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How System Criminality Could Exacerbate the Weaknesses of International Criminal Law

Julian Ku*

In its rapid and spectacular growth over the past few decades, international criminal law has been characterized by two foundational principles. First, international criminal law doctrines have insisted on individual rather than state responsibility for international crimes.¹ Second, one of the primary goals of international criminal law is the deterrence of future criminal activity.² Not surprisingly, then, international criminal law doctrines have been applied almost exclusively against individuals, particularly against political and military leaders.³ Such prosecutions have generally been justified as a way to deter future wrongdoing.⁴

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- 1. See, e.g., *The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany*, Part 22, 447 (“Crimes against international law are committed by men, not by abstract entities.”)(emphasis added).
- 2. See, e.g., M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT’L L. 191, 192 (2003). (“[t]he pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts.”).
- 3. See, e.g., *Prosecutor v Slobodan Milosevic*, Case No. IT-02-54-T, Prosecution Opening Statement, 8 (Feb. 12, 2002).
- 4. See, e.g., Rome Statute of the International Criminal Court *prmbi.*, July 17, 1998, 2187 U.N.T.S. 90 (“[d]etermined to put an end to impunity for the perpetrators . . . and thus to contribute to the *prevention* of [serious international] crimes”) [hereinafter Rome Statute].

Andre Nollkaemper's paper usefully challenges the first of these foundational principles.⁵ According to Nollkaemper, the problem of "system criminality" reveals a flaw in the international criminal law's focus on individual liability.⁶ Because many of the criminal acts prohibited by international criminal law are inextricably intertwined with the political and legal system from which it emerges, Nollkaemper argues, international criminal law should be reconsidered to address these systemic factors.⁷ Otherwise, it cannot achieve its second goal of deterring future criminal activity.⁸

In this paper, I will first discuss the importance of the deterrence rationale to the application of international criminal law. Although deterrence may be a laudable goal, I will then suggest that the relationship between deterrence and international criminal law is woefully under-theorized and unsupported by any empirical evidence. Finally, I consider the effect of Nollkaemper's proposed shift to system criminality in light of this critique of the deterrence rationale. While in some ways my critique of the deterrence rationale supports Nollkaemper's overall recommendation, I suggest that pursuing system criminality would actually tend to worsen the problems I will identify in my deterrence critique. By widening the set of individuals who are likely to resist prosecution, the pursuit of system criminality is more likely to strengthen rather than weaken the regime's resisting international criminal prosecution, both in the short term and possibly in the long term as well. I use the recent ICC arrest warrants against Sudan's sitting President and Minister of the Interior as early evidence of the dangers of Nollkaemper's proposal.

I. The Deterrence Thesis

The movement to develop mechanisms for the enforcement of international criminal law has a long history, but it gained new momentum in the last decade of the twentieth century.⁹ In that short ten-year span, the world witnessed the establishment of the first United Nations-sponsored tribunals for the application for

5. André Nollkaemper, *System Criminality in International Law: Can the Law of International Responsibility Reach the System?*, 8 SANTA CLARA J. INT'L L. 313 (2010).

6. *Id.*

7. *Id.*

8. *Id.*

9. See Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 784-85; See GARY A. BASS, *STAYING THE HAND OF VENGEANCE* 75-105 (2000) (discussing pre-World War II plans for war crimes trials).

international criminal law as well as the creation of the first permanent International Criminal Court.

The rationale for this explosion in international criminal law tribunals (ICTs) has been varied. Most of the academic literature has focused on improving the institutional design of ICTs and rarely offers justifications for the creation and support of ICTs.¹⁰ One rationale, however, is almost always offered: supporters of ICTs typically argue that ICTs can deter or prevent future humanitarian atrocities.¹¹

The deterrence rationale for ICTs is often phrased as an argument for administering punishment as a way to prevent recurrence of the punished acts. As a leading academic supporter explains, “The pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts.”¹² As former ICTY (International Criminal Tribunal for the former Yugoslavia) judge and scholar Antonio Cassese has suggested, the failure to punish the Armenian genocide “gave a nod and a wink to Adolf Hitler and others to pursue the Holocaust some twenty years later.”¹³

This idea that international criminal justice can prevent future atrocities is reflected in the preamble to the Rome Statute which created the International Criminal Court.¹⁴ The Rome Statute states that the ICC is “[d]etermined to put an end to impunity for the perpetrators. . . and thus to contribute to the *prevention* of [serious international] crimes.”¹⁵

The manner in which ICTs can prevent future atrocities is usually explained in two ways. First, advocates argue that the ICTs can change the cultural makeup of a

10. See, e.g., Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633 (2003); See also Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751 (2005).

11. Some academics have recognized the problems with assuming an ICT can deter atrocities, although most do so only in the context of proposals to increase the use and powers of ICTs so as to increase the likelihood of deterrence. See, e.g., Diane Marie Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities*, THIRD WORLD LEGAL STUDIES 169, 174 (2000–2003); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 591 (2002).

12. M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT’L L. 191, 192 (2003).

13. Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1, 2 (1998).

14. Rome Statute, *supra* note 4, prmb1.

15. *Id.*

society that had previously tolerated atrocities.¹⁶ Second, ICT supporters have argued that ICTs will have deterrence effects in the same way that domestic criminal courts have deterrence effects, an effect that will likely increase as ICT prosecutions become more common.¹⁷ As prominent human rights advocate Kenneth Roth once argued, “the ICC could start saving lives tomorrow” if the US agreed to allow a referral of Sudan to the ICC as opposed to seeking the creation of an ad hoc court.¹⁸ Foreign policy scholar Samantha Power made a similar argument against ad hoc ICTs, which are only created after a particular set of atrocities occurs and with a necessarily limited jurisdiction.¹⁹ A permanent ICC prosecution would not only punish individuals in Sudan, but also deter future atrocities generally.²⁰

II. The Deterrence Critique

If, as I have argued here, deterrence is an important justification for establishing international criminal tribunals and for international criminal law more generally, then it is surprising that there is very little theoretical or empirical work examining the efficacy of such ICTs and ICL in deterring future atrocities. Scholars and advocates tend to assume that deterrence will occur, as long as the mechanisms of international criminal justice are designed properly.

