

Domestic war crimes trials: only for “others”? Bridging national and international criminal law

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In the context of most discussions around the potential of prosecutions to contribute to strengthening compliance with international humanitarian law, there is a common focus on the international level. This paper argues that national trials of a state’s own nationals can and should play a more important role in increasing compliance with international humanitarian law, but that common deceptive perceptions and a marked reluctance to bring war crimes charges against one’s own nationals have obstructed the realisation of the full potential of such proceedings.

I. Introduction

In the context of most discussions around the potential of criminal prosecutions to contribute to strengthening compliance with international humanitarian law, there is a common focus, both in the scholarly and advocacy literature, on the international level. The International Criminal Court (ICC) and other international tribunals have received particular attention. They are relatively young and certainly exciting institutions that have given rise to great expectations. Indeed, “global justice” for victims of war crimes, crimes against humanity and genocide is a widely used phrase,¹ with its realisation typically seen to be possible through international or internationalised tribunals.

This heavy focus on the international level can to some extent be explained by the relatively small numbers of cases that have arisen from purely national proceedings. As a matter of fact, there is little domestic jurisprudence on violations of international humanitarian law. However, given that international or internationalised trials will always be limited to a few cases, both for political and practical reasons – international trials are much more expensive

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¹ For a critical appraisal, see Sarah MH Nouwen and Wouter G Werner, ‘Foreword: Pursuing Global Justice through International Criminal Law’ (2014) *International Journal of Criminal Justice*.

than national ones – the majority of cases will have to be brought before national institutions, which constitute the “backbone of international criminal law enforcement”.²

In this sense, the international level is not a distinct sphere in which certain problems are resolved in an isolated manner. Rather, as this article argues, the recent international developments in the field of criminal justice are closely related to national developments and have influenced and will continue to influence national legal systems in various ways. This dynamic and multifaceted relationship between the international and national levels as well as their synergetic contribution to ending impunity and deterring further crimes is not fully understood. This article attempts to grasp this relationship and will argue that national trials of a state’s own nationals can and should play a more important role in increasing compliance with international humanitarian law, but that common deceptive perceptions and a marked reluctance to bring war crimes charges against one’s own nationals have obstructed the realisation of the full potential of such proceedings.

From a historical perspective, three sets of political circumstances that are conducive for domestic war crimes trials have been identified:³ first, important political transitions within states, as in the immediate aftermath of World War II in Germany; second, the exercise of immediate threat of international jurisdiction, as after World War I in Germany and Turkey; and third, serious violations of the laws of war by a state’s own nationals abroad. This article will focus on the latter and least analysed set of circumstances. Domestic trials of a state’s own nationals – or rather the lack of such trials – in the absence of major political transitions or potential international responses reveal two related phenomena: a prevailing, clear separation between national and international approaches with respect to dealing with international crimes as well as a profound characteristic of the nature of international humanitarian law and international criminal law, namely the “othering” that is created by and constitutive of these bodies of law.

It is useful to recall that the focus on criminal responsibility in the context of violations of international humanitarian law is a recent phenomenon. Although the Nuremberg and Tokyo tribunals that were established by the victorious Allies in the aftermath of World War II to try

² Robert Cryer et al, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, 3rd ed, 2014) 88.

³ This categorisation follows Tim McCormack, ‘*Their Atrocities and Our Misdemeanours: The Reticence of states to Try Their “Own Nationals” for International Crimes*’ in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity* (2003) 107, 108-110. See also Gerry Simpson, ‘*War Crimes: A Critical Introduction*’ in T. McCormack and G. Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 28.

German and Japanese war criminals may be considered the groundbreaking milestones for international criminal law,⁴ not a single genuinely international trial was held in the following decades. Moreover, few national trials were held, with the trial of the Nazi Adolf Eichmann in Jerusalem in the early 1960s being a notable exception. But international criminal law, and with it prosecutions for war crimes more generally, had to await its rebirth in the 1990s when the United Nations Security Council decided to react to the unfolding atrocities in the Balkans by establishing the International Criminal Tribunal for the Former Yugoslavia (ICTY). Soon after, in the face of the Rwandan genocide, the International Criminal Tribunal for Rwanda (ICTR) followed. These rapid developments that started with the establishment of these *ad hoc* tribunals and culminated in the entry into force of the Rome Statute of the ICC in 2002 were so exceptional that they have been described as an “accountability bubble”.⁵ While this international bubble may not be as big in the second decade of the 21st century as in the 1990s, it has certainly not blown up. The adoption of the Rome Statute did not only establish a new institution that has the potential to bring to justice at least some of those political and military leaders that are suspected to have committed war crimes but would otherwise appear to be beyond the reach of the criminal law; arguably even more important is the objective and real potential of the Rome Statute to incentivise all states to prosecute alleged perpetrators of the so-called core crimes under international law, namely genocide, crimes against humanity, war crimes and the crime of aggression.

In addition to this impact that the international level has on the national level, it should not be overlooked that international criminal law and the jurisprudence of international criminal tribunals have been influenced significantly by national criminal law traditions. The ICTY and the ICTR, for instance, have relied heavily on a comparative analysis of national law and national legal cultures to interpret and apply international criminal law.⁶ While international criminal law and its application can hence be considered, at least to some extent, a product of national legal systems, this product is clearly more than just an amalgam of national approaches and, in turn, affects national legislation and practice.

⁴ For the argument that international criminal law has multiple beginnings and has not developed in a linear fashion, see the contributions in Yuki Tanaka, Tim McCormack and Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Martinus Nijhoff, 2011).

⁵ L. Vinjamuri and A.P. Boesenecker, ‘Accountability and Peace Agreements: Mapping Trends from 1980 to 2006’ (Centre for Humanitarian Dialogue, 2007) <<http://www.hdcentre.org/files/Accountabilityreport.pdf>>, 27.

⁶ See e.g. Vladimir Tochilovsky, ‘Legal Systems and Cultures in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia’ in D Horst Fischer, Claus Kress and Sascha Rolf Lüder (eds), *International and National Prosecution of Crimes under International Law: Current Developments* (Arno Spitz, 2001) 627. An in-depth analysis is offered in Antonio Cassese and Mireille Delmas-Marty (eds), *Juridictions nationales et crimes internationaux* (Presses Universitaires de France, 2002).

