since then, it has added four more investigations, in Kenya, the Ivory Coast, Libya, and Mali.⁷⁹² However, the funding has not matched this increasing workload. Prosecutor Bensouda pointed out that the ICC was struggling to work with zero nominal growth imposed on the court. She stated that:

‘[W]e have been very clear to explain to the states... that we have tried always to work within the budget but we have cut it as near as possible to the bone and we cannot go any further; this has to be very clear. And if the state parties want the court to be as effective and to do things it was set out to do, we need to have a sufficient budget. We need to remember or recall why this institution was set up; are we now thinking of a resource-driven court or a case-driven court?...if we have to go to the extent of deciding whether to open a case or not because of the budget, that will not be good.’⁷⁹³

States parties had such high expectations of the ICC, yet a few major contributors were not willing to fully fund it.⁷⁹⁴ Some of the court’s funders see the court as a

⁷⁹²See ‘ICC Secures Budget Increase’ Institute for Peace and War Reporting <http://iwpr.net/report-news/icc-secures-budget-increase> 20 January 2014

⁷⁹³ See ‘The International Criminal Court: A New Approach to International Relations’ Council of Foreign Relations – Youtube, 24 September 2012 <http://www.youtube.com/watch?v=zq4oMkLxOVc>

⁷⁹⁴See Coalition for International Criminal Court Press Release ASP Reaches Controversial Compromise on ICC Budget; States Parties Adopt International Criminal Court Budget for 2012; Coalition Says Budget Deal Could Have Damaging Consequences For Court’ 21 December 2011 (incorrect date of 2012 on the statement)

wasteful and expensive project.⁷⁹⁵ The ICC concluded a single case (*Lubanga*) after 10 years in existence, spending \$900 million during the period.⁷⁹⁶ With only one completed trial in a decade of effort and expenditure, the ICC has faced regular criticism that it fritters away investment with few results to show for it.⁷⁹⁷ By the end of 2013, the ICC was focusing on 18 cases, most of them incomplete and carried over from previous years (See Table 1, below). To be sure, the cases presented before the

<i>Budget in thousands euros (#cases)</i>	Operational Support	Uganda	DRC	Darfur	CAR	Kenya	Libya	Côte D'Ivoire
2009 approved	16,198.9 (9 cases)	3,233.4 (1 case)	17,475.4 (4 cases)	7,575.6 (3 cases)	7,390.5	0.0 N/A	0.0 N/A	N/A
2010 approved	18,158.3 (11 cases)	3,057.8 (1 case)	17,506.1 (5-6 cases)	6,719.1 (3 cases)	7,485.9 (1-2 cases)	0.0 N/A	0.0 N/A	N/A
2011 approved	21,972.0 (13 cases + 2)	2,269.7 (1 case)	13,499.6 (5 cases)	4,728.9 (4 cases)	5,653.3 (1 case)	7,740.8 (2 cases)	4,072.6 (2 cases)	N/A
2012 approved	19,940.08 (17 cases)	1,496.87 (1 case)	9,728.31 (6 cases)	3,175.03 (4 cases)	2,985.81 (1 case)	7,412.13 (2 cases)	2,322.57 (2 cases)	3,165.92 (1 case)
2013 proposed	25,127.40 (18 cases)	970.70 (1 case)	7,779.00 (6 cases)	1,777.30 (4 cases)	3,412.50 (1 case)	7,721.20 (2 cases)	1,710.50 (2 cases)	4,583.70 (2 cases)

(1) Includes 2,616 contingency fund notification for possible use of extra resource for Kenya situation for period June to December 2011.

(2) Contingency Fund notification for possible use of extra resource for Libya situation for period May to December 2011. Note: the term 'case' is used in the present table in a generic sense and encompasses not only all cases that are in the Pre-Trial, Trial or Appeals stage but also cases that are being investigated by the OTP where no application for an arrest warrant/or summons to appear has been made. (extracted from International Criminal Court ICC-ASP/11/10 Assembly of State Parties, Eleventh session, The Hague, 14-22 November 2012, p.11)

ICC are often complex, and in most instances, necessitate lengthy negotiations with national governments. The handful of cases that the ICC handles takes years to

⁷⁹⁵See J. Silverman, 'Ten years, \$900m, one verdict: Does the ICC cost too much?' BBC News Magazine; 14 March 2012 <http://www.bbc.co.uk/news/magazine-17351946>

⁷⁹⁶ Ibid

⁷⁹⁷ Ibid

conclude.⁷⁹⁸

The budget of just under €122 million (166 million US dollars) approved for 2014 represented a significant increase on the €115 million allocated for the previous year, particularly given the fact that in some years, the governments that contribute funds have refused to sanction any growth.⁷⁹⁹ But the funding approved still falls short of the €126 million the court asked for when it submitted its 2014 budget proposal the previous year.⁸⁰⁰ Over that period, the court's budget crept up from €101 million in 2009 to €115 million in 2013. Under these circumstances, the work of the ICC has been described as conducting 'international justice on the cheap.'⁸⁰¹ Without a substantial increase in resources, the Office of the Prosecutor (OTP) 'is unable to perform high-quality preliminary examinations, investigations and prosecutions.'⁸⁰²

6.2 Selectivity of situations and cases

International criminal tribunals and courts cannot prosecute all offenders. Part of the reason is, as discussed above, financial constraints. The ICC Prosecutor must exercise prosecutorial selection of 'situations' and 'cases' due to this limited capacity.⁸⁰³ With regards to cases, the Prosecutor has made clear that, given the 'global character of the ICC, its statutory provisions and logistical constraints,' the OTP will generally focus on those who bear the greatest responsibility for crimes.⁸⁰⁴ The ICC would encourage domestic jurisdictions to help close any potential 'impunity gap' left by the ICC's focus on a minority of suspects.⁸⁰⁵

⁷⁹⁸W.Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice' (2008) 49 *Harvard International Law Journal* 53.54

⁷⁹⁹See 'ICC Secures Budget Increase' Institute for Peace and War Reporting <http://iwpr.net/report-news/icc-secures-budget-increase> (20 January 2014)

⁸⁰⁰ *ibid*

⁸⁰¹See L.Ocheing and S Jennings, 'ICC secures budget increase' Institute for War and Peace Reporting, 20 January 2014, quoting Professor Phil Clark of the London School of African and Oriental Studies (SOAS) <https://iwpr.net/global-voices/icc-secures-budget-increase> (last accessed 10 November 2014)

⁸⁰² *Ibid*

⁸⁰³ I. Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*' (2009) 9 *International Criminal Law Review* 547

⁸⁰⁴See ICC, Office of the Prosecutor, Paper on Some Policy Issues before the Office of the Prosecutor, 7, September 2003, http://www.icccpi.int/library/organs/otp/030905_PolicyPaper.pdf; also, <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>

⁸⁰⁵See 'Paper on some policy issues before the Office of the Prosecutor' September 2003 http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf

The thesis focuses here on ‘gravity’; other factors influencing prosecutorial selection will be discussed in Chapter 7. The ‘gravity threshold’ has played a critical role in guiding the Prosecutor’s selection of both situations and cases.⁸⁰⁶ The OTP applies the concept of gravity twice, first with regard to situations as noted above, and secondly, once inside the situation.⁸⁰⁷ In general, the prosecutorial determination at the ICC hinges primarily on whether a given situation within which ‘the most serious crimes of international concern’ have been allegedly committed is of ‘sufficient gravity to justify further action by the Court’, and whether or not its investigation would serve the ‘interests of justice.’⁸⁰⁸ The concept of gravity or seriousness resides at the epicentre of the legal regime of the ICC.⁸⁰⁹ However, gravity is not defined. All crimes brought before the ICC are, of course, of a ‘grave’ nature. The Statute implies that genocide, crimes against humanity, war crimes, and aggression are ‘the most serious crimes of concern to the international community.’⁸¹⁰ The court, however, still has to determine the threshold. Theoretically, it is meant to be the yardstick to assess the role played by ‘State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation (those suspected of being most responsible.)’⁸¹¹

The OTP has outlined that its assessment of gravity would consider: the scale of the crimes, the severity of the crimes, and the systematic nature of the crimes, the manner in which they were committed, and the impact on victims.⁸¹² The Chamber

⁸⁰⁶ S. SáCouto and K Cleary, ‘The Gravity Threshold of the International Criminal Court’ (2008) 23(5) *American Journal of International Law* 807-854.

⁸⁰⁷ See *Prosecutor v Dyilo* Case No. ICC-01/04-01/06, Decision Concerning Pre- ‘Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into 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’ (10 February 2006), 44. ‘The gravity threshold provided for under Article 17(l) (d) of the Statute must be applied at two different stages: (i) at the stage of initiation of the investigation of a situation, the relevant situation must meet such a gravity threshold and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold provided within that provision.’ See also ‘OTP Report on the activities performed during the first three years (June 2003-June 2006)’ The Hague, 12 September 2006 http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf (12 September, 2006), 8

⁸⁰⁸ See Rome Statute Article 53(1) (a)-(c)

⁸⁰⁹ M. deGuzman ‘Gravity and the Legitimacy of the International Criminal Court’ (2009) 32 *Fordham International Law Journal* 1400

⁸¹⁰Rome Statute: Preamble

⁸¹¹*Prosecutor v Lubanga*, Decision on the Prosecutor’s application for warrant of arrest under Article 58 (10 February 2006) (ICC-01/04-01/06-8-US-Corr); See also *Prosecutor v Ntaganda*, Annex II ICC-01/04-520 (21 July 2008) (ICC-01-04-02-06-20-Anx2) para 52.

⁸¹²See ‘ICC Report on Preliminary Examination Activities 2013,’ November 2013 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary

also approved the Prosecutor's Policy Paper statement of 2003 that as a general rule the OTP should focus its investigative and prosecutorial resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes.⁸¹³ The Appeals Chamber in *Lubanga*, however, rejected this approach, noting that the imposition of rigid standards on top seniority and excluding non-leaders would hamper the Court's deterrent potential.⁸¹⁴ Nonetheless, it is impossible for the ICC to prosecute all offenders. Because of situational constraints, the ICC will, in the end, prosecute only small numbers of defendants.

6.3 Political factors

In general, there are three mechanisms that can trigger the ICC jurisdiction in 'situations' (1) referral to the Prosecutor by a State Party to the treaty (self-referrals)⁸¹⁵ (2) referral to the Prosecutor by the UN Security Council⁸¹⁶, or (3) investigation initiated by the Prosecutor *proprio motu*.⁸¹⁷ Of the nine situations that came before the court, the Security Council had referred the situations in Darfur, Sudan and Libya – both non-States Parties. The prosecutor has exercised his *proprio motu* powers on the cases in Kenya and Cote d'Ivoire (Ivory Coast). Charges against Kenyan President Uhuru Kenyatta were eventually dropped. Four situations - Uganda, DRC, Central African Republic (CAR) (two referrals) and Mali - were self-referrals. Much of the debate has centred on the ICC's selection of defendants, with criticism that the OTP is improperly impelled by political motivations.⁸¹⁸ Former prosecutor Luis Moreno-Ocampo argued, however, that his 'duty is to apply the law

[%20Examinations/OTP%20%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF](#)

⁸¹³ *Prosecutor v Lubanga* Decision on the Prosecutor's application for warrant of arrest under Article 58 [10 February 2006] para 61; See 'Paper on some policy issues before the Office of the Prosecutor' ICC-OTP (September 2003), 7 http://www.icccpi.int/library/organs/otp/030905_PolicyPaper.pdf;

⁸¹⁴ *Prosecutor v. Ntaganda and Lubanga Dyilo*, Case No ICC-01/04-169, Judgment on the Prosecutor's Appeal, para 75 (see also paras 73–75) [13 July, 2006], <http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf>.

http://wwwold.icc-cpi.int/library/organs/otp/draft_policy_paper.pdf; at p. 6; See also W Schabas *An Introduction to the International Criminal Court* (Cambridge University Press: Cambridge, 2007) 32-6

⁸¹⁵ See Rome Statute, Arts. 13(a) and 14

⁸¹⁶ *ibid* Art.13(b)

⁸¹⁷ *ibid* Art. 15

⁸¹⁸ M. deGuzman, 'Choosing to prosecute: Expressive selection at the International Criminal Court' (2012) *Michigan Journal of International Law* 265

without political considerations. Other actors have to adjust to the law.⁸¹⁹ However, an analysis of prosecutorial selection seems to show political and pragmatic considerations at play. The purpose of the following examination is to show the ICC's political 'constraints' in self-referrals.

6.3.1 Self-referrals

The ICC allows states to refer situations in their countries for investigations. Self-referrals have not been expressly provided for in the Rome Statute. Some authors hold that 'self-referrals' are a 'creative interpretation' of Article 14.⁸²⁰ However, self-referrals have not always been entirely 'voluntary.' It appears that the Prosecutor pursues a policy of encouraging states to self-refer situations.⁸²¹ Soliciting self-referrals has practical advantages. In an annex to the paper on the management of referrals and communications by the OTP, it was stated:

'Where the Prosecutor receives a referral from the State in which a crime has been committed, the Prosecutor has the advantage of knowing that the State has the political will to provide his Office with all the cooperation within the country that it is required to give under the Statute. Because the State, of its own volition, has requested the exercise of the Court's jurisdiction, the Prosecutor can be confident that the national authorities will assist the investigation, will accord the privileges and immunities necessary for the investigation, and will be anxious to provide if possible and appropriate the necessary level of protection to investigators and witnesses.'⁸²²

The self-referral scheme can work effectively only if its intervention is triggered, or at least strongly supported, by the state on whose territory the crimes were perpetrated. Because of the need for co-operation of state actors, the self-referral mechanism thus far has tended to be exonerative of self-referring states. A common factor of all self-referrals is that governments claim they are unable to conduct fair and effective

⁸¹⁹See Luis Moreno-Ocampo, 'Prosecutor for the International Criminal Court, Keynote Address at the Council on Foreign Relations in Washington, D.C.' (4 February 4, 2010), 6

⁸²⁰See eg M. Arsanjani and W. Reisman, 'Law-in-Action of the International Criminal Court', 99 *American Journal of International Law* (2005), 385, pp.389-39, noting '(...) before and during the Rome negotiations, no one assumed that governments would want to invite the future court to investigate and prosecute crimes that occurred in their territory'.

⁸²¹ See Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 'Report of the Prosecutor of the ICC' (Report, Second Assembly of States Parties to the *Rome Statute of the International Criminal Court*, 2003) 4 <[http://www.un.org/law/icc/asp/2ndsession/ocampo_statement_8sep\(e\).pdf](http://www.un.org/law/icc/asp/2ndsession/ocampo_statement_8sep(e).pdf)>(accessed 13 April 2013).

⁸²² See ICC-OTP, Annex to the 'Paper on Some Policy Issues Before the Office of the Prosecutor': Referrals and Communications (Policy Paper, September 2003) 5 <http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf>(accessed 10 April 2013)

criminal proceedings against non-state actors over whom they do not have control and that they therefore seek the assistance of the ICC. Uganda's president Yoweri Museveni set the trend in motion by referring the situation concerning the Lord's Resistance Army to the ICC.⁸²³ After the referral, arrest warrants were issued for Joseph Kony, leader of the Lord's Resistance Army (LRA), Vincent Otti, his deputy, and two other key commanders, Dominic Ongwen and Okot Odhiambo.⁸²⁴ The DRC soon followed suit.⁸²⁵ In March 2005, Lubanga was arrested by the Congolese authorities and charged with conscription, enlistment and use of child soldiers. Others arrested in the DRC case afterwards include Germain Katanga, commander of the *Force de Résistance Patriotique en Ituri* (FRPI), and Mathieu Ngudjolo, former leader of the *Front des Nationalistes et des Intégrationnistes* (FNI). In April 2008, an arrest warrant was unsealed for Ntaganda, a former associate of Lubanga. Despite the warrant, Ntaganda joined the DRC armed forces and was promoted to general.

The CAR also took its case to the ICC.⁸²⁶ On 30 May 2014, the ICC Prosecutor received yet another self-referral from the CAR authorities regarding crimes allegedly committed on CAR territory since 1 August 2012. On 24 September 2014, following an independent and comprehensive preliminary examination, the OTP announced the opening of open a second investigation in the CAR with respect to crimes allegedly committed since 2012.⁸²⁷ On 13 July 2012, Mali's Minister of Justice referred the situation in the Republic of Mali asserting that grave and massive violations of human rights and of international humanitarian law had been committed, especially in the northern parts of its territory. After conducting a preliminary examination of the situation, including an assessment of admissibility of

⁸²³See Press Release ICC: 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC' (29 January 2004)

⁸²⁴See *Prosecutor v Kony* Case No ICC-02/04-01/05 Decision to Terminate the Proceedings Against Raska Lukwiya (11 July 2007)

⁸²⁵ Press Release ICC OTP: 'Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo' (19 April 2004) http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx (last accessed 15 March 2014)

⁸²⁶ See Press Release ICC OTP, 'Prosecutor receives referral concerning Central African Republic', ICC-OTP=20050107-86-En, (7 January 2005) http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/press%20releases/Pages/otp%20prosecutor%20receives%20referral%20concerning%20central%20african%20republic.aspx (last accessed 15 March 2014)

⁸²⁷ See ICC 'Situation and Cases' http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last accessed 2 April 2014)

potential cases, the OTP determined that there was a reasonable basis to proceed with an investigation.⁸²⁸

A discernible trend of self-referrals is that they have targeted rebels or non-state actors. Having referred only the ‘situation concerning the Lord’s Resistance Army’, the Ugandan government has always been convinced that the ICC would prosecute exclusively the LRA.⁸²⁹ The Prosecutor’s decision to hold a press conference jointly with President Museveni to announce the referral immediately gave rise to suspicions⁸³⁰ which were subsequently exacerbated by his failure to charge any members of the Uganda People’s Defence Forces (UPDF).⁸³¹ It has been asserted that the crimes alleged against the LRA are more serious than those attributed to the UPDF.⁸³² Olara Otunnu, the former UN Undersecretary-General and Special Representative for Children and Armed Conflict argued, however, that government operations against the Acholi⁸³³ as a group had led to tens, or even hundreds, of thousands of deaths and to the slow destruction of an entire ethnic group, amounted to genocide.⁸³⁴ In dominant international discourse of the conflict, government violence has tended to be downplayed, if not entirely ignored.⁸³⁵ This ‘official discourse’ limits its focus to the LRA’s brutality, in particular its violence against children.⁸³⁶ Some scholars conclude the Ugandan government decided to refer the LRA to the ICC as part of a military strategy and international reputation campaign,

⁸²⁸See ICC Press Release ‘ICC Prosecutor opens investigation into war crimes in Mali’ 16 January 2013 ‘The legal requirements have been met. We will investigate’ ICC-OTP-20130116-PR869 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/news%20and%20highlights/Pages/pr869.aspx (last accessed 3 April 2014)

⁸²⁹S. Nouwen and W. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2010) 21 *European Journal of International Law* 941, 950

⁸³⁰See ICC, ‘President of Uganda Refers Situation concerning the Lord’s Resistance Army (LRA) to the ICC’, (Press Release, 29 January 2004), <<http://www.icc-cpi.int>> (accessed 15 April 2014); T Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (Zed Books, 2006) 96–102.

⁸³¹T. Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army* (Zed Books, 2006), 96–102, 97

⁸³²See eg M Happold ‘The International Criminal Court and the Lord’s Resistance Army’ (2007) 8 *Melbourne Journal of International Law* 159

⁸³³Acholi is an ethnic group from Northern Uganda

⁸³⁴See the text of his Sydney Peace Prize Lecture, ‘Saving Our Children From the Scourge of War,’ Daily Monitor (Kampala), 8-9 January 2006; available at <www.essex.ac.uk/armedcon/story_id/000290.html> (accessed 14 April 2014)

⁸³⁵A. Branch ‘Uganda’s Civil War and the Politics of ICC Intervention’ (2007) 21 *Ethics & International Affairs* 179

⁸³⁶S. Finnstrom *Living with Bad Surroundings: War, History, and Everyday Moments in Northern Uganda* (Durham, NC: Duke University Press, 2008); A. Branch ‘Neither Peace nor Justice: Political Violence and the Peasantry in Northern Uganda, 1986-1998’ (2005) 8 *African Studies Quarterly* 1,2–8

rather than out of a conviction about law and justice.⁸³⁷ The Prosecutor stated that the OTP had not closed its investigations in Uganda: it had simply made an affirmative decision to seek arrest warrants against certain LRA leaders, which did not exclude subsequent decisions to charge members of other parties to the conflict.⁸³⁸ However, so far the prosecutor has neither investigated nor brought charges against members of the UPDF.

Similar concerns were raised in the DRC. The OTP has been criticised for failing to pursue government actors complicit in serious crimes – preferring to go after relatively ‘small fish’ such as Lubanga, Katanga, Ngudjolo and Ntaganda.⁸³⁹ There is less clear evidence to connect Kabila to atrocities committed in Ituri. It has, however, been stated that ‘there were *kadogo* [child soldiers] in Kabila’s forces as well.’⁸⁴⁰ The fact that former militia leaders testified in the Katanga and Ngudjolo trial and have highlighted the role of the government of the DRC in the attack on Bogoro, which is the centrepiece of that case, was a cause for frustration. Many saw this testimony as a vivid reminder of the evidence that is available of government participation in crimes in Ituri.⁸⁴¹ In CAR, coup leader General Francois Bozizé’s first action was to refer alleged atrocities by the former president Ange-Félix Patassé and Jean-Pierre Bemba.⁸⁴² The ICC did not bring any charges or conduct investigation against Bozizé, for his actions during the coup or the serious human rights and humanitarian failings of his government.⁸⁴³ In the course of the intense fighting between Patassé and Bozizé, *both sides* allegedly committed atrocities such as rape, killing, and looting,

⁸³⁷ S. Nouwen and W. Werner ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2010) 21 *European Journal of International Law* 941, 949

⁸³⁸ *Prosecutor v Kony* (Pre-Trial Chamber II) ICC-02/04-01/05-76 (11 January 2006) pp.3–4 (OTP Submission Providing Information on Status of the Investigation in Anticipation of the Status Conference to be held on 13 January 2006)

⁸³⁹ P. Clark ‘Ocampo’s Darfur Strategy Depends on Congo’ Oxford Transitional Justice Research Working Paper Series 2 (2008)

⁸⁴⁰ See ‘Just Justice? Civil Society, International Justice and the Search for Accountability in Africa’ Refugee International Rights Initiative ‘Interview with man in Ituri, (19 October 2011) <<http://www.refugee-rights.org/Assets/PDFs/2012/StepsTowardJusticeFinal.pdf>> (accessed 11 May 2013), 23

⁸⁴¹ See ‘Just Justice? Civil Society, International Justice and the Search for Accountability in Africa’ Refugee International Rights Initiative ‘Interview with man in Ituri, (19 October 2011) <<http://www.refugee-rights.org/Assets/PDFs/2012/StepsTowardJusticeFinal.pdf>> (accessed 11 May 2013), 24

⁸⁴² *Prosecutor v Jean-Pierre Bemba Gombo* ICC-01/05 -01/08; Patasse sought refuge in Togo, which is not an ICC state party.

⁸⁴³ J von Geldern ‘International Criminal Justice: Growing Pains of Incurable Contradictions’ (2011) 28 *Macalester International* Article 11; <http://digitalcommons.macalester.edu/macintl/vol28/iss1/11>

against the civilian population.⁸⁴⁴ Similarly, the Mali self-referral was made by the interim government, and like the three other ‘self-referrals’, implicitly asked the Court to prosecute rebel groups rather than itself. Some have argued that because of this trend (state actors’ exoneration) ‘the ICC can indeed prove an effective tool against political opponents.’⁸⁴⁵

The prosecutor has argued he is guided by the ‘gravity’ of offences in determining prosecutions. However, ‘assessing the gravity of one party’s or individual’s crimes *relative* to their opponents is ethically and politically problematic. This approach ultimately results in the ICC’s *de facto* support of one side of the conflict over another and perpetuates impunity gaps at the international and domestic level.’⁸⁴⁶ Clark, extrapolating from the trend of self-referrals, highlights the dilemma between politics and law.⁸⁴⁷ On the one hand, the Prosecutor needs the co-operation of national authorities, privileges and immunities protection to investigators and witnesses.⁸⁴⁸ On the other, the fact that the prosecutor encourages a state referral and then pursues rebels makes it less difficult to conclude that the ICC is being manipulated.⁸⁴⁹ The ICC is constrained from pursuing state actors because of pragmatic objectives. The court had been dormant since the Rome Statute came into force in 2002. As ‘a new global institution, it needed ‘to get legal runs on the board in order to build support among its states parties and to be perceived as an established global actor in the fight against impunity.’⁸⁵⁰ Self-referrals were, therefore, a way of ‘getting things going.’⁸⁵¹ However, the effect of the ‘political

⁸⁴⁴ *ibid* 92; See also ‘Questions & answers on the ICC Central African Republic Investigation’ American Non-governmental Organisations Coalition for the International Criminal Court (AMICC) <http://amicc.org/docs/CAR%20Q&A.pdf> [emphasis added]>(accessed 17 April 2013)

⁸⁴⁵ von Geldern *ibid* 92

⁸⁴⁶ A. Tiemessen ‘Defying Gravity: Seeking Political Balance in ICC Prosecutions’ *Justice in Conflict*, 2013; <http://justiceinconflict.org/2013/04/22/defying-gravity-seeking-political-balance-in-icc-prosecutions/> (last accessed 22 April 2014)

⁸⁴⁷ P. Clark ‘Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda’ in *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008)

⁸⁴⁸ See ICC-OTP, Annex to the ‘Paper on Some Policy Issues Before the Office of the Prosecutor’: Referrals and Communications (Policy Paper, September 2003) 5 <http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf>(accessed 10 April 2013) para 1, D

⁸⁴⁹ R. Murphy ‘Gravity Issues and The International Criminal Court’ (2006) 17 *Criminal Law Forum* 281

⁸⁵⁰ P. Clark ‘Law, Politics and Pragmatism: ICC Case Selection in the Democratic Republic of Congo and Uganda’ in P. Clark and N. Waddell (eds.) *Courting Conflict? Peace, Justice and the ICC in Africa* (London: Royal African Society, 2008), 44

⁸⁵¹ M. Damaska, ‘Discussion Workshops: The International Criminal Court Five Years On: Progress or Stagnation’ (2008) 6 *Journal of International Criminal Justice* 763

instrumentalisation'⁸⁵² of the ICC has been the preclusion of self-referring state actors from investigations resulting in the ICC only prosecuting a small number of rebels. Nouwen and Werner conclude that the ICC is inherently political by making a distinction between the friends and enemies of the international community which it purports to represent.⁸⁵³ This, they note, does not amount to criticism of the ICC 'but is meant to underline that a sound normative evaluation of the Court's activities can be made only when its political dimensions are acknowledged and understood.'⁸⁵⁴As 'with deterrence and retribution, the expressive value of law and punishment is weakened by selectivity and indeterminacy in the operationalisation of law and punishment, as well as the political contingency of the entire enterprise.'⁸⁵⁵The indictments of President Gbagbo (Ivory Coast), President Uhuru Kenyatta (Kenya-charges dropped) and President Al-Bashir (Sudan) and Saif Gaddafi and others (Libya), however, suggest an encouraging paradigm shift through the pursuit of state actors. It can be argued that the prosecution of such state actors could have more expressive mileage. A cosmopolitan ethos would require the court to prosecute violations of international law committed by all sides to the conflict. Prosecutions targeting one side risk encouraging impunity and denting the legitimacy of the court. The 'community of the accused is particularly susceptible to perceptions of victor's justice because of its natural scepticism of the accuser, who is usually somehow linked to the conflict's winner. In the face of that scepticism, any international law violations by the accuser undermines the standing of the prosecutor.'⁸⁵⁶ The biased selectivity of self-referrals corrodes the ICC's own objectives of retribution and deterrence because culpable individuals (state actors) will evade accountability.

6.4 Lack of enforcement mechanism

However, the dilemma is that the ICC depends on these state actors. A major political constraint arises from the court's lack of an enforcement mechanism. The court relies

⁸⁵² A. Branch 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21 *Ethics & International Affairs* 179

⁸⁵³S. Nouwen and W. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan' (2010) 21 *European Journal of International Law* 941; See also A Branch 'Uganda's Civil War and the Politics of ICC Intervention' (2007) 21 *Ethics & International Affairs* 941

⁸⁵⁴Ibid

⁸⁵⁵ M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539, 593

⁸⁵⁶V. Padmanabhan 'Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay' (2009) 3 *Journal of International Law* 427,441

on states for enforcement on its warrants. Notably, some states are not parties to ICC. For example, countries like Sudan and Libya are not parties to the Rome Statute, apart from the fact that state actors may be offenders themselves. States parties to the ICC can simply decline to co-operate with the court. For instance, despite a warrant of arrest against him, Al-Bashir has managed to travel to states that are parties to the Rome Statute without arrest. On 10 July, 2010 Al-Bashir arrived in Chad to a warm embrace from Chadian leader Idris Deby.⁸⁵⁷ On August 27, 2010, the ICC reported Al-Bashir's visit to Kenya and directed that country to take any actions deemed necessary to apprehend him.⁸⁵⁸ However, the Kenya authorities failed to arrest Al-Bashir, effectively failing to meet Kenya's international obligations as a party to the Rome Statute. While the Sudan is not a state party, and therefore not obligated to take action in regard to the investigation, Kenya is legally bound to act as a signatory to the statute.⁸⁵⁹ Chad and Kenya's inaction can also be explained from the standpoint of the African Union (AU) which has refused to co-operate with the ICC on the case of Al-Bashir.

One of the reasons for the lack of cooperation results from the perception of the ICC. All of the cases that the ICC has and is prosecuting emanate from crimes allegedly committed in countries in Africa. This 'has raised questions as to whether this is an example of the selectivity of international criminal law.'⁸⁶⁰ African political leaders have accused the ICC of exclusive focus on and bias against them. There are, however, 'good reasons to pursue the cases that are under investigation or prosecution before the ICC. Africa has experienced a large number of atrocities and, statistically speaking, the rate of atrocity crimes committed on the continent would make it a natural focus for the court.'⁸⁶¹ Most child soldiers have been used in

⁸⁵⁷See, eg J. Clarke, 'Chad Urged to Arrest Sudan's President' Irish Times, 23 July 2010, 9 (discussing that, upon President Al Bashir's arrival to N'Djamena, the capital of Chad, Idriss Deby was there to greet him); cited in G Barnes 'The International Criminal Court's Ineffective Enforcement Mechanisms: the Indictment of President Omar al Bashir' (2011) 34 *Ford International Law Journal* 1584

⁸⁵⁸See *Prosecutor v Omar Hassan Ahmad al Bashir* Pre-Trial Chamber I Case No.: ICC-02/05-01/09 27 August 2010 (noting that the Republic of Kenya has a clear obligation to cooperate with the Court in relation to the enforcement of such warrants of arrest...)

⁸⁵⁹ K. Bennet 'International Criminal Court: Non-signatory Countries' *Jurist* <http://jurist.org/feature/2012/07/international-criminal-court.php> (last accessed 24 April 2014)

⁸⁶⁰M. Plessis, T. Maluwa and A. O'Reilly 'Africa and the International Criminal Court' *International Law* 2013/01 Chatham House, 2

⁸⁶¹Ibid

hostilities in these conflicts. The victims of those crimes want justice.⁸⁶² Despite the resistance, as noted above, the CAR made a second self-referral to the ICC in 2014.⁸⁶³ Further, more than two-thirds of the members of the AU are states parties to the Rome Statute. Senegal was the first country to sign the Rome Statute. The ideals of the court seemed to resonate with a significant number of African countries. Nonetheless, on 21 July, 2008, the AU Peace and Security Council requested that the UN Security Council defer the prosecution against Al-Bashir for twelve months pursuant to Article 16 of the Rome Statute.⁸⁶⁴ The communiqué stated that the ICC arrest warrant may reflect ‘double standards’ and may amount to a ‘misuse of indictments against African leaders.’⁸⁶⁵ The Security Council did not respond to the request. Prosecutor Moreno-Ocampo proceeded with the case. On 3 July 2009, the AU Assembly of Heads of State and Government (Summit) adopted a decision on the ICC’s indictment of Al-Bashir, stating its refusal to cooperate with the court in his arrest.⁸⁶⁶ In 2010, the AU reaffirmed the decision, also rejecting ‘for now’ the opening of an ICC liaison office in the Ethiopian capital, Addis Ababa; and criticising the conduct of the ICC prosecutor on the basis that he ‘has been making egregiously unacceptable, rude and condescending statements’ in the case against Al-Bashir and ‘other situations in Africa.’⁸⁶⁷ The decisions have placed African states parties to the Rome Statute in the invidious position of having to choose between their obligations as member states of the AU on the one hand, and their obligations as states party to the Rome Statute, on the other.⁸⁶⁸ Under the Rome Statute, member states are required to cooperate with the ICC in its investigations and prosecutions.⁸⁶⁹ Al-

⁸⁶²Ibid

⁸⁶³See ICC ‘Situation and Cases’ http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last accessed 2 April 2014)

⁸⁶⁴AU Peace and Security Council Communiqué PSC/Min/Comm (CXLII) 21 July 2008.

⁸⁶⁵AU Peace and Security Council Communiqué PSC/Min/Comm(CXLII) 21 July 2008 paras 3 and 7

⁸⁶⁶Decision of the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Doc. Assembly/AU/13 (XIII), Addis Ababa, July 1-3, 2009; Communiqué of the 207th Meeting of the Peace and Security Council at the Level of the Heads of State and Government, Doc. PSC/AHG/COMM.1 (CCVII), Oct. 29, 2009, at 10. The AU, citing Article 16 of the Rome Statute, had requested that no investigation or prosecution be commenced or continued for a year once the UNSC has so requested the Court. The AU was worried that a prosecution of the incumbent Sudanese President could impede the prospects for peace

⁸⁶⁷Assembly of the African Union, “Decision on the Progress Report of the Commission on the Implementation of Decision Assembly/AU/Dec.270 (XIV) on the Second Ministerial Meeting on the Rome Statute of the International Criminal Court (ICC),” Assembly/AU/Dec.296 (XV), Kampala, July 27, 2010, paras 5, 8 and 9

⁸⁶⁸D. Tladi, ‘The African Union and the International Criminal Court: The battle for the soul of international law’ (2009) 34 *South African Yearbook of International Law* 57

⁸⁶⁹ See Rome Statute Art.86-87

Bashir is charged with crimes against humanity, war crimes and genocide.⁸⁷⁰ As noted here, the complaints about bias have tended to be pronounced by ‘African political elites, not the victims, who appear to be almost universally relieved that somebody – anybody – is paying attention to their plight.’⁸⁷¹

In DRC, Ntaganda - Lubanga’s deputy and co-accused - had an ICC arrest warrant, also for the recruitment of child soldiers, among other crimes.⁸⁷² President Kabila, nonetheless, drafted him into the Congolese army. Furthermore, Kabila promoted him within the army.⁸⁷³ Kabila’s government reportedly signed a peace agreement with Ntaganda, culminating in the reward with an army job; hence the warrant was deemed to have the potential to derail the peace process.⁸⁷⁴ However, in April 2012 he defected from the Congolese army to resume insurgency. Ntaganda led a mutiny and became one of the main leaders of a new Rwanda-backed rebel group, the M23.⁸⁷⁵ M23 fighters have been responsible for widespread war crimes, including summary executions, rapes, and forced recruitment of children.⁸⁷⁶ In March 2013, following infighting between two M23 factions, Ntaganda turned himself in to the United States embassy in Rwanda and was flown to The Hague where he awaits trial before the ICC.⁸⁷⁷ The effect of these political constraints is that the ICC will ultimately prosecute only a few individuals often handed over by states. It cannot be an honest argument that the ‘international society’ is a perfect society. The implementation of cosmopolitan justice will be challenging.

⁸⁷⁰*Prosecutor v. Al Bashir*, Case No. ICC-02/05-01/09

⁸⁷¹M. du Plessis, T Maluwa and A O’Reilly, ‘Africa and the International Criminal Court’ *International Law* 2013/01 Chatham House, 2

⁸⁷²*Prosecutor v Ntaganda and Lubanga Dyilo*, Case No ICC-01/04-169

⁸⁷³See ‘DR Congo: Arrest Bosco Ntaganda for ICC Trial’ Human Rights Watch, 13 April 2012

<http://www.hrw.org/news/2012/04/13/dr-congo-arrest-bosco-ntaganda-icc-trial> (accessed 24 April 2014)

⁸⁷⁴J. Geis and A. Mundt ‘When to indict? The Impact of Timing of International Criminal indictments on Peace Processes and Humanitarian Action’ (2009) Paper prepared for the World Humanitarian Studies Conference Groningen, Netherlands; The Brookings Institution-University of Bern Project on Internal Displacement (February 2009)

http://www.brookings.edu/~media/research/files/papers/2009/4/peace%20and%20justice%20geis/04_peace_and_justice_geis.pdf

⁸⁷⁵See ‘Who is Bosco Ntaganda’ Human Rights Watch <http://www.hrw.org/topic/international-justice/bosco-ntaganda>

⁸⁷⁶Ibid

⁸⁷⁷Ibid

6.5 Conclusion

The creation of international justice institutions, culminating in the establishment of the ICC, has triggered ceremony about cosmopolitan justice. Despite this glee, these institutions have several weaknesses. I have divided these into 'idealist/goal-related' and 'practical/institutional'. This chapter discussed the latter, focusing on the ICC. Studies on organisation behaviour note the dearth in analysis of contexts and their effects on the operations of institutions. The ICC operates in a unique context. 'Context effects', as the set of factors exerting some direct or indirect influence on it, have brought some constraints on the ICC. The major constraints facing the international criminal justice system is its dependence on national systems in its operation and implementation. The purpose of this chapter was to highlight the limitations of the ICC. A reflection on the context effects and situational constraints can assist the formulation of plausible theories for international criminal justice. The ICC operations are funded by states. However, over the years, the funding has proved inadequate for the duties imposed on it. Unlike domestic systems, international courts and tribunals do not have detective divisions, police forces or armies at their disposal to investigate crimes and capture perpetrators and indictees. Given the lack of coercive authority of international courts and tribunals international criminal institutions are dependent on the states where crimes took place, as well as third party states, to ensure effective utilisation of jurisdiction to prescribe and enforce. The overall effect is that international courts are, as a result, largely symbolic. They can prosecute only a handful of cases.

CHAPTER SEVEN

LUBANGA: THEORY AND PRACTICE

Introduction

This thesis has thus far attempted to elucidate normative developments in child law relating to soldiering and international criminal justice. The overall objective of the previous chapters was to highlight socio-historical and normative developments on child soldiering in international law and international criminal justice and establish a philosophical framework for analysis. International law has emerged as a thriving arena of philosophical inquiry.⁸⁷⁸ The study has concluded that, through constructivist processes, substantive norms have emerged and been adopted in international law since the glorified participation of children in early wars. The thesis chose to interpret this ‘logic of appropriateness’ through philosophical prism of ‘cosmopolitanism’ that perceives the protection of the rights of children as a universal duty, as the explanatory framework for these developments. As noted in the previous chapter regarding reliance on states, the cosmopolitan agenda encounters hurdles. The ‘sense of cosmopolitan identity has grown gradually through individuals advocating for a cosmopolitan approach within whatever cracks and fissures have appeared in the Statist system of international law.’⁸⁷⁹ Cosmopolitanism postulates justice for all, individual rights, setting minimum standards for all citizens apart from imposing duties towards one another. According to Hirsh, tribunals have been established since Nuremberg to conduct ‘cosmopolitan trials,’⁸⁸⁰ for universally condemned crimes. As noted, however, until the establishment of the SCSL in 2002, child soldiering had not appeared in the criminal law statutes of the tribunals. Children were, however, involved in almost all the conflicts that gave rise to the international tribunals. UNICEF observed that the ‘crimes committed against children have not received due attention in current and previous international justice and truth-seeking mechanisms, most often being mentioned only as part of atrocities committed against the civilian population in

⁸⁷⁸S. Beeson and J. Tasioulas, *The Philosophy of International Law* (Oxford University Press, 2010)

⁸⁷⁹D. Hirsh, *Law Against Genocide: Cosmopolitan Trials* (Routledge Cavendish 2003) xv, 6.

⁸⁸⁰See D. Hirsh, *Law against genocide: cosmopolitan trials* (Routledge 2012)

general.⁸⁸¹ I have concluded that the criminological and penal culture of the ‘cosmopolitan trials’ has, for a long time, been fixated on human massacres. Prosecutors would select defendants suspected to have been responsible for mass deaths. Child soldiering was criminalised by the SCSL, drawing its provisions from the Rome Statute of 1998. Because of its status, the ICC has generated high expectations. The objective of the study is to establish which and how a plausible penological justification for the prosecution of Lubanga can fit into the global philosophical framework that has emerged. According to the Preamble of the ICC Statute and Articles 1 and 5, its objectives are the prosecution and punishment of the most serious crimes of international concern.⁸⁸² The Statute describes crimes prosecuted by the ICC as ‘unimaginable atrocities’, and ‘grave crimes’ that ‘deeply shock the conscience of humanity.’⁸⁸³ The ICC was established ‘to these ends and for the sake of present and future generations.’⁸⁸⁴ These provisions have been interpreted as meaning that retribution and deterrence are primary goals of the ICC.⁸⁸⁵ However, these are not the only aims that international criminal justice has imposed on itself. The previous chapter discussed the ‘practical/institutional’ weaknesses of international criminal justice. The conclusion is that because of these constraints or context effects, the ICC can prosecute only a miniscule of defendants. This chapter focuses on the ‘idealist/goal-related’ weaknesses. Formulation of plausible theory for international criminal justice requires consideration of these deficiencies. The objective of the chapter is, firstly, to assess how retribution and deterrence rationales have played out in *Lubanga* and whether they are the best aims for the mass crimes that the court adjudicates. The chapter also assesses some of the penological goals that international criminal justice seeks to achieve. The chapter is organised as follows. The first part provides a brief background to the conflict in the DRC and the case of *Lubanga*. The second part conceptualises child soldiering in the DRC as a mass crime and contextualises the case of *Lubanga* as such. Unlike genocide, the conscription, enlistment and use of children in armed conflict has barely been characterised in its mass form. We cannot establish plausible rationales

⁸⁸¹See International Criminal Justice and Children (No Peace without Justice and UNICEF, 2002), 12 <http://www.unicef.org/emerg/files/ICJC.pdf>

⁸⁸²See Rome Statute, Preamble, para 4 and Art. 1 and 5

⁸⁸³ Ibid

⁸⁸⁴ Ibid para 9

⁸⁸⁵ E. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Publishing 2010) 143

for penology without its appropriate characterisation. This section analyses the debate on individual guilt for collective crimes. It discusses the legal issues around Lubanga's charge as a co-perpetrator. A criticism of international criminal justice is that its modalities of individuating guilt and penological goals (retribution and deterrence) are unsuitable for mass criminality. The third part discusses retribution and deterrence in the context of *Lubanga*. To have a more informative conception of the project of international criminal justice, the last part concludes with some theoretical reflections on the other penal rationales often invoked in penology. A further criticism of international criminal justice is that it invokes extra-judicial goals removed from its core functions and hardly achievable.

