From Moral Rhetoric to Critical Analysis

An Evaluative Model for the ICC’s Contribution to Deterrence:

the Lubanga Case

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‘In the interests of justice and to deter other would-be recruiters in the DRC, the child recruiters must be brought to justice, in accordance with international legal standards that have been developed to counter the culture of impunity surrounding child recruitment.’

Amnesty International, 2003
**Acknowledgements**

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<tr>
<td>CAR</td>
<td>Central African Republic</td>
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<tr>
<td>CNDP</td>
<td>Le Congrès National pour la Défense du Peuple</td>
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<tr>
<td>CONADER</td>
<td>Commission Nationale de Désarmement, Démobilisation et Réinsertion</td>
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<tr>
<td>DDR</td>
<td>Disarmament Demobilization and Reintegration</td>
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<tr>
<td>DDRRR</td>
<td>Disarmament, Demobilisation, Repatriation, Reintegration, and Resettlement</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<tr>
<td>ECCC</td>
<td>Extraordinary Chambers in the Courts of Cambodia</td>
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<tr>
<td>FARDC</td>
<td>Forces Armées de la République Démocratique du Congo</td>
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<td>FDLR</td>
<td>Forces Démocratiques de Libération du Rwanda</td>
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<td>FNI</td>
<td>Front des Nationalistes et Intégrationnistes</td>
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<td>FPLC</td>
<td>Forces Patriotiques pour la Libération du Congo</td>
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<td>FRPI</td>
<td>Forces de Résistance Patriotique d’Ituri</td>
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<td>GIAT</td>
<td>Global and Inclusive Agreement on the Transition in the DRC</td>
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<td>HRW</td>
<td>Human Rights Watch</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICTJ</td>
<td>International Center for Transitional Justice</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for former Yugoslavia</td>
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<tr>
<td>IWPR</td>
<td>Institute for War &amp; Peace Reporting</td>
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<tr>
<td>MDRP</td>
<td>Multi-Country Demobilization and Reintegration Program</td>
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<td>MONUSCO</td>
<td>United Nations Organization Stabilization Mission in the DRC</td>
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<td>RPF</td>
<td>Rwandan Patriotic Front</td>
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<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<td>SDHC</td>
<td>Special Division of the High Court</td>
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<td>SSR</td>
<td>Security Sector Reform</td>
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<td>STL</td>
<td>Special Tribunal for Lebanon</td>
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<tr>
<td>TDRP</td>
<td>Transitional Demobilization and Reintegration Program</td>
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<td>UPC</td>
<td>Union des Patriotes Congolais</td>
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<td>UPDF</td>
<td>Uganda People’s Defence Force</td>
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<td>OSJI</td>
<td>Open Society Justice Initiative</td>
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<td>OtP</td>
<td>Office of the Prosecutor</td>
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<tr>
<td>PARSEC</td>
<td>Projet D’appui à la Reinsertion Socio-économique Post Conflict</td>
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<tr>
<td>PNDDR</td>
<td>Programme National de Désarmement, Démobilisation et Réinsertion</td>
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Introduction

The International Criminal Court and Deterrence: an Abundance of Claims

Within an already wide varied pallet of peace-building instruments, international criminal prosecution by the International Criminal Court (henceforth ‘ICC’ or ‘Court’) is increasingly claimed to contribute to constraining conflict and building peace.¹ In line with this, the threat of international prosecution is increasingly considered as a means to pressure leaders to put an end to hostilities as was recently seen in Libya and Côte d’Ivoire. Inherent to this faith that the ICC can contribute to peace and security, is the belief in the deterrent effect of (the threat of) international prosecution. This is underlined by the preambles of the Rome Statute: ‘[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’² and contribute to peace, security and the well-being of the world.³ Yet, it is exactly this correlation between on the one hand international prosecution and on the other deterrence in terms of a decrease in – or even cessation of – the prevalence of atrocities that is largely based on assumptions. Within the international criminal justice paradigm, the deterrence claim is often either simply declared⁴ or rejected short of credible empirical or theoretical scrutiny.⁵

The assumptions of the deterrent effect of international prosecution lead the ‘ICC supporters’ to consider international prosecution as a positive development an sich, whereas ‘ICC critics’ point to demonstrated negative backlashes of ICC prosecution arguing that it is likely to do more harm than good. Despite the heated debates, efforts to actually evaluate the Court’s contribution to the deterrent effect remain scarce.⁶ In fact, surprisingly – or perhaps more shockingly


³ Preambular clause of the Rome Statute (n 2): “Recognizing that such grave crimes threaten the peace, security and well-being of the world”.


⁶ J. Alexander, ‘The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact’ (2009) 54 Villanova Law Review 1, 32. Recently, efforts are being undertaken by The Grotius Centre for
— little analysis of the deterrent effect is to be found in ICC documents that could justify its claimed preventative working. The fact that this prevalent – at times almost blind, yet criticised – faith in the deterrent effect of international criminal prosecutions is upheld amidst the scarcity of well-grounded insights is a reason for concern. It is particularly problematic because it is not only used as an argument to justify ICC prosecution, but it also provides the basis for many policies7 and underlies the development of judicial assistance programmes ultimately aimed to protect civilians. This amounts to a situation in which these interventions, which affect the lives of so many, are grounded in uncertainty. Thus, the prevailing uncertainty and under-exploration of the deterrent claim and associated (policy) developments make it of utmost importance to further investigate and better understand the validity of these claims. As with any international intervention in local contexts, well-informed efforts ought to be taken in order to optimise effectiveness, to constrain negative backlashes and do as little harm as possible.

The scarcity of empirical evidence able to justify these claims of correlation leads one to wonder what the actual effects of ICC prosecution are and whether the practice of international prosecution truly attains the intended goal(s). This thesis is a reaction to calls for an increase in studies investigating the relationship between ICC prosecution and deterrence.8 More specifically, I set out to gain insight into the assumed and claimed correlation between deterrence and the actual impact of ICC prosecution on the ground on ‘those most responsible’ (ie. political, military and militia leaders). In order to evaluate this relationship, I will examine the only case before the ICC that is close to completion: the Thomas Lubanga Dyilo case.9 Lubanga is the alleged founder and leader of one of the larger Congolese militias active in North-eastern Democratic Republic of Congo (hereafter DRC or ‘Congo’) and charged with one specific crime: enlisting, conscripting and using child soldiers.

**Measuring the Relationship between ICC Prosecution and Deterrence**

The ICC leaves its goals vague and a specific time-span or criteria of achievement undefined. Given the permanent nature of the Court, this is hardly surprising since it would otherwise be interpreted as too deterministic and setting its own finish-line. Nevertheless, this makes the goal to help end impunity and prevent future crimes difficult to operationalise and thus difficult to measure.

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7 For instance, the deterrent argument is often used to counter the application of conditional amnesties for serious crimes. This has arguably left peace negotiators without a valuable tool to secure peace and a restricted space in which to conduct political negotiations. As such, threats of prosecution may then actually deter perpetrators from peace negotiations and prolong the fighting thereby generating more casualties. See, L. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (Transnational Publishers, 2002), 66; D. Dukic, “Transitional Justice and the International Criminal Court – in “the interests of justice”?” (2007) *89 International Review of the Red Cross* 867, 694.


9 According to its Preambular clauses, the Rome Statute focuses on ‘those most responsible’ which it considers to be those in leadership positions.

10 The case commenced in January 2009 and the oral closing statements are expected on 25 and 26 August of this year (2011). See, *The Prosecutor vs. Thomas Lubanga Dyilo* (Public Order on the Timetable for Closing Submissions) Trial Chamber I ICC-01/04-01/06 (12 April 2011).
Aside from the vagueness of the goal, the incredible complex realities on the ground make it very difficult to objectively measure the deterrent effect of international prosecution as an independent variable. Obvious dependent variables to measure the relation would be a change in behaviour and the number of children in armed groups before and after the trial. However, in the context of ongoing conflict, the vast abundance of factors shaping conflict dynamics could all easily influence behaviour as well as fluctuations in the amount of children in armed groups and forces. The large assortment of interfering variables makes it close to impossible to single out whether prosecution, as an independent variable, has an effect on behaviour or on the number of children in armed groups.

More fundamentally even, is the question whether a deterrent effect can ever be objectively measured. Essentially, deterrence is aimed at preventing recidivism (specific deterrence) or minimising the amount of first time offenders (general deterrence). Deterrence is thus future oriented and it is close to impossible to objectively measure something that has not come into existence. As so eloquently put by William Schabas: ‘While we can readily point to those who are not deterred, it is nearly impossible to identify those who are’, although it may appear logical to counter this statement by saying that all those not being prosecuted have thus apparently been deterred, this would be based on a faulty reasoning for it need not necessarily be prosecution that motivated individuals to refrain from criminal acts. Prosecutor Luis Moreno-Ocampo’s suggested measurement of the ‘absence of trials’ is therefore not an adequate one to solely measure the success of the Court.

Acknowledging the measurement difficulties, efforts can nevertheless be undertaken to identify key factors of prosecution that are important for deterring criminal behaviour. In fact, the relationship has been widely theorised about dating back to renowned scholars such as Jeremy Bentham and has been studied and heavily debated at the national level in established domestic systems. By applying these theories and studies to the international level and the ICC, they can help develop a framework that will facilitate the evaluation of the assumed deterrent effect of ICC prosecution. Applying this framework to the Lubanga case may then generate insights into the potential of ICC prosecution to deter leaders from enlisting, conscripting and using child soldiers.

**Research Question and Approach**

The main question to be addressed by this research is:

*How can the contribution of the International Criminal Court to deter political, military and militia leaders from conscripting, enlisting and using child soldiers be evaluated?*

In order to answer the question, I will develop a basic evaluative framework about prosecution and deterrence (chapter one), and apply the factors identified in the framework to international criminal

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11 For instance in terms of instructions by leaders to release children from armed forces or groups.

12 Once one can think of the myriads of factors such as stabilisation efforts, advocacy campaigns, cycles of violence, or demographic figures such as birth and fatality rates.


prosecution (specifically ICC prosecution) in order to refine it in line with the particularities of the international level and situations of violent conflict (chapter two). I will then specifically apply the framework to the *Lubanga* case in order to evaluate the ICC’s contribution to deter militia leaders from conscripting, enlisting and using child soldiers (chapter three). Based on the findings generated by the aforementioned applications, the goal is to produce recommendations that may enhance the deterrent potential of ICC prosecution (conclusion).

The approach taken is an interdisciplinary one; partly legal and partly non-legal. Though ICC prosecution can be approached as a sec legal issue, evaluating the deterrent effect of the Court is simply not just a legal undertaking. Deterrence as such is largely determined by issues of criminology, psychology and sociology. Deterrence in an international setting also involves issues of international politics and conflict studies. The thesis will thus be substantiated by an interdisciplinary literature review drawing from scholarly works of the aforementioned fields combined with case law and legal conventions.

As with any study and theoretical framework, the quality of it depends on the extent to which the framework’s premises accurately reflect the real developments on the ground. As such, aside from the *Lubanga* case, I will also refer to other situations before the Court and *ad hoc* tribunals (although marginally), and draw from the effects of international prosecution observed on the ground. For these observations, I will use sources such as field research conducted by other researchers, NGO reports, newspaper articles and, where feasible, interviews with experts (both practitioners and academics).

This thesis should be considered as an initial attempt to discuss an evaluative framework of deterrence and the ICC. The interdisciplinary nature of this desk-study, notorious difficulties in researching deterrence, the restricted timeframe, and the limited scope of the thesis will inevitably demand some generalisations. Unfortunately, but unavoidably, some issues and debates cannot be considered as in-depth as would do justice to their complexities and nuances. This is especially the case regarding analyses of the Congolese context.
1. Prosecution and Deterrence: a Basic Evaluative Framework

1.1 Deterrence Theory

Essentially, deterrence is aimed at preventing crimes based on the fear of the consequences of engaging in criminal behaviour. The deterrence theory is typically classified in one of the more general schools of thought within criminology; the classical school which builds upon principles of free will and the rational considerations of individuals. In this line of reasoning, human beings commit (specific) crime(s) when they consider it to be beneficial, and refrain from crimes when they are thought to be too costly. Thus, individuals must be convinced that the likely costs (i.e. punishment through prosecution) of their actions (i.e. crime) will be sufficiently certain, swift, and severe enough to outweigh the expected benefits. According to the deterrence theory, individuals will refrain from engaging in criminal action if the likelihood of the materialisation of the costs outweighs the expected benefits of crime.

The certainty is dependent on the likelihood of actually being apprehended for the crime. The swiftness refers to how quick punishment follows the commission of the crime, and the severity is determined by the intensity (nature and level) of the punishment. Hence, the common argument of deterrence rests on the assumption that ‘if criminal behaviour is consistently met with swift and strong enough punishment, it will tilt the balance to non-criminal behaviour’ and thereby compliance with the law. This all furthermore requires the individual to have knowledge of the legal norm and corresponding punishment; a fourth factor by which punishment is thought to influence criminal behaviour. The latter requires the legislator to formulate the legal norm in a manner that is understandable to the norm addressees as well as to undertake efforts to make the norm known to its addressees.

There are a number of different kinds of deterrence, with the main type being general deterrence. General deterrence is the broadest kind and occurs when an individual who has not yet engaged in crime refrains from doing so. As such, the punishment is not so much inflicted from the idea that the perpetrator deserves it, but rather from a more utilitarian perspective that it will reduce crime. A sub-kind of this general deterrence is deterrence via indirect experience. This implies

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16 Assuming that human beings are rational actors, the deterrence theory also pays attention to the importance of certain crimes to individuals. The reasoning is that specific crimes bring specific benefits to potential offenders. As such, the nature of the offence is thought to impact the calculation of the individual. R. Clarke and D. Cornish, ‘Rational Choice’ in R. Paternoster and R. Bachman (eds), Explaining Criminals and Crime (Roxbury Publishing Company, 2001), 25. As is apparent from the introduction, this research focuses on enlisting, conscripting and using child soldiers as a crime.
17 Clarke and Cornish (n 16)
20 Utilitarianism in relation to punishment was purported by Jeremy Bentham who believed that people are subjected to, and governed by, pain and pleasure. This ‘subjection’ is recognized by the principle of utility which approves or disapproves every action dependent on whether it increase or decreases the happiness of the party in question. Hence, punishment can only be imposed when it produces happiness and benefit for society or prevents the occurrence of evil. Jeremy Bentham (1789) in Paternoster and Bachmann (n 18), 11.
that an individual will engage in crime if he knows that someone else has not been punished for it\textsuperscript{21} or otherwise has sufficient opportunity to do so.\textsuperscript{22} This adds yet another factor to the equation: knowledge of consistent rule enforcement.

After a number of national empirical studies of the deterrence theory,\textsuperscript{23} findings showed a much weaker correlation between criminal prosecution and deterrence than was initially theorised. Firstly, the threshold of credibility, implying that the threat of prosecution must be meaningful to potential criminals, was found to affect the deterrent effect. The individual must be convinced that the threat of prosecution will be acted upon and materialise. Secondly, it was found that the – what had always been thought to be objective – factors of certainty, swiftness, and severity are partly subjectively shaped: they must also be perceived to be convincing enough.\textsuperscript{24} This subjective assessment depends on the personal characteristics of the individual such as: ‘their values, background, personal circumstances, mental capacity, position\textsuperscript{25} and previous experiences (with the law) all affect their reasoning and behaviour.’\textsuperscript{26}

It thus appears that in the end, in order for prosecution to have any kind of deterrent effect, the norm addressees must perceive and accept the entirety of it all – the prosecuting entity and its procedures as well as the governing body of law – as authoritative; or legitimate. In the end, the seven identified factors all contribute to the legitimacy of prosecution in one way or another.