II. “Global justice” – from the international to the national level

The adoption of the Rome Statute, while not comparable to a criminal code *per se*,⁷ has clarified and contributed to the development of an international obligation of states to investigate and prosecute genocide, crimes against humanity and war crimes. Few earlier treaties, including the 1949 Genocide Convention and Geneva Conventions, established such obligations. Furthermore, the Genocide Convention only requires those states where the genocide was committed to punish persons having committed genocide.⁸ As for the Geneva Conventions, the obligation to prosecute or extradite war criminals only relates to “grave breaches”. These include, as stated for instance in article 147 of the Fourth Geneva Convention, the “wilful killing, torture or inhuman treatment ... not justified by military necessity and carried out unlawfully and wantonly.”⁹ Another important limitation concerns the fact that initially this obligation could only arise in the context of international armed conflicts; situations of non-international armed conflicts, with their traditionally thinner layer of regulation by international humanitarian law, were not affected. Customary international law and, more recently, also treaty law has responded to some extent to this unequal situation, which is particularly untenable in a world where the majority of armed conflicts take place within states, and not between “High Contracting Parties” any more, and where states are clearly not the only international legal subjects any more (if they ever were). There is indeed a discernible trend that consists in harmonising the regime governing non-international armed conflicts with the more developed one governing international armed conflicts. As was noted by ICTY Judge Abi-Saab in the *Tadic* case, “a growing practice and *opinio juris* both of States and international organizations has established the principle of personal criminal responsibility for the acts figuring in the grave breaches articles as well as for the other serious violations of the *jus in bello*, even when they are committed in the course of an internal armed conflict.”¹⁰ The amendment of the Rome Statute at the Review Conference in 2010 that significantly extended the list of war crimes committed in the context of a non-international armed conflict can also be assessed in this light. In sum, although there is no

⁷ Antonio Cassese, *International Criminal Law* (Oxford University Press, 3rd ed, 2013) 5.

⁸ As article 6 states, “[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction. *Convention on the Prevention and Punishment of the Crime of Genocide*, art 6.

⁹ *Fourth Geneva Convention*, art 147.

¹⁰ *Prosecutor v. Tadic* (IT-95-1), Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Chapter IV.

specific treaty provision in this regard, it is increasingly recognised that war crimes committed in the context of non-international armed conflicts as well as crimes against humanity must be prosecuted under customary international law.

As mentioned above, despite the establishment of a number of international or internationalised criminal tribunals in recent years, including the ICTY, ICTR, ICC, the Special Court for Sierra Leone, the Special Panels of the Dili District Court in East Timor, and the Extraordinary Chambers in the Courts of Cambodia, the huge burden of investigating and prosecuting war crimes will always have to be carried by national justice systems. Among other reasons, international, and even internationalised, tribunals are considered too expensive – although their price tag may appear absurdly small when compared to the worldwide military expenditures – and are typically established to deal, in lengthy trials, with a few high-level perpetrators who are considered most responsible for the worst crimes. This means that “global justice” in this form is unlikely to reach directly the victims of lower-level and mid-level perpetrators. As a result, an important objective and legacy of international criminal justice institutions should be to spur national proceedings. As Payam Akhavan argues, “the ICC must resist the temptation of institutional self-perpetuation. Instead, its success should be measured in terms of a dialogue with, and empowerment of, national jurisdictions wherever this may be possible.”¹¹

Encouraging such empowerment of national criminal justice systems would be important, as states have traditionally been reluctant to prosecute violations of international humanitarian law, whether based on their national law or on international criminal law.¹² The relatively small number of convictions can also be explained by the fact that many national trials take place long after the crimes were committed, which creates additional challenges with respect to obtaining sufficient and reliable evidence. As a result, there is little case law, with the only recent noteworthy exceptions being the situations of large-scale conflict in the former Yugoslavia and Rwanda. In these situations, the international level, via the establishment of the ICTY and ICTR, instigated national prosecutions. Nevertheless, the observation that the “disparity between perpetration and prosecution is staggering”¹³ is unfortunately still as true today as more than a decade ago. The certainly remarkable developments in the field of

¹¹ Payam Akhavan, ‘The Rise, and Fall, and Rise, of International Criminal Justice’ (2013) 11 *Journal of International Criminal Justice* 527, 532.

¹² See generally W N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press, 2006).

¹³ McCormack, above n 3, 108.

criminal law at the international level have not yet altered underlying assumptions and resulting practices. As will be explored in more detail below, the insight that “we” – and not only “they” – can also commit war crimes, at least potentially, does not seem to have been fully internalised.¹⁴

III. A gap between international law and national approaches

Current legislative models

The direct application of customary international law in criminal matters does not seem to be a workable option for states.¹⁵ Instead, many states have enacted specific legislation in recent years to be able to prosecute alleged war criminals. This is particularly noteworthy as the 1949 Geneva Conventions and Additional Protocol I do not require states to adopt specific legislative provisions. Nevertheless, there is an increasing trend in this regard, which can, once again, be related to the adoption of the Rome Statute in 1998 and its entry into force in 2002.

States have adopted different legislative models, which can be classified in three categories. Some states have chosen to provide a generic reference to specific treaties or to the “laws and customs of war” in their legislation. The Canadian *War Crimes and Crimes Against Humanity Act*, adopted in 2000, is an example of this approach. Other states have adopted specific provisions in their own national legislation, with the most prominent example being Germany’s *Völkerstrafgesetzbuch* (“international criminal code”). Australia followed a similar approach in the course of its implementation of the Rome Statute and enacted the *International Criminal Court (Consequential Amendments) Act 2002 (Cth)* to amend the Criminal Code and incorporate war crimes, crimes against humanity and genocide. Finally, and somewhat surprisingly given the important developments on the international level, many states, including France, Austria, Israel and Turkey,¹⁶ still rely on existing offences under their ordinary military law or criminal law to prosecute what could also constitute war crimes in international law.