7.1 Lubanga background

The Democratic Republic of Congo (DRC), formerly Zaire, has been blighted by political conflict and instability for decades. The war is extraordinarily complex with huge numbers of rebel groups fighting each other, with many swapping sides. Lubanga was a founding member and President of the Union des Patriotes Congolais (UPC) created in September 2000 and Commander-in Chief of the UPC's military wing, the Force Patriotique pour la Libération du Congo (FPLC) in the DRC. Between September 2002 and 13 August 2003, the UPC/FPLC was involved in an armed conflict for control over the Ituri region of the DRC which resulted in the deaths of many civilians. The DRC became a State party to the Rome Statute establishing the ICC on 11 April 2002 and, pursuant to Article 14, President Kabila referred the 'situation' in the DRC to the Prosecutor in March 2004.⁸⁸⁶The 'self-referral' was not spontaneous; the ICC requested it, even though he had declared that - absent a referral by the DRC - he was ready to use his *proprio motu* powers and start an investigation after being authorized by the Pre-Trial Chamber.⁸⁸⁷On 23 June 2004, the Prosecutor opened an investigation into the situation. On 19 March 2005, Lubanga was arrested and detained by the DRC authorities for other charges relating to an attack on UN peacekeepers. On 10 February 2006, the ICC issued an arrest warrant against Lubanga charging him with the war crime of recruiting and enlisting children under the age of 15 and using them in hostilities. On 17 March 2006,

⁸⁸⁶See Decision assigning the Situation in the Democratic Republic of Congo to Pre-Trial Chamber I, ICC-01/04-1, 5 July 2004 (notified on 6 July 2004),

⁸⁸⁷ P. Gaeta 'Is the Practice of 'Self- Referrals' a Sound Start for the ICC?' (2004) 2 *Journal of International Criminal Justice* 949-952

Lubanga was surrendered to the Court by the DRC. The prosecution submitted that the accused, jointly with his co-perpetrators, committed the crimes of conscription, enlistment and use of children under the age of 15, from 1 September 2002 to 13 August 2003.⁸⁸⁸ The court also issued a warrant against Lubanga's co-accused, Ntaganda.

Article 61 of the Rome Statute provides that the Pre-Trial Chamber (PTC) must confirm the charges brought by the Prosecutor against an arrested person before going to trial. The PTC confirmed the charges against Lubanga on 29 January 2007, considering that there is sufficient evidence to establish substantial grounds to believe that he is responsible, as a co-perpetrator under Article 25(3) (a) of the Rome Statute, for the charges of:

- Enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of article 8(2)(b)(xxvi) of the Statute from September 2002 to June 2003 in the context of an international armed conflict and;
- Enlisting and conscripting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of article 8(2)(e)(vii) of the Statute from 2 June to 13 August 2003 in the context of a non-international armed conflict.⁸⁸⁹

The Pre-Trial Chamber held that there were substantial grounds to believe that the relevant conflict was of an international character in the period in which Uganda was an occupying power in the Ituri region and a non-international armed conflict thereafter. However, the Trial Chamber changed the classification of the conflict and held that the relevant conflict was non-international throughout.⁸⁹⁰

After three years of proceedings, Lubanga was found guilty on 14 March 2012. As the leader of the UPC and the commander-in-chief of its military wing, the FPLC, Lubanga was found guilty of 'enlisting', 'conscripting' children under the age of fifteen and 'using' them to participate actively in hostilities, from September 2002 to 13 August 2003 as set out in Article 8(2) (e) (vii). Lubanga was sentenced to 14 years

⁸⁸⁸Lubanga Decision on Confirmation of Charges [29 January 2007]

⁸⁸⁹ Ibid

⁸⁹⁰ Ibid

in prison on 10 July 2012.⁸⁹¹ He appealed against the decision. On 1 December 2014, the Appeals Court upheld Lubanga's conviction and sentence.

7.2 Lubanga and mass crime

Mass crime has often been discussed in terms of widespread killings.⁸⁹² The mass nature of child soldiering has often been under-expressed because it does not always result in mass fatalities, depriving it of the gravity associated with other international crimes. However, the group dynamics of mass crimes are not dissimilar. ICL 'crimes involve extraordinary collective dimensions and extensive communal engagement.'⁸⁹³ Trainin observes that 'as distinct from common crimes, international crimes are almost always committed not by one person but by several or many persons-a group, a band, a clique.'⁸⁹⁴ However, the organic nature of child soldiering has barely been explained. This is important because child soldiering ought to be 'theorised' within the same category of egregious crimes. It has been estimated that one in ten child soldiers - or 30,000 children - are found in the DRC.⁸⁹⁵ The UN believes that 15-30 percent of all newly-recruited combatants in the DRC army are under 18 years old.⁸⁹⁶ As noted earlier about the sinister motives behind the deployment of children - the reason the army and the rebels use child soldiers is partly that the enemy cannot find it in themselves to kill children.⁸⁹⁷ Therefore, the number of recruits remains high as fewer of them are lost in battle. During the course of Lubanga's UPC/FPLC organised recruitment drives, commanders oversaw awareness-raising campaigns to persuade villagers to send their children for

⁸⁹¹See Lubanga Sentencing Judgment ICC-01/04-01/06 [10 July 2012]

⁸⁹²See eg M. Drumbl, *Atrocity, Punishment, and International Law* (2007), 8, 24, 38, 123-124; M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', (2005) 99 *Northwestern University Law Review* 539; M. Osiel, 'The Banality of Good: Aligning Incentives Against Mass Atrocity' (2005) 105 *Columbia Law Review* 1751; M. Osiel, *Making Sense of Mass Atrocity* (Cambridge University Press 2009)

⁸⁹³ D. Robinson, 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127, 128

⁸⁹⁴A Trainin, 'Hitlerite Responsibility Under Criminal Law' 79 (A.Y. Vishinski ed., Andrew Rothstein trans., Hutchinson & Co. 1945) (1944), 79 cited in M. Osiel 'The Banality of Good: Aligning Incentives against Mass Atrocity' (2005) 105 *Columbia Law Review* 1751, footnote 2

⁸⁹⁵ See 'Child Soldiers in the DRC' SOS Children's Villages <http://www.child-soldier.org/child-soldiers-in-drc>

⁸⁹⁶ Ibid

⁸⁹⁷ Ibid

training.⁸⁹⁸ They provided information to parents about sending their children, and others, to be trained as soldiers.⁸⁹⁹ There were consultations between the elders of the UPC from various villages, and their role was to support the UPC and to mobilise young people and enlist them in the army. Children were made available following these meetings, and the new recruits were driven to the training camps. The elders or ‘wise men’, along with others referred to as the ‘cadres’ or senior officials of the party, raised awareness in the villages and explained the purpose of the UPC, so as to ensure the civilian population’s support. Elder Gegere ‘wise men’ persuaded the population to make young people available to the UPC, for enlistment in the armed forces in order to contribute to the protection of their ethnic group against the rival Lendu.⁹⁰⁰ Parents were threatened that if they did not assist, when war came to their town ‘we would not come to rescue them’.⁹⁰¹ There were ‘several types of *kadogos*’⁹⁰², but those used in the army, including those who were young, were able to bear weapons.⁹⁰³ Children of 13 and 14 years old were used in battle, acting as bodyguards, escorts and as front-line soldiers.⁹⁰⁴ A former member of UPC claimed, however, that child combatants as young as ten years old bore arms.⁹⁰⁵ Child soldiers, both girls and boys, were ‘more used’ as body guards (acting as escorts for several of the commanders), because children were ‘fearless’ – in contrast with adults– and they did not ask a great deal of their commanders.⁹⁰⁶ There was no particular criteria applied when assigning children, save that some commanders preferred to have young children as they were ‘more desirable.’⁹⁰⁷ The younger children followed their orders more diligently than older children.⁹⁰⁸

Child soldiering, as illustrated above, is a mass crime which involves mass communal engagement. The distinction of its mass nature from mass deaths has often diluted its gravity. The prosecution submitted that Lubanga jointly with his co-perpetrators

⁸⁹⁸*Prosecutor v Thomas Lubanga Dyilo Lubanga* Judgment pursuant to Article 74 of the Statute ICC-01/04-01/06 [14 March 2012] [Hereinafter ‘Lubanga Trial Judgment ICC-01/04-01/06 [14 March 2012]’] para 753

⁸⁹⁹ *Ibid* para 1075

⁹⁰⁰ *Ibid* para 771

⁹⁰¹ *Ibid* para 1075

⁹⁰² Generally means ‘small ones’ or ‘small children’ in KiSwahili

⁹⁰³ *Ibid* para 761

⁹⁰⁴ *Ibid* para 824

⁹⁰⁵ *Ibid* para 695

⁹⁰⁶ *Ibid* para 851

⁹⁰⁷ *Ibid* para 824

⁹⁰⁸ *Ibid* para 851

committed the crimes of conscription, enlistment and use of children under the age of 15, from 1 September 2002 to 13 August 2003.⁹⁰⁹ The diffuse nature of the crime was recognised by the court. The Chamber in *Lubanga* concluded in the Judgment that the evidence established beyond a reasonable doubt that during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread, that a significant number of children were used as military guards and as escorts or bodyguards for the main staff commanders, and that children under 15 years of age were used by the UPC/FPLC in hostilities.⁹¹⁰

7.2.1 Collective crime, individual responsibility

Drumbl notes that the law academy has distinguished normative differences between extraordinary crimes against the world community and ordinary crimes against the local community.⁹¹¹ Despite the extraordinary nature of mass criminality, ‘its modality of punishment, theory of sentencing, and process of determining guilt or innocence each remains disappointingly ordinary.’⁹¹² Lubanga was found guilty of co-perpetrating the crimes of enlisting and conscripting child soldiers and using them to participate actively in hostilities under Article 8(2) (e) (vii) of the Rome Statute.⁹¹³ The Chamber found that Lubanga and others came together with the intent of ‘build[ing] an army for the purpose of establishing and maintaining political and military control over Ituri’, which ‘resulted, in the ordinary course of events, in the conscription and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities.’⁹¹⁴

The Prosecutor had charged Lubanga with criminal responsibility under Article 25(3) (a).⁹¹⁵ Under the Rome Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

⁹⁰⁹ Ibid para 91

⁹¹⁰ Lubanga Sentencing Judgment ICC-01/04-01/06 [10 July 2012] para 50

⁹¹¹ M. Drumbl ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Northwestern University Law Review* 539

⁹¹² Ibid 541

⁹¹³ Lubanga Trial Judgement para 1358

⁹¹⁴ Ibid para 1351

⁹¹⁵ *Prosecutor v Lubanga* ICC-01/04-01/06-356-Conf-Anx1, Documents Containing the Charges [28 August 2006] para 27

- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime⁹¹⁶

The *mens rea* for co-perpetration is determined by ‘the existence of an agreement or common plan between two or more persons.’⁹¹⁷The PTC in *Lubanga* stated that the concept of co-perpetration as set out in Article 25(3) (a) was:

[R]ooted in the idea that when the sum of co-ordinated individual contributions of a plurality of persons results in the realisation of all the objective elements of a crime, any person making a contribution can be held vicariously responsible for the contributions of all the others and, as a result, can be considered as a principal to the whole crime.⁹¹⁸

The PTC found that co-perpetration under Article 25(3) corresponded to ‘control theory of co-perpetration’ pioneered in the 1960s by Claude Roxin, a leading German criminal-law theorist, and not the ICTY’s Joint Criminal Enterprise (JCE) concept.⁹¹⁹ The difference is that under the JCE doctrine, any contribution to the common plan satisfies the *actus reus* requirement,⁹²⁰ while the control theory demands an ‘essential contribution.’⁹²¹ A crime would not have eventuated without such contribution.⁹²² This determination of culpability resorts to the characterization of principals versus accomplices, on the nature of complicity, on aiding and abetting,

⁹¹⁶Rome Statute Art. 25 (3)

⁹¹⁷ Lubanga Trial Judgment para 1006

⁹¹⁸ Lubanga Decision on Confirmation of Charges [29 January 2007] para 326

⁹¹⁹Lubanga Decision on Confirmation of Charges [29 January 2007] paras 326–341

⁹²⁰See *Prosecutor v Miroslav Kvocka et al.*, Judgment, Appeals Chamber, IT-98-30/1-A, 2005, paras. 97, 421

⁹²¹Lubanga Decision on Confirmation of Charges [29 January 2007] paras. 334–5, 346–7; See also Lubanga Trial Judgment, paras 921–2

⁹²² Ibid [Confirmation decision...]

and on whether one is a co-perpetrator.⁹²³ It also focuses the weight to be accorded the *actus reus* versus the *mens rea* of the crime.⁹²⁴ An assessment of *mens rea* for co-perpetration involves analysis of an objective element of this concept, namely the requirement of ‘the existence of an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime.’⁹²⁵ The Trial Chamber adopted the PTC’s interpretation.⁹²⁶ Lubanga was found to have made an ‘essential contribution’ to implementing the common plan and to have done so with the requisite *mens rea*.⁹²⁷

As noted in the previous section, mass crime involves organic group dimensions. Such crimes could not occur without the organized cooperation of many, often numbering in the several thousands.⁹²⁸ However, as noted above, only Lubanga was arrested and charged as a co-perpetrator. Only one of his accomplices, Ntaganda, has since surrendered to the court. Some authors have argued that the penal approach to mass crime that international courts adjudicate is flawed. The ‘collective nature of crimes of war escapes the bounds of the individualist paradigm of Western criminal law.’⁹²⁹ And ‘the most common objections to liberal accounts include: that they insist on a legalistic criminal law response and exclude other alternatives; that they are fixated on the individual and cannot process collective dimensions’;⁹³⁰ and that ‘they conceive of persons as socially unencumbered individuals and fail to account for communitarian values and duties and social meaning; and that they impose Western constructs.’⁹³¹ English law, for instance, does not ‘capture the distinctive aspects of mass criminality: its collective nature and the climate of moral permissiveness that encourages or endorses this conduct. The reason for this paucity is partly that much greater emphasis given to the doctrines of joint criminal enterprise and conspiracy as

⁹²³ P. Stephens, ‘Collective criminality and individual responsibility: the constraints of interpretation’ 2014 (37) *Fordham International Law Journal* 501, 509

⁹²⁴ *Ibid*

⁹²⁵ Lubanga Trial Judgment, para 1006

⁹²⁶ *Ibid*

⁹²⁷ Lubanga Trial Judgment paras 1356–7

⁹²⁸ M. Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocity’, (2005) 105 *Columbia Law Review* 1751

⁹²⁹ A. Sepinwall, ‘Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq’, in T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (2011), 233; *See also* M. Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocity’ (2005) 105 *Columbia Law Review* 1751

⁹³⁰ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 139

⁹³¹ *Ibid*

modes of accounting for collective action. These are inchoate and accessory forms of liability though, and themselves rest on questionable foundations.’⁹³² On the other hand, German law, influenced by ‘Roxin’s criterion of detachedness from the law’,⁹³³ is ‘sensitive to the perversion of norms which makes these crimes possible.’⁹³⁴ To be sure, the ICC, which, as noted above, drew from Roxin’s ‘control theory,’ recognised the widespread nature of Lubanga’s crimes. The prosecution insisted that the extent and widespread nature of the crimes should be taken into account by the Chamber in setting the sentence.’⁹³⁵ The chamber concluded that ‘the evidence established beyond a reasonable doubt that during the period of the charges, recruitment by the UPC/FPLC of young people, including children under 15, was widespread, that a significant number of children were used as military guards and as escorts or bodyguards for the main staff commanders, and that children under 15 years of age were used by the UPC/FPLC in hostilities.’⁹³⁶

However, Jain argues that the shortcomings of Roxin’s doctrine upon which the ICC relied ‘lie in its treatment of the character of the physical perpetrator as a soulless automaton. It also oversimplifies to the point of caricature, the conditions under which mass atrocity occurs: a vertical, tautly-structured hierarchical organization is simply non-existent in most cases of international crimes....’⁹³⁷ Drumbl points out that there is a need to appreciate the fundamental differences between perpetrators of extraordinary international crimes such as mass atrocity and perpetrators of ordinary domestic crimes in ordinary times.⁹³⁸ The perpetrator of mass atrocity fundamentally differs from the perpetrator of ordinary crime.⁹³⁹ Drumbl contends that the paradigm of individual culpability may be suitable for deviant isolated crimes but not for mass crimes, which involve organic group dimensions.⁹⁴⁰

⁹³² N. Jain ‘Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration’ (2013) 61 *The American Journal of Comparative Law* 831, 864

⁹³³ Ibid 865

⁹³⁴ Ibid 865

⁹³⁵ Lubanga sentencing judgment para 45

⁹³⁶ Ibid para 49

⁹³⁷ Ibid 865

⁹³⁸ M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 11

⁹³⁹ Ibid

⁹⁴⁰ Ibid 24; see also A. Sepinwall, ‘Citizen Responsibility and the Reactive Attitudes: Blaming Americans for War Crimes in Iraq’, in T. Isaacs and R. Vernon (eds.), *Accountability for Collective Wrongdoing* (Cambridge University Press 2011) 233, ‘the collective nature of crimes of war escapes the bounds of the individualist paradigm of Western criminal law’.

However, other authors argue that ‘we can advance a liberal criminal law theory without necessarily subscribing to an empirically unsound worldview in which we were all atomistic, self-created individuals who entered into a social contract to advance our personal aims.’⁹⁴¹ Contrary ‘to a common belief, a liberal theory of penal justice is not necessarily one that conceives the individual as an abstract subject or person uprooted from its social and ethical environment.’⁹⁴² Without denying the affiliation between ‘liberalism’ and Western thought, one could question whether basic principles such as fair warning or personal culpability are truly only values of the West.⁹⁴³ In the negotiation of the Rome Statute, for example, delegates from all regions and legal traditions exhibited a shared commitment to the fundamental principles of legality and personal culpability.⁹⁴⁴ One could respond that the delegates were subject to Western pressure or reflected a Westernised elite.⁹⁴⁵ However, a survey of domestic systems would indicate that the principles seem to attract global recognition and support.⁹⁴⁶ Robinson posits thus:

‘A liberal theory can acknowledge that we are social and political animals, that we were born in society, and that our identities and our realities are richly socially constructed. A liberal criminal law theory does not have to ignore the importance of society. It simply requires that we *justify* our actions against the individual on behalf of society.’⁹⁴⁷

7.3 ICC: penal objectives

The most common and dominant penal justifications in jurisprudence have been retribution and deterrence. And international criminal law (ICL) has by and large

⁹⁴¹ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 142

⁹⁴² A. Brudner, *Punishment and Freedom* (2009), ix. Cited in *ibid* 142

⁹⁴³ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 143

⁹⁴⁴ *Ibid* 143 citing P. Saland, ‘International Criminal Law Principles’, in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 189 at 194–5 (‘never a contentious issue’); B. Broomhall, ‘Article 22’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2008), 713 at 715 (‘widespread agreement’ on need for clarity, precision, and specificity in accordance with principle of legality and that fundamental principles of criminal law should be clearly set out in the Statute); D. Piragoff and D. Robinson, ‘Article 30’, in *ibid.*, 849 at 850 (general view that no criminal responsibility without *mens rea*); S. Lamb, ‘Nullum Crimen, Nullum Poena Sine Lege’, in A. Cassese et al. (eds.), *Rome Statute of the International Criminal Court: A Commentary* (2002), 733 at 734 (viewed by most delegates as self-evident) and 735 (relatively little controversy).

⁹⁴⁵ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 143

⁹⁴⁶ *Ibid*

⁹⁴⁷ *Ibid* 142

transposed these Western penal principles to international institutions to address mass crime.⁹⁴⁸ Judge Sang-Hyun Song, President of the ICC stated that the *Lubanga* judgment ‘sets a crucial precedent in the fight against impunity and reinforces the Rome Statute’s growing deterrent effect against perpetrators of heinous crimes against children.’⁹⁴⁹ The verdict also shored up retribution and deterrence as primary objectives.⁹⁵⁰ The rhetoric about ‘sending a message’ that followed was predicated on these traditional penal rationales. The Special Representative of the Secretary-General on Children and Armed Conflict, Rhadika Coomaraswamy, pronounced: ‘... today’s verdict will reach warlords and commanders across the world and serve as a strong deterrent.’⁹⁵¹ The UN Secretary-General’s Office stated: ‘Mr. Lubanga’s conviction for the war crimes of enlisting and conscripting children under the age of 15 is an important step forward in realising the international community’s commitment to ensuring that perpetrators of crimes against children in situations of armed conflict are brought to justice.’⁹⁵² Ambassador Wittig, Chair of the UN Security Council Working Group on Children and Armed Conflict stated: ‘This is a *message* well beyond Lubanga’s case: all those who perpetrate acts of grave violations against children’s rights won’t go *unpunished*.’⁹⁵³ Graça Machel, member of The Elders and former UN independent expert on the impact of armed conflict on children, pronounced: ‘...the decision of the ICC must be commended and supported unequivocally and without reservation to ensure that the global voice of humanity as a whole *sends a clear message* to both State and non-State actors, not just in Africa but throughout the world where children have often been used as soldiers, that war is

⁹⁴⁸ K. Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Accountable to the World* (Routledge, 2013)

⁹⁴⁹ See ‘Social Event at City Hall in The Hague Remarks by Judge Sang-Hyun Song, President of the ICC 13 November 2012;

⁹⁵⁰ *Prosecutor v Thomas Lubanga Dyilo* Sentencing Judgment ICC-01/04-01/06 [10 July 2006] para 16

⁹⁵¹ See ‘SRSG Coomaraswamy welcomes the International Criminal Court’s first verdict - the conviction of Thomas Lubanga for child recruitment’ (OSRSG/140312-4) Office of the Special Representative of the UN Secretary General on Children and Armed Conflict 12 March 2012

<http://www.un.org/children/conflict/english/pr/2012-03-14281.html>; See also DRC: ICC conviction of Thomas Lubanga welcomed (Amnesty UK, 14 March 2012); http://www.amnesty.org.uk/news_details.asp?NewsID=19998 (last visited 24 April 2014) Foreign Office Minister welcomes International Criminal Court verdict of Thomas Lubanga (British Embassy, The Hague, 14 March 2012) <http://ukinnl.fco.gov.uk/en/news/?view=News&id=741984782>; (last visited 24 April 2014)

⁹⁵² See ‘International Criminal Court’s Conviction of Thomas Lubanga for Conscripting Children ‘Important Step Forward in Ending Impunity, Says Secretary-General’: SG/SM/14155 AFR/2352 L/3187, 14 March 2012

⁹⁵³ See ‘Reactions to the first verdict of the ICC’ - ICC OTP Weekly Briefing Issue 115; 16 to 26 March 2012

no place for a child...'⁹⁵⁴ Anthony Lake, UNICEF Executive Director, declared: 'The conviction of Thomas Lubanga by the ICC *sends a clear message* to all armed groups that enslave and brutalize children: Impunity will not be tolerated.'⁹⁵⁵ The idea of 'sending a message' is common in law. However, there is less clarity on what appropriate message to send.

7.3.1 *Lubanga* and retribution

Retributive justice is a system by which offenders, or those who disturb social order, are punished in proportion to the moral magnitude of their intentionally committed harms.⁹⁵⁶ Punishment can either be *deserved* on retributive grounds or it can be *useful* as an instrument of social protection.⁹⁵⁷ Like in most societies ravaged by human-sponsored calamity, residents of Ituri – the centre of Lubanga's crimes - anticipated retribution for crimes perpetrated during the conflict. Prosecutions are perceived as transmitting a message to individuals who commit crimes, warning them that they are not above the law.⁹⁵⁸ The trial and punishment of Lubanga was viewed as a way to effectuate retribution and sending a message to him. Research conducted in Ituri suggests that retribution was an expectation. Retributivists also suggest, and as stated in *Lubanga* by the Trial Chamber, sentence should always be proportionate to the crime.⁹⁵⁹ The principle of proportionality - that penalties be proportionate in their severity to the gravity of the defendant's criminal conduct - seems to be a basic requirement of fairness.⁹⁶⁰ The sentencing judgment in *Lubanga* noted that the 'gravity of the crime', as set out in Article 78(1) of the Statute and in Rule 145 of the Rules, is one of the principal factors to be considered in the determination of the sentence, which should be in proportion to the crime (Article 81(2) (a) of the Statute), and it should reflect the culpability of the convicted

⁹⁵⁴ Ibid (my emphasis)

⁹⁵⁵ Ibid

⁹⁵⁶ K. Carlsmith, and J. Darley, 'The psychological aspect of retributive Justice' in M. Zanna (ed.), *Advances in Experimental Social Psychology* (San Diego, CA: Elsevier 2008)

⁹⁵⁷ G. Fletcher, 'The place of victims in the theory of retribution' (1999) 3 *Buffalo Criminal Law Review* 51

⁹⁵⁸ See 'Steps towards justice, frustrated hopes: Some Reflections on the Experience of the International Criminal Court in Ituri.' The International Refugee Rights Initiative and Association pour la promotion et la défense de la dignité des victimes (APRODIVI) March 2012

⁹⁵⁹ See Decision on Sentence pursuant to Article 76 of the Statute: Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v Thomas Lubanga Dyilo* ICC-01/04-01/06 10 July 2006 para 93

⁹⁶⁰ A. von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55

person.⁹⁶¹The Chamber, in passing sentence, reflected its determination that the involvement of children was widespread.⁹⁶² The court noted that crimes of conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities are undoubtedly very serious crimes that affect the international community as a whole.⁹⁶³ Additionally, the crime of conscription is distinguished by the added element of compulsion.⁹⁶⁴ The court asserted that the vulnerability of children meant that they need to be afforded particular protection that does not apply to the general population, as recognised in various international treaties.⁹⁶⁵

Pursuant to Article 77(1) of the Statute and Rule 145(3) of the Rules, the Chamber may impose a sentence of imprisonment that does not exceed 30 years, unless ‘the extreme gravity of the crime and the individual circumstances of the convicted person’ warrant a term of life imprisonment.⁹⁶⁶ The Court considered the crimes of ‘conscripting’, ‘enlistment’ and ‘using’ child soldiers separately, the latter regarded most grave. Lubanga was sentenced to 14 years in prison. The Chamber articulated the sentencing as follows: 1) for having committed, jointly with other persons, the crime of conscripting children under the age of 15 into the UPC to 13 years’ imprisonment; 2) for having committed, jointly with other persons, the crime of enlisting children under the age of 15 into the UPC to 12 years’ imprisonment; and 3) for having committed, jointly with other persons, the crime of using children under the age of 15 to participate actively in hostilities to 14 years’ imprisonment.⁹⁶⁷

Pursuant to Article 78(3) of the Statute, the total period of imprisonment on the basis of the joint sentence is 14 years’ imprisonment.⁹⁶⁸ Having been in prison for six years before the trial, Lubanga will serve eight years from the date of sentence. The ICC appeared to replicate the dominant rationales for punishment. Passing sentence, the Court declared:

⁹⁶¹Lubanga Sentencing Judgment [10 July 2012]para 36; See also ICC Rule 145(l) (a) of the Rules

⁹⁶² Ibid

⁹⁶³ Ibid para 37

⁹⁶⁴ ibid

⁹⁶⁵ ibid

⁹⁶⁶ibid para 21

⁹⁶⁷ Ibid para 98

⁹⁶⁸ Ibid para 99

‘In considering the purposes of punishment at the ICC, the Chamber has taken into account the Preamble of the Statute, which provides that ‘the most serious crimes of concern to the international community as a whole must not go unpunished.’ The Preamble further provides that the States Parties are ‘[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.’ The ICC was established ‘to these ends and for the sake of present and future generations.’⁹⁶⁹

These objectives have been interpreted as meaning retribution and deterrence are the court’s principal objectives. The goal of ending impunity through punishment denotes a retributive motive. The regard for future generations is rooted in the desire to deter such crimes in the future. While the conscription, enlistment and use of child combatants constitute(s) a grave crime, it is also notoriously problematic to match gravity and punishment.⁹⁷⁰ Some found Lubanga’s sentence lenient, not least the prosecutor.⁹⁷¹ The prosecutor had sought a 30-year prison term. The Office of the Prosecutor (OTP) lodged an appeal to have the 14-year sentence revised upwards. However, the conviction and sentence were upheld in December 2014. The assumption of proportionality of punishments is untenable in most pluralistic societies because there is often widespread public disagreement on the severity of particular offences.⁹⁷² Under these conditions, ‘a retributive sentencing system that espouses proportional sanctions would be based on the erroneous assumption that there is public consensus in the rankings of the moral gravity of particular types of crime.’⁹⁷³ In Ituri, Lubanga’s sentence drew diverse responses.⁹⁷⁴ A Congolese activist fighting for the rights of children pointed out that the sentence gave him hope.⁹⁷⁵ Some felt the sentence was too harsh. ⁹⁷⁶ Others, including victims, argued the

⁹⁶⁹Lubanga Sentencing Judgment [10 July 2012] para 16

⁹⁷⁰ G. Dingwall and T. Hillier, ‘The Banality of Punishment: Context Specificity and Justifying Punishment of Extraordinary Crimes’ (2010) 6 *International Journal of Punishment & Sentencing* 6

⁹⁷¹See R. Williams ‘The Thomas Lubanga Trial - Dangerous for Children’ War Child UK <http://www.warchild.org.uk/news/blog-thomas-lubanga-trial-dangerous-children> (last accessed 2 October 2014 stating: ‘[A] sentence of 14 years does not address the extent to which the international community has declared itself determined to stamp out the use of child soldiers’

⁹⁷²See eg E. Waite, C Bose, and R Berk, ‘The Seriousness of Crime: Normative Structure and Individual Differences’ (1974) 39 *American Sociological Review* 224; T Miethe ‘Types of Consensus in Public Evaluations of Crime: An Illustration of Strategies for Measuring Consensus’ (1984) 75 *Journal of Criminal Law & Criminology* 459

⁹⁷³T. Miethe and H.Lu (eds), *Punishment. A Comparative Historical Perspective* (Cambridge University Press, 2005), 15

⁹⁷⁴See ‘14 Years: Too Much or Not Enough?’ International Justice Monitor, 16 July 2012

⁹⁷⁵See ‘Congolese activists react to Lubanga sentence’ Reuters, 11 July 2012 <http://www.sabc.co.za/news/a/79c46d004beec1cfb9fdffa583a5afo0/Congolese-activists-react-to-Lubanga-sentence-20120711>

⁹⁷⁶See ‘14 Years: Too Much or Not Enough?’ International Justice Monitor, 16 July 2012

punishment was too lenient.⁹⁷⁷ Also, the ‘massive nature of atrocity cannot be reflected in retributive punishment owing to human rights standards, which cabin the range of sanction.’⁹⁷⁸ These ‘standards limit the amount of pain institutions can inflict upon convicts.’⁹⁷⁹ To some, external imprisonment in Western countries provided comforts and a place of refuge inimical to deterrent punishment. The relatively comfortable conditions of jail in The Hague were deemed to undermine the deterrent effect of the Court, one remarking: ‘everyone can see Lubanga on TV, and we can see that he is getting fat.’⁹⁸⁰ Compared with the conditions of detention in the DRC, the perception of Lubanga’s luxurious confinement in The Hague eviscerated the severity of the punishment⁹⁸¹ particularly in the eyes of the afflicted community.

7.3.2 Lubanga and deterrence

Deterrence is based on the general utilitarian moral philosophy framework according to which the moral value of an act is based on its socially useful consequences.⁹⁸² Utilitarian accounts of punishment typically try to show that judicial and punitive practices are justified by considering the net benefits of the practice.⁹⁸³ Against the backdrop of the generalised impunity in the DRC, the fact that trials eventuated at the ICC at all was deemed as no small feat.⁹⁸⁴ The prosecutions were perceived as having contributed to deterring further crimes and to fostering better security in the region. In other words, Lubanga’s prosecution and punishment had sent a message

⁹⁷⁷ See video ‘DR Congo: Reactions to Lubanga’s sentence’ http://www.voxafrica.co.uk/news/video/?v=o_iuqoa6oz&p=1&PHPSESSID=c66a86f5122b2611ceaa349254e9135; (last accessed 25 April 2014) See also ‘Congolese activists react to Lubanga sentence’ Reuters, 11 July 2012 ‘Victims see this as a lenient sentence for Lubanga. Meaning that despite the atrocities taking place in Ituri, they gave him 14 years whilst his victims were expecting more,’ said Folo Bakelenge, a Congolese human rights lawyer.

<http://www.sabc.co.za/news/a/79c46d004beec1cfb9fdffa583a5af00/Congolese-activists-react-to-Lubanga-sentence-20120711> (last accessed 25 April 2014)

⁹⁷⁸ M. Dumb, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 15

⁹⁷⁹ Ibid

⁹⁸⁰ See ‘Steps towards justice, frustrated hopes: Some Reflections on the Experience of the International Criminal Court in Ituri.’ The International Refugee Rights Initiative and Association pour la promotion et la défense de la dignité des victims (APRODIVI) March 2012; <http://www.refugee-rights.org/Assets/PDFs/2012/StepsTowardJusticeFinal.pdf>

⁹⁸¹ Ibid

⁹⁸² I. Tallgren, ‘The Sensibility and Sense of International Criminal Law’ (2002) 12 *European Journal of International Law* 561

⁹⁸³ B. Wringer, ‘Why punish war crimes? Victor’s Justice and Expressive Justifications of Punishment’ (2006) 25 *Law and Philosophy* 159

⁹⁸⁴ See ‘Steps towards justice, frustrated hopes: Some Reflections on the Experience of the International Criminal Court in Ituri.’ The International Refugee Rights Initiative and Association pour la promotion et la défense de la dignité des victims (APRODIVI) March 2012; <http://www.refugee-rights.org/Assets/PDFs/2012/StepsTowardJusticeFinal.pdf>

to potential child soldier recruiters and enlists. While it is difficult to determine causality between decreased crime and the particular efforts of the ICC, most people interviewed noted an improvement in the security situation over the past several years.⁹⁸⁵ It was also acknowledged that the security situation had improved significantly since the Court first became involved, attributed in part to the ICC's engagement.⁹⁸⁶ However, the persistent conflict and continued recruitment of children in the DRC rebels groups fail to support the deterrent effect of *Lubanga*. Further, ICC's ability to effectuate deterrence is hindered by the lack of an enforcement mechanism to account for suspects, thus limiting the number of defendants the court can prosecute. The Court will only ever be able to try a very small number of cases. Lubanga is only one of at least seven individuals in two situations (DRC and Uganda) who faced charges of the use of children in armed hostilities brought before the ICC.⁹⁸⁷ Both situations were the subject of the controversial self-referrals that have, almost systemically, excluded state actors. Only three cases⁹⁸⁸ had been concluded at the time of writing. Considering the estimated number of 300 000 child soldiers worldwide, the number of defendants is negligible. The DRC failed to account for Lubanga's co-accused, Ntaganda, after a warrant against him was issued. Not only was he not been arrested, he was integrated into the national army at the rank of general *after* the warrant was issued. Ntaganda's promotion not only undermined the credibility of the Court generally, but also led to speculations about bias. As one Ituri activist put it: 'justice is working at two speeds... the fact that Bosco (Ntaganda) is protected when Lubanga has been handed over shows that political expediency overshadows justice.'⁹⁸⁹ The DRC Minister of Information, Lambert Mende argued:

'As soon as he agreed to take part in the disarmament of the rebel group CNDP, the government used him (Ntaganda) for the operation and continues to do so. Therefore

⁹⁸⁵ Ibid

⁹⁸⁶ Ibid

⁹⁸⁷ Apart from Lubanga, the other cases are: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* ICC-01/04-01/07; *Prosecutor v Bosco Ntaganda* ICC-01/04-02/06 ; *Prosecutor v Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* ICC-02/04-01/05

⁹⁸⁸ *Prosecutor v Thomas Lubanga Dyilo* No. ICC-01/04-01; *Prosecutor v Germain Katanga* ICC-01/04-01/07; (convicted of other charges excluding child soldiering) *Prosecutor v Mathieu Ngudjolo Chui* ICC-01/04-02/(acquitted of other charges, including child soldiering)

⁹⁸⁹ See 'Steps towards justice, frustrated hopes: Some Reflections on the Experience of the International Criminal Court in Ituri'. The International Refugee Rights Initiative and Association pour la promotion et la défense de la dignité des victims (APRODIVI) March 2012; <http://www.refugee-rights.org/Assets/PDFs/2012/StepsTowardJusticeFinal.pdf>

the government did not find it opportune to open the case against him. It is really a question of timing.⁹⁹⁰

The consequence of this deliberate inaction was that Ntaganda was allowed to keep committing the same type of abuses committed in Ituri.⁹⁹¹ Ntaganda eventually submitted to the ICC of his own accord. Self-referrals have resulted in apparent trade-offs between the ICC and states, resulting in the exemption of state actors. In Ituri, some believe that the interests of victims were subjugated to pragmatism: it was suggested, that the decision of the OTP to focus on militia rather than government crimes was aimed at ensuring continuing state cooperation rather than on an objective assessment of the gravity of the crimes committed and the views of affected communities.⁹⁹² Of particular concern was the failure of the Court to go after individuals in the Kinshasa government.⁹⁹³ Similar crimes committed by government forces were not equally pursued. As one commentator put it: ‘...there were *kadogo* [child soldiers] in Kabila’s forces as well.’⁹⁹⁴

7.4 Lubanga: theoretical reflections

Deterrence theorists depict the punishment of criminal offenders as morally justified because it deters other people from committing crime and thereby produces a net gain to society, with the suffering inflicted by criminals outweighed by the larger quantity of suffering that potential crime victims are spared.⁹⁹⁵ However, deterrence is difficult to prove. Wippman notes that the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption.⁹⁹⁶ In any event, any anecdotal research must take into account the reality that atrocity persists in many places following the creation of criminal tribunals to punish perpetrators.⁹⁹⁷ Deterrence, transposed to mass crimes, ignores the unique environments that foster such criminal behavior. A critique of the liberal model points to the fixation on ‘individualistic and abstract that they miss out on communitarian values and duties, or on social meaning. The concern is that

⁹⁹⁰Ibid 15

⁹⁹¹Ibid

⁹⁹² Ibid

⁹⁹³ Ibid

⁹⁹⁴ Ibid

⁹⁹⁵D. Dolinko, ‘Three Mistakes of Retributivism’ (1992) 39 *UCLA Law Review* 1623

⁹⁹⁶D. Wippman, ‘Atrocities, Deterrence, and the Limits of International Justice’ (1999) 23 *Fordham International Law Journal* 473

⁹⁹⁷M. Dumbbl *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007)417

liberal theory misconceives of the individual as completely separate from society.⁹⁹⁸ Often, offenders subscribe to group codes and are impelled, not by evil – not ‘radical’ evil in Arendt’s words – but a belief in a genuine cause. If the ‘rational-actor model of deterrence is suspect in the national context, it is exponentially so in the international, where war, large scale violence, and collective pathologies, as well as the institutional and resource limitations of ICL can be expected to distort the viability of the familiar cost-benefit calculus on which that model depends.’⁹⁹⁹ The hostilities ‘with which international criminal justice is concerned often engage powerful passions – even self-transcending behavioural motives – and tend to involve individuals who are ready to accept the risk of punishment.’¹⁰⁰⁰ These passions cannot be dissociated from child soldiering. The recruitment enlistment and use of children for purposes of armed conflict arises from the passion around triumphalism in war. Klabbers contends ICL will not play a significant deterrent role because the cost-benefit analysis underlying the rationale cannot be applied to human rights violators because they are mainly motivated by political reasons.¹⁰⁰¹ The recruitment of children continued, according to testimony in *Lubanga*, ‘...because the UPC was striving to consolidate its position as a strong political movement in the Ituri region.’¹⁰⁰² Lubanga urged ‘Iturians’ ‘to wake up, they had to rise, and team up with him to chase out’¹⁰⁰³ a rival. Subsequently, some boys and girls ‘volunteered.’¹⁰⁰⁴ And ‘a lot of recruits came to get revenge for their families who had been killed’ and so they were ‘very keen volunteers’.¹⁰⁰⁵ Beneath this political carapace was crucible of ethnic tension. Lubanga, of the Hema ethnic group, accused his rival of ethnic discrimination.¹⁰⁰⁶ The clashes between Hema and Lendu have sucked in other ethnic groups in the region. The strong emotions associated with such conflict make the deterrence objective difficult to accomplish. Perpetrators are ‘overcast with ideology, fanaticism or religious fundamentalism, and who conceive themselves to be

⁹⁹⁸ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127

⁹⁹⁹ R. Sloane, ‘The Expressive Capacity of International Punishment’ (2007) 43 *Stanford Journal of International Law* 39, 40

¹⁰⁰⁰ M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 344

¹⁰⁰¹ J. Klabbers, ‘Just Revenge? The Deterrence Argument in International Criminal Law’ (2001) 12 *Finnish Yearbook of International Law* 249

¹⁰⁰² ‘Lubanga Trial Judgment ICC-01/04-01/06 [14 March 2012] para 1077

¹⁰⁰³ *Ibid* para 1054

¹⁰⁰⁴ *Ibid* para 1076

¹⁰⁰⁵ *Ibid* para 784

¹⁰⁰⁶ *Ibid* para 1089

over and above the law anyhow' and system criminality, which is characterized by a state or state-like entity facilitating or encouraging such acts.¹⁰⁰⁷

In the DRC, the rise of a new rebel group, M23 – also recruiting children - during Lubanga's trial seemed to confound assumptions that the prosecution would 'send a message' and thus cultivate general deterrence. The fact that the elusive Ugandan rebel leader Kony and his LRA continue to use child soldiers after *Lubanga* also denudes the claims about the deterrent effect of the ICC and *Lubanga*. Further, there are practical concerns. There 'is a very low chance' that if accused, suspected offenders 'are ever taken into the custody of international criminal justice institutions.'¹⁰⁰⁸ Kony is a case in point. Ntaganda only handed himself to the ICC. International criminal justice requires the co-operation of states. In some cases, the state actors are the offenders. Furthermore, as illustrated in the case of the DRC and Ntaganda, the objectives of peace can supersede those of justice. State actors can collude with suspected offenders, for example rebels, to end internal conflicts, thus evading justice.