\subsection{1.2 Rational Actors}

The belief in the rationality of human beings held by the deterrence theories has not been left void of critique. A fundamental point of criticism goes to the heart of the theory and questions whether human beings are, in fact, rational beings. Without delving into this debate, the most relevant point of criticism to consider for present purposes, and which will be done in the subsequent chapter, is that the rational choice theory largely disregards structural factors such as the broader social and political contexts\textsuperscript{27} and social influences that shape the criminalised behaviour. Where the rational choice theory suggests that individuals decide to commit crimes in isolation, its critics argue that individuals’ decision to engage or refrain from criminal behaviour is shaped by interaction with their (social) environment and their conduct conforms to those around them.\textsuperscript{28} This becomes especially pressing when examining criminal behaviour that materialises in the realm of armed conflict; a politically volatile and socially disruptive context.

\subsection{1.3 A Basic Evaluative Framework}

This chapter has revealed the fundamental factors of the theory underlying the deterrent argument used to justify prosecution. According to the deterrence theory, rationality is a base element that

\begin{itemize}
\item\textsuperscript{21} Paternoster and Bachman (n 18), 5.
\item\textsuperscript{22} I. Piliavin, R. Gartner, C. Thornton and R. Matsueda, ‘Crime, Deterrence and Rational Choice’ 51 \textit{American Sociological Review} 1, 103.
\item\textsuperscript{23} For instance, Gibbs (1975) and Nagin (1978) in Paternoster and Bachmann (n 18), 16.
\item\textsuperscript{24} Paternoster and Bachmann (n 18), 17; Major M. Smidt, ‘The International Criminal Court: An Effective Means of Deterrence?’ (2001) 167 \textit{Military Law Review}; 167: Ku and Nzelibe (n 5), 789.
\item\textsuperscript{26} Piliavin, Gartner, Thornton and Matsueda (n 22), 115
\item\textsuperscript{27} Clarke and Cornish (n 16), 37-38.
\end{itemize}
must be present for prosecution to have an affect on criminal behaviour. Furthermore, this chapter has identified the following key factors of prosecution that are important for deterring criminal behaviour: the certainty of apprehension, the swiftness of punishment, the severity of the punishment, knowledge of the legal norm and corresponding punishment, knowledge of consistent rule enforcement, the credibility of the threat of prosecution, and the subjective assessment of the threat of prosecution and punishment. Visualised, this gives rise to figure 1 depicted below.

Figure 1: Key Factors of Prosecution that are Important for Deterring Criminal Behaviour
2. ICC Prosecution and Deterrence: an Evaluative Framework

It is striking that hardly any attention was paid to past and ongoing debates about deterrence and punishment during the drafting of the Rome Statute.\(^29\) This leads one to believe that the founders of the ICC must have drawn on the disputed deterrent working of national criminal law and prosecution, whereas – aside from uncertainties at the national level – this may be entirely different on the international level. In this chapter, I will apply the factors identified in the preceding chapter to the international level, the situations of violent conflict, and the workings of the ICC.

2.1 International Criminal Justice and the ICC’s Approach

The crimes that fall within the jurisdiction of the Court are considered to be so heinous that they ‘deeply shock the conscience of humanity’\(^30\) and are thereby offences against the world community,\(^31\) rendering equal applicability of the law to all individuals.\(^32\) This places the Court at the heart of the international criminal justice paradigm that has developed since Nuremberg at the end of the Second World War and has given rise to the \textit{ad hoc} tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) as well as various hybrid courts and tribunals.\(^33\) This paradigm views the crimes against humanity, war crimes, and genocide as universal norms in need of investigation, prosecution and punishment against individuals by an international institution.\(^34\) The aims and strategies of the Court are thereby grounded in a constitutionalist conception of the international legal order that is envisioned to be composed of a global constituency made up of states and non-state actors. This constituency is then committed to a universal normative framework which contains fundamental, or ‘constitutional’ shared common values.\(^35\)

The international criminal justice rhetoric and discourse that gives expression to, and advances this universal normative framework installs international prosecution with a high level of ambition that promises to transform societies affected by conflict. To illustrate: it was believed that the establishment of the ICTY by the Security Council ‘would contribute to the restoration and maintenance of peace’.\(^36\) A similar task was envisioned for the ICTR and the Special Court for Sierra Leone (SCSL) and was even complemented by a belief that prosecution would ‘contribute to the process of national reconciliation’.\(^37\) Like the ICC, both \textit{ad hoc} tribunals were established with a widespread belief that prosecution of ‘violations of international humanitarian law will contribute to


\(^30\) Preambulular clause of the Rome Statute (n 2)

\(^31\) This appears to make the international community a constituency of the Court.

\(^32\) Rodio (n 19), 10.

\(^33\) For instance the Special Court of Sierra Leone (SCSL), the Special Tribunal for Lebanon (STL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC).


\(^37\) UNSC Res 955 (8 November 1994) UN Doc S/RES/955. UNSC Res 1315 (14 August 2000) UN Doc S/RES/1315 establishing the SCSL recognises in its preambles that ‘[…] in the particular circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace’.
ensuring that such violations are halted and effectively redressed’. In the words of Rosemary Byrne: ‘modesty was never a restraining force on the projected role these Courts were supposed to play in the broader political order.

Due to the material jurisdiction of the Court and its permanent nature, prosecutorial interventions often take place in a context of ongoing (non-)international armed conflict. This adds extra dimensions to the relation between ICC prosecution and its contribution to deterring leaders, for these situations are inherently complex and highly politically unstable. They thereby not only generate many more variables that could influence the relationship, but that could also negatively affect the intended impartiality and legitimacy of the Court. Notwithstanding this, the Prosecutor has claimed on many occasions to operate separate from politics and in an impartial manner; unblemished by ‘political bargaining, immunity of political superiors, or the non-justiciability of political questions’.

Within this claimed impartial and universalist approach, the Court thus aims to deter criminal behaviour through effective prosecution and punishment of those most responsible (ie. political, military and militia leaders) and thereby convince (future) perpetrators to refrain from or stop engaging in criminal acts. As a Court of last resort, the ICC envisages this prosecution to first of all be ensured through measures taken at the national level and by enhancing international cooperation. When national institutions are ‘unable or unwilling’ to conduct genuine investigations – they need not actually proceed to prosecute – into the crimes that fall under the ICC’s temporal and material jurisdiction, the Court’s jurisdiction will be triggered.

2.2 Applying the Evaluative Framework

2.2.1 Rational Actors: Calculating in Times of War

As noted earlier, the most relevant point of criticism of the rational actor theory to consider for present purposes is that it largely disregards structural factors such as the broader social and political contexts that shape criminalised behaviour. The volatile and disruptive nature of mass violence gives

38 UNSC Res 827 (n 36); UNSC Res 955 (n 37).
39 Byrne (n 5), 486. Rosemary Byrne is the Director of the Centre for Post-Conflict Justice at Trinity College Dublin.
40 See, for instance the conflict situations in Darfur, the situation in Uganda (arguably relative peace has come to Northern Uganda, but the hunt for the LRA continues on Congolese soil), the situation in DRC, the situation in the Central African Republic, and the recent situation in Libyan Arab Jamahiriya. These are five out of the six situations currently before the Court.
41 The Prosecutor has stated: “I apply the law without political considerations. But the other actors have to adjust to the law” L. Moreno-Ocampo (Keynote address for Council on Foreign Relations, 4 February 2010) <www.cfr.org/content/MorenoOcampo.CFR.2.4.2010.pdf> accessed 22 May 2011. Also: “I am putting a legal limit to the politicians. That’s my job. I police the borderline and say, if you cross this you’re no longer on the political side, you are on the criminal side. I am the border patrol.” L. Moreno-Ocampo in S. Nouwen and W. Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan.’ (2011) 21 The European Journal of International Law, 962.
42 S. Nouwen and W. Werner (n 41), 941-942.
43 Preambulary clause of the Rome Statute (n 2): “[...] effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”
44 Art 1 and 17(1)(a) of the Rome Statute (n 2)
45 The ICC has jurisdiction over crimes that fall within the scope of the Rome Statute (n 2): articles 6 (genocide), 7 (crimes against humanity), 8 (war crimes) of the Rome Statute since 2002; the date that the Rome Statute entered into force (art. 11).
rise to a significantly different context in which actors behave differently in comparison to ‘ordinary’ criminals in national contexts. 46

Perpetrators of grave international crimes operate in a context characterised by societal breakdown in which it is not uncommon for violence to be the norm and the concentration of the use of force to be scattered. In contrast, perpetrators of grave national crimes generally engage in criminal behaviour in a more stable context where violence is the exception to the rule and the use of force typically monopolised by the state. In the context of mass violence, morality thus seems to be reversed amidst an abundance of opportunities to resort to crime. In situations where individuals perceive and experience criminal activity to be widespread (ie. conflict situations), individuals have been found to be more likely to commit crimes themselves 47 and violence has been considered to constitute norm conforming behaviour. 48 In fact, fighting may become a legitimate way to defend one’s group or advance the group’s interests and contribute to enhancing the perpetrator’s status. It is not uncommon for participants in international crimes to believe in the righteousness, or at least necessity, of their violent behaviour whereby it becomes justified. 49 Alternatively, those not conforming to violent norms may constitute the minority and even be subjected to violent reprisals or punishment by the state or other armed forces thus driving them to commit crimes out of fear of their own safety. 50 These circumstances affect the (moral) choices made by individuals to such an extent that is it highly questionable whether these can still be compared to choices made in more peaceful, stable situations. 51 The meaning of behaviour is thus distinctly contextual and thereby complex. If the goal of international prosecution is to influence peoples’ decision-making so as to have a deterrent affect, then it is important to be aware of the contextual complexities and understand what drives people to engage in international criminal acts.

Research into the individuals responsible for grave violations has almost universally found that these acts were engaged in by ordinary people unaffected by psychiatric disorders 52 that would exclude their criminal responsibility. 53 Aside from suspicions regarding the sanity of Rudolf Hess, deputy leader of Adolf Hitler’s German National Socialist Party, no international court or tribunal has declared a suspect to be insane 54 suggesting that perpetrators of mass violence can indeed operate in a rational manner. They are often ordinary people who find themselves in extraordinary

47 Kahan (n 28), 350; Tallgren (n 25), 575; Drumbl 2003 (n 19), 268.
50 Legally speaking, this could qualify as a situation of duress which would exclude the individual in question of his/her criminal responsibility. Art 31(d) of the Rome Statute (n 2).
51 Tallgren (n 25), 573; Drumbl 2003 (n 19), 268-269.
52 Smeulers (n 49), 234.
53 Art. 31(1)(a) of the Rome Statute (n 2) excludes from criminal responsibility the individual who: “suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law”.
54 Statement by G. Sluiter, Professor of International Criminal Law, Faculty of Law, University of Amsterdam (Personal communication 14 July 2011).
circumstances and who commit crimes out of obedience or (false) justifications rather than deviant behaviour.\textsuperscript{57}

Notwithstanding trials of ‘ordinary’ perpetrators,\textsuperscript{58} international criminal trials generally focus on those holding leadership positions, or in the ICC’s case: those most responsible. Having done extensive research on international perpetrators, Alette Smeulers has identified four overarching types of offenders. In one of the categories she identifies the devoted warrior; committed soldiers ready to submit to authority, and the fanatic who are largely driven by ideology.\textsuperscript{59} A second category consists of the conformists, the followers and the compromised perpetrators, with the latter being forced to commit crimes.\textsuperscript{60} The remaining two categories are applicable to political, military and militia leaders. Smeulers also identifies the profiteer, the careerist, and the criminal/sadist. The common denominator binding these offenders is that they are lead by greed or the benefit of the situation as it presents itself. These offenders are most likely to also engage in criminal acts in times of peace.\textsuperscript{61} Most relevant to this thesis however, is the criminal mastermind who is usually a Head of State or head of a specific organisation. This offender is characterized as “ruthless, harsh, cruel and merciless,”\textsuperscript{62} and in pursuit of power and control.

The presence of rationality appears to increase with each category with the criminal mastermind (ie. political, military and militia leaders) being the most rational and the compromised perpetrator the least rational. Smeulers’ research thereby sufficiently substantiates the assumption that political, military and militia leaders do show some rational behaviour largely driven by prospects of economic gain and power. This suggests that leader behaviour could, theoretically, be affected by (the threat of) international prosecution if the latter is able to tilt the cost-benefit scale so that the costs outweigh the benefits connected to the crime (ie. the benefits of using child soldiers). It is exactly this latter condition that is challenged by the havoc of violent conflict.

Though it is not beyond the bounds of credibility to assume that the perpetrators that may fall in Smeulers’ latter two categories will engage in strategic and rational deliberations, it is another thing to assume that the prospects of international prosecution will penetrate these deliberations to the extent that they will result in the refraining of engagement in criminal behaviour. The immediate needs of warfare may demand other calculations that give more weight to costs of war (eg. loss of life, loss of strategic battles, losing access to mineral rich areas, loss of power and wealth) than to the costs of prosecution. Also, it is likely that the degree of influence of prospects of prosecution – if

\textsuperscript{55} The famous Milgram experiment studied obedience and examined conditions that affect it. Unaware of the real topic of the experiment, the subjects were asked to function as ‘teachers’ who would apply electric shocks upon a ‘learner’ whenever (s)he gave a wrong answer to a question. With each time that a wrong answer was given by the learner, the teacher was instructed to give a stronger shock. As the shocks grew stronger, the learner started complaining saying that he no longer wanted to continue with the experiment, that he had heart problems and showed that he was in extreme pain (no actual shocks were given; the ‘learners’ were actors instructed to act as if they were being shocked). Most teachers showed signs of great distress saying that they did not want to continue because they were hurting an innocent person. The experimenter then urged them on pointing out the significance of the experiment, taking all the responsibility and ensuring the teacher that the learner would suffer no permanent tissue damage. The results of the experiment were shocking: 65% of the teachers were prepared to give the learner a shock of 460 Volt when the experimenter urged them. See, S. Milgram, \textit{Obedience to Authority: an Experimental View} (Perennial Classics, 2004).

\textsuperscript{56} Tanner (n 49)


\textsuperscript{58} See, for example, \textit{Tadic Case} (Judgment) ICTY-94-1 (26 January 2000).

\textsuperscript{59} Smeulers (n 49), 244.

\textsuperscript{60} Smeulers (n 49), 254-258

\textsuperscript{61} Smeulers (n 49), 247-251.

\textsuperscript{62} Smeulers (n 49): 244.

\textsuperscript{63} See also, Drumbl 2004-2005 (n 34).
present at all – will differ in the various types and stages of the respective conflict. In early stages of violent insurgencies or phases characterized by an increase in the intensity of fighting and frequency of clashes, prospects of prosecution will arguably be subordinated to more pressing military and strategic deliberations. Additionally, decision-making may be more difficult to influence in conflicts where fighting is perceived to be ‘just’ by the perpetrators (a case in point are national wars of liberation) and in situations where prosecution and the ICC will not be considered legitimate.

2.2.2 The Certainty of Apprehension: Cooperation and Enforcement Problems

The ICC does not have a police or military force to its availability and thus operates without enforcement forces. This makes the Court highly dependent on state cooperation for executing arrest warrants, access to evidence, relocation of witnesses, and enforcement of sentences. The duty – and exceptions – for states to cooperate is regulated by the Rome Statute. However, in line with fundamental principles state sovereignty and equality and basic principles of treaty law such as the *pacta tertii nec nocent nec prosum* principle, the Rome Statute in principle only binds 144 States Parties to the Statute. The remaining 49 non-party states can only be bound by Security Council resolutions by virtue of their United Nations (UN) membership and obligations under the UN Charter.