¹⁴ For this language, see *ibid* 140. As McCormack argues, “[t]rials of those fellow nationals who are representative of the predominant ‘us’ will always be more difficult to prosecute.” *Ibid* 141.

¹⁵ Helmut Kreicker, ‘Die Rezeption des Völkerstrafrechts durch nationale Rechtsordnungen: Rechtsvergleichende Bestandsaufnahme und kritische Bewertung’ (2004) <https://www.mpicc.de/files/pdf1/natstraf_vortrag_istanbull.pdf>, 8.

¹⁶ For a succinct comparative analysis, see Knut Dörmann and Robin Geiß, ‘The Implementation of Grave Breaches Into Domestic Legal Orders’ (2009) 7(4) *Journal of International Criminal Justice* 703, 713-14.

A hesitant prosecutorial practice

The stance of states vis-à-vis war crimes is even more palpable when it comes to their actual prosecutorial practice. As a matter of fact, and independently from the legislative model followed, it is common state practice to charge alleged war criminals – in particular in the case of a state’s own nationals – with ordinary crimes, and not with the more specific war crimes charges. The practice of the United States is particularly consistent and telling in this regard. By way of example, the trials concerning the My Lai massacre of hundreds of civilians during the Vietnam War only involved domestic, and not international, crimes. The trials were also held separately to avoid creating parallels with the war crimes trials in Nuremberg and to contain suggestions that Washington had pursued a policy comparable to the Nazi regime.¹⁷ In the end, only Lieutenant William Calley was convicted. It may serve as an additional illustration of the application of different standards in this context that Calley, although sentenced initially to hard labour for the rest of his life for his involvement in the massacre, ended up serving only three and a half years under house arrest.¹⁸ Much more recently, but quite similarly, US soldiers who were convicted for crimes committed in the Iraqi Abu Ghraib prison were not charged with war crimes. In fact, no US soldier has ever been charged under the 1996 *War Crimes Act*,¹⁹ which is in line with the guidance contained in the *US Manual for Courts Martial*, according to which charges under the Uniform Code of Military Justice are to be preferred over war crimes.²⁰

By the same token, an Australian case concerning the killing of Afghan civilians in 2009, the *Re Civilian Casualty Court Martial* case brought under the Australian *Defence Force Discipline Act 1982*, did not involve war crimes charges but “manslaughter by negligence”,²¹ and in a recent Canadian case, *R v Semrau*,²² a Captain was convicted in 2010 of “having

¹⁷ Matthew Lippman, ‘War Crimes: The My Lai Massacre and the Vietnam War’ (1993) 1 *San Diego Justice Journal* 309, 315.

¹⁸ For more information on this trial, see *ibid* 318-329.

¹⁹ For more information, see Thomas W Pittman and Matthew Heaphy, ‘Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court (2008) 21(1) *Leiden Journal of International Law* 165, 174.

²⁰ “Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.” *Manual for Courts-Martial United States (2012 Edition)*, Rule 307(c)(2), Discussion (D), <http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf>.

²¹ For more information on the case, see Joshua Kelly, ‘*Re Civilian Casualty Court Material: Prosecuting Breaches of International Humanitarian Law Using the Australian Military Justice System*’ (2013) 37(2) *Melbourne University Law Review* 342.

²² *R v Semrau* (2010) CM 4010. Captain Semrau was subsequently dismissed from the army and apparently went on to do private security work in northern Iraq. Oliver Mooke, ‘Former Canadian Army Officer Accused of Murder Speaks Out’, *The Globe and Mail* (online), 04 September 2012

behaved in a disgraceful manner” for what, at least *prima facie*, resembled a mercy killing of an Afghan who was *hors de combat*. It is worth recalling that specific war crimes legislation would have been available in both cases. To be clear, it is not presumed here that the respective members of the armed forces in these cases did commit war crimes and should have been convicted for war crimes, or that the ICC should have become involved; rather, it is argued that the appropriate charges would have been war crimes.

This fairly widespread practice to bring cases rather as disciplinary matters and to charge soldiers with “undisciplined” or “disgraceful behaviour” or with the civilian crime of “manslaughter”, instead of “war crimes”, merits further attention. It may be argued that the type of charge is irrelevant as long as proper criminal investigations and prosecutions are carried out. “Global justice” may be achievable through various means, with war crimes trials not being the only one. As mentioned above, according to an orthodox understanding of international humanitarian law, no specific legislation must be adopted if an effective sanction exists in the ordinary criminal law.²³ Knut Dörmann and Robin Geiß of the International Committee of the Red Cross write that “life-imprisonment for the act of murder as an ordinary crime would appear to be as effective a penal sanction as a life-time imprisonment for a wilful killing in the sense of Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, Article 130 of the Third Geneva Convention and Article 147 of the Fourth Geneva Convention.”²⁴ Following this logic, it can be argued that if specific war crimes legislation exists, there can be no international obligation to apply it, in other words to bring specific war crimes charges instead of using the ordinary criminal law. From a practitioner’s perspective, bringing charges by using the better-known ordinary offences, such as murder and manslaughter, might also facilitate the task of national prosecutors, judges and defence counsels who may be less familiar with the presumably more “exotic” war crimes provisions derived from international law.

However, such a policy that privileges the “ordinary” approach rooted in the national law over the more specific international law-based approach has several shortcomings. First of all, and in line with classical Kantian and Hegelian ideas of retributivist justice,²⁵ the injustice and specific meaning of war crimes can hardly be captured by reference to ordinary criminal

<<http://www.theglobeandmail.com/news/national/former-canadian-army-officer-accused-of-murder-speaks-out/article4518314/>>.

²³ Kreicker, above n 15, 5.

²⁴ Dörmann and Geiß, above n 16, 707-708.

