OF NO CONSEQUENCE: THE ICC, CRIMINAL DETERRENCE AND THE REALITY OF SEXUALIZED VIOLENCE IN THE DRC

by

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ABSTRACT

In addition to its retributive and restorative functions, by its mere existence the International Criminal Court is slated to play a deterrence role never before seen in international criminal law. However, unabated sexualized violence in the Democratic Republic of Congo evidences limits of the permanent ICC's deterrent capacity. Despite the ICC's investigation, and indictments and proceedings against Germain Katanga and Mathieu Ngudjolo for sexually violent war crimes and crimes against humanity, the nascent court is yet unable to elicit preventive effects. While deterrence theory is logically compelling, mechanisms and assumptions underlying it prove impractical when deterrence is assessed in reality. First, the ICC cannot execute certain, severe or swift enough punishment to generally deter. Second, deterrence theory's assumption that perpetrators are rational actors engaged in utilitarian calculations of legal risk is dispelled by an analysis of Congolese perpetrators' accounts. Evidently, prosecutions alone will not end sexualized violence in the DRC.

Keywords: International Criminal Court, criminal deterrence theory, rational actor assumption, sexualized violence, Democratic Republic of Congo, Mai Mai militia, Forces Armees de la Republique Democratique du Congo (FARDC)

For the resilient.

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The ICC's authority is far too attenuated to make the slightest bit of difference either to the war criminals or to the outside world. In cases where the West in particular has been unwilling to intervene militarily to prevent crimes against humanity as they were happening, why will a potential perpetrator feel deterred by the mere possibility of future legal action? A weak and distant Court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity. Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed? Holding out the prospect of ICC deterrence to the weak and vulnerable amounts to a cruel joke. - Former United States Under Secretary of State, John R. Bolton (2002)[1]

Stopping the use of rape in conflict areas is not just a matter of time. It requires pro-active measures, political will and military responsibility. Acts of sexual violence on this scale are crimes against humanity. To say they cannot be stopped makes no sense. As someone said in today's launch – what other crime against humanity is inevitable? - UN Special Representative on Sexual Violence in Conflict, Margot Wallström (2010)[2]

1. INTRODUCTION

Recounts of sexualized violence in the Democratic Republic of Congo (DRC) have shocked the world. Deemed a "war within a war" (Human Rights Watch 2002), the "monstrosity of the century" (Greenberg 2008) and "murderous madness" (International Alert 2005, 11) the gravity of the situation has not gone unnoticed. With the "power to exercise its jurisdiction over persons for the most serious crimes of international concern" (Rome Statute of the ICC 1998, 2), it was forecasted that the International Criminal Court's (ICC) investigation in the DRC and indictments against five individuals for crimes against humanity and war crimes would help bring the ongoing savagery to a halt. Although former United Nations Secretary-General Kofi Annan welcomed the opening of the ICC with hope that the new institution would "deter future war criminals and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity"

[1] Remarks made to the Federalist Society 14 November 2002

[2] Interview with the UN News Centre 30 June 2010 following the release of a new toolkit for peacekeepers on how to prevent sexual violence at the local level (in UN News Centre 30 June 2010).

(UN/ICC 2002), humanitarian workers report that rape in the Congo "is becoming more violent and more common" (Wakabi 2008, 15). The truth is that while the ICC may serve to politically incapacitated some of the accused, contribute to global moral education and set the stage for future prosecutions in the DRC and elsewhere, institutional constraints and limitations of deterrence itself may hinder the Court's capacity to *prevent* ongoing abuses.

Although deterrence has long been revered as a primary function among the classical purposes of domestic criminal justice systems, the International Criminal Court (ICC)[3], as a *permanent* retributive and restorative institution, is said to play a deterrence role never before seen in international law. Because of the many confounding variables often at play, deterrence, as a general undertaking, is inherently difficult to wrest, or gauge. Deterrence à la international criminal law has yet to be tested by statistical analysis; it is therefore the premise of deterrence, based only on theory and its logic, upon which the ICC's slated preventive function rests.

Deterrence theory has been lauded as one of the most influential products of the social sciences (Achen and Snidal 1989, 143; Morgan 2003, 42) and the logic underlying deterrence has been critical to post-Cold War thinking on various security affairs (Ibid.; Bachman, Ward, & Paternoster, 1992). Despite its importance, the applicability and functionality of international criminal law's deterrence capacity

[3] A comprehensive overview of the functions of the Rome Statute and ICC are beyond the scope of this paper. For great historical and institutional analyses of the Court *see inter alia* Yusaf Askar, (2004) *Implementing International Humanitarian Law: From the Ad Hoc Tribunals to a Permanent International Criminal Court*; Dominic McGoldrick, Criminal Trials Before International Tribunals*, in The Permanent International Criminal Court: Legal and Policy Issues*, 40-45 (Dominic McGoldrick & Eric Donnelly eds., 2004); and Marlies Glasius (2006),*The International Criminal Court: A global civil society achievement*.

remains tenuous. Arguably, one of the reasons why the threat of prosecution was of little influence during the active stages of the war in the former Yugoslavia “was the failure to meet the formal requirements for effective deterrence” (Rodman 2008, 534). It is therefore vital to ask the following question in the ICC’s early years: What may impede the permanent International Criminal Court from effectively deterring further perpetration of sexualized violence in countries like the Democratic Republic of Congo?

Because most perpetrators of wartime violence throughout history have gone unpunished, save for the select few prosecuted by *ad hoc* military and criminal tribunals, the United Nations interprets that “it is reasonable to conclude that most perpetrators of such atrocities have believed that their crimes would go unpunished” (UN ICC Fact Sheet 1999). In the Democratic Republic of Congo, it is apparent that the scale of rape with impunity over years of war has made this crime seem more acceptable (Oxfam International 2010). As a stable legal fixture with wide jurisdiction, the advent of the International Criminal Court is slated to dismantle such offenders’ reliance on impunity. Proponents contend that a permanent ICC’s mere existence ostensibly creates a deterrence effect that *ad hoc* international tribunals, established in the aftermath of heinous crimes, cannot; ICC skeptics, on the other hand, have always vociferously contested the true deterrent value of legal sanctions by the autonomous and distant court.

The gradualness of international legal processes and the uncertainty of severe punishment (or arrest at all) for offenders are but two shortcomings made evident over the first eight years. Moreover, tenets of deterrence effects are

dependent on rational actors who logically weigh the (legal) cost of crime against potential benefits in their immediate environment. The rational actor assumption is questionable in the arena of war, especially because the antecedents leading actors to commit sexually violent crimes during conflict remain poorly understood. The lack of a unified and comparative accounting of factors identified as influencing the type of violence, extent of violence and motivations of sexualized violence in the DRC, and elsewhere, prevent well-informed practical legal frameworks and action platform development. This leads to the secondary question: If fear of legal sanctions does not quell sexualized violence in the Democratic Republic of Congo, is there an alternate approach that should be considered?

This question is becoming more hotly debated as numerous actors grow increasingly impatient, wondering if more immediate or aggressive measures than international judiciaries would better serve the interest of vulnerable civilians. Because, to date, no empirical evidence exists specifically supporting *or* dispelling the ICC's proposed deterrent effect for the long-term, there remains fundamental confusion in the international community about the appropriate roles of political power, diplomacy, military and legal procedures in preventing today's atrocities by the most prolific of abusers (Bolton 2001, 175-176).

The aim of this paper is to shift the focus of discourse beyond legal sanctions by drawing attention to the impracticality of deterrence expectations in societies actively engaged in conflict. Few would argue that perpetrators must be held accountable, if not for retribution, then as a restorative measure for victims. Surely, ending the impunity enjoyed by human rights abusers is fundamental. Our focus

here, however, is the lack of evidence supporting the assertion that the International Criminal Court, as an institution, is capable of *generally* deterring those offenders most responsible for widespread sexualized violence in the DRC. If *preventing* further commission of rape is the immediate goal (instead of enacting punitive measures in the wake thereof), other preventive approaches such as those that emerge from an exploration of perpetrators' motives, must be explored. That said, I do not claim to provide an answer to ending conflict-related sexual violence in the Democratic Republic or elsewhere. Nor do I intend- in anyway- to imply that rape is ever justifiable, in any context.The intention is to illustrate why it may be that criminal deterrence is currently ineffective in preventing its incidence.

What follows next is a look at the International Criminal Court. Section 2 touches on the rationale for a permanent criminal tribunal, questions how the ICC proposes it will deter, and discusses some other enumerated limitations of international criminal law. Section 3 provides a summary of the Democratic Republic of Congo's more recent warscape and a snapshot of the ICC's involvement. Background information is deemed important here because it will contribute to a more comprehensive appreciation of the climate in which rampant sexualized violence persists and the complex crises from within which deterrence effects would need to emerge. Section 4 introduces deterrence theory and prominent scholarly thinking on general deterrence, broadly, and incorporates critiques of the central tenets of deterrence (namely, reliance on rational actors who engage in utilitarian reasoning, and the necessity of certain, swift and severe punishment) in an effort to

illustrate limitations of the ICC's preventive capabilities.[4] The fifth and final core section of the paper is two-part: first, it bridges earlier sections of the paper with an assay of soldiers' explanations of- and motivations for sexualized violence. Information extracted from recent interviews with members of the Congolese national army and the Mai Mai militia by Maria Eriksson Baaz and Maria Stern (2009), and Jocelyn Kelly (2010), reveal the myriad factors (for example, poverty, feelings of neglect, frustration) mediating the act of rape in the Democratic Republic of Congo, challenges the rational actor assumption, and explicates how offenders' daily realities trivialize any deterrence effects of a far removed legal institution like the International Criminal Court. Secondly, based on what soldiers describe in terms of "excuses" or "motivations" for sexual violence, the need for provisions beyond victim-centred services is briefly put forward. I conclude with a short summary, considerations and suggestions for future research.

[4] My immediate concern here is with criminal deterrence, however, one may argue that insight gained during the evolution of IR deterrence theory is important. While I tend to agree, limitations of the current paper require a narrow focus. To summarize, it was in the aftermath of World War II, scholars concerned with the strategic implications of nuclear warfare developed the first wave of deterrence theory within international affairs/politics. Early deterrence ideas were rather basic and lacked standardization, and therefore had relatively little impact on policy (Jervis 1979, 291). From the late 1950s through to the immediate post-Cold War era and first Gulf War, three waves of ever-more comprehensive and policy-relevant deterrence frameworks gained popularity for their attempts to remedy harsh criticisms such as the lack of supporting empirical research and inattention to actor perceptions (Jervis 1979, 291-292; Lupovici 2010, 706-707). For an excellent summary and analysis of deterrence theory's evolution, please see Amir Lupovici's The Emerging Fourth Wave of Deterrence Theory- Toward a New Research Agenda in *International Studies Quarterly (2010) 54, 705-732*.

2. THE ICC AS THE NEW FACE OF INTERNATIONAL LAW AND ITS PRE-EXISTING LIMITATIONS

The 20th Century saw some of the worst atrocities in modern history. In too many cases, the International Criminal Court asserts, "these crimes (were) committed with impunity, which has only encouraged others to flout the laws of humanity" (ICC, 2003). In the aftermath of the First World War, the League of Nations broached the concept of a permanent criminal court, but quickly dismissed it as premature (Glasius 2006, 7; Von Hebel 1999, 17; Hall 1997b). Proposals for a permanent international criminal court were again tabled then rejected during the Second World War "in favour of *ad hoc* tribunals at Nuremberg and Tokyo, followed by Allied national military tribunals to prosecute nationals of the Axis powers" (Glasius, 8). Those tribunals were later criticized for 'imposing 'victor's justice,' and for prosecuting individuals of crimes not previously formulated in international law. Accordingly, the scope of brutal crimes committed during WWII resulted in decisive calls for accountability and marked the beginning of a new legal era for the international community with the adoption of both the Universal Declaration of Human Rights and the Genocide Convention in 1948. ICC scholar Marlies Glasius notes that there were aspirations to further develop plans for an international criminal court again at this time, but that we "missed the window of opportunity that closed as the Cold War advanced" (Ibid.).

The drive of international law scholars Arthur Robinson, Robert Woetzel, Ben Ferencz and Cherif Bassiouni to ensure that the idea of an 'ICC' stayed on the agenda of the International Law Commission into the 1980s (in hopes that it would

lead to the establishment of an ICC) encountered impressive delays mustered up by opposing states (Glasius 2006, 10-12). Unforeseen atrocities in the former Yugoslavia and the Rwandan genocide during the 1990s necessitating the establishment of two more *ad hoc* institutions for criminal proceedings spawned a renewed impetus for a permanent international court that could prosecute heinous crimes committed during future times of conflict. Professor Bassiouni, by then the Chairmen of the Commission, continued work on a first Draft Statute for an 'ICC.' In 1995, the international committee tasked with authorizing the *ad hoc* tribunals morphed into a preparatory committee (PrepCom) responsible for text revisions to be presented during negotiations for a treaty-based court that would help to end impunity and deter gross violations of international humanitarian law (ICC 2003).

In 1998, delegates from over 120 states met to negotiate the Rome Statute, the governing instrument of the ICC. The creation of a permanent International Criminal Court (ICC), based in The Hague, The Netherlands, signified an important development in the quest to prevent atrocious crimes of concern to the international community. The Rome Statute gives the autonomous court wide jurisdiction over genocide, war crimes, and crimes against humanity occurring within the borders of States Parties to the Statute, over crimes committed by nationals of those States, and allows the UN Security Council to refer crimes committed by non-State Parties. Following ratification by 60 states, the Rome Statute entered into force 1 July 2002 marking the opening of the International Criminal Court. One hundred fourteen states had ratified the Rome Statute at the time of writing, while another 25 including

the United States, Iran, Russia, and Israel have signed, but not ratified (UN Treaty Collections, 2011).