International criminal justice transposes the goals of municipal law to the international sphere. But as Bass concludes: '[T]he application of national law to war crimes is in many ways the legal equivalent of a bad analogy.'¹⁰⁰⁹ On the international plane, the objectives are not only incongruous but overstated. Context insensitive research and context insensitive theory form a self-reinforcing pattern of context insensitive scholarship.¹⁰¹⁰ For, '[I]f 'we aren't looking for context effects, we won't seek out context sensitive theoretical perspectives.'¹⁰¹¹ We 'cannot simply project familiar national principles onto ICL. We must inspect and re-articulate those principles to take into account the special contexts encountered by ICL, which

¹⁰⁰⁷ C. Safferling, 'Can Criminal Prosecution be the Answer to massive human rights violations?' (2004) 5 *German Law Journal* 1469, 1484

¹⁰⁰⁸ M. Dumb, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) 169

¹⁰⁰⁹ G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press 2000) 13

¹⁰¹⁰ D. Whetten 'An Examination of the Interface Between Context and Theory Applied to the Study of Chinese Organizations' (2009) 5 *Management Organisation Review* 29

¹⁰¹¹ *ibid* 31

include massively collective action...'¹⁰¹²In 'theorising' the ICC, it is also important to take cognisance of its contextual environment as discussed in the previous chapter. For, when situational constraints are high, organisations realise weaker or lower outcomes.¹⁰¹³

7.4.1 Beyond 'retribution' and 'deterrence'

The idealism of ICL is far broader. It includes among other aims: reconciliation, rehabilitation, incapacitation, restoration, access to victims, historical recording building, preventing revisionism, crystallizing international norms, general affirmative prevention, establishing peace, preventing war, vindicating international law prohibitions, setting standards for fair trials, ending impunity, and expressive functions.¹⁰¹⁴ The Secretary General of the UN, outlined some these, stating international criminal tribunals pursue a number of aims including '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 restoration of peace.'¹⁰¹⁵

While this thesis does not concentrate on this particular mosaic of penal aims, it is worth noting them. These 'idealist/goal' related issues do not all necessarily apply to *Lubanga* but have been cited at one time or another in international jurisprudence. There has been debate¹⁰¹⁶ about the need, plausibility and operability of the

¹⁰¹² D. Robinson, 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127, 129

¹⁰¹³ See eg L. Peters and M. Chassie *et al* 'The joint influence of situational constraints and goal setting on performance and affective outcomes' (1982) 8 *Journal of Management* 7; S. Freedman and J. Phillips. 'The effects of situational performance constraints on intrinsic motivation and task satisfaction: The role of perceived competence and self-determination' (1985) 35 *Organizational Behaviour and Human Decision Processes* 397

¹⁰¹⁴ See S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?', (2014) 3 *Penn State Journal of Law and International Affairs* 30, 37, footnote 25, citing other authors.

¹⁰¹⁵ See 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' Report of UN Secretary-General, U.N. Doc. S/2004/616 [23 August 2004] para 38-39, <http://www.unrol.org/files/2004%20report.pdf>

¹⁰¹⁶ I am indebted to D. Abels, 'The Objectives of International Punishment' in D. Abels and R. Mulgrew, *Research Handbook of the International Penal System*, (Elgar publishing 2015) for capturing part of this debate.

expansive ‘idealism’¹⁰¹⁷ of international courts which now includes ‘socio-political’¹⁰¹⁸ or ‘extra-judicial’ goals. Some scholars are agnostic about, for instance, the objective of ‘rehabilitation’ aimed at ‘reintegrating the guilty accused into society.’¹⁰¹⁹ The viability of this goal is ordinarily dependent on other factors, not least age; rehabilitation usually has a role to play ‘when younger, or less educated, members of society are found guilty of offences... to re-integrate them into society so that they can become useful members of it and enable them to lead normal and productive lives upon their release from imprisonment.’¹⁰²⁰ However, international courts, despite acknowledging it as a guiding principle for sentence, barely implement it. The 45-year sentence in *Blaskic*,¹⁰²¹ when he was as young as 40, does not give credence to ‘rehabilitation as serious consideration by international courts.’¹⁰²² Such a sentence would have been based, instead, on motives of perhaps retribution and deterrence. The prudence of implementing rehabilitation for such serious crimes is also questionable. The ICTY noted that, because of the grave nature of the crimes adjudicated by the tribunal, which were not comparable to national criminal cases, rehabilitation cannot ‘play a predominant role in the decision-making process of a Trial Chamber of the Tribunal’ and ‘cannot be given undue weight.’¹⁰²³

For Mulgrew, objectives such as reconciliation and the maintenance of peace should be actively pursued by the tribunals in their penal regimes, to facilitate reconciliation by convicted persons towards victims.¹⁰²⁴ Some authors have, however, expressed ‘doubts about whether extra-judicial motives could be part of the legitimate or

¹⁰¹⁷See eg S. Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3 *Penn State Journal of Law and International Affairs* 30; Y. Shany, ‘Assessing the effectiveness of international courts: a goal-based approach’ (2012) 106 *American Journal of International Law* 255; C. Stahn, ‘Between ‘Faith’ and ‘Facts’: By What Standards Should we Assess International Criminal Justice?’ (2012) 25 *Leiden Journal of International Law* 251; M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329

¹⁰¹⁸Y. Shany, ‘Assessing the effectiveness of international courts: a goal-based approach’ (2012) 106 *American Journal of International Law* 255

¹⁰¹⁹*Prosecutor v Delalić et al.*, IT-96-21-A, A. Ch., Judgment [20 February 2001] para 805

¹⁰²⁰*Ibid* para 804

¹⁰²¹*Prosecutor v Blaskic*, ICTY IT-95-14-T, Judgment [3 March 2000] para 762

¹⁰²²S. Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3 *Penn State Journal of Law and International Affairs* 30

¹⁰²³*Prosecutor v. Delalić et al.*, IT-96-21-A, A. Ch., ICTY Judgment [20 February 2001] para 806

¹⁰²⁴R. Mulgrew, ‘Towards the Development of the International Penal System’ (Cambridge: Cambridge University Press 2013) 215

primary goals of criminal justice.¹⁰²⁵ Damaska, for instance, has argued that '[s]ome of the presently accepted objectives of international criminal courts should be altered - that is, scaled down, or even abandoned, and left to other mechanisms of public response to massive human rights violations.'¹⁰²⁶ This situation (multiplicity of aims) '[h]as several disquieting consequences, one of which is that the performance of international criminal courts cannot be assessed reliably.'¹⁰²⁷ For Shany, '[t]he general nature of some abstract goals renders them imprecise and leaves considerable interpretive discretion as to translating such goals into concrete judicial policies and operative or intermediate judicial goals.'¹⁰²⁸ Dana argues that 'reconciliation', for instance, should be abandoned as a rationale for sentencing purposes.¹⁰²⁹ In the words of Dana,

'...when international judges give undue weight to utilitarian aspirations in their sentencing judgments, they distort and diminish the culpability and just distribution of punishment among the various actors' responsibility for atrocity crimes in a situation. Moreover, the goals they seek to achieve with their sentencing reductions, like reconciliation, are beyond the immediate capacity of criminal courts. International prosecutions should assume a more modest posture regarding its capabilities, lest it damages its core responsibility of punishing perpetrators of atrocities crimes.'¹⁰³⁰

Successful reconciliation, he points out, requires the mobilisation of diverse elements of social and legal order.¹⁰³¹ The very nature of mass atrocities, Dana notes, problematises achieving grand ambitions like reconciliation because the widespread participation in atrocity crimes creates deep complicity that is not easily overcome through the narrow lens of judicially constructed narratives via international criminal justice mechanisms.¹⁰³² Dana concludes that:

¹⁰²⁵ C. Stahn, 'Between 'Faith' and 'Facts': By What Standards Should we Assess International Criminal Justice?' (2012) 25 *Leiden Journal of International Law* 251, 259

¹⁰²⁶ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 330

¹⁰²⁷ *Ibid*

¹⁰²⁸ Y. Shany, 'Assessing the effectiveness of international courts: a goal-based approach' (2012) 106 *American Journal of International Law* 255

¹⁰²⁹ S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?', (2014) 3 *Penn State Journal of Law and International Affairs* 30, 55

¹⁰³⁰ D. Koller, 'The Faith of the International Criminal Lawyer' (2008) 40 *New York University Journal of International Law and Policy* 1019, 112

¹⁰³¹ S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?', (2014) 3 *Penn State Journal of Law and International Affairs* 30, 55

¹⁰³² *Ibid*

Ambitious social engineering in the wake of mass atrocities is wisely left to other social processes and institutions. Legalism has its limits, and those limits should be respected. Its formality, rigidity, and obligation to protect the rights of parties make it a limited agent of social change. These meta-judicial goals require a matrix of social and spiritual institutions working together to rebuild the fabric of society post-atrocity. When other institutions and agents of society share this responsibility, international criminal justice can play a modest but important role.¹⁰³³

Koller suggests, for instance, that ‘a civil reparations mechanism could provide financial remedies to victims, a fact-finding commission could establish a historical record, or a truth and reconciliation commission could achieve both goals.’¹⁰³⁴ The ICC established a Trust Fund for Victims (TFV).¹⁰³⁵ The court may award reparations to be effected through the TFV. The governing legal texts prescribe that Fund restrict its projects to the victims of crimes that fall within the ICC’s jurisdiction. The Fund should direct its activities to situations in which the prosecutor has issued indictments. Rule 85 of the ICC Rules of Procedure and Evidence states:

(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.¹⁰³⁶

As an objective, compensating victims does not seem too extraneous to the project of justice. Restitution and compensation for losses have been hallmarks of both criminal and civil law. The court orders forfeitures and fines from convicted persons. The basic right to reparation is recognised by international law through the International Covenant for Civil and Political Rights.¹⁰³⁷ However, convicted persons may not hold sufficient funds and assets to compensate victims. Further, historically, funding for international criminal courts has been inadequate. The TFV has very limited resources, far too insufficient to provide anything more than nominal sums to individual victims, considering the often large numbers of victims of mass crime.¹⁰³⁸ The TFV sources donations. It has been suggested that collective reparations, such as

¹⁰³³Ibid

¹⁰³⁴D. Koller, ‘The Faith of the International Criminal Lawyer’ (2008) 40 *New York University Journal of International Law and Policy* 1019, 1031

¹⁰³⁵ See Rome Statute, Art. 79

¹⁰³⁶ 2002 Rules of Procedure and Evidence, ICC-ASP/1/3, Rule 85.

¹⁰³⁷ See International Covenant for Civil and Political Rights (ICCPR) Art. 2 (3)

¹⁰³⁸C. Van den Wyngaert, ‘Victims Before International Criminal Court: Some Views and Concerns of an ICC Trial Judge’ (2012) 44 *Case Western. Reserve Journal of International Law* 475, 491

the construction of schools or hospitals, may be more viable than paying individual victims for the harm they suffered.¹⁰³⁹ The reparations project does appear to creep out of the bounds of the court's core functions. But significantly, reparations have a symbolic associational value; recipient victims are imparted with a sense of belonging to a broader normative community. The mandate for compensations falls under the TFV as a separate body, with its own board of directors.¹⁰⁴⁰

However, objectives such as 'establishing peace' may be illusory and burdensome. Instead, the UN Security Council 'can specifically contemplate and take actions to restore or maintain peace and security, whereas a court or tribunal—bound to follow its limited legal mandate—can only have ancillary and unpredictable effects on peace and security.'¹⁰⁴¹ Attempting to combine these different functions with a criminal trial could interfere with the conduct of the trial.¹⁰⁴² In DRC, there have been peace agreements of 2002, negotiated in Sun City, South Africa, and the agreement of 2008, concluded in Goma, Eastern Congo, the Ituri Agreements of 2006 and the Nairobi Communiqué of 2007.¹⁰⁴³ The UN is also conducting peace efforts in the DRC through MONUSCO.¹⁰⁴⁴ Nothing so far suggests a direct correlation between *Lubanga* and peace in the DRC. The objective of ending impunity does not seem to carry sufficient weight. The leader of the M23 rebels warned in November 2014 of the possibility of renewed conflict in the DRC. The rebels' 18-month war had only been brought the year before by government troops and UN peacekeepers.¹⁰⁴⁵ The ICC needs to set modest goals for its work. An 'overly ambitious, or otherwise inappropriate, selection of goals generates disparities between declaration and achievement, and uncertainty about their relative importance produces

¹⁰³⁹C. Van den Wyngaert, 'Victims Before International Criminal Court: Some Views and Concerns of an ICC Trial Judge' (2012) 44 *Case Western. Reserve Journal of International Law* 475, 491

¹⁰⁴⁰ See 'Trust Fund for Victims' <http://www.trustfundforvictims.org/about-us>

¹⁰⁴¹D. Koller, 'The Faith of the International Criminal Lawyer' (2008) 40 *New York University Journal of International Law and Policy* 1019, 1031

¹⁰⁴²Ibid

¹⁰⁴³See L. Davis and P. Hayner 'Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC' International Center for Transitional Justice, March 2009

¹⁰⁴⁴See 'DR Congo peace efforts, regional framework at crucial juncture, UN officials stress', UN News Centre 13 January 2014 <http://www.un.org/apps/news/story.asp?NewsID=46918#.VIO6-61ybIU> > (last accessed 7 December 2014)

¹⁰⁴⁵See 'DRC's M23 rebels warn of new conflict risk' News24, 8 November 2014 <http://www.news24.com/Africa/News/DRCs-M23-rebels-warn-of-new-conflict-risk-20141108> > (last accessed 7 December 2014)

disorientation.¹⁰⁴⁶ As Damaska aptly concludes: ‘Disillusionment stemming from unfulfilled expectations and inconsistencies that spring from disorientation are harmful to any system of justice, and especially to an evolving one whose legitimacy in the communities affected by international crime is still as delicate as the wings of a butterfly.’¹⁰⁴⁷

7.5 Conclusion

The ICC appears to predicate its work primarily on principles of retribution and deterrence. Studies in DRC suggest that these were also the expectations of the affected community in the case of *Lubanga*. However, the prosecution of a few individuals for a mass crime like child soldiering barely serves these twin objectives. In general, critics of retributive justifications for international trials note the inability of international courts to prosecute all or even most of the crimes committed in a given situation and the difficulty of inflicting retributively proportionate punishments for such crimes as genocide.¹⁰⁴⁸ *Lubanga* was one of many perpetrators of the mass crimes, unaccounted for. Retribution ‘assumes that prosecution is always a necessary response to wrongdoing and deterrence would be undermined whenever an offender walks free.’¹⁰⁴⁹ Further, it is inevitable that dissonance arises on the quantum of sentence. Some find sentences either lenient or harsh. On deterrence, the mass nature of the crimes and passions associated with them make this a difficult objective to achieve. Also, proof of a counter-factual – that but for the actions of international courts more crimes would have occurred – is elusive.¹⁰⁵⁰ However, it is equally difficult to demonstrate that deterrence does not work; people rarely admit that they were considering committing crimes but were deterred by the threat of punishment.¹⁰⁵¹ In the absence of conclusive proof on either side, therefore, it is reasonable to continue to invoke deterrence as at least a partial justification for

¹⁰⁴⁶ M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 365

¹⁰⁴⁷ *Ibid* 365

¹⁰⁴⁸ M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’) in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012)

¹⁰⁴⁹ M. deGuzman, ‘Choosing to prosecute: Expressive selection at the International Criminal Court’ (2012) *Michigan Journal of International Law* 265, 316

¹⁰⁵⁰ *Ibid* 26

¹⁰⁵¹ *Ibid* 26

punishment.¹⁰⁵² In the DRC, some claim that *Lubanga* resulted in the decline in hostilities. It is, however, difficult to state with certainty that the lull was occasioned by his prosecution. Further, the persistent hostilities and recruitment of child soldiers in the DRC conflict with pronouncements of deterrence. Retribution and deterrence are not the only objectives. International criminal justice has arrogated itself manifold goals. As observed in this chapter, however, these other objectives of international criminal justice tend to go beyond the core functions of courts. Apart from the costs associated with this idealism, socio-political functions may be left to other institutions.

¹⁰⁵² Ibid 26

CHAPTER EIGHT

PROSECUTORIAL SELECTION AND THEMATIC PROSECUTIONS

Introduction

A plausible theory of international criminal justice would recognise the unique features of mass crime and limitations of the ICC. Because of the history of under-criminalisation and under-judicialisation of child soldiering, it is unsurprising that the ICC's groundbreaking trial and punishment of Lubanga elicited expectations of the court's retributive and deterrent effect. However, it is completely unrealistic that the ICC can achieve these ambitious objectives. Because of the 'practical/institutional' constraints, the ICC is largely a symbolic court. Because 'no cluster of effective supranational institutions yet exists to enforce international criminal law, the effective operation of international criminal courts must depend on the unstable reserve of political will, especially in world capitals.'¹⁰⁵³ The overall effect of the context effects and situational limitations is that the ICC can only prosecute a handful of defendants. The focus on high-level offenders, exemption of state actors, the lack of resources and an enforcement mechanism means the ICC can prosecute a small number of defendants, rendering retributive and deterrence objectives tenuous. The crimes that form the subject of prosecutions under ICL 'dwarf ordinary conceptions of wrongdoing and punishment.'¹⁰⁵⁴ The perpetrator of international crimes, like Lubanga, is considered a different type of perpetrator compared with the perpetrator of ordinary crime. While criminal law, distinguishes extraordinary crimes against the world community and ordinary crimes against the local community, ICL nevertheless is modelled, philosophically, on national criminal law systems which have been developed to deal with ordinary, common crime.¹⁰⁵⁵

¹⁰⁵³ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 330

¹⁰⁵⁴ A. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', (2001) 87 *Virginia Law Review* 415, 418

¹⁰⁵⁵ See review of M. Drumbl, *Atrocity, Punishment, and International Law*, (New York: Cambridge University Press 2007); A. Smeulers 'Punishing the Enemies of All Mankind' (2008) 21 *Leiden Journal of International Law* 971

A deterrence-based framework for selecting situations and cases for prosecution ‘would be at least highly impracticable, if not impossible, to develop.’¹⁰⁵⁶ The inconsistencies in sentencing make retribution less plausible as a rationale for international penalty. As such, there seems to be a lack of coherent rationalisations for prosecution and punishment of international criminals. The main objective of this thesis is to respond to this paucity. As Dana points out about punishment:

‘Under-theorization and the absence of scholarly examination of the sentencing jurisprudence of international criminal courts has left us with an *ad hoc* approach to sentencing for genocide, crimes against humanity, and war crimes. In the absence of a guiding theory, the wide discretion given to international judges in sentencing has failed to produce a rational and consistent international sentencing practice.’¹⁰⁵⁷

International criminal justice lacks a credible theory suitable for its own context. Damaska notes that one of the weaknesses of international courts springs from the array of goals international criminal courts have set for themselves.¹⁰⁵⁸ The miscellany of goals that international criminal justice has imposed upon itself transcends core functions of the court, are not viable and expensive. As has been illustrated in the previous chapter, retribution and deterrence in *Lubanga* do not seem viable objectives. The other ‘idealist/goal-related’ problem is that the objectives are numerous and extend beyond the core functions of the court. But this ‘weakness’ of the ICC can be reduced, or eliminated...¹⁰⁵⁹ The ICC ought to have a modest, realistic and imaginative rationale upon which it premises its work. The selective practices can achieve modest but important objectives. This thesis argues that the most plausible justification for the prosecution and punishment of Lubanga is the expressive function of law (expressivism). The basic proposition of expressivism is that the principal selection criteria and animus for prosecution is to disseminate global norms and identify construction. The ICC does not have to prosecute multitudes to achieve this objective. A handful of cases will suffice. The objective is to reinforce global norms. The key to expressivist discourse is the selection of cases.

¹⁰⁵⁶ M. deGuzman, ‘Choosing to prosecute: Expressive selection at the International Criminal Court’ (2012) 33 *Michigan Journal of International Law* 265, 309

¹⁰⁵⁷ Dana, S ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’, (2014) 3 *Penn State Journal of Law and International Affairs* 30, 110

¹⁰⁵⁸ M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 330

¹⁰⁵⁹ *Ibid*

The cases that prosecutors select determine themes and narratives for crimes to be prosecuted. This chapter discusses the selection criteria of the ICC. One of the selection precepts proposed in recent literature rests on choosing cases around particular themes of criminality in order to reinforce norms. Such prioritisation would derive from the status of the international crimes such as historical under-enforcement. This chapter discusses ‘thematic prosecutions’ as the expressive function of law. As has already been argued, child soldiering has historically been under-recognised. The assumption of thematic prosecutions is that the selection for prosecution of child militarisation crimes would shore up the previously under-recognised norms against the use of children in armed conflict. Such selection would be motivated by a cosmopolitan sense of duty and ethos of equality for all, not least the vulnerable. This chapter is organised as follows. The first section discusses the discretion of the prosecutor in the selection of situations and cases. It examines the factors that influence the prosecutor’s selection decisions. The second discusses theoretical perspectives on thematic penology. A new body of scholarship has emerged agitating for prioritisation of certain crimes for prosecution at international courts or specifically, the ICC. The third part places child soldiering within the context of ‘thematic prosecutions.’ The sub-sections outline justificatory grounds for a thematic approach to child soldiering: historical under-enforcement of the norm, gravity and the discriminatory nature of the crime. The last part attempts to place thematic prosecutions within the purview of ‘cosmopolitan justice.’

8.1 Prosecutorial selection of ‘situations’ and ‘cases’

Prosecutorial discretion has been a feature of international criminal justice since Nuremberg.¹⁰⁶⁰ However, the prosecutors were not ‘independent’ ‘but rather representatives of their own governments, and their role, at least in part, was surely to ensure that the interests of their respective states were protected.’¹⁰⁶¹ The ‘conception of an independent ICC prosecutor provoked bitter debate during the negotiation of the Rome Statute, with the United States demanding that the prosecutorial function be dependent always upon the UN Security Council’s decision

¹⁰⁶⁰W. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 *Journal of International Criminal Justice* 731

¹⁰⁶¹ Ibid 732

to trigger investigation of any 'situation' of alleged crimes.¹⁰⁶²The 'defeat of that proposal in favour of a more independent prosecutor may have ended one debate, but it has failed to resolve the more profound question of how the ICC Prosecutor should and will employ the authority afforded by the Rome Statute.'¹⁰⁶³

Article 25 of Rome Statute states the Court shall have jurisdiction over natural persons pursuant to this Statute. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally. The prosecutor has to make selection decisions, firstly, because of limited resources and secondly, based on jurisdictional and admissibility criteria. While not entirely unrestrained, the ICC Prosecutor remains the most crucial arbiter of where, and against whom, the ICC directs its efforts.¹⁰⁶⁴The ICC Prosecutor must exercise prosecutorial selection of 'situations' and 'cases' due to his/her limited capacity.¹⁰⁶⁵The concepts of 'situations' and 'cases' are not defined in the Rome Statute. Former ICC Prosecutor Moreno-Ocampo defined a 'case' as comprising one or more alleged suspects and one or more alleged crimes within the Court's jurisdiction, while 'situation' is a broader concept referring to a territorial and temporal context in which such crimes have allegedly been committed.¹⁰⁶⁶ For example, the DRC constitutes a 'situation' and Lubanga is a 'case.'

The ICC prosecutor can proceed from, as noted earlier, self-referrals; cases referred by the UN Security Council and cases of his own instigation. The inclusion of prosecutorial discretion within the Statute of the ICC was intended to bring a degree of independence and pragmatism to the world's first permanent international

¹⁰⁶² A. Greenwalt 'Justice 'Without Politics? Prosecutorial Discretion and the International Criminal Court' (2007) 39 *New York Journal of International Law and Politics* 583, 585

¹⁰⁶³ Ibid

¹⁰⁶⁴ Ibid

¹⁰⁶⁵ I. Stegmiller, 'The Gravity Threshold under the ICC Statute: Gravity Back and Forth in *Lubanga* and *Ntaganda*' (2009) 9 *International Criminal Law Review* 547

¹⁰⁶⁶ See ICC-OTP 'Draft for Discussion: Criteria for Selection of Situations and Cases' (1 June 2006). <[https://coursewebs.law.columbia.edu/coursewebs/cw_12F_L9165_001.nsf/Of66a77852c3921f852571c100169cb9/3B271E8B408FB8DA85257A96006CBDFF/\\$FILE/ICC+OTP+-+Interest+of+Justice.pdf?OpenElement](https://coursewebs.law.columbia.edu/coursewebs/cw_12F_L9165_001.nsf/Of66a77852c3921f852571c100169cb9/3B271E8B408FB8DA85257A96006CBDFF/$FILE/ICC+OTP+-+Interest+of+Justice.pdf?OpenElement)> (accessed 10 April 2013).

criminal court.¹⁰⁶⁷ By providing the Prosecutor with the power to initiate criminal proceedings *proprio motu*, advocates of a more equitable and uniformly applied international legal system believed that the ICC could begin to distance itself from the influences of power politics that pervaded the Nuremberg and Tokyo military tribunals.¹⁰⁶⁸ In Article 53, sections 1 and 2 establish the discretion of the prosecutor to decide whether or not he will proceed with a case in various circumstances. Section 2 provides that ‘if the prosecutor concludes that there is not sufficient basis for a prosecution ... ‘he shall inform the Security Council in a case under Article 13, subparagraph (b) of his or her conclusion and the reasons for the conclusion.’ Moreover, section 3 (a) provides that ‘at the request of the Security Council,’ concerning a referral under Article 13(b), ‘the Pre-Trial Chamber may review a decision of the prosecutor not to proceed and may request the prosecutor to reconsider that decision.’ He will also be guided by Article 17 on whether a state is unwilling or unable to prosecute. Before he proceeds, the prosecutor has to make a number of evaluations. I discuss these below.

8.1.1 Jurisdiction and Admissibility

The ICC may exercise jurisdiction over genocide, crimes against humanity and war crimes. These crimes are defined in detail in the Rome Statute. In addition, the *ratione materiae* is supplemented by the text of the ‘Elements of Crimes’ which provides a breakdown of the elements of each crime. The *ratione personae* includes individuals directly responsible for committing the crimes as well as others who may be liable for the crimes, for example by aiding, abetting or otherwise assisting in the commission of a crime. The latter group also includes military commanders or other superiors whose responsibility is defined in the Statute. The Court may only exercise jurisdiction if:

- The accused is a national of a State Party or a State otherwise accepting the jurisdiction of the Court;
- The crime took place on the territory of a State Party or a State otherwise accepting the jurisdiction of the Court; or

¹⁰⁶⁷M. Brubacher ‘Prosecutorial Discretion within the International Criminal Court’ (2004) 2 *Journal of International Criminal Justice* 71, 71

¹⁰⁶⁸*Ibid*

- The UN Security Council has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.

The ICC's *ratione temporis* is limited to events taking place since 1 July 2002. In addition, if a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that State. Such a State may nonetheless accept the jurisdiction of the Court for the period before the Statute's entry into force. However, in no case can the Court exercise jurisdiction over events before 1 July 2002.

Even where the Court has jurisdiction, it will not necessarily act. The principle of 'complementarity' provides that certain cases will be inadmissible even though the Court has jurisdiction. In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction. However, a case may be admissible if the investigating or prosecuting State is unwilling or unable to genuinely to carry out the investigation or prosecution. The OTP has relied largely on two strategies to justify selection decisions: (1) the gravity of the crimes selected; and (2) and portraying decisions as reached impartially, objectively, independently, and transparently.¹⁰⁶⁹ In general, the prosecutorial determination at the ICC hinges primarily on whether a given situation within which 'the most serious crimes of international concern' have been allegedly committed is of 'sufficient gravity to justify further action by the Court', and whether or not its investigation would serve the 'interests of justice.' Article 53(1) (a)-(c) of the Statute provides that, in order to determine whether there is a reasonable basis to proceed with an investigation into the situation the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the 'interests of justice.'

¹⁰⁶⁹See Office of the Prosecutor [OTP], ICC, Draft Policy Paper on Preliminary Examinations 6–8, 13 (2010) <http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP-Draftpolicypaperonpreliminary_examinations04101.pdf> (accessed 18 April 2013).

8.1.2 The Concept of ‘Gravity’

The concept of gravity or seriousness resides at the epicentre of the legal regime of the ICC.¹⁰⁷⁰ All crimes brought before the ICC are, of course, of a ‘grave’ nature. The Statute implies that genocide, crimes against humanity, war crimes, and aggression are ‘the most serious crimes of concern to the international community.’¹⁰⁷¹ However, the court has to determine the threshold for gravity. Article 17(1) (d) of the Rome Statute provides that the Court shall determine that a case is inadmissible where the case is not of sufficient gravity to justify further action by the Court. The OTP applies the concept of gravity twice, first with regard to ‘situations’, and secondly, once inside the situation.¹⁰⁷² However, like a number of concepts in the Rome Statute, ‘gravity’ is not defined. The OTP, according to its own guidelines, assesses this criterion having regard to both quantitative and qualitative considerations, including: (a) the scale of the crimes number of victims, the extent of the damage), (b) nature of the crimes (specific elements of each offence such as killings, rapes, and other crimes involving sexual or gender violence and crimes committed against children, or the imposition of conditions of life on a community calculated to bring about its destruction), (c) manner of commission of the crimes (means employed to execute the crime, elements of particular cruelty, systematic or organized nature of the crimes resulting from the abuse of power or official capacity etc.) and (d) their impact (consequences on the local or international community, including the long term social, economic and environmental damage).¹⁰⁷³ Gravity is invoked ‘not so much as a justification for the selection of cases on which to proceed as a justification

¹⁰⁷⁰ M deGuzman ‘Gravity and the Legitimacy of the International Criminal Court’ (2009) 32 *Fordham International Law Journal* 1400

¹⁰⁷¹ Rome Statute Preamble

¹⁰⁷² See *Prosecutor v Lubanga Dyilo*, ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into 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 CICC-01/04-01/06-8-US-Corr., (10 February 2006), 44. ‘The gravity threshold provided for under Article 17(1)(d) of the Statute must be applied at two different stages: (i) at the stage of initiation of the investigation of a situation, the relevant situation must meet such a gravity threshold and (ii) once a case arises from the investigation of a situation, it must also meet the gravity threshold provided within that provision.’ See also ‘OTP Report on the activities performed during the first three years (June 2003-June 2006)’ The Hague, 12 September 2006 <http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf> (accessed 20 April 2013), 8.

¹⁰⁷³ See ‘Regulations of the Office of the Prosecutor’ (ICC-BD/05-01-09), Regulation 29 para 2; Draft Policy Paper, 13, paras 67, 68 and 70.

for refusing to undertake other cases.¹⁰⁷⁴ The Prosecutor decided not to proceed with investigations in Iraq, on the grounds that there were more victims in Uganda and the DRC. As Schabas notes, the Prosecutor did not, however, compare the situation in Iraq or for that matter the situations in the central African countries, with those elsewhere in the 106 states over which he has territorial jurisdiction.¹⁰⁷⁵ These approaches have spawned accusations of bias.

In deciding the admissibility of the *Lubanga* and *Ntaganda* cases, the judges of the Pre-Trial Chamber held that the gravity threshold requires widespread or systematic crimes and high-level defendants with the greatest responsibility for those crimes.¹⁰⁷⁶ Therefore, the guidelines do not distinguish between state and non-state actor but only determines the scale of offences, ranking of offenders and level of responsibility. The concept of gravity and jurisprudence do not render distinctions in the treatment of state and non-state actors. In assessing gravity in *Lubanga*, the chamber noted that the role played by ‘State entities, organisations or armed groups in the overall commission of crimes within the jurisdiction of the Court in the relevant situation (those suspected of being most responsible)’¹⁰⁷⁷ should be considered. The Pre-Trial Chamber also approved the Prosecutor’s Policy Paper statement of 2003 that as a general rule the OTP should focus its investigative and prosecutorial resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes.¹⁰⁷⁸ However, a noticeable pattern, as discussed previously regarding self-referrals, is that the prosecutor has focused on rebels or non-state actors.

¹⁰⁷⁴W. Schabas, ‘Prosecutorial Discretion v. Judicial Activism at the International Criminal Court’ (2008) 6 *Journal of International Criminal Justice* 731

¹⁰⁷⁵Ibid 740

¹⁰⁷⁶ *Prosecutor v Lubanga* Case No ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr Thomas Lubanga Dyilo, 46, 50 (24 February 2006) See also; *Prosecutor v Lubanga*, Decision on the Prosecutor’s application for warrant of arrest under Article 58 Case No ICC-01/04-01/06-8-US-Corr; [10 February 2006] *Prosecutor v Ntaganda*, Annex II ICC-01/04-520, [21 July 2008] (ICC-01-04-02-06-20-Anx2) para 52.

¹⁰⁷⁷ *Prosecutor v Lubanga*, Decision on the Prosecutor’s application for warrant of arrest under Article 58 [10 February 2006] (ICC-01/04-01/06-8-US-Corr; See also *Prosecutor v Ntaganda*, Annex II ICC-01/04-520 [21 July 2008] (ICC-01-04-02-06-20-Anx2) para 52

¹⁰⁷⁸ *Prosecutor v Lubanga* Decision on the Prosecutor’s application for warrant of arrest under Article 58 (10 February 2006) para 61; See ‘Paper on some policy issues before the Office of the Prosecutor’ ICC-OTP (September 2003) 7

According to the conclusion of the Pre-Trial Chamber in *Lubanga*, the ‘gravity threshold is a key tool provided by the drafters to maximise the Court’s deterrent effect.’¹⁰⁷⁹ While the relationship remains debatable, ‘gravity’ has also been used to assess or match the ‘degree of retribution’ (proportionality) to be inflicted on an offender. ‘Gravity’ as a tool to deter widespread and systemic crimes and proportionate punishment naturally presumes open-minded and impartial investigation. In other words, such a fair approach would determine the gravity of, and degree of punishment for, crimes committed by both state and non-state actors during conflict. The exemption of state actors brings into question fair assessment of gravity.

8.1.3 ‘Interests of Justice’

While international criminal law has, among other objectives, the infliction retribution and deterrence, penal processes also seek to serve the ‘interests of justice’. The phrase ‘in the interests of justice’ potentially has a broad scope. It includes the right to a fair trial, legal representation, the interests of victims and so on. The phrase appears in several places in the ICC Statute and Rules of Procedure and Evidence¹⁰⁸⁰ but it is never defined. Article 53(1) of the Statute addresses the initiation of an investigation. If the Prosecutor is satisfied that there is a reasonable basis to believe that the case is within the jurisdiction of the Court and is or would be admissible under Article 17 of the Statute, he or she must determine whether, taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the ‘interests of justice.’ Article 53(2) addresses the initiation of a prosecution. It indicates that, upon investigation, the Prosecutor may conclude that there is not a sufficient basis to proceed because it ‘is not in the ‘interests of justice’, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime.’

¹⁰⁷⁹ *Prosecutor v Lubanga*, ICC-01/04-01/06-8-US-Corr [10 February 2006] para 48;

¹⁰⁸⁰ See for example Articles 55[2](c), 65[4] and 67[1](d), as well as rules 69, 73, 82, 100, 136 and 185. These provisions tend to deal with matters closely related to the rights of the accused or of victims in the course of investigations or trial. They may provide some guidance for the way in which the phrase should be understood in the context of Article 53.

In the absence of definition, it has been argued Article 53 practically gives to the Prosecutor the broadest possible scope of political discretion in order to decide whether or not to proceed with a prosecution.¹⁰⁸¹ The OTP attempts to elucidate the premises of the test in its Policy Paper on the Interest of Justice.¹⁰⁸² The ‘interests of justice’ tests, according to the paper, need only be considered where positive determinations have been made on both jurisdiction and admissibility. While the other two tests (jurisdiction and admissibility) are positive requirements that *must* be satisfied, the interests of justice’ is not. According to the OTP, like gravity, the ‘interests of justice’ test is a potential countervailing consideration that might produce a reason *not* to proceed even where the first two are satisfied. This difference, according to the OTP, is important: the Prosecutor is not required to establish that an investigation or prosecution is in the interests of justice. The interpretation and application of the ‘interests of justice’ test may lie in the first instance with the Prosecutor, but is subject to review and judicial determination by the Pre Trial Chamber.¹⁰⁸³

Taking into consideration the ordinary meaning of the terms in their context, as well as the object and purpose of the Rome Statute, the OTP points out that only in exceptional circumstances will the Prosecutor of the ICC conclude that an investigation or a prosecution may not serve the ‘interests of justice.’ According to the OTP, the investigations conducted required consideration of the question of the ‘interests of justice’ prior to proceeding for an application for arrest warrants or summonses.¹⁰⁸⁴ As already pointed out, in order for a case to be admissible, not only do the crimes have to be within the jurisdiction of the Court, but they must also meet the higher threshold of being of ‘sufficient gravity to justify further action’ of the Court in terms of Article 17(1)(d). In determining whether the situation is of sufficient gravity, the Office considers the scale of the crimes, the nature of the crimes, the manner of their commission and their impact. Before considering whether there are substantial reasons to believe that it is not in the ‘interests of justice’ to initiate an investigation, the Prosecutor will necessarily have already come

¹⁰⁸¹H. Olasolo, ‘The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-Judicial or a Political Body’ (2003) 3 *International Criminal Law Review*87.

¹⁰⁸² See OTP-ICC ‘Policy Paper on the Interests of Justice’ (1 September 2007)

¹⁰⁸³ *Ibid*

¹⁰⁸⁴ *Ibid*

to a positive view on admissibility, including that the case is of sufficient gravity to justify further action.¹⁰⁸⁵

8.1.4 Interests of victims

As pointed out above, Article 53 (1) obligates the Prosecutor to take into account the interests of victims before starting an investigation or prosecution. It requires the prosecutor, in deciding whether to initiate an investigation, to consider, among other things, whether taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.¹⁰⁸⁶ The OTP considers that the ‘interests of victims’ includes the victims’ interests in seeing justice done, but also includes other essential interests such as their protection, as indicated by the Rome Statute.¹⁰⁸⁷

One of the great innovations of the Rome Statute and the Rules of Evidence and Procedure is the important role accorded to victims. Until the establishment of the ICC, international criminal courts and tribunals established since Nuremberg had given only sparse consideration to victims’ views and concerns and limited space for their active engagement with such institutions beyond the role of prosecution witness.¹⁰⁸⁸ For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and concerns to the Court and participate in all stages of the proceedings before the Court.¹⁰⁸⁹ The scheme is designed, *inter alia*, to recognise victims’ suffering, let them ‘experience and perceive justice, thus contributing to their healing process and the rebuilding of peaceful societies’¹⁰⁹⁰ As already noted, for the people who suffer most from crimes under ICC jurisdiction, the Rome Statute created the Trust Fund for Victims, having

¹⁰⁸⁵ Ibid.

¹⁰⁸⁶ Rome Statute Art. 53 1 (c)

¹⁰⁸⁷ See ‘ICC Policy Paper on the Interests of Justice’ (September 2007) <www.icc-cpi.int/NR/rdonlyres/.../ICCOTPIterestsOfJustice.pdf> (accessed 20 April 2013)

¹⁰⁸⁸ C. Fertsman, ‘The Participation of Victims in International Criminal Court Proceedings A Review of the Practice and Consideration of Options for the Future’ Redress Trust, October 2012

¹⁰⁸⁹ Rome Statute Art. 68 (3)

¹⁰⁹⁰ See ICC ‘Report of the Court on the Revised strategy in relation to victims:

Past, present and future’ ICC-ASP/11/40 Assembly of States Parties Eleventh session The Hague, 14-22 November 2012, 13.

two mandates: (i) to implement Court-ordered reparations; and (ii) to provide physical and psychosocial rehabilitation or material support to victims of crimes within the jurisdiction of the ICC.¹⁰⁹¹ Reparations may be granted to direct and indirect victims, including the family members of direct victims.