²⁵ For an overview, see Michael Tonry (ed), *Why Punish? How Much?* (Oxford University Press, 2011), 8-11.

law. This is the very reason why specific terms describing particularly wrongful conduct under international law, such as “war crimes”, “grave breaches”, “crimes against humanity” and “genocide”, have been invented. These concepts carry particular stigma and have important symbolic functions.²⁶ Moreover, they are, following the language of the preamble of the Rome Statute, automatically a concern of the international community as a whole. While not breaching any international obligations *per se*, states that rely on their ordinary criminal law do undermine the spirit and objectives of international criminal law. Using ordinary criminal law provisions to judge acts of belligerents has therefore been considered to be “artificial”, as Brennan J noted in *Polyukhovich v Commonwealth*.²⁷ In the same vein, the International Law Commission advised in its Commentary on the Draft Statute for an International Criminal Court in 1994 that the *non bis in idem* prohibition “should not apply where the crime dealt with by the earlier court lacked in its definition or application those elements of international concerns, as reflected in the elements of general international law or applicable treaties, which are the basis for the international criminal court having jurisdiction”.²⁸ The International Law Commission hence suggested that the ordinary criminal law may lack specific elements, and that someone convicted of murder or manslaughter, for instance, may be tried again for genocide, war crimes or crimes against humanity. In short, a conviction under the ordinary criminal law is not equivalent to a conviction for an international crime.

Furthermore, and in a more technical sense, the nexus to the armed conflict is lost and several salient principles governing armed conflict cannot apply if ordinary charges are brought instead of war crimes charges. By way of example, the fundamental international humanitarian law concepts of “combatants” and “protected persons” do not exist in ordinary criminal law and can therefore not play any role. This carries the risk of punishing individuals who have complied with international humanitarian law and should therefore not be punished. It might indeed be easier to defend oneself against appropriately brought war crimes charges – consider the example of the perfectly legal killing of an enemy combatant or the necessary and proportional killing of a civilian – than the equivalent charge of murder or manslaughter under ordinary criminal law. Finally, not all war crimes have an equivalent in

²⁶ For the “expressive capacity of international punishment”, see Robert D Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National law Analogy and the Potential of International Criminal Law’ (2007) 43 *Stanford Journal of International Law* 39.

²⁷ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 543.

²⁸ *Report of the International Law Commission on the work of its forty-sixth session*, UN GAOR, 49th sess, Supp No 10, UN Doc A/49/10 (2 May-22 July 1994), Draft Statute for an International Criminal Court, art 42, Commentary (6).

the ordinary criminal law, which means that some forms of conduct that have clearly been criminalised under international law would go unpunished without specific war crimes charges. Examples include compelling a prisoner of war to serve in enemy forces and the improper use of the distinctive emblems of the Geneva Conventions.²⁹

Orientalist beliefs

By not adopting specific legislation, such as the Canadian *War Crimes and Crimes Against Humanity Act*, or by not using such legislation in proceedings against their own nationals, Western states follow a common and apparently well-entrenched orientalist-tainted³⁰ belief: certain forms of atrocities that have been given specific names in international law can only be committed by “others” in some remote place far away. This “othering” builds on a long tradition in international law, and in particular international humanitarian law, with the figure of the “other” arguably being constitutive of our contemporary laws of war. In the words of Frédéric Mégret, “it is their dark alter ego, the ‘uncivilized’, ‘barbarian’, ‘savage’ from which the laws [of war] seek to distance themselves.”³¹ And yet, as Antony Anghie maintains, “[w]ars against the ‘uncivilized’ inevitably require the use of uncivilized methods and this tends to have the effect of corrupting the self-identified civilized as well.”³² It appears, moreover, highly ironic that international humanitarian law was originally conceived for “civilised nations”; now, the language of war crimes seems to be reserved for the “barbarians”. These underlying dynamics that characterise the nature of international humanitarian law and international criminal law reveal the urgent necessity of a consistent and self-critical application of these bodies of law, which is why the framing of crimes in the context of armed conflicts, in particular when committed by a state’s own nationals, matters.

These well-entrenched orientalist beliefs only seem to be changing slowly. However, the developments within and impact of international law account for certain changes. The rich discussions around the different cases brought in the United Kingdom for the death of the Iraqi detainee Baha Mousa are an insightful example. For many commentators, the death of Baha Mousa could neither be a common crime nor a war crime but constituted a “breach of discipline”, which was explained by the “difficult conditions under which UK soldiers were

²⁹ See e.g. articles 8(2)(a)(v) and 8(2)(b)(vii) of the Rome Statute.

³⁰ See generally Edward Said, *Orientalism* (Penguin, 1977).

³¹ Frédéric Mégret, ‘From “Savages” to “Unlawful Combatants”’: A Postcolonial Look at International Humanitarian Law’s “Other” in Anne Orford (ed), *International Law and its Others* (Cambridge University Press, 2006) 265, 267.

³² Antony Anghie, ‘On Critique and the Other’ in Anne Orford (ed), *International Law and its Others* (Cambridge University Press, 2006) 389, 399.

operating.”³³ The military was mostly concerned with the possibility that allegations of torture and inhumane treatment affect the reputation and operational effectiveness of the armed forces. As Gerry Simpson points out with respect to the language employed in the court-martial proceedings, “Mousa and his fellow victims are consigned to the margins; their terrible suffering over 36 hours in Basra becomes an ‘unlawful conditioning process’.”³⁴ Furthermore, the announcement that British soldiers would be charged with war crimes was met with huge criticism in the UK.³⁵ Simpson concludes that “[t]he critics of the Basra investigations are responding to a (legitimate) sense that war crimes law, in its broadest sense, is associated with mass criminality. ... there is an assumption underlying the *Rome Statute* that war crimes law is to be concerned with bureaucratically directed or state-controlled acts of large-scale political criminality.”³⁶ While this may be true for proceedings before the ICC, it is not necessarily the case that domestic war crimes proceedings are and should only be concerned with mass criminality. To the contrary, as it will be argued in more detail below, prosecuting even relatively isolated war crimes *as war crimes* can not only advance the goals of “global justice” but also help breaking with the well-entrenched and dangerous “us” versus “them” dichotomy in international humanitarian law and international criminal law.

In sum, as it is argued here, the benefits of adopting specific legislation and of bringing war crimes charges, when appropriate, clearly outweigh the costs. Updating national legislation, training judges, prosecutors and defence lawyers to make them aware of and consider the added value of international humanitarian law and international criminal law will contribute to bridging the national with the international level and has the potential to strengthen compliance with international humanitarian law.