2.1 Why have an ICC?

The rationale for establishing an international criminal court lies in the coming together of three elements: international humanitarian law, criminal law and permanency. At its core, the International Criminal Court brings together the trilogy in an attempt to meet contemporary desires for an international legal order oriented towards the protection of all human beings from aberrant leaders. The international nature of human rights law rests on the belief that any ruler of a sovereign state cannot or should not hold absolute power, "that there must be standards beyond the ruler to protect his or her citizens" (Glasius 2006, 2). International criminal law, and hence an international court of criminal law, formulates those beliefs into standards and policies. By establishing norms and having the ability to administer punitive justice on a global scale, international criminal law takes free reign away from rulers, enabling not only common criminals, but also heads of state, to be indicted where they have failed in their duty to protect or have inflicted grave harm themselves.

The ICC is the first-ever permanent and autonomous international institution with wide jurisdiction to prosecute individuals responsible for the most serious crimes of concern to the international community: genocide, crimes against humanity and war crimes.[5] Because it is a fixed international criminal tribunal, the International Criminal Court cites that the delays and enormous costs of creating situation-specific

[5] The ICC is slated to exercise jurisdiction with respect to the crime of aggression once agreed upon provisions are adopted defining the crime and the conditions under which the Court shall have jurisdiction over it are established.

ad hoc tribunals are avoided (ICC, 2003). The jurisdiction of the ICC is complementary to national courts, meaning that the Court may only act when countries themselves have demonstrated that they are unwilling or unable to investigate, prosecute and/or punish those responsible. In addition to complementarity, the ICC's governing *Rome Statute* and *Rules of Procedure and Evidence* (ICC-ASP/1/13 2002) include additional protections for due process, and procedural safeguards to protect the ICC and State Parties from abuse. Furthermore, the ICC is slated to advance victims' rights and gender justice in ways never before seen under international law. The nascent court is deemed revolutionary in its unprecedented effort to protect victims from further harm and claims to be the first of its kind to unequivocally acknowledge the rights of victims of sexualized violence. The Court's professed prerogative is that it strikes a "balance between retributive and restorative justice that will enable the ICC, not only to bring criminals to justice but also help the victims themselves obtain justice" (ICC 2003).

Over and above *post hoc* justice and restoration, contemporary justifications for the International Criminal Court often emphasize its capacity to deter future humanitarian atrocities. According to the United Nations, effective deterrence was in fact a primary objective of those who worked tirelessly to establish the Court (UN 1998). But, how exactly is the ICC expected to act as a deterrent?

2.2 How shall the ICC deter atrocity crimes?

Neither the Court nor its working documents provide an effectual deterrence action-plan. By prosecuting and convicting those most responsible for gross violations of human rights, however, the ICC purports to send a message: so called

'atrocity crimes' will not be tolerated by the international community. In the publicized *raison d'être* for an ICC, the UN writes:

> Once it is clear that the international community will no longer tolerate such monstrous acts without assigning responsibility and meting out appropriate punishment -- to heads of State and commanding officers as well as to the lowliest soldiers in the field or militia recruits -- it is hoped that those who would incite a genocide; embark on a campaign of ethnic cleansing; murder, rape and brutalize civilians caught in an armed conflict; or use children for barbarous medical experiments will no longer find willing helpers. (UN,1998)

Based on an intrinsically economic theory of criminal deterrence, two factors in particular are central to the reduction of crime in rational criminal actors: certain and severe punishment. The ICC's *ability* to execute certain and severe punishment, however, is but one barrier standing between the Court's preventative hopes and its capacity (as will be expanded on in Section Four). A preemptive consideration is the enduring lack of understanding about how deterrence effects come about; according to Amir Lupovici, this stems from literature's descriptions of, rather than explanations for, deterrence success (2010, 709-710). The deficit is likely due to the fact that direct application of theoretical approaches like deterrence does not allow for exploration of how actors' preferences to act in particular manners are formed in the first place. The author notes that "deterrence theory and most deterrence scholars are only able to show a correlation between deterrence strategy and avoidance of violence, and they find it difficult to establish the causal connections between the two" (709).[6] Essentially, the question remains: how is the ICC going to act as a

[6] See generally Achen 1987; Luke 1989; Achen and Snidel 1989; and Lebow and Stein 1990.

deterrent? However unsatisfying, we must therefore rest with an appraisal of how it is *supposed* to.

Matsueda, Kreager and Huizinga (2006) assert that the propensity to commit future crimes is actually "associated with criminal opportunities and rewards, but not costs" (103) in rational, motivated actors who are rational enough to seek targets while avoiding detection. They cannot, however, provide a sufficient explanation for why costs often do not deter "rational" actors. These findings highlight the difficulty that persists in conceptualizing how impactful deterrence processing shall work in reality. The *rationalizations* of actors imputed with rampant sexualized violence in the Democratic Republic of Congo underscores the impracticality of the rational actor assumption (see Section 5). Furthermore, without at least certainty and severity of international laws, the ICC's slated deterrence mechanism is impotent.

Arguably, the paramount goal of the tribunals, and now the International Criminal Court, is to "pick off the people who really are in charge and not the mid- or lower level criminals…one could argue that in an ideal world we would be able to convict all of them, the realities are not that way" (T. Markus Funk, Reason TV interview, 4 May 2010). Legal scholars Jide Nzelibe and Julian Ku (2007) project that the main pool of perpetrators of atrocities in Africa, namely failed coup plotters and dictators, are subject to a range of domestic legal and extra-legal sanctions far more severe and certain than international law can dole out. Furthermore, the authors' analyses of tribunals' involvement reveal that in certain situations, the targeting of politically indispensable powerhouses for international criminal proceedings may in fact encourage interested politicians to rest on international

efforts instead of engaging in humanitarian interventions or domestic institutional reforms that may more effectively prevent future atrocities. Not least, influential actors are aware that procedural mistakes by international tribunals and difficulty securing credible witnesses are plausible should charges lead to prosecutorial action. For example, Gregory Gordon (2007) notes that the ICC's dependence on State Parties to undertake searches, seizures, arrests and detention could "open the door to serious due process issues" (671). UN personnel, state police, governmental agents or "civilian vigilantes could ignore the privacy interests of suspects or accused persons…in the perceived greater interest of promoting justice and eradicating impunity for heinous crimes" (Ibid., 671-672). Gordon draws attention to a series of ICTR and ICTY decisions ruling on defense motions for release in which arresting states faulted, *inter alia*, by delaying the assignment of defense counsel for the accused, by national authorities arbitrarily arresting in the absence of indictments, and detentions without basic rights provisions for the accused such as the right to silence and notification of charges against them (672-676). Some of the specific difficulties and impracticalities of ensuring that international criminal laws' deterrence requisites are translated on the ground are presented throughout Sections 4 and 5. Nonetheless, there are ancillary limitations of international criminal law, and thus the ICC, worth briefly mentioning before turning focus to the DRC and the challenges of deterrence.

2.3 Other enumerated challenges for international criminal law

International judicial intervention is but one way to influence human rights abusers. Even then, NGOs such as Amnesty International and Human Rights Watch

often regard justice (i.e., holding human rights abuses accountable in some way) as a “central instrument for lasting peace” (Keen 2008, 81) But, the philosophical desire for international criminal law, and the ICC in particular, to be effective punitively (and therefore also impactful as a criminal deterrent) faces veritable challenges when institutional mandates are translated on the ground. While “it is commonly said that peace and justice are indivisible, there are always dangers aligned with rigid policies aimed at punishing abusers” (Keen 2008, 82). Global prosecution (and defense) efforts “may be stymied by three recurring phenomenon unique to international criminal prosecution: (1) the fragmentation of enforcement over two or more jurisdictions; (2) the integration of two distinct, and often contradictory, legal systems- the common law and civil law; and (3) the extreme gravity of the crimes involved” (Gordon 2007, 670-671). In addition, Keen (2008) urges that focusing only on violent groups or individuals, and manipulating their incentives, poses three unique dangers: “putting power and resources into the hands of violent groups; sending a signal to the wider society that violence ‘works’; and neglecting the grievances in the wider society” (183).

International law has long been a law of nations, not a body acknowledging individual subjects with legal rights or obligations (Higgins 1994). Hence, the more recent integration of international human rights has brought with it a remarkable challenge to international law’s traditional state-centric system (Kaplan 2004, 1905). The assimilation of international human rights has introduced the obligation of the international criminal law to redress individuals, instead of states, under international laws (Higgins 1994, 95). Nonetheless, in the name of collective interest, the shift

"potentially provides a valuable tool for promoting human rights enforcement in international law" (Kaplan 2004, 1903). Only recently has enforcement of international laws "begun to catch up with the development of substantive law, beginning the transformation of international criminal law from a set of unenforced, seemingly hortatory norms into a body of law backed by institutions, precedents, and convictions of offenders" (Harvard Law Review 2001, 1948). Still, legal scholar John Haskell acknowledges that there remains an "anxiousness, or ambivalence, within the discipline and the international community at large as to international law's purpose and practicality" stemming from awareness of failures in international law's not so distant past (Haskell 2009, 37). Because of these failures, expectations of international criminal law tend to be tentatively held given that only a handful of cases have been successfully prosecuted by the *ad hoc* ICTY or ICTR. While impressive leaps have certainly been taken toward individual accountability through the advent of the *ad hoc* tribunals, hybrid tribunals and now the ICC, the discouraging record of contemporary international law raises the question of whether individual criminal responsibility is really enough.

To overcome limitations of international criminal law, B.H. Birkland (2009) argues for greater state responsibility: the onus should be on sovereign states to reign-in their own actors; moreover, liability should fall upon a state when they fail to prevent acts protected under international human rights law. This broadening of states' obligations was borne of the International Court of Justice's decision (following the violence in the former Yugoslavia) to impose upon states a "clear duty" to prevent non-state actors "over whom they have influence" from committing grave

breaches, such as genocide (1626). Because the majority of new regional and international bodies have jurisdiction only over individual perpetrators and because states may opt *not* to sign optional protocols for human rights agreements (for example, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women that would subject them to complaints),[7] states are afforded discretion "to decide whether they want to be held accountable for noncompliance with human-rights obligations" (Ibid.).

Regional bodies and the adoption of international agreements such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) now allow individuals, in some instances, to report abuses directly rather than *hoping* that their state will assert a claim on their behalf. Notwithstanding, individual victims' power remains limited. Kaplan reports "most of the new regional and international bodies that have emerged to enforce human rights have jurisdiction only over individual perpetrators of human rights violations, leaving little recourse for those whose rights have been violated by the state" (Kaplan 2004, 1906-1907). In the interest of victims, almost two decades ago legal scholar, M. Cherif Bassiouni (1994), identified two basic factors contributing to successful criminalization of acts violating human rights: "(1) the perceived significance of the social or human interest protected by this right in the commonly shared values of the world community (however that process occurs), and (2) the perceived need to protect this right through the means of international criminalization" (349). While the esteemed professor held that an analogous process should ideally take place within national

[7] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* 6 October, 1999, art. 2, 39 I.L.M. 281, 282

judicial systems, he warned “gaps and inconsistencies weaken the entire protective scheme” (350). The truth of the matter is states, even those in violation of human rights, remain the overwhelmingly dominant actors in international law despite widespread ratification of internationally drafted resolutions and conventions. Where a complaint against the state is lodged, the power of an international legal body still rests on the consent of the state against which the individual’s complaint originated (Kaplan 2004,1907).

International criminal law currently suffers from another limitation: misunderstandings and disagreements that stem from the cultural diversity within which it operates. It is long known that cultural diversity impacts the success of international dispute resolution (Lew and Shore 1999, 33-38). Similarly, it must be acknowledged that international tribunals operate in an environment characterized by broad cultural differences, “sometimes radical, not only in terms of language, skills and tools, but also with respect to socio-cultural norms” alongside preconceptions about justice norms (Almqvist 2006, 763-764). When ignored these differences seriously undermine the efficacy and value of international criminal proceedings in the eyes of those impacted by laws, namely the accused, witnesses and victims, and their affected communities (ibid.). Along those same lines, non-state domestic actors often attempt to secure favourable outcomes by capitalizing on the judiciary’s concern for national reconciliation (O’Donnell 2009, 333). That said, both O’Donnell and Almqvist lament that little has been done, to date, to integrate cultural diversity into the international legal arena, despite recognition that cultural

differences, if ignored, seriously undermine efforts to provide redress for individual victims and others affected by grave breaches of human rights.

Finally, international law's attempt to provide a structure for dispensing justice and restitution within the current capacity of human rights, governance, and economic liberation too often "operates to efface the identities, histories, and claims of...victims" (Haskell 2009, 40). This may be due, in part, to the lack of clarity and ongoing debate surrounding the content of these rights and the extent to which individuals may seek legal protection (Kaplan 2004, 1906). Additionally, limited proactive communication with local communities spawns suspicion that in turn hampers the ability of international legal bodies to address human rights violations and contribute to "societal reconstruction" (Harvard Law Review 2001, 1975). For affected communities, procedural limitations and challenges are analogous to failures of justice.