Compared to domestic courts, the discretionary powers of an international court prosecutor have been controversial.¹⁰⁹² Given the multitudes of cases national courts adjudicate, only very exceptionally will a selection decision spark challenges to the legitimacy of the entire criminal justice system.¹⁰⁹³ As Greenwalt noted, no aspect of the ICC institutional architecture provoked more controversy than ‘the provision for a standing independent prosecutor authorized to initiate investigations and indictments subject primarily to judicial rather than political constraints.’¹⁰⁹⁴ Every choice has made has been criticised, for instance, that Lubanga, was not senior enough and child soldiering was not serious enough; the Court should have investigated British soldiers for war crimes committed in Iraq; and the Court’s focus on situations in Africa is inappropriate.¹⁰⁹⁵ The former prosecutor Luis Moreno-Ocampo argued that his decisions were apolitical—that he is simply implementing the provisions of the Rome Statute. As noted, the Statute does not however clear selection criteria and goals. This lack of clearly defined goals and priorities poses a serious challenge to the ICC’s legitimacy.¹⁰⁹⁶ The selectivity imperils ICC’s goals of retribution and deterrence. Amann notes that ‘because of the selectivity and randomness, the paucity of punishment not only narrows the breadth of specific deterrence, but also diminishes general deterrence by signalling a risk of punishment too low to dissuade a rational wrongdoer.’¹⁰⁹⁷ Of the penological goals, Drumbl points out that expressivism is a tertiary goal that emerges occasionally in the international jurisprudence’ but it ‘may be a more plausible justification for the

¹⁰⁹¹Rome Statute Art. 79

¹⁰⁹² M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265, 267

¹⁰⁹³ Ibid

¹⁰⁹⁴ A. Greenwalt, ‘Justice ‘Without Politics? Prosecutorial Discretion and the International Criminal Court’ (2007) 39 *New York Journal of International Law and Politics* 583, 585

¹⁰⁹⁵ M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265, 267

¹⁰⁹⁶ Ibid

¹⁰⁹⁷D. Amann ‘Group Mentality, Expressivism, and Genocide’ (2002) 2 *International Criminal Law Review* 93, 121-124

punishment of *extraordinary* international criminals.¹⁰⁹⁸ For Drumbl just like deterrence and retribution, however, the expressive value of law and punishment is also weakened by selectivity and indeterminacy in the operationalisation of law and punishment, as well as the political contingency of the entire enterprise.¹⁰⁹⁹ DeGuzman argues that ‘[T]he ICC’s core selectivity problem is that the Court lacks sufficiently clear goals and priorities to justify its decisions.’¹¹⁰⁰ She, however, contends that purposive selection of cases can have expressive value. DeGuzman argues that the classical rationales for criminal law—deterrence and retribution—although valid for ICC’s work, do not provide an adequate basis for selection decisions.¹¹⁰¹ The ICC’s meagre resources mean that it can have only a limited impact in each of these areas.¹¹⁰² More recent theories of restorative justice, which urge a greater focus on rebuilding relationships, also provide a partial justification for the work of the ICC, but do not provide an adequate basis for the Court’s selection decisions.¹¹⁰³ I have already argued in the previous chapters that extra-judicial socio-political objectives would better be undertaken by other institutions. The Court simply lacks the resources to make any significant progress toward such locally oriented goals.¹¹⁰⁴ DeGuzman asserts that the Court’s decisions about which situations and cases to select for prosecution should aim primarily to maximize the Court’s expressive impact.¹¹⁰⁵ While the ICC can make only a very small impact in terms of such goals as retribution and deterrence, the Court can effectively promote global norms with a limited number of illustrative prosecutions.¹¹⁰⁶

To a large extent, DeGuzman provides the theoretical framework for this study. This thesis argues that the most plausible justification for the prosecution of Lubanga is expressivism. Expressivism has also been under-explored, particularly in ICL. Recently, scholars have begun to explore expressivism as a primary justification for

¹⁰⁹⁸ Drumbl, [Draft] *Atrocity, Punishment and International Law*] 11

¹⁰⁹⁹ M. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’, (2005) 99 *Northwestern University Law Review* 539, 593

¹¹⁰⁰ M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265, 267

¹¹⁰¹ *Ibid* 269

¹¹⁰² *Ibid* 270

¹¹⁰³ *Ibid* 269-70

¹¹⁰⁴ *Ibid* 270

¹¹⁰⁵ *Ibid*

¹¹⁰⁶ *Ibid* 312

international prosecution and penalty.¹¹⁰⁷ Authors have since generated a body of scholarship calling special attention to law's expressive dimension and social meaning.¹¹⁰⁸ Expressive theories posit that law, like other forms of expression, manifests states of mind, including beliefs, attitudes, and intentions.¹¹⁰⁹ Law therefore, has 'social meaning.'¹¹¹⁰ Identification of social meaning thus plays a key role in expressivist writings.¹¹¹¹ Expressivism and constructivism have affinities. What is crucial to the constructivist framework is the nexus between norms, law and social meaning.¹¹¹² Prosecutions can provide this nexus. An expressive approach to ICL suggests that a primary purpose of international criminal trials is to express global norms.¹¹¹³ This proposition is not just ideologically plausible but based on a consideration of the court's situational constraints (practical/institutional) discussed earlier. The propagation of norms is what the court can realistically achieve. As Cote notes, '[i]nternational criminal justice remains largely symbolic and has limited

¹¹⁰⁷J. Feinberg 'The Expressive Function of Punishment' in *Doing and Deserving* (Princeton: Princeton University Press, 1970); M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal International Law* 265; M. Dumbly *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) A. Geisinger and M. Stein 'A Theory of Expressive International Law' (2007) 60 *Vanderbilt Law Review* 77; D. Amann, 'Message as Medium in Sierra Leone' (2001) 7 *ILSA Journal of International and Comparative Law* 237; B. Wringer, 'Why punish war crimes? Victor's Justice and Expressive Justifications of Punishment' (2006) 25 *Law and Philosophy* 159; R. Sloane, 'The Expressive Capacity of International Punishment' (2007) 43 *Stanford Journal of International Law* 39; B. Wringer, 'War crimes and expressive theories of punishment: communication or denunciation?' (2010) 16 *Res Publica* 119

¹¹⁰⁸See eg R. Pildes, 'Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism' (1998) 27 *Journal of Legal Studies* 725(1998); E. Anderson and R. Pildes 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Journal of International Law* 1503; C. Lawrence III, 'The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism'(1987) 39 *Stanford Law Review* 317 ; C. Sunstein 'On the Expressive Function of Law'(1996) 144 *University of Pennsylvania Journal of International Law* 2021; L. Lessig 'The Regulation of Social Meaning'(1995) 62 *University of Chicago Law Review* 943; D. Hellman 'The Expressive Dimension of Equal Protection'(2000)85 *Minnesota Law Review* 1; J. Feinberg 'The Expressive Function of Punishment' in *Doing and Deserving* (Princeton: Princeton University Press,1970) ; D. Kahan, 'The Secret Ambition of Deterrence,'(1999)113 *Harvard Law Review* 413; A. Geisinger and M. Stein 'A Theory of Expressive International Law' (2007) 60 *Vanderbilt Law Review* 77; D. Amann, 'Message as Medium in Sierra Leone' (2001) 7 *ILSA Journal of International and Comparative Law* 237; B. Wringer, 'Why punish war crimes? Victor's Justice and Expressive Justifications of Punishment' (2006) 25 *Law and Philosophy* 159; R. Sloane 'The Expressive Capacity of International Punishment' (2007) 43 *Stanford Journal of International Law* 39; B. Wringer, 'War crimes and expressive theories of punishment: communication or denunciation?' (2010) 16 *Res Publica* 119

¹¹⁰⁹E. Anderson and R. Pildes 'Expressive Theories of Law: A General Restatement' (2000) 148 *University of Pennsylvania Law Review* 1503, 1504–05

¹¹¹⁰D. Kahan, 'What Do Alternative Sanctions Mean?' (1996) 63 *University of Chicago Law Review* 591, 597

¹¹¹¹D. Amann 'Group Mentality, Expressivism, and Genocide,' (2002) 2 *International Criminal Law Review* 93,118

¹¹¹² A. Geisinger and M. Stein 'A Theory of Expressive International Law' (2007) 60 *Vanderbilt Law Review* 77

¹¹¹³ *ibid*

resources that require exemplary selective prosecutions.¹¹¹⁴ Expressivism therefore ‘is not just the best justification for the ICC’s work; it also provides the most appropriate theoretical basis for the Court’s resource allocation decisions.¹¹¹⁵ The ultimate objective of expressivism is the reinforcement of the law through internalisation of global norms. This is a far more purposive, worthwhile and realistic objective for international criminal courts than retribution and deterrence.

An objective to disseminate global norms presumes a normative community. I have, for the greater part of the thesis, attempted to articulate normative developments in child soldiering through the purview of cosmopolitanism. A regime of norms against the conscription, enlistment and use of children has emerged and crystallised. An expressivist approach to international criminal justice highlights and promotes the recognition and internalisation of the norms. Although still in its infancy, the ICC ‘has already become a powerful symbol of a long-hoped for international legal order in which universal human rights and cosmopolitan ideals of justice can win protection from the imperatives and intrusions of statecraft.’¹¹¹⁶ To enhance the ICC’s legitimacy, it will be necessary to develop such goals and priorities in a manner that reflects the values of the ICC’s constitutive communities.¹¹¹⁷ For Roach, the ICC has a moral duty to investigate all serious crimes within its jurisdiction in the service of global communitarianism.¹¹¹⁸

The expressive prescription raises questions about what global norms the ICC should seek to express and in what order of priority in the absence of international consensus about the goals of the Court.¹¹¹⁹ Ambos and Stegmiller point out that given ‘the high number of communications and referrals to the ICC, a focused strategy

¹¹¹⁴L. Cote, ‘Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law’ (2005) 3 *Journal of International Criminal Justice* 162, 175

¹¹¹⁵M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265

¹¹¹⁶V. Peskin, ‘An ideal becoming real? The International Criminal Court and the limits of the cosmopolitan vision of justice’ in R. Pierik (ed.), *Perspectives from International Law and Political Theory*, (Cambridge University Press 2010) 195

¹¹¹⁷M. deGuzman, ‘Choosing to prosecute: Expressive selection at the International Criminal Court’ (2012) 33 *Michigan Journal of International Law* 265, 312

¹¹¹⁸S. Roach, ‘Value Pluralism, Liberalism, and the Cosmopolitan Intent of the International Criminal Court’ (2005) 4 *Journal of Human Rights* 475, 483, 487 cited in M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265

¹¹¹⁹M. deGuzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265, 267

setting out the criteria for situation and case selection and prioritisation should be one of the priorities of the Prosecutor.¹¹²⁰ An emerging body of scholarship has proposed prioritisation of under-enforced norms. The strategy of ‘thematic prosecutions’ would orientate cases around particular themes of criminality.¹¹²¹ Such themes may take the form of focused or thematic investigations and prosecutions of these crimes, or the construction of crime-specific institutional capacity within the criminal justice system.¹¹²² The selection and prosecution of such crimes would be illustrative in stigmatising previously under-the-radar crimes whose egregiousness is now recognised. A ‘cosmopolitan trial’ on child soldiering ensures that the court firstly recognizes the universal rights of children above states. Secondly, the proliferation of child soldiering across the globe makes an expressive approach an ideal objective for the ICC. Thematic prosecutions fulfill the current preconditions for selections, gravity, interests of justice and interests of victims.

8.2 Thematic prosecutions

As already observed, international courts operate against significant constraints. They cannot be expected to pursue each and every incidence of violence that would fall within their jurisdiction.¹¹²³ Some element of selection and prioritization, which is not uncommon even for most domestic criminal courts, is thus rather inevitable in the practice of international criminal courts.¹¹²⁴ There has, however, been little discussion of how this selectivity may be justified.¹¹²⁵ As noted in the preceding

¹¹²⁰ K. Ambos and I. Stegmiller, ‘Prosecuting International Crimes at the International: Criminal Court: Is There a Coherent and Comprehensive Prosecution Strategy?’ (2013) 59 *Crime, Law and Social Change* 415, 415

¹¹²¹ M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’) in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012) 11

¹¹²² M. Bergsmo and W Ling, ‘Understanding and Enhancing Criminal Justice Work Processes: the Concepts of Thematic Prosecution and Criminal Justice Themes’ in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012), 3

¹¹²³ N. Jain, ‘Going beyond prosecutorial discretion: institutional factors influencing thematic prosecution’, in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012)

¹¹²⁴ Ibid

¹¹²⁵ N. Jain, ‘Going beyond prosecutorial discretion: institutional factors influencing thematic prosecution’, in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012); M. deGuzman, M ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265, noting that ICC lacks sufficiently clear goals and priorities to justify its decisions.

chapters, such selective prosecution renders Western principles of retribution and deterrence ill-suited for the crimes that international criminal courts prosecute. The few cases that the ICC selects can perform an illustrative function. The ICC is particularly situated to propagate global norms. The selection of cases to be investigated and brought to trial determines the narratives to be established, the authoritative ‘historical truth’ of a conflict and social meanings to be pronounced by the court. Social meanings reflect what ‘a society’s values, what it esteems, what it abhors.’¹¹²⁶ Social meanings can carry stigma. If an action creates a stigma, that stigma is a social meaning.¹¹²⁷ Mégret points out that prosecutors at tribunals and courts should recognise the assigning stigma to certain types of behaviour as an important objective.¹¹²⁸ The prosecutor has the upper hand in launching the process of designating what is most worth stigmatizing.¹¹²⁹ Hierarchy in stigma reflects international criminal justice’s expressivist ambition.¹¹³⁰ An emerging body of scholarship suggests the creation of prosecutorial themes for particular crimes to enhance their stigma.’ Thematic prosecution’ refers to the prosecutorial practice of selecting certain crimes and prioritising particular phenomena within international criminal indictments, usually for purposes related to the best use of limited resources,¹¹³¹ but often also due to the symbolism of elevating attention on a given matter of international concern.¹¹³² Such an approach would aim at creating stigma around such crimes through illustrative prosecutions. The idea of exclusive prosecution of certain crimes was used in some of the earliest prosecutions for international crimes after Second World War.¹¹³³ The practice of ‘thematic

¹¹²⁶ D. Amann, ‘Group Mentality, Expressivism, and Genocide’, (2002) 2 *International Criminal Law Review* 93-143, 118, 120.

¹¹²⁷ L. Lessig, ‘The Regulation of Social Meaning’ (1995) 62 *University of Chicago Law Review* 943;

¹¹²⁸ F. Mégret, ‘Practices Of Stigmatization’ (2014) 76 *Law and Contemporary Problems* 287

¹¹²⁹ Ibid

¹¹³⁰ F. Mégret, Practices Of Stigmatization, (2014) 76 *Law and Contemporary Problems* 287

¹¹³¹ M. Bergsmo and C. Wui Ling, ‘Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, (2012), 4

¹¹³² See, eg N. Jain, ‘Going beyond prosecutorial discretion: institutional factors influencing thematic prosecution’, in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012); M. deGuzman ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012) pp. 11–44; M. deGuzman, M ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265,

¹¹³³ See J. Bush, ‘The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said’ (2009) 109 *Columbia Law Review* 1167–1173, discussing the history behind prosecutors’ decisions to pursue thematic prosecutions at the Nuremberg Military Tribunals. Examples include the trials of industrialists, doctors, and judges. US Military Tribunal at Nuremberg,,

prosecutions' in international criminal law may be traced back to Nuremberg where trials were divided according to the particular participation of segments of the German society in the war and their spheres of activity.¹¹³⁴ The trials of medical professionals for their role in medical experimentation on human subjects and in the programme of mass euthanasia¹¹³⁵ and of legal professionals for furthering Nazi programmes of persecution, sterilisation, and extermination through the development of legislation and penal processes.¹¹³⁶ In recent years, emerging literature and jurisprudence have focused on thematic prosecution of offences against children and sex crimes.¹¹³⁷ Although 'feminism is not the only force behind the rise of thematic prosecution it is definitely the most significant.'¹¹³⁸ Thematic prosecutions can be located within the cosmopolitan project. Moral cosmopolitanism refers to accounts that retain a commitment to treating all human beings with equal concern within a global frame.¹¹³⁹ Cosmopolitan feminist projects are characterised

United States of America v Friedrich Flick et al., Judgment, 22 December 1947; US Military Tribunal at Nuremberg, *United States of America v Carl Krauch et al.*, Judgment, 30 July 1948; US Military Tribunal at Nuremberg, *United States of America v Alfred Krupp et al.*, Judgment, 31 July 1948; US Military Tribunal at Nuremberg, *United States of America v Karl Brandt et al.*, Judgment, 19 August 1947; Nuremberg Military Tribunal, *United States of America v Josef Altstötter et al.*, Judgment, 4 December 1947, cited in M. deGuzman 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012)

¹¹³⁴See M. deGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012) For an outline of the subsequent Nuremberg trials, see K. Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, (Oxford University Press, Oxford 2011)

¹¹³⁵US Military Tribunal at Nuremberg, *US v Karl Brandt et al.*, Judgment of 19 July 1947, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. II, 1950, pp. 171–300 (the Medical Case)

¹¹³⁶US Military Tribunal at Nuremberg, *US v. Josef Altstötter et al.*, Opinion and Judgment of 3 December 1947, Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10, Vol. III, 1951, 954–1199 (the Justice Case) cited in N. Jain, 'Going beyond prosecutorial discretion: institutional factors influencing thematic prosecution', in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012);. For these observations, see also J. Kyriakakis, 'Developments in international criminal law and the case of business involvement in international crimes' (2012) 94 *International Review of the Red Cross*

¹¹³⁷J. Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, (University of Chicago Press 2003) 181–182; M. Bergsmo et al., *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Torkel Opsahl Academic E-Publisher, Oslo 2010) 109, footnote. 46, cited in M. deGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012) See eg S. Greijer, 'The Thematic Prosecution of Crimes Against Children' in M. Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing 2012);

¹¹³⁸A. Quijano, 'Science and International Thematic Prosecution of Sex Crimes: A Tale of Re-Essentialisation' in M. Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012) 12 footnote 1

¹¹³⁹Niamh Reilly 'Cosmopolitan Feminism and Human Rights' (2007) 22 *Hypatia* 180

by a critical, practical engagement with legal discourse and a radical critique of the public-private configuration in international law.¹¹⁴⁰In addition to the 1990s global campaign for women’s human rights, other significant examples include efforts to ensure the inclusion of feminist analyses and gender perspectives in the ICC statute and the adoption of UN Security Council Resolution 1325, which addresses women’s roles in peace building and post-conflict reconstruction.¹¹⁴¹ Feminists successfully pushed for prioritising and isolating the prosecution of sex crimes between 1995 and 2001 when the ICTY issued the first indictments and verdicts exclusively for counts of rape and sexual slavery in *Kunarac et al.*¹¹⁴²— also known as the ‘Foča cases.’ Thematic prosecution of international sex crimes involve the selection and prioritisation of sexual crimes over and above other crimes for investigation and prosecution at national or international judicial institutions.¹¹⁴³ This arrogation of pre-eminence to crime is inevitably controversial. There is a need to justify focus on one given crime and its accompanying normative framework, rather than focusing on other core international crimes.¹¹⁴⁴ This will help prevent norm over-expansion, contested interpretations, and, more importantly, the dilution of international consensus and commitment.¹¹⁴⁵ However, its proponents argue that:

‘[T]o thematically prosecute certain crimes does not necessarily mean that such crimes are prioritised over other crimes, which will be left unaddressed, but rather that such crimes are investigated and prosecuted in a thematic way, meaning that methods specific to the acts and the victims are employed.’¹¹⁴⁶

Sex crimes should not always be prioritised over killing crimes: each case and situation presents unique characteristics, making it imprudent to proffer categorical arguments about when prosecutors should give priority to particular crimes.¹¹⁴⁷ A

¹¹⁴⁰Ibid

¹¹⁴¹Ibid

¹¹⁴²*Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vuković*, ICTY Trial Judgment, [22 February 2001] IT-96-23-T and IT-96-23/1-T

¹¹⁴³B. Olugbuo, Thematic Prosecution of International Sex Crimes and Stigmatisation of Victims and Survivors: Two Sides of the Same Coin? in M. Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012), 109

¹¹⁴⁴M. Bergsmo, A. Skre, C. Wui Ling and E. Wood, ‘Introductory remarks - Examining Thematic Prosecutions and the Challenges of Understanding and Proving International Sex Crimes’ FICHL Policy Brief Series No. 11 (2013)

¹¹⁴⁵ibid

¹¹⁴⁶ S. Grejfer, ‘The Thematic Prosecution of Crimes Against Children’ in M. Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing 2012) 162

¹¹⁴⁷ M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012)

case selection decision that appears justified in isolation may nonetheless be ill-advised when viewed in the context of the other prosecutions in the situation.¹¹⁴⁸ Examining the concept and practice of prosecutorial thematisation requires the engagement of theoretical questions.¹¹⁴⁹ Despite the increased focus on sex crime prosecutions in recent years, no effort has been made, either at the tribunals or in the scholarship, to provide a philosophical justification for the practice of giving priority to sex crimes.¹¹⁵⁰ Crime selection and prioritisation in the field of criminal justice for atrocities primarily takes place in response to the practical challenge of prudently applying limited resources.¹¹⁵¹ Jain has argued that the institutional structure of the ICC might support thematic prosecutions centred on crimes that are ‘less universally regarded, at least in practice, as equally deserving of condemnation.’¹¹⁵² The advocates argue that the strongest justification for a special focus on sex crimes at international courts lies in the need to express the undervalued norms prohibiting such crimes. In other words, such an approach would serve expressive objectives. DeGuzman argues boldly:

‘...if international criminal law aims to express global norms it should often seek to promote the norms against sex crimes even at the expense of other important norms. The need for such special emphasis lies in the history of under-enforcement of sex crimes in both national and international for a as well as in the discriminatory expression inherent in the crimes themselves.’¹¹⁵³

The argument on prosecutorial thematisation has focused on gravity. Historically, sex crimes have been considered less serious than murder crimes.¹¹⁵⁴ The evidence that many people consider rape less serious than murder does not, however,

¹¹⁴⁸ Ibid

¹¹⁴⁹ M. Bergsmo and W Ling, ‘Understanding and Enhancing Criminal Justice Work Processes: the Concepts of Thematic Prosecution and Criminal Justice Themes in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012) 4

¹¹⁵⁰ M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012) 13

¹¹⁵¹ M Bergsmo and W Ling ‘Understanding and Enhancing Criminal Justice Work Processes: the Concepts of Thematic Prosecution and Criminal Justice Themes in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012), 4

¹¹⁵² N. Jain, ‘Going beyond prosecutorial discretion: institutional factors influencing thematic prosecution’, in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012) 226.

¹¹⁵³ M. deGuzman ‘Thematic Prosecution of International Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012), 22

¹¹⁵⁴ Ibid

establish that murderers are more deserving of punishment than rapists as a moral matter.¹¹⁵⁵ DeGuzman argues that the context of conflict in which many international crimes are perpetrated legitimises killing. She posits:

‘[K]illing one’s enemy is the very purpose of war. International humanitarian law legitimise the intentional killing of other people in many circumstances. As ‘such, one who violates those laws by, for example, killing in a manner that is disproportionate to legitimate military objectives may be less culpable for crossing that ill-defined boundary than one who kills intentionally in peacetime.’¹¹⁵⁶

In contrast, sex crimes are never legitimate – the wartime context does nothing to reduce the culpability of those who perpetrate such crimes. Moreover, sex crimes involve discrimination and/or persecution based on gender, which enhances the culpability of their perpetrators.¹¹⁵⁷ For these reasons, the culpability of a rapist will sometimes be higher than that of a killer in the international context.¹¹⁵⁸ Expressive theories of criminal justice essentially focus upon the social meaning ascribed to the practice of criminal justice. The prosecution of sexual violence crimes serves to express to the international community generally that these acts are illegal and those who committed or permitted them are to be held accountable and condemned. Buss describes this as ‘social meanings communicated and interpreted through legal processes.’¹¹⁵⁹

8.3 Child soldiering and thematic prosecutions

I do not herein focus on sex crimes. The subject has received considerable attention.¹¹⁶⁰ However, the approach to crimes of sexual violence provides a useful

¹¹⁵⁵ Ibid

¹¹⁵⁶ ibid

¹¹⁵⁷ A Danner, ‘ConstructingaHierarchyofCrimesinInternationalCriminalSentencing’ (2001) 87 *Virginia Law Review* 415,

¹¹⁵⁸ M deGuzman ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012) 22

¹¹⁵⁹ D. Buss, ‘Performing Legal Order: Some Feminist Thoughts on International Criminal Law’ (2011) 11 *International Criminal Law Review* 409, 411

¹¹⁶⁰ See eg K Askin , ‘Developments in International Criminal Law: Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status’ (1999) 93 *American Journal of International Law* 97; M. deGuzman ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012); S. SáCouto and K.Cleary, ‘Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court’ (2009) 17 *American University Journal of Gender, Social Policy & the Law*, 337; B Bedont and K Hall-Martinez, ‘Ending Impunity for Gender Crimes Under the

framework for analysing child soldiering, the focus of this thesis. The arguments above can be transposed to the case of children and armed conflict. The ICC has outlawed child soldiering. Expressivists argue that when the Court is faced with having to choose particular situations and cases over others that also deserve its attention, such decisions should aim to maximise Court's expression.¹¹⁶¹ Historical under-enforcement, perceptions of lesser gravity and discrimination of a 'weaker' group comport with the precepts of 'expressive' thematic prosecutions. Identification of social meaning plays a key role in expressivism.¹¹⁶² A 'collective conscience' has emerged on the social meaning of child soldiering. A plethora of legal instruments has been promulgated to protect the rights of children. The regime includes the Convention on the Rights of the Child (CRC); the Optional protocol on the involvement of children in armed conflict; (OPAC); the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; the African Charter on the Rights and Welfare of the Child, the Universal Article 25 (2); the International Covenant on Civil and Political Rights (Article 24) and the International Covenant on Economic, Social and Cultural Rights (Article 10) as well as soft law instruments.¹¹⁶³ However, jurisprudential examination suggests a dearth in the 'social meaning' of child soldiering owing to under-criminalisation. Comparatively, the use of children in armed conflict has historically been less stigmatic. The true goal of stigmatising practices should be to stigmatize the crimes.¹¹⁶⁴

8.3.1 Under-enforcement

Child recruitment and sexual violence have been frequent in military conflicts since far back in history, but these practices have been considered differently in different time periods.¹¹⁶⁵ Rape, for instance, was seen both as a property crime and as a crime against the honour of the husband or the family before being considered as a crime

International Criminal Court' (1999) 6 *Brown Journal of World Affairs* 65, C Steains, 'Gender Issues' in R. Lee, (ed) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations and Results* (Kluwer Law International 1999)

¹¹⁶¹ M. deGuzman, 'Choosing to prosecute: Expressive selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265, 312

¹¹⁶² D. Amann, 'Group Mentality, Expressivism, and Genocide' (2002) 2 *International Criminal Law Review* 93, 118

¹¹⁶³ For detailed analysis, see eg T. Buck, *International Child Law* (Routledge 2014)

¹¹⁶⁴ *Ibid*

¹¹⁶⁵ S. Greijer, 'The Thematic Prosecution of Crimes Against Children' in M Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing 2012) 157

against women or a 'gender crime.'¹¹⁶⁶ Rape and sexual violence were codified as international crimes much earlier than child recruitment, although initially in a limited manner.¹¹⁶⁷ Comparatively, sex crimes were prosecuted earlier as illustrated by the Foča cases at the ICTY. As illustrated in Chapter 3, historically, child soldiering has been under-criminalised, and thus also been less stigmatic compared to the murder crimes. In the hierarchy of mass crimes or 'mass atrocities', child soldiering has appeared less 'atrocious'. The statutes of criminal tribunals did not protect children who participated in warfare. Children who participated in military conflict were regarded as 'brave', 'heroic' and 'patriotic'. The four 1949 Geneva Conventions are silent with regard to the direct involvement of children in armed conflict, but Geneva Convention IV on the protection of civilians makes a number of important references to children and their protection. On the other hand, the two 1977 Additional Protocols ('AP') I and II to the Geneva Conventions are perfectly explicit in their prohibition of the acts of recruiting or using children under the age of 15 in armed conflict. Such acts are not, however, considered by these instruments as 'grave breaches.'¹¹⁶⁸

The first prosecutions for child soldiering were conducted at the Special Court for Sierra Leone (SCSL) established in 2002. An important contribution in the area of international criminal law by the SCSL relates to the Norman Case.¹¹⁶⁹ The defence had invoked the doctrine of *nullum crimen sine lege*¹¹⁷⁰ (no crime without law) arguing that the recruitment of child soldiers was not a crime when the crimes were committed – before 1996 - until the Rome Statute of 1998 establishing the ICC, ratified in 2002. In May 2004, the SCSL issued a landmark decision affirming that an individual may be held criminally responsible for the recruitment of child

¹¹⁶⁶ S. Greijer, 'The Thematic Prosecution of Crimes Against Children' in M Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012) 157
¹¹⁶⁷ *ibid* 158; Statute of the International Criminal Tribunal for the former Yugoslavia, Art.5 (g). See also *Prosecutor v Akayesu*, Case No. ICTR-96-4-T (ICTR)

¹¹⁶⁸ Greijer *ibid* 139

¹¹⁶⁹ See *Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72 (E) (Special Court for Sierra Leone 31 May, 2004) [Hereinafter Norman Decision on Child Recruitment] Sam Hinga Norman was indicted on 7 March 2003. On 28 February 2004 the Trial Chamber ordered the joint trial of Norman, Fofana and Kondewa, and on 5 March prosecutors issued a consolidated indictment. The CDF trial began on 3 June 2004. On 14 July 2005, the Prosecution concluded its case. On 22 February 2007, Norman died of natural causes while in Dakar for medical treatment and the case against him was closed.

¹¹⁷⁰ *Prosecutor v Sam Hinga* Case No. SCSL-2003-08-PT *nullum crimen sine lege* ('no crime without law.')

combatants. The Appeals Chamber of the Special Court held that the recruitment of child soldiers, namely the conscription, enlistment and use to participate actively in hostilities of children aged under 15, was a crime under customary international law attracting individual criminal responsibility since at least November 1996.

Recognition of the prohibition was ‘both widespread and virtually universal in international treaties, state practice, and other international resolutions and instruments.’¹¹⁷¹ The recruitment of children into armed conflict ‘is and was unquestionably a violation of international humanitarian law at the time the alleged offences took place.’¹¹⁷²

However, Happold asserts, the authority of the decision is weakened by the unconvincing evidence relied upon by the Appeal Chamber in coming to its conclusions and by a strong dissent from one of the judges.¹¹⁷³ In his dissent, Judge Robertson distinguished conscription from enlistment, arguing that individual criminal responsibility did not attach to the offence of enlistment until the Rome Treaty of the International Criminal Court was adopted in July 1998. Justice Robertson described conscription as ‘implying some use of force, implying compulsion, albeit in some cases through force of law.’¹¹⁷⁴ The narrower crime of ‘abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities’ was a crime under customary international law during the period in question. However, in his view, the broader crime of ‘conscripting or enlisting children under the age of 15 years into armed forces or armed groups or using them to participate actively in hostilities’ was not such a crime.¹¹⁷⁵ Accordingly, he argued, the indictment for enlistment before this date violates the principle of *nullem crimen sine lege* (no crime without law).¹¹⁷⁶ In concluding that the prohibition on child recruitment had crystallized as customary international law before November 1996,

¹¹⁷¹*Prosecutor v Sam Hinga* Case No. SCSL-2003-08-PT para 17

¹¹⁷²*Ibid* para 9

¹¹⁷³ M. Happold ‘International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone’s Decision in *Prosecutor v. Samuel Hinga Norman*’ (2005) 18 *Leiden Journal of International Law* 283

¹¹⁷⁴ See Lack of Jurisdiction (Child Recruitment), Norman (SCSL-2004-14- AR72 (E)) Appeals Chamber, [31 May 2004] Dissenting Opinion of Justice Robertson at paras 1 and 5 respectively. See also para 46

¹¹⁷⁵*Prosecutor v Sam Hinga* Case No. SCSL-2003-08

¹¹⁷⁶*Prosecutor v Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E) [SCSL 31 May 2004] [hereinafter Norman Decision on Child Recruitment]

the Appeal Chamber simply based its findings on the widespread ratification of AP II and the CRC, as well as the lack of any reservations to the CRC specifically seeking to avoid Article 38.¹¹⁷⁷

Happold also notes that the OPAC simply put an obligation on states to take measures to prevent the use of child combatants by non-governmental armed groups, where in many such cases the threat of criminal sanctions would seem to be the only measure available. OPAC imposes no concomitant obligation on states to criminalise illegal uses of child soldiers by their officials.¹¹⁷⁸ Further, *opinion juris* on criminalisation of child soldiering by states is lacking. Only three examples could be found of states having explicitly criminalized child recruitment prior to 1996 and two of them were on the basis that the state had criminalized all breaches of AP II.¹¹⁷⁹ Whether the outlawry of child soldiering has assumed customary law status or not, no examples of a person having been prosecuted for having recruited child soldiers could be found.¹¹⁸⁰ Conduct is criminalisable when it involves wrongful harm that is fairly imputable to the person being (criminalised) blamed for that harm.¹¹⁸¹ On the other hand, under-criminalisation suggests that ‘some very harmful and destructive actions or inactions that are not criminal should be.’¹¹⁸² Without specific criminal statutes, then acts - regardless of how offensive, harmful or egregious they are – are not crimes.¹¹⁸³ The crime of conscription, enlistment and use of child combatants did not exist in the statutes of the Nuremberg International Military Tribunal, the International Military Tribunal for the Far East, the International Criminal Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda and other tribunals. International criminal justice appeared fixated on crimes of human extermination. The Holocaust, Srebrenica and Rwanda, for example, tend to readily evoke a sense of outrage. For instance, after the Nazi atrocities, the crimes were described as ‘radical evil.’¹¹⁸⁴ Some argue that genocide is the worst crime, followed

¹¹⁷⁷ Norman Decision on Child Recruitment, para 20

¹¹⁷⁸ M. Happold, ‘International Humanitarian Law, War Criminality and Child Recruitment: The Special Court for Sierra Leone’s Decision in *Prosecutor v Samuel Hinga Norman*’ (2005) 18 *Leiden Journal of International Law* 283, 290-291

¹¹⁷⁹ *Ibid*

¹¹⁸⁰ *Ibid* 291

¹¹⁸¹ D. Baker, ‘The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation’ (2008) 33 *Australian Journal of Legal Philosophy* 66

¹¹⁸² R. Bohm and B. Vogel *A Primer on Crime and Delinquency Theory* (Cengage Learning 2010), 10

¹¹⁸³ M. Clifford and T. Edwards *Environmental Crime* (Jones & Bartlett Publishers, 2011) 130-31

¹¹⁸⁴ H. Arendt *The Human Condition* (University of Chicago Press; 2nd revised edition 1999), borrowing term from Immanuel Kant

by crimes against humanity and then war crimes.¹¹⁸⁵ The ICTR described genocide as ‘the crime of crimes’.¹¹⁸⁶ Under this paradigm, mass violence is constructed as something extraordinarily transgressive of universal norms.¹¹⁸⁷ The under-criminalisation of child soldiering appears to be the result of the focus on the prevention of future deaths of civilians¹¹⁸⁸ arising from these human-sponsored catastrophes. Comparatively, thus, crimes of mass human eliminationism have been expressed in jurisprudence and literature since Nuremberg.¹¹⁸⁹ Child soldiering was criminalized in the SCSL statute, drawing its provisions from the Rome Statute of 1998, establishing the ICC. Thematic prosecutions would thus be premised on elevating the stigma or social meaning of children’s participation in armed conflict.

8.3.2 Child soldiering: Gravity

A common element in international criminal law is ‘gravity’. As noted above, the use of children in armed conflict appeared a lesser ‘atrociousness’ or none at all because it did not eventuate in mass deaths. Thus, it did not draw a sense of any gravity. ‘Gravity’ appears the key criterion in the Rome Statute,¹¹⁹⁰ but it does not define it. The OTP, according to its own guidelines, assesses this criterion having regard to both quantitative and qualitative considerations, including: (a) the scale of the crimes (b) nature of the crimes (c) manner of (d) their impact.¹¹⁹¹ Child soldiering often occurs at a large scale with children rounded conscripted or persuaded to join state armies or/and armed groups. The use of children in armed conflict may not result in the horror-inducing mass fatalities, but it can be argued that ‘non-murder’ crimes are

¹¹⁸⁵A. Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Sentencing’ (2001) 87 *Virginia Law Review* 415, 420 arguing ‘that the chapeaux of the crimes under international law should be read to form a hierarchy of crimes, connoting increasing levels of harm caused by a defendants actions.’

¹¹⁸⁶*Prosecutor v Kambanda*, Case No ICTR 97-23-S, Trial Chamber, Judgment and Sentence, [4 September, 1998] <http://www.ictor.org/> (visited June 14, 2001) [hereinafter *Kambanda Trial Judgment*] para. 16.

¹¹⁸⁷See M. Drumbl ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Northwestern University Law Review* 539

¹¹⁸⁸P. Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?’ (2001) *American Journal of International Law* 95; J. Ku and J. Nzalibe ‘Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?’ (2006) 84 *Washington University Law Review*, 777; E. Baylis ‘Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks’ (2009) 50 *Boston College Law Review* 1

¹¹⁸⁹See eg G. Rosenfeld ‘The Politics of Uniqueness: Reflections on the Recent Polemical Turn in Holocaust and Genocide Scholarship’ (1999) 13 *Holocaust and Genocide Studies*, 28, stating that this process of ‘historicisation’ began as early as the 1950s, when scholars first began to make sense of the recent Nazi experience.

¹¹⁹⁰See Rome Statute Art. 77

¹¹⁹¹See ‘Regulations of the Office of the Prosecutor’ (ICC-BD/05-01-09), Regulation 29 para 2; Draft Policy Paper, 13, paras 67, 68 and 70.

still no less egregious or extraordinary. Evidence suggests that children's participation in war has long term psycho-social impact.¹¹⁹² Those who survive often suffer trauma, injury, abuse, and psychological scarring from the violence and brutality they experience.¹¹⁹³ The 'exposure to chronic and traumatic stress during development leaves the children with mental and related physical ill-health, notably PTSD and severe personality changes.'¹¹⁹⁴ Such 'exposure also deprives the child from a normal and healthy development and impairs their integration into society as a fully functioning member.'¹¹⁹⁵ Non-murder crimes could be deemed more egregious because society has to contend with the ill-effects on the living than the dead. Greijer points out that 'the selection of crimes in international courts should reflect the reality in which sexual slavery and the transformation of young children into slaughter machines— that is, crimes involving a complete deprivation of the victims' value as human beings, or 'murder of the soul'¹¹⁹⁶ – can, depending on the situation, be of greater gravity than the deprivation of lives on a battlefield.'¹¹⁹⁷ Considered in this manner, the thematic selection of child soldiering falls within the prosecutorial conditions of 'gravity.' When faced with a situation in which a great number of the victims are survivors, special attention needs to be paid to the restorative potential of international criminal justice.¹¹⁹⁸ The goal of restorative justice may in some cases justify the choice to prosecute sex crimes and crimes against children, and to invest the necessary resources in order to do so in a way that is sensitive to the particularities of those crimes.¹¹⁹⁹ While crimes involving killings are universally recognised as crimes of the most serious nature, it seems important to work for an equal recognition of the gravity of sex crimes and crimes against children, which severely affect the future of an already war-torn society and its members.¹²⁰⁰

¹¹⁹² C. Bayer, F. Klasen and H. Adam 'Association of Trauma and PTSD Symptoms With Openness to Reconciliation and Feelings of Revenge Among Former Ugandan and Congolese Child Soldiers' *Journal of the American Medical Association*

¹¹⁹³ See 'What's Going on – Child Soldiers'

<http://www.un.org/cyberschoolbus/childsoldiers/whatsgoingon/>

¹¹⁹⁴ E. Schauer and T Elbert, 'The Psychological Impact of Child Soldiering' in E. Martz (ed.) *Trauma Rehabilitation After War and Conflict*, (Springer New York 2010)

¹¹⁹⁵ Ibid

¹¹⁹⁶ B. Nowrojee, 'Your Justice is Too Slow: Will the ICTR Fail Rwanda's Rape Victims?' United Nations Research Institute for Social Development, Occasional Paper 10, November 2005, p. 1.

¹¹⁹⁷ S. Greijer 'The Thematic Prosecution of Crimes Against Children' in M. Bergsmo (ed) , *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012), 149

¹¹⁹⁸ Ibid 174

¹¹⁹⁹ Ibid

¹²⁰⁰ Ibid

8.3.3 Discrimination

Drumbl points out that at the very core of the extraordinariness of atrocity crimes is conduct – planned, systematized, and organized – that targets large numbers of individuals based on their actual or perceived membership in a particular group that has become selected as a target, in particular on discriminatory grounds.¹²⁰¹ The gravity of genocide relates to segregation for elimination in whole or in part, a national, ethnical, racial or religious group.¹²⁰² [C]onviction requires proof that the victim was seen as belonging to such a group; that is, that the victim was chosen because of perceived membership in a group targeted for destruction. This complex *mens rea* - this element of a group mentality - characterizes genocide and no other crime.¹²⁰³ One premise ‘to give priority to sex crimes in setting the expressive agenda of international courts is that, unlike killing crimes, sex crimes virtually always involve the perpetrator’s discriminatory valuation of a group – usually women.’¹²⁰⁴ However, consideration of ‘gravity’ does not take into account this selectivity. This argument can be transposed to child soldiers. Children are recruited into armed forces and groups because they are targeted as impressionable, easy to manipulate and fearless. If the gravity of genocide is based on selectivity of certain groups, the gravity of child soldiering can also be premised on the targeting of a particular age group. While children lack the physical capacity of grown adults, they exhibit certain tendencies that some military leaders find appealing. Child soldiers considered ‘more fearless, loyal and obedient.’¹²⁰⁵ A Congolese soldier summarises three main reasons why children make good soldiers: ‘they obey orders; they are not concerned about getting back to their wife and family and they don’t know fear.’¹²⁰⁶ The conscription and enlistment of children for war ends are *expressions* of harms by the perpetrators. Anderson and Pildes state that: ‘A person suffers expressive harm when she is treated

¹²⁰¹ M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007)

¹²⁰² See eg Rome Statute, Art. 6

¹²⁰³ D. Amann, ‘Group Mentality, Expressivism, and Genocide’ (2002) 2 *International Criminal Law Review* 93

¹²⁰⁴ M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012) 41

¹²⁰⁵ S. Gates and J. Andvig, ‘Recruiting Children for Armed Conflict’, paper presented at the Dutch Flemish Association for Economy and Peace, 22 June 2006.

http://www.stichtingvredeswetenschappen.nl/Andvig_Gates_Hague.pdf (last accessed 10 May 2014), 4

¹²⁰⁶ See ‘Children Under Arms’ *The Economist* 10 July 1999, 22 cited in S. Gates and S. Reich, (eds) *Child soldiers in the age of fractured states* (Pittsburg, Pa.: University of Pittsburgh Press, 2010) 79

according to principles that express negative or inappropriate attitudes toward her.¹²⁰⁷ Such expressions contest widely-held social meanings and have concrete negative consequences.¹²⁰⁸ ‘Expressive harms’, unlike the injuries typically recognized by the common law, are not material (physical or economic) injuries.¹²⁰⁹ Rather, they specifically focus on the *message* - usually a message of racial, gender, or religious inferiority,¹²¹⁰ or in this case, ‘inferior’ age group. Child soldiering is thus an expressive harm based on discrimination. Child soldiering, as an expressive harm, illustrates the traditionally harmful imbalance of power relations between a stronger and weaker category of human beings. Discriminatory crimes are in greater need of prevention because they express the perpetrator’s view that not just the victim, but an entire class of people, is less valuable and thus deserving of ill treatment.¹²¹¹ According to Hampton, punishment is thus justified because it is a required response to another expressive act: the wrong.¹²¹² To intentionally wrong another person is to treat that person as having lower value than oneself; it is to demean her.¹²¹³ Not only is criminal law expressive; so too is the criminal behaviour it addresses.¹²¹⁴ The concept of expressive harm is germane to the problem of child soldiering. The deliberate conscription, enlistment and use of children in hostilities are based on the vulnerability of a weaker age group that can be sacrificed.

8.4 Thematic prosecutions and cosmopolitan justice

Constructivists consider shared international norms to have an impact because of their mutually constitutive nature: interacting actors construct norms; norms guide

¹²⁰⁷ E. Anderson and R. Pildes, ‘Expressive Theories of Law: A General Restatement’ (2000) 148 *University of Pennsylvania Journal of International Law* 1503, 1527

¹²⁰⁸ L. Lessig, ‘The Regulation of Social Meaning’ (1995) 62 *University of Chicago Law Review* 943; C. Sunstein, ‘On the Expressive Function of Law’ (1996) 144 *University of Pennsylvania Law Review* 2021, 2022

¹²⁰⁹ The term ‘expressive harm’ was coined by Professors Richard Pildes and Richard Niemi. See R. Pildes and R. Niemi ‘Expressive Harms, “Bizarre Districts” and Voting Rights: Evaluating Election-District Appearances After *Shaw v. Reno*’ (1993) 92 *Michigan Law Review* 483

¹²¹⁰ J. Hill ‘Expressive Harms and Standing’ (1999) 112 *Harvard Law Review* 1313

¹²¹¹ M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012) 42

¹²¹² J. Hampton, ‘Correcting Harms versus Righting Wrongs: The Goal of Retribution’ (1990) 39 *UCLA Law Review* 1659, 1661–66.

¹²¹³ J. Hampton and J. Murphy, *Forgiveness and Mercy* (New York: Cambridge, 1988), 52

¹²¹⁴ M. deGuzman, ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012)

the actors' behaviour; and norms may change the definition of the actors' preferences and even identity.¹²¹⁵The expressive function of law is central for our identity...¹²¹⁶ That identity attributes the positive effects of ICL to a 'collective conscience'¹²¹⁷ or the 'totality of beliefs and sentiments common to average citizens of the same society,'¹²¹⁸ in this case the 'international society.' The laws and prosecution for child soldiering would illustrate the humanistic values on child soldiering – 'a concern for human beings that extends beyond borders'¹²¹⁹that cosmopolitanism and the 'collective conscience' expound. The centrality of cosmopolitanism is the recognition of every individual's equal moral standing.¹²²⁰Treating people as ends in themselves requires thinking universally.¹²²¹ Restricting moral concern to one's own state renders any belief in equality incomplete.¹²²² If the purpose of international prosecution is to reaffirm the values and identity of the international community, that identity is more seriously threatened by crimes involving discrimination than by non-discriminatory crimes.¹²²³ A crime that conveys the perpetrator's devaluation of a particular class of people is more worthy of condemnation than a comparable act that does not.¹²²⁴ Human equality is at the centre of cosmopolitan discourse. Drawing from Kant, Hayden stresses the centrality of the individual as an equal being and member of a global community.¹²²⁵ Cosmopolitan duties 'to recognise individual

¹²¹⁵ J. Ruggie, *Constructing the World Polity: Essays on International Institutionalisation* (London: Routledge 1998)

¹²¹⁶ W. Burg, 'The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues' (2001) 20 *Law and Philosophy* 31,53 referring to domestic law

¹²¹⁷ H. van der wilt, 'Crimes against humanity' in B. van Beers, L. Corrias and W. Werner (eds) *Humanity across International Law and Biolaw* (Cambridge University Press, 2014) 36-37.