IV. Why prosecute? Functions of individual criminal responsibility for serious violations of international humanitarian law

Armed conflicts are arguably idiosyncratic situations that eschew the rationale behind the functioning of criminal law in ordinary, peaceful societies. International criminal law, as

³³ For an overview of such arguments, see Gerry Simpson, ‘The Death of Baha Mousa’ (2007) 8(2) *Melbourne Journal of International Law* 340, 347-348.

³⁴ *Ibid* 348 [footnote omitted].

³⁵ *Ibid* 350-51.

³⁶ *Ibid* 351.

opposed to national criminal law, does not only attempt to serve multiple communities; international crimes also take place within a different normative universe.³⁷ As Hannah Arendt already asked pointedly in the context of her efforts to theorise what she called the “banality of evil” generated during the Third Reich, “[c]an we apply the same principle that is applied to a governmental apparatus in which crime and violence are exceptions and borderline cases to a political order in which crime is legal and the rule?”³⁸ In the same way, most war criminals must be considered a particular type of criminals, and insights on specific and general deterrence stemming from the general literature on criminology are only useful to a limited extent. At the same time, it must be recalled that not all war criminals fall into the same category, and it would be erroneous to try to apply the same logic and standards to all war criminals. As Robert D. Sloane has argued, not all war criminals embody “a single psychosocial profile, say, that of the paranoid automaton, inculcated with hatred and psychologically conditioned to act as he does by propaganda, social pressure, primordial cultural influences, and so forth.”³⁹

The scope of this article can of course not do justice to the numerous and complex functions of prosecutions. Nevertheless, two main streams of consequentialist arguments, in addition to a Kantian categorical imperative that requires proportional punishment, in favour of holding individuals criminally accountable for serious violations of international humanitarian law can be identified. These streams will be analysed in light of the potential of national approaches and the ways in which the existing gap between the national and the international levels can be bridged.

Restraining potential war criminals

The first argument is based on the fundamental assumption that the threat of criminal sanctions for breaching the laws of war enhances compliance with this body of law. According to this reasoning, particular individuals, whether high-ranking political and military decision-makers or low-ranking soldiers, will be more concerned about the legality of their actions if, in addition to state responsibility, these actions may be also be scrutinized through the lens of the criminal law. Not only knowledge of the applicable law is hence required and matters here; the actor in question must also be aware of the fact that breaching the applicable law might lead to him or her being prosecuted. The likelihood of such

³⁷ Sloane, above n 26, 41.

³⁸ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 1963), 291-292.

³⁹ Sloane, above n 26, 73.

prosecutions is obviously significant. It is the awareness – even in the middle of the so-called “fog of war” – of the respective actor that certain actions might lead to criminal prosecutions that determines whether such prosecutions remain a purely abstract threat or come into play in the context of the actual conduct of hostilities.

From a military perspective, credible threats of prosecutions as well as actual prosecutions can contribute to maintaining discipline within the armed forces and also increase compliance with international humanitarian law. For Australian members of the Defence Forces, for instance, the possibility of individual criminal responsibility for their actions in the context of the involvement of the Defence Forces in United Nations peacekeeping operations as well as in place like Afghanistan and Iraq adds another layer of accountability. Australian soldiers might care about Australia’s responsibility, as a state, for its internationally wrongful conduct; concern about an individual’s own future, however, may strike deeper and more directly. This concern might also be amplified by the fact that a “breach of discipline” might constitute and be framed as a “war crime”.

This reasoning assumes that the respective individuals are sensible actors that make their decisions based on a rationally pursued cost-benefit analysis. As Payam Akhavan argues, “[l]eaders may be desperate, erratic, or even psychotic, but incitement to ethnic violence is usually aimed at the acquisition and sustained exercise of power.”⁴⁰ The point here is that war criminals, or potential war criminals, are to be considered rational actors who also take into account the threat of criminal prosecutions and their possible incapacitation through the criminal law.

However, emotions, of which such rationally behaving individuals are supposed to abstract themselves, play an important role, particularly in the context of armed conflict. Political and military leaders might not only seek to acquire or sustain their exercise of power; waging a war, especially an ethno-political one, goes to the very heart of both an individual’s and a community’s feelings. The general deficiencies of the deterrence model in a national criminal law context are hence amplified in times of war. Armed conflicts are unusual situations. As Leslie P. Francis and John G. Francis have argued by relying on John Rawls’ theory of justice, the situations for which international criminal institutions have been established can be described as partial compliance contexts, where people “lack basic assurances of

⁴⁰ Payam Akhavan, ‘Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities’ (2001) (95(1) *American Journal of International Law* 7, 12.

stability.”⁴¹ It is because of the unusual circumstances of such situations arising from armed conflict that prosecutions, or the threat of prosecutions, may be less effective in preventing further crimes than in an ordinary national context.⁴²

The role of emotions is significant but underestimated and understudied in the legal literature, which still tends to construct legal subjects as rational actors whose behaviour can be influenced more or less directly by the so-called rule of law. The extent to which international humanitarian law has been and is violated in some situations – the Balkans, Darfur, Syria, to name just a few – illustrates that rational rule of law principles that apply in ideal contexts do not necessarily apply in circumstances of severe injustice.⁴³ Moreover, the facts that even presumably well-trained members of western armies mistreat and torture detainees and suffer themselves in large numbers from post-traumatic stress disorders⁴⁴ indicate that armed conflicts cannot be perceived as a purely, or largely, rational matter. This brings us to the conclusion that due to its fundamental attempt to *reason* individuals, international criminal law, including its application by national institutions, is necessarily of limited reach. Despite every possible effort to make members of the armed forces internalise the laws of armed conflict and the threat of criminal sanctions, we may have to accept that at least in some circumstances, these rules deeply rooted in reason and rationality must remain abstract and inconsequential.