After nearly seven years, the International Criminal Court's reputation within the Democratic Republic of Congo faces steep challenges. The lack of awareness of international laws and misunderstandings of the Court's procedural limitations undermine its legitimacy among local communities, Two years into Thomas Lubanga's trial for war crimes, few Congolese say that the International Criminal Court has had a direct- and positive impact on the ground in the country. They hold that international criminal justice has failed their local communities on a number of fronts: to hold the 'real' criminals responsible; to build the capacity of the Congolese judicial system; and to allow local populations the opportunity to witness trials first hand (IRIN 2011). Given that the country was already wrought by decades of inter-

state and civil upheaval, the ICC took on a colossal task when in 2004 it opened an investigation into the situation in the DRC. The following section will show that throughout the Democratic Republic of Congo's modern history, state and non-state actors' personal motivations have often built on existing tensions.

3. A CONGOLESE WARSCAPE WARRANTING CALLS FOR INTERNATIONAL LEGAL INTERVENTION

Given the scale of the situation, we expect to be investigation in the DRC for along duration. Therefore, we are working sequentially, starting with one or two cases, selected on the basis of gravity, while continuing to develop other cases. We have focused our investigation through analysis… first, we confirmed that the North Eastern region of DRC (including Ituri) was the area with the gravest crimes within our temporal jurisdiction; second, we identified the most serious incidents; and third, we traced responsibilities back to the persons most responsible...- ICC Chief Prosecutor, Luis Morena-Ocampo [8]

The Congo has endured a long history of bloodshed and poverty. Seventy-five years of brutal colonial rule under Belgium preceded brief political freedom for the Congolese people in 1960 under a new head of state, Patrice Lumumba. Shortly thereafter, in need of a more favourable Cold War ally the United States and Europe aided Mobutu Sese Soko in taking down Lumumba's government. Over the next 32 years, Mobutu's military regime would earn infamy for its vast institutionalized corruption and misappropriation of the state's resource wealth. President Mobutu's siphoning of large proportions of the revenues from state-owned resources led to mounting debt, which in turn contributed to the collapse of Congo's economy and widespread corruption.

In what would become the first conflict of many, Rebel leader Laurent- Desire Kabila ousted Mobutu's US-supported government in May 1997 with the help of Rwanda, Uganda, Angola, Eritrea and Burundi. Under Kabila, it appeared as though the country may rebound; instead, the situation deteriorated. Accused of establishing a corrupt dictatorship disloyal to his former allies, Kabila broke allegiance with his former supporters, and Rwanda and Uganda invaded eastern Congo. A renewed conflict for control over the country's basic natural resources such as water and rich

[8] Statement made at an informal meeting of legal advisors of Ministries of Foreign Affiars 24 October, 2005.

mineral deposits drew in government forces, seven foreign armies and numerous armed paramilitary groups. This second war from 1998 to 2003 became the deadliest since World War II, resulting in the deaths of an estimated 5.4 million people (International Rescue Committee (IRC) 2008). All sides used widespread sexualized violence, sometimes systematic, to "deliberately terrorize civilians, to exert control over them, or to punish them for perceived collaboration with the enemy" (Human Rights Watch (HRW) 2009, 15). Women in the eastern regions of the Democratic Republic of Congo were abused to such an extent that they came to believe that war was being waged "on their bodies" (Campagnes des femmes congolaise, n.d.). Women and girls began being abducted by armed groups for use as sexual slaves (HRW 2002, 2) and subjected to numerous other acts classified as war crimes and crimes against humanity under international law.

Violence continued unabated up until Laurent-Desire Kabila's assassination in 2001 and the subsequent swearing in of his son, Joseph Kabila. Kabila junior retained support from Angola, Zimbabwe and Namibia, who in turn fought rebels backed by the governments of Rwanda, Burundi and Uganda. Upon taking office, the DRC's new President Kabila avowed to open up dialogue for national reconciliation and power distribution that would include rebel movements, civil society organizations, non-armed opposition groups, political parties and government. However, when it came time for the main talks, only one opposition group was invited to negotiate power sharing, allowing the elite networks to continue to run a self-serving war economy funded by the country's misappropriated gems and minerals. Then when it came time to sign a peace agreement to end the civil

war in 2003, only DRC President Joseph Kabila and Rwandan President Paul Kagame were party to it. “Africa’s World War” *officially* ended in July 2003 with the signing of a peace agreement, however, violence continued under a different guise throughout the peace process and through the national elections in 2006, when Kabila was re-elected,

As dictated by peace agreements signed between the transitional Congolese government, and the States of Rwanda and Uganda, in 2003 members from the most problematic rebel groups were brought together with the existing government army to form the Congolese national army (Forces Armees de la Republique Democratique du Congo (FARDC)) in an effort to dismantle residual rebel forces in the eastern DRC. Each of the incoming organizations was allotted officer and command positions, and “[i[n order to break former chains of command and enhance the integration of former enemy combatants into new units, the transitional government pursued a policy of *brassage* (mixing up)” in which the 18 new brigades were formed of soldiers from each of the main groups (HRW 2009, 20). After only three months of basic training, many of the freshly integrated units were placed in frontline positions in the country’s violent eastern region, the part of the country predominately under control of foreign rebels (Institute for Security Studies 2008, 3).

Marauding militia and the new FARDC brigades terrorized people “and violence, including rape, continued” (HRW 2009, 15). Civilians in eastern DRC suffered attacks from any number of Hutu-aligned Rwandan rebels (Democratic Forces for the Liberation of Rwanda (FDLR)), members of Uganda’s Lord’s Resistance Army (LRA), the Congolese police, the Congolese national army, and

newly created ethnic paramilitary groups (Prunier 2009; Global Security 2010; MONUC, n.d.). Human Rights Watch (2009) reports that as fighting intensified in 2008 in Congo's eastern province of North Kivu, "so did the cases of sexual violence" (15). During another mass integration process during 2009, an estimated 12,000 former rebels joined the Congolese national army, bringing the estimated number of FARDC troops in eastern Congo to 60,000 (HRW 2009, 20). The rapid growth of the national forces exacerbated existing problems of discipline, pay, and command and control, and "contributed further to the wide scale abuses committed with impunity by Congolese army soldiers" (HRW 2009, 20). In the climate of violence and reigning impunity, acts of sexualized violence against civilians, by civilians, also notably increased. The UN Human Rights Council (2008) attributes this trend to the influx of demobilized combatants who re-entered society with few rehabilitation measures, and to the gradual erosion of protective social norms in communities continually brutalized.

In recent years, several attempted peace accords and the deployment of more than 20,000 uniformed UN personnel (including 18,884 troops) with the *Mission des Nations Unies au Congo* (MONUC) failed to end the conflict or protect civilians.[9] By 2009, the western part of the DRC, in particular, showed signs of benefiting from increased government authority and subsequent increases in security (Steiner et al. 2009). But, in 2010 again hundreds were killed and raped by

[9] Countries rich in minerals such as cobalt, coltan, cassiterite, copper, and gold are often marred by corruption, authoritarian repression, militarization, and civil war. Rebel groups, governments and mining companies exploit mineral resources, fueling civil and interstate conflict as players vie for control over riches. Countries such as the Democratic Republic of Congo have fallen victim to rebels who use revenue from minerals such as diamonds, coltan and casserite to purchase arms and fuel conflict (Schure, 2010). Also see Global Witness Report (2010) and Prunier (2010)

insurgents who accused local populations of supporting various opponents (HRW 2011, 104). A 2009 MONUC-supported joint operation pitting the DRC and Rwanda against the FDLR did achieve military gains in eastern DRC as well, but at the cost of civilian security. FDLR rebels carried out reprisal attacks in regions where they had lost business partners and continued pillaging, kidnapping and committing violent hit-and-run attacks, often searching for food and supplies (IRIN 2003). Villages that were former FDLR strongholds to this day remain paralyzed by the surges in fighting between different armed groups, including the national army. Raping of women and girls, and the pillaging of homes, hospitals and fields persist.

Eager to establish the DRC as self-sufficient ahead of the country's 50th anniversary of independence, the Congolese government called for the withdrawal of MONUC. The UN peacekeeping mission was instead renamed the UN Organization Stabilization Mission in Congo (MONUSCO). Responding to criticism from the international community that peacekeepers had failed to ensure respect for human rights, MONUSCO sought to strengthen its conditionality policy by committing to support only those battalions it had previously screened (HRW 2011, 103). Those conditions of the peace accord stipulating that allied factions be blended into the national army, however, made implementation of MONUSCO's policy difficult. Numerous officers with known track records of criminal abuses were granted new command positions in the joint operation, or assumed *de facto* roles outside of the chain of command. A prime example is General Bosco Ntaganda, the alleged former Deputy Chief of the General Staff of the *Forces Patriotiques pour la Liberation of Congo,* sought on an arrest warrant by the International Criminal Court.

In his current role as the *de facto* Deputy Commander of the joint military operations he continues to engage in human rights abuses, including assassinations and arbitrary arrests of individuals opposed to his authority (HRW 2011, 107).

Fighting between the Congolese national army and numerous armed groups throughout the country's north, east and west regions set the stage for vicious attacks on civilians throughout 2010. Despite the presence of the UN's stabilization forces "all sides targeted civilians, who were killed, raped, arbitrarily arrested, pressed into forced labor, and looted" (HRW 2011, 103). Violence in 2010 forced two million people out of their homes and an additional 145,000 into neighbouring countries as refugees. As of April 2010, some of the ongoing conflict's 1.3 million IDPs had returned home due to improved security in the Kivu provinces and the Ituri district to the east (Holmes 2010 in HRW 2011), but OCHA's 2010 *Humanitarian Plan* estimates that 1.8 million people remain displaced, the majority from North Kivu, South Kivu and Orientale Provinces (Ituri). Congolese who remain in these eastern parts of the DRC continue to suffer human rights abuses, food insecurity, disease, and displacement (ACT International 2010). The constant threat of violence prevents even the wounded from reaching local hospitals staffed by Medicins Sans Frontieres/Doctors Without Borders (MSF), the only international medical organization currently providing medical care in the region.

3.1 Sexualized violence in the Democratic Republic of Congo

In the eastern part of the country the prevalence and intensity of sexualized violence, especially rape, is said to be the worst in the world. In 2009, MONUC reported 200,000 cases of sexualized violence had been documented over the years

of war; the Minister for Gender, Family, and Children in the Democratic Republic of Congo, however, believes over one million women and girls have suffered sexual violence in the Congo (HRW 2009, note 4 at 14).

Between January and September 2007, the UN office for the Coordination of Humanitarian Affairs (OCHA) reported 4,500 cases of sexual violence in a single eastern province. The United Nations Population Fund (UNFPA) reports that 15,996 new cases of sexualized violence occurred in the DRC during 2008: 4,820 of those attacks in North Kivu province alone (HRW 2009,14).

According to OCHA's 2010 summary on the DRC, one female in South Kivu province is raped every two hours (OCHA 2010). Additionally, extortion, kidnapping, looting, pillaging, and recruitment of children by armed rebels persist. UNFPA, the United Nations agency coordinating work on sexual and gender based violence in Congo, relayed to Human Rights Watch that at least 65 percent of victims of sexualized violence are children, the majority adolescent girls, but it is known that a good portion of those rape victims are children under ten (HRW 2009, 14). During 2010, rebels from the Rwandan Hutu extremist group raped more than three hundred women in one North Kivu village over the span of several days (Hogg 28 January 2011).

Early into the New Year, 2011 was already marred by mass sexual assaults. January 6, 2011, MSF issued a press release stating that they had treated 33 women who had been restrained with ropes, beaten unconscious and raped by up to four uniformed attackers at a time in a coordinated attack on New Years Day in Fizi, South Kivu (MSF 2011). News reports later surfaced that members of the national

army, FARDC, stood accused of strategically raping 67 people in that New Years Day ambush; a retaliatory attack on civilians following a dispute that had ended in a soldier's death (Hogg 28 January 2011; UMOYA 10 February 2011). Between January 19 and 21, MSF provided specialized care to another 53 men, women and children raped in a series of attacks in other South Kivu towns. Over only the first few weeks of January, MSF provided medical treatment to nearly 100 victims raped in mass attacks. Annemarie Loof, head of MSF's mission in South Kivu province, relays that the injured are "normal people who have nothing to do with the conflict and who bear the brunt of a recent increase in violence and insecurity in this part of eastern DRC" (MSF Press Release 28 January 2011). Confronted with a scale of sexual violence not seen in South Kivu since 2004, the organization believes the many brutal attacks early into 2011 represent "what appears to be a further deterioration in the situation."

A mobile Congolese military court opened proceedings against Lieutenant Colonel Mutware Daniel Kibibi and 10 of his soldiers February 10, 2011 on charges of crimes against humanity for fifty of the rapes committed during the New Years Day attack on Fizi (VOA Breaking News, 10 February 2011). The prompt trial comes in response to calls from UN officials that a swift investigation and transparent legal process bring the perpetrators to justice (UMOYA 10 February 2011). In a surprisingly expeditious succession of events, news headlines rang out February 21, 2011 announcing that the military court had sentenced the former rebel to 20 years imprisonment in the first domestic trial of a FARDC commanding officer for rape in eastern Congo. Three of Kibibi's officers also received 20-year sentences; five

others were handed lesser sentences, while one was acquitted and another deferred to juvenile proceedings (BBC 21 February 2011; Michelle Faul 21 2011). The International Criminal Court, on the other hand, has yet to complete a single trial since it first opened an investigation into the DRC in 2004.