¹²¹⁸ E. Durkheim, *The Division of Labor in Society*, 1893/1984:38–39). (cited in F Mégret 'Practices Of Stigmatization' 76 (2014) *Law and Contemporary Problems* 287

¹²¹⁹ D. Robinson, 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127

¹²²⁰ R. Shapcott 'International ethics' in J. Baylis, S. Smith and P. Owens (eds.), *The Globalization of World Politics: An Introduction to International Relations* (Oxford, UK: Oxford University Press, 2013)

¹²²¹ R. Shapcott 'International ethics' in J. Baylis, S. Smith and P. Owens (eds.), *The Globalization of World Politics: An Introduction to International Relations* (Oxford, UK: Oxford University Press, 2013)

¹²²² R. Shapcott 'International ethics' in J. Baylis, S. Smith and P. Owens (eds.), *The Globalization of World Politics: An Introduction to International Relations* (Oxford, UK: Oxford University Press, 2013)

¹²²³D. Kahan, 'What Do Alternative Sanctions Mean?' (1996) 63 *University of Chicago Law Review* 591, 597

¹²²⁴D. Kahan, 'What Do Alternative Sanctions Mean?' (1996) 63 *University of Chicago Law Review* 591, 597

¹²²⁵ P. Hayden, *Cosmopolitan Global Politics* (Ashgate Publishing 2005)

equality apply to individuals as well as the global institutional/legal order.’¹²²⁶ The CRC states that ‘no child should be treated unfairly on any basis’¹²²⁷ Assuming the international community is a ‘community’ in a meaningful sense, Sunstein asserts, ‘that community may have an ‘integrity interest’ in countering normative expression that conflicts with the community’s vision of its identity.’¹²²⁸

8.5 Conclusion

The prosecutor holds significant power in the selection of cases. However, each time his selections have been confronted by controversy. This is because the prosecutor is accused of acting from political motivations. As has been noted, such controversy arises because the ICC has lacked clear goals for the cases it selects. This thesis argues that the most plausible philosophical justification for the cases the ICC selects is the expressive function of law. This chapter has focused on ‘thematic prosecutions’ as an expressive function. ‘Thematic prosecution’ refers to the prosecutorial practice of selecting certain crimes and prioritising particular phenomena within international criminal indictments, usually for purposes related to the best use of limited resources,¹²²⁹ but often also due to the symbolism of elevating attention on a given matter of international concern.¹²³⁰ Historically, the jurisprudence on military conflicts and its attendant literature appear to have given prominence to killing crimes. This primacy of the massacre subsumed other transgressions during political and social catastrophes. Sex crimes and crimes against children did not feature on the radar of international statutes and judicial processes. The feminist lobby has made an impact in influencing approaches to sex crimes. This chapter has sought to transpose arguments advanced for ‘thematic prosecutions’ for sex crimes to child

¹²²⁶ R. Shapcott ‘International ethics’ in J. Baylis, S. Smith and P. Owens (eds.), *The Globalization of World Politics: An Introduction to International Relations* (Oxford, UK: Oxford University Press, 2013) 201

¹²²⁷ See CRC, Art 2

¹²²⁸ C Sunstein, ‘On the Expressive Function of Law’ (1996) 144 *University of Pennsylvania Law Review* 2021, 2026–2027

¹²²⁹ M. Bergsmo and C. Wui Ling ‘Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, (2012), 4

¹²³⁰ See, eg N. Jain, ‘Going beyond prosecutorial discretion: institutional factors influencing thematic prosecution’, in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012); M. deGuzman ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012) pp. 11–44; M. deGuzman, M ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265,

soldiering. Thematic prosecutions intend to give priority to under-judicialised crimes. Some the justificatory grounds for prioritising sex crimes are the under-recognised gravity, historical enforcement failure and the discriminatory nature of the crimes. These observations apply to child soldiering. Until the establishment of the SCSL, the conscription, enlistment and use of children in armed conflict had been under-criminalised. I have argued above that this focus could also have been the result of international criminal law's concentration on mass murder crimes. While mass killings are indeed grave, there is a plausible argument that 'non-murder' crimes are serious – or even more serious – considering societies have to contend with the ill-effects of conflict on the living. Psychological problems and possibilities of recidivism pose considerable threats to post-conflict societies. Further, child soldiering is a discriminatory crime targeting a vulnerable social group. However, this selectivity has not been part of the calculus of gravity. Thematic prosecutions have been conceptualised to reorient international criminal law towards these under-recognised crimes. Ultimately, the goal is to advance cosmopolitan norms and identity affirmation by shoring up social meanings of under-enforced norms through focused penology, and also develop prosecutorial approaches to such crimes.

CHAPTER NINE

LUBANGA AND EXPRESSIVISM

Introduction

International criminal justice is bereft of a viable theory suitable for its own context. The paradigm of ICL has been burdened by multifarious objectives. However, these goals are either unsuitable or expand beyond the core functions of the court. This thesis argues that the most plausible philosophical justification for the selection and prosecution of Lubanga is the expressive function of law. Expressivism is a modest but important goal. It takes cognisance of the gravity of crimes, the constraints of international courts and proposes a socio-pedagogical function. International criminal justice remains largely symbolic because of limited resources; international courts can only conduct illustrative prosecutions.¹²³¹ Neither the legal mandate of the ICC nor the resources available to it are sufficient to allow it to fulfil the world's high expectations.¹²³² In *Lubanga*, the Pre-Trial Chamber approved the Prosecutor's Policy Paper statement of 2003 that as a general rule the OTP should focus its investigative and prosecutorial resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes.¹²³³ Thus, 'the primary significance of the International Criminal Court will be its symbolic significance.'¹²³⁴ The few cases that the ICC can prosecute may perform illustrative functions.' Thematic prosecution' as a penal approach presents a justificatory framework for prioritisation and 'illustration' of particular crimes. This is an expressive objective. Rather than objectives of retribution and deterrence, an expressive approach to ICL suggests that a primary purpose of international criminal trials is to express global norms.¹²³⁵ This is a more plausible

¹²³¹L. Cote, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law' (2005) 3 *Journal of International Criminal Justice* 162, 175

¹²³² W. Burke-White 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice' (2008) 49 *Harvard International Law Journal* 53

¹²³³ *Prosecutor v Lubanga* Decision on the Prosecutor's application for warrant of arrest under Article 58 [10 February 2006] para 61; See 'Paper on some policy issues before the Office of the Prosecutor' ICC-OTP (September 2003) 7. http://www.icccpi.int/library/organs/otp/030905_PolicyPaper.pdf;

¹²³⁴ E. Wise, 'The International Criminal Court: A Budget of Paradoxes,' (2000) 8 *Tulane Journal of International & Comparative Law* 261, 268

¹²³⁵ M. deGuzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal International Law* 265

rationale considering the constraints of the courts, which limit the number of defendants.

Apart from resource-based arguments, as Drumbl notes, there 'is cause to believe that expressivism may be a more plausible justification for the punishment of *extraordinary* international criminals.'¹²³⁶ Although both expressivism and deterrence aim to discourage future atrocities, they take different routes.¹²³⁷ Deterrence theories assert that individuals will be dissuaded from committing extraordinary international crimes because of fear of getting caught. Expressivist theories, instead, adopt a more of an intergenerational focus that speaks to audiences beyond those already tempted to commit crimes.¹²³⁸ '[P]unishment may not simply frighten individuals who might themselves commit crimes but also play a role in communicating the standards of a community to its members, thereby influencing their moral and social development...'.¹²³⁹ I have pointed out the objective of propagating international norms is based on the presumption of an existing normative community. The Rome Statute 'is a particularly significant development because of the constitutive symbolic function of criminal law as a community-creating, community-maintaining device.'¹²⁴⁰ Rather than expectations on deterrence the ICC, would instead serve as 'a symbolic affirmation of the ties that hold a community together and by fostering a sense that one is a law-abiding citizen.'¹²⁴¹ An expressive justification for the prosecution of Lubanga would be premised on the propagation of the cosmopolitan values against egregious crime of child soldiering. With these observations in mind, this chapter seeks to apply expressivism to *Lubanga*. The chapter focuses more on the 'practical' approach to expressivism. The chapter highlights practices that enhanced and depreciated the expressive value of *Lubanga*. This chapter is organised as follows. The first section discusses the ICC and expressive effect of its status as the most prominent global penal institution. The second part attempts to apply expressivism to Lubanga, examining (a) the expressive

¹²³⁶Drumbl, [Draft] *Atrocity, Punishment and International Law*] 11

¹²³⁷M. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law' (2007) 75 *George Washington Law Review* 1165

¹²³⁸*Ibid*

¹²³⁹B. Wringe, 'War Crimes and Expressive Theories of Punishment: Communication or Denunciation?' (2010) 16 *Res Publica* 119, 121

¹²⁴⁰E. Wise, 'The International Criminal Court: A Budget of Paradoxes,' (2000) 8 *Tulane Journal of International & Comparative Law* 261, 268

¹²⁴¹ *ibid* 267

function of selection, trial, verdict; and punishment. The third part discusses media and norm transmission. The last part discusses norm internalisation.

9.1 ICC jurisdiction: situational opportunity

9.1.1 Complementarity

Even where the ICC has jurisdiction, it will not necessarily act. It is a court of last resort. States have the first responsibility and right to prosecute international crimes. The ICC may only exercise jurisdiction where national legal systems fail to do so, including where they purport to act but in reality are unwilling or unable to genuinely carry out proceedings.¹²⁴² ‘Unwillingness’ implies some form of action by or on behalf of the concerned state, while ‘inability’ means that judicial activity is not possible because of ‘a total or substantial collapse or unavailability of [a state’s] national judicial system’ which precludes it from obtaining ‘the accused or the necessary evidence and testimony or otherwise ... carry[ing] out its proceedings.’¹²⁴³ The principle of complementarity is based both on respect for the primary jurisdiction of States and on considerations of efficiency and effectiveness, since States will generally have the best access to evidence and witnesses and the resources to carry out proceedings.¹²⁴⁴ The establishment of an international order wherein national institutions respond effectively to international crimes, thereby obviating the need for trials before the ICC, would indeed be a major success for the Court and the international community as a whole.¹²⁴⁵ As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. The ‘sad reality, however, is that national institutions have all too frequently proven unable or unwilling to address international crimes.’¹²⁴⁶ International criminal justice remains relevant.

¹²⁴² See Rome Statute, Art.17

¹²⁴³ Ibid

¹²⁴⁴ Statement by Mr. Luis Moreno-Ocampo, June 16, 2003 Ceremony for the Solemn Undertaking of the Chief Prosecutor <http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>

¹²⁴⁵ Statement by Mr. Luis Moreno-Ocampo, June 16, 2003 Ceremony for the Solemn Undertaking of the Chief Prosecutor <http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>

¹²⁴⁶ Statement by Mr. Luis Moreno-Ocampo, June 16, 2003 Ceremony for the Solemn Undertaking of the Chief Prosecutor <http://www.icc-cpi.int/NR/rdonlyres/20BB4494-70F9-4698-8E30-907F631453ED/281984/complementarity.pdf>

Whereas the ICC faces situational constraints, court is ‘a highly visible, institutional trademark of the international rule of law, respect for human rights, and accountability for those who participate in the worst of atrocities.’¹²⁴⁷ Because of its status, the ICC therefore enjoys a ‘situational opportunity’ to propagate (international) social meanings. Law has ‘social meaning’¹²⁴⁸ related to the stigma it creates. While the ICC promotes ‘positive complementarity’ – the need for states to prosecute crimes under the jurisdiction of the ICC – the international court remains the most prominent criminal law platform to propagate global norms. To ‘be prosecuted by the ICC is in a sense a double stigma: The substantive charge imposes stigma, but so does the fact that one is being tried by the ICC, a body that presents itself as an emanation of mankind.’¹²⁴⁹ Since these offences are constructed as being of concern to humanity as a whole, which ‘deeply shock the conscience of humanity’ it is such crime that can justify an internationalisation of their prosecution...¹²⁵⁰ There ‘is an assumption...that the punishment inflicted by an international tribunal operating prominently on the global agenda at the cusp of history has enhanced expressive value in asserting the importance of law and the stigmatization of the offender who transgresses that law.’¹²⁵¹ Selection of crimes to prosecute, as discussed in the previous chapter, is critical. ICC prosecutions carry particular stigma given their highly selective character and the attendant belief, apparent from public opinion, that the prosecutor ‘must be pretty sure’ of her case to have selected a particular defendant.¹²⁵² For Durkheim, the true goal of stigmatising practices should be to stigmatise the *crimes themselves* as forms of reprehensible deviancy, rather than the individuals as such.¹²⁵³

¹²⁴⁷ K. Hale, ‘The Price We Must Pay For International Criminal Justice’ Huffington Post, 19 November 2012 http://www.huffingtonpost.com/kip-hale/international-criminal-court-funding_b_2149834.html

¹²⁴⁸D. Kahan, ‘What Do Alternative Sanctions Mean?’ (1996) 63 *University of Chicago Law Review* 591, 597

¹²⁴⁹ F. Mégret, ‘Practices Of Stigmatization’(2014) 76 *Law and Contemporary Problems* 287, 310

¹²⁵⁰See A Pellet, ‘Internationalized Courts: Better Than Nothing’ in C Romano, A Nollkaemper, and J Kleffner in *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: OUP 2004) 437, 438

¹²⁵¹ M. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Northwestern University Law Review* 539, 593

¹²⁵² A Pellet, ‘Internationalized Courts: Better Than Nothing’ in C Romano, A Nollkaemper, and J Kleffner in *Internationalised Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford: OUP 2004) 437, 438

¹²⁵³F. Mégret, ‘Practices Of Stigmatization’, (2014) 76 *Law and Contemporary Problems* 287

While the SCSL made jurisprudential breakthrough with the first conviction on child soldiering, its lower status limited its capacity to express, stigmatise and reinforce the global norms against child soldiering. Compared to domestic courts, international criminal tribunals have superior qualities in norm expression.¹²⁵⁴ The SCSL may indeed have served expressive purposes in the immediate and afflicted Sierra Leonean community. However, its seminal ruling on child soldiering has been more a subject of legal academy than a matter of broad international consumption by the media and ordinary people. The SCSL is most frequently referred to within the context of another story.¹²⁵⁵ At times the Court has been mentioned in discussions about future war crime trials for Iraq and Darfur, and at other times in the context of controversial institutional matters, such as the legal battles of staff members.¹²⁵⁶

International criminal law (ICL) ‘purports to serve multiple communities - ethnic or national communities – and the figurative ‘international community.’¹²⁵⁷ Criminal law is supposed to be concerned with harms to ‘the whole community, considered as a community, in its social aggregate capacity.’¹²⁵⁸ The Rome Statute alludes to crimes that ‘deeply shock the conscience of humanity.’¹²⁵⁹ The ICC thus becomes the symbol of the collective conscience, ‘its living expression in the eyes of all.’¹²⁶⁰ The criminal law process serves as ‘a symbolic affirmation of the ties that hold a community together and by fostering a sense that one is a law-abiding citizen.’¹²⁶¹ Some have argued against the surrender of prosecution for international crimes to domestic jurisdictions. Durkheim pointed out that ‘specificity of modern criminal justice systems is that this collective reaction is exercised through the medium of body

¹²⁵⁴ H. van der Wilt, ‘Crimes against humanity’ in B. van Beers, L. Corrias and W. Werner (eds), *Humanity across International Law and Biolaw*, (Cambridge University Press, 2014) 36

¹²⁵⁵ L. Lang ‘The Special Court for Sierra Leone: Media Coverage of Charles Taylor’ University of California, Berkeley War Crimes Studies Center

¹²⁵⁶ L. Lang, ‘The Special Court for Sierra Leone: Media Coverage of Charles Taylor’ University of California, Berkeley War Crimes Studies Centre

¹²⁵⁷ R. Sloane, ‘The Expressive Capacity of International Punishment’ (2006) Columbia Public Law & Legal Theory Working Papers, 3

¹²⁵⁸ W. Blackstone, *Commentaries on the laws of England*:5 (1769) cited in E. Wise ‘The International Criminal Court: A Budget of Paradoxes,’ (2000) 8 *Tulane Journal of International and Comparative Law* 261

¹²⁵⁹ See Rome Statute: Preamble

¹²⁶⁰ E. Durkheim, *The Division of Labor in Society*, 84 cited in F. Mégret, ‘Practices Of Stigmatization’ (2014) 76 *Law and Contemporary Problems* 287

¹²⁶¹ E. Wise, ‘The International Criminal Court: A Budget of Paradoxes,’ (2000) 8 *Tulane Journal of International & Comparative Law* 261, 267

acting upon those of its members who have violated certain rules of conduct.¹²⁶² Since these offences concern to humanity as a whole, international institutions representative of the global community become legitimated as the ideal institutions to dispense justice and inflict punishment.¹²⁶³

‘[I]t must be kept in mind that only crimes which ‘deeply shock the conscience of humanity’ can justify an internationalization of their prosecution, which involves a far-reaching blow to the competence of domestic courts on an issue which otherwise would come under matters which are essentially within the domestic jurisdiction of States ... when such serious crimes are at stake ... it is then important that they not be ‘confiscated’ by any particular state, including the one in which the crime has been committed or of which the victims or the authors are nationals.’¹²⁶⁴

9.2 Lubanga: expressive selection?

To suggest that the most plausible justification for the prosecution of Lubanga is expressivism is not to state this was the deliberate motivation behind his trial. Instead, the thesis argues it *ought* to be the most viable premise compared to the ICC’s dominant penological objectives of retribution and deterrence. On March 2005, the DRC issued a warrant of arrest on charges of genocide, crimes against humanity, including crimes of murder and illegal detention. Under the OTP’s principle positive complementarity, it would have encouraged national prosecution. The DRC national justice system was functional at the time. The court only proceeded against Lubanga because the DRC did not include the charge of conscription, enlistment and using child soldiers.¹²⁶⁵ Fatou Bensouda, then Deputy Prosecutor of the ICC noted:

‘It is the view of the Office of the Prosecutor that the abuse of child soldiers has gone largely unrecognised and unpunished for too long. . . Regardless of the outcome of

¹²⁶²Ibid

¹²⁶³ M. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Northwestern University Law Review* 539, citing H. Arendt, *Eichmann in Jerusalem* (Viking Press 1965) 254, 269

¹²⁶⁴ K. Kleffner, *Internationalised Criminal Courts* (Oxford University Press 2004) 437, 438

¹²⁶⁵ *Prosecutor v Lubanga* ICC-01/04-01/06 Decision on the Prosecutor’s Application for a Warrant of Arrest, [10 June 2006] para 37

these proceedings, the hearing (on Lubanga) represents an unprecedented opportunity to shine a spotlight on this abuse of children worldwide.¹²⁶⁶

Some assert that the selection of child soldiering crimes was purposeful on the part of the ICC. Bergsmo and Wui Ling, for instance, suggest that: '[B]y 'singling out the theme of recruitment and use of child soldiers in its first case, the ICC legitimises the very idea of thematic prosecution at the international and national levels.'¹²⁶⁷ Greijer seems to argue, however, that the exclusive prosecution of Lubanga for the crimes of recruiting and using children in armed conflict did not represent a deliberate strategy of the OTP.¹²⁶⁸ Rather, 'the context in which the Lubanga investigation unfolded strongly influenced the case against him.'¹²⁶⁹ According to Greijer, two arguments seem to have influenced the choice to try him solely for crimes against children.¹²⁷⁰ 'First, it is hard to deny that the overwhelming evidence of massive, and often brutal, child recruitment and the gravity of that crime played a role in selecting it for prosecution. Second, there was an important element related to the Court as such and its credibility.'¹²⁷¹ She also points out that failing to arrest the LRA members indicted for the Uganda situation, made it imperative for Lubanga to be prosecuted, even if that would mean trying him for only a fraction of the crimes he may have been responsible for.¹²⁷² Risking the disappearance of Lubanga and a possible subsequent failure to arrest him simply was not an option. Geijer notes:

'In this sense, the principle of opportunity was used to its maximum. Although this may not represent an ideal prosecutorial strategy, the fact that it is a unique situation in the Court's developing case law thus far tells us that we should not be too hard on this relatively new and inexperienced institution.'¹²⁷³

¹²⁶⁶F. Bensouda, Deputy Prosecutor of the ICC, Statement at the OTP Monthly Media Briefing 3 (28 August 2006), http://www.icc-cpi.int/NR/rdonlyres/AFD13ED5-315B-4393-9D30-E80C5583462E/277236/FB_20060828_en5.pdf (last accessed 28 August 2014)

¹²⁶⁷M. Bergsmo and C Wui Ling, 'Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes' in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, (2012), 2

¹²⁶⁸ S. Greijer 'The Thematic Prosecution of Crimes Against Children' in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012) 172-173

¹²⁶⁹ Ibid 173

¹²⁷⁰ Ibid 173

¹²⁷¹ Ibid 173

¹²⁷² Ibid 173

¹²⁷³ Ibid 173

As DeGuzman points out, the ICC lacks sufficiently clear goals and priorities to justify its decisions.¹²⁷⁴ She argues that when the Court is faced with having to choose particular situations and cases over others that also deserve its attention, such decisions should aim to maximize the Court's expression.¹²⁷⁵ It has been argued that prosecutors at tribunals and courts should recognise that assigning stigma to certain types of behaviour is an important objective.¹²⁷⁶ For Durkheim, the objective should be to stigmatize the *crimes themselves* as forms of reprehensible deviancy, rather than the individuals.¹²⁷⁷ As such, the prosecutor has the upper hand in launching the process of designating what is most worth stigmatising.¹²⁷⁸ It is she or he who will typically be criticised if certain states, groups, crimes, or victims are insufficiently represented in charges.¹²⁷⁹

During the confirmation of charges against Lubanga, the OTP presented narrow charges of recruiting, enlisting and actively using child soldiers. The ICC Chamber later strongly deprecated 'the attitude of the former prosecutor in relation to the issue of sexual violence.'¹²⁸⁰ Former ICC prosecutor Moreno Ocampo had advanced extensive submissions regarding sexual violence in his opening and closing submissions at trial. In his arguments on sentence, he contended that sexual violence is an aggravating factor that should be reflected by the Chamber. However, the Chamber noted that 'not only did the former prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during the trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis.'¹²⁸¹ The Confirmation Decision did not include any findings in this regard.¹²⁸² Ultimately, the Chamber ruled:

¹²⁷⁴ M. deGuzman, 'Choosing to prosecute: Expressive selection at the International Criminal Court' (2012) *Michigan Journal of International Law* 265

¹²⁷⁵ E. Wise, 'The International Criminal Court: A Budget of Paradoxes,' (2000) 8 *Tulane Journal of International & Comparative Law* 261, 312

¹²⁷⁶ F. Mégret, 'Practices Of Stigmatization' (2014) 76 *Law and Contemporary Problems* 287

¹²⁷⁷ F. Mégret, 'Practices Of Stigmatization,' (2014) 76 *Law and Contemporary Problems* 287

¹²⁷⁸ *Ibid*

¹²⁷⁹ *Ibid*

¹²⁸⁰ Lubanga Sentencing Judgment [10 July 2012] para 60

¹²⁸¹ *Ibid*

¹²⁸² *ibid* para 64

‘On the basis of the totality of the evidence introduced during the trial on this issue, the Majority is unable to conclude that sexual violence against the children who were recruited was sufficiently widespread that it could be characterised as occurring in the ordinary course of the implementation of the common plan for which Mr Lubanga is responsible. Moreover, nothing suggests that Mr Lubanga ordered or encouraged sexual violence, that he was aware of it or that it could otherwise be attributed to him in a way that reflects his culpability.’¹²⁸³

The Chamber did not address whether acts of sexual violence can be counted as ‘using [children] to participate actively in hostilities.’ The controversial decision to charge Lubanga only with crimes related to child soldiers may indeed have been animated by expressive goals.¹²⁸⁴ Expressivists suggest that the decision to proceed in the absence of evidence of arguably more serious crimes such as murder and rape seemed to reflect a desire to promote the relatively new and ill-established norm against the recruitment and use of child soldiers.¹²⁸⁵ This ‘thematic approach’ seems to be supported by Prosecutor Moreno-Ocampo’s contention that a separate charge of sexual violence would detract from the fact that the girls were, first and foremost, child soldiers.¹²⁸⁶ When a prosecutor focuses on charges against a suspected offender in a ‘particular evolving area of international criminal law, there is a possibility of worldwide attention being drawn to that area of criminal actions.’¹²⁸⁷ The exclusion of sexual violence and failure to make a declaration on the state of the offence would later trigger a legal debate as evidenced by the dissenting opinion of Justice Odio Benito,¹²⁸⁸ in academia¹²⁸⁹ and the international community.¹²⁹⁰ Dissenting opinions or judgments have been an important feature of international courts for many years.¹²⁹¹

¹²⁸³Lubanga Sentencing Judgment [10 July 2012] para 74

¹²⁸⁴ M. deGuzman, ‘Choosing to prosecute: Expressive selection at the International Criminal Court’ (2012) 33 *Michigan Journal of International Law* 265, 312

¹²⁸⁵ M. deGuzman, ‘Choosing to prosecute: Expressive selection at the International Criminal Court’ (2012) 33 *Michigan Journal of International Law* 265

¹²⁸⁶ See *Prosecutor v Lubanga* ICC-01/04-01/06 ‘Prosecution Closing Statement’ [25 August 2011] 54

¹²⁸⁷ E. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Publishing) (Google e-book 2010) 137

¹²⁸⁸ *Prosecutor v Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, Trial Chamber I, ICC-01/04-01/06, 2012 Judge Odio Benito, Separate and Dissenting Opinion – [hereinafter ‘Dissenting Opinion Odio Benito’]

¹²⁸⁹ See eg S. Merope, ‘Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC,’ (2011) 3 *Criminal Law Forum* 311; S Sharratt *Gender, Shame and Sexual Violence: The Voices of Witnesses and Court Members at War Crimes Tribunals* (Ashgate Publishing, Ltd., 2013) with references to exclusion of sexual violence in *Lubanga*

¹²⁹⁰ See eg ‘The Prosecutor v. Thomas Lubanga Dyilo – a turbulent but promising retrospective’ The Hague Justice Portal <http://www.haguejusticeportal.net/index.php?id=12989>

¹²⁹¹ D. Di Pietro ‘The Controversial Role of Dissenting Opinions in International Arbitral Awards’ *Transnational Notes: Reflections on Transnational Litigation*, 24 October 2011

9.2.1 Expressive function of Lubanga arrest and trial

Expressivism does not just focus on the expressive role of punishment but the expressive role of the legal process.¹²⁹² Expressivists contend that arrest, trial, conviction and punishment appreciate public respect for law.¹²⁹³ Trials in particular are ‘expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes.’¹²⁹⁴ The ‘dramaturgy of the trial process’ is a tool for norm projection in international criminal law.¹²⁹⁵ What emerges is an intensely dramaturgical process that narrates a story.¹²⁹⁶ By dramatizing the effect of the law-breaking conduct through the spectacle of trial making, *Lubanga* made clear what was not previously understood.¹²⁹⁷

‘Trials can educate the public through the spectacle of theatre – there is, after all, pedagogical value to performance and communicative value to dramaturgy. This performance is made all the more weighty by the reality that, coincident with the closing act, comes the infliction of shame, sanction and stigma upon the antagonists.’¹²⁹⁸

Since ‘expressivism is concerned with the narrative and messaging function of law, it places considerable importance on the methodology of how individuals are convicted and punished and, thereby, has come to value due process and legalism.’¹²⁹⁹ Therefore, we should not just focus on the expressive role of punishment but the expressive role of the legal process.¹³⁰⁰ ‘Deterrence’ and ‘retribution’ feature as pronouncements at the tail-end of trials. For all its faults, it can be observed from *Lubanga* that the court went to great lengths to protect the due process rights of the accused and ensure a fair trial. After the trial started on 13 June 2008, the Court

¹²⁹² B. Wringer, ‘Why punish war crimes? Victor’s Justice and Expressive Justifications of Punishment’ (2006) 25 *Law and Philosophy* 159

¹²⁹³ L. May and J. Brown, *Philosophy of Law: Classic and Contemporary Readings* (Wiley-Blackwell, 2009)

¹²⁹⁴ D. Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’ Georgetown Law Faculty Working Papers (2008) 9

¹²⁹⁵ D. Luban, ‘Beyond Moral Minimalism’ (2006) 20 *Ethics & International Affairs* 353, 355

¹²⁹⁶ M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press, 2007), 17

¹²⁹⁷ L. Davis and P. Hayner, ‘Difficult Peace, Limited Justice’ International Centre for Transitional Justice (March 2009), 31 discussing both the positive and negative effects

¹²⁹⁸ M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007) 175

¹²⁹⁹ M. Drumbl, ‘The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law’ (2007) 75 *George Washington Law Review* 1165, 1182

¹³⁰⁰ B. Wringer ‘Why punish war crimes? Victor’s Justice and Expressive Justifications of Punishment’ 2006 (25) *Law and Philosophy* 159

announced a stay of the proceedings because the Prosecution was unable to make available potentially exculpatory materials.¹³⁰¹ The Prosecutor had obtained the evidence on a confidential basis from several sources, including the UN, and these sources had refused to disclose it to the Defence and, in most cases, to the Trial Chamber.¹³⁰² Trial Chamber explained that – ‘[t]he disclosure of exculpatory evidence in the possession of the prosecution is a fundamental aspect of the accused’s right to a fair trial.’¹³⁰³ On 2 July 2008, Trial Chamber I issued an order granting unconditional release to Lubanga.¹³⁰⁴ The Prosecution appealed the order which was given suspensive effect, meaning that the accused would not leave detention until the Appeals Chamber had resolved the issue.

On 11 July 2008, the Prosecution requested Trial Chamber I to resume trial proceedings and to revoke the order of release of Lubanga. But Trial Chamber I decided to maintain the stay of the proceedings. Lubanga, however, remained in detention until a final decision was taken by the ICC Appeals Chamber on the appeal of the order granting him unconditional release. On 21 October 2008, the Appeals Chamber rejected the appeal by the prosecutor to revive the trial. The judges, however, ruled that Lubanga’s release is not the ‘inevitable’ consequence and ‘the only correct course’ to take.¹³⁰⁵ The judges remanded the matter back to the Trial Chamber for a new determination. On 18 November 2008, Trial Chamber I announced the trial would start on 26 January 2009.

To procure witnesses in the DRC, the OTP used several ‘intermediaries’; individuals who would assist the investigation by sourcing former child combatants and

¹³⁰¹See Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v. Thomas Lubanga Dyilo* (hereinafter, Lubanga) (ICC 01/04-01/06), Trial Chamber 1, [13 June 2008] para 73

¹³⁰²See ‘Case Information Sheet’ Situation in Democratic Republic of the Congo *Prosecutor v Lubanga* Case n° ICC-01/04-01/06 <http://www.icc.cpi.int/iccdocs/PIDS/FC/Docs/LubangaENG.pdf>

¹³⁰³*Prosecutor v Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain other Issues Raised at the Status Conference on 10 June 2008, para 92

¹³⁰⁴ See ‘Case Information Sheet’ Situation in Democratic Republic of the Congo *Prosecutor v Thomas Lubanga Dyilo* Case n° ICC-01/04-01/06 <http://www.icc.cpi.int/iccdocs/PIDS/FC/Docs/LubangaENG.pdf>

¹³⁰⁵See *Prosecutor v Thomas Lubanga Dyilo* Case n° ICC-01/04-01/06 Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled ‘Decision on the release of Thomas Lubanga Dyilo’ ICC-01/04-01/06 OA 12, [21 October 2008] para 1

communicating with them and their families.¹³⁰⁶ During the trial, nine witnesses who claimed to have been child combatants in the FPLC gave evidence at the trial. Not one of the witnesses was found by the Court to have been honest and reliable.¹³⁰⁷ Most of the judgment focuses on the findings in relation these witnesses and the ‘intermediaries’ who may have manipulated them.¹³⁰⁸ Ultimately, the court convicted Lubanga without depending on the direct testimony of underage members of his militia. The ‘judgment evinced the view that conviction need not necessarily depend on the testimony of children; rather, conviction for child soldiering may be secured on the testimony of others, coupled with certain documents-most importantly in *Lubanga*, videotapes of the defendant surrounded by bodyguards whose very young age was evident even without the benefit of birth certificates or grade school rosters.’¹³⁰⁹ The absence of important records diminished the expressive impact of the *Lubanga*.¹³¹⁰ It is to be hoped ‘that a richer trove of creditable evidence will be adduced in subsequent international prosecutions.’¹³¹¹ For the first time in the history of international criminal justice, victims have the possibility under the Statute to present their views and observations before the Court.¹³¹² The recognition of victims’ participatory rights in criminal proceedings is a novelty in international criminal law.¹³¹³ It has been asserted that victims can provide the Court with knowledge that only those who experience these crimes can give and ‘their attendance in person at the trial may help in establishing the truth.’¹³¹⁴ The Chamber authorised 129 victims to participate.¹³¹⁵ The Chamber dismissed the testimony of

¹³⁰⁶ For detailed analysis, see C. Buisman, ‘Delegating Investigations: Lessons to be Learned from the Lubanga Judgment’ (2013) 11 *Northwestern University Journal of International Human Rights* 30

¹³⁰⁷ *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC, [14 March 2012] paras 479–80

¹³⁰⁸ *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC, [14 March 2012] paras 63–220.

¹³⁰⁹ D. Amann, ‘Children and the First Verdict of the International Criminal Court’ (2013), 12 *Washington University Global Studies Law Review* 411, 429

¹³¹⁰ *Ibid*

¹³¹¹ *Ibid*

¹³¹² See ICC website ‘Victims and Witnesses’ http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/Pages/victims%20and%20witnesses.aspx

¹³¹³ W. Schabas, *An Introduction to the International Criminal Court* 328 (3d ed. 2007) See also A Cassese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections,’ 10 (1999) *European Journal of International Law* 144, 167

¹³¹⁴ C. Jorda and J de Hemptinne, ‘The Status and Role of the Victim’ in A. Cassese et al. (eds) *The Rome Statute of the International Criminal Court: A Commentary* 1387, 1388 (Oxford University Press 2002)

¹³¹⁵ *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC [14 March 2012] para 11

the three victims who gave evidence.¹³¹⁶ However, as a concept, the participation of victims, although represented during proceedings by legal practitioners, adds to the dramaturgy and expressive value of the trial process.

Expressivism is designed to strengthen faith in the rule of law among the general public;¹³¹⁷ it transcends retribution and deterrence in claiming as a central goal the crafting of historical narratives, their authentication as truths, and their pedagogical dissemination to the public.¹³¹⁸ The President of the Yugoslavia Tribunal stated that in international criminal trials, ‘a fully reliable *record* is established of atrocities so that future *generations* can remember and be made fully cognisant of what happened.’¹³¹⁹ The ‘desire to set the historical record straight, and to restore the integrity of human remembrance, is greatly strengthened by the belief that truth telling about the past is a necessary precondition for reconciliation and avoidance of future conflicts.’¹³²⁰ The ‘power to discover and represent facts provides these trials a unique opportunity to shape the historical knowledge of the atrocities that transpired.’¹³²¹ Also ‘[G]raphic accounts of past human rights abuses and war crimes may be a powerful tool to internalize norms prohibiting such conduct.’¹³²² However, problems arise because adversarial systems have to deal with competing narratives. As Osiel notes, in transitional trials ‘the criminal courtroom will inevitably be viewed as providing a forum in which competing historical accounts of recent catastrophes will be promoted... and judgments likely will be viewed as endorsing one or another version of collective memory.’¹³²³ The procedural scrupulousness and rigour of authentication in *Lubanga* in, for example, the insistence on the availability of exculpatory evidence and the elimination of witnesses and victims lacking credibility suggest that efforts to establish that a plausible historical record on *Lubanga* were made. The perceived fairness of the trial may have enhanced the sociological

¹³¹⁶ *Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC [14 March 2012] para 485–502

¹³¹⁷ *ibid* 173

¹³¹⁸ *ibid*

¹³¹⁹ A. Cassese, ‘Reflections on International Criminal Justice’ (198) 61 *Modern Law Review* 1, 1

¹³²⁰ M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 335

¹³²¹ V. Padmanabhan ‘Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay’ (2009) 3 *Journal of International Law* 427, 438

¹³²² *Ibid*

¹³²³ M. Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, NJ: Transaction Publishers, 1997), 39–40.

legitimacy and norm internalization. What the court may have lacked in sociological legitimacy, the trial recouped in procedural legitimacy.

9.2.2 Expressive role of Lubanga verdict

Expressivists are interested in ‘how legal ‘statements’ might be designed to change social norms.’¹³²⁴ The expressive value of story-telling is enhanced when it takes the form of a judicial pronouncement, cloaked in a mantle of authority, which can intone an aura of impartiality.¹³²⁵ As Douglas notes, trials tell stories and narrate events – publicly – and then impose punishment on the guilty in a manner that can shame and stigmatize.¹³²⁶ It ‘is the judges who ultimately decide whether stigma will be confirmed through judgment.’¹³²⁷ The court ruled that Lubanga as the President of the UPC/FPLC, and as the evidence had demonstrated, was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role over the activities of the UPC/FPLC. He was informed, on a substantive and continuous basis, of the operations of the FPLC.¹³²⁸ He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives.¹³²⁹ He personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15. The Chamber concluded that these contributions by Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.¹³³⁰ He was found guilty as a co-perpetrator. The court concluded:

‘The accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri. This resulted, in the ordinary course of events, in the

¹³²⁴ C. Sunstein ‘On the Expressive Function of Law’ (1996)¹⁴⁴ *University of Pennsylvania Journal of International Law* 2021, 2025

¹³²⁵ M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007), 17

¹³²⁶ L. Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*. London: Yale University Press, 2001) cited in M. Drumbl (*Atrocity, Punishment and International Law draft*)

¹³²⁷ F. Mégret, ‘Practices Of Stigmatization’ (2014) 76 *Law and Contemporary Problems* 287, 296

¹³²⁸ Lubanga Judgment para 1356

¹³²⁹ Ibid

¹³³⁰ Ibid

conscripting and enlistment of boys and girls under the age of 15, and their use to participate actively in hostilities.¹³³¹

Lubanga's FPLC recruited children by abduction, and put pressure on the population to permit recruitment and to accept the enlistment of children during the recruitment campaigns.¹³³² Apart from reinforcing law, trials ought to clarify it.

'And it is here that lies the great potential of international criminal tribunals, in their role in the development of humanitarian norm, via the elaboration of crimes that ensue from their violation; transporting us from theoretical or doctrinal speculations to concrete determinations of the constitutive elements of these crimes.'¹³³³

Lubanga as the first international proceeding involving only child-soldiering crimes 'offered a first interpretation of the main features characterising these crimes...'¹³³⁴ and it 'more generally provided early clarifications on both procedural and substantive legal issues relevant to the international criminal justice system established by the Rome Statute.'¹³³⁵ The Prosecution charged Lubanga under articles 8(2)(e)(vii) and 25(3)(a) of the Statute with the war crimes of conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities. The Lubanga judgment dealt with a number of issues of law. All had didactic value. Because expressivism aims at altering norms, I shall, however, concentrate on decisions that had pertinent socio-pedagogical value or failed to advance this goal. For instance, I will not focus on minutiae of the decision that the conflict in Ituri was of a non-international and not international character. These aspects have been unpicked comprehensively elsewhere.¹³³⁶ Instead, I shall concentrate on socially-oriented or socially valuable messages that would have

¹³³¹ Ibid para 1351

¹³³² See *Prosecutor v Thomas Lubanga Dyilo* Judgment ICC-01/04-01/06; [12 March 2012] para 30

¹³³³ G. Abi-Saab 'International criminal tribunals and the development of international humanitarian and human rights law' in E Yakpo and T Boumedra (eds) *Liber Amicorum: Judge Mohammed Bedjaoui*: (The Hague: Kluwer Academic 1999) 651

¹³³⁴ T. Mariniello *Prosecutor v Thomas Lubanga Dyilo: The First Judgment of the International Criminal Court's Trial Chamber* (2012) 1 *International Human Rights Law Review* 137, 138

¹³³⁵ Ibid

¹³³⁶ See eg K. Ambos, 'The first Judgment of the International Criminal Court (Prosecutor v. Lubanga): A comprehensive Analysis of the Legal Issues' 12 (2012) *International Criminal Law Review* 115; R. Graf 'The International Criminal Court and Child Soldiers (2012) 10 *Journal of International Criminal Justice*' *Journal of Internal Criminal Justice* 945; T. Lieflander, 'The Lubanga Judgment of the ICC: More than Just the First Step' (2012) 1 *Cambridge Journal of International and Comparative Law* 191; T. Mariniello *Prosecutor v Thomas Lubanga Dyilo: The First Judgment of the International Criminal Court's Trial Chamber* (2012) 1 *International Human Rights Law Review* 137

made DRC society, and indeed the international community, learn some aspects about child soldiering that might not have been clear.