In addition to relatively abstract notions of general deterrence, the question is whether criminal prosecutions, or threat of criminal prosecutions, may have an immediate impact on the conduct of the hostilities itself. In other words, can the involvement of institutions like the ICC in specific situations increase compliance with international humanitarian law in the context of ongoing armed conflicts?⁴⁵ It has been argued that “[s]igmatizing delinquent leaders through indictment, as well as apprehension and prosecution, undermines their

⁴¹ Leslie P Francis and John G Francis, ‘International Criminal Courts, the Rule of Law, and the Prevention of Harm: Building Justice in Times of Injustice’ in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (Cambridge University Press, 2010) 58, 65.

⁴² For these arguments, see Deirdre Golash, ‘The Justification of Punishment in the International Context’ in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (Cambridge University Press, 2010) 201, 202.

⁴³ This language draws on Francis and Francis, above n 41, 64.

⁴⁴ See e.g. Karen H. Seal et al, ‘Bringing the War Back Home: Mental Health Disorders Amongst 103,788 US veterans returning from Iraq and Afghanistan Seen at Department of Veterans Affairs Facilities’ (2007) 167 *JAMA Internal Medicine* 476.

⁴⁵ I have tried to find some answers to these difficult questions in ‘The ICC in Darfur – Savior or Spoiler?’ (2007) 14:1 *ILSA Journal of International and Comparative Law* 145 and in ‘Armed Conflicts and the International Criminal Court: From Elusive Outcomes to Process-Related Commitments’ (2014) 12(3) *Journal of International Criminal Justice* 471.

influence.”⁴⁶ This would mean that criminal leaders who are responsible for ordering or not preventing war crimes can be weakened by the initiation of criminal proceedings against them. Such a perceived impact – or its potential – is obviously hard to assess. It might therefore be misleading to conclude that it is prosecutions, or the threat of prosecutions, that make the decisive difference. In the context of northern Uganda, for instance, it has been argued that the issuance of arrest warrants by the ICC against the leaders of the Lord’s Resistance Army both thwarted all efforts to negotiate with them *and* brought them to the negotiating table, that the warrants both made the Lord’s Resistance Army act more cautiously *and* provoked further massacres of civilians.⁴⁷

Moreover, although non-international armed conflicts have by far outnumbered the more traditional international armed conflicts and produce the majority of victims, for these conflicts international humanitarian law, and as a corollary also international criminal law, is still less developed. Moreover, the application itself of this body of law might be disputed since states are often reluctant to acknowledge that an armed conflict in the sense of the Geneva Conventions and Additional Protocol II is actually taking place on their territory. Another important limitation of war crimes prosecutions is that not all violations of international humanitarian law are also war crimes, which means that other means must complement this approach to ensure that international humanitarian law is respected entirely.

Nevertheless, the risk of criminal prosecutions has become a reality for all political and military leaders involved in armed conflicts, whether international or non-international in character, in particular since the establishment of the ICC. Due to its permanent nature, the ICC has the potential to shift the delivery of post-conflict justice, which all other international and internationalised tribunals have primarily been concerned with, towards during-conflict justice. The Court has a novel capacity to contribute to more restraint by holding high-level offenders accountable of their decisions. Since more than two thirds of all states have become parties to its statute, the ICC also has great legitimacy; and since the Security Council may refer to the ICC Prosecutor any situation that it deems to be a threat to international peace and security in line with Chapter VII of the Charter of the United Nations, the threat of a trial before the ICC – and possibly outright incapacitation following a conviction – is truly a global one.

⁴⁶ Akhavan, above n 40, 7.

⁴⁷ For an overview of some of these arguments, see Philipp Kastner, *International Criminal Justice in bello? The ICC between Law and Politics in Darfur and Northern Uganda* (Martinus Nijhoff, 2011) 77-85.

In other words, the ICC, as well as other international and also national tribunals, may influence the dynamics of an ongoing armed conflict significantly and may hence contribute to increasing compliance with international humanitarian law. This impact may be greater with respect to preventing the *outbreak* of violence, or its resumption in post-conflict situations, than with respect to halting atrocities that have already started.⁴⁸ This is an important *caveat*. The real or potential involvement of criminal justice institutions in the context of ongoing armed conflicts has indeed generated exaggerated and often illusory expectations with respect to ending a conflict or reducing violations of international humanitarian law and international human rights law.⁴⁹ Having such immediate political effects is not part of the mandate of criminal justice institutions, and such effects should neither be expected nor be the reason for referring situations to the ICC Prosecutor or for creating international, internationalised or special national tribunals.

Eliminating safe havens

Ensuring that there are no safe havens for war criminals is another important function that can be attributed to criminal prosecutions for serious violations of international humanitarian law. Focussing rather on the mid- to long-term impact, instead of immediate effects, that criminal sanctions may have, this concern lies at the heart of a common discourse that has emerged since the 1990s and that consists in declaring a global “fight” against impunity. Although these global efforts to eliminate safe havens for war criminals is altogether a recent phenomenon, precursors to the current practice can be found in legislation adopted in the aftermath of World War II. Australia, for instance, adopted the *War Crimes Act 1945 (Cth)* to prevent war criminals from immigrating to Australia and finding a safe haven there. However, the legislation remained largely symbolic for several decades and had little impact in practice,⁵⁰ which illustrates the oftentimes only formal and rather rhetorical, but not actual, commitment to bring war criminals to justice.

⁴⁸ For this argument, see Akhavan, above n 40, 10.

⁴⁹ It is now firmly established that international human rights law also applies in the context of armed conflict. For an in-depth discussion of the relationship between international human rights law and international humanitarian law, see René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002).

⁵⁰ For Australia’s tradition as a “sanctuary” for war criminals, see Mark Aarons, *War Criminals Welcome: Australia, A Sanctuary for Fugitive War Criminals since 1945* (Black, 2001).

An important feature in this “fight” against impunity is the increasing expansion of the principle of universal jurisdiction, according to which any state may prosecute non-nationals for genocide, crimes against humanity and war crimes, even if the crimes have been committed abroad against foreign nationals. Transcending the traditional jurisdictional links of nationality and territoriality in these situations is warranted since such crimes are automatically a concern to the international community as a whole. Every state should hence contribute to fighting impunity and to eliminating safe havens for war criminals.