3.2 ICC involvement in the DRC

The International Criminal Court had been following closely the situation in the Democratic Republic of Congo between July 2003 and April 2004, before President Joseph Kabila himself asked the Office of the Prosecutor to ascertain if any individual(s) should be charged with grave crimes within the jurisdiction of the Court. President Kabila's referral marked the beginning of the ICC's first investigation (ICC Press Release, 2004). The investigation focused on the Ituri district in the north-eastern Orientale Province and led to the eventual arrest of three militia leaders: Thomas Lubanga Dyilo (17 March 2006), Germain Katanga (17 October 2007) and Mathiew Ngudjolo Chui (6 February 2008). Following the ICC Trial Chamber's rejection of the suspect's application for a stay of proceedings, at the time of writing, Lubanga[10] remains on trial for war crimes related to the enlistment and conscription of child soldiers (children under the age of 15) (ICC Press Release 23 February 2011).[11] Seven years after the investigation into the DRC opened, Lubanga's alleged subordinate, Bosco Ntaganda, remains at large on

[10] Thomas Lubanga Dyilo is the alleged founder and President of the Union des Patriotes Congolais (UPC) and alleged founder and Commander in Chief of the Forces Patriotique pour la Liberation du Congo (FPLC), two notoriously violent rebel groups operating in eastern DRC.

[11] Full details of each case are available from the ICC online by visiting www.icc-cpi.int, and following Situations and Cases.

charges related to the enlistment, conscription, and use of child soldiers during armed conflict.

The two other DRC militiamen on trial at The Hague, Germain Katanga and Mathiew Ngudjolo Chui, face charges of intentionally commanding others to commit war crimes and crimes against humanity, including sexual slavery, rape and outrages against personal dignity for crimes committed upon civilian women present at Bogoro village. A decision in Pre-Trial was made to combine the cases of Germain Katanga and Mathiew Ngudjolo Chui because of their alleged joint involvement in the same massacre on the village of Bogoro on or about 24 February 2003. The Prosecution holds that Katanga's *Force de Patriotique en Ituri* (FRPI) and Ngudjolo's *Front des Nationalistes et Integrationnistes* (FNI) implemented a policy of targeting the ethnic *Hema* population with the goal of "wiping out" Bogoro village (ICC Case No. ICC-01/04-01/07-649-AnxIA, para. 40). The ICC joint-trial for the two accused opened on 24 November 2009 and is still underway. In light of the gravity of their offences, 30 September 2008, the Prosecutor confirmed that the Chamber had substantiated charges of criminal responsibility for rape *and* sexual slavery as both war crimes *and* crimes against humanity (widespread and systematic) (ICC Case No. ICC-01/04-01/07). It remains to be seen if convictions are achieved, and how sentencing procedures will play out.

Victims as well as NGOs such as HEAL African, Open Society Initiatives for East Africa, Women's Initiatives for Gender Justice, and Action Sante Femme remain outraged that the ICC neglected to pursue charges of sexualized violence against Lubanga and his deputy, Ntaganda (Kahorha 2008; Glassborow 2008). Phil

Clark, lecturer in Comparative and International Politics at the University of London's School of Oriental and African Studies reports that "[i]n Ituri, the prosecutor's strategy is seen more as fulfilling his own need to get fast judicial results than reflecting the magnitude of Lubanga's crimes" (IRIN, 2011). Similarly, former Court employees claim that ICC prosecutors told the team tasked with investigating Lubanga to "focus solely on the use of child soldiers…[because] prosecutors wanted something to present at court as soon as possible" (Glassborow 2008). Former International Criminal Court investigators claim that flawed planning of investigative techniques by the Office of the Prosecutor (OTP) are to blame for the number of sexually violent crimes going unpunished (Human Rights Tribune Special Report, October 2008). These ex-employees of the Court claim that the OTP should have undertaken a more thorough country analysis, that staffers should have been assigned to investigative interviews with victims of sexual violence, and that pertinent evidence should have been collected. Furious that a conscious decision was made to ignore allegations of torture, pillage, rape and enslavement, Congolese attorney Mireille Amani Kahatwa pronounced "If the ICC does not take into account the crimes related to sexual violence…perpetrators arrested all over the country should be released" (in Kahorha 2008).

As noted, President Kabila himself referred the DRC case to the ICC and willingly assisted in the arrest and transfer of Lubanga, Katanga and Ngudjolo. But, despite such exemplary cooperation with two of the cases, the government refuses to arrest Bosco Ntaganda, claiming such an arrest would weaken the country's fragile peace. Unfortunately, the ICC does not have its own police or military forces

and must rely on the DRC government while Ntaganda is within its borders, or must wait for the suspect to cross into a nation more willing to apprehend him. Kabila's government is aware that Ntaganda currently holds a *de facto* position commanding the state's FARDC troops in the war ravaged eastern region. What's more, he has been implicated in further human rights abuses. Param-Preet Singh, a lawyer with HRW's International Justice Program condemns the government's apathy, citing that "[a]llowing alleged war criminals such as Bosco Ntaganda to lead troops only gives a green light to him and others to continue their attacks on civilians," (HRW News 23 November 2009). The Ntaganda case is an early warning sign that the ICC risks becoming a soft means for states, like the DRC, to deflect pressure for tough action. As an apolitical institution, the International Criminal Court cannot employ compellence measures that would otherwise compel (or coerce) states to act for risk of costs of sufficient magnitude.[12] Instead, the ICC purports to act as a deterrent in the eyes of individual perpetrators. What the following analysis and critique will show is that general criminal deterrence, with its convincing logic and the emergence of effects when consistently applied in some peacetime scenarios, requires specific institutional executions and actor characteristics unachievable in ICC-DRC situations. As a result, expectations for violence's end remain unmet.

[12] Such strategies involve the use of non-forcible measures, such as economic sanctions (Rodman 2008, 534). For example, when militias supported by the Indonesian army went on a rampage of looting and widespread violence against civilians in the aftermath of East Timor's 1999 vote for independence from Indonesia, the Clinton administration threatened to link future World Bank and IMF loans to Indonesia's willingness to stop the violence.

4. RELYING ON DETERENCE: AN UNDERSTANDING AND CRITIQUE

If perpetrators know that they're going to be prosecuted and punished they will hopefully be deterred. Now this may not deter the type of tyrants that we have seen throughout history. But it may deter a number of senior or even junior officers who will be able to say "well, I'm not going to obey this order and I'm not going to commit this act because I'm liable to be prosecuted." And so we do hope that it will have a deterrent action and therefore that it will prevent some harm. Obviously, it is not going to prevent all harm, but it will prevent some, and if we can create an institution that can minimize the amount of human harm that occurs, then I think it will be a very useful step to take. - President of the International Human Rights Law Institute, Professor Cherif Bassiouni (1997)[13]

General deterrence "provides a key rationale for international criminal justice" (Alexander 2009, 10). Throughout history various parties have sought to prevent their opponent from acting against their wishes by threatening harm should the opponent proceed with the behaviour. Deterrence theory in criminology draws on the work of classical school theorists like Beccaria (1764), Bentham (1789), and Montesquie (1748) to portray humans as rational, hedonistic, pain-avoiding beings. These assumptions give way to the relatively simple neoclassical theory of crime: "People will engage in criminal behaviour when it brings them pleasure (generates rewards) and carries little risk of pain" (Vito, Maahs, & Holmes 2006, 56). Ultimately, deterrence is a utility-based theory of human behaviour where 'utility' is taken to be correlative to a desire or want, and is measured against any perceived negative outcomes caused by the behaviour (Becker 1968).[14] While the formal theory involving deterrence economics is relatively new, the concept itself is ancient and has been practiced to some extent by virtually all cultures.

[13] Transcribed from the interview titled 'The Case for an International Criminal Court' on *Common Ground: Radio's Weekly Program on World Affairs*. Original Air Date 15 July 1997.

[14] Gary Becker is widely recognized as the grandfather of the individual utility model for criminology: O = O (p, f, u), where O is the average number of offenses, p is the probability of being convicted, f represents average punishment, and u is a vector of average socioeconomic forces. For an in-depth explanation of the utility model of deterrence, please see the excellent work of Becker (1968).

General deterrence studies suggest that increased certainty, severity or celerity of punishment cause a reduction in the amount of crime committed against a population. For punishments to be effective, however, deterrence theorists purport that the cost of punishment *must* clearly outweigh any benefits reaped from criminal behaviour. Offenders are therefore assumed to be rational individuals with the capacity to measure the consequences of their behaviour, before they act. Tests of deterrence theory largely examine patterns of either certainty of punishment (for example, researchers may look for trends before and after crackdowns on specific criminal acts in a specific region) or severity of punishment (for example, researchers may look at different prison sentences handed out for the same crime across different jurisdictions) based on analyses of aggregate data. Another significant portion of the empirical literature uses hypothetical scenarios to measure respondents' perceptions of such variables as crime benefits or sanction certainty. While this literature provides us with insight into dynamic decision-making processes of individuals, they are surely limited in their generalizability to real-life criminal processes, especially in conflict situations. Jacobs (2010) warns that "respondents, who are drawn heavily from university student populations, might not be representative of the general offender population…(and) the scenarios in some of these research designs might beget responses of questionable validity" (419). Accordingly, where study results are included, strictly experimental studies have been purposefully left out. Also, it is important to note that presented studies are largely based on European and North American domestic samples in peace time as similar literature based on conflict-affected societies remains unavailable; this is

accepted as a limitation of this analysis. However, the information discussed here is considered an important and necessary starting point for any future assessment of the ICC's ability to *generally* deter would-be war criminals engulfed in active conflict. What follows are the key tenets of the deterrence model: the assumption of rational and utility-engaged actors; and the necessity of certain, severe and swift punishment.

4.1 Are they always rational, calculating Individuals?

Deterrence is built on the assumption that individuals will commit crimes to the extent they are more pleasurable (or beneficial) than punitive measures are painful. Deterrence really is the "*persuasion* of one's opponent that the costs and/or risks of a given course of action he might take outweigh its benefits" (George and Smoke 1974, 11. Italics added). In this sense, the efficacy of deterrence is affected as much by the punishment-inflicting institution's interpretation of a perpetrator's reality as it is affected by the individual's perception of potential legal consequences. Perceptions of the crimes and their costs, including the certainty of costs and how severe the formal sanctions are, influence the decision to commit an offense (Andenaes 1974; Bachman, Ward, & Paternoster, 1992; Gibbs 1975; Zimring & Hawkins 1973). Though, a number of criticisms arise from the notion that sufficient costs, universally relevant to all offenders, can be established.

More than two decades ago, Etzioni (1988) lamented that utility-based theoretical approaches like deterrence and rational-choice fail to heed the role of perpetrators' sundry moral positions and belief systems. Additionally, Zimring and Hawkins (1968), and Homel (1993) have bemoaned deterrence scholars' reluctance

to define the type of individual sensitive to legal sanction probabilities. In answer, Greg Pogarsky (2002), and most recently Bruce Jacobs (2010), attempt to operationalize the concept of a "deterrable" offender. On one end of the spectrum are individuals governed by an internal moral compass and who comply with the law because it is the right thing to do. These "law-abiding men" (Andenaes 1974), or "acute conformists" (Wilkins 1964; Jacobs 2010, 420) would likely not commit serious crimes even if formal sanctions were absent. At the other extreme of the spectrum lay the "incorrigible offenders" (Jacobs 2010, 420) whom Pogarsky (2002) deems immune and unresponsive to increases in the perceived certainty or severity of crime's costs. These "committed offenders who are impervious to dissuasion" (Jacobs 2010, 420) pose the greatest threat to the validity of deterrence mechanisms. Deterrence rests specifically on a central group of individuals who may contemplate crime, but are estimated to be "deterrable" (Pogarsky 2002). This breed of offender, Pogarsky explains, "includes anyone for whom a sanction threat is potentially influential" (432).

Jacobs (2010) characterizes "deterrability", as the "capacity or willingness of the would-be offender to engage in this (cost/benefit) calculation" (420). History has shown that even "capable" offenders, in the traditional sense, may at times dismiss this type of negotiation as impractical. Take for instance ICTY defense attorney Anthony D'Amato's recollection. His client, Milan Kovacevic, perceived indictments for complicity in genocide, war crimes and crimes against humanity as bogus labels "trumped up by a kangaroo court;" that, in fact, there was no such thing as a war crime (D'Amato 1998, 1). While Professor D'Amato is a subscriber to the theory of

deterrence in criminal jurisprudence, he notes that when lives are on the line, it may be unreasonable or superfluous to expect the average combatant to worry about rules; any legal cost of crime is trumped by the 'benefit' of surviving. He notes that "some observers will contend that in "total war" there can be no laws regulating military conduct; after all, if it's "kill or be killed", there is no room for law or mortality" (Ibid.).[15]

By simplifying human behaviours to utility-based theories, there is risk of disqualifying the dynamic nature of decision-making processes bound to occur between different offenders and across varying conflict situations. This dynamic nature of cost-aversion leads us to another criticism. While part of the durability of the rules of war can be attributed to a protective concept of reciprocity, as conflict rages on, reciprocity may ebb into retaliation, eroding that same set of rules (D'Amato 1998, 2). In D'Amato's experience, "people have different degrees of risk aversion…what is important is to establish a positive degree of personal risk for all soldiers who might be tempted to commit war crimes" (Ibid.). Just as the market values of goods are subject to inflation and deflation, the price that a combatant or head of state is willing to pay for the commission of heinous crimes at the outset of conflict will likely change as battle rages on.