Despite the legal provisions subjecting both party and non-party states to cooperation obligations, the Court suffers from significant cooperation and enforcement problems. The problem of cooperation effectively comes down to the Court’s dependence on states that – for whatever reason – are, broadly speaking, either unwilling to cooperate or states that are unable to cooperate (or possibly both).

The level of state cooperation provided to the Court could depend on the manner in which the situation came before the Court. Although the term ‘self-referral’ may lead one to believe otherwise, self-referrals are not necessarily the result of genuine conviction acted upon by states. They may perhaps more so be the result of international pressure, the political utility of having certain suspects indicted (eg. Jean-Pierre Bemba), or the desire to gain a favourable image and credit on the international diplomatic stage. Seeing that such political interests and dynamics are

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64 Keller (n 10), 42-43; Statement by P. Clark, Lecturer in Comparative and International Politics and Research Associate, School of Oriental and African Studies, University of London (Personal communication 12 July 2011).
65 See, Arts. 103-109 of the Rome Statute (n 2).
70 Although formally Bemba’s indictment is the result on investigations pursuant to a self-referral by the Central African Republic (CAR), his arrest has drawn a lot of critique due to his prominent place in Congolese politics. Bemba – one of the four former Vice-Presidents in the 2002 – 2006 Transition Government – was one of Kabila’s fiercest political opponents in the 2006 Presidential elections. Duthie and Specht (n 8), 4.
71 Reportedly, President Yoweri Museveni used the Court to label the LRA as a political enemy so that it could frame its sustained military operations as fighting impunity and thereby creating a favourable image for the Ugandan government. See, Nouwen and Werner (n 41), 962; Rodio (n 19), 11; Ku and Nzelibe (n 5), 818, 826; 781, 823; Clark 2008 (n 69), 40-43.
susceptible to rapid changes, so would the level of cooperation of the self-referring states be. Notwithstanding these annotations, it is safe to assume that, generally speaking, self-referring states – whatever their (covert) incentives – are likely to at least be more cooperative than states whose situations have been referred to by the Security Council (eg. Darfur) or which are the result of proprio motu investigations (eg. Kenya\(^{72}\)).

When reviewing the situations surrounding the suspects who are sought by the Court yet remain at large, the unwillingness of (self-referring) states becomes apparent in the pursuit of arresting Omar Hassan Ahmad Al-Bashir, Ahmad Muhammad Harun, and Ali Muhammad Ali Abd-Al-Rahman (the Darfur situation) and Bosco Ntaganda (the DRC situation). Ntaganda’s case will be further elaborated on in chapter 3.4.2, but suffice to say here is that despite an outstanding arrest warrant and a duty to cooperate with the Court, Ntaganda has been appointed a Deputy Commander in the Congolese army. He is well within the reach of the Congolese authorities to be transferred to The Hague, but the Prosecutor’s requests have been to no avail. The reason being that Ntaganda was considered instrumental to the DRC in their fight against the *Forces Démocratiques de Libération du Rwanda* (FDLR).\(^{73}\) At the time of writing, his political usefulness still functions as a shield protecting him from prosecution.

The outstanding arrest warrants for Joseph Kony, Okot Odhiambo, and Dominic Ongwen,\(^{74}\) (the Uganda situation) may arguably be attributed to the incapability of the Uganda People’s Defence Force (UPDF) to capture the LRA leadership. Yet, despite numerous military operations to enforce the arrest warrant and capture (or kill) Kony and his top commanders,\(^{75}\) questions have been raised as to the Ugandan government’s genuine will to capture the LRA leadership.\(^{76}\)

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\(^{74}\) The ICC initially also indicted LRA leaders Vincent Otti and Raska Lukwiya, but both have deceased. LRA Deputy Army Commander Raska Lukwiya was killed in 2006 and LRA Second-in-Command Vincent Otti was killed in 2007. The remainder of the LRA top still wreaks havoc in the border region between DRC, the CAR and South Sudan. The Pre-Trial Chamber has only decided to terminate the proceedings against Lukwiya. See, *Prosecutor vs. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (Decision of Pre-Trial Chamber II) ICC-02/04-01/05-248 (11 July 2007).

\(^{75}\) Since the issuing of the arrest warrants for Joseph Kony and his key commanders in October 2005 and after the breakdown of the 2008 Juba peace process, the UPDF has been involved in a joint military offensive with the Congolese and South(ern) Sudanese armies. With American resources supporting the preparation phase, *Operation Lightning Thunder* was launched in December 2008. In March 2009, the UPDF involvement officially came to an end and the operation was left in the hands of the Congolese authorities who renamed it *Operation Radio*. The UPDF however continues to lead the operation and pursues the LRA into its main areas of operation: the DRC, CAR and (South) Sudan. See, J. Hemmer and N. Franken, ‘The Lord’s Resistance Army: In Search for a New Approach’ (2010) Closed Expert Meeting, Netherlands Institute for International Relations Clingendael, annex III. Arguably, Uganda’s attention has now turned to the UPDF engagement in an African Union (AU) peacekeeping mission in Somalia.

Each situation before the Court has its unique dynamics, but the cooperation problems essentially come down to political considerations and interests that trump the fulfilment of legal obligations. So far, the Court’s apprehension record offers Heads of State little reason for concern to be handed over to the Court as long as they have political allies. Military and militia leaders may (rightly) believe that political affiliation and negotiation with their governments may prove to be a worthwhile undertaking. All in all, despite applicable international legal obligations, the lack of ICC enforcement forces and dependence on state cooperation thus inherently diminish the certainty for accused to be apprehended and brought before the ICC prosecution and thereby weaken the strength of this factor to positively affect the deterrent potential of ICC prosecutions.

2.2.3 Swiftness of Punishment: Lengthy Trials

If the suspect has actually been captured and transferred to the ICC detention centre in Scheveningen, (s)he will immediately experience some degree of swift – or an advancement of – punishment in the form of pre-trial detention. At least until the commencement of the trial and throughout its duration, the suspect will be detained which significantly diminishes the risk of flight and may already be experienced as a form of punishment. Because the Prosecutor will most likely not risk losing the first cases in the history of the Court, one can imagine that the selection of the cases – assuming the suspects can in fact be arrested – will ensure an acquittal rate close to zero\(^{77}\) which would contribute to securing the certainty of punishment.

As of yet it is impossible to say anything casuistic about the swiftness of punishment in the context of ICC, for the Court has yet to convict a suspect. Therefore the ICTR and ICTY – both operative for over the past 15 years – are more suitable to facilitate the application of this factor of the theoretical framework.

Looking at the length of international criminal trials before the ICTR and ICTY, it becomes evident that international trials generally require many years. As of November 2008, the ICTR had rendered 37 judgements and another 37 accused were either in trial or were awaiting their trial to commence.\(^{78}\) At the same time, the ICTY had passed judgement on 67 accused and 45 had trials in progress.\(^{79}\) This extensive length may be attributable to a number of factors: the strong emphasis on a fair trial, the difficulties of finding reliable evidence in situations characterised by mass violence and general breakdown, as well as the dependence on states.

Placing the figures in light of the thousands of perpetrators of grave atrocities in both conflicts, the international trials can be argued to have prosecuted a too small a number over a too large a time span to affect (future) perpetrators’ criminal behaviour. However, this statement must be refined by the compensatory note that the importance of the perpetrators may also affect the perpetrator’s cost-benefit analysis. The line of reasoning is that prosecuting perpetrators of high importance will increase the chance of deterring other important perpetrators, which in its turn may mitigate the relative small amount of trials.\(^{80}\) The prosecution of the ‘big fish’ is thought to have an amplified effect considering their leadership positions and – in the case of Heads of State and ministers – victory over their immunity that for so long shielded them from prosecution even for breaching the most fundamental norms of international law. The prosecution of these leaders is then

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\(^{77}\) Statement by G. Sluiter (n 54).
\(^{78}\) Alexander (n 6), 9.
\(^{79}\) Alexander (n 6), 9.
\(^{80}\) Alexander (n 6), 10. At this point it must also be noted that international criminal trials are by no means the only manner by which the perpetrators in these conflicts have been held accountable. National and local (‘traditional’) courts (eg. the Gacaca Courts in Rwanda) have tried a large number of cases.
theorised to attain a symbolic function to express the international community’s intolerance for the crimes subject to the trial.\(^{81}\)

The latter assumption gives rise to more questions relevant for evaluating the contribution of international prosecution to the deterrence. For instance, does the level of importance of the accused have any effect on the potential of deterrence? Does this mean that the likelihood of deterring criminal behaviour of a certain type of offender\(^{82}\) is positively affected if the prosecution targets the same type of offender? The latter more concretely: does the prosecution of another political, military, and militia leader – rather than an ‘ordinary’ perpetrator – have a higher chance of potentially deterring another such leader? The ICC’s rather specific focus on ‘the most responsible’ perpetrators makes one wonder whether this means that the importance and type of offender of the accused are two other theoretical factors of importance to the deterrent potential of international prosecution. Unfortunately, the consideration of these questions goes beyond the current scope of this inquiring undertaking, but would be interesting to investigate at a later stage.

### 2.2.4 The Severity of the Punishment: Meaningful Punishment

Punishment must be experienced as significant in order to have a deterrent effect. The level of suffering is thereby frequently coupled with the severity of the punishment. The severity – or intensity – of the punishment can be determined by the nature of the punishment (eg. imprisonment) as well as the level of punishment (eg. length of imprisonment). Based on Part VII of the Rome Statute, the ICC can impose (life) imprisonment with a maximum of 30 years, a fine, or forfeit property and assets.\(^{83}\) The sentence is determined by factors such as ‘the gravity of the crime and the individual circumstances of the convicted person’.\(^{84}\) In case of a prison sentence, the time spent in detention will be deducted from the total sentence.\(^{85}\) Regarding incarceration, the conditions of the imprisonment may also play a role in determining the severity of the punishment. Often cited by those arguing that imprisonment in Scheveningen is not necessarily a punishment are the ‘luxurious’ circumstances of the ICC detention centre in Scheveningen (sufficient food, medical care and air-conditioned rooms). The comparison is made to the (below) minimal standards of an average African prison with the problem being that the conditions of prison life in Scheveningen disproportionately surpass the quality of living conditions for many people in the world; most likely those living in countries where the perpetrators have their origin rendering the imprisonment unfair.\(^{86}\) In rebuttal, ICC supporters assert that the more correct comparison is that of imprisonment in Scheveningen versus no imprisonment at all; thus impunity.\(^{87}\)

The severity of punishment in relation to deterrence *an sich* has figured prominently as subject of debate in national parliaments and criminological circles. This has resulted in an academic consensus that an increase in severity of punishment does not enhance compliance with the law. National empirical studies have shown that there is no consistent deterrent effect of perceived severity of formal sanctions\(^{88}\) and that certainty of punishment is a stronger factor than the length of

\(^{81}\) Since this function hints towards the expressivism goal of the ICC rather than the deterrence goal, I will not further elaborate on it.

\(^{82}\) See also, Smeulers’s categories of types of offenders in chapter 2.2.1 of this thesis.

\(^{83}\) Art. 77 of the Rome Statute (n 2).

\(^{84}\) Art. 78(1) of the Rome Statute (n 2).

\(^{85}\) Art. 78(2) of the Rome Statute (n 2).

\(^{86}\) Keller (n 10), 45.

\(^{87}\) Alexander (n 6), 12.

\(^{88}\) Waldo and Chiricos (1972); Silberman (1976); Bailey and Lott (1976); Meier and Johnson (1977) in Piliavin, Gartner, Thornton and Matsueda (n 22), 102.
punishment.\textsuperscript{89} Instead, informal sanctions such as shaming have shown to have a stronger effect on preventing deviant behaviour than their formal counterparts.\textsuperscript{90} Instead of the threat of formal sanctions by a remote international institution, law conforming behaviour is apparently enhanced more strongly by individuals’ perceptions of others. This idea of criminality as social construct is that crime is not so much an individual’s undertaking as it is embedded in his/her community.\textsuperscript{91} Influencing an individual’s behaviour may thus be more effective when done in a manner and by an entity that is meaningful or at least acceptable, to the individual and his/her community. Instead of the severity, the meaning of the form of punishment then becomes an important for evaluating the deterrent potential of international prosecution. The differences of the meaning of punishment at the international level will be considered when applying the next factor.

\subsection*{2.2.5 Knowledge of the Legal Norm and Corresponding Punishment: Pluralism}

As was established in the preceding chapter, knowledge of the legal norm and corresponding punishment requires the legislator to formulate the legal norm in a manner that is understandable to the norm addressees as well as to undertake efforts to make the norm known to its addressees.

Legal norms prohibiting certain behaviour are enshrined in national criminal law. Anchored in the nation-state, national criminal law is supposed to be a reflection of common values of a homogeneous constituency, offer a solution to social problems and regulate the relationship between an authoritative state and the individual. These functions experience significant distortion when transposed to the international level. On an international level, the relationship between the authority (the ‘international community’ in the form of the ICC) and the individual does not receive much attention,\textsuperscript{92} and the international social problems are so numerous and complex they represent a web that even entangles the ‘legislator’ (‘international community’). Regarding common values and constituency, the Rome Statute focuses on the most serious crimes of concern to the international community as a whole.\textsuperscript{93} However, on an international level, the pool of norm addressees not only magnifies, but also diversifies on a number of levels, amongst which on a cultural level. This challenges the commonality of values and which may give rise to conflicting norms. The Court’s constitutionalist approach towards a global constituency is attractive in theory and on a rhetorical level, but may not always hold in the realities of a pluralistic world order.

The breadth of cultures in the world gives rise to a multitude of diverging – and at times conflicting – norms, values, and conceptions of what is deemed criminal behaviour. Although it is likely that the majority of cultures and people(s) in the world will consider the crimes under the Rome Statute as horrendous,\textsuperscript{94} this may be different for the crime of enlisting, conscripting and using child soldiers. Anthropologists have revealed that the conception of childhood is culturally diverse.\textsuperscript{95} For

\begin{footnotesize}
\begin{enumerate}
\item J. Braithwaite, \textit{Crime, Shame and Reintegration} (Cambridge University Press, 1999), 69; Ku and Nzelihe (n 5), 793; Kahan (n 28), 384; Tanner (n 49), 282.
\item Tallgren (n 25), 566.
\item Preamble of the Rome Statute (n 2). Emphasis added.
\item An argument could be made that some ICC crimes amount to natural law meaning that certain rights or values are inherent to human nature and are thereby universal and can be known to all by virtue of human reason. See, J. Donovan, \textit{Legal Anthropology: An Introduction} (Altamira Press, 2008). Arguably, this may hold for acts involving killing and rape, it is more difficult to apply to the enlistment and use of child soldiers.
\end{enumerate}
\end{footnotesize}
instance, in Sierra Leone, the initiation rite for passage from childhood to adulthood includes, amongst others, the becoming of a warrior or soldier. Placed in this cultural context, the term ‘child soldier’ becomes an oxymoron96 and the international crime an ‘alien standard of justice’.97

The application of this factor of the framework to the international level lays bare the Court’s Western-based, top-down system98 of ‘bringing justice’.99 This frequently vented point of critique gives rise to allegations that the Court does not do enough justice to local realities, needs and informal justice systems.100 In addition to this, the Court’s constitutionalist approach risks solidifying a certain level of rigidity that will not be flexible enough to allow a degree of cultural flexibility.101 It thereby contributes to a disconnect between what occurs in The Hague and what is needed by the society affected by the violence,102 but also to a disconnect of what is considered criminal behaviour by the international community and individuals on the ground. Important for deterrence to be achieved is that the perpetrator must identify the law as ‘wrong’.103 As such, the ‘internationalisation’ of crimes may weaken the potential of ICC prosecution to have a deterrent effect on the norm addresssee.