Universal jurisdiction gained much attention in the late 1990s with the extradition proceedings in the United Kingdom of General Augusto Pinochet that were initiated by Spain. It appears, however, that the trend to apply the principle broadly, as illustrated by the initially extensive Belgian law of universal jurisdiction that was adopted in 1993, has yielded to a narrower application. The Belgian law, after a number of controversial attempts had been made to indict various foreign political figures, was amended in 2003 to provide *inter alia* that the accused must be a Belgian resident.⁵¹

It is the Rwandan genocide and the mass atrocities committed in the Balkans that have given rise to several cases brought under the principle of universal jurisdiction in Europe and North America. By way of example, several Rwandan nationals have been convicted for genocide, crimes against humanity and war crimes in Belgium, Canada, Finland, and Germany. These cases confirm and reinforce the feeling that is, it seems, increasingly shared in host countries, namely that war criminals are not to be welcomed but should rather be prosecuted. Such cases may not only satisfy the perceived need of the host society to provide justice and convince itself of its “clean hands”; they may also provide some form of justice for the victims. The world has become smaller due to modern means of transportation and communication. With large diaspora communities, decisions like the *Butare Four*⁵² in Belgium and *Désiré Munyaneza*⁵³ in Canada will not remain unnoticed amongst the community that is immediately most concerned, even if the crimes in question were committed far away. Another consequentialist argument is that a consistent application of the universality principle will contribute to the overall effort of deterring the perpetration of future crimes. If potential criminals know that it will be increasingly difficult for them to find

⁵¹ For an overview of these developments, see Steven R. Ratner, ‘Belgium’s War Crimes Statute: A Postmortem’ (2003) 97 *American Journal of International Law* 888.

⁵² For an analysis of this case, see Luc Reydam, ‘Belgium’s First Application of Universal Jurisdiction: The *Butare Four* Case’ (2003) 2 *Journal of International Criminal Justice* 428.

⁵³ *R v Munyaneza* (2009) QCCS 2201.

a safe haven, the threat of criminal prosecutions simply becomes more credible and may hence weigh more in the individual cost-benefit analysis.

It should be recalled that the criminal law is not the only avenue to prevent alleged war criminals from travelling to and becoming residents of other states. In addition to the 1951 Refugee Convention, which prevents perpetrators of international crimes from obtaining refugee status,⁵⁴ many states have adopted legislation that allows them to deny temporary or permanent resident status when the applicant has allegedly committed an international crime.⁵⁵ Such an approach may be problematic for several reasons. Among others, from a criminal justice perspective, the standard of proof in such administrative proceedings is much lower than the threshold required for a criminal conviction and is typically equivalent to or lower than a balance of probabilities.⁵⁶ Moreover, while applying international criminal law to some extent in the proceedings, the tribunals deciding immigration and refugees cases have a different rationale. The primary underlying objective in such proceedings is obviously not to punish war criminals *per se* but to ensure that such alleged war criminals will not be able to obtain permanent, or even temporary, resident status. While such immigration laws may hence be seen as contributing to the fight against impunity, potential war criminals may be even less deterred by these measures than by the threat of genuine criminal prosecutions. Furthermore, using immigration laws in this context does not correspond to the declared objective of most states that consists in fighting impunity for serious violations of international humanitarian law. This avenue can, at best, be considered an indirect tool and may, in some cases, even contribute to perpetuating impunity; an alleged war criminal might not be tried in his or her current state of residence for lack of resources or political will, and an already convicted war criminal would in most instances not be able to travel to another state. Instead of refusing visas because there are grounds to believe that the applicant is an alleged war criminal, the more consistent avenue would thus be to initiate proper criminal investigations and to prosecute any alleged war criminal that the state in question can get hold of. In light of the significant resources and particular expertise that such trials require, it is, however, unlikely that states will become more active sponsors in this fight against

⁵⁴ *Convention relating to the Status of Refugees*, art 1F(a).

⁵⁵ For a comparative summary of the jurisprudence in Canada, Australia, New Zealand, the United Kingdom and the United States, see Joseph Rikhof, 'War Criminals Not Welcome; How Common Law Countries Approach the Phenomenon of International Crimes in the Immigration and Refugee Context' (2009) *International Journal of Refugee Law* 453.

⁵⁶ *Ibid* 502.

impunity but will rather prefer to apply a character test to prevent “undesirable” persons from becoming residents.

V. Conclusion

The more and more frequent use of criminal justice institutions to deal with serious violations of international humanitarian law reflects an increasingly shared commitment within the international community to address impunity for serious crimes. This development can be seen as being part of a process that Gerry Simpson has called the “juridification” of war.⁵⁷ International criminal law, above all in its embodiment in the ICC, has become an inevitable part of the discourse in the context of armed conflicts and now constitutes an ever more solid framework, even and precisely in the challenging times of armed conflict. This momentum should be seized to further bridge the national and the international levels.

Holding violators of international humanitarian law criminally accountable for their actions has significant potential. This statement can be read both in a descriptive and in a normative mode: descriptively, the recent practice of international, internationalised and national criminal justice institutions has shown that prosecutions can make a difference; normatively, it is, generally speaking, desirable that criminals be brought to justice, among others because war crimes trials can help stabilise situations and contribute to preventing future crimes. However, the deterrent effect of prosecutions, in particular their possible impact on ongoing armed conflicts, is not easily assessable. Armed conflicts are complex and idiosyncratic situations, and it may be impossible to establish with certainty any causal links by singling out one specific factor. Such conflicts challenge profoundly the very idea of the rule of law, although it is precisely in such situations that law and legal certainty would be most needed. Armed conflicts also reveal the limits of an inherently rationality-based approach that must encounter difficulties in the face of actions that are often, at least in part, driven by emotions. Much depends on the normalising potential of law in this context, which is a matter of degree. Members of armies that are well-trained – not only militarily but also with respect to the laws of war – can generally be expected to have internalised the rules of international humanitarian law. In this context, the threat of criminal prosecutions both at the national and the international level for serious violations of international humanitarian law may be

⁵⁷ Gerry J. Simpson, *Law, War & Crime: War Crimes, Trials and the Reinvention of International Law* (Polity Press, 2007) 132-157.

expected to have an important deterrent effect. It is salient that exceptions to such expectable compliance are dealt with effectively by bringing appropriate war crimes charges. Such exceptions do and will unfortunately still occur, since no state is immune from the possibility that its nationals commit war crimes – consider that the crimes committed in Abu Ghraib were committed by supposedly well-trained members of the armed forces of the United States. Such exceptions to the habitual compliance with international humanitarian law by the nationals of certain states are challenging and must be taken seriously.