9.2.2.1 Recruitment

The word ‘recruiting’, which is used in the Additional Protocols and in the Convention on the Rights of the Child (CRC), was replaced by ‘conscripting’ and ‘enlisting’ in the Statute.¹³³⁷ The Trial Chamber ruled that Article 8(2) (e) (vii) established three different offences, which constitute war crimes if they took place in the context of, or are associated with, a non-international armed conflict. The Trial Chamber made a distinction between ‘conscription’ and ‘enlistment’ on the basis of the child’s consent. ‘Enlisting’ is defined as ‘to enrol on the list of a military body’ and ‘conscripting’ is defined as ‘to enlist compulsorily.’¹³³⁸ Therefore, the distinguishing element is that for conscription there is the added element of compulsion.¹³³⁹ Both of these, according to the Trial Chamber, are forms of recruitment, thus the distinction is irrelevant. This is an important clarification that might hold didactic value among armed forces and rebel groups. In assessing the evidence, the court noted for instance, that a witness seemed to consider that ‘voluntary’ enlistment is not a form of recruitment or a crime. However, recruitment, the court ruled, does not necessarily involve the conscription of children by force, given the many alternative, non-forceful ways of persuading children to join the military ‘voluntarily’ that were available.¹³⁴⁰ The consent of a child to his or her recruitment does not provide an accused with a valid defence¹³⁴¹ but it may assume relevance only in relation to the determination of sentences or victim reparation. This is due to the fact that a girl or a boy under 15 years of age is unable to provide ‘genuine and informed consent when enlisting in an armed group or force.’¹³⁴²

These offences are committed at the moment a child under the age of 15 is enrolled in, or joins an armed group, with or without compulsion. In addition, they are continuous crimes, meaning that they only end when the child reaches 15 years of age

¹³³⁷ Lubanga trial judgment para 607

¹³³⁸ Ibid 608

¹³³⁹ Ibid 608

¹³⁴⁰ Ibid 784

¹³⁴¹ Ibid 617

¹³⁴² Ibid 613

or leaves the force or group.¹³⁴³ On the conduct of *using* child soldiers to participate actively in hostilities, the Trial Chamber held that the reference to the expression ‘to participate actively’ covers a wider range of activities and roles than the expression ‘direct participation’ used by Additional Protocol I to the Geneva Conventions.¹³⁴⁴ I discuss this aspect below

9.2.2.2 Nature of participation

The Chamber also had to interpret the term ‘using [children] to participate actively in hostilities’ as contained in the charge. As noted from the Cape Town and Paris Principles (*see* Chapter 4:4.5), the definition of child soldiering has expanded from just direct military combat. The participating victims and the prosecution wanted the Trial Chamber to interpret ‘participate actively in hostilities’ as broadly as possible to include all of the children who were recruited by the UPC, even those who did not engage in combat on the front lines.¹³⁴⁵ The Court had to decide whether the use of children as guards of military objects, bodyguards for commanders, couriers, spies and so on constituted ‘using them to participate actively in hostilities.’ The *Lubanga* judgment concluded the underlying common feature was whether the child concerned is, at the very least, a ‘potential target.’ The Chamber stated that:

‘Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an ‘indirect’ role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors—the child’s support and this level of consequential risk—mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them. Given the different types of roles that may be performed by children used by armed groups, the Chamber’s determination of whether a particular activity constitutes ‘active participation’ can only be made on a case-by-case basis.’¹³⁴⁶

¹³⁴³ Ibid 617

¹³⁴⁴ Ibid 627-628

¹³⁴⁵ See ‘Deconstructing Lubanga, the ICC’s First Case: The Trial and Conviction of Thomas Lubanga Dyilo’ American Non-Governmental Organisations for the International Criminal Court (AMICC) http://www.amicc.org/docs/Deconstructing_Lubanga.pdf (7 September 2012)

¹³⁴⁶ Lubanga judgment para 628

Although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them.¹³⁴⁷ The ICC reaffirmed the expanding conception of actively participating in warfare as had been advocated by NGOs. Those who participate actively in hostilities include a wide range of individuals, from those on the front line (who participate directly) through to the boys or girls who are involved in a myriad of roles that support the combatants.

9.2.2.3 Child soldiering and sex crimes

As already noted, the chamber did not consider sexual crimes. The prosecutor adduced significant evidence of these crimes. Young girls participated in combat, they acted as guards and went out with the patrols, and in this sense they undertook the same routine duties as the other soldiers.¹³⁴⁸ However, they were also used as sexual slaves and domestic servants. Their most important role was to assist the commanders by cooking, along with ‘other feminine tasks, routine tasks carried out by women.’¹³⁴⁹ The Chamber took into account the evidence concerning domestic work undertaken by girls under the age of 15 when the support provided by the girl exposed her to danger by becoming a potential target.¹³⁵⁰ Although girls were often used to prepare food, they were also used to provide sexual services for the commanders. The commanders particularly treated the girls as if they were their ‘women’ or their ‘wives.’¹³⁵¹ Commander Abelanga kept a girl under 15 years old at his home, for a considerable period of time. It was commonly known and commented on that this girl was Abelanga’s ‘wife.’ She prepared the commander’s food and notwithstanding her saying ‘I don’t want to’, her cries were heard at night.¹³⁵² Commander Ndjabu retained another as his bodyguard (she later became pregnant by the brigade commander).¹³⁵³

¹³⁴⁷Ibid

¹³⁴⁸Lubanga Trial Judgment, para 878

¹³⁴⁹Ibid paras 878 - 882

¹³⁵⁰Ibid para 882

¹³⁵¹Ibid para 894

¹³⁵²Ibid para 895

¹³⁵³Ibid para 895

A witness stated the girls she met at demobilisation centres, except for a few who had been protected by certain women in the camps, claimed they had been sexually abused, most frequently by their commanders but also by other soldiers. Some fell pregnant, resulting in abortions; and there were instances of multiple abortions. The witness gave evidence that the psychological and physical state of some of these young girls was catastrophic.¹³⁵⁴ The youngest victim of this sexual abuse interviewed by the witness was 12 years old. The witness stated that some of those who became pregnant were thrown out of the armed group and ended up on the streets of Bunia.¹³⁵⁵

However, the Prosecutor failed to include allegations of sexual slavery or sexual violence in the charges. The majority of the Trial Chamber considered these acts to be irrelevant in connection to the charge of child soldiering. The situation would have been different if the OTP had also charged Lubanga with sex crimes. Although sexual violence is an element of the legal definition of the crimes of enlistment, conscription and use of children under the age of 15 to participate actively in hostilities, crimes of sexual violence are distinct and separate crimes that could have been evaluated separately by the Chamber if the Prosecutor would have presented charges against these criminal conducts.¹³⁵⁶ Therefore, the evidence was considered irrelevant for the purposes of Article 74 of the Rome Statute stating '[T]he decision shall not exceed the facts and circumstances described in the charges and any amendments to the charges.' These crimes or facts related to them were not included in the decision on the confirmation of charges handed down by the Pre-Trial Chamber. The Trial Chamber did not make any findings of fact on the issue, particularly as to whether responsibility was to be attributed to Lubanga.¹³⁵⁷ While there are provisions to recharacterise crimes,¹³⁵⁸ this can only be done within the facts and circumstances described in the charges. Article 74 (2) of the Rome Statute does not allow the Trial Chamber to rule beyond what is brought before the Court by the OTP. In her dissenting opinion, Judge Odio-Benito, pointed out that the majority 'seems to confuse the factual allegations of this case with the legal concept of the crime, which

¹³⁵⁴ibid para 890

¹³⁵⁵ibid para 891, 892

¹³⁵⁶Dissenting Opinion Odio Benito para 20

¹³⁵⁷Ibid para 896

¹³⁵⁸ Regulation 55 of the ICC

are independent'.¹³⁵⁹ Judge Odio-Benito proposed the inclusion of sexual violence within the legal concept of using child soldiers to participate actively in the hostilities.¹³⁶⁰ However, such recharacterisation would be inconsistent with Article 23(2) of the Statute, which explicitly states that 'the definition of a crime shall be *strictly construed* and shall *not be extended by analogy*'.¹³⁶¹ In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted.¹³⁶² Therefore, the Trial Chamber excluded that a decision pursuant to Article 74 can cover factual allegations potentially supporting sexual slavery, since they had not been included in the decision on the confirmation of charges.¹³⁶³ The omission of these crucial components of child soldiering diminished expressive mileage of *Lubanga*. While the prosecutor advanced arguments about non-combat roles, his preclusion of sexual violence and sexual slavery under participating 'actively in hostilities' shut an avenue for broad interpretation and evidence of sexual violence at trial.¹³⁶⁴ The court was also reticent on ruling whether it constituted participating actively in hostilities, risking making the element invisible. This omission has devalued the full expression of the character of child soldiering. It failed to stigmatise adequately the sexual component of child soldiering.

Dissenting opinions have played a remarkable role in the development of international law.¹³⁶⁵ The importance of dissents is 'due to the public nature of the proceedings and the fact that such decisions often address novel issues over which no solid body of jurisprudence has yet developed.'¹³⁶⁶ Judge Benito argued that the Chamber should have clarified the law (on whether sexual violence constitutes participating actively in hostilities); in her opinion, by not doing so 'the Majority of the Chamber is making this critical aspect of the crime invisible.'¹³⁶⁷ On the other hand, it has been argued that the focused charges on *Lubanga* triggered 'an

¹³⁵⁹Dissenting Opinion Odio Benito para 16

¹³⁶⁰Ibid

¹³⁶¹T. Mariniello *Prosecutor v Thomas Lubanga Dyilo: The First Judgment of the International Criminal Court's Trial Chamber* (2012) 1 *International Human Rights Law Review* 137

¹³⁶²Ibid

¹³⁶³Ibid

¹³⁶⁴See 'Deconstructing *Lubanga*, the ICC's First Case: The Trial and Conviction of Thomas Lubanga Dyilo' American Non-Governmental Organisations for the International Criminal Court (AMICC) http://www.amicc.org/docs/Deconstructing_Lubanga.pdf (7 September 2012)

¹³⁶⁵R. Anand, 'The Role Of Individual And Dissenting Opinions In International Adjudication' (1965) 14 *International and Comparative Law Quarterly* 788

¹³⁶⁶D. Di Pietro 'The Controversial Role of Dissenting Opinions in International Arbitral Awards' *Transnational Notes: Reflections on Transnational Litigation*, 24 October 2011

¹³⁶⁷Dissenting Opinion Odio Benito, para 16

international awareness of the social, psychological and legal nature of what constitutes the crime of conscripting or enlisting children into militias and using them to participate actively in hostilities...¹³⁶⁸The Prosecutor is responsible for designating what is most worth stigmatizing.¹³⁶⁹ It is she or he who will face criticism ‘if certain states, groups, crimes, or victims are insufficiently represented in charges.’¹³⁷⁰In the Sentencing Decision, the Trial Chamber, with strong language, explicitly admonished former Prosecutor Luis Moreno-Ocampo:

‘The Chamber strongly deprecates the attitude of the former Prosecutor in relation to the issue of sexual violence. He advanced extensive submissions as regards to sexual violence in his opening and closing submissions at trial, and in his arguments on sentence he contended that sexual violence is an aggravating factor that should be reflected by the Chamber. However, not only did the former Prosecutor fail to apply to include sexual violence or sexual slavery at any stage during these proceedings, including in the original charges, but he actively opposed taking this step during trial when he submitted that it would cause unfairness to the accused if he was convicted on this basis.’¹³⁷¹

The possible consequence is that perpetrators of child militarisation may consider rape less stigmatic. Nonetheless, the *Lubanga* judgment still offered ‘interesting insights on the socio-pedagogical role of international criminal justice.’¹³⁷² A defence witness testified that Lubanga’s UPC did not have a policy of systematically recruiting children into the FPLC. Recruitment was not necessary, he pointed out, because ‘a lot of recruits came to get revenge for their families who had been killed’ and so they were ‘very keen volunteers.’¹³⁷³ The Trial Chamber noted that from the defence witness’ account it appeared he considered that ‘voluntary’ enlistment was not a form of recruitment or a crime. As the Trial Chamber pointed out, recruitment did not necessarily involve the conscription of children by force, given the many alternatives, non-forceful ways of persuading children to join the military ‘voluntarily’.¹³⁷⁴ The Trial Chamber accepted the approach adopted by the Pre-Trial

¹³⁶⁸ E Mendes *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Publishing) (Google e-book, 2010) , 137

¹³⁶⁹ Ibid

¹³⁷⁰ Ibid

¹³⁷¹ Trial Chamber I, *Situation in the Democratic Republic of Congo*, Prosecutor v. Lubanga, ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute [10 July 2012].

¹³⁷² T. Mariniello *Prosecutor v Thomas Lubanga Dyilo: The First Judgment of the International Criminal Court’s Trial Chamber* (2012) 1 *International Human Rights Law Review* 137

¹³⁷³ Lubanga Trial Judgment para 784

¹³⁷⁴ Ibid

Chamber that ‘conscription’ and ‘enlistment’ are both forms of recruitment, in that they refer to the incorporation of a boy or a girl under the age of 15 into an armed group, whether coercively (conscription) or voluntarily (enlistment).¹³⁷⁵ However, the exclusion of sex crimes hampered the advancement in the development of law on child soldiering.

9.2.3 Expressive role of Lubanga punishment

The problem of penology in particular, however, concerns the appropriate explanation and justification of the legal institution of punishing wrongdoers.¹³⁷⁶ When a perpetrator is punished for committing a harm, what is the justification for that punishment?¹³⁷⁷ The Prosecution in Lubanga had sought the maximum term of 30 years. He was sentenced to 14 years in prison but will serve eight. The Rome Statute does not outline purposes to be pursued in meting out sentences. In considering the purposes of punishment at the ICC, the Chamber took into account the Preamble of the Statute, which provides the retributive objective that ‘the most serious crimes of concern to the international community as a whole must not go unpunished.’¹³⁷⁸ The ICC was established ‘to these ends and for the sake of present and future generations.’¹³⁷⁹ The Chamber stated that the principal historical objective underlying the prohibition against the use of child soldiers is to protect children under the age of 15 from the risks that are associated with armed conflict, and particularly they are directed at securing their physical and psychological wellbeing.¹³⁸⁰ This includes not only protection from violence and fatal or non-fatal injuries during fighting, but also the potentially serious trauma that can accompany recruitment, including separating children from their families, interrupting or disrupting their schooling and exposing them to an environment of violence and fear.¹³⁸¹ The court thus managed to place the gravity of child soldiering globally. The Lubanga judgment regurgitates the classical objectives of retribution and

¹³⁷⁵Ibid para 607, Trial Chamber also citing R. Lee (ed) *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers 2001), 205

¹³⁷⁶ R. Lipkin, ‘The Moral Good Theory of Punishment’ (1998) 40 *University of Florida Law Review* 4

¹³⁷⁷ For discussion on this question see, eg, J Darley, J et al ‘Incapacitation and Just Deserts as Motives for Punishment’ (2000) 24 *Law and Human Behaviour* 659

¹³⁷⁸See Rome Statute, Preamble para. 4

¹³⁷⁹Ibid para 9

¹³⁸⁰Lubanga Sentencing Judgment [10 July 2012] para 38

¹³⁸¹Ibid

deterrence¹³⁸² as primary goals. The principle of proportionality-that penalties be proportionate in their severity to the gravity of the defendant's criminal conduct- has traditionally been a basic requirement of fairness.¹³⁸³ Assessing the appropriate sentence is problematic. What would be the appropriate sentence for perpetrators of the Holocaust genocide? The 'image of Adolf Eichmann, Josef Mengele and other Nazis in their dotage, tending their rose gardens in South America make no utilitarian sense whatsoever. They will not do their crimes again, nor would their punishment deter others.'¹³⁸⁴

The reactions to Lubanga's sentence suggested dissatisfaction. Dana, for instance, states that '[F]or ICC Presiding Judge Adrian Fulford to stare down at Lubanga and forcefully declare that his crimes are undoubtedly very serious crimes that affect the international community as a whole[,]but then impose a punishment that is less than half of the maximum term penalty available under the ICC Statute must have been perplexing, even for supporters of the Court.¹³⁸⁵ As already been noted, many people in Ituri also believed Lubanga's sentence was lenient, and did not fit the crime. The quantum of sentences is almost invariably controversial. Sentences deemed to be too high are considered vengeful and inappropriate.¹³⁸⁶ For instance, it has been argued Charles Taylor's sentence of 50 years was highly disproportionate.¹³⁸⁷

Expressivist theories, on the other hand, look at the messaging effect of verdict *and* punishment, in particular the symbolic value of penology.¹³⁸⁸ Expressivism is, however, criticised for not providing sufficient justification for penology either.¹³⁸⁹ 'To condemn meaningfully', as Anderson and Pildes assert, 'requires not a mere utterance, even in the form of a stern lecture from the bench, but a practice of

¹³⁸²Ibid para 16

¹³⁸³ A. von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55, 55

¹³⁸⁴ A. Oldenquist, 'An explanation of retribution' (1988) 85 *Journal of Philosophy* 464, 464

¹³⁸⁵S. Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?' (2014) 3 *Penn State Journal of Law & International Affairs* 30

¹³⁸⁶ For a discussion on human rights and sentencing, see eg D. van Zyl Smit and A. Ashworth 'Disproportionate Sentences as Human Rights Violations' (2004) 67 *Modern Law Review* 54

¹³⁸⁷ K. Heller, 'The Taylor Sentencing Judgment: A Critical Analysis' (2013) 11 *Journal of International Criminal Justice* 835

¹³⁸⁸D. Amann, 'Message as Medium in Sierra Leone' (2001) 7 *ILSA Journal of International & Comparative Law* 237, 238

¹³⁸⁹See eg G. Dingwall and T. Hillier, 'The Banality of Punishment: Context Specificity and Justifying Punishment of Extraordinary Crimes' (2010) 6 *International Journal of Punishing and Sentencing* 6

punishment socially understood to express condemnation effectively, such as incarceration.¹³⁹⁰ However, expressivism does not discard the idea of punishment. The difference is in interpreting what punishment would serve. According to Feinberg, the expressive function of punishment serves important social purposes.¹³⁹¹ Punishment, he posits, is deemed a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted.¹³⁹² Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.¹³⁹³ It maintains the normative force of the law.¹³⁹⁴ International judges have occasionally invoked expressive goals in justifying the sentences they impose. In the sentencing judgment in the ICTY’s *Erdemović* case for example, the judges wrote that:

[T]he 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 of the essential functions of a prison sentence for a crime against humanity.¹³⁹⁵

While expressivism is essentially ‘utilitarian’, on its account, punishment is delivered to strengthen faith in rule of law among the general public, as opposed to punishing simply because the perpetrator deserves it or because potential perpetrators will be deterred by it.¹³⁹⁶ Although it seems a ‘reach for legalist punishment to exact retribution or deter individuals...instilling fear of getting caught, punishments bears greater promise to educate future generations about the effects of extreme evil and edify a moral consensus...’¹³⁹⁷ The ICTY in *Kupreskić* held that: ‘[T]his (punishment) should be done in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in

¹³⁹⁰E. Anderson and R. Pildes, ‘Expressive Theories of Law: A General Restatement’ (2000) 148 *University of Pennsylvania Journal of International Law* 1503, 1567

¹³⁹¹J. Feinberg ‘The Expressive Function of Punishment’ in *Doing and Deserving* (Princeton: Princeton University Press 1970)101-105

¹³⁹² *Ibid* 96

¹³⁹³ *Ibid* 95, 98

¹³⁹⁴ *Ibid*

¹³⁹⁵ *Prosecutor v. Erdemović*, Sentencing Judgment, ICTY [29 November 1996], para. 65.

¹³⁹⁶M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 173

¹³⁹⁷ M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 17

and respect for the developing system of international justice'¹³⁹⁸Citing the *Nikolic Sentencing Judgment at the ICTY*, the AFRC Judgment at the SCSL stated:

‘One of the main purposes of a sentence is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.’¹³⁹⁹

Expressivism only ‘self-consciously focuses less on the immediate instrumental value of punishment—as a tool of either retribution or deterrence on the rational actor model—and more on the long-term normative values served by any system of criminal law.’¹⁴⁰⁰After all, the Rome statute proclaims that the ICC was established ‘for the sake of present and *future* generations.’¹⁴⁰¹ In short, expressivists posit that whether or not punishment fits the crime, penology is justified if it transmits socially valuable messages. Damaska argues, for instance, that ‘a court decision suitable for the advancement of human rights culture in world society at large may produce a negative effect in communities from whose horrors international criminal courts derive their cases.’¹⁴⁰²He further contends that international judges ‘should not be swayed by hostile local responses to their decisions if they are generated by values or attitudes whose transcendence is the pedagogic aim of international criminal justice.’¹⁴⁰³ Disregarding ‘such beliefs, despite adverse local responses, may be facilitated by the prospect that they will lose their virulence as soon as passions unleashed by conflict subside, and extraterritorial pedagogic signals encounter a more congenial climate (relate to concerns over punishment).’¹⁴⁰⁴

Perhaps a consideration has to be made of what else international tribunals and the ICC in particular, can realistically achieve, considering the constraints the court faces, having discarded retribution and deterrence as lesser plausible rationales for

¹³⁹⁸*Prosecutor v Zoran Kupreskic et al.*, ICTY Case No. IT-95-16, Judgment, [14 January 2000] para 848

¹³⁹⁹*Prosecutor v Charles Ghankay Taylor*SCSL-03-01-T), Sentencing Judgment, Trial Chamber II, [20 May 2012] para16

¹⁴⁰⁰ R. Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,’ (2007) 43 *Stanford Journal of International Law* 39, 71

¹⁴⁰¹ Rome Statute, Preamble para 9

¹⁴⁰² M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 347

¹⁴⁰³ *Ibid* 348

¹⁴⁰⁴ *Ibid* 348

its work. As Duff put it, philosophical theories must attend to the empirical actualities of that which they theorise.¹⁴⁰⁵The court, it would appear, is ideally situated to and can realistically express global norms against egregious crimes as most serious offences. In that sense, the punishment of war crimes, for instance, would be seen as a special case, requiring a different sort of justification from that which was applicable to the institution of punishment as a whole.¹⁴⁰⁶The expressive value of the punishment of extraordinary international criminals will thus be strengthened to the extent that this value can be distinguished from that of punishing ordinary common criminals.¹⁴⁰⁷ A more purposive utilitarian account

‘...might aim to take into account other communicative effects of punishment which go beyond simple deterrence. Punishment may not simply frighten individuals who might themselves commit crimes but also play a role in communicating the standards of a community to its members, thereby influencing their moral and social development...’¹⁴⁰⁸

From this perspective, image of the Nazis imprisoned in their old age would make sense. The objective of preventing recidivism at such age and inflicting ‘pain’ on them is less plausible. Instead, punishment would be denunciatory and an affirmation of collective values. The role of punishment, according to Durkheim:

‘is not what it is ordinarily perceived to be. It does not serve, or serves only incidentally, to reform the offender or to scare off potential imitators. Its effectiveness in these respects is questionable—at any rate, mediocre. Its real function is to maintain intact the cohesion of society by sustaining in all its vigour communal consciousness.’¹⁴⁰⁹

It is this community affirmation effect that is crucial. Punishment reaffirms and reinforces collective beliefs about what constitutes right and wrong.¹⁴¹⁰ If crime did

¹⁴⁰⁵ A. Duff, ‘Theories of Criminal Law’ *The Stanford Encyclopedia of Philosophy* (Summer 2013 Edition), E NZalta (ed.), forthcoming URL =

<<http://plato.stanford.edu/archives/sum2013/entries/criminal-law/>>.

¹⁴⁰⁶ B. Wringer, ‘Why punish war crimes? Victor’s Justice and Expressive Justifications of Punishment’ (2006) 25 *Law and Philosophy* 159

¹⁴⁰⁷ M. Drumbl, *Atrocity, punishment, and international law* (Cambridge University Press 2007)

¹⁴⁰⁸ B. Wringer, ‘War Crimes and Expressive Theories of Punishment: Communication or Denunciation?’ (2010) 16 *Res Publica*, 119, 121

¹⁴⁰⁹ E. Durkheim, *De la Division Du Travail Social* 76-77 (7th ed. 1960) (1893) translated by E. Wise ‘The International Criminal Court: A Budget of Paradoxes,’ (2000) 8 *Tulane Journal of International & Comparative Law* 261. For other translations of this passage, see E. Durkheim, *The Division Of Labor In Society* 108 (George Simpson trans., 1933) (1893); Durkheim And The Law 68-69 (S. Lukes and A. Scull (eds. 1983) cited in E. Wise ‘The International Criminal Court: A Budget of Paradoxes,’ (2000) 8 *Tulane Journal of International & Comparative Law* 261, 266

¹⁴¹⁰ E. Wise ‘The International Criminal Court: A Budget of Paradoxes,’ (2000) 8 *Tulane Journal of International & Comparative Law* 261

not exist, a community would have to invent it in order to retain its sense of being a community.¹⁴¹¹ Expressive law is most important for its effect, not on criminals, but on honest, law-abiding people.¹⁴¹² It not only keeps them law-abiding; it helps hold the community together. While the indications suggest norm internalisation might be taking place in some places in the DRC, the penal aims of expressivism transcend local spaces affected by conflict. The ICC serves the international community. As such it engenders the cosmopolitan purpose of international law. The '[I]nternational criminal justice institutions will not enjoy legitimacy unless they are seen to operate according to the values of the expressivist Everyone, both the society directly affected by a tragedy and the amorphous, sometimes legalistic audience known as 'international society.'¹⁴¹³The cosmopolitan elements to international criminal law suggest that its audience is the entire human community.¹⁴¹⁴ A legal regime helps to constitute our identity as individuals who believe in the rule of law.¹⁴¹⁵ However, the ICC in *Lubanga* was surprisingly reticent in propounding this function in international criminal law. The Lubanga judgment simply regurgitated the classical objectives of retribution and deterrence¹⁴¹⁶ as primary goals.

9.3 Mass crime and norm internalisation

Although both expressivism and deterrence hope to discourage future atrocities, they proceed differently.¹⁴¹⁷ Since expressivist theories adopt an intergenerational approach¹⁴¹⁸ and moral and social development,¹⁴¹⁹ the ultimate objective is norm internalisation. One conception suggests norms are 'internalised, and become embedded in domestic legal and political processes.'¹⁴²⁰ International legal scholars (constructivists in particular) have explained how transnational actors interact and

¹⁴¹¹ Ibid

¹⁴¹² Ibid

¹⁴¹³D. Amann 'Group Mentality, Expressivism, and Genocide,' (2002) 2 *International Criminal Law Review* 93, 132

¹⁴¹⁴D. Koller, 'The Faith of the International Criminal Lawyer', (2008) 40 *New York University Journal of International Law and Politics* 1019, 1062

¹⁴¹⁵ Ibid 1059

¹⁴¹⁶Lubanga Sentencing Judgment [10 July 2012] para 16

¹⁴¹⁷M. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law' (2007) 75 *George Washington Law Review* 1165

¹⁴¹⁸Ibid

¹⁴¹⁹B. Wringer 'War Crimes and Expressive Theories of Punishment: Communication or Denunciation?' (2010) 16 *Res Publica* 119, 121

¹⁴²⁰H. Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process', (1996) 75 *Nebraska Law Review* 181, 205

cause international norms to become internalised into domestic structures.¹⁴²¹ There ‘is a gap in the legal scholarship on how norms are translated on the local level.’¹⁴²² Norm internalisation herein is not regarded mainly as the acceptance of international law by states but the internalisation of norms of international law by individuals within ‘international society.’ While international criminal courts are largely symbolic, a more purposive justification for prosecution of such egregious crimes would be premised on a long term objective of internalising norms in individuals especially in affected communities. Otherwise would serve little purpose. Internalisation occurs when ‘a norm’s maintenance has become independent of external outcomes - that is, to the extent that its reinforcing consequences are internally mediated, without the support of external events such as rewards or punishment.’¹⁴²³

Despite Damaska’s apparent disregard for the impact of court decisions on local communities, he partially concedes, that ‘the importance of considering local responses to the decisions of international criminal courts can hardly be overemphasized. From the standpoint of the courts’ pedagogic mission, these responses may often deserve to be attributed greater weight than favourable.’¹⁴²⁴ Trials are ‘central to the norm internalisation process.’¹⁴²⁵ Such an objective is much more important in communities affected by conflict. New (international) norms or social meanings can gradually become internalised by the different actors.¹⁴²⁶ Such an objective is critical for crimes of ‘mass’ nature that involve wide communal engagement. Norms become entrenched, and actors come instinctively to obey them, through repeated participation, or ‘cycle(s) of interaction, interpretation, and

¹⁴²¹G. Sarfaty, ‘International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation’ (2007) 48 *Harvard International Law Journal* 441, citing eg H. Koh, ‘Why Do Nations Obey International Law?’ (1997) 106 *Yale Law Journal* 2599

¹⁴²²G. Sarfaty, ‘International Norm Diffusion in the Pimicikamak Cree Nation: A Model of Legal Mediation’, (2007) 48 *Harvard International Law Journal* 441, 442

¹⁴²³J. Aronfreed, *Conduct and conscience; the socialization of internalized control over behavior* (Academic Press, New York 1968) 18

¹⁴²⁴ M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 348

¹⁴²⁵V. Padmanabhan ‘Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay’ (2009) 3 *Journal of International Law* 427

¹⁴²⁶D. Koller, ‘The Faith of the International Criminal Lawyer’ (2008) 40 *New York University Journal of International Law and Policy* 1019, 1052

internalisation' fostered by international institutions like the Tribunals.¹⁴²⁷ An expressivist model of international law and international criminal law would envisage embedding norms with the aim of compliance by actors over time. Expressivism places importance on social meaning thus focusing on broader society. When norms are internalised, they assume a particular social meaning within society. The prosecution and punishment of Lubanga would produce and reinforce the social meaning on the undesirability of child soldiering. Padmanabhan points out that norm internalisation appears to be an attractive trial objective when three conditions are met.¹⁴²⁸

'First, there is a clear international criminal prohibition on the conduct in question and the cost of continued violations of the norm is high. This creates a great desire to prevent future violations. Second, the prohibition in question is not deeply rooted in the personal or social morality of the community, creating a risk that this community will violate the norm. Generally, this community is that of the defendant. Often the defendant is just one of many members of his community who has violated international law, creating a need to deepen that community's commitment to international law. Third, there exists a population of potential defendants whose trials might produce narratives sufficient to deepen social commitment to the norm in question.'¹⁴²⁹

It would appear *Lubanga* fulfils all these precepts. Child soldiering is now regarded as a war crime, which clearly prohibits conscription, enlistment and the use of children in armed conflict. Nonetheless, child militarisation in Lubanga's 'community' of the DRC has continued. According to a UN report, almost 1,000 cases of child recruitment by armed groups were verified by the mission between 1 January 2012 and 31 August 2013.¹⁴³⁰ This trend would suggest that the norm is not deeply rooted, either for cultural relativist or rationalist reasons. Lubanga's trial would thus aim to deepen commitment to international norms against child soldiering. The objective of prosecution would be to inculcate normative standards over generations. Based on it,

'the internalizer is expected to show higher intolerance with regard to norm violation than both those who follow the norm under external enforcement and those who are

¹⁴²⁷H. Koh, 'The 1994 Roscoe Pound Lecture: Transnational Legal Process' (1996) 75 *Nebraska Law Review* 181, 265

¹⁴²⁸V. Padmanabhan, 'Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay' (2009) 3 *Journal of International Law* 427

¹⁴²⁹Ibid

¹⁴³⁰ See 'Child recruitment remains 'endemic' in DR Congo, UN says in new report' UN News Centre 24 October 2013 <http://www.un.org/apps/news/story.asp?NewsID=46330#.VBrABq1ozIU>

spontaneously motivated to behave accordingly. Violation is a disturbing factor for the internalizer, which might lead it to weaken and even revise the commitment made. Hence, norm internalizers are expected to be more consistent and compliant than externally-enforced norm observers and endogenously motivated agents...'¹⁴³¹

For the expressivist, punishment can impede the early indoctrination phases in which ordinary people become assimilated into the machinery of mass crime. This objective of punishment differs from deterring individuals after they have become habituated into crime by desire or desperation.¹⁴³² The ICC would thus make expressivism, with the aim of norm internalisation, its primary rationale for selection, prosecution and punishment. Human rights groups point out that the prosecution and punishment of Lubanga at the ICC played a crucial role in raising global awareness on child soldiering.¹⁴³³ Human Rights Watch (HRW) concluded that the Lubanga case had 'undeniably contributed to raising awareness about the plight of child combatants in the DRC, and among those who previously thought that crimes relating to child combatants were not 'serious'—including parents in Ituri who had their children join militia groups.'¹⁴³⁴ An HRW research study concluded:

[the ICC prosecution] is particularly important among families who gave their children voluntarily as an act of solidarity to the relevant militia, which they felt represented their interests. In this regard, child protection agencies admitted that the Lubanga case seems to have reached out to families in the region much more effectively than years of their own campaigning.¹⁴³⁵

The Coalition for the International Court also stated that the biggest impact of the Lubanga trial was that there was 'no doubt in eastern DRC about the fact that child soldiering is a crime.'¹⁴³⁶ The social meaning of child soldiering was beginning to take hold. Previously 'people thought that children were doing military service that was somehow legitimized by the state of conflict.'¹⁴³⁷ The use of children as part of the

¹⁴³¹G. Andrighetto, D Villatoro and R Conte (2010) 23 'Norm internalisation in artificial societies' *AI Communications* 325, 337

¹⁴³²M. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law' (2007) 75 *George Washington Law Review* 1165, 1184 discussing mass crimes.

¹⁴³³See eg 'ICC: Landmark Verdict a warning to rights abusers' Human Rights Watch 14 March 2014 stating that 'The Lubanga trial has contributed to raising awareness about the plight of children forced to go to war.' <http://www.hrw.org/news/2012/03/14/icc-landmark-verdict-warning-rights-abusers>

¹⁴³⁴ See 'DR Congo: Q&A on the First Verdict at the International Criminal Court' Human Rights Watch 29 February 2012 <http://www.hrw.org/news/2012/02/29/dr-congo-qa-first-verdict-international-criminal-court>

¹⁴³⁵ Human Rights Watch, *Courting History: The Landmark International Criminal Court's First Years*, 11 July 2008, 68

¹⁴³⁶See Coalition for the International Criminal Court: Media Statements and Quotes <http://www.iccnw.org/?mod=newsdetail&news=4422> (last accessed 20 August 2013)

¹⁴³⁷Ibid

armed groups had become normalized, especially before the conviction of Lubanga.¹⁴³⁸

‘When one explained the concept of child recruitment, people were often confused. They obviously saw the crimes like pillaging, rape, murder as the main crimes. The child recruitment for them was seen like almost an obligation or right of the armed groups...’¹⁴³⁹

A legal representative for 22 of the 133 victims in *Lubanga* explained that some of his clients were not aware of the fact that their recruitment was a crime under international criminal law.¹⁴⁴⁰ Since the ICC had become active in Ituri, children themselves had been educated about their rights and sensitized to their roles as both victims and perpetrators in a way which may impact their own future behaviour.¹⁴⁴¹ The awareness campaign calling for children to leave armed groups in the DRC succeeded in demobilising 557 children between March and August 2013.¹⁴⁴² Like the SCSL cases, *Lubanga* ‘is simply indicative of a slowly changing consensus, from a time when we accepted that children could be war heroes by performing intelligence, communications or other acts of bravery to our contemporary recognition of the importance of the developmental needs of children and youth.’¹⁴⁴³ Human rights groups in the DRC claimed such effect from *Lubanga*.¹⁴⁴⁴

9.3.1 *Lubanga* and norm transmission

Drumbl points out that: ‘[T]here is an assumption, which at first blush seems perfectly plausible, that the punishment inflicted by an international tribunal

¹⁴³⁸See N. Ojewski ‘Analysis: Targeted assistance needed for former DRC’s child soldiers’ IRIN 3 July 2014 <http://www.irinnews.org/report/100300/analysis-targeted-assistance-needed-for-drc-s-former-child-soldiers>

¹⁴³⁹Ibid

¹⁴⁴⁰ Ibid

¹⁴⁴¹See ‘Steps towards justice, frustrated hopes: Some Reflections on the Experience of the International Criminal Court in Ituri.’ The International Refugee Rights Initiative and Association pour la promotion et la défense de la dignité des victimes (APRODIVI March 2012) 10

¹⁴⁴²Ibid

¹⁴⁴³M. Bergsmo and C. Wui Ling, ‘Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, (2012), 2

¹⁴⁴⁴ See eg ‘DR Congo: Q&A on the First Verdict at the International Criminal Court’ Human Rights Watch 29 February 2012 <http://www.hrw.org/news/2012/02/29/dr-congo-qa-first-verdict-international-criminal-court> stating the Lubanga case had ‘undeniably contributed to raising awareness about the plight of child combatants in the DRC, and among those who previously thought that crimes relating to child soldiers were not ‘serious’—including parents in Ituri who had their children join militia groups.’ (last accessed 26 May 2014)

operating prominently on the global agenda at the cusp of history has enhanced expressive value in asserting the importance of law and the stigmatization of the offender who transgresses that law.’¹⁴⁴⁵ However the expressive value is ‘assailed...by the reality that this value often is externalized from afflicted local communities owing to the distance and mistrust evident between such communities and the machinery of international criminal justice.’¹⁴⁴⁶ This is a valid observation. Most of international criminal trials have been conducted away from affected communities. This would diminish the ‘ICC’s situational opportunity’ and prompt arguments about conducting proceedings within the affected geographical spaces. However, security concerns and the lack of credible judicial systems in the affected countries have necessitated the externalisation of proceedings. International criminal courts have resorted to the use of the media. The ICC communications strategy in *Lubanga* emphasised leveraging both local and international media.¹⁴⁴⁷ Comparatively, the coverage of the Lubanga trial was extensive.¹⁴⁴⁸ Radio serves as the primary means of accessing information, as 54 percent of the population of eastern DRC listens to the radio on a daily basis.¹⁴⁴⁹ Summaries of the proceedings were broadcast through national television and radio stations, as well as via seven local community radio stations in Ituri reaching an audience of 25 million and 1.8 million, respectively.¹⁴⁵⁰ Social media have also proved to be platforms for dissemination. At the conviction of Lubanga, the former Secretary-General’s Special Representative for Children and Armed Conflict, Radhika Coomaraswamy stated: ‘Today, impunity ends for Thomas Lubanga and those who recruit and use children in armed conflict. In this age of global media, today’s verdict will reach warlords and commanders across the world and serve as a

¹⁴⁴⁵ M. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2005) 99 *Northwestern University Law Review* 539, 593

¹⁴⁴⁶ M. Drumbl, ‘Toward a Criminology of International Crime’ Washington & Lee Public Law and Legal Theory Research Paper Series Working Paper No. 03-07 May 2003, 17

¹⁴⁴⁷ See ‘Communications strategy trial of Thomas Lubanga’ Outreach Unit, Public Information and Documentation Section (PIDS) The Hague, The Netherlands, January 2009 http://www.icc-cpi.int/NR/rdonlyres/F8CB60B0-731D-41DB-9705-B45E20F0BE66/279608/Outreach_SP_Lubanga_ENGpdf.pdf

¹⁴⁴⁸ See Coalition for the International Criminal Court. DRC Media Coverage of Lubanga Trial Opening 27 January 2009 <http://www.iccnw.org/?mod=newsdetail&news=3230> See also M De Guzman ‘An Expressive Rationale for the Prosecution of Thematic Sex crimes’ (2012) 11 *International Criminal Law Review* (stating that the ICC’s actions are covered widely by the international news media)

¹⁴⁴⁹ P. Vinck, P. Pham, S. Baldo and R Shigekane, ‘Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in eastern Democratic Republic of Congo,’ The Human Rights Center, University of California, Berkeley,; the Payson Center for International Development; The International Centre for Transitional Justice, August 2008.

¹⁴⁵⁰ See ‘Outreach Report 2008’ ICC Public Information and Documentation Section, Outreach Unit http://www.iccnw.org/documents/Outreach_report-2008-en-LR.pdf

strong deterrent.¹⁴⁵¹ However, as already argued, deterrence is a rather ambitious expectation. *Kony 2012*, a video produced by the charity, Invisible Children, fitted into this value system; it coincided with the Lubanga trial and was named the most shared social video in 2012.¹⁴⁵² It reached 100 million views.¹⁴⁵³ *The Guardian* remarked, ‘In the space of a week, the unique torment of children who are conscripted to kill and be killed has been thrust back into the forefront of global consciousness.’¹⁴⁵⁴ However, the video has been criticised for misrepresentations and oversimplification of the Ugandan conflict. But as Ruha Devanesan, fellow at Berkman Centre observed ‘You have to make the issue relevant to [people] somehow...Invisible Children managed to take an issue far removed from the 14- to 25-year-old target segment and make it personally relevant.’¹⁴⁵⁵

A significant portion of social learning and socialization occurs through exposure to the mass media.¹⁴⁵⁶ Several prominent research traditions in the area of media effects have already demonstrated that media may influence audiences’ judgements of social reality, including that of social values and norms.¹⁴⁵⁷ Scholarly work on expressivism does not seem to recognise the role of the media. The mass media act as an enforcer

¹⁴⁵¹See ‘In landmark ruling, ICC finds Congolese warlord guilty of recruiting child soldiers’ UN News Centre, 14 March 2012 <http://www.un.org/apps/news/story.asp?NewsID=41537&Cr=ICC&Cr1=#.U9-Nda1ATIV> (last accessed 29 May 2014)

¹⁴⁵²See J. Glenday, ‘Kony 2012 named most shared social video ad of 2012’ *The Drum*, 3 December 2012 <http://www.thedrum.com/news/2012/12/03/top-20-most-shared-social-video-ads-2012-named>

¹⁴⁵³See P. Carsten, ‘Joseph Kony 2012: film passes 100 million views as it becomes most successful viral video of all time’ 14 March 2012 <http://www.telegraph.co.uk/news/worldnews/joseph-kony/9143781/Joseph-Kony-2012-film-passes-100-million-views-as-it-becomes-most-successful-viral-video-of-all-time.html> The video, put out by American charity Invisible Children, aims to raise awareness of Kony.