Besides being understandable, the legal norm must thus also be meaningful.

The identification of wrongful conduct is affected by violent conflict. A study by the International Committee of the Red Cross (ICRC) revealed that the majority of violators of international humanitarian (and criminal) law in the former Yugoslavia understood and accepted the laws, but felt that they were in a life and death struggle which justified the suspension of the laws.104 This suggests that in situations of violent conflict, the law is negotiable and its meaning, through (false) justifications, may be (temporarily) neutralised.105 Especially in situations wherein international crimes are associated with ideology, chances are slim that the perpetrator will be deterred.106

The importance of meaning is not unique to legal norms, but must also be present for the corresponding punishment. International criminal prosecutions are but one of many ways to address accountability of grave crimes. In some societies, traditional conflict resolution mechanisms and traditional justice systems based on values such as ‘mercy, shaming, recompense, forgiveness,
compassion, and repentance\textsuperscript{107} may be more suitable to ensure accountability, reconcile deeply divided societies, and deter criminal behaviour; although the latter is a topic yet to be studied.\textsuperscript{108} Societies affected by conflict are inherently divided and may be best served by forms of justice that do not focus as much on formal sanctions and incarceration as the Western-based model does.

In the chambers of the ICC, there is insufficient space for the values listed above. As such, ICC trials do not have as much promising capacity to contribute to reconciliation as traditional forms of justice do.\textsuperscript{109} In fact, international criminal adjudication could even exacerbate the situation if the prosecution is perceived by one party to the conflict as unfair or victor’s justice.\textsuperscript{110} It is assumable that these perceptions will be present in a societies divided by violent conflict. In this sense, some degree of perceptions of unfairness and victor justice will be inevitable. A more in-depth and nuanced evaluation of the impact of international criminal prosecution on reconciliation surpasses the limits of this thesis. Suffice to say is that there exists a tension between international criminal adjudication and punishment on the one hand, and informal forms of justice and reconciliation on the other.

The legislator also needs to undertake efforts to make the norm known to its addressees.\textsuperscript{111} Very practically speaking, this requires an effective infrastructure through which to disseminate information and communicate the legal norm and corresponding punishment to the public. The undertakings of the Court must be visible and meaningful which requires an increase in sensitised outreach activities. One can think of media such as internet, radio, television, and print by which this can be done. For states where the level of development and literacy is sufficiently high, this may not pose much of a problem and can easily be achieved in printed form which is simultaneously made accessible to the public via the internet. However, in countries that have lower levels of development and literacy rates – which are often exactly those states affected by conflict and susceptible to ICC intervention – effective dissemination of information is a battle in and of itself and may require a number of different media other than print. Yet, knowledge of understandable and meaningful legal norms and corresponding punishment is insufficient to deter if it is common knowledge that the rules are not consistently enforced.

\subsection*{2.2.6 Knowledge of Consistent Rule Enforcement: Fighting Impunity}
Knowledge of consistent rule enforcement is theorised to be required in order to deter individuals via indirect experience for it is thought that an individual will engage in crime if he knows that someone else has not been punished for it, or what is often referred to as impunity in the international legal discourse. Connected to the knowledge of consistent rule enforcement is the selection of cases that end up before the Court, most notably by way of Security Council referrals and \textit{propio motu} investigations.

The fact that all the Court’s cases currently concern situations in Africa has invited many critical comments framed in terms of selectivity. Formally speaking, the selection does fall well within the Court’s mandate to investigate the most serious situations where states are unable and

\textsuperscript{107} Gustafson (n 91), 83.
\textsuperscript{108} Keller (n 10), 41.
\textsuperscript{109} Stromseth (n 8), 90. This comment does not intend to glorify local systems of justice for they have also been known to have functioned as instruments for cementing authority of certain leaders. T. Allen, ‘Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda’ in N. Waddel and P. Clark (eds), \textit{Courting Conflict? Justice, Peace and the ICC in Africa} (Royal African Society, 2008): 47-54; Drumbl 2004-2005 (n 34), 602.
\textsuperscript{110} Gustafson (n 91), 67-68.
\textsuperscript{111} Considering that those most likely to end up in the Hague are leaders, the various modes of liability such as command responsibility and joint criminal enterprise must also be known.
unwilling to do so themselves. Seeing that most armed conflicts are concentrated on the African continent, this selectivity may be warranted. Nevertheless, the Court’s concentration in Africa has strained its relationship with the African Union. Not only does this negatively impact the willingness of African states to cooperate with the Court – despite the outstanding arrest warrant and some limitations in his movements, Al-Bashir has been welcomed by a number of African Heads of States – it could hypothetically lead other leaders to disregard the chances of ICC intervention in their respective areas of the world for history has shown that the ICC only operates in African states.

In its selection, the consistency of rules enforced by the ICC is furthermore challenged in practical terms: it has limited (financial) resources and can only handle a certain case load. In the absence of a well-functioning or willing state apparatus, this leaves ample opportunities for other leaders to act as they wish. Having indicted six Kenyan executives (dubbed ‘The Ocampo Six’) for their involvement in the Kenyan post-election violence in 2007-2008, remaining leading participants can rest assured that the Prosecutor will not be able to investigate their cases. Based on this observation, an interesting thought experiment – unfortunately going beyond the scope of this thesis – would be to question what affect a certain degree of unpredictability – obviously within the boundaries of the prosecutorial strategy and Rome Statute – in the selection of cases would have on the calculations and perceptions of the threat of prosecution held by (future) perpetrators.

2.2.7 The Credibility of the Threat of Prosecution: Giving Effect to the Threat

The finding that the credibility of the threat of prosecution must be meaningful to potential criminals in order to be likely to have a deterrent effect implies that the norm addressees must be convinced that the ICC intends to give effect to its threats of prosecution. Judging from the current situations before the Court, the OTP appears to score reasonably well on this factor. The Prosecutor has demonstrated strong perseverance and determination in pursuing the prosecution of Al-Bashir. Additionally, the threat of prosecution was acted upon following the Security Council referral of the Libyan situation and the ICC issued the arrest warrants on June 27th of the same (this) year. Nevertheless, credibility is also determined by the effectuation of the threat. Since this is dependent on state cooperation, this factor is likely to suffer the same decrease in contribution as the certainty of being apprehended described above in chapter 2.2.2.

Giving effect to threats first of all requires communicating the threat. In order for the potential violator to believe that the threat is real, it is imperative that communication of the intent is clear for any mixed signals may temper the value of the threat. The Court’s dependence on the cooperation of states as agents tasked with the follow up of the threat as expressed by the Prosecutor (or Security Council), may further reduce the credibility of the threat because the dependence on states increases the chances of sending mixed messages to (future) leaders. Such credibility can be said to have been affected in the Al-Bashir case seeing that Al-Bashir was not only welcomed by

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112 A more in-depth discussion on prosecutorial discretion, the criteria of gravity and their consequences would be interesting, but goes beyond the scope of the thesis.
114 Although the Court has undertaken preliminary investigations in Afghanistan, Georgia, Colombia and Gaza, these have not (yet) lead to trials.
115 Statement by G. Sluiter (n 54).
118 Smidt (n 24), 169.
African Heads of State, but recently also received a red-carpet welcome by China’s President Hu Jintao in order to discuss oil deals. This reinforces the impression that state interests will surpass the interests and legal obligations owed to the ICC making threats of ICC prosecution less credible.

2.2.8 Subjective Assessment: Case-by-Case

In order to increase the Court’s contribution to deterrence on a theoretical level, the factors described above must also be perceived to be convincing enough. Since the deterrence argument is typically fear-based and the threshold of what constitutes fear will differ per individual, the assessment of this factor is primarily an individual undertaking. Arguably individuals in leadership positions are inclined to take greater risks and are thereby more immune to the risk of prosecution.

Although a general analysis of this factor is difficult, a frequently invoked argument that fits subjective assessment is that the threat of prosecution may create adverse incentives for leaders to strengthen their hold on power even more so than they do already (e.g. Zimbabwe’s Robert Mugabe). Analogous is also the case of the militia leader who may be deterred from signing a peace accord knowing that he may face prosecution. Reportedly Joseph Kony assessed Charles Taylor’s fate, – who was prosecuted before the Special Court of Sierra Leone (SCSL) in spite of a promise of asylum – when he conditioned his signature of the Juba peace accords on the dropping of the ICC arrest warrants. Yet, other factors such as fear of reprisal attacks or coup d’états by national actors may weigh more heavily than international prosecution.

2.2.9 Legitimacy: Perceptions of Partiality

Legitimacy is a crucial element that overarches all factors that are important for prosecution to be able to deter leaders. The ICC seeks its legal legitimacy in international laws and accountability procedures rather than local laws, norms, and accountability procedures whereas these are more likely to be meaningful to individuals and thereby have a deterrent effect. Furthermore, the effectiveness of (the threat of) international prosecution rests on the level of authority and legitimacy that is given to the prosecuting institution by the prosecutorial target. At the international level, this is not only made difficult by the perceptions that the Court is culturally foreign and geographically distant, but also subject to political interests. The dependence on states weakens the certainty of apprehension; swiftness of punishment; knowledge of consistent rule enforcement, and the credibility of the threat of prosecution. The decrease of strength in these factors all contribute to a decrease in legitimacy of the Court. Additionally, legitimacy is dependent by the extent to which the Court is perceived to be impartial. The Prosecutor has claimed impartiality on many occasions. Yet, it is exactly this claim that is heavily criticised partly due to the selectivity of cases described above, the Otp’s intertwining with politics, and its perceived bias which all negatively affect its impartiality.

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119 Even though the People’s Republic of China is not a state party to the Rome Statute, it is still obliged to cooperate with the Court based on the SC resolution 1593 referring the Darfur situation to the Court. See, UNSC Res 1593 (31 March 2005) UN Doc D/RES/1593. For a review of the legality of the resolution see, G. Sluiter, ‘Obtaining Cooperation from Sudan – Where is the Law?’ (2008) 6 Journal of International Criminal Justice: 871-884.
122 Aloyo (n 76), 18.
123 Sloane (n 48), 72.
The independence and impartiality of the judiciary in the national legal order is one of the most fundamental elements of concepts of law and justice and finds its origins in Montesquieu’s *trias politica*. In the Rome Statute, the independence of the Prosecutor is enshrined in article 42(1). However, in the international legal order Montesquieu’s *trias politica* does not hold and the proposition of complete independence of legal institutions becomes based on the unrealistic premise that law and politics can be separated at the international level.

The Court in general – and the OTrP specifically – is inherently affected by politics in a number of ways: it is created by states and is dependent for cooperation on the political will of states, each with their own political agenda; its involvement can be triggered by the Security Council, a political body by nature; and it operates in highly political situations. The situations in which ICC crimes occur is characterised by inextricable linkages between conflict and politics. This makes the ICC crimes and their prosecution inextricably linked to politics. Moreover, the Court’s intertwining with politics makes it susceptible to be manipulated as a pawn in domestic political games and thereby decrease its legitimacy.

Regarding perceived bias, the following is observed. Both in the Congolese and the Ugandan case, prosecution has focused only on militias whereas evidence prevails that the national armies have just as well committed grave human rights violations. Not only does this affect the legitimacy in the eyes of the militia leaders challenging their acceptance of the validity of the Court, it also raises questions for victims. This was expressed by a community leader in Bunia, DRC to a Human Rights Watch researcher: “This is selective justice. It will not help us in revealing the truth of what happened and why we have suffered so much.”

Regardless of all these critiques and political complexities, the Prosecutor maintains that he applies universal norms and that impartial international prosecution will contribute to the prevention of future atrocities. This is troublesome because approaching the ICC crimes as sec crimes and their perpetrators as sec ‘war criminals’ fuels a discourse that is not grounded in the political realities of the conflict creating a gap between an ideal and reality. This approach risks being only marginally effective at best as well as the coming into being of unforeseen and unintended adverse effects and dilemmas.

### 2.3 Particularities of the International Level and Situations of Violent Conflict

When transposed from the national to the international level, the functions of criminal law cannot be upheld and encounter particularities of the international context and situations of violent conflict that present complicating factors that weaken the ICC’s contribution to deterrence. The complicating (sub-)factors that have been identified in this chapter are: *dynamics of violent conflict* including the immediate needs of warfare; *inseparability of law and politics* and thereby the precedence of political interests over legal obligations and the Court’s institutional dependence on states; and the heterogeneity of constituencies and corresponding norms and values that generate a *plurality in concepts of criminal behaviour, concepts of justice, and approaches to accountability*. These

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125 [Nouwen and Werner (n 41), 943; Clark 2008 (n 69), 37-45.](https://www.icc-cpi.int/en_menus/icc/caselaw/en_cases.php)

126 [Nouwen and Werner (n 41), 962; Rodio (n 19), 11; Ku and Nzelibe (n 5), 818, 826; Clark 2008 (n 69), 40-43.](https://www.icc-cpi.int/en_menus/icc/caselaw/en_cases.php)


complicating factors all present almost insurmountable obstacles to the impartiality and legitimacy of the Court. Despite these particularities, the ICC and its supporters pursue a steady course and continue to promote its universal and impartial approach and concept of bringing justice. It is not surprising that advancing this idea has clashed with reality. These clashes can largely be categorized as: law versus politics; homogeneity versus heterogeneity; retributive justice (punishment) versus restorative justice (reconciliation); conflicts between international and local interests; and peace versus justice.\textsuperscript{130}

As demonstrated by the difficulties of enforcement and cooperation, an extra dynamic to take into account on the international level is the (ancient) dilemma between law and politics. Despite the ‘hardness’ and legally binding nature of the duty to cooperate, these obligations are easily set aside in the turmoil, unpredictable ‘reality’ of international politics.\textsuperscript{131} The cooperation of states whose situation is before the Court ultimately depends on the extent to which cooperation serves their respective political interests. This makes it incredibly hard – if not impossible – for the Court to be effective and perceived as impartial at all times.

Despite its claimed universal approach, the ICC’s values (e.g., prosecution, formal punishment, and retribution) do not necessarily resonate with the diversity of its norm addressees. The declared homogeneity of the ‘international community’ in the ICC’s discourse is really a constructed all-encompassing term for a myriad of diverse, heterogeneous sub-constituencies. The heterogeneity of the international realm gives rise to a divergence of understanding of what is considered criminal behaviour as well as divergent forms and meanings of ‘justice’. Whilst it may be in the interests – and perhaps within its restricted mandate – of the ICC to prosecute serious crimes that are of concern to the international community, this mission may not be in the interest of local communities directly affected by the conflict.

Indeed, the Rome Statute was not designed with an intent to satisfy diverging local values such as truth-telling and reconciliation.\textsuperscript{132} When the ICC intervenes in societies that attach importance to these values, intervention is likely to amount to a conflict of norms. The ICC’s ‘Western’ approach and concept of ‘justice’ in the form of prosecution and punishment and main objectives of retribution, retaliation and deterrence may clash with the more forgiving, reconciliatory nature of some traditional forms and concepts of ‘justice’ important for the societies affected by ICC cases. The interests of the figurative international community then conflict with those of the literal domestic communities that international criminal law supposedly serves.\textsuperscript{133} Not surprisingly, unclarity abounds as to who really (ought to be) the Court’s constituency. This raises interesting questions to pursue at another point in time concerning the accountability of the ICC: is the ICC accountable to the ‘international community’, its member states, or the victims of crimes that fall within its jurisdiction?