The even bigger question is how the international community can possibly deal with situations of mass atrocities that bring to light the very dark sides of humanity, what the philosopher Hannah Arendt has described as “radical evil”. As argued above, criminal justice institutions, whether national, internationalised or international ones, are unlikely to halt the perpetration of international crimes but may rather contribute to preventing the outbreak of violence in the first place. It is indeed difficult to conceive that referring situations to the ICC will stop mass crimes in Darfur or Syria, as it is sometimes argued. However, establishing and using such institutions can be expected to contribute to preventing future violations. This impact is admittedly hard to measure and will only materialise over time. Sometimes the language of international crimes and the particular stigma that the international community attaches to “genocide”, “crimes against humanity”, “war crimes” and “aggression”, will raise awareness internationally and send a signal that “we” care about “others”. In this sense, it may not always be the prosecutions themselves of alleged war criminals that contribute to increasing compliance with international humanitarian law, but rather the fact that the language of international criminal law may trigger other actions. Some recent developments are evocative here. The 2005 Security Council referral of the situation in Darfur to the ICC Prosecutor did not lead to additional measures by the Security Council. In fact, it may be argued that the referral rather contributed to a further disengagement by the Security Council, which presumably shifted part of the burden to take action in Darfur to the ICC. The reaction, or rather lack of reaction, to the half-yearly briefings by the ICC Prosecutor to the Security Council about the investigations in Darfur did not alter the situation but confirmed the view that the Security Council had considered the Court a politically convenient tool when it referred the situation to the ICC Prosecutor and that it did not have a genuine interest to pursue and support the fight against impunity in Darfur. The fact that the second Prosecutor of the International Criminal Court, Fatou Bensouda, declared in December 2014 that she would put on hold the investigations in Darfur because of the little progress that had been

made due to Sudan's lack of cooperation and the Security Council's "lack of foresight of what should happen in Darfur",⁵⁸ and that she called for a "dramatic shift" in the Security Council's approach⁵⁹ in the face of the continuous perpetration of international crimes, indicates that the ICC may start to assume a more active role in reminding political authorities, above all the Security Council and states parties to the Rome Statute referring situations to the Prosecutor, of the primary mandate and objectives of the ICC.

Finally, structural factors, inequalities and historical injustices that may lay the groundwork for the perpetration of serious crimes must be considered. This should not be pursued to the detriment of individual criminal responsibility: without doubt, not everybody would commit war crimes in a given situation. However, it is salient to consider the context and the root causes of the perpetration of war crimes. In addition to complex ethno-political conflicts, where killing members of another ethnic group may amount to "normal" behaviour, structural factors must also be considered in the context of the abovementioned "exceptions" to the habitual compliance with international humanitarian law by members of the armed forces of western states. There is the *individualisable* responsibility of the direct perpetrator and possibly his or her superiors, but there are also structural factors – the training and selection process of soldiers, stress management, entrenched perceptions of the "enemy" and his or her "othering" – that must be addressed. Prosecutions can only be one part of more comprehensive solutions; otherwise they risk becoming facile answers that do not genuinely address more substantial problems.

It is important to keep in mind both the victims and the alleged perpetrators are, above all, human beings. Nobody is born or just turns into a ruthless war criminal or génocidaire by himself or herself, in isolation of the larger social circumstances. We must therefore avoid dehumanising alleged war criminals and put them into glass cages, like dangerous animals, as literally illustrated in the case of Adolf Eichmann's trial in Jerusalem in 1961. Unfortunately, the dominant discourse is all but constructive in this regard. The theatrical language of the Prosecutor of the Special Court for Sierra Leone in his opening statement in the first trial before the Special Court in 2004 is particularly noteworthy and worth quoting at length:

The long dark shadows of war are retreating. The pain, agony, the destruction and the uncertainty are fading. The light of truth, the fresh breeze of justice

⁵⁸ International Criminal Court, Office of the Prosecutor, 'Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)' (12 December 2014), <<http://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf>>.

⁵⁹ Ibid.

moves freely about this beaten and broken land. The rule of the law marches out of the camps of the downtrodden onward under the banners of ‘never again’ and ‘no more’. ... The law has returned to Sierra Leone... Mankind has stepped back from the brink of chaos several times in the past 59 years. In 1945, civilization gasped in horror at its capacity to cause suffering. Again in the early 1990's, reacting to the horrors of Rwanda and Yugoslavia, the world joined in a further step away from the abyss and now in West Africa, in Sierra Leone, another bold and noble step has been taken away from the grim jaws of the beast. The Special Court for Sierra Leone, a hybrid international war crimes tribunal, gives a new century, indeed a new millennia [sic] the chance to face down that beast of impunity.⁶⁰

This all too common discourse that consists in “bringing justice” to exotic, “barbaric” places artificially and deceptively creates and maintains boundaries between “us” and “them”. This not only simplifies and distorts reality but goes against the very idea of a global community that embodies a shared humanity. We should strive to break with the idea that ugly things happen only far away, in “other” places, committed by “others” and to “others”. Getting serious about prosecuting our own nationals appropriately and self-critically can only help.

⁶⁰ Special Court for Sierra Leone, ‘Opening Statement of David M. Crane in the International Criminal Trial for Crimes against Humanity, War Crimes and Other Serious Violations of International Humanitarian Law’ (SCSL-03-14-1) (3 June 2004), <<http://www.rscsl.org/Documents/Press/OTP/prosecutor-openingstatement060304.pdf>>.