Vito, Maahs and Holmes (2007) point out that informal costs (for example, shame), tangible benefits of the crime (for example, money, property or resources), and intangible benefits of the crime (for example, respect of peers, pleasure gained

[15] "Total war" refers to conflict limitless in its breadth in which the lines are more blurred between combatants and civilians than in other conflicts. In some instances, there is no such differentiation between combatants and civilians and nearly every human resource is at risk of becoming a game piece for tactical efforts.

during crime) are often overlooked by today's narrow assessment of deterrence theory (67). Formal sanctions may not represent the worst-case scenario for some individuals; in fact, Paternoster (2010, 812) illustrates that multivariate models consistently show that informal sanctions are more responsible for inhibiting criminal conduct than the fear of formal sanctions. The notion of informal sanctions and intangible benefits has been circulating since Jeremy Bentham's seminal work, *An Introduction to the Principles of Morals and Legislation (Introduction to Principles* (1789|1948). Paternoster's appraisal of present-day understandings of deterrence draws attention back to Bentham's general theory of human behaviour. Bentham incorporated a host of informal sanctions, inflicted on oneself and by social others, in addition to a breadth of unique pleasures that are a function of criminal behavior and are not under the direct control of legal authorities (Paternoster 2010, 767-773).[16] Determining any sufficient 'cost' to outweigh the 'benefit' of crime requires knowledge of what exactly it is that reinforces, and weakens, the perpetration of that crime in the first place.

Advocates of international criminal law may emphasize that systematic attacks on civilians are not spontaneously occurring rampages, but rather the finale of careful speculation and planning. But, scholars challenge that antecedents of *most* criminal behaviour, especially *en masse* during civil strife, are not wholly captured within an insulated and measured equation embraced by legal systems. Circumstances of pervasive lawlessness and social decay often usher a descent into irrational gross violence. Drawing on their fieldwork in Bosnia, legal scholars Laurel

[16] Please see Raymond Paternoster's (2010) wonderful assessment of the contributions to deterrence by two of the great Enlightenment philosophers, Cesare Beccaria and Jeremy Bentham.

Fletcher and Harvey Weinstein (2002) propose that individuals do not always maintain control over their actions in the context of cataclysmic collective events, instead becoming captives of violent social norms (605). Other scholars note that in addition to the influence from social peers during sorties, actors "may value a nation, ethnicity, or political agenda more than they fear any sort of individual punishment" (Alexander 2009, 17). The expectation that 'new' and foreign-imposed legal order will rapidly take precedent over multi-tiered elements that designed the tensions over decades is hopeful, at best. Instead, by allotting charges related to mass violence onto select evildoers, international criminal law avoids dealing with "the myriad political, economic, historical, and colonial factors that facilitate the violence" (Drumbl 2005, 586).

Mark Drumbl (2005) argues that international criminal law too often, and naively, assimilates domestic legal assumptions into the international context. He notes that the paranoia and bloodlust endemic to *genocidaires*, for example, may prevent the utilitarian cost/benefit analyses expected by general deterrence in Western domestic contexts.

> [W]ill a suicide-bomber be deterred by fear of punishment in the event of capture? Does the existence of a permanent ICC necessarily mean that those imbued in political paranoia will see their actions as legally or morally wrong? Do genocidal fanatics make cost-benefit analyses prior to initiating violence? Do ordinary people swept up in supremacist euphoria have the moral resources to make dispassionate decisions? (590-591)

Subscribers of deterrence rely on the assumption that criminal actors are logical according to general concepts of rationality. Furthermore, it is presumed that actors know the objective certainty of arrest and the severity of punishment (Matsueda, Kreager and Huizinga 2006, 97). The effectiveness of general deterrence requires

would-be perpetrators to weigh the potential *disutility* of sanctions against the expected *utility* that may be gained from their crimes. To at least some extent, legal systems require potential perpetrators, including those who may go on to mastermind atrocities, to be rational actors sensitive to dissuasion. The overarching assumption of deterrence theory, then, is that jurisprudence can adequately exploit the rationality of even calculated and informed criminals. In reality, Vito, Maahs and Holmes suggest that the theory rests on a faulty assumption of Rational Choice Theory; "that is, people may not be as rational as they are portrayed in this theory" (66).

Numerous scholars stress that the rational actor assumption overlooks an inventory of possible mediating factors underwriting criminal behaviour. Primarily, one cannot predict the manner in which actors' preferences will change through interactions with other individuals or their environment (Lebow and Stein 1989, 215–217; Carlsnaes 1992, 251–252; Wendt 1999, 36- 115; Tannenwald 2007, 36–37; and Agnew and Matthews 2008 in Lupovici). Furthermore, it is difficult to ascertain the effect that national or cultural interests will have on deterrence instruments (Weldes 1999, 3–16 and 118–119; and Tannenwald 2007,18 in Lupovici 2010, 709-10). Lastly, in times of crisis, "actors face political and cultural barriers to empathy, plus cognitive shortcomings- various heuristics that distort perception and judgment" (Morgan 2003, 142).

One's likelihood to engage in "out-of-character" behaviour largely depends on the ebb and flow of social dynamics in one's environment (Lupovici 2010, 709-710). Furthermore, habituation to frequently occurring moral missteps may re-establish the

boundaries of “normal” behaviour. Lebow and Stein (1987) write that such departures from an actor’s rational norms “lead to the misperception of intentions, commitment, resolve, or values, and to major errors in the cost-benefit calculations required by deterrence.” They postulate that “these kinds of errors and biases occur with sufficient magnitude and severity in cases of deterrence failure to challenge the assumption of rationality so central to theories of deterrence” (166). Matsueda and his colleagues (2006) acknowledge that crime creates “a difficult case for rational choice theory” (95) even within simple domestic scenarios. They find that at least among adolescent samples, for example, social status within groups is a key component in decisions to offend. Association with other non-conforming individuals, this study suggests, precludes rational end-behaviors normally responsive to deterrence mechanisms. Similarly, using longitudinal data from another adolescent sample, Robert Agnew and Shelley Matthews (2008) find that certainty of punishment, the deterrence mechanism largely deemed most salient, is only dissuading for those with few or no delinquent peers; here the normalization of crime behaviour precludes the fear of negative consequences.

What is intriguing about socialization’s role in actors’ rationality is the manner in which individuals process this information. For example, Congolese soldiers interviewed by Eriksson Baaz and Stern (2009) “convey ambivalence in the ways in which they make sense of the norms and codes which determine ethical and acceptable behaviour” (497). The researchers go on to note that “[i]mportantly, the ambivalences and struggles around questions of ethics in their testimonies also underscore their sense of themselves as agents and therewith ethically responsible

for rapes they commit." This insight tends to suggest that the ways in which individuals act out (as influenced by their social environment) are not necessarily reflections of changes in their belief systems (the static characteristic of how individuals perceive themselves ethically). Would a truly "rational" actor commit violent acts that directly contradict how they perceive themselves ethically?

It is important to remember that the degree of criminality under ICC jurisdiction involves perpetrators of great atrocities; priority for the Court lies in holding state and military elites the likes of Slobodan Milosevic, Joseph Kambanda, Pol Pot and Omar Al Bashir accountable. In countries like the former Yugoslavia, Rwanda, Cambodia and Sudan, top-down widespread and systematic attacks on civilian populations are identifiable. But, in situations like the Democratic Republic of Congo where the central government has welcomed ICC involvement, average foot soldiers or incorrigible militants caught up in the cataclysm of mass violence are as much to blame for ongoing rampant abuses as the military elites who are alleged to have ordered systematic attacks. Even if the International Criminal Court executed all required deterrent elements impeccably (namely, certain, swift and severe punishment), the "small fish" who carry out the everyday abuses are often so entrenched in the imbroglio of ongoing conflict that potential punishment is a risk worth taking, or is not at play in decision-making at all. This is not to say that the International Criminal Court does not serve a greater purpose as a retributive organ; the question here is whether it has a deterrent value. The truth of the matter is that "an ordinary person caught up in 'supremacist euphoria' may not be deterrable" however "state leaders thinking about fanning hatreds to support their own

instrumental ends might be" (Alexander 2009, 18). *General* deterrence, this insight would suggest, is not attainable by international criminal law.

4.2 Punishments must be certain, swift and severe, or at least certain

The intrinsic value of deterrence is largely thought to rest on consistently certain and severe punishments that, in turn, increase the pain of crimes. In other words, the greater the absolute certainty of arrest, the greater the certainty of prosecution, and the faster severe penalties are handed down- the more likely it is that there will be a reduction or cessation of crime by the general population (general deterrence) (Vito, Maahs and Holmes 2007, 57-67). Empirical evidence lending equal support to all three predicted ingredients of deterrence (certainty, severity and celerity), however, is hard to come by. In contrast to the consensus in the literature that the perceived certainty of punishment is more important than the perceived severity or celerity of punishment, Silvia Mendes (2004) urges that "it is the idea that individuals perceive the deterrent components in conjunction that is key to comprehending deterrence theory" (61). Close examination, and reanalysis, of commonly reported studies reveals that the problem rests not with the individual effects of the theory, but with how the theory is analyzed, Mendes and her colleague Michael McDonald (2001) argue. Accordingly, we shall look briefly at *each* of the three components.

a. Certainty

Based on what deterrence theory suggests, severity and celerity should be equally as effective as certainty in eliciting a sufficient cost of crime. Yet, for decades, scholars have long insisted that rational individuals perceive the effects of

the probabilities of arrest and conviction differently than they do the other factors of punishment such as sentence severity and the speed with which the justice system processes offenders (Becker 1968; Ehrlich 1973; Witte 1983; Decker and Kohfeld 1990; Eide 1994; Farrington, Langan and Wikstrom 1994; Langan and Farrington 1998; Mendes 2004). Meta-analyses by both Anne Witte (1983), and Scott Decker and Carol Kohfeld (1990) conclude that measures of certain conviction and imprisonment have a greater effect on the level of offenses than do changes in sentence severity. In fact, Decker and Kohfeld go so far as to assert that the same relationship between severity effects and offenses has never been found (1990, 3).

Using aggregate data, more recent empirical deterrence studies calculating the statistical relationship between changed certainty of punishment and crime rates report a correlation. Examining crime and punishment trends in England, the United States and Sweden between 1981 and 1996, Farrington, Langan and Wikstrom (1994), and Langan and Farrington (1998), report a significant negative correlation between their certainty measure (the likelihood of conviction) and crime rates. Simply put, where more convictions are recorded, fewer crimes are subsequently committed. Marvell and Moody (1994) report similar findings. Their quantitative study using American data over the period 1973-1991, finds the size of prison populations (as a proxy for certainty of punishment) to be negatively correlated with crime rates. Three additional U.S. studies examined the relationship between the number of police officers per capita and measures of violent crime rates. As a follow-up to their just mentioned work, Thomas B. Marvell and Carlisle E. Moody (1996) looked at information from 56 urban centres in 49 U.S. states between 1973 and 1992 and

found a significant inverse relationship between the number of police officers visibly present and the number of homicides, robberies and burglaries. The authors estimate that each additional police officer resulted in an average reduction of four crimes at the state level and an impressive twenty-four crimes at the city level (632). Similarly, using records collected by U.S. cities from the 1970s to 1990s, Steven D. Levitt (1998 and 2002) found that increasing the number of police officers reduced both property and violent crime by between 5-8%.

In further support of this notion of certainty, crime rates appear to decrease when researchers manipulate certainty effects by focusing increased police patrols in high crime areas during periods when criminal activity is at its highest (for example, overnight) (Vito, Maahs and Holmes 2007, 61). It is probable, I would argue, that the direct presence of police also begets a celerity effect.

But, the International Criminal Court has neither police nor military forces to keep a watchful eye, enforce its order or apprehend suspects. Furthermore, the eagerness of a state to lend a hand with its own forces “may be expected to depend upon that state’s political motivations” (Alexander 2009, 11); other states may be willing, but unable, to apprehend suspects indicted by the Court. For ICC chief prosecutor, Luis Moreno-Ocampo, there is an irony in this otherwise discouraging scenario:“[H]e had thousands of police officers working for him when he was a prosecutor in Buenos Aires, but now that he is responsible for half the world, he has zero” (Alexander 2009,11). As stipulated by international criminal procedure, while the International Criminal Court may issue indictments, arrest warrants must be executed by a sovereign national jurisdiction. History shows this type of

fragmentation causes uncertainty for international criminal tribunals; accordingly, the ICC will likely encounter many of the same obstacles as the *ad hoc* institutions have, if not more.

Like the International Criminal Tribunal for the Former Yugoslavia (ICTY), the ICC may struggle to apprehend and obtain custody of their most powerful suspects (Kerr 2004). It is important to note that many of those indicted by the ICTY were actually arrested by the NATO-led Stabilization Force (Kaul 2007, 575-580). Alternatively, at times the Court may experience the type of state cooperation seen by the International Criminal Tribunal for Rwanda from Paul Kagame's post-genocide government and the states bordering Rwanda. In fact, Hans-Peter Kaul notes that the majority of ICTR arrests were executed by Rwanda's neighbouring states (575-580). Lastly, the more distant international community may too get involved, but only at times, to pressure states who are harboring fugitives to assist the ICC by tracking and/or apprehending those suspects.