The legal goal of enforcing international criminal justice for serious crimes committed during a conflict encounters a fundamental dilemma when stability is at stake. In this larger peace versus justice debate, the development of peace negotiations – specifically the debate concerning the inclusion of amnesty provisions in peace agreements\textsuperscript{134} and local forms of justice – has exemplified

\textsuperscript{130} This dichotomous formulation merely intends to reveal the tensions between these factors. I do not mean to suggest a strict, mutually exclusive dichotomy between the concepts.

\textsuperscript{131} Tallgren (n 25), 567.

\textsuperscript{132} There is no mention of reconciliation in the preambles of the Rome Statute (n 2).

\textsuperscript{133} Sloane (n 48), 49.

\textsuperscript{134} Although it is widely accepted in (legal) academic circles that blanket amnesties contradict the pursuit of justice for international crimes of serious nature and are incompatible with international law the debate has not yet settled on conditional amnesties (hereafter referred to as ‘amnesties’). See, D. Robinson, ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 European Journal for
the frailty of the deterrence argument and the ICC’s approach. Since this debate encompasses all particularities and dilemmas encountered. It is worthwhile to devote some more attention to it which I will do by recalling the peace negotiations with the Lord’s Resistance Army in Juba, South(ern) Sudan. The Court’s role in the Ugandan situation provides a vivid example of conflicts between (international) legal obligations, a political necessity (of negotiating an end to a conflict), and a difference in local norms and values as well as concepts and approaches to justice.

In 2000, the Ugandan government passed an Amnesty Act providing amnesty to any Ugandan involved in armed struggle since 1986.135 Only two years later, President Museveni signed and ratified the Rome Treaty, later expressing his intention to amend the Amnesty Act to exclude the LRA’s top leadership. In late 2003, Museveni referred the LRA-situation to the International Criminal Court (ICC) which issued arrest warrants for LRA-leader Joseph Kony and four of his commanders. The referral and the issuance of the arrest warrants took place amidst loud protest of delegations of religious, cultural and district leaders who promoted local justice mechanisms that allowed for amnesties in order to end the conflict and the consequential humanitarian crisis, but the protests were not successful in preventing the involvement of the ICC.136 Traditional justice mechanisms would not pass the Rome Statute’s complementarity test.137 Although the arrest warrants have been applauded for motivating the LRA to sit down at the negotiation table in Juba, they have been widely criticised to be spoilers in the subsequent peace process. Kony now demands amnesty and the removal of the ICC arrest warrants, whereas the Prosecutor is determined to prosecute those most responsible for the alleged crimes. This dilemma was an issue during the Juba talks which broke down at the end of 2008 when Kony failed to show up at the signing ceremony on three consecutive occasions. Without insinuating the arrest warrants to be the only obstacle to a negotiated settlement of the conflict, the LRA is now once again engaged in committing gross human rights violation. It is highly unlikely that Kony will end the violence, surrender, and sign a peace agreement that leaves him vulnerable to prosecution by the ICC.138 The provision of amnesties or permitting local justice mechanisms may have been a means to putting an immediate halt to the violence.139 In effect, an opportunity to end the LRA conflict is thus obstructed by the ICC’s involvement.

The Rome Statute does not directly address this issue which nonetheless goes to the heart of the aims and purposes of the Court. Nevertheless, the most plausible provision in the ICC Statute that could be interpreted to allow amnesties in peace agreements is article 53.140 Article 53 allows the OTP, under review of the Pre-Trial Chamber, the discretion to not investigate or prosecute on the grounds that it would not be in the ‘interests of justice’141 which is the test against which amnesties must be considered.

Proponents of a narrow interpretation of article 53 (often also the ‘ICC supporters’) consider justice to be a pre-condition for sustainable peace and an important mechanism to address needs of

135 Art. 3(1) and (2) of the Uganda Amnesty Act (21 January 2000).
136 Dukic (n 7), 692.
140 Other articles that touch upon the issue of (domestic) amnesties are largely art. 17 and 16 of the Rome Statute (n 2).
141 Art. 53 of the Rome Statute (n 2).
victims and prevent recurrence of abuses (ie. deterrence). This approach considers the provision of amnesties to be the stimulation or toleration of a culture of impunity that presents an obstacle for the establishment of a peaceful international order based on the rule of law that is to be achieved by the deterrent effect of prosecution. According to this approach, allowing amnesties would contradict the provisions of the Rome Statute. Moreover, the inclusion of political considerations to the discretion of the Prosecutor is argued to severely damage and undermine the appearance of the Court and the Prosecutor as an independent and impartial legal institution.142

Proponents of a more political, pragmatic approach (often also the ‘ICC critics’) recognise that amnesties may be the sole incentive for perpetrating parties to end violence, and that amnesties thus function as a practical necessity to stop a violent conflict. This is especially applicable to ongoing conflicts in which the perpetrator is a party which has a powerful (military) position and whose cooperation is vital in ending the conflict and thereby preventing more crimes. In these cases, the threat of prosecution may prove to have an adverse effect by alienating the perpetrator from the solution. By definition, all parties to a violent conflict resort to armed force and the likelihood that all combating parties engage in criminal acts is so great, that it is almost automatically unfair to only prosecute one of the parties.

When taking the latter approach, amnesties can thus be considered to have a positive, stabilising effect in their capacity as tools of conflict resolution143 and as such ‘trump’ rigid legalist arguments. However, care must be taken when suggesting that the Court meddle in political processes for this could fuel perceptions of partiality and views of the Court as a political instrument readily available to states. Moreover, allowing amnesties in peace negotiations for the sake of stability may be necessary in the short run, but may indeed set a dangerous precedent in the long run. It runs the risk of encouraging (future) perpetrators of egregious international criminal acts to believe that they will be able to negotiate their way out of any ongoing conflict as long as they use enough violence that will ‘trigger’ the pragmatic approach. Hence, these perpetrators would then find more security in prolonging the conflict. The crux of the problem is that immediate needs (ie. negotiating an end to a conflict) then obstruct factors that require a longer timeframe to gain strength (ie. consistency in rule enforcement, certainty of punishment, and the credibility of the threat of prosecution).

In the end, the particularities of the international level and situations of violent conflict significantly weaken the contribution that ICC prosecution has on leaders at this point in the Court’s history. The failure to adapt the ICC’s international approach to these complicating factors that arise from transposing elements of national criminal law to the international level amounts to clashes on a number of levels that have been described above. If the problem is partly due to the internationalisation of prosecution, a logical thought to pursue is whether the ICC would be better off catalysing domestic proceedings. Reportedly, prosecution by the Serbian War Crimes Chamber in Serbia has a much greater impact than the ICTY144 because it is not done by a remote institution that is associated with the nations responsible for the 1999 bombing.145 I will now briefly consider the ICC’s role in catalysing domestic proceedings.

142 Dukic (n 7), 716
143 Amnesties played a crucial role in brokering peace in Mozambique, El Salvador, Argentina, Cambodia, Chile, Guatemala, South Africa, Uruguay, and Haiti. See, Rodman (n 138), 102; B. Broomhall, International Justice and the International Criminal Court (Oxford University Press, 2003), 94.
144 Although the ad hoc tribunals and the ICC can only be compared to a certain extent due to their differences in coming into existence, temporal and territorial jurisdiction, the remoteness and ‘Western’ nature is similar.
145 Tanner (n 49), 284.
2.4 Catalysing Domestic Proceedings: ‘Complementarity Deterrence’

The effect of the complementarity principle on the deterrent potential of the Court can be argued in two opposite ways. On the one hand, the principle can weaken the deterrent potential of the Court for it refutes the principle of primacy that gives direct effect to international law in the domestic legal order. On the other hand, it may well allow the ICC to trigger national prosecutions, encourage the passing of appropriate legislation and reforms, and empower domestic courts. The domestic courts, in their turn, may possibly be more effective in contributing to deterrence than an international court. The latter effect of the complementarity principle has been referred to as ‘complementarity deterrence’. However, this type of deterrence ultimately depends on the functioning of the national and local judicial institutions.

Instrumentally, complementarity deterrence has occurred in Kenya and Uganda. After the post-election violence in 2007-2008 in Kenya, the Prosecutor claimed jurisdiction over the alleged crimes which has supposedly catalysed domestic accountability procedures. Uganda recently passed the Uganda ICC Act which is adopted to give direct effect to the Rome Statute and has established the Special Division of the High Court (SDHC). The SDHC’s origins are to be found in the Juba peace process and were envisaged as a way to challenge the admissibility of the cases in an attempt to put an end to the ICC’s involvement. The SDHC has jurisdiction ‘to try individuals who are alleged to have committed serious crimes during the conflict’. However, the implications of these catalysed developments are ambiguous. Though they may have enhanced supremacy of the law and accountability, they arguably jeopardise equality before the law, fairness and legal certainty. Illustrative of the latter is the recent case trying former LRA commander Thomas Kwoyelo before the SDHC. Being a former LRA commander – not belonging to the top that have been exempted from amnesty by amendments to the Amnesty Act in 2003 – Kwoyelo is entitled to amnesty under the 2000 Amnesty Act. The attempts by Ugandan government officials to justify the prosecution amount to legal gymnastics. Ultimately, the prosecution gives rise to a situation of legal uncertainty and creates a strong disincentive for the Ugandan LRA members to surrender and return home.

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146 This could be different per state, because the efficacy of international law in the national legal order depends on the constitutional composition of the respective order (ie. whether it is a monist or dualist system) which varies amongst states.
147 Alexander (n 6), 6, 14-16.
149 Uganda International Criminal Court Act (25 June 2010) The Uganda Gazette No 39 Volume CIII (ICC Act). Important to note is that almost all the ICC crimes – with the exception of the enlistment of children – have already been criminalised by virtue of the Ugandan Penal Code and the 1964 Geneva Conventions Act. See, Nouwen 2011b (n 137).
150 Nouwen 2011b (n 137)
151 Clause 7 of the Annexure to the Agreement on Accountability and Reconciliation (Juba, 19 February 2008) in: Nouwen (n 137), 11.
152 For an in-depth review see, Nouwen 2011b (n 137), 39-40.
153 Uganda Amnesty Act (25 January 2000)
154 It has been asserted that Kwoyelo is not entitled to amnesty because only applied for amnesty after he was arrested. It has also been argued that the 2000 Amnesty Act in its entirety is not applicable ‘because Kwoyelo has been charged with crimes other than “crimes against the state”’. In: Nouwen 2011n (n 137), 34.
155 Article s. 2 of the Amnesty Act allows for application of amnesty once arrested. The dismissal of the entire Amnesty Act would mean that Kwoyelo’s acts were not committed in the context of the conflict; an argument which is difficult to uphold. See, Nouwen 2011b (n 137), 34-35.
156 Due to their roaming and adductions in other countries, the LRA membership is believed to have become a mix of Ugandan, Congolese, Central African Republic and Sudanese nationals. See, Hemmer and Frencken (n 75); International Crisis Group, ‘LRA: A Regional Strategy Beyond Killing Kony’ (2010) Africa Report 157.
2.5 Adapting the Framework for ICC Prosecution

The functions that criminal law fulfils in the national legal order become ineffective when transposed to the international level. Aside from the lack of a solid relationship between the individual and an authoritative entity representing a functioning state, the commonality of norms and regulation of social problems are beyond the Court’s reach at the international level.

The volatile and disruptive nature of mass violence gives rise to a significantly different context characterised by social breakdown and possibly a reversal of morality. Surrounded by extreme violence, individuals may internalise violence to be legitimate or otherwise be forced to participate in the fighting. The meaning of behaviour is contextual and the difference in contexts disallows a comparison between the national and international perpetrator. What can be concluded is that it is not beyond the bounds of credibility that political, military and militia leaders engage in deliberations which, albeit rational, may not be influenced by the prospect of ICC prosecution.

Further application of the basic evaluative framework produces the conclusion that the ICC’s contribution to deterrence is severely limited – if existent at all – by other, more pressing costs of war as well as the dynamics of the conflict; the lengthy duration of international trials and thereby decrease in swiftness of punishment; the low certainty of apprehension due to a lack of enforcement forces and a dependence on state cooperation subject to political interests. This and institutional restrictions also abate the consistency of rule enforcement. Despite the Prosecutor’s perseverance, the Court’s dependence on state cooperation furthermore undermines the threshold of credibility thereby further stripping ICC prosecution of its potential to deter. Additionally, the inherent restrictions in terms of case load and the Court’s perceived selectivity also reduce the Courts contribution to deterrence. The Court’s remoteness and Western-based style of approaching justice, its perceived bias and partiality also negatively affect the meaning of legal norms and corresponding forms of punishment. All these factors taint the ICC’s legitimacy and limit its contribution to deterrence.

Besides revealing a weak role for the ICC in deterring leaders, the application of the framework to the international level has resulted in the omitting of a factor (the severity of punishment) and the refinement and addition of some others, namely: the finding that the legal norm and corresponding punishment must be meaningful, the importance of access to information, visibility and outreach, the need to be sensitive towards the local context in order to be considerate to local needs (legal) norms, forms of accountability, and concepts of criminal behaviour.

In overarching terms, the particularities of the international context that challenge the ICC in its pursuit of deterrence are: the dynamics of violent conflict and respective immediate needs of warfare that affect individuals’ behaviour; inseparability of law and politics, and the Court’s institutional dependence on states whose behaviour is ultimately determined by political interests than legal obligations; and heterogeneity of constituencies and corresponding norms and values which gives rise to different, at times conflicting, concepts of criminal behaviour, concepts of justice, and approaches to accountability. These particularities of the international level and situations of violent conflict place the Court at the heart of dilemmas such as criminal adjudication versus informal justice mechanisms and the notorious peace versus justice debate. The application of the basic evaluative framework to the international level and situations of violent conflict leads to the adaptation of the framework in the following manner.
Figure 2: Key Factors of ICC Prosecution that are Important for Deterring Criminal Behaviour

Certainty of apprehension
Swiftness of punishment
Meaningful knowledge of the legal norm and corresponding punishment
Access to information and visibility
Sensitivity towards the local context
Knowledge of consistent rule enforcement
Credibility of the threat of prosecution
Subjective assessment of the punishment or threat of prosecution

Costs of ICC Prosecution

Dynamics of violent conflict
- Immediate needs of warfare

Inseparability of law and politics
- Precedence of political interest over legal obligations
- ICC’s institutional dependence on states

Heterogeneity of constituencies and corresponding norms and values
- Plurality in concepts of criminal behaviour
- Plurality in concepts of justice
- Plurality in approaches to accountability

Rational Actor

ICCs Deterrent Effect

Benefits of the Crime
3. ICC Prosecution and Deterring Militia Leaders from Using Child Soldiers: Applying the Framework to the Lubanga Case

3.1 The DRC Context and the Lubanga Case

A century of Belgian colonial rule, a 30-year brutal reign by Mobutu, invasive Cold War meddling, and two African Wars have left a volatile, highly fragmented situation that is still tormented by ongoing violence in the eastern provinces of the DRC. The Congolese battlefields have attracted and are fuelled by many (foreign) forces and the interests of the warring factions have ranged from countering militia operations to alleged exploitation of Congo’s natural wealth. Control of the mines is sufficiently enriching that armed groups constantly compete, by whatever available means, to secure their military capabilities. Instrumental in this — and ever prevalent throughout the wars — has been the recruitment and use of child soldiers, especially in Ituri; a district in North-eastern DRC. Despite the Sun City accords formally brokering an end to the 1998-2002 war, fighting still continues in the eastern part of the country. The omnipresence of extreme violence in the history of (eastern) DRC has resulted in the existence of a mentality that political power is acquired through military power. The operative environment in the DRC is one in which all issues are militarised, (politically) difficult to navigate and hardly conducive for the precedence of law over politics and violence.