¹⁴⁵⁴See D. Smith, ‘Kony 2012 puts child soldiers back under the spotlight’ *The Guardian* (UK) 16 March 2012 <http://www.guardian.co.uk/global-development/2012/mar/16/kony-2012-child-soldiers-spotlight>

¹⁴⁵⁵See ‘The film that stirred a cause, perhaps: Berkman Fellow discusses impact, criticism of year-old ‘Kony 2012’ *Harvard Gazette* (4 March 2013) <http://news.harvard.edu/gazette/story/2013/03/the-clip-that-stirred-a-cause-perhaps/> (last accessed 21 May 2013)

¹⁴⁵⁶See eg C. Atkin ‘Television socialization and risky driving by teenagers’ (1989) 5 *Alcohol, Drugs & Driving* 1; G. Gerbner, L. Gross, M. Morgan and N. Signorielli ‘Living with television: The dynamics of the cultivation process’ in J Bryant and D Zillman (eds) *Perspectives on media effects* (Hillsdale, NJ: Lawrence Erlbaum 1986) 17-40; N. Signorielli *Mass media images and impact on health: A sourcebook* (Westport, CT: Greenwood Press, 1993); I. Yanovitzky and J. Stryker ‘Mass Media, Social Norms, and Health Promotion Efforts A Longitudinal Study of Media Effects on Youth Binge Drinking’ (2001) 28 *Communication Research* 208

¹⁴⁵⁷See eg S. Ball-Rokeach, G. Power, K. Guthrie and H Waring ‘Value-framing abortion in the United States: An application of media system dependency theory’ (1990) 2 *International Journal of Public Opinion Research* 249; D. Shah, K. Domke and D. Wackman ‘To thine own self be true’: Values, framing, and voter decision-making strategies’ (1996) 23 *Communication Research* 509

of social values in many ways. One background assumption of news is ‘the consensual nature of society: the process of signification - giving social meanings to events - both assumes and helps to construct society as a consensus.’¹⁴⁵⁸ The news is constructed to fit into this ‘central value system,’ ‘collective conscience’ or ‘moral community’

9.4. ‘Expressive’ Outreach

Expressivism premises itself on the expression of global norms of such a community. Under expressivism, recall that the intended audience ‘is not just the wrongdoer of most concern to deterrence and retributive theorists. It is also the Everyone of most interest to expressive theorists: the law-abider and the lawmaker, the activist and the private citizen, and even the potential victim, today and tomorrow.’¹⁴⁵⁹ The ICC formulated public information strategies ¹⁴⁶⁰ which would utilise the media. The Outreach Action Plan in *Lubanga* targeted at, in part, an international audience through international media.¹⁴⁶¹ The Lubanga communications strategy would ‘communicate and reinforce the messages specifically tailored towards an international audience, and will continuously review them to ensure that they continue to be communicated clearly and accurately to them.’¹⁴⁶² Outreach schemes can be perceived as an expressive function of the Court. It was concluded that with the ‘international community as an audience’, *Lubanga* served an ‘important didactic and pedagogical goals of teaching the international community about the tragedy of child soldiers.’¹⁴⁶³ However, if expressivism aims to change norms, foster moral development and achieve norm internalisation, is it important to focus more critically on the communities of the defendant. While expressivism has a broad

¹⁴⁵⁸ S. Hall, C. Critcher, T. Jefferson, J. Clarke and B. Roberts ‘The Social Production of News’ in P Marris and S Thornham (eds) *Media Studies: A Reader* (New York: New York University Press 2000) 646

¹⁴⁵⁹ D. Amann, ‘Group Mentality, Expressivism, and Genocide,’ (2002) 2 *International Criminal Law Review* 93, 124

¹⁴⁶⁰ See ‘Integrated Strategy for External Relations, Public Information and Outreach’; Strategic Plan for Outreach of the International Criminal Court (ICC-ASP/5/12)(29 September 2006)

¹⁴⁶¹ See ‘Communications strategy trial of Thomas Lubanga’ Outreach Unit, Public Information and Documentation Section (PIDS) The Hague, The Netherlands, January 2009 http://www.icc-cpi.int/NR/rdonlyres/F8CB60B0-731D-41DB-9705-B45E20F0BE66/279608/Outreach_SP_Lubanga_ENGpdf.pdf

¹⁴⁶² See ICC ‘Communications strategy - Trial of Thomas Lubanga’ Outreach Unit Public Information and Documentation Section (PIDS) The Hague, The Netherlands, January 2009, para 3.2.2 http://www.icc-cpi.int/NR/rdonlyres/F8CB60B0-731D-41DB-9705-B45E20F0BE66/279608/Outreach_SP_Lubanga_ENGpdf.pdf

¹⁴⁶³ D. Bodansky, ‘International Decisions’ (2007) 101 *The American Journal of International Law* 841, 846

approach, 'a high priority demand on international criminal courts should be to establish effective lines of communication with local audiences.'¹⁴⁶⁴ There does not seem to be an anomaly between a court pronouncing the socio-pedagogical purpose of trial and punishment on one hand and implementing that objective on the ground. The creation of a 'moral community' can only be achieved by bringing changing and aligning norms of different societies with values of that broader community. Outreach ought to be distinguished from the socio-political idealism of international criminal courts. The purpose of outreach would ideally be 'informational' and educative about a particular case and the norms it seeks to project. International courts stand to achieve more in terms of norm internalisation when they have direct engagement with communities affected by hostilities. In some of these communities, child soldiering has been attributed to cultural particularist or rationalist impetuses. And has been noted with regards to 'voluntary' recruitment of children for purposes of armed conflict, such practice might, in fact, be out of ignorance. Indeed, trials may achieve global norm internalisation through expressivism in such communities, and media can perform the role disseminating global norms. However, the media may genuinely not understand the law, or may portray it in misleading or oversimplified ways.¹⁴⁶⁵ The 'media coverage may be sensational, giving a disproportionate focus on the antics of defendants.'¹⁴⁶⁶ Outreach programmes can provide accurate portrayals of proceedings. The *Lubanga* outreach programme also aimed, and more importantly, at making the judicial proceedings accessible to the communities within the DRC where child soldiering was rife. Human rights lawyers noted:

'Outreach is needed all the more because the ICC may often hold trials far away from the scene of the alleged crimes, and apply law with which most people in the communities affected by the crimes are unfamiliar.'¹⁴⁶⁷

The DRC has experienced child soldiering for several years. A research report by HRW concluded that 'many people in the region did not view the use of child soldiers

¹⁴⁶⁴ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 349

¹⁴⁶⁵ V. Padmanabhan 'Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay' (2009) 3 *Journal of International Law* 427, 448

¹⁴⁶⁶ *Ibid* 449

¹⁴⁶⁷ see 'Effective public outreach for the International Criminal Court' Lawyers Committee for Human Rights, January 2004, 1 <http://web.undp.org/comtoolkit/why-communicate/docs/Best%20Practices/EffectivePublicOutreachfortheInternationalCriminalCourt.pdf>

as being illegal or a particularly serious crime.¹⁴⁶⁸ As Padmanabhan noted, norm internalisation as an objective is ideal when ‘the prohibition in question is not deeply rooted in the personal or social morality of the community, particularly that of the defendant,...¹⁴⁶⁹ ‘and that there exists a population of potential defendants whose trials might produce narratives sufficient to deepen social commitment to the norm in question’.¹⁴⁷⁰ However, trials will achieve norm internalisation if international law is accepted as a legitimate regulatory agent.¹⁴⁷¹ Surveys conducted from September to December 2007 among a sample population of 2,620 individuals in the Ituri district in Oriental province and the provinces of North and South Kivu in the DRC revealed that among the means to achieve justice, the eastern Congolese population endorsed the national court system (51 percent), followed by the International Criminal Court (ICC) (26 percent).¹⁴⁷²

	North Kivu	South Kivu	Ituri	Total
Have you heard about the Lubanga proceeding? (% yes)	27.8	27.5	29.3	28.1
Have you heard about the ICC? (% yes)	25.7	27.6	26.9	26.6
(If heard about the ICC) Did you hear about the Trust Fund for Victims at the ICC? (% yes)	15.6	13.0	18.6	15.6
Do you know how to access the ICC? (% yes)	14.4	10.3	10.8	12.1
Would you like to participate in ICC activities? (% yes)	66.5	67.1	68.2	67.2

(Table 1 : A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in eastern Democratic Republic of Congo,’ The Human Rights Centre, University of California, Berkeley,; the Payson Centre for International Development, The International Centre for Transitional Justice, August 2008)

¹⁴⁶⁸ See ‘Human Rights Watch, Courting History: The Landmark International Criminal Court's First Years’ July 2008, 127

¹⁴⁶⁹V. Padmanabhan ‘Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay’ (2009) 3 *Journal of International Law* 427

¹⁴⁷⁰Ibid

¹⁴⁷¹ Ibid

¹⁴⁷² P. Vinck, P. Pham, S. Baldo and R. Shigekane, ‘Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in eastern Democratic Republic of Congo,’ The Human Rights Center, University of California, Berkeley; the Payson Center for International Development; The International Centre for Transitional Justice, August 2008.

These findings raise questions about the sociological legitimacy of the court - perceptions of relevant audiences that the legal authority is legitimate or its decisions are justified and accepted for reasons beyond fear of sanctions.¹⁴⁷³ Sociological legitimacy is critical to norm internalisation. While there was support for the ICC as a means of achieving justice in the DRC (26 percent of respondents), there was low awareness among the population of eastern Congo (27 percent) and in Kinshasa (28%) of the ICC or of the first scheduled trial against Lubanga in eastern DRC (28 percent) and Kinshasa (29 percent).¹⁴⁷⁴ Nevertheless a majority of those in eastern DRC who had heard about the ICC would like to participate in its activities (67 percent).¹⁴⁷⁵ (See 'table 1' above) The ICC outreach scheme in *Lubanga* can help enhance the legitimacy of the court; it is aimed at raising awareness on the commencement of the trial and the level of understanding by the public concerning the process of the trial in various aspects: the alleged crimes, the concept of fair trial and the role of each of the parties and participants.¹⁴⁷⁶ The overall objective of the ICC formulated public information strategies was to advance 'the Court's strategic goal of being a well-recognised and adequately supported institution and to maximise the Court's preventative impact.'¹⁴⁷⁷ Such projects can also help clarify contentious issues such as sentences. In 2008, the ICC intensified outreach activities in the Ituri Province. Video summaries of the proceedings were screened to large audiences in Bogoro, Kasenyi, Tchomia, Nyakunde, Marabo and Bunia, locations that had been affected by the conflict.¹⁴⁷⁸ Popular trials cultivate debate.¹⁴⁷⁹ The screenings were followed by lively debates. By highlighting 'the educative-dialogical dimension it is thought that we can bring into focus the ways in which those who are likely to be

¹⁴⁷³ R. Fallon, Jr., 'Legitimacy and The Constitution' (2005) 118 *Harvard Law Review* 1787

¹⁴⁷⁴ P. Vinck, P. Pham, S. Baldo and R. Shigekane, 'Living with Fear: A Population-Based Survey on Attitudes about Peace, Justice and Social Reconstruction in eastern Democratic Republic of Congo,' The Human Rights Center, University of California, Berkeley,; the Payson Center for International Development; The International Centre for Transitional Justice, August 2008.

¹⁴⁷⁵ Ibid

¹⁴⁷⁶ See 'Communications strategy trial of Thomas Lubanga' Outreach Unit, Public Information and Documentation Section (PIDS) The Hague, The Netherlands, January 2009 http://www.icc-cpi.int/NR/rdonlyres/F8CB60B0-731D-41DB-9705-B45E20F0BE66/279608/Outreach_SP_Lubanga_ENGpdf.pdf

¹⁴⁷⁷ See 'Report of the Court on the public information strategy 2011-2013' ICC-ASP/9/29 22 November 2010, 2

¹⁴⁷⁸ See ICC 'Outreach Report 2008 Public Information and Documentation: Outreach Unit' http://www.icc-cpi.int/NR/rdonlyres/AE9B69EB-2692-4F9C-8F08-B3844FE397C7/279073/Outreach_report2008enLR.pdf

¹⁴⁷⁹ M. Drumbl, 'The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law' (2007) 75 *George Washington Law Review* 1165

affected by an outcome gather to discuss, shape, and possibly expose themselves to *learning* something beyond their initial position.’¹⁴⁸⁰

Such outreach programmes are particularly relevant in communities producing the mass crimes international courts prosecute whether such crimes emanate from cultural or rationalist motivations. Crimes that involve widespread communal engagement may be better addressed through supplementary ‘expressive’ outreach to achieve norm internalisation. In *Lubanga*, multiple agents were involved in the conscription, enlistment and use of minors in armed conflict. A consequence of norm internalisation is that agents are much better at defending the internalised norms than externally-enforced observers.¹⁴⁸¹ Internalisation ‘is a good predictor of compliance and second order cooperation, that is - urging others to comply with the norms.’¹⁴⁸² ‘Norm defence’ or ‘norm support’ is crucial in the spreading and stabilization of norms over a population of autonomous agents.¹⁴⁸³ This would reinforce the social meaning of law in societies. Human rights groups in the DRC were part of organisations that defended the role of the ICC and were active in gathering evidence against Lubanga.¹⁴⁸⁴ They campaigned for the charges against him to be widened.¹⁴⁸⁵ *Lubanga* thus brought child soldiering to the top of the agenda for such groups as well as fostering ‘norm defence.’ A cosmopolitan community can be reinforced when norms are defended and supported voluntarily. An important function of ‘expressive outreach’ is to express to the afflicted community that it is part of the broader international or ‘moral community’. These approaches transcend classical precepts of retribution and deterrence.

Unlike retribution and deterrence, which are empirically indeterminate, ‘expressive’ outreach can be evaluated to assess norm internalisation. Societies can be educated through trial or proactive engagement about the conscription, enlistment and use of child combatants. The ICC has set up standardised and evaluation systems for

¹⁴⁸⁰ M. Di Paolantonio, ‘Framing Trials for Past Abuses Through An Educative Dialogue: Recovering the Formative Role of Conflict in a Democracy’ in D. Vokey (ed.), *The Philosophy of Education Yearbook* 2006, 59, 60

¹⁴⁸¹G. Andrighetto, D. Villatoro and R. Conte (2010) 23 ‘Norm internalisation in artificial societies’ *AI Communications* 325, 337

¹⁴⁸²Ibid

¹⁴⁸³Ibid

¹⁴⁸⁴See ‘NGOs Defend ICC Role in Lubanga Case’ Institute of War and Peace Reporting Issue 479, 1 December 2006 <http://iwpr.net/report-news/ngos-defend-icc-role-lubanga-case> (last visited 23 June 2014)

¹⁴⁸⁵ Ibid

outreach programmes.¹⁴⁸⁶ Evaluation of activities conducted in Kinshasa and Ituri, as well as external studies, demonstrate that the population exposed to Outreach for more than one year is beginning to have a better understanding of both the Court's mission and the legal processes that the Court follows.¹⁴⁸⁷ External organisations¹⁴⁸⁸ have also sought feedback in the DRC. An evaluation report by UNICEF for the DRC in August 2013 stated: 'It appears that recruitment overall is falling and the age of recruitment appears to have increased. UNICEF based its conclusions on the decline in the number of released children receiving reintegration packages, from 10,000 in 2008 to 2,312 in 2011.¹⁴⁸⁹ However, this finding may not be accurately reflective of the state of child soldiering as minors might not be continuing the fighting without submitting to demobilisation. Both trials and extra-judicial activities may not produce immediate or positive results. However, when they take broader effect, the results would be beneficial. An important benefit of internalisation is the reduction in costs of enforcement. When society internalise a norm, the necessity for coercive measures is diminished. Agents conform to norms not merely because of external sanctions such as material rewards or punishment. A consequence of this is lesser crime. The ICC prosecutes only a handful of defendants, partly because of lack of funding, cooperation of states and an enforcement mechanism. The ICC has stated that for it 'to effectively deal with situations referred by the council ... it needs to be able to count on the full and continuing cooperation of all UN members, whether they are parties to (the court) or not.'¹⁴⁹⁰ If the Court were to encounter simultaneously the constraints of slower contributions and the need to fund unforeseen events, it could find itself in a position of being unable to carry out

¹⁴⁸⁶Ibid

¹⁴⁸⁷See 'Outreach Report 2008' ICC Public Information and Documentation Section, Outreach Unit http://www.iccnw.org/documents/Outreach_report-2008-en-LR.pdf (last visited 23 June 2014)

¹⁴⁸⁸ See Human Rights Watch, 'Courting History: The Landmark International Criminal Court's First Years' July 2008; International Bar Association, 'ICC Monitoring and Outreach Programme, Beyond The Hague: Forging Linkages between the International Criminal Court and Key Jurisdictions,' August 2008; P. Vinck, P Pham, S Baldo and Ra Shigekane, 'Living with Fear, A Population-Based Survey on Attitudes About Peace, Justice and Social Reconstruction in Eastern Democratic Republic of the Congo,' conducted by the Berkeley-Tulane Initiative on Vulnerable Populations, a joint project of University of California, Berkeley's Human Rights Center and Tulane University's Payson Center for International Development, and the New York-based International Center for Transitional Justice. August 2008.

¹⁴⁸⁹See 'Evaluation of UNICEF Programmes to Protect Children in Emergencies, Democratic Republic of the Congo Country Case Study' United Nations Children's Fund (UNICEF, New York, 2013) 43

¹⁴⁹⁰ See 'ICC complains of lack of support, wants more UN support' Reuters 17 October 2013 <http://www.reuters.com/article/2012/10/17/us-crime-un-icc-idUSBRE89G1M720121017>

necessary Court operations due to lack of funds.¹⁴⁹¹ A consensus seems to have emerged that the OTP should negotiate the inherent limitations of prosecutorial capacity by focusing investigations and prosecutions on those culpable individuals who occupied the highest levels of political or military authority.¹⁴⁹² These few cases the ICC prosecutes will suffice for expression of norms, and reduce more crime. Norm expression and stigmatization do not require that all or even most of the perpetrators be prosecuted to achieve a pedagogical function; a small number of illustrative prosecutions are sufficient to convey the necessary message.¹⁴⁹³ Unlike deterrence, which is intended to affect the calculus of individuals disposed to criminal conduct, norm promulgation seeks to ensure that community members never even consider committing crimes.¹⁴⁹⁴ *Lubanga* and later *Ntaganda* would reinforce global norms on child soldiering. The ultimate objective ought to be internationalization of norms against child soldiering, locally and globally. Embryonic research on norm consumption after *Lubanga* is encouraging. Norm internalisation process will thus not only benefit the ICC through the actual compliance, but will also benefit the society as a whole (herein contributing states) by reducing the cost of norm enforcement.

Another significant expressive dimension in *Lubanga* is the reparations for victims and their families. On 7 August 2012, Trial Chamber established, for the first time in the ICC's history, principles for providing reparations to victims. The Chamber thus noted that pursuant to Rule 85 of the ICC Rules of Evidence and Procedure¹⁴⁹⁵, reparations may be granted to: direct victims, who suffered harm resulting from the

¹⁴⁹¹See International Criminal Court Assembly of States Parties 'Report of the Court on the options for replenishment of the Contingency Fund' ICC-ASP/8/28 Eighth session The Hague 18-26 November 2009

¹⁴⁹² M. C. Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights' in M C Bassiouni (ed.) *Post-Conflict Justice* ((Transnational Publishers, Ardsley, NY, 2002) 3, 27 noting that 'As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors. This policy does not and should not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals.'; see also A. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court' (2003) 97 *American Journal of International Law* 510, 543 noting 'That the international justice forum should be reserved for high-level perpetrators has gained wide acceptance.'

¹⁴⁹³M. deGuzman, 'Choosing to prosecute: Expressive selection at the International Criminal Court' (2012) 33 *Michigan Journal of International Law* 265

¹⁴⁹⁴M. deGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in M. Bergsmo (ed), *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing 2012) 35

¹⁴⁹⁵ See 2002 Rules of Procedure and Evidence, ICC-ASP/1/3, Rule 85.

crimes of enlisting, conscripting and using children under the age of 15 in Ituri, DRC from 1 September 2002 to 13 August 2003; indirect victims, including family members of direct victims, along with individuals who intervened to help the victims or to prevent the commission of these crimes and legal entities, such as NGO or hospitals. The Chamber declared that reparations could be awarded on an individual or collective basis. Reparations can be part of punishment against the accused. However, in view of the indigence of Lubanga, it was decided that reparations in *Lubanga* will be implemented through the Trust Fund for Victims (TFV).¹⁴⁹⁶ The TFV would appear to transcend the core functions of court. However, the compensation for losses and restitution to victims has traditionally been component of justice through both criminal and civil law. In international law, reparations have a more important function. It has been noted that ‘...geography does not assist victims, with the *ad hoc* tribunals and ICC located far from the countries where the atrocities were committed. This distance contributes to the isolation of victims from the mainstream of prosecutions.’¹⁴⁹⁷ By recognising the harms committed and compensation for them, this project would also express to victims that they are part of the broader normative community.

9.5 Conclusion

The principal argument of this study is that the most plausible justification for prosecution and punishment of Lubanga is expressivism. Retribution and deterrence do not seem sufficient rationales for the work of the ICC. This chapter attempted to locate *Lubanga* within expressivism. The chapter discussed how the arrest, trial, verdict, punishment and the media performed an expressive function within DRC and beyond. *Lubanga*, as the first case by the ICC was bound to encounter some problems. Some shortcomings depleted the expressive value of the case. In particular, the lack of records and exclusion of sexual violence from the Court’s consideration diminished its expressive mileage. However, prosecutorial indiscretions ought not to discount expressivism as a plausible rationale for

¹⁴⁹⁶Rome Statute Art.79 (1). The TFV was established for the benefit of victims within the jurisdiction of the Court, and of the families of such victims.

¹⁴⁹⁷ A. Wiersing, ‘Lubanga and its Implications for Victims Seeking Reparations at the International Criminal Court’ Summer Issue (2012) *Amsterdam Law Forum* 21, 23

international prosecutions. With the few cases the ICC prosecutes, expressivism remains a viable theoretical basis for international law and ICL. Unlike the retributive and deterrence agenda, expressivism postulates that the rationale for penalty at the ICC would be the expression of global norms. Despite some omissions, Lubanga provided insights into the crime of child soldiering. As has been illustrated, the dramaturgy or spectacle of trial in *Lubanga* served the purposes of norm projection. There is a considerable appreciation of child soldiering as a serious offence, starting with Lubanga's arrest. Some components of the crime of 'child soldiering' were articulated. The crime was separated into 'conscripted', 'enlistment' and 'use' of children in armed conflict although this had earlier been decided by the SCSL. The decision also clarified that 'enlistment' or voluntary recruitment constituted a crime, something, hitherto, unclear at least from the evidence of a witness. Critically, the court also decided that 'participating actively' in hostilities would only be determined by whether a child was a 'potential target.'

International criminal courts would play a far important function - probably the most possible out of the plethora of objectives - of expressing norms, clarifying the law and enhancing norm internalisation as the primary goal. The media coverage of *Lubanga* points to a considerable awareness of child soldiering as an international crime. The most significant impact may not be on the perpetrators, but civilians, such as parents and guardians of the children. Outreach programmes should be a fundamental component of international criminal justice mechanisms. While media play a critical role, they may not comprehend issues or distort them. A logical trajectory would presuppose 'norm internalisation' as the ultimate goal for ICL for it to be purposive. This is particularly important with regards to crimes of diffuse and widespread involvement that the ICC adjudicates. As an extension of the work of the court, 'expressive' outreach programmes are critical to the internalisation of norms. Evidence suggests that parents and children in Ituri became sensitised to the criminality of child soldiering. However, an expressive justification of penalty at the ICC would look beyond the afflicted social spaces; child soldiering is an international crime prosecuted at an international court. Thus, the expression of norms ought to transcend the affected communities but aim at fostering cosmopolitanism through the gradual internalisation of norms against child soldiering.

CHAPTER TEN

Introduction

What purpose would the few cases of mass crime that the ICC prosecutes serve? The point of departure for the study was that ICL lacks a theory suitable for its own context. This lacuna has left the ICC without clear theoretical premise(s) to guide prosecution and punishment. At present, ICL and the ICC replicate domestic principles of penalty. The main objective of this thesis was to reappraise international criminal law and, in particular the work of the ICC with reference to an extant case. The prosecution and punishment of Lubanga provided an opportunity to reflect on the ICC's penological rationales. In the past, no case was available for scholars to theorise the work of the court in a substantive way. *Lubanga*, as the first case before the ICC, is important in assessing the court's work and its future direction. The focus on child soldiering is, firstly, given, considering that *Lubanga* was the first case before the ICC. However, an important objective of this thesis was to accentuate the 'mass' nature of child soldiering. International courts adjudicate, primarily, mass crimes, regarded as most egregious. However, child soldiering has barely been articulated as such diffuse crime perhaps, or as grave, particularly because it does always eventuate in mass deaths. As has been argued in this thesis, child soldiering is a mass crime involving multiple social and political agents. In that respect, it can help us analyse approaches of the ICC to mass crime.

As already noted, national doctrinal frameworks of retribution and deterrence have also been advocated as objectives of international criminal law and mass crimes. I have argued here, however, that a cogent rationale for international penalty would need to be cognisant of the fact that international criminal courts are largely symbolic. Owing to the constraints articulated in this study, the ICC can only conduct a few illustrative and symbolic prosecutions. A successive question would rest on what the ICC symbolises. While international 'collectivism' is imperfect, a global community of shared standards now exists. ICC penalty would thus represent the communal standards of the international society. The thesis has argued that the most plausible philosophical objective for the prosecution and punishment of

Lubanga is expressivism. Expressivism is an under-studied rationale of ICL. However, as Drumbl, DeGuzman, Sloane and others have noted, there is cause to believe that it is the most viable premise for the punishment for extraordinary crime. An expressive approach to international criminal law would, primarily, propagate and reinforce the standards of the international society. This final chapter concludes by harmonising and summarising these key issues and arguments rose in the thesis. In particular, it attempts to reconcile the analysis in the previous chapters. It then draws conclusions on the importance of the findings and their implications.

10.1 Key arguments

10.1.1 Contextual constraints

The objective of this thesis was to make sense of the work of the ICC as reference point for the mass crimes the court prosecutes. The central proposition for this study is that ICL requires a theory of prosecution and punishment applicable to its context.¹⁴⁹⁸ International criminal justice has operated against a plethora of expectations and aims. Theorisation of ICL appears divorced both conceptually and practically from context. Plausible theorisation ought to focus on what international courts can realistically achieve. In this study, I have categorised the weaknesses of international criminal justice as ‘practical/institutional’ and ‘idealistic/goal-related.’ Both weaknesses ought to inform theoretical perspectives. The ICC operates against numerous contextual constraints. Firstly, the court relies on financial largesse of states. However, not all states parties are able to provide the funding or meet their obligations. Further, the ICC lacks a coercive authority or police force to account for suspects. The court depends on the co-operation of states. Former President of the ICTY Gabrielle Kirk McDonald noted that, ‘the cooperation of states and international organizations is essential to the effective functioning of an international criminal institution.’¹⁴⁹⁹ Article 86 of the Rome Statute stipulates that all states parties are obliged to ‘cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.’¹⁵⁰⁰ States that fail to meet

¹⁴⁹⁸J. Ohlin, ‘Towards a Unique Theory of International Criminal Sentencing’ in G. Sluiter and S. Vasiliev (eds) *International Criminal Procedure: Towards a Coherent Body of Law*, (London: Cameron, 2009), 390

¹⁴⁹⁹G. McDonald, ‘Problems, Obstacles and Achievements of the ICTY’ (2004) 2 *Journal of International Criminal Justice* 558, 565

¹⁵⁰⁰ See Rome Statute Art. 86

their financial obligations will be denied the vote. However, this appears a light disincentive to dissuade defaulting states. Where some states have chosen to cooperate with the court, they have done so for political expediency with the acquiescence of the ICC. The ICC has at times, in its selection of cases, trumped fairness for pragmatic ends, focusing on non-state actors and exempting state actors. As in the case of the DRC, some state actors can consort with indictees, often rebels, for rationalist ends of achieving peace. In the face of the hurdles, international courts and tribunals have resorted to the UN Security Council, for example in the case of Sudan, and diplomacy. However, these efforts have not had a strong record of success. In theorising the ICC, we need to be sensitive to these contexts and their impact. The overall effect of these constraints is that the ICC can only prosecute a handful of defendants.

10.1.2 Retribution and deterrence

International criminal justice also faces a problem from the goals it has imposed upon itself. The ‘idealistic/goal-related’ weaknesses emanate from obscure and unachievable objectives. When deconstructed, international criminal justice’s principal goals have been retribution and deterrence.¹⁵⁰¹ The few convicts are supposed to be punished proportionately as well as deterring them and others from committing crimes in the future. Since Nuremberg, jurisprudence of the subsequent tribunal has evinced the preponderance of these two objectives. According to the Preamble of the ICC Statute and Articles 1 and 5, its objectives are the prosecution and punishment of the most serious crimes of international concern.¹⁵⁰² The Statute describes crimes prosecuted by the ICC as ‘unimaginable atrocities’, and ‘grave

¹⁵⁰¹See eg *Prosecutor v Kupreskic*, Judgment ICTY-IT-95-16-T [14 January 2000] para 848; *Prosecutor v Kordić and Cerkez*, ICTY-IT-95-14/2-A [ICTY Appeals Chamber, 17 December 2004] para 1076 (‘both individual [n.b. specific] and general deterrence serve as important goals of sentencing...’); *Prosecutor v Popović*, ICTY-IT-05-88-T, Trial Judgment, para 2128 (ICTY 10 June, 2010); *Prosecutor v Lukić*, ICTY-IT-05-87 Trial Judgment, [20 July 2009] para. 1049; *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Trial Judgment, para 1144 [ICTY 26 February 2009]; *Prosecutor v Delić*, Case No 1T-04-83-T, Trial Judgment, [ICTY 15 September 2008] para 559; *Prosecutor v Milošević*, ICTY-IT-98-29/1-T, Trial Judgment, para 987; *Prosecutor v Fofana and Kondewa*, Sentencing Judgment SCSL-04-14-T [9 October 2007] para 26, citing *Prosecutor v Aleksovski* IT-95-14/1-A Appeal Judgment ICTY [24 March 2000] para 185; *Prosecutor v Kambanda* ICTR-97-23-S Judgment and Sentence (TC) [4 September 1998] para 28 and *Prosecutor v Nikolic* IT-02-60/1-S Sentencing Judgment (TC) [2 December 2003] para 86

¹⁵⁰²See Rome Statute, Preamble, para 4 and Art. 1 and 5

crimes' that 'deeply shock the conscience of humanity.'¹⁵⁰³ The ICC was established 'to these ends and for the sake of present and future generations.'¹⁵⁰⁴ These provisions have been interpreted as meaning that retribution and deterrence are primary goals of the ICC.¹⁵⁰⁵ Both the gleeful post-conviction rhetoric and jurisprudence in *Lubanga* reflected these as primary goals. However, both theory and practice cast aspersions on the plausibility of these lofty objectives. The unreflecting mimicry of domestic law principles is problematic. International criminal law in its normative and institutional configuration is barely capable of serving the ICC's borrowed and dominant objectives of retribution and deterrence. Several authors argue that the correlation between international criminal justice and such aims is tenuous. Because of the contextual constraints, international courts are unable to account for all offenders. Critics of retributive justifications for international trials note this inability of international courts to prosecute all or even most of the crimes committed in a given situation and the difficulty of inflicting retributively proportionate punishments.¹⁵⁰⁶ This thesis has noted that, because of the few cases can prosecute, the court is largely symbolic. Furthermore, a 'mission creep' appears to be occurring in international criminal justice. The goals are expansive and removed for the core functions of the court. These include incapacitation, access for victims, historicisation, reconciliation to reintegration and rehabilitation,¹⁵⁰⁷ peace and security.¹⁵⁰⁸ These self-imposed demands are quite gargantuan.¹⁵⁰⁹ A system that promises so much and fails to deliver can only court disillusionment. These objectives should be scaled down, and other objectives left to other mechanisms of public response to massive human rights violations.¹⁵¹⁰ International criminal courts perform a more modest role in advancing the rule of

¹⁵⁰³ Ibid

¹⁵⁰⁴ Ibid para 9

¹⁵⁰⁵ E. Mendes, *Peace and Justice at the International Criminal Court: A Court of Last Resort* (Edward Elgar Publishing, 2010), 143

¹⁵⁰⁶ M. deGuzman, 'An Expressive Rationale for the Thematic Prosecution of Sex Crimes' in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012)

¹⁵⁰⁷ Just like in many influential ordinary justice systems, rehabilitation is given little effectivity. See e.g. *Prosecutor v Miroslav Deronjić*, Case No. IT-02-61-A [ICTY Appeals Chamber 20 July 2005]; *Prosecutor v Kordić and Cerkez*, IT-95-14/2-A [ICTY Appeals Chamber, 17 December 2004] para 1079. On reconciliation, see *Prosecutor v Babić*, [ICTY Appeals Chamber, July 18, 2005], Case No. IT-03-72-A

¹⁵⁰⁸ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329

¹⁵⁰⁹ ibid 331

¹⁵¹⁰ Ibid 330

law.¹⁵¹¹ I have in this thesis limited such involvement to outreach and reparations for victims.

10.1.3 Mass crime

A cosmopolitan outlook towards mass crimes is not unfounded. Mass crimes, for their diffuse nature, threaten values of human life on a huge scale. ICL ‘crimes involve extraordinary collective dimensions and extensive communal engagement.’¹⁵¹² As distinct from common crimes, ‘international crimes are almost always committed not by one person but by several or many persons—a group, a band, a clique.’¹⁵¹³ Traditional, jurisprudence has considered genocide, crimes against humanity and war crimes as ‘mass atrocities’. However, child soldiering, as now a war crime, has not been adequately articulated as mass crime. Conceptually, mass crimes need not be acts eventuating in mass fatalities. Instead, they are widespread crimes involving multiple agents. As such, apart from the consequences of crimes, the dynamics of diffuse communal involvement are similar. In this thesis, I have attempted to accentuate the ‘mass’ nature of child soldiering. Such an approach can assist in conceptualising a common theoretical justification for the mass crimes that the ICC adjudicates. Child soldiering involves mass conscription, enlistment and the use of children for purposes of war.¹⁵¹⁴ The replication of domestic penal rationales obscures the collective character of ICL crimes - a feature that distinguishes them from most similar crimes of violence in the national sphere.¹⁵¹⁵ Therefore ‘we cannot simply project familiar national principles onto ICL. We must inspect and re-

¹⁵¹¹ Ibid

¹⁵¹² D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 128

¹⁵¹³ A Trainin, ‘Hitlerite Responsibility Under Criminal Law’ 79 (A.Y. Vishinski ed., Andrew Rothstein trans., Hutchinson & Co. 1945) (1944), 79 cited in M. Osiel ‘The Banality of Good: Aligning Incentives against Mass Atrocity’ (2005) 105 *Columbia Law Review* 1751, footnote 2

¹⁵¹⁴ See eg D. Wippman, ‘Atrocities, Deterrence, and the Limits of International Justice’ (1999) 23 *Fordham International Law Journal* 473, 474 stating that ‘the connection between international prosecutions and the actual deterrence of future atrocities, for instance, is at best a plausible but largely untested assumption’; M. Drumbl *Atrocity, Punishment an International Law* (Cambridge University Press 2007) noting that any anecdotal research must take into account the reality that atrocity continues to occur, unabated, in many places following the creation of criminal tribunals to punish perpetrators.

¹⁵¹⁵ R. Sloane, ‘The Expressive Capacity of International Punishment’ (2006) Columbia Public Law & Legal Theory Working Papers, citing *Prosecutor v. Tadic*, IT-94-1, Judgment, para 191 (15 July 1999) (‘Most of the time [ICL] crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design.’)

articulate those principles to take into account the special contexts encountered by ICL, which include massively collective action...'.¹⁵¹⁶The perpetrator of mass atrocity fundamentally differs from the perpetrator of ordinary crime.¹⁵¹⁷The hostilities with which international criminal justice is concerned often involve powerful passions.¹⁵¹⁸Deterrence, transposed to mass crimes, ignores the unique environments that foster such criminal behavior. While Arendt speaks of 'radical evil', often, offenders subscribe to group codes and are impelled, not by evil, but a genuine belief in a cause. Deterrence can distort the viability of the familiar cost-benefit calculus on which that model depends.¹⁵¹⁹ Further, the massive nature of atrocity cannot be reflected in retributive sanction because of restrictive human rights standards.¹⁵²⁰ These 'standards limit the amount of pain institutions can inflict upon convicts.'¹⁵²¹ Inconsistencies in the quantum of punishment also arise because of the discretion reposed on judges.¹⁵²² Theorists, almost invariably, note that deterrence is notoriously difficult to assess. It is impossible to prove categorically that the existence or the type of punishment has had any bearing on subsequent events.¹⁵²³ Further, the belief that perpetrators make cost-benefit calculations before they commit crimes is extremely presumptuous.¹⁵²⁴ But more significantly the crimes that international courts prosecute – mass crimes - are distinct from those adjudicated in domestic law. Given the contextual constraints of the court and theoretical incongruities, the question that has animated this thesis is: what is the most plausible philosophical justification for the selection and prosecution of Lubanga for the mass crime of child soldiering? This question – though specific to child militarisation, strikes at the heart of the philosophy of international law, and in particular mass crimes the ICC prosecutes.

¹⁵¹⁶ D. Robinson, 'International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law' (2013) 26 *Leiden Journal of International Law* 127, 129

¹⁵¹⁷ M. Drumbl, *Atrocity, Punishment and International Law* (Cambridge University Press 2007)

¹⁵¹⁸ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 344

¹⁵¹⁹ R. Sloane, 'The Expressive Capacity of International Punishment' (2007) 43 *Stanford Journal of International Law* 39, 40

¹⁵²⁰ M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) 15

¹⁵²¹ *Ibid* 15

¹⁵²² *Ibid* 15

¹⁵²³ G. Dingwall and T. Hillier, 'The Banality of Punishment: Context Specificity and Justifying Punishment of Extraordinary Crimes' (2010) 6 *International Journal of Punishing and Sentencing* 6

¹⁵²⁴ See eg I. Tallgren, 'The Sensibility and Sense of International Criminal Law' (2002) 12 *European Journal of International Law* 561, 584

10.2 Expressivism

International criminal law tends to speak to itself, the immediate gallery and epistemic communities. It may need philosophical recasting if it is to be purposive. As Dana puts it:

‘Identifying a primary justification for international criminal law, of course, does not mean that ICL cannot make a meaningful contribution to other goals. However, it is imperative that the ICC coalesces around a primary justification for its work and set modest expectations. An idealism that avoids prioritizing goals and eagerly pursues them all can only delay the inevitable choice, as the experience of *ad hoc* international criminal tribunals reveals, because some of these objectives are in conflict.’¹⁵²⁵

And Damaska points out that we must not accept the existing absence of orientation but select a goal as central to the mission of international criminal courts.¹⁵²⁶ Both deterrence and retribution appear context-insensitive to the contextual constraints of international judicial institutions and the dynamics of mass crime. In this thesis, I have argued that the most plausible philosophical rationale for the prosecution of Lubanga is expressivism. The basic premise of expressivism is the messaging effect law and punishment. I have stated that ‘statutes and ‘shaming and naming’ may not be effective ways for norm transmission. International criminal justice processes present a more efficacious means for norm propagation. An expressivist approach in the case of the ICC would also be based on what the court can realistically achieve. Each ‘conventional goal of punishment in national law offers insights, but analysis of the extent to which retributive and deterrence theories can or should be coherently transposed to the international context reveals that the primary value that international punishment can realistically serve consists in its expressive functions.’¹⁵²⁷ The court can barely do much more. But expressivism is important as an objective. Although under-studied, as Drumbl asserts that there ‘is cause to believe that it (expressivism) may be a more plausible justification for the

¹⁵²⁵ S. Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3 *Penn State Journal of Law and International Affairs* 30

¹⁵²⁶ *ibid*

¹⁵²⁷ R. Sloane, ‘The Expressive Capacity of International Punishment’ (2007) 43 *Stanford Journal of International Law* 39 also R Sloane ‘The Expressive Capacity of International Punishment’ (2006) *Columbia Public Law & Legal Theory Working Papers*.

punishment of *extraordinary* international criminals.¹⁵²⁸The expressivist punishes to strengthen faith in the rule of law among the general public, as opposed to punishing simply because the perpetrator deserves it or because potential perpetrators will be deterred by it.¹⁵²⁹As Wringer also points out that, ‘under an expressive approach, punishment may not simply frighten individuals who might themselves commit crimes but also play a role in communicating the standards of a community to its members, thereby influencing their moral and social development...’¹⁵³⁰Although it seems a ‘reach for legalist punishment to exact retribution or deter individuals...instilling fear of getting caught, punishment bears greater promise to educate future generations about the effects of extreme evil and edify a moral consensus...’¹⁵³¹ As such, international law ought to have long-term objectives against egregious crimes. Trials in particular are ‘expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes.’¹⁵³²The ‘dramaturgy of the trial process’ is a tool for norm projection in international criminal law.¹⁵³³ By dramatizing the effect of the law-breaking conduct through the spectacle of trial making, international criminal justice makes clear what was not previously understood: in this case, that recruiting, enlisting, and using children to fight is a war crime.¹⁵³⁴ Expressivism is particularly cognisant of what the ICC can realistically achieve. It takes into account the institutional prominence of the court, selectivity of the few cases it can adjudicate and the channels of global norm dissemination. Expressivism is therefore the most appropriate theoretical basis, considering the court’s limited resources.¹⁵³⁵

10.3.1 Thematic prosecution

An analysis of the criminological and penal culture showed that until the Special Court for Sierra Leone (SCSL) adjudicated upon the matter and *Lubanga* at the ICC,

¹⁵²⁸ M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007)

¹⁵²⁹ *Ibid* 173

¹⁵³⁰ B. Wringer, ‘War Crimes and Expressive Theories of Punishment: Communication or Denunciation?’ (2010) 16 *Res Publica* 119, 121

¹⁵³¹ M. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007), 17

¹⁵³² D. Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’ Georgetown Law Faculty Working Papers (2008), 9

¹⁵³³ D. Luban, ‘*Beyond Moral Minimalism*’ (2006) 20 *Ethics & International Affairs* 353, 355

¹⁵³⁴ L. Davis and P Hayner, ‘Difficult Peace, Limited Justice’ International Centre for Transitional Justice (March 2009), 31 discussing both the positive and negative effects

¹⁵³⁵ M. deGuzman, ‘Choosing to prosecute: Expressive selection at the International Criminal Court’ (2012) *Michigan Journal of International Law* 265, 270

child soldiering was historically under-criminalised and under-judicialised. It is only with the Machel Report on the impact of armed conflict on children,¹⁵³⁶ and following the adoption of the Convention on the Rights of the Child (CRC) in 1989,¹⁵³⁷ that the specific plight of children in the context of mass or systematic crimes began to capture international attention.¹⁵³⁸ Before then, international crimes had been defined rather restrictively, influenced mainly by the historical contexts of the crimes committed by the Nazis during World War II.¹⁵³⁹ With a few exceptions, little attention was devoted to the plight of children: crimes against children were left to be addressed by national judicial systems.¹⁵⁴⁰ The establishments of the ICC and the SCSL, a few years after the publication of the Machel report, triggered major developments regarding the sanctioning of crimes against children.¹⁵⁴¹ Francis posits that with the unfolding events relating to prosecution for conscription, enlistment and using child combatants the international community is beginning to wake up to the challenge of enforcing its numerous ‘paper protection’ instruments for the protection of children.¹⁵⁴² The SCSL’s landmark rulings on child soldiering laid the ground work for the prosecution of Lubanga.

Child soldiering has historically been under-criminalised and under-judicialised. It would appear that, jurisprudentially, international criminal law was obsessed with mass killings; child soldiering did not feature on the statutes of the tribunals until the establishment of the SCSL and ICC. The paradigm of international criminal law has been shaped by cataclysmic events such as the Holocaust, Sebrenica and Rwanda. The primacy of massacres in ICL has subsumed the grave nature of non-murder egregious crimes. A strategy some courts have adopted is to pursue ‘thematic prosecutions’ – that is, to orient cases around particular themes of criminality¹⁵⁴³ that has historically been under-enforced. ‘Thematic prosecution’ refers to the

¹⁵³⁶C. Aptel ‘Children and Accountability for International Crimes: The Contribution of International Criminal Courts’ (2010) *Innocenti Working Paper* No. 2010-20. Florence, UNICEF Innocenti Research Centre.