At the time of writing, developments in the situations of the Democratic Republic of Congo, northern Uganda and Sudan (Darfur) had offered examples of how differently the justice process will play out. Three of the five rebel leaders indicted by the ICC have been *captured by* the Congolese government and surrendered to the Court; the Ugandan government remains *unable to arrest* any of the four indicted leaders of the Lord's Resistance Army; and the Sudanese government remains *unwilling* to assist the Court in executing arrest warrants for the three suspects at large. Incidentally, one of those indicted suspects, Omar Al Bashir, remains (north) Sudan's ruling head of state. James Alexander predicts that "[m]ore

likely than not, the ICC will often confront Darfur-like situations in which the power with physical control over suspects is unwilling to turn over suspects and cannot be compelled to do so absent outside military intervention" (12). The more perpetrators observe that justice can be thwarted, the less certainty of punishment; the less certainty of punishment, research shows, the more unlikely it is that a deterrent effect will take shape.

b. Severity

Deterrence theory would have one believe that even if a perpetrator perceives that legal repercussions are fairly certain, the nature of the potential legal sanctions will then be incorporated into the cost/benefit ratio. But even early Classical school criminology theorists like Montesquieu, Beccaria and Bentham stressed the importance of certainty, and celerity, over the severity of punishment. The trend across modern literature remains fairly consistent with early thought. The previously mentioned Farrington et al. (1994), and Langan and Farrington (1998) studies reveal a weak (and not statistically significant) negative correlation between severity of punishment and crime rates. Similarly, a thorough review and analysis of two-decades worth of deterrence literature by Andrew von Hirsch and his colleagues found "scant evidence" of severity effects and only "modest negative correlations between some severity variables and crime rates, albeit ones that seldom achieve statistical significance" (von Hirsch, Bottoms, Burney, & Wickstrom 1999, 47). But, Mendes and McDonald (2001) contend that removing the severity of punishment from the theory "unbundles" the deterrence package. Professors Mendes and McDonald are adamant that deterring criminal behaviour "requires combining the

probability of arrest, the probability of conviction given arrest, and a punishment of some severity following conviction…each of the three components is necessary; no one component acting alone is sufficient" (606). Mendes and McDonald's reanalysis of data sets lend support for their assertion: for one, contrary to Deck and Kohfeld's (1990) original analysis, the authors find a "significant effect of the severity of punishment on the robbery and burglary crime rates" (603); however the authors acknowledge that the artifactual manipulations of data they used to produce this outcome is but one criticism of their work (601). Reilly and Witt (1996) and Layson (1985) might agree with the importance of sentence severity. In addition to the certainty effects reported above, their English and Welsh prison data (1980-1991) reveal sentence length, in particular, to be correlated with lower recorded crime rates. The nature of the crimes for which domestic courts sentence accused, however, is wildly different than those on the international stage.

There is a blaring paradox in international criminal law. International tribunals aim to prosecute individuals deemed *most* responsible for the *most* serious crimes of concern to the international community as a whole, but the sentences are at times no more severe than those meted out to *average* criminals responsible for *common* crimes against their local community. Crimes of the magnitude dealt with by international courts are, as Mark Drumbl writes, "extraordinarily transgressive of universal norms" (2005, 540). Still, "[d]espite the extraordinary nature of this criminality, its modality of punishment, theory of sentencing, and process of determining guilt or innocence each remains disappointingly ordinary" (Drumbl 2005, 541). For example, in 2006 a mere fifteen-year sentence was handed-down for

crimes of genocide and extermination committed in Rwanda.[17] Lenient sentences imposed by the ICTY continue to provoke scholars to criticize the tendency of international criminal law to apply standard, domestic, paradigms to exceptionally heinous atrocities such as genocide (Aukerman 2002, 94-97; Drumbl 2005; Harmon and Gaynor 2007, 711-712; and Alexander 2009, 15). Lenient sentencing, Mark Harmon and Fergal Gaynor argue, weakens respect for human dignity and the Rule of Law.[18]

To date, the ICC has yet to convict an individual, or issue a sentencing decision. Therefore, one can only speculate whether the permanent court will impose longer sentences than the *ad hoc* tribunals, and to what degree appeals will be successful. In addition to imprisonment, it remains to be seen how the International Criminal Court may go about ordering the fines and the forfeiture of "proceeds, property and assets" specified under Article 77(2). It is clear that Article 77 (1) of the Rome Statute stipulates that individuals may be imprisoned for up to 30 years or "a term of life imprisonment when justified by the extreme gravity of the crimes and the individual circumstances of the convicted person;" however, it is also

[17] *For a complete review of the decision, please see* Prosecutor v. Seromba, Case No. ICTR 2001-66-I, Judgement, 104 (Dec. 13, 2006).

[18] According to James Alexander (2009) , a representative sample of ICTY and ICTR opinions reveals "an eight year sentence for the crime of attacks on civilians; a thirteen year sentence for the combined crimes of torture, cruel treatment of detainees, and personally participating in the murders of nine detainees; and a fifteen-year sentence for the crimes of genocide and extermination" (15).

clear to scholars and perpetrators alike that the duration of imprisonment for even the worst perpetrator may be reduced over time.[19]

Length of sentences aside, the conditions in which sentences are served can vary widely. Severity of punishment, after all, is not merely a function of sentence duration. Observers have noted that those most responsible for grave crimes serve their time in The Hague "in more humane conditions than the 'small fries' serving their time in places like Rwanda or the Congo…prison conditions in many countries, particularly in Africa, remain well below international minimum standards" (Alexander 2009, 16). Additionally, writes James Alexander, for offenders with compromised health, "improved access to quality medical care may mean that incarceration actually provides some substantial *benefit"* (16). But*,* proponents of international criminal law argue that holding perpetrators in even comfortable conditions supersedes allowing them to live with impunity. Individuals generally wish to avoid incarceration, and so by the ICC prosecuting those who would likely go otherwise unpunished, the Court is serving a greater function. The function of concern here, however, is whether offenders capable of mass atrocities will perceive the ICC's fines, forfeitures and sentences as a veritable deterrent to crime. Having explored the debate surrounding certainty and severity, the final component of criminal deterrence to consider is swiftness. How important is celerity to the deterrence formula? Does it too pose a problem within international criminal law?

[19] Article 110 of the Rome Statute provides opportunity for sentences to be reduced, by review of the ICC alone. For example, Article 110(3) instructs that the Court shall review the sentence when the individual has served two thirds of the sentence, or 25 years in the case of life imprisonment; Article 110(4) offers that the Court may reduce the sentence for reasons such as if the person has a demonstrated a willingness to cooperate with the Court's over time, or has assisted the Court in regards to other cases.

c. Celerity

The swiftness of punishment is said to be the final requisite component that makes, or breaks, deterrence. For his 1965 *Criminal Behaviour and Learning Theory*, C. Ray Jeffery drew upon the work of two of the twentieth century's most esteemed social scientists: behavioural psychologist, B.F. Skinner and criminologist, Edwin Sutherland. Jeffrey identifies three truths inherent to legal systems that prevent them from being a more successful deterrent: first, legal punishments are generally very uncertain; sanctions are only imposed long after the crime has been committed; and finally, because the pleasures of crime are immediate, they carry greater weight than the delayed costs of crime in the would-be offender's risk calculations (Jeffrey 1965, 299). Jeffrey notes that most often when crime occurs, "[t]here are no aversive stimuli in the environment *at that moment*" (Jeffrey 1965 in Paternoster 2010, 777, emphasis added). Celerity is therefore vital to effective deterrence, in theory, and may in fact be an understudied tacit effect working alongside certainty (as seen in the policing data presented earlier). Unfortunately, researchers have largely neglected to study the independent role that swift punishment plays on self-reported real crime. Paternoster (2010) posits that the avoidance of this question "may be due to the fact that it is not entirely clear which direction the deterrence hypothesis would predict," but points to the emphasis on celerity in works by early theorists like Beccaria as impetus for scholarly exploration of the celerity question (see Paternoster 2010, note 246).

Notwithstanding how difficult it is for international legal bodies to physically apprehend indicted suspects in a timely fashion, criminal proceedings in

international law often move at a staggeringly slow pace over many years. The cases are incomprehensibly complex and greater time is needed for "the otherwise praiseworthy fact that they rigorously ensure respect for defendants' due process rights" (Alexander 2009, 13). But, the tying up of resources for the duration of each lengthy trial means that fewer trials can take place. While the tribunals are lauded for their retributive successes, the ICTY and ICTR have prosecuted and convicted but a small fraction of the thousands of perpetrators who committed heinous crimes in the former Yugoslavia and Rwanda. At the time of writing, the International Tribunal for the Former Yugoslavia had indicted 161 persons: 18 are currently at trial; 64 individuals have been sentenced.[20] The International Tribunal for Rwanda has completed 52 cases and has another 21 cases at trial.[21] The unique nature of the International Criminal Court's multi-national jurisdiction means that chambers are already tied up with cases from four different countries, and pending the outcomes of Mr. Moreno-Ocampo's investigation in Kenya and the UN Security Council's very recent referral regarding Libya, cases from six. To date, the ICC has been able to investigate and issue indictments for 17 individuals, but has just three cases at trial. The ICC has yet to convict even one perpetrator responsible for atrocities in any of the countries investigated as none of the three trials have concluded.

[20] Of the 161 suspects indicted, 36 had their indictments withdrawn or died before the completion of their trial (this of course includes Slobadan Milosevic) and 13 cases were referred back to a national jurisdiction. Of the 64 sentenced, three died while serving their sentence. For up to date statistics on ICTY proceedings, see Key Figures by way of Cases at www.icty.org. (Last visited February 11. 2011).

[21] Of the 52 cases completed, eight decisions are pending appeal and a further 10 suspects are appealing their charges prior to trial; two suspects are reported deceased. Ten of the suspects indicted remain at large. The 21 current cases cited, in actuality, consist of four trials prosecuting four identifiable groupings of individuals, and five individual cases. For up to date statistics on ICTR proceedings, see Status of Cases by way of Cases at www.unictr.org. (Last visited February 11. 2011).

Numbers aside, it is important to take into account which perpetrators have been indicted and prosecuted. One would expect that implicating political powerhouses, like the ICTR's prosecution of Prime Minister Jean Kambanda and the ICC's indictment of Omar Al Bashir, should send a louder message to others in powerful positions. Observers note that the ICTY learned the hard way that those responsible at the highest political and military ranks should be the court's priority. For example, former ICTY Judge Patricia Wald writes in her 2006 article, *International Criminal Courts- A Stormy Adolescence,* that early on the *ad hoc* tribunals indicted too many low- and medium level defendants to justify their existence. Because the chambers were burdened with the proceedings of minor players, there were enormous delays in justice when Stabilization Forces were able to deliver masterminds of atrocities, like Milosevic and Karadzic, to the ICTY (319-339). Alexander (2009) observes that "[c]lear intentions about whom the prosecutor will target naturally impact the deterrent effect of possible ICC prosecution upon variously situated perpetrators." He furthers that "[a]lthough a low-level foot soldier of genocide faces a low risk of punishment by the ICC, the court's target group-high-level instigators- should face a substantially greater chance of prosecution" (14).

Chief prosecutor Luis Moreno-Ocampo appears to be adhering closely to Article 5 of the Rome Statute, that "[t]he jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole," (Rome Statute 1998, 3), and as such is focusing resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for those crimes. The truth of the matter is that in the Democratic

Republic of Congo, the sexualized violence the international community is so very concerned about is not limited to calamitous rape missions ordered by commanders or the State. While coordinated attacks on civilian populations are occurring, like the Bogoro massacre and the New Years Day events in Fizi, common foot soldiers are themselves inflicting terror on a day-to-day basis (Eriksson Baaz and Stern 2009; HRW 2009; Kelly 2010).

There is an additional- and very important- reason why the ICC processes may not actually move along any faster than the tribunals: as part of the Rome Statute's restorative mandate, for the first time in history victims are offered the opportunity to communicate their grievances through a legal representative, independent of witness testimony. What we cannot learn from the *ad hoc* tribunals is to what extent the nascent International Criminal Court's victim participation allowances will delay court proceedings. Article 68(3) of the Rome Statute states that "[w]here the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court" (Rome Statute 1998, 47). Since ICC investigations began, a total of 4,101 victims have applied to participate in proceedings; of those, 905 have already been authorized to participate by the relevant Chambers at the time of writing. In the DRC situation alone, 196 out of the 1,057 victims who applied have been authorized to participate (ICC Registry Facts

and Figures 2010, 4).[22] The burden that victim participation places on the Chambers will have to be monitored as cases proceed, as will the possibility of any unforeseen affects on perpetrators created by victim participation and reparations. Both elements of the Courts restorative mechanisms are worthy of a comprehensive analysis down the road. For now, clear intentions about whom Prosecution will try can be expected to impact the deterrent effect of the ICC "upon variously situated perpetrators" (Alexander 2009, 14). Who those perpetrators are, however, is vitally important in the deterrence calculus.

Deterrence certainly is logically compelling, however, pervasive deficiencies are apparent when applied in reality. Aforementioned imperfections within deterrence, namely the theory's propensity to reduce crimes to utilitarian equations, the presence of inadequately administered punishment, and the dependence on actors' rationality, do have pragmatic implications. The case study of rampant sexualized violence in the Democratic Republic of Congo illustrates how imperfect, and impractical, a fit the key mechanisms and assumptions of deterrence are for situations of grave enough concern for the International Criminal Court at The Hague. Because the preceding ideas rest precariously on the shoulders of the 'rational actor assumption', the final core section of the paper presents an assay of rape perpetrators' logic in the DRC and ponders the exigency to look beyond law for the prevention of further sexualized violence in the Congo.

[22] The Registry's November 2010 report specifies that as of September 2010, 103 victims had been accepted to participate in the *Lubanga* case, 362 in the *Katanga and Ngudjolo Chui* case, 41 in the *Kony et al.* case, 135 in the *Bemba* case, 87 in the *Abu Garda* case, 6 in the *Harun* case and 12 in the *Al Bashir* case. The report also discloses that a total of 743 applications for reparations had been received from victims.