In broad terms the fighting in Ituri occurs between two rival ethnic militia groups: the Hema ethnic communities represented by the Union des Patriotes Congolais (UPC) and the Parti Pour l’Unité et la Sauvegarde de l’Intégrité du Congo (PUSIC), and the Lendu ethnic communities represented by the Forces de Résistance Patriote d’Ituri (FRI) and the Front des Nationalistes et Intégrationnistes (FNI). The clashes between these antagonistic groups are mainly fuelled by contesting mineral rich land claims and continued interference by Rwanda and Uganda.

Amidst this context, President Kabila referred the situation in the Congo to the Prosecutor in April 2004. In February of 2006, the ICC issued an arrest warrant for Thomas Lubanga Dyilo which was made public in March 2006. Already in Congolese custody, Lubanga was transferred to The Hague that same month to stand trial before the ICC for three counts of war crimes related to the recruitment and use of child soldiers. Lubanga is the alleged founder and leader of the UPC active in Ituri. Additionally, he is thought to be the former Commander-in-Chief of the UPC’s military wing;

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157 For instance, an International Court of Justice (ICJ) ruling has found Uganda to be in violation of the prohibition of the use of force and principle of non-intervention as well as other norms of international humanitarian law and obligations owed to the DRC. See, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (Judgment) ICJ Reports (19 December 2005): 168.
163 The Prosecutor vs. Thomas Lubanga Dyilo (Document Containing the Charges, Article 61(3)(a), Public Redacted Version) International Criminal Court (28 August 2006).
the Forces Patriotiques pour la Libération du Congo (FPLC). Delayed by numerous procedural obstacles, related to (the disclosure of) evidence, the trial finally started on 26 January 2009. Lubanga has entered a not guilty plea claiming that he was merely a political leader and actually tried to demobilise the children in the armed units.

### 3.2 The Use of Child Soldiers in the DRC

An estimated number of 250,000 children currently take part in (non-)international armed conflict. A recent calculation documents 1,593 cases of child recruitment during October 2008 and December 2009. Having done extensive field research focused on the Congolese army (Forces Armées de la République Démocratique du Congo; FARDC), Judith Verweijen explains that reliable numbers about the total amount of child soldiers in Congo are hard to generate. Although also present in national armies, – including the FARDC - child soldiers mostly fight on the side of militia forces. Their roles are numerous varying in their contribution along a hypothetical scale of directness of engagement in hostilities: fighters, carriers of arms and supplies, cooks, and wives. The use of child soldiers is thought to beneficial since they are known to be malleable, less fearful and more compliant than adults; putting them at the disposal of military leaders. They are more susceptible to socialisation processes and indoctrination techniques that ‘train’ them to commit the most horrendous atrocities. Additionally, the large-scale flow of small arms into the DRC has made the use of child soldiers in this conflict especially practical as the light weight of the weapons allows easy carriage by small children.

Aside from the prevalent image of the child fighter as a victim, reports have documented that in certain cases, children freely join militia groups most notably motivated by financial gain, or a desire to defend their ethnic group, but also out of ‘revenge, martyrdom, and fear of being abducted’. Nevertheless, the genuine nature of this ‘voluntary’ enlisting can be doubted considering the limited possibility to make free choices in a context where structural factors such as rampant fighting, prevailing insecurity and widespread poverty heavily influence behaviour. Turning to militia groups could well be an instrument of survival for children.

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168 The existence of parallel structures is not unknown to the Congolese context which is characterised by its prevalent corruption. Commanders are free to make lists of their soldiers that do not correspond with the reality within their forces. This and the fact that MONUSCO’s monitoring activities are geographically and logistically restricted make it very difficult to gauge the actual amount of children within armed groups and forces. Statement by J. Verweijen, PhD Candidate at the Centre for Conflict Studies, Utrecht University and the Faculty of Military Sciences, Netherlands Defence Academy (Personal communication 15 July 2011).
170 Amnesty International (n 4), 2.
171 See, Eisele (n 169), 4-5; Redress, (n 158).
172 Amnesty International (n 4).
When assessing the relationship between Lubanga’s prosecution and the use of child soldiers, it must also be taken into account that international prosecution is not the only effort at the international level undertaken to protect children. Especially since these programmes have been around longer than the prosecution of Lubanga makes the existence of a direct correlation uncertain.\(^\text{173}\) In fact, the disarmament, demobilisation and reintegration (DDR) of (former) combatants in DRC has been addressed both on a regional and on a national level with special division in place for children.\(^\text{174}\)

According to a report written by Amnesty International in 2003, demobilisation efforts undertaken by militia leaders can be mere publicity stunts. A case in point is the decree ordering the demobilisation of all the children amidst the ranks of the UPC at the time (thus prior to the release of his arrest warrant) signed by Lubanga. This happened under international pressure following the deployment of UN peacekeepers in the region which had drawn attention to the plight of child soldiers in Ituri. After humanitarian agencies denied the UPC’s demand for television coverage of the event, the UPC reportedly lost interest and only released half (40) of the promised number of children. The genuine will to demobilise is doubtful at best as militia leaders have been known to monitor demobilised child soldier and re-recruit them when the conflict developments require so.\(^\text{175}\) Children have reported to have been recruited two or more times.\(^\text{176}\) Aside from policy initiatives and advocacy campaigns, the relationship between ICC prosecution and a deterrent effect is made murky by a multitude of factors most probably including, but not limited to: successful escapes,\(^\text{177}\) voluntary enlistment, alternate sanctions and informal mechanisms,\(^\text{178}\) other international sanction regimes such as UNSC sanctions\(^\text{179}\) and perhaps even national legal provisions and prosecutions.\(^\text{180}\)

\(^{173}\) Statement by Project Leader Central Africa, IKV Pax Christi (Personal communication 12 July 2011).

\(^{174}\) The Congolese national framework for DDR was founded during the Lusaka agreement in 1999 and was strongly orientated towards foreign forces. A national DDR program was created as part of the Global and Inclusive Agreement on the Transition in 2003. This Programme national de désarmement, démobilisation et réinsertion (PNDDR) was designed in 2004 and is administered by the Commission Nationale de Désarmement, Démobilisation et Réinsertion (CONADER). One of the five departments is specifically dedicated to children. In 2007, the Congolese government requested further assistance and the African Development Bank financed a US$ 25 million parallel project called Projet D'appui à la Reinsertion Socio-économique Post Conflict (PARSEC) which was intended to run until December 2010 (World Bank, ‘DDR in the Democratic Republic of Congo’ (2009) Program Update <www.mdrp.org/drc> accessed 5 June 2011). The regional approach took the form of Multi-Country Demobilization and Reintegration Program (MDRP) under which Central African governments administered their respective national programs and were enabled to target foreign combatants. After the closure of the MDRP program in June 2009, the Transitional Demobilization and Reintegration Program (TDRP) was set up to support ongoing efforts in the wider region (Transitional Demobilization and Reintegration Program (TDRP), ‘Quarterly Report’ (July-September 2010) <www.tdrp.net> accessed 5 June 2011). Another program that facilitates DDR efforts for combatants on foreign soil is MONUSCO’s voluntary Disarmament, Demobilisation, Repatriation, Reintegration, and Resettlement (DDRRR) program. Aside from these programs, UNICEF and MONUSCO’s Child Protection Unit engage in DDR activities and it is highly likely that (local) NGOs have developed their own initiatives to promote DDR activities amongst militia groups.


\(^{176}\) Report of the Secretary General 2010 (n 167), 5.


\(^{178}\) See, also Braithwaite (n 90) on the power of informal sanctions. Further research into informal justice systems present in Ituri would be required. In South Kivu, the militias have reportedly shunned the use of children amidst their ranks in order to enhance goodwill within the communities living in their areas of operation. Statement by Coordination Officer of MONUSCO’s Stabilisation Support Unit (SSU) (Personal email correspondence 7 June 2011).


\(^{180}\) In 2006, the Military Tribunal of Bukavu convicted Jean Pierre Biyoyo – a former Commander of the Mudundu-40 movement – to five years imprisonment for illegal recruitment and abduction of children. In striking
3.3 Conscripting, Enlisting and Using Child Soldiers as International Crime

The cultural diversity of recruitment and use of child soldiers as an international crime manifested itself in the international legal debate on determining at what age a child can be enrolled in the armed forces.\(^{181}\) A full review of the crime of conscripting, enlisting and using child soldiers in international law goes beyond the scope of the thesis. Suffice to say that the permissible age for recruitment was a matter of dispute amongst states when drafting the conventions. Generally speaking, international law prohibits enlisting and using children under fifteen in armed conflict with a number of conventions criminalising recruitment of children below the age of fifteen. However, the 1990 African Charter on the Rights and Welfare of the Child\(^{182}\) and the 26th International Conference of the Red Cross and Red Crescent in 1995 raised the age restriction to eighteen which is also adhered to in the 2002 Optional Protocol on the Involvement of Children in Armed Conflict.\(^{183}\) The DRC is party to all conventions listed above.

In international case law, the ambiguities of the criminality of child enlistment were addressed in Justice Robertson’s dissenting opinion in the \textit{Samuel Hinga Norman} case before the SCSL. Norman was the first to be prosecuted before an international tribunal for ‘enlisting children under the age of 15 into the armed forces or groups or using them to participate actively in hostilities’\(^{184}\) during the Sierra Leone civil that raged from March 1991 to January 2002. Highlighting the importance of the \textit{nullem crimen sine lege} principle and the prohibition of retroactive criminal legislation in order to defend societies against new and unexpected forms of criminality, Justice Robertson pointed to the unclarities of the criminality of child enlistment that abounded prior to the entry into force of the Rome Statute and at the time of the civil war in Sierra Leone. To substantiate, he says:

“If it was not clear to the Secretary-General and his legal advisers that international law had by 1996 criminalized the enlistment of child soldiers, could it really have been any clearer to Chief Hinga Norman or any other defendant at that time, embattled in Sierra Leone?”\(^{185}\)

Although Norman died before the tribunal was able to come to a judgment, the case set a clarifying precedence that the recruitment or use of child soldiers below the age of fifteen is an offence under international law.\(^{186}\)

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\(^{184}\) Prosecutor vs Samuel Hinga Norman (Dissenting Opinion of Justice Robertson) SCSL-04-14-AR72(E) (31 May 2004).

In line with this ruling and the majority of the international conventions, the Rome Statute maintains the fifteen-year threshold and has further designated enlisting, conscripting and using child soldiers as a war crime both in international armed conflict\textsuperscript{187} and non-international armed conflict.\textsuperscript{188} The crime under the Rome Statute consists of three elements: conscripting, enlisting, and using them to participate actively in hostilities. The narrow scope of the first two elements requires administrative efforts of listing new recruits, but allows recruitment campaigns.\textsuperscript{189} Under the Statute, the latter element excludes more passive forms of participation such as cooking and carrying goods and weapons.\textsuperscript{190} There is no internationally set standard sentence for the crime.

3.4 Applying the Theoretical Framework

3.4.1 Rational Actors: Thomas Lubanga Dyilo

In terms of Smeuler’s typology of offenders, Lubanga most likely does not belong to the devoted warrior or fanatic categories. Although his acts may be embedded in an ethnic strife between the Hema and Gegere which dominate the UPC and the Lendu and Ngiti groups,\textsuperscript{191} it is doubtful that his actions are primarily motivated by ideology. Instead, considering the nexus between the natural riches of the conflict in eastern DRC\textsuperscript{192} and nature of the crime,\textsuperscript{193} it is not beyond the bounds of credibility that Lubanga – and also other militia leaders – can be classified as criminal masterminds, profiteers or careerists that benefit from lucrative circumstances.\textsuperscript{194} Lubanga’s leadership position within the UPC generates an understandable conclusion that he was amongst those most responsible for the crimes in the Ituri conflict and thereby susceptible to the ICC’s ratione personae. However, a more nuanced look at the context and other actors in the conflict cast a shadow of doubt on this assumption for there are fish bigger than Lubanga, Ngudjolo and Katanga involved in the Ituri conflict.\textsuperscript{195} Rumour has it that Lubanga was sacrificed as a gesture of Congolese goodwill to the international community.\textsuperscript{196} An analysis of Lubanga’s – or that of other leaders’ – decisions and to

\textsuperscript{186} Norman case (n 185)
\textsuperscript{187} Art. 8(b)(xxvi) “For the purpose of this Statute, “war crimes” means:
(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”
\textsuperscript{188} Art 8(e)(vii) “(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;”
\textsuperscript{189} His decision was made to put at ease the concerns held by the United States of America. Redress (n 158), 30.
\textsuperscript{191} See, Amnesty International (n 4), 27
\textsuperscript{193} Child soldiers are beneficial to use in armed conflict since they are generally considered to be less fearless and more susceptible to indoctrination than adults. See, Eisele (n 169); Happold (n 169). For a more extensive elaboration, see section 3.2 of this paper.
\textsuperscript{195} Statement by Project Leader Central Africa, IKV Pax Christi (n 173); Statement by P. Clark (n 64)
\textsuperscript{196} Statement by J. Verweijen (n 168)
what extent they are influenced by such rumours, prosecution, and the dynamics of the conflict remains uncertain and highly context dependent. As such, further analysis of this at this point would be speculative and void of meaning.

3.4.2 The Certainty of Apprehension: Rewarding Negotiations

Thomas Lubanga was arrested by the Congolese authorities in March 2005 who charged him with genocide, crimes against humanity and war crimes enshrined in the DRC’s military criminal code.197 However, reportedly Lubanga was not so much arrested as the result of active Congolese law enforcement, but was rather handed over to the authorities by his ‘allies’. 198 This is hardly surprising for the Congolese context is renowned for the quick fluctuations in alliances between militias. The account prompts a closer look into the circumstances in which the other suspects in the Congo situation have been caught; or still remain at large.

What seems to be revealed is that the certainty of apprehension in the DRC depends not so much on solid law enforcement action, but rather on political developments. One such development is the larger Security Sector Reform (SSR) of the Congolese defence sector provided by the Global and Inclusive Agreement on the Transition (GIAT)199 signed in 2003. Part of the reform of the defence sector has been the creation of a unified national army as envisioned in the GIAT. One of the lines along which to achieve this were the process of brassage and mixage. Brassage refers to the process of (re)training combatants as well as integrating former belligerents into the national army.200 A separate process of integration into the FARDC was agreed upon between President Kabila and General Laurent Nkunda of the Le Congrès National pour la Défense du Peuple (CNDP). Nkunda’s troops were to be integrated into the Congolese national army by way of mixage, leaving the command structure of the troops intact. Riddled with problems, the integration collapsed within approximately half a year fuelling an increase in fighting between government soldiers and the CNDP.201

After Bosco Ntaganda – a presumed Rwandan citizen – ousted Laurent Nkunda as the leader of the CDNP, he too was integrated into the Congolese army and was deployed to engage in cooperative military operations with the Rwandan government in an attempt to fight the Forces Démocratiques de Libération du Rwanda (FDLR). The FDLR – originally composed of remnant Hutu genocidaires of the 1994 Rwandan genocide – fled across the Rwandan-Congolese border after being defeated by the Rwandan Patriotic Front (RPF). Using these military operations as a justification and necessity to first establish a certain level of peace in eastern Congo, the Congolese government refuses to hand Ntaganda over to the ICC.202 In contrast, former militia leader Mathieu Ngudjolo Chui whom had been integrated into the Congolese army as a colonel as the result of the Goma Actes d’Engagement,203 was handed over to the ICC in 2008 whilst he was in training in Kinshasa.204

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198 Statement by P. Clark (n 64)
202 ICTJ 2009 (n 197)
203 The Goma Actes d’Engagement are the result of the Goma Peace Conference held in January 2008 and signed by 22 armed groups and the Government of the DRC.
204 ICTJ 2010 (n 161).
time of the Congolese self-referral to the Court, Germain Katanga – Ngudjolo’s co-defendant – was already in Congolese custody awaiting an ongoing investigation. After an arrest warrant had been issued by the ICC, Katanga was transferred to The Hague in October 2007. The political dynamics hampering the execution of Ntaganda’s arrest warrant instills Congolese military and militia leaders with confidence that they will be able to negotiate or buy their way around prosecution. It is no so much The Hague that matters, but rather Kinshasa. The political peculiarities of Congolese politics thus negatively influence the certainty of arrest and by extension undermine the ICC’s contribution to deterrence.