¹⁵³⁷ *ibid*

¹⁵³⁸ *ibid*

¹⁵³⁹ *ibid*

¹⁵⁴⁰ *ibid*

¹⁵⁴¹ *ibid*

¹⁵⁴² D. Francis, ‘Paper Protection’ Mechanisms: Child Soldiers and the International Protection of Children in Africa’s Conflict Zones’ (2007) 45 *Journal of Modern African Studies* 207

¹⁵⁴³ M. deGuzman ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012), 11

prosecutorial practice of selecting certain crimes and prioritising particular phenomena within international criminal indictments, usually for purposes related to the best use of limited resources,¹⁵⁴⁴ but often also due to the symbolism of elevating attention on a given matter of international concern.¹⁵⁴⁵

Such themes may take the form of focused or thematic investigations and prosecutions of these crimes, or the construction of crime-specific institutional capacity within the criminal justice system.¹⁵⁴⁶ This strategy was used in some of the earliest prosecutions for international crimes after World War II.¹⁵⁴⁷ Emerging literature and jurisprudence have focused on thematic prosecution of offences against children and sex crimes.¹⁵⁴⁸ Thematic prosecution of international sex crimes involves the selection and prioritization of sexual crimes over and above other crimes for investigation and prosecution at national or international judicial institutions.¹⁵⁴⁹ This arrogation of criminal pre-eminence is inevitably controversial. However, its proponents argue that:

‘To thematically prosecute certain crimes does not necessarily mean that such crimes are prioritised over other crimes, which will be left unaddressed, but

¹⁵⁴⁴M. Bergsmo and C. Wui Ling ‘Towards Rational Thematic Prosecution and the Challenge of International Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, (2012), 4

¹⁵⁴⁵See, eg N. Jain, ‘Going beyond prosecutorial discretion: institutional factors influencing thematic prosecution’, in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012); M. deGuzman ‘An Expressive Rationale for the Thematic Prosecution of Sex Crimes’ in M. Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* FICHL Publication Series No. 13 (Torkel Opsahl Academic E-Publisher, Beijing, 2012) pp. 11–44; M. deGuzman, M ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2012) 33 *Michigan Journal International Law* 265,

¹⁵⁴⁶ M. Bergsmo and W Ling ‘Understanding and Enhancing Criminal Justice Work Processes: the Concepts of Thematic Prosecution and Criminal Justice Themes’ in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012) 3

¹⁵⁴⁷See J. Bush, ‘The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said’ (2009) 109 *Columbia Law Review* 1094, pp. 1167–1173, discussing the history behind prosecutors’ decisions to pursue thematic prosecutions at the Nuremberg Military Tribunals. Examples include the trials of industrialists, doctors, and judges. Nuremberg Military Tribunal, *United States of America v. Friedrich Flick et al.*, Judgment, 22 December 1947; Nuremberg Military Tribunal, *United States of America v Carl Krauch et al.*, Judgment, 30 July 1948; Nuremberg Military Tribunal, *United States of America v Alfried Krupp et al.*, Judgment, 31 July 1948; Nuremberg Military Tribunal, *United States of America v Karl Brandt et al.*, Judgment, 19 August 1947; Nuremberg Military Tribunal, *United States of America v. Josef Altstötter et al.*, Judgment, 4 December 1947. (cited in De Guzman)

¹⁵⁴⁸ J. Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal*, University of (Chicago Press, 2003) 181–182; M Bergsmo et al., *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, (Torkel Opsahl Academic E-Publisher, Oslo, 2010,) 109, footnote 46.

¹⁵⁴⁹B. Olugbuo, ‘Thematic Prosecution of International Sex Crimes and Stigmatisation of Victims and Survivors: Two Sides of the Same Coin?’ in M Bergsmo (ed) *Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012), 109

rather that such crimes are investigated and prosecuted in a thematic way, meaning that methods specific to the acts and the victims are employed.’¹⁵⁵⁰

Law has social meaning.¹⁵⁵¹ Social meanings are a product of norms, or can produce norms. Any description of the effects of some legal rule is a product of expressive norms that give consequences identifiable social meanings...’¹⁵⁵² Social meanings can carry stigma. If an action creates a stigma, that stigma is a social meaning.¹⁵⁵³ We have traced the genesis of child militarisation from the glorified perceptions of the phenomenon. Thematic prosecutions promote the social meaning of child soldiering that contrasts with heroic portrayals of child soldiers in the past, by shining a spotlight on this under-criminalised standard of international society. It is not clear whether the trial of Lubanga was a deliberate ‘thematic prosecution.’ Prosecutor Bensouda stated:

The case against him (Lubanga) represented the first time that an international criminal tribunal or court decided to charge someone solely for the crimes of enlisting and conscripting children and using them in hostilities as child soldiers. The Special Court for Sierra Leone had charged individuals for this before. But they charged together with other offences. We concentrated only on this war crime based on our conviction that we have to demonstrate to the world the seriousness of this crime. To let the world know that a whole generation of children is being abducted and destroyed; robbing these children of their right to live, learn and play as children, and in many cases, depriving their countries and their communities of future leaders. When children are forced to undergo such traumatic experiences, it could lead to countless problems tomorrow. And through our prosecution in the Lubanga case, we were able to draw the world’s attention to that.¹⁵⁵⁴

10.3.2 Cosmopolitanism

Expressivism presumes the existence of a global community. International criminal law ‘purports to serve multiple communities - ethnic or national communities — and

¹⁵⁵⁰ S. Greijer ‘The Thematic Prosecution of Crimes Against Children’ in M Bergsmo (ed) ,*Thematic Prosecution of International Sex Crimes* (Torkel Opsahl Academic E-Publisher, Beijing, 2012), 162

¹⁵⁵¹D. Kahan, ‘What Do Alternative Sanctions Mean?’ (1996) 63 *University of Chicago Law Review* 591, 597

¹⁵⁵² C. Sunstein, ‘On the Expressive Function of Law’(1996)144 *University of Pennsylvania Journal of International Law* 2021, 2048

¹⁵⁵³L. Lessig ‘The Regulation of Social Meaning’(1995) 62*University of Chicago Law Review* 943;

¹⁵⁵⁴Vereinte Nationen – ‘We Should at All Costs Prevent the ICC from Being Politicized’ (2014) 62*German Review on the United Nations* 1,2

the figurative ‘international community.’¹⁵⁵⁵ I have in thesis described the current state of international relations through the purview of cosmopolitanism. Cosmopolitanism seeks out commonalities between such cultures, acknowledges differences, and embraces pluralism and the building of a *modus vivendi*.¹⁵⁵⁶ The ‘regard for others does not stop at the boundaries of a given state; we are rightly concerned with the global community of humans;... emphasis is placed on humans rather than states...’¹⁵⁵⁷ Cosmopolitanism has manifested itself through international legalism as a *modus vivendi*. International law has aimed at ‘creating coordination among multiple equilibria, making certain outcomes focal; the law can coordinate expectations around the ‘good’ equilibrium.’¹⁵⁵⁸ For instance, international treaties setting standards and protecting the rights of children have received considerable ratifications from all regions. While ‘unenforced’ international law statutes may not have expressive value, they however express shared values of an international society. International criminal trials, as ‘law in action’, stand to serve expressive objectives by actively propagating communitarian standards. Thus cosmopolitanism ‘resonates with the aspirations of ICL: a concern for human beings that extends beyond borders, a willingness to embrace alternative governance structures to supplement state structures, and inclusiveness of the concerns of the ‘international community as a whole.’¹⁵⁵⁹ According to Durkheim, the criminal process is, fundamentally, a manifestation of the ‘collective conscience.’¹⁵⁶⁰ The ‘specificity of modern criminal justice systems is that this collective reaction is exercised through the medium of body acting upon those of its members who have violated certain rules of conduct.’¹⁵⁶¹ Expressivism seeks to allocate stigma to behaviour that violates collective standards. Damaška points out the ‘didactic objective’ for trials, or ‘socio-pedagogical’ role of strengthening accountability for violations of international law

¹⁵⁵⁵ R. Sloane, ‘The Expressive Capacity of International Punishment’ (2006) Columbia Public Law & Legal Theory Working Papers, 3

¹⁵⁵⁶ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 137 citing .K. Appiah, *Cosmopolitanism: Ethics in a World of Strangers* (Penguin Books 2006); xv, 96-99, 144, 151; S. van Hooft, *Cosmopolitanism: A Philosophy for Global Ethics* (McGill-Queen's University Press, 2009) 164-69

¹⁵⁵⁷ D. Robinson, ‘International criminal courts and tribunals: A cosmopolitan liberal account of international criminal law’ (2013) 26 *Leiden Journal of International Law* 127, 137

¹⁵⁵⁸ R. McAdams, ‘A Focal Point Theory of Expressive Law’ (2000) 86 *Virginia Law Review* 1649

¹⁵⁵⁹ Art. 5 of ICC Statute referring to ‘crimes of concern to the international community as a whole’.

¹⁵⁶⁰ E. Durkheim *The Division of Labour In Society*, 70–108 cited in F. Mégret, ‘Practices Of Stigmatization’ (2014) 76 *Law and Contemporary Problems* 287

¹⁵⁶¹ *Ibid*

through exposure and stigmatization of wrongdoing.¹⁵⁶² Mégret asserts that prosecutors at tribunals and courts should recognise the assigning stigma to certain types of behaviour as an important objective.¹⁵⁶³ ‘A stigma-based approach’, he argues, ‘would recommend that we look for the impact of international criminal justice far beyond the immediate operation of the ICC, in the reinforcement of some sort of global ‘conscience collective.’¹⁵⁶⁴ Expressivism, essentially seeks to allocate stigma to certain behaviours. Several tribunals have been set up since Nuremberg. The prosecution of international crimes ‘is often given pride of place within the new cosmopolitanism as the marker not only of the transition from classical international law to cosmopolitan law but of the emergence more broadly of a cosmopolitan consciousness that stretches across national boundaries.’¹⁵⁶⁵ ICL may influence our underlying conceptions of identity.¹⁵⁶⁶ The construction of a shared global identity is a necessary first step in the establishment of a cosmopolitan community.¹⁵⁶⁷ The most fundamental way in which international law has an effect on identity creation is by contributing to building the particular community which identifies the need to respond to crimes.¹⁵⁶⁸ Most recently, this has been the development of a cosmopolitan community, reflected in the idea that crimes against humanity and genocide are of universal moral concern.¹⁵⁶⁹ The recent emergence of attempts to exercise universal jurisdiction over such crimes is an explicit endorsement of their universal moral concern.¹⁵⁷⁰ Since Nuremberg, we have witnessed a transformation from *Realpolitik* to ‘legal cosmopolitanism’. The ultimate value of international criminal law may rest not in its functions of retribution or deterrence, but in its role

¹⁵⁶² M Damaška, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 345

¹⁵⁶³ F. Mégret, ‘Practices Of Stigmatization’ (2014) 76 *Law and Contemporary Problems* 287

¹⁵⁶⁴ F. Mégret, ‘Practices Of Stigmatization’ (2014) 76 *Law and Contemporary Problems* 287, 317

¹⁵⁶⁵ R. Fine, *Cosmopolitanism* (Routledge, 2007) 96

¹⁵⁶⁶ While the focus of this section is on how participation in international criminal law may influence the identities of individuals, constructivist literature in international relations theory has shown how the same could be applied to the formation of States’ interests and identities. Martha Finnemore has argued that the participation of States in the International Committee of the Red Cross and the regime of international humanitarian law has socialized States to accept and internalize the underlying humanitarian values. The development of international criminal law can be seen as a further evolution of this process. See M. Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell University Press 1996)

¹⁵⁶⁷ D. Koller, ‘The Faith of the International Criminal Lawyer’, (2008) 40 *New York University Journal of International Law and Politics* 1019, 263-64.

¹⁵⁶⁸ *Ibid* 1057

¹⁵⁶⁹ J. Bohman, ‘Punishment as a Political Obligation: Crimes Against Humanity and the Enforceable Right to Membership’ (2002) 5 *Buffalo Criminal Law Review* 551, 567

¹⁵⁷⁰ D. Koller, ‘The Faith of the International Criminal Lawyer’, (2008) 40 *New York University Journal of International Law and Politics* 1019, 1058

in identity construction, in particular in constructing a cosmopolitan community identity embracing all of humankind.¹⁵⁷¹ Continuing to pursue the international criminal law project may be valuable insofar as it gives voice to, and thus shapes, the identity of individuals as participants in an international community.¹⁵⁷² To ‘abandon international criminal law would not only lose this socialising aspect of the law, but it might also send the message that we are giving up on trying to realize a globally shared cosmopolitan identity.’¹⁵⁷³ The Rome Statute is a particularly significant development because of ‘the constitutive symbolic function of criminal law as a community-creating, community-maintaining device.’¹⁵⁷⁴ Child soldiering is a discriminatory crime, targeting the impressionable and vulnerable for use as weapons of war. If ‘the purpose of international prosecution is to reaffirm the values and identity of the international community, that identity is more seriously threatened by crimes involving discrimination than by non-discriminatory crimes.’¹⁵⁷⁵ A crime that conveys the perpetrator’s devaluation of a particular class of people is more worthy of condemnation than a comparable act that does not.¹⁵⁷⁶ Such ‘expressive harms’ require countering by the law. International criminal law offers a vehicle for realizing a cosmopolitan community in which each individual human being is truly valued as a unit of moral concern.¹⁵⁷⁷ Assuming ‘the international community is a ‘community’ in a meaningful sense that community may have an integrity interest in countering normative expression that conflicts with the community’s vision of its identity.’¹⁵⁷⁸ Expressivism recognises the ability of international criminal proceedings to convey the values of the international community.¹⁵⁷⁹

¹⁵⁷¹ Ibid 1060

¹⁵⁷² Ibid 1060

¹⁵⁷³ Ibid 1060

¹⁵⁷⁴ E. Wise, ‘The International Criminal Court: A Budget of Paradoxes,’ (2000) 8 *Tulane Journal of International & Comparative Law* 261, 268

¹⁵⁷⁵ M. Drumbl, ‘The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law’ (2007) 75 *George Washington Law Review* 1165, 1195; D Amann ‘Group Mentality, Expressivism, and Genocide,’ (2002) 2 *International Criminal Law Review* 93,121

¹⁵⁷⁶ D. Kahan, ‘What do Alternative Sanctions Mean?’ (1996) 63 *University of Chicago Law Review*, 591 598, stating that a racist killing ‘is more worthy of condemnation’ than a mother’s revenge killing ‘because hatred express a more reprehensible valuation’

¹⁵⁷⁷ D. Koller, ‘The Faith of the International Criminal Lawyer’,(2008) 40 *New York University Journal of International Law and Politics* 1019, 1067

¹⁵⁷⁸ C. Sunstein, ‘On the Expressive Function of Law’ (1996) 144 *University of Pennsylvania Law Review*, 2021, 2026–2027

¹⁵⁷⁹ M. Drumbl, ‘The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, the Geneva Conventions, and International Criminal Law’ (2007) 75 *George Washington Law Review* 1165, 1195;

10.3.3 Lubanga and expressivism

International criminal justice is largely symbolic; it has limited resources, faces political constraints, and thus cannot prosecute large numbers of defendants in cases of mass crime. The OTP has outlined that its assessment of gravity would consider: the scale of the crimes, the severity of the crimes, and the systematic nature of the crimes, the manner in which they were committed, and the impact on victims.¹⁵⁸⁰ The Chamber also approved the Prosecutor's Policy Paper statement of 2003 that as a general rule the OTP should focus its investigative and prosecutorial resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes.¹⁵⁸¹ With this small number of defendants, an expressive approach to ICL suggests that a primary purpose of international criminal trials is to express global norms.¹⁵⁸² Norm expression and stigmatization do not require that all or even most of the perpetrators be prosecuted to achieve a pedagogical function; a small number of illustrative prosecutions are sufficient to convey the necessary message.¹⁵⁸³ By dramatizing the effect of the law-breaking conduct through the spectacle of trial making, international criminal justice makes clear what was not previously understood: in this case, that recruiting, enlisting, and using children to fight is a war crime.¹⁵⁸⁴ Expressivism is therefore 'not just the best justification for the ICC's work; it also provides the most appropriate theoretical basis for the Court's resource allocation decisions.'¹⁵⁸⁵ Apart from resource-based arguments, there 'is cause to believe that expressivism may be a more

D. Amann, 'Group Mentality, Expressivism, and Genocide,' (2002) 2 *International Criminal Law Review* 93, 121

¹⁵⁸⁰ See 'ICC Report on Preliminary Examination Activities 2013,' November 2013 http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF

¹⁵⁸¹ *Prosecutor v Lubanga* Decision on the Prosecutor's application for warrant of arrest under Article 58 (10 February 2006) para 61; See 'Paper on some policy issues before the Office of the Prosecutor' ICC-OTP (September 2003) 7

¹⁵⁸² M deGuzman 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2012) 33 *Michigan Journal International Law* 265

¹⁵⁸³ *ibid*

¹⁵⁸⁴ L. Davis and P Hayner, 'Difficult Peace, Limited Justice' International Centre for Transitional Justice (March 2009), 31 discussing both the positive and negative effects

¹⁵⁸⁵ M. deGuzman, 'Choosing to prosecute: Expressive selection at the International Criminal Court' (2012) *Michigan Journal of International Law* 265, 270

plausible justification for the punishment of *extraordinary* international criminals.¹⁵⁸⁶

Trials are a way of redefining the community to include the victim within the community.¹⁵⁸⁷ While the unprecedented role for victims to participate in trials, even if not called as witnesses at the ICC, may in part be motivated by a desire to provide victims with a forum to tell their story, it is also a means for establishing a community between the victims and the supporters of the Court, thereby expanding the boundaries of the cosmopolitan community.¹⁵⁸⁸

10.3.4 Norm internalisation

The objective of establishing a cosmopolitan community can be achieved through norm internalisation. The mass media act as an enforcer of social values in many ways. One background assumption of news is ‘the consensual nature of society: the process of signification - giving social meanings to events - both assumes and helps to construct society as a consensus.’¹⁵⁸⁹ Norm internalisation has been recognised as a long term objective of law.¹⁵⁹⁰ To this end the study has attempted to graphically harmonise the concepts discussed in this thesis by customising Finnemore and Sikkink’s norm cycle model, incorporating expressivism (see Figure 2)

¹⁵⁸⁶ M. Dumb, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007)

¹⁵⁸⁷ D. Koller, ‘The Faith of the International Criminal Lawyer’, (2008) 40 *New York University Journal of International Law and Politics* 1019, 1058

¹⁵⁸⁸ *Ibid* 1058-59

¹⁵⁸⁹ S. Hall, C. Critcher, T. Jefferson, J. Clarke and B. Roberts ‘The Social Production of News’ in P Marris and S Thornham (eds) *Media Studies: A Reader* (New York: New York University Press 2000) 646

¹⁵⁹⁰ V. Padmanabhan ‘Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay’ (2009) 3 *Journal of International Law* 427

An expressivist model of international law and criminal law

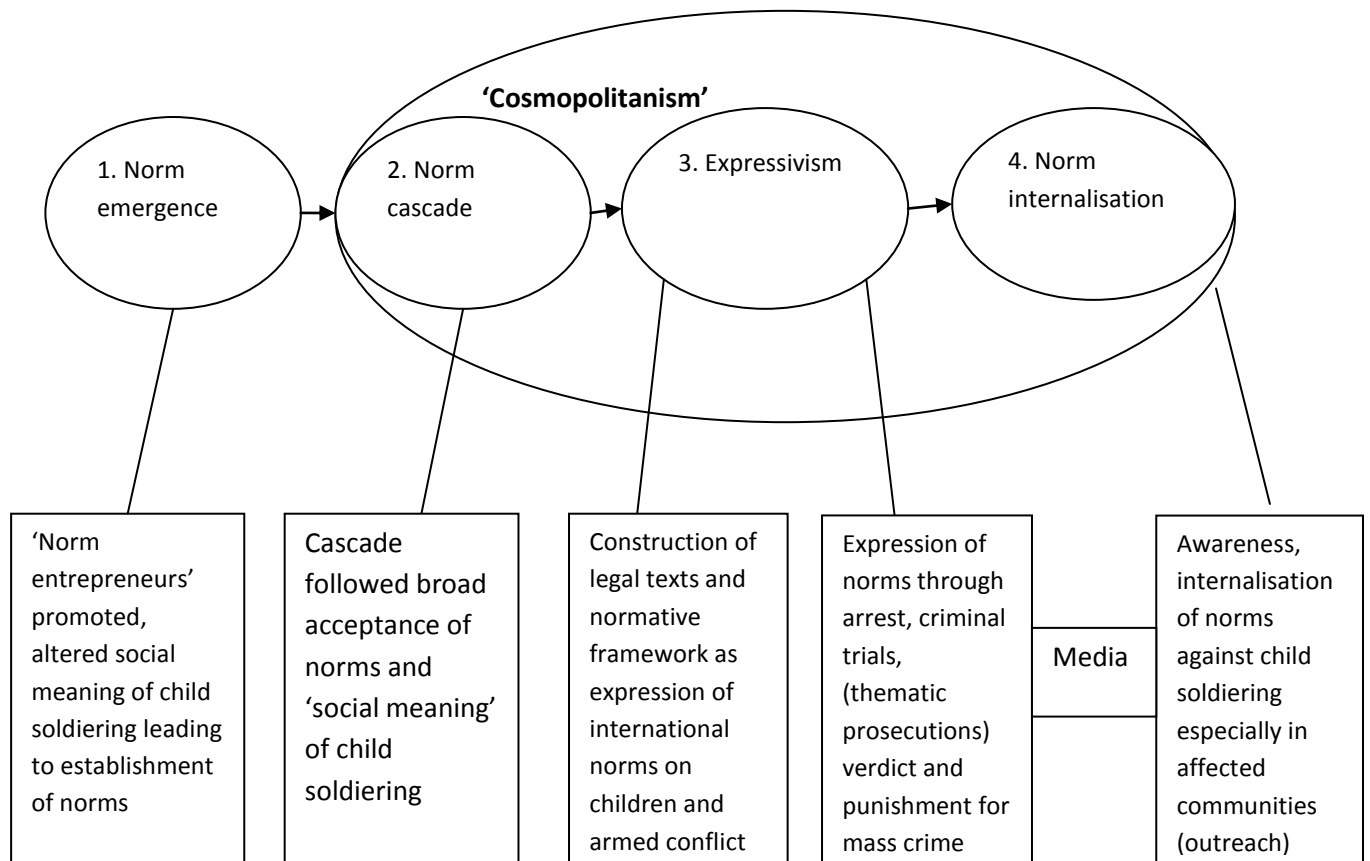


Figure 2

Trials are ‘central to the norm internalisation process’¹⁵⁹¹ within local communities. The purpose is to internalise, especially within a targeted audience, a respect for international law and for the norm in question or social meaning that drives the audience not to repeat the violation in the future.¹⁵⁹² Norm internalisation ‘recognises this gap, and focuses on developing internal drives to follow the law, given that stable compliance with the law depends on an internal drive to follow the law regardless of enforcement.’¹⁵⁹³ This is, however, a long term project. As Akhavan notes, criminal sanctions instil voluntary or ‘good faith’ respect for just conduct by discrediting inhumane and unjust conduct, the cumulative effect of which encourages habitual or subliminal conformity with the law.¹⁵⁹⁴ Thus, the prevention

¹⁵⁹¹Ibid

¹⁵⁹²Ibid

¹⁵⁹³Ibid 435

¹⁵⁹⁴P. Akhavan, ‘Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal’ (1998) 20 *Human Rights Quarterly* 737, 741

of future crimes is necessarily a long-term process of social and political transformation, entailing internalization of ideals in a particular context or ‘reality,’ or the gradual penetration of principles into power realities.¹⁵⁹⁵ It is unrealistic to expect Lubanga to effect immediate and dramatic changes to the practice of child soldiering.¹⁵⁹⁶ Respect ‘for international law, and a sense of morality modified to encompass prohibitions on genocide, crimes against humanity, and serious war crimes must be developed over time; the appropriate measurement of success may not be months or years but rather decades.’¹⁵⁹⁷

10.3.5 Outreach

It was concluded that with the ‘international community as an audience’, *Lubanga* served ‘important didactic and pedagogical goals of teaching the international community about the tragedy of child soldiers.’¹⁵⁹⁸ As Damaška noted, the ‘socio-pedagogical’ role of courts strengthen accountability for violations of international law through exposure and stigmatization of wrongdoing.¹⁵⁹⁹ Today, however, it is rare to find any jurisprudential analysis, consideration, or even awareness of the law-education connection.¹⁶⁰⁰ When people are conscious of the issue, they will support the abolition of the use of child soldiers.¹⁶⁰¹ Indeed trials may achieve norm internalisation through expressivism, and media can perform the role disseminating global norms. It has been asserted that, ‘compared to national criminal courts, international criminal tribunals will often need to place greater emphasis on victim and witness support programs, as well as public education and outreach efforts.’¹⁶⁰² As already argued, international courts should avoid engaging in programmes that

¹⁵⁹⁵Ibid

¹⁵⁹⁶ Graf ‘The International Criminal Court and Child Soldiers (2012) 10 *Journal of International Criminal Justice*’ *Journal of Internal Criminal Justice* 945

¹⁵⁹⁷V. Padmanabhan ‘Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay’ (2009) 3 *Journal of International Law* 427, 439

¹⁵⁹⁸ D. Bodansky, ‘International Decisions’ (2007) 101 *The American Journal of International Law*, 841, 846

¹⁵⁹⁹ M Damaška, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 345

¹⁶⁰⁰B Burge-Hendrix ‘The educative function of law’ in M Freeman and R Harrison (eds.), *Law and Philosophy* (Oxford University Press 2007)

¹⁶⁰¹S. Svoboda, ‘The United Nations and the Issue of Child Soldiers in Africa: The Use of Child Soldiers’ <http://voices.yahoo.com/the-united-nations-issue-child-soldiers-6167938.html?cat=7>

¹⁶⁰² A. Danner and J Martinez ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law (2005) 93 *California Law Review* 75, 101

can be left to other organisations. Outreach programmes are best limited to providing information about trials and clarifying law and proceedings. International criminal trials stand to internalise norms more through such proactive engagement, particularly in the affected communities. Mass crime involves a profusion of agents and actors. The work of international criminal courts would be inadequate without direct contact with communities affected by social and political calamities. The ICC, located in The Hague, has formulated an outreach programme. Such a programme has been implemented in the DRC, the location of Lubanga's crime. In this project, I incorporate outreach within the scope of socio-pedagogical function of expressivism. Expressivism aims to clarify the law; and media may misrepresent or misinterpret events out of sensationalist reasons or genuine lack of knowledge of the law and procedures. Outreach programmes can be conceptualised as the expressive function of law because such programmes can outline laws and reasons defendants were facing prosecution directly to affected communities. Unlike retribution and deterrence, which are empirically indeterminate, expressive outreach can be evaluated to assess norm internalisation. If international punishment is to have the cosmopolitan 'community-creating' effect around shared norms, outreach programmes would be an effective means of achieving this goal.

A benefit of norm internalisation is norm defence' or 'norm support'. Norm defence is crucial in the spreading and stabilization of norms over a population of autonomous agents.¹⁶⁰³ This would reinforce the social meaning of law in societies. Human rights groups in the DRC were part of organisations that defended the role of the ICC and were active in gathering evidence against Lubanga.¹⁶⁰⁴ They campaigned for the charges against him to be widened.¹⁶⁰⁵ *Lubanga* thus brought child soldiering to the top of the agenda for such groups as well as fostering 'norm defence'. A cosmopolitan community can be reinforced when norms are defended and supported voluntarily. These approaches transcend classical precepts of retribution and deterrence.

¹⁶⁰³G. Andrighetto, D. Villatoro and R. Conte (2010) 23 'Norm internalisation in artificial societies' *AI Communications* 325

¹⁶⁰⁴See 'NGOs Defend ICC Role in Lubanga Case' Institute of War and Peace Reporting Issue 479, 1 December 2006 <http://iwpr.net/report-news/ngos-defend-icc-role-lubanga-case>

¹⁶⁰⁵Ibid

Another important benefit of internalisation through criminal trials and proactive engagement is reduction in costs of enforcement when ‘agents begin to conform to an internal norm because doing so is an end in itself, and not merely because of external sanctions, such as material rewards or punishment. This will reduce costs of norm enforcement.’¹⁶⁰⁶ As already noted, the ICC does not have an enforcement mechanism. It relies on the ‘charity’ of states, not just in terms of funding, but enforcement. The ICC can only prosecute a handful of defendants, partly because of lack of cooperation of states and lack of an enforcement mechanism. The ICC has stated that for it ‘to effectively deal with situations referred by the council ... it needs to be able to count on the full and continuing cooperation of all U.N. members, whether they are parties to (the court) or not.’¹⁶⁰⁷ Among the ICC’s financial commitments are investigations, trials, legal representation and reparations funded primarily by states¹⁶⁰⁸, the UN¹⁶⁰⁹ and voluntary contributions.¹⁶¹⁰ If the Court were to encounter simultaneously the constraints of slower contributions and the need to fund unforeseen events, it could find itself in a position of being unable to carry out necessary Court operations due to lack of funds.¹⁶¹¹ A consensus seems to have emerged that the OTP should negotiate the inherent limitations of prosecutorial capacity by focusing investigations and prosecutions on those culpable individuals who occupied the highest levels of political or military authority.¹⁶¹² The prosecution thus has to exercise selectivity. The ICC concluded a single case (*Lubanga*) after 10 years in existence, spending \$900 million during the period. Norm internalisation would, over time, reduce the number of offenders, and ultimately, costs. Given the limitations of the ICC, norm internalisation as the ultimate aim of prosecution of mass crimes would appear a more realistic and most plausible philosophical

¹⁶⁰⁶ D Villatoro ‘Self-organization in decentralized agent societies through social norms’

¹⁶⁰⁷ See ‘ICC complains of lack of support, wants more UN support’ Reuters 17 October 2013 <http://www.reuters.com/article/2012/10/17/us-crime-un-icc-idUSBRE89G1M720121017>

¹⁶⁰⁸ See ‘About the court’ ICC; <http://www.icc-cpi.int/Menus/ICC/about+the+Court/>

¹⁶⁰⁹ Rome Statute Art. 115

¹⁶¹⁰ Rome Statute Art. 116

¹⁶¹¹ See International Criminal Court Assembly of States Parties ‘Report of the Court on the options for replenishment of the Contingency Fund’ ICC-ASP/8/28 Eighth session The Hague 18-26 November 2009

¹⁶¹² M. C. Bassiouni ‘Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights’ in M. C. Bassiouni (ed.), *Post-Conflict Justice* 3, 27 (2002) (‘As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors. This policy does not and should not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals.’); see also A. Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’ (2003) 97 *American Journal of International Law* 510, p 543 (‘That the international justice forum should be reserved for high-level perpetrators has gained wide acceptance.’).

justification for ICC penalty. Some commentators have, nonetheless, inferred the futility of international criminal courts' didactic aspirations from the absence of discernible educational effects of their decisions.¹⁶¹³ But as Damaska notes:

'...the absence of these effects in the short run does not preclude the possibility of their appearance in a time horizon of longer range. This is especially the case in communities traumatized by atrocities, where intense passions unleashed by conflict take time to subside. Jumping to pessimistic conclusions is also unwarranted, so long as the working of international criminal courts is not properly attuned to pedagogic objectives.'¹⁶¹⁴

10.4 limits of the thesis

The modest objective of this study was to reappraise aspects of ICL by bringing attention to a timely case before the foremost global criminal law institution to help us reflect on legal, in particular, penal theory and mass crime. The study does not discuss the whole mosaic of penal justifications in detail. Incapacitation, rehabilitation, reconciliation, restoration and access for victims and so on remain justifications for international criminal justice. While valid, these appear to be less salient in ICL nor do they provide sufficient and realistic justification for the work of an international court. As jurisprudence has shown, retribution and deterrence are the prominent rationales of ICL. Secondly, detailed exploration of each and every rationale of ICL would demand more space than is provided for in this thesis. Comprehensive analyses would thus compromise focused interrogation of issues under study. In any case, some of these objectives, such as rehabilitation and restoration, should be left to other organisations rather than be attached to the already wide range of duties imposed on courts. International courts seem to be setting objectives outside their core functions. While this thesis discussed some of these rationales to reflect the array of aims, its theoretical framework focused mainly on retribution and deterrence. The thesis attempts to offer a contribution to international law and international criminal law by advancing an under-explored rationale.

¹⁶¹³J. Snyder and L. Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies on International Justice' (2003/4) 28 *International Security* 5,39-40

¹⁶¹⁴ M. Damaska, 'What is the Point of International Criminal Justice?' (2008) 83 *Chicago-Kent Law Review* 329, 364 footnote 27

While encouraging in its seeming support of the thesis and the theoretical framework that frames it, we ought to bear in mind that *Lubanga* represents an evolving crime of child soldiering and effect and furthermore, the impact of his trial and conviction might take some time to play out fully. The thesis does not, therefore, profess to show the immediate results of expressivist value of *Lubanga*. International criminal courts will not achieve much without reaching out to ‘victim communities.’ Much of that impact of the ICC will be contingent upon sustained proactive engagement with the affected community.

Admittedly, this study does not focus on the broader rights of children because of its preoccupation with the child soldiering case before the ICC. The full extent of norm internalisation resulting from the expressive role of *Lubanga* is difficult to measure. However, research by human rights bodies show encouraging signs in terms of norm internalisation. Human Rights Watch (HRW) concluded that *Lubanga* had ‘undeniably contributed to raising awareness about the plight of child combatants in the DRC, and among those who previously thought that crimes relating to child soldiers were not ‘serious’—including parents in Ituri who had their children join militia groups.’¹⁶¹⁵ Since the ICC had become active in Ituri, children themselves had been educated about their rights and sensitized to their roles as both victims and perpetrators in a way which may impact their own future behaviour.¹⁶¹⁶ As Damaska notes, the effects of norm internalisation may take longer to appear in communities traumatised by atrocities until intense passions that cause conflict subside.¹⁶¹⁷

10.5 Future Research

Other than outreach, norm internalisation would, however, depend on cycles of prosecution. Perhaps, the greatest effect of expressivism with regards to child soldiering will be realised with the arrest of the elusive Ugandan rebel leader, Kony

¹⁶¹⁵ See ‘DR Congo: Q&A on the First Verdict at the International Criminal Court’ Human Rights Watch 29 February 2012 <http://www.hrw.org/news/2012/02/29/dr-congo-qa-first-verdict-international-criminal-court>

¹⁶¹⁶ See ‘Steps towards justice, frustrated hopes: Some Reflections on the Experience of the International Criminal Court in Ituri.’ The International Refugee Rights Initiative and Association pour la promotion et la défense de la dignité des victimes (APRODIVI) March 2012, 10

¹⁶¹⁷ M. Damaska, ‘What is the Point of International Criminal Justice?’ (2008) 83 *Chicago-Kent Law Review* 329, 364 footnote 27

(if he is captured alive) and the OTP chooses to conduct a putative thematic prosecution on the use of children in armed conflict. While Kony is associated with other brutalities, he has been notorious for his use of child soldiers. An internet campaign for the capture of Kony generated international responses. US troops have been deployed in Central Africa to search for Kony. The recent arrest of Lubanga's co-accused would provide an opportunity for the ICC prosecutor to address the inadequacies in *Lubanga*.

On 22 August 2006¹⁶¹⁸ and on 13 July 2012,¹⁶¹⁹ the ICC issued two warrants of arrest against Ntaganda. Ntaganda was Deputy chief of staff of FPLC and Lubanga's co-accused. Despite the warrant of arrest issued for him and Lubanga, the DRC arrested and handed over only Lubanga, but recruited the former into the armed forces. He, however, left the army to rejoin rebel ranks. On 22 March 2013, Ntaganda voluntarily surrendered to the Court¹⁶²⁰ and on 26 March 2013, he made his first appearance before the ICC. On 10 January 2014, the Prosecutor filed the Document Containing the Charges together with the list of evidence¹⁶²¹ He was charged with 13 counts of war crimes (murder and attempted murder; attacking civilians; rape; sexual slavery of civilians; pillaging; displacement of civilians; attacking protected objects; destroying the enemy's property; and rape, sexual slavery, enlistment and conscription of child soldiers under the age of fifteen years and using them to participate actively in hostilities) and five counts of crimes against humanity (murder and attempted murder; rape; sexual slavery; persecution; forcible transfer of population) against Bosco Ntaganda allegedly committed in 2002-2003 in the Ituri Province of DRC. On 9 June 2014, Pre-Trial Chamber II decided that the Court has jurisdiction over the case, determining it admissible, confirming the charges presented by the Prosecutor against Ntaganda.¹⁶²² His trial has been set for June

¹⁶¹⁸ Pre-Trial Chamber I, 'Decision on the Prosecution Application for a Warrant of Arrest', 22 August 2006, ICC-01/04-02/06-1-US-Exp-tEN. The warrant of arrest was initially issued under seal. On 28 April 2008, Pre-Trial Chamber I decided to unseal the warrant of arrest, see 'Decision to Unseal the Warrant of Arrest against Bosco Ntaganda', ICC-01/04-02/06-18.

¹⁶¹⁹ Pre-Trial Chamber II, "Decision on the Prosecutor's Application under Article 58", 13 July 2012, ICC-01/04-02/06-36-Conf-Exp

¹⁶²⁰ Pre-Trial Chamber II, 'Decision on Setting the Date for the Initial Appearance and Related Issues', 22 March 2013, ICC-01/04-02/06-41, para. 7.

¹⁶²¹ See Document Containing the Charges (DCC) ICC-01/04-02/06-203-AnxA.

¹⁶²² See *Prosecutor v Bosco Ntaganda* Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda ICC-01/04-02/06. 9 June 2014

2015. Future research would focus on how the Ntaganda case would provide remedies for the commissions and omissions in *Lubanga*.

The objective of this thesis was not to give blind endorsement to the application of expressivism in *Lubanga*. Several issues impacted on the expressive value of the case. Prosecutorial procedure and substantive inadequacies need to be addressed for the full expressivist value of law and penalty to be realised. For instance, the tendency to prosecute rebels, and not state actors would impact on the legitimacy of the court. Self-referring governments have opportunistically utilised the mechanism to delegitimise domestic rivals. This bias may create a sense of ‘victors’ justice’ – the prosecutor representing the triumphalism of the referring state. ‘[F]ailure to deal with the crimes committed by the accuser quickly discredits the trial in the eyes of the community of the accused, both as a fact-finding exercise and as a moral guidepost.’¹⁶²³ It can be argued that the prosecution of state actors would generate more expressive value in some cases. The trial of a former head of State or high-ranking official sends a message that even the most powerful political actors will be held answerable to the law.¹⁶²⁴ Prosecuting ‘minor figures can undermine norm internalization by failing to create a sufficiently dramatic spectacle to communicate the perils of transgressing international law and express the stigma associated with such violations.’¹⁶²⁵ The ‘defendant’s community will not develop greater respect for international law, nor internalise international norms, if the trial’s narrative is insufficiently powerful to spawn moral reflection.’¹⁶²⁶

As a seminal case, *Lubanga* encountered a number of problems. Procedurally, the prosecutor would need to address issues that delayed the trial such as the unnecessary withholding exculpatory evidence. Further research would observe how the OTP would also address its methods of identifying witnesses and use of ‘intermediaries’ who may have influenced them. In *Lubanga* not one of the witnesses

¹⁶²³V. Padmanabhan ‘Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay’ (2009) 3 *Journal of International Law* 427,441-442

¹⁶²⁴D. Koller, ‘The Faith of the International Criminal Lawyer’,(2008) 40 *New York University Journal of International Law and Politics* 1019, 1059

¹⁶²⁵V. Padmanabhan ‘Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay’ (2009) 3 *Journal of International Law* 427, 445

¹⁶²⁶ibid

was found by the Court to have been honest and reliable.¹⁶²⁷ Lubanga was thus convicted without relying on the direct testimony of child soldiers but others, coupled with certain documents and videotapes. Birth certificates or grade school rosters' were not available. As has been noted, the absence of such important records diminished the expressive impact of the *Lubanga*.¹⁶²⁸ '[C]rooked trials, though more effective in terms of securing convictions of defendants, are not venues for moral education because the historical narrative produced at such a trial will not be accepted as accurate by the defendant's community.'¹⁶²⁹

For legal scholarship on child soldiering, the prosecutor's approach to sex crimes will be one area of focus. ICC judges admonished the prosecutor for his failure to lay a separate charge of sexual violence. The Office of the Prosecutor chose to focus on crimes related to the use of child soldiers to the exclusion of sex crimes, thereby failing to reflect the full nature and dynamics of child soldiering. Following *Lubanga*, the OTP has published a policy paper which states that the 'the Office will charge acts of sexual and gender-based crimes as different categories of crimes within the Court's jurisdiction (war crimes, crimes against humanity, and genocide), in order to properly describe, *inter alia*, the nature, manner of commission, intent, impact, and context.'¹⁶³⁰

Notwithstanding its inadequacies, *Lubanga* provided an opportunity for the expressive function of law by highlighting other significant elements of child soldiering. *Lubanga*, as well as the case law of the SCSL including the recently delivered judgment against Charles Taylor, may offer interesting insights on the socio-pedagogical role of international criminal justice.¹⁶³¹

¹⁶²⁷*Prosecutor v Thomas Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC, 14 March 2012 paras 479–80.

¹⁶²⁸D. Amann, 'Children and the First Verdict of the International Criminal Court' (2013) 12 *Washington University Global Studies Law Review* 411, 429

¹⁶²⁹V. Padmanabhan 'Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay' (2009) 3 *Journal of International Law* 427, 453

¹⁶³⁰See 'Policy Paper on Sexual and Gender-Based Crimes' Office of the Prosecutor (ICC) June 2014, para 8; <http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes-June-2014.pdf>

¹⁶³¹T Mariniello 'Prosecutor v Thomas Lubanga Dyilo: The First Judgment of the International Criminal Court's Trial Chamber' (2012) 1 *International Human Rights Law Review* 137, 146

‘They may contribute to strengthening the sense of accountability for recruiting and using child soldiers, by stigmatising these conducts as contrary to the fundamental values of the international community. Moreover, by defining and denouncing the criminal nature of heinous conduct, such as the conscription, enlistment, and use of child soldiers, these cases enhance the normative scope of international criminal law. Therefore, beyond the actual effect of the ICC’s decision on potential criminals, it is expected that the *Lubanga* judgment serves—toward the entire collectivity of States—an important pedagogical goal of social acknowledgment of the values protected by international criminal justice.’¹⁶³²

To conclude, international criminal law needs to face up to its limitations.

Retribution and deterrence cannot be proved or disproved in a methodologically sound way. The ICC’s first case hopefully illustrates that expressivism bears promise as a rationale for its work on mass crimes. Empirical research could assess levels of awareness generated by both *Lubanga* and *Ntaganda*. Evaluation on comprehension of norms is a possible exercise. However, the OTP needs to address issues arising from *Lubanga* in order to maximise expressive objectives. The focus on figures considered ‘minor’ and exempting state actors may undermine norm internalisation by failing to create a sufficiently dramatic spectacle to communicate the perils of transgressing international law and express the stigma associated with such violations.’¹⁶³³The trial of high-ranking state actors transmits a powerful message that even the most powerful political actors will not be exempted. Repeated often enough, this lesson will gradually be internalized and passed down to successive generations¹⁶³⁴Prosecutorial indiscretions, however, ought not to discount expressivism, as a rationale, its plausibility as a premise for international prosecutions.

¹⁶³² Ibid

¹⁶³³V. Padmanabhan ‘Norm Internationalization through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay’ (2009) 3 *Journal of International Law* 427, 445

¹⁶³⁴D. Koller, ‘The Faith of the International Criminal Lawyer’, (2008) 40 *New York University Journal of International Law and Politics* 1019,1059

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