5. RELINQUISHING ANY LAST HOPE FOR DETERRENCE IN THE DRC: PERPETRATORS' RATIONALIZATIONS FOR SEXUALIZED VIOLENCE

To rape? Well, rape for a Mai Mai, it is Satan's work, because as people walk, Satan follows behind them.... This means it [raping] may happen to you when you are not prepared, but all of a sudden, the Devil fools you. - Male Mai Mai Soldier (Kelly 2010, 8)

Rape (...) there are different types of rape. They are all forbidden. There is the rape when a soldier is away, when he has not seen his women for a while and has needs and no money. This is the lust/need rape [viol ya posa]. But there are also the bad rapes, as a result of the spirit of war (...) to humiliate the dignity of people. This is an evil rape. -Male, FARDC Lieutenant (Eriksson Baaz and Stern 2009, 495)

Interest in prosecuting rape does not necessarily come with an ability or willingness to understand the circumstances giving rise to it, or therefore an ability to deter most perpetrators. Since Susan Brownmiller published her seminal work, *Against Our Will* (1975), exploring the historical origins of rape during war- and peacetime, numerous other scholars have studied rape contexts in an attempt to identify discernable patterns. More recently, Elisabeth Wood (2004) took to analyzing variations in sexualized violence across 20th Century conflicts in European, African and South American contexts, as well as the absence of sexualized violence in certain contexts like the enduring Israel-Palestine conflict. Wood (2004) initially concluded that "we do not have an adequate explanation for the variation in sexual violence across wars and armed groups" (21), but in follow-up, offered six distinct hypotheses for wartime rape that emerge as a result of her comparative analysis of conflict situations (Wood 2006, 331-333). The hypotheses taken from Wood's descriptive *Variation in Sexual Violence during War (2006)* predict that strategic choices from armed group leadership, the norms of combatants, dynamics within small units, and the effectiveness of military discipline may all be factors contributing to the different faces of conflict-rape. While unable to offer a comprehensive theory of sexualized violence during war, Professor Wood

suggests that addressing the puzzle of variation in sexual violence requires three levels of analysis: "that of the armed group (an insurgent group or a national military), the small unit in which combatants have face-to-face relations, and the individual" (331).

At the local level, sexualized violence likely happens during conflict in the Democratic Republic of Congo for the same reasons it happens during peace, but to an exaggerated degree. We know that rape is a phenomenon often rooted in inequality, discrimination, male domination and aggression, misogyny and/or an entrenched socialization of violence (Tompkins 1995, 851). Notwithstanding, until very recently insufficient energy was afforded to understanding the way in which perpetrators themselves understood their violent acts through the lenses of inequality, gender roles and socialized violence. Two very recent studies conducted with two different armed factions widely implicated in sexualized violence, the Congolese national army (FARDC) and the Mai Mai militia group[23], offer insight into combatants' explanations of, and even excuses for, continuing to rape in Congo. In the first study, 193 members of the national army (FARDC) were interviewed in small groups alongside fellow officers and soldiers of the same rank and gender

[23] Mai Mai militias became a powerful force in eastern Congo since 1993 in response to the influx of foreign rebel groups after the Rwandan genocide and to protect their own communities from Mobutu's army. As the group expanded throughout the eastern regions, they began warring each other, foreign militias and the government over natural resources and land rights. They have increasingly been implicated in looting, rape, abduction, and displacement of civilians and are one of the factions continually integrated in the FARDC (HRW 16 December 2008). Two Mai Mai sub-factions are discussed here: Mai Mai Shikito and Mai Mai Kifuafua. Soldiers from the Mai Mai Shikito group were much more likely to state that they did not rape and that rape "never" occurred in the group. Soldiers from the Mai Mai Kifuafua group were much more likely to admit to raping and to talk about treating women as a spoil of war (Kelly 2010, 9).

(Eriksson Baaz and Stern 2009).[24] For the second study, thirty-three male Mai Mai combatants were each interviewed in a private setting by a team of male Congolese social workers and psychologists experienced in working with war-affected populations (Kelly 2010, 5).[25] Although the sample sizes are small and the information cannot be taken to represent the views of their organizations (or wartime rape generally) the information explicates why the threat of legal sanctions from a distant court will not deter a good number of rapes happening on the ground.

We have established that the verdict is out on the strength of deterrence theory, as a theory. And we have established that its application is vehemently disputed by scholars and legal practitioners alike. But, given Kofi Annan's hopes for deterrence and Prosecutor Luis Moreno-Ocampo's confidence that "[w]ith the (governing) Rome Statute, nobody is beyond the reach of international justice" (Grono 2008), it is worth assuming, for argument's sake, that deterrence theory is sound and that international justice is as effectively administered as possible. These assumptions provide us opportunity to explore why it may be that the existence of the International Criminal Court has, as of yet, been unable to deter individuals, and groups including the Congolese national army, from committing rife sexualized violence in the country. Hence, with concern to the ongoing sexualized violence in the Democratic Republic of Congo, three realities, especially, stand out:

[24] Maria Eriksson Baaz herself carried out the semi-structured interviews in the local Lingala language, without an interpreter. Fourty-nine group interviews (3-4 individuals per group) focused first on participants' perceptions of what was required of themselves and others to be good or successful soldiers. The researcher then explored understandings of masculinity and femininity in relation to soldiering, and then initiated discussion of sexual violence (Baaz and Stern 503-504).

[25] Interviews took place in three rural towns in eastern DRC among interviewees ranked from private to major. With permission, Mai Mai respondents were recorded speaking about such things as their motivations to join the group, the group belief systems, command structures, attitudes toward women and sexual violence and the soldiers' aspirations for the future (Kelly 2010).

I. Those who commit rape are influenced by their current social, cultural and/or spiritual environment. Based on the literature presented in the previous section the offenses are thus not moderated by "rational" utilitarian calculations sensitive to deterrence.
II. Common grievances and ideologies exist among low- and mid-ranked combatants who admit to perpetrating sexualized violence. Rampant abuses by uniformed men will continue if collaborative efforts are not made by different sectors (For example, security sector, social service sector and health sector) to address at least some of the more prominent grievances.
III. The International Criminal Court's prioritization of high-ranking officials does little to deter common foot soldiers who remain entrenched in unchanged domestic scenarios

5.1 Uniformed actors inside a dim reality

Observers report that the majority of rapes in the DRC are carried out by uniformed men (HRW 2009; Harvard Humanitarian Initiative (HHI) 2010; MSF 2011). Over 80 percent of women interviewed for Harvard Humanitarian Initiative's survey in the eastern region of Congo report that their attacker had been in uniform. Of those, almost half had been abducted and over two-thirds reported being gang-raped (HHI 2010). Furthermore, acts of sexualized violence, according to interviews with victims and witnesses, are often carried out in conjunction with looting activities (HRW 2009, 27).

When probed about their experiences, members of the Congolese national army (FARDC) attribute the propensity to rape to the cumulative effects of poverty, frustration, "power (having a gun)," and the "craziness" of war (Eriksson Baaz and Stern 2009, 508-513). Poverty and frustration are also present among low-level soldiers in other sexually violent groups like the Mai Mai militia who at times only receive one-tenth of their promised pay (Kelly 2010, 7). In turn, Mai Mai combatants often treat civilians they set out to protect as a resource to be exploited (Kelly 2010).

In Congolese culture, men who do not fulfill their obligations are not only somehow deprived of their manhood, they are also not considered as having the same rights to demand 'submission' from their wives (Eriksson Baaz and Stern, 507). As one male Major explained: "If you look at the Bible, it says ''man, love your wife'' and ''wife be submissive to your husband."… If you do not give your wife money, she has not eaten, also the children have not eaten, can you then come home in the evening and ask her: did you wash the clothes? That is not how it was supposed to be" (507). This chronic tension of having 'power' as a combatant and feeling powerless over ones' life circumstance creates an environment among armed men whereby rape becomes a performative act of masculinity (Eriksson Baaz and Stern 2009, 510).

Eriksson Baaz and Stern reflect that members of the national army tend to recast that which in "normal" circumstances is "abnormal" (i.e. sex by force) as "normalized in the military setting through discourses of disempowerment and unfulfilled masculinity" (2009, 510). Male soldiers typically live away from their wives and may not see them for several years at a time (HRW 2009, 44). "The particular circumstances of being a soldier in the FARDC" Eriksson Baaz and Stern decipher, "provides the context where soldiers are "forced" to rape instead of engaging in the more "normal" sexual behaviours organized through civilian life" (508-509). Nowhere is the recasting of societal "norms" made clearer than in the categorization of certain sexual assaults as "normal/lust" rapes (versus "evil" or criminal rape). "Normal" or "lust" rapes, soldiers purport, are excused as acts committed to quell unmet sexual desires and feelings of inadequacy as men. "Normal" behaviour, after all, is not a

crime. Jocelyn Kelly (2010) discovers a similar disconnect from civilian reality among Mai Mai militants, noting that even as numerous individuals described "raping women, abducting women for themselves or their commanders, or raping for individual reasons," many communicate that it is strictly forbidden by their principles and deny that 'rape', according to their definition of it as a crime, occurs (8-9).

Both FARDC and Mai Mai combatants interviewed did however emphasize disapproval of the more 'brutal' forms of rape such as the use of foreign objects and genital mutilation reported by a number of non-governmental and international organizations. In response to the notion of extremely violent rape, one Mai Mai respondent (who himself had admitted to perpetrating the more 'normalized' type of rape) exclaimed "[t]hat is a crime!" (Kelly 2010, 10); similarly, FARDC soldiers and officers claim to distance themselves from those 'insane' individuals who commit "violent/evil" rapes (Eriksson Baaz and Stern, 508). That only the *more* "evil" rapes are deemed "criminal" is alarming. But, given the vocal disapproval of those who commit "evil" rapes and the weight of informal sanctions (for example, shame, loss of comradery), one would expect extremely violent rapes to occur infrequently. In reality, this is not the case. Renowned Congolese Gynecologist, Dr. Mukengere Mukwege, reports that the majority of the 4,311 female rape victims treated at Panzi Hospital in South Kivu province between 2004 and 2008 had experienced 'rape with extreme violence'[26] (Mukwege and Nagnini 2009, 1-2).

[26] After more than a decade of treating women at Panzi Hospital, Dr. Mukwege coined the term 'rape with extreme violence' (REV) to describe 1. gang raped, usually by three or more men; 2. rape with intentional mutilation of female genitals ; and 3. rape with intentional transmission of sexually transmitted diseases such as HIV or Chlamydia (See Mukwege and Nagnini 2009).

It is important to note that combatants do not present themselves as unable or unwilling to weigh the costs and benefits of rape, rather, they negotiate costs and benefits more relevant to their imminent subjective well-being. Soldiers who communicate practical reasons *not* to rape cite three common 'deterrents' in their day-to-day lives. Contracting sexually transmitted infections, especially HIV/AIDS, is one of the more deterring "consequences" and "punishments" spoken of in terms rapes, especially *en masse.* One Mai Mai combatant explains that should he suspect a victim is infected with HIV/AIDS, he will "decide not to do it, and…let the person go" (Kelly 2010, 9). Another 'consequence' of rape commonly referred to is the risk of retaliatory violence and 'spiritual' revenge in the wake of assaulting another man's woman; there is an understanding that if a man takes a woman identified as another's, "he has to die" (Eriksson Baaz and Stern, 512). A FARDC Corporal tells the story of a soldier who went into the forest, met a woman and raped her, and that "when he came back, water/liquid started to pour from his body [mai ebandi kobima ye na nzoto]." He died immediately after telling the doctor what he had done, thus providing the interviewee with an explanation for why "rape is something bad" (Ibid). Mai Mai Interviewees note that acting out sexual violence poses risks to the community support upon which soldiers relied heavily. As one respondent explains, "there are women there who grow food in their fields in the surrounding villages, they assist us with food" (Ibid.). Rape of civilians is seen as a practical liability for the Mai Mai because it weakens support from the community vital to all group members (Ibid. at 11).

Some Mai Mai, however, report being ordered to abduct women for use as combatant rewards or "spoils of war": "We are always sent by our chiefs who tell us: "Do this!" Despite your refusal, they oblige you to do it; otherwise you will be beaten seriously." As a result, the soldier reveals, "you will do it unwillingly. And you can even rape because of that" (Kelly 2009, 8). Aversion to the immediate risk of *not* raping, or refusing to facilitate others' rape, subverts what Jacobs would characterize as a soldier's ' capacity or willingness to engage in (legal) cost/benefit calculations (2010, 420). Within the insular command structure of the organization, social or organizational costs and benefits remain the primary concern over and above extralegal sanctions. Furthermore, soldiers know that should they be implicated in rape, superiors will fervidly deny its occurrence or protect perpetrators' identities knowing that they, as commanders, themselves risk prosecution from increasingly functional domestic courts (Human Rights Watch 2009 31-33). The probable certainty of their ever being investigated, then arrested, tried and convicted by the International Criminal Court is so infinitely small, that a look at other proactive measures that may better quell the antecedents of non-systematic sexually violent crimes seems appropriate given the miscarriage of deterrence expectations.

Without mention of international legal punishment, both FARDC and Mai Mai combatants communicate that being seen as a perpetrator of "evil" rapes, the cost of disease or reprisals, and fear of lost support are what causes pause and is responsible for the inhibition of criminal conduct. Poverty, compromised feelings of masculinity, frustration and anger, on the other hand, are what serve as powerful spurs for sexualized violence. Informal costs (for example, shame, isolation),

tangible benefits of the crime (for example, money, property or resources), and intangible benefits of the crime (for example, respect of peers, the removal of negative feelings as a result of the crime) are overlooked by the narrow application of deterrence (Vito, Maahs and Holmes 2007, 67). The rational actor assumption within deterrence overlooks the influence that extraneous variables such as poverty, frustration, rigid gender roles, and habituation to violence could have as mediating factors underlying an individual's decision to engage in criminal behaviour. These grand omissions in deterrence, as a theory, provide further examples for why deterrence is deemed insufficient as a preventive measure when applied to natural settings, especially during conflict. In what would be considered improbable from a 'rational' standpoint, Eriksson Baaz and Stern discover that because strong connections exist within Congolese culture between having resources (money), acting as a 'normal' heterosexual man who needs sex, and being perceived as a self-respected provider, rape in the throws of conflict-culture "although perhaps unfortunate, is written not as morally wrong…the "rapist" is exonerated from any crime other than, perhaps, being a victim of circumstance" (510).