3.4.3 The Swiftness of Punishment: Procedural Challenges and Delays

Lubanga was transferred to The Hague in March 2006. Shortly before his trial was scheduled to start, the Trial Chamber stopped the proceedings based on obstacles with the Prosecutor’s use of evidence. Amongst the some 200 documents collected by NGOs and the UN, were documents containing exculpatory evidence that the Prosecutor claimed he could not share with the defence based on confidentiality concerns. After obtaining permission, the Prosecutor shared the documents and the trial began in January 2009. After resumption, the Trial continued to be stirring. In July 2010, Trial Chamber I ordered the stay of proceedings206 of the trial followed by the order to release Lubanga.207 The Prosecutor appealed with success and the Appeals Chamber reversed the Chamber’s decision preventing Lubanga’s release.208 Early 2011, Lubanga applied for the stay of proceedings once more which was rejected in February of the same year.209 The numerous (procedural) challenges have delayed the trial and thereby the swiftness of punishment. At the time of writing, the Court is yet to pass a judgment on Lubanga’s case.210

3.4.4 Meaningful Knowledge of the Legal Norm and Corresponding Punishment: Gravity

In Congo, the ICC crimes fall under the jurisdiction of military courts. The Congolese Military Penal Code does not adequately delineate the elements and scope of war crimes. Since DRC is a monist state, a number of ratified international conventions prohibiting the use of child soldiers also – at least in theory – permeate the national legal order. Aside from the ratification of the ICC Statute in March 2002, an ICC Bill has been drafted that still awaits approval by the parliament. If it is approved, the jurisdiction of the ICC crimes will rest with civilian courts.211

The 2006 Congolese constitution does not specifically ban recruitment of child soldiers and only punishes ‘mistreatment and sexual abuse of minors’ defining minors to be under eighteen. It does however oblige public authorities to protect children and to prosecute those engaging in violent behaviour against children. Recruitment of children into armed forces is however penalised in the

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205 Statement by J. Verwijen (n 168).
206 In the case of The Prosecutor v. Thomas Lubanga Dyilo (Trial Chamber I) ICC-01/04-01 /06-T-313 (8 July 2010).
207 In the case of The Prosecutor v. Thomas Lubanga Dyilo (Trial Chamber I) CC-01/04-01/06-T-314 (15 July 2010).
208 In the case of The Prosecutor v. Thomas Lubanga Dyilo (Appeals Chamber) ICC-01/04-01/06-T-315 (8 October 2010).
209 In the case of The Prosecutor v. Thomas Lubanga Dyilo (Trial Chamber I) ICC-01/04-01/06-T-338 (23 February 2011).
210 ICTJ 2009 (n 197).
Congolese Labour Code. Law No 023/2002 of the Military Justice Code defines recruitment of children under the age of eighteen as a war crime. Moreover, Decree Law No. 066 of 2000 orders armed groups to demobilise all children below the age of eighteen. Furthermore, the Congolese Criminal code criminalises kidnapping and forced detention.212

Lubanga’s charges have been met with surprise as some Congolese were unaware of the internationally illegal nature of using children in armed conflict.213 Others were disappointed in the limited material scope of the indictment, expressing that the use of child soldiers was not amongst the gravest of crimes allegedly committed by Lubanga and his armed forces.214 A 2008 population-based survey on attitudes about peace, justice, and social reconstruction in Eastern DRC found that 85% of the 2620 respondents believed that those who committed crimes ought to be held accountable, indicating murder (92%) and sexual violence (70%) as crimes for which they thought accountability must be pursued. Amidst other crimes, only 22% listed forced recruitment of children as a crime requiring accountability indicating a lower perceived gravity of the crime.215 When asked about victims, only 33% of the respondents living in areas renowned for forced recruitment of children actually listed children as a victimised group.216 The gravity attached to the crime at the international level does not necessarily reflect the gravity – or hierarchy – at the national level.

It must be noted that the findings pertain to civilians who do not necessarily reflect the level of knowledge or attitudes of leaders. Drawing from observations on the ground that fear of arrest abounds, it may be concluded that there is at least an increase in awareness of the illegality of using child soldiers amongst leaders based on the Lubanga case.217 The biggest impact of the Lubanga trial however, may well be the formal passing of laws protecting children and raising the awareness that child soldiering is a crime218 and hints towards a more constructive contribution by the Court by way of complementary deterrence.

3.4.5 Sensitivity towards the Local Context: National Solutions

Though the following also concerns perceptions held by civilians as opposed to leaders, their views do shed some light relevant for applying the framework. When asked by the population-survey researchers which institution should hold people accountable, 80% envisioned a role for the government, and 22% mentioned the national judicial system. Aside from a misunderstanding of the functioning of the government and judiciary, this may suggest a lack of trust in the system. The ICC was considered a relevant mechanism by 24%, closely followed by the international community (22%) and leaving traditional justice mechanisms far behind (6%).219 When asked what means should be used to address the crimes, 51% referred to national courts, 26% to the ICC, and 20% to military courts. Informal mechanisms that were mentioned were a truth mechanism (20%), and conflict-

212 Redress (n 158), 27-28. This sum up of laws should not be considered exhaustive. The point is that child recruitment under the age of 18 is criminalised.
213 Redress (n 158), 22.
214 Clark 2008 (n 69), 41. Statement by Project Leader Central Africa, IKV Pax Christi (n 173).
216 Vinck, Pham, Baldo and Shigekane (n 215), 29.
217 Statement by J. Verweijen (n 168).
218 Redress (n 158)
219 Vinck, Pham, Baldo and Shigekane (n 215), 42.
resolution projects developed by NGOs (14%).\textsuperscript{220} Overall, it seems that the Congolese people – at least those questioned – prefer a national solution to address the crimes.

\subsection*{3.4.6 Access to Information and Visibility: Insufficient Outreach}

In the 2008 survey, 67\% of the respondents identified radio as their primary source of information, followed by personal communication with friends, family or the community (23\%).\textsuperscript{221} Illiteracy rates aside, in the Congolese situation, dissemination of the legal norm and corresponding punishment by way of print will thus not likely reach many people in order to generate the level of knowledge necessary to affect behaviour. The population-survey revealed that only 28\% of the respondents in eastern DRC were aware of the \textit{Lubanga} trial and the ICC. Those that were aware of the trial had learned about its existence either by radio or television.\textsuperscript{222}

Efforts to gauge the impact of Lubanga’s trial result in a conclusion that it has had a limited impact due to little visibility of the case. In 2009, the ‘Lubanga Project’\textsuperscript{223} met with a number of Congolese civil society leaders and students to discuss the case. The consensus that the trial had little impact on the ground was accorded to the slowness of the proceedings, and poor visibility due to a lack of communication with the Congolese people.\textsuperscript{224} These reactions do not support a very positive view of the Court’s intervention in the Congolese situation. Indeed, the Court has also been criticised for poor outreach by other sources.\textsuperscript{225} Apparently the ICC – in cooperation with MONUSCO – organised muted screenings of the trial in The Hague on only a couple of occasions.\textsuperscript{226} Whether this can be attributed to poor outreach is probable – though undetermined – but the ICC trials are not part of the Congolese national dialogue.\textsuperscript{227} Additionally, there are geographical differences in knowledge about Lubanga’s case in the eastern provinces of the DRC, with people in Ituri being most aware of the trial in contrast to South and North Kivu.\textsuperscript{228}

\subsection*{3.4.7 Knowledge of Consistent Rule Enforcement: Culture of Impunity}

Despite numerous international judicial reform efforts,\textsuperscript{229} DR Congo is renowned for its culture of impunity and the Congolese justice system for its ineffectiveness which may marginalise any contribution of the Court to deterrence. This is probably more so because the consistency of rule enforcement is undermined by political interests of the Congolese authorities. Nevertheless, the

\begin{flushleft}
\textsuperscript{220} Vinck, Pham, Baldo and Shigekane (n 215), 45.
\textsuperscript{221} Vinck, Pham, Baldo and Shigekane (n 215), 52.
\textsuperscript{222} Vinck, Pham, Baldo and Shigekane (n 215), 3, 47.
\textsuperscript{223} A joint initiative of the Institute for war & Peace Reporting (IWPR) and the Open Society Justice Initiative (OSJI).
\textsuperscript{226} Statement by Project Leader Central Africa, IKV Pax Christi (n 173); Statement by P. Clark (n 64)
\textsuperscript{227} Statement by Project Leader Central Africa, IKV Pax Christi (n 173)
\textsuperscript{228} Statement by Coordination Officer of MONUSCO’s Stabilisation Support Unit (SSU) (n 178)
\textsuperscript{229} In 2005, the \textit{Comité Mixte de Justice} (CMJ) was created to enable national authorities and international partners to coordinate their reform efforts. The CMJ was officially formalized in 2007 and has since played a key role in facilitating the formulation of the Justice Reform Action Plan that is formally made operational by eleven working groups. The plan’s aims are fourfold: (i) universal access to justice, (ii) the establishment of the legal and constitutional framework of justice, (iii) combating corruption and impunity, and (iv) the promotion of, and respect for, human rights. To facilitate the achievement of these aims, ten programs were set up totalling to an amount of US$ 150 million (H. Boshoff, D. Hendrickson, S. Moore and T. Vircoulon, ‘Supporting SSR in the DRC: Between a Rock and a Hard Place’ (2010) Netherlands Institute of International Relations Clingendael).
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military courts in DRC have gradually taken a more promising role in adjudicating low-level or mid-level offenders for war crimes, crimes against humanity and sexual violence\(^{230}\) albeit not child soldiers. Also, with the possible establishment of a specialised chamber,\(^{231}\) the national level may gain an increasingly stronger impact. However, whether the chamber will actually be established and whether this has positive consequences still remains to be seen.

### 3.4.8 The Credibility of the Threat of Prosecution: Mixed Signals

Seeing that the credibility of the ICC’s threat of prosecution is partially dependent on the Congolese authorities to give effect to the threat, the application of this factor suffers from the same problems as encountered by the certainty of apprehension. Observations have been made that a degree of fear of arrest abounds amongst military and militia leaders. Nevertheless, the political ventures preventing the arrest of Ntaganda have sent a message to these leaders that arrest warrants are negotiable. Hence, the marginal chances of being indicted, arrested as well as the political room to negotiate with Kinshasa prevent this fear manifesting in a restraint in criminal behaviour.\(^{232}\)

### 3.4.9 Subjective Assessment: the ‘Lubanga Syndrome’

Deterrence is fear-based and essentially dependent on individual character traits. Reportedly, the fear of arrest has induced Congolese militia leaders to release child soldiers from their ranks and into DDR programmes for fear of negative consequences.\(^{233}\) Based on this, claims have been made that the Court has positively influenced militia behaviour on the ground. However, other leaders have been reported to have instructed their ‘kadogos’\(^{234}\) to lie about their age upon arrival at child protection centres or hide when child protection workers were present. Messages also circulate that children were simply left behind by commanders joining the brassage process.\(^{235}\) Though this may, at least, indicate an increase in awareness of the illegality of the recruitment and use of child soldiers, it does not yet prove the existence of a deterrent effect.\(^{236}\)

The fear of arrest allegedly induced by prosecuting Lubanga has been dubbed the ‘Lubanga syndrome’. The ‘Lubanga syndrome’ finds its origins in an interview conducted by a Human Rights Watch (HRW) researcher when she spoke to a Congolese warlord who said that he did not ‘want to

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\(^{231}\) In a report documenting grave human rights violations that occurred on Congolese territory between March 1993 and June 2003, UNHCHR discusses a number of accountability options including the ICC, adjudication by third states based on the principle of universal jurisdiction, an international tribunal, a hybrid court and a specialized mixed chamber. In response, the Congolese government has expressed preference for a specialized chamber within the Congolese judicial system whose jurisdiction would include the most serious crimes committed in the DRC. See, UNHCHR, ‘Democratic Republic of Congo 1993-2003 – Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of Congo between March 1993 and June 2003’ (UN Mapping Report) August 2010, 454 in: Human Rights Watch 2010 (n 211), 2-4.

\(^{232}\) Statement by J. Verweijen (n 168).

\(^{233}\) Van Woudenberg (n 4); Duthie and Specht (n 8), 4; Mattioli (n 4); Redress (n 158), 22.

\(^{234}\) A KiSwahili term used to refer to children in armed groups.


\(^{236}\) Mattioli and van Woudenberg (n 230), 56. These developments have been confirmed in a Statement by Project Leader Central Africa, IKV Pax Christi (n 173) and in a Statement by J. Verweijen (n 168).
end up like Lubanga. Ever since, the syndrome has been referred to in other (NGO) reports and has become something larger than it originally was. Nevertheless, other pieces of anecdotal evidence do exist. An ex-combatant in Ituri testifies that: ‘Today many leaders of armed groups are afraid to engage in hostilities or recruit child soldiers [for] fear of being charged by the International Criminal Court.’ Moreover, anecdotes of the Lubanga phenomenon are not restricted to the Congolese context. According to Radhika Coomaraswamy – Special Representative to the Secretary General for Children in Armed Conflict – prosecuting those enlisting and using child soldiers has lead armed groups worldwide to seek negotiation for the release of the children from their midst. Citing the release of 3,000 child soldiers in Nepal she said: ‘[t]he Lybanga trial represents a crucial precedent in the fight against impunity and will have a decisive deterrent effect against perpetrators of such crimes.’

However, when examining the anecdotal evidence more closely, it must be noted that it becomes unconvincing. The warlord’s statement was given in reaction to the HRW researcher’s informative message that arresting and executing one’s rival was a war crime. Although this statement may hint towards a deterrent effect of Lubanga’s prosecution for this particular individual, it does not necessarily directly link to the crime of enlisting, conscripting and using child soldiers. More importantly though, it does not prove that his words manifested into corresponding behaviour attributable to the ICC prosecution. In fact, experts proclaim that the Lubanga trial has only had a marginal impact on child soldier recruitment in eastern DRC since it is still a widespread practice. The context of the statement by the Iturian ex-combatant and the Nepalese situation remains unanalysed. This is problematic because a multiplicity of other factors could be responsible for the release of children from the Nepalese armed group(s). A correlation between the Lubanga trial and the release of child soldiers in Nepal cannot be asserted without substantiation by a thorough contextual analysis. Effectively, the ‘Lubanga syndrome’ is still an anecdotal phenomenon void of structural corresponding behaviour and should therefore be treated with caution as reliable evidence of a deterrent effect of the Lubanga trial.

3.4.10 Impartiality: Perceptions of Partiality

The arrest of Thomas Lubanga has been met with mixed reactions in Congo. For some, Lubanga’s indictment and arrest raised hope and expectations, for others it has amounted to a disappointment. Amidst the havoc of the Ituri conflict, the regional setting of the Congolese conflict, and numerous conflicting groups, the ICC is bound to be tainted by accusations and perceptions of selectivity, bias and political meddling. Indeed, some Congolese communities view the ICC as a Western Court incapable of being independent and which uses Lubanga as a scapegoat. This is not surprising since – aside from his identity as ruthless warlord, Lubanga is also seen as protector of the Hema tribe. Giving expression to perceptions of bias and selectivity, a Lendu elder explains:

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237 Van Woudenberg (n 4).
238 Statement by P. Clark (n 64); Statement by S. Nouwen, Mayer Brown Research Fellow in International Law, Faculty of Law, University of Cambridge (Personal communication 15 July 2011).
240 ICC 2010 (n 148), 5.
242 Van Woudenberg (n 4).
243 Waruzi (n 160).
‘The ICC trial has no deterrent effect because the real criminals are exempt from charges and are integrated in communities. Moreover, this trial is taking place thousands of kilometres outside Ituri. Elsewhere we know that the world tries to demonise Ituri as they arrested only Ituriens.’

Despite efforts to professionalise and reform the army, the FARDC is one of the most notorious violators of international law in Congo. Amongst these violations is the use of child soldiers. Between October 2008 and December 2009, the FARDC was documented to be responsible for recruiting 42% of the 1,593 children, yet no army official has yet stood trial for these transgressions. As noted earlier, selectivity is also found in the narrow selection of criminal charges. It is thus not surprising that the Court’s legitimacy is challenged in the Congolese context.

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244 Lendu elder quoted in: Morland (n 239)
245 Report of the Secretary-General 2010 (n 167), 4-5.
4. Conclusion

4.1 ICC’s Contribution to Deter Leaders from Using Child Soldiers

4.1.1 Evaluative Framework

Championed by ICC supporters and rejected by ICC critics, the claimed deterrent effect of the ICC lacks well-grounded research or theoretical scrutiny. This is a problem because the deterrent argument is used to justify ICC prosecution at all times, whereas ICC intervention has demonstrated adverse effects. Efforts must therefore be taken to evaluate the soundness of the deterrent claim. Because deterrence is notoriously difficult to measure, I have resorted to develop an evaluative framework based on an extensive interdisciplinary literature review and observations from the ground. This has resulted in the creation of a basic framework that consists of seven key factors that are important for deterring criminal behaviour. This framework has been adapted to the particularities of the international level, situations of violent conflict, and the workings of the ICC, and has been applied to the Lubanga case. The result is a framework that consists of eight key factors of importance and three overarching complicating factors subdivided into six sub-factors that weaken the Court’s contribution to deterrence.

According to the deterrence theory, individuals will be deterred from criminal behaviour if the likelihood of the materialisation of the perceived costs (punishment through prosecution) outweighs the expected benefits of the crime. The seven key factors important for this cost-benefit analysis are theorised to be: the certainty of apprehension, the swiftness of punishment, the severity of the punishment, the knowledge of the legal norm and corresponding punishment, the knowledge of consistent rule enforcement and sufficient opportunities, the credibility of the threat of prosecution, and the subjective assessment of the threat of prosecution punishment. In the end, all these factors determine the legitimacy of the prosecuting entity, its procedures as well as the governing body of law.

The ICC’s approach to deterrence is set in a larger paradigm that is framed by the international criminal discourse. This discourse envisages the Court to have a global constituency that is committed to universal norms. These shared common values are so fundamental that their violation justifies investigation, prosecution and punishment against their transgressors. This paradigm installs the Court with epic ambitions. In their efforts to advocate this international criminal justice ideal, its promoters appear to take successful achievement of the goals (ie. a deterrent effect) at face value rather than investigate the empirical realities on the ground. Bestowing institutions such as the ICC with such grand roles and promises inevitably leads them to clash with the harsh realities and complexities of contemporary conflict, and arguably sets them up for failure by the outset in strict terms of their own goals.

The fundamental limits of international prosecution become painfully apparent when applying the seven factors to the international level and situations of violent conflict. The volatile and disruptive nature of mass violence gives rise to situations in which morality is reversed and violence is the norm. These circumstances affect the (moral) choices by individuals to such an extent that they do not resemble ‘regular’ cost-benefit calculations. Whilst leaders plausibly engage in rational calculations, the dynamics of violent conflict and immediate needs of warfare make it unlikely for remote costs of prosecution to penetrate or override strategic military and political decisions.
Without enforcement forces, the Court is highly dependent on states. This is problematic because – despite their legal obligations – the willingness of states to cooperate is subject to political considerations and interests. Vivid examples of these difficulties are the Darfur situation and the Ntaganda case. The Court’s institutional dependence on states thus diminishes the certainty of apprehension. The low level of certainty of apprehension contributes to a low swiftness of punishment. However, if caught, the suspect will endure some type of punishment in the form of pre-trail detention in Scheveningen. Nevertheless, international trials are renowned for their lengthy duration be it the result of a strong emphasis on a fair trial, difficulties in finding reliable evidence in situations of mass violence, and dependence on states.

Drawing from national debates and studies, the conclusion can be made to omit the severity of punishment as a key factor. Instead, the meaning of punishment has been found to be of greater importance. Since criminality is a social construct, the meaning of punishment is likely to be embedded in the individual’s community. As such, informal approaches to justice may be more effective than formal processes. The importance of meaning is also important for legal norms. Since the number and cultures of norm addressers pluralises at the international level, the chance that international legal norms are meaningful in all cultures decreases. Particularly the crime of enlisting, conscripting and using child soldiers is determined by different (cultural) conceptions of childhood.

Though the other ICC crimes will most probably not be considered alien standards of justice by the majority of people, they may lose their meaning if the situation of violent conflict calls for it. Even though this may not be a tolerable development, it does diminish the chance to stop and prevent atrocities. The internationalisation and the Court’s Western-based top-down system of bringing justice contributes to a disconnect between international and local concepts of criminal behaviour, concepts of justice and forms of accountability. In broad terms, a tension exists between criminal adjudication and retributive justice conducted by the ICC and restorative and reconciliatory forms of justice at times preferred by the local communities. Aside from being meaningful, giving effect to this factor also entails practical undertakings of dissemination of information which is challenged by rampant insecurity in situations of violent conflict. Taking into account the above, the evaluative framework must emphasise the importance of the meaning of norms and corresponding punishment and include access to information, visibility and sensitivity to the local context.

Aside from state dependency, the perceived selectivity of the Court and its restrictions in limited (financial) resources and case load undermine the knowledge and consistency of rule enforcement. Despite some preliminary investigations in other areas of the world, the history of the Court thus far demonstrates an exclusive concentration of cases on the African continent. Though this may be warranted by its legal mandate, it has lead to much criticism and a tense relationship with African states. Although the Prosecutor pushes hard to give effect to his threats, the Court’s tense relationship with states distorts the communication of a clear threat and thereby taints the credibility of the threat of prosecution. This is due to the mixed signals that result from states pursuing their national interests in spite of their legal obligations.

The poor scoring of the Court on all these key factors is detrimental for the Court’s legitimacy. Perceptions of bias and selectivity generate a view that the Court is partial. The Court’s institutional structure, ratione materiae, and intervention in ongoing situations of conflict, make the Court predetermined to be affected by politics, making it susceptible to political manipulation. Moreover, the Court’s initial focus on militia leaders has invited critique in terms of selectivity and bias leading which further challenges the Court’s impartiality and legitimacy. The application of the
seven factors leads to the conclusion that the Court only has a marginal deterrent contribution at best.

Regardless of these difficulties and critiques, the Prosecutor and ICC supporters continue to defend the universal and impartial approach. This is not only problematic because the approach and its discourse are not grounded in political realities of the international legal order and situations of violent conflict, but also because the deterrence argument is based on the assumed workings of prosecution at the national level.

The transposition of the deterrence argument from the national level to the international level is first of all problematic due to the disputed nature of deterrence at the national level. Secondly, the typical functions of criminal law that the deterrence theory rests on (a body of law reflecting common values of a homogeneous constituency, capable of offering a solution to social problems, and regulating the relationship between an authoritative state and the individual living in it) do not work at the international level. The analysis of ICC prosecution has resulted in the adaptation of the basic framework so that it consists of eight key factors that must be present and three overarching complicating factors. The latter can be subdivided into six sub-factors that weaken the Court’s contribution to deterrence.

The dynamics of violent conflict give rise to a significantly different context characterised by the immediate needs of warfare and in which actors behave differently than in national contexts of relative stability. The inseparability of law and politics create a context in which political interests take precedence over legal obligations. In this situation, the Court’s institutional dependence on states negatively affects (perceptions of) the Court’s impartiality and legitimacy. The heterogeneity of constituencies and corresponding norms and values at the international level lead to a plurality in concepts of criminal behaviour, concepts of justice, and approaches to accountability. This diversity may amount to conflicts between the international and local level and also undermines the impartiality and legitimacy of the Court.

In conclusion, these complicating factors that characterise the Court’s operative environment significantly weaken its contributory role to deterring (future) perpetrators of ICC crimes and place the Court at the centre of dilemmas such as the peace and justice debate. Plausibly, the deterrent potential of the Court still lies in the future. Since the Court is a permanent institution, it is important to start evaluating its workings for ultimately the ‘successes’ or effects of ‘justice’ must be evaluated by their impact on the ground, not by faith. Until the ICC and its supporters bridge the gap between an ideal and reality, the achievement of deterrence will remain marginal at best and unlikely in the future. This suggest that, in order for the ICC to remain a legitimate institution, the advocates of the international criminal justice paradigm must come to terms with the limits of international prosecution, re-examine their faith, and be open to pierce their protective belts.

4.1.2 The Thomas Lubanga Dyilo Case

Regarding the extent to which the Lubanga case has a deterrent effect on militia behaviour in terms of enlisting, conscripting and using child soldiers, the following can be concluded. The Democratic Republic of Congo presents a highly complex context where conscripting, enlisting and using child soldiers can be a beneficial tool for militia groups to strengthen their military capabilities and thereby secure control over the mines. It can be concluded that the trial has not been able to sufficiently check all the boxes of the key factors to have a deterrent effect. The reasons for this could rest with a
corrupt government that is willing to disregard the ICC and its legal obligations and thereby decrease the certainty of apprehension; consistency of rule enforcement; and the credibility of the threat of prosecution. It could also be attributed to the lack of swiftness and visibility of the trial and prevalent perceptions of selectivity (of the suspects and charges) and impartiality. However, it must be noted that these impacts were expressed by actors other than the actual norm addressees which need to be deterred.

The impact on the norm addressees – the documented ‘Lubanga syndrome’ – has been used as evidence that the Court is capable of having a deterrent effect. This is problematic because this syndrome is primarily based on unanalysed anecdotal evidence that is void of structural corresponding behaviour. The little solid support for the ‘Lubanga syndrome’ renders it unreliable to confirm a positive correlation between Lubanga’s case and a (worldwide) deterrent effect. It should therefore be treated with caution as reliable evidence supporting claims of deterrence of the Lubanga trial. Until more empirical research is conducted the ‘Lubanga syndrome’ and deterrence argument must be approached with scepticism.

4.2 Recommendations

The permanent nature of the Court dictates that the ICC will be a fixed entity in the international institution landscape for many more years to come. Having concluded that the Court’s contribution to deterrence is minimal, ways need to be found to optimise the workings of the Court so that it can constrain negative side-effects to the best of its ability. Based on the evaluative framework and the conclusions, I humbly come to the following recommendations that may contribute to enhancing the Court’s contribution to a deterrent effect in the long run.

First off, the great ambitions that the ICC purports arguably make it (morally) accountable to those affected by mass violence for promises that it makes. The Court would be well advised to critically reflect on what it can realistically achieve, come to terms with the realities and complexities of its inter(national) operative environment, and manage expectations to minimise disappointment and frustration. For this, the Court should engage with further empirical and interdisciplinary research to assess the validity of its claims. This can be done by drawing on lessons learned and debates about the workings of deterrence on national levels by other disciplines.

Ultimately the Court’s contribution to deterrence is defined by the perceptions of its legitimacy. Hence, recommendations must centre around ways that increase its legitimacy. One way to achieve this might be to close the ‘distance’ gap between the international level and local level. This would entail sensitising the Court’s approach to the local context and allowing more space for local concepts of justice and approaches to accountability to function in a complementary manner to the Court. This would imply a more flexible assessment of the Court’s complementarity principle. It could also mean that the Court must increase its physical proximity to the war-affected population. This requires an adapted (culturally sensitive) communication strategy and intensification of its outreach programmes. Whilst acknowledging the (practical) difficulties, the Court could also consider in situ trials or cooperation with hybrid tribunals. In order to sensitise the Court’s strategies and at least minimise perceptions that the Court can be abused by states as a political instrument, it is imperative that the OtP engage in more thorough political and contextual analyses prior to investigating situations.
4.3 Further Areas of Research

As established in the introduction, the deterrent effect lacks credible empirical or theoretical scrutiny. This thesis has been an attempt to take a step in filling this gap, yet would benefit from further qualitative field research in (post)conflict situations. This could take the form of investigating how militia leaders subjectively assess the key factors of the evaluative framework. For instance, is there a hierarchy in the factors? If so, how is this determined?

Aside from further critically analysing what the ICC can realistically achieve and how it interrelates with the national (and local) context, it is also imperative to build on existing studies to gain a deeper understanding why leaders engage in criminal acts in the first place. Only then can a strategy start to be developed that may be effective in influencing decision-making. For instance, how does the development of the (nature and phase of the) conflict affect the likelihood that the prospect of prosecution will influence the strategic deliberations engaged in by militia leaders? Related to this issue are questions concerning the influence of the type of offender of the accused and his/her importance. It would also be interesting to analyse what effect a certain degree of unpredictability could have on the calculations and perceptions of the threat of prosecution.

The finding that criminality is a social phenomenon and the plurality of norms in the international order warrant more research into the deterrent effects of informal justice systems as well as efforts to investigate whether the ICC can attain a multi-cultural justice system. Also, the multitude of constituencies that fall within the reach of the ICC and the Court’s grand promises make it essential to consider issues of the Court’s own accountability.
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FROM MORAL RHETORIC TO CRITICAL ANALYSIS:
An Evaluative Model for the ICC’s Contribution to Deterrence: the Lubanga Case

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Summary

Within an already wide varied pallet of peace-building instruments, international criminal prosecution by the International Criminal Court (ICC) is increasingly claimed to contribute to constraining conflict and building peace. Inherent to this faith that the ICC can contribute to peace and security, is the belief in the deterrent effect of (the threat of) international prosecution. Yet, it is exactly this correlation between on the one hand international prosecution and on the other deterrence in terms of a decrease in – or even cessation of – the prevalence of atrocities that is largely based on assumptions. Within the international criminal justice paradigm, the deterrence claim is often either simply declared or rejected short of credible empirical or theoretical scrutiny. The assumptions of the deterrent effect of international prosecution lead the ‘ICC supporters’ to consider international prosecution as a positive development an sich, whereas ‘ICC critics’ point to demonstrated negative backlashes of ICC prosecution arguing that it is likely to do more harm than good. Despite the heated debates, efforts to actually evaluate the Court’s contribution to the deterrent effect remain scarce. The prevailing uncertainty and under-exploration of the deterrent claim and associated (policy) developments make it of utmost importance to further investigate and better understand the validity of these claims. This thesis set out to do exactly that. More specifically, I set out to gain insight into the assumed and claimed correlation between deterrence and the actual impact of ICC prosecution on the ground on ‘those most responsible’ (ie. political, military and militia leaders). In order to evaluate this relationship, I examined the only case before the ICC that was close to completion at the time of writing: the Thomas Lubanga Dyilo case. Lubanga was the alleged founder and leader of one of the larger Congolese militias active in North-eastern Democratic Republic of Congo (hereafter DRC or ‘Congo’) and charged with one specific crime: enlisting, conscripting and using child soldiers. Anecdotal evidence abounds that the Lubanga case has generated a fear of arrest amongst Congolese militia leaders. This fear has been dubbed the ‘Lubanga syndrome’. Yet, the question remains whether the ICC and the Lubanga case can contribute to deterrence and whether the ‘Lubanga syndrome’ truly exists.