Organizational problems and the way in which superiors handle themselves contribute to the 'circumstances' in which rape becomes acceptable among soldiers. Poor or absent salary distribution, a persistent lack of food and clean drinking water availability, inadequate housing, and weak internal support not only contribute to a general acceptance of violence, they significantly lower soldiers' loyalty and respect for their superiors (Eriksson Baaz and Stern, 501; HRW 2009, 44). In order to retain troop solidarity, higher-ranking officials often protect low-ranking foot soldiers who

have been identified as perpetrators (HRW 2009, 51); some turn a blind eye to acts of sexualized violence and looting, while other commanders simply transfer identified suspects to different units, “unless they have fallen into disgrace “(49). Still, other commanders openly condone or even encourage abuses.

5.2 Where to go from here: Reducing isolation and disempowerment, and forging community ties for prevention

One of the themes of David Kennedy's (2004) *The Dark Sides of Virtue* is the proneness of the human rights community to overvalue what law can accomplish. Kennedy attributes this to the presumption that international institutions can "do globally what we fantasize or expect national governments to do locally" (31). Verdant advocacy of the ICC’s involvement in the DRC from humanitarian organizations and Kabila’s Government highlights the misperception that a distant court’s issuance of indictments for select perpetrators will remedy a problem with obvious social and security sector contributions at the local level. In a similar light to Human Rights Watch’s assessment of the Darfur situation, “the implication is that continued criminal violence can be attributed to the climate of impunity fostered by the failure to prosecute” (Rodman 2008, 558).

Law Professor, Kenneth Anderson (2005), censures that the international community calls for legal intervention as an easy way to salve one’s public conscience when there is actually an unwillingness to intervene. In other words, there is risk that the ICC may create a new moral hazard (Neumayer 2009; Smith 2002), meaning that the existence of the Court may provide states with the opportunity to reassure their civilians that something is being done to stop gross

human rights violations while continuing to avoid the implementation costs of preventing those crimes from being committed in the first place. Unduly attributing the causes of unabated raping to impunity and failures of deterrence mechanisms prevents the address of veritable causes, and thus the employment of novel prevention platforms for would-be perpetrators and victims alike. As a result, victim numbers continue to rise and thus victim services, because they are on perpetually urgent status, garner ever-increasing expansion. The origins of the problem are left unremitted while both international and Congolese Government efforts to *end* sexual violence disproportionately focus on treating the symptoms of the phenomenon as opposed to the contagions giving risen to it.

International government donors and non-governmental organizations have made it a priority to provide psychological, medical, social and legal assistance to victims while encouraging Kabila's government to actively seek an 'end to sexual violence'. A prime example is the collaboration of government and local non-governmental organizations for the UN's Comprehensive Strategy on Combating Sexual Violence in DRC. It sets forth detailed recommendations in four areas: combating impunity; security sector reform; protection of vulnerable victim populations; and multi-sectoral programs for health, psychosocial support and reintegration of victims into society (HRW 2009, 35). The aforementioned inconsequentiality of legal action means that only security sector reform can be considered a veritable preventative measure. It must be noted, however, that no part of the UN strategy has become official government policy. In another example, the UN Development Fund for Women (UNIFEM), the UN Department of Peacekeeping

(DPKO), the Stop Rape Now campaign and the Australian Government released a practical toolkit in 2010 advising peacekeepers 'how to deter sexual violence in war'. Margot Wallstrom, the UN Special Representative on Sexual Violence in Conflict, explained that the booklet provides practical information on how to move from words to deeds (UN News Centre 30 June 2010). In providing an example, Ms. Wallstrom described how the UN peacekeeping mission in the DRC (at the time MONUC) escorts women to local trading markets to improve women's sense of security and economic development. Likewise, on an acutely domestic level, the Ministry of Gender, Family Affairs and Children, the lead Congolese government department concerned with sexual violence, announced in 2009 plans to create a fund designated for the protection of women and children, and a decision to establish an agency "for the fight against sexual violence" (International Centre for Transitional Justice 2009, 4). In an interview with Human Rights Watch, Minister Marie-Ange Lukiana, explained that the Ministry's agency would fight sexual violence by "providing victim assistance" (HRW 2009, 36). Victim assistance, however, does not *prevent* rape.

While these provisions for the protection of civilians and support for victims are crucial, they do little to address the antecedents necessitating victim safety and support. This is where excuses- and motivations for raping, as relayed from perpetrators and would-be perpetrators themselves, become key. As counter-intuitive as it may seem, additional funds directed toward improving the daily living conditions and hopes of the main male perpetrators of sexualized violence may more effectively reduce the scale and scope of sexualized violence occurring in the

DRC. Ultimately, preventing victim numbers from continuing to grow is the main objective.

Social ties within the community provide the foundation from which the potential for informal social regulation can develop. Combatants emphasize that social isolation, in particular, is extremely difficult and is the source of much of their anger and frustration. Many express a desire to go back to life as it existed before the war and be seen as a member of the community once again (Kelly 2010, 5). FARDC Lieutenant Colonels interviewed by Maria Eriksson Baaz explain that soldiers are routinely sent out on year-long missions without leave. One Lt. Col. suggests ”That is not normal. You have to have leave: some go and after three months another one comes, like that. Then the soldier can go home for a bit, sees his normal friends, family, and his wife／woman [mwasi na ye]” (Eriksson Baaz and Stern, 2009, 509). Echoing the desire for social ties, one Mai Mai soldier lamented how people only look at him as another “passing soldier,” where in his father’s village he was a “respected individual” (Kelly, 8). Indeed, existing far from one’s village as a transient combatant strips one of their individual identity. Deindividuation, the sociology and psychology term used to describe the state in which group members cease to be seen or acknowledged as individuals, has long been shown to increase the risk of anti-normative behaviour.[27]

[27] Leon Festinger first examined deindividuation in 1952 and labelled anonymity as the central antecedent to the ‘state of deindividuation’. Subsequent studies by Jerome Singer (1965) and Philip Zimbardo (1970) later showed that individuals demonstrated a propensity to behave more violently and aggressively in anonymous situations.

Recognizing the reality of lengthy posts, FARDC soldiers interviewed by Human Rights Watch in 2009 saw "the solution of their problems in barracks that house soldiers and their families and offer schools for their children" (2009, 44). One soldier states, "If we had military camps that are well-equipped, that would limit the vagabondage militaire (soldier's vagrancy)…my biggest concern is that I want to have my wife and children here. But, where would they live?" (HRW 2009, 44). As part of security sector reforms, it may be wise to ascertain the feasibility of erecting military barracks to house soldiers with their families. The physical arrangement in which soldiers live, however, is not the only aspect of their conditions needing immediate attention.

Like victims, soldiers require multi-sectoral programs for health, culturally-sensitive psychosocial support, and mechanisms through which they can reintegrate into society should they so choose. Soldiers' reference to war "destroying the minds of people", or the "civilian being beat out of them" resonates with generalized notions of psychological trauma occurring in conflict.[28] Because being respected and having the ability to 'provide' for themselves and their families are so revered among male soldiers, efforts to empower the men who hold 'powerful' positions (i.e. those who carry weapons) should be undertaken. First, soldiers report receiving little if any pay and do not have access to other income earning or educational/training means outside of the military structure (Eriksson Baaz and Stern 2009; HRW 2009; Kelly 2010). Second, complete immersion in military life alongside the absence of clear alternatives leaves nothing for soldiers to fall back on should they wish to demobilize

[28] Please see D. Summerfield (1999) A critique of seven assumptions behind psychological trauma programmes in war-affected areas, *Social Sciences and Medicine*, 48 (10) for a convincing critique of trauma thinking.

or defect from abhorrent commanders. Third, they also have little more to lose, socially, should they themselves engage in abhorrent activity.

Accordingly, non-state resource centres tailored specifically to the protection and empowerment of state soldiers and other militants who wish to demobilize could offer education and training for alternate employment opportunities, and healthcare (medical and psychological) geared toward successful reintegration. Funding for social workers or other social service providers who regularly engage soldiers with local communities may positively impact both civilians and soldiers more immediately than limited prosecutions by a well-intentioned, but un-influential, International Criminal Court.

6. CONCLUDING THOUGHTS

The scale and scope of rape in the Democratic Republic of Congo has not decreased despite the International Criminal Court's investigation in the country and the subsequent trials of three individuals at The Hague. In fact, instances of mass rape have proliferated in recent months. As such, this paper put the International Criminal Court's claimed deterrence faculty in the hot seat by challenging the theory itself and questioning the relevance of potential legal sanctions by a distant court for those actively perpetrating offences. In addition to other limitations inherent to international criminal law, a review of scholarly literature reveals that certainty, celerity and severity of punishment may not ever be achievable by the autonomous ICC. Not only is the Court tasked with investigating, charging and prosecuting the most serious crimes of concern to the international community, it must simultaneously do so for numerous countries. What's more, should the ICC effectively meet the aforementioned institutional requirements for deterrence effects, a number of factors challenge the rational actor assumption upon which the entire utilitarian premise rests. While deterrence, as a theory, proves to be logically compelling, a substantial review of literature and an assay of perpetrators' logic demonstrate that deterrence is in fact largely deficient when applied to the reality of sexualized violence in the Congo.

With regard to the presented case study of the Democratic Republic of Congo, while civilians are increasingly implicated, the majority of attacks are carried out by armed men in uniform. When asked about their experiences soldiers of the national army (*Forces Armees de la Republique Democratique du Congo* (FARDC))

and members of the organized Mai Mai militia largely normalize rape as a consequence of unmet sexual desires, poverty, frustration and anger. The circumstances giving rise to their actions are presented as explanations and excuses despite recognition that their behaviour is wrong, especially when rape is particularly violent. The manner in which perpetrators frame their decisions to engage in raping, or not, makes evident that they do employ logic, however, at the same time are not 'rational actors' engaged in utilitarian calculations necessary for deterrent effects. Indeed, soldiers' accounts trouble law's dependence on acts of sexual violence being viewed as a departure from acceptable norms, as "the discourses which designate the ''normal'' are revealed to be constitutive of the logics which underwrite perpetrators reasons for rape" (Eriksson Baaz and Stern 2009, 515). A look outside of the confines of law is therefore deemed necessary should soldiers be expected to refrain from this 'normal' effect of their circumstances.

A number of considerations arise that must be addressed insofar as the potential deterrent effect of the International Criminal Court is concerned. First, the ICC must be afforded time to establish its potential. Still in its infancy, the Court has yet to complete its first trial. It will likely take many years and numerous decisions before the preventive impact of the Court may be fairly measured. Second, there may well be a proxy effect of domestic judicial reform in countries like the DRC and a subsequent decline in the commission of crimes against humanity and war crimes as they are defined in the Rome Statute. Any appreciable drop in atrocity crimes cannot be attributed to the ICC alone, especially if legitimate domestic proceedings increasingly take on new crimes as they occur (for example, the expedited

proceedings against the New Years Day attackers in Fizi). A decline in heinous crime, by the ICC or in partnership, is a decline nonetheless. Ideally, states will be empowered by the ICC's involvement and will discharge their responsibilities under national laws to fight impunity and create a domestic preventive framework for the long-term protection of civilians. Regardless, in the short term it is apparent that in the DRC and other situation countries, the ICC must continue building its reputation and establishing its legitimacy as an apolitical institution of criminal law to be feared by would-be offenders.

With respect to the case at hand, if the urgent priority is to prevent sexualized violence (as opposed to ensuring perpetrators are held accountable after their actions), collaborative efforts must be made to further clarify what soldiers attribute as mediators of the violence. Where trends emerge, such as soldiers' perceived isolation and feelings of disempowerment, practical measures to remedy specific 'excuses' for rape should be applied and their impact empirically tracked over time.

Looking forward, researchers must continue to learn offenders' motivations for rape during conflict. A move from theoretical analysis to offender profiling will better advise legal interventions and policy development. Structured and semi-structured interviews with perpetrators across various cultural and conflict contexts will help to facilitate practical international frameworks and action platform development. Similarly, interviews with troops who have notoriously abstained from sexual violence throughout the course of enduring conflict, for example the Israel Defense Forces, are important as reference points. Understanding what mediating factors are at play at both the individual- and organizational levels for soldiers who

do *not* rape is integral to the prevention question. Of greatest interest would be an exploration of emerging trends: Do perpetrators in other conflict contexts and across armed groups identify poverty, anger, frustration, isolation and/or feelings of powerlessness as drivers for their propensity to rape? Is sexual violence a performative act of masculinity in conflict settings where gender roles in peacetime are less rigid? In addition to asking soldiers what contributes to outward acts of sexualized violence in their particular context, it could be instructive to probe degrees of risk aversion across different contexts. Finally, victim numbers from non-governmental organizations, government branches and health facilities must be brought together and centrally maintained to enable ongoing analyses of sexualized violence in the Congo and the emergence of deterrence trends (for example, an inverse relationship between arrests or prosecutions and reports of new sex crimes).

Given that rape does not occur in a vacuum, interdisciplinary studies that bring together law, the social sciences and healthcare will have greater influence for informed policy application on the ground. International human rights groups, law and governments must move beyond merely protecting vulnerable citizens, treating victims and ending the impunity of perpetrators; the time has come to get to the root of the problem. If there is a possibility that the prevention of sexualized violence during conflict will ever supersede the need for remedial measures, it is evident that the ICC, alone, will not be the intermediary to achieve this.

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