In prior work, Professor Jide Nzelibe and I offered reasons to doubt this easy assumption.²¹ One of the most plausible theories for how criminal punishment deters future crimes draws on economic theory.²² In this view, the two key factors for deterrence are the likelihood of punishment and the severity of that punishment.²³ In their calls for institutional reform and effectiveness, most ICT supporters implicitly accept the usefulness of this framework.²⁴

16. See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 13-19 (2001).

17. Theodor Meron, Op-Ed., *From Nuremberg to The Hague*, 149 MIL. L. REV. 107, 110-11 (1995).

18. See Nicholas Kristof, Op-Ed., *Why Should We Shield the Killers?*, N.Y. TIMES, Feb. 2, 2005, at A21 (quoting Kenneth Roth, spokesman for Human Rights Watch, who stated “[t]he I.C.C. could start tomorrow saving lives . . . [but w]ith the [ad hoc] tribunal route, you’re talking about another year of killing.”).

19. See Samantha Power, *Court of First Resort*, N.Y. TIMES, Feb. 10, 2005, at A23.

20. *Id.*

21. Ku & Nzelibe, *supra* note 9.

22. *Id.* at 792.

23. *Id.* at 798.

24. See Power, *supra* note 19.

When such a framework is tested against existing data, however, we seriously doubt that international criminal law can have a significant deterrence effect. As ICT supporters acknowledge, the likelihood of punishment for international crimes in an international tribunal is relatively low. But more fundamentally, the severity of punishment in such a tribunal is also relatively low, especially as compared to the serious sanctions of murder, imprisonment, and torture that is faced by most perpetrators of humanitarian atrocities.²⁵ Because, by definition, international criminal law will apply most often to activities by leaders and governments in weak or failed states,²⁶ perpetrators often commit atrocities in the shadow of atrocities that they fear will be committed against them by their political and military opponents. In our view, the sanctions of an ICT, which could result in life imprisonment in only the rarest of cases and would never result in death as a penalty, are unlikely to have a serious deterrence effect.²⁷

We offered a preliminary empirical assessment of our analysis via data on the fates of leaders and failed coup plotters in Africa in the post-WWII era.²⁸ We concluded that such plotters, who represented the type of individuals most likely to be brought before ICTs or punished by ICL, faced a relatively high likelihood of severe punishment in the event of a failure to win power.²⁹ For African leaders who achieved power, a startling 17.7 percent were killed, and another 41.6 percent either suffered imprisonment or exile, or both.³⁰ For coup participants, odds are even more startling: among coup participants, 28 percent were executed or otherwise murdered; 22 percent were exiled or imprisoned; and another 16 percent were arrested without any clear outcomes.³¹ Failure in a coup, of course, leads to even more dire outcomes with a 35 percent execution or murder rate and a 27 percent imprisonment rate.³²

Even if one assumes a high likelihood of punishment by an ICT, there is no way that an ICT could ever mete out punishments as severe as those faced by likely perpetrators of humanitarian atrocities. Unless ICT supporters can offer a different analytical framework or evidence from different empirical sources, the case for

25. See generally Ku & Nzelibe, *supra* note 9.

26. *Id.*

27. *Id.*

28. *Id.* at 801-810

29. *Id.*

30. *Id.* at 804-806

31. See Ku & Nzelibe, *supra* note 9, at 804-806.

32. *Id.*

ICT deterrence has yet to be made. Certainly, this rationale is far weaker than most of its supporters have assumed.

III. System Criminality and the Deterrence Critique

It is likely that Nollkaemper shares this negative assessment of the deterrence effects of ICL. After all, the unstated premise of Nollkaemper's paper is that without a shift toward system criminality, international criminal law is unlikely to succeed in its efforts to deter international crimes.³³ The main difference, therefore, lies in our comparative prescriptions for reform.

In Nollkaemper's view, the admitted weaknesses of international criminal law suggest expanding the scope of ICL's targets to include states and systems as opposed merely to individuals.³⁴ In my view, these same weaknesses suggest a need for a greater willingness to restrain the ICL in circumstances where it is unlikely to deter atrocities and, indeed, possibly worsen such atrocities.

One early test case for our competing views is the ICC's current investigation into serious atrocities arising out of the civil war in Sudan. In 2005, the United Nations Security Council referred Sudan to the ICC, the first such Security Council referral in the ICC's history.³⁵ All of the other existing ICC investigations involved self-referrals by the governments of the countries being investigated.³⁶ But in the case of Sudan, the government refused to join the ICC or to accede to the ICC's jurisdiction.³⁷

Perhaps not surprisingly, the ICC's investigation immediately targeted prominent members of the existing Sudanese government. In its first action, the ICC issued an arrest warrant for Ahmad Harun, who was the sitting Minister of State for the Interior of the Government of Sudan.³⁸ Raising the stakes in 2008, the ICC Prosecutor sought, and won, an arrest warrant for the Omar al-Bashir, Sudan's sitting president and head of the state.³⁹

33. See Nollkaemper, *supra* note 5, at 352.

34. *Id.*

35. See S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

36. See *Communications and Referrals*, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Referrals+and+communications/> (describing three state referrals and one referral from UN Security Council.).

37. See *Sudan rejects ICC jurisdiction*, REUTERS, Feb. 27, 2007, <http://www.alertnet.org>.

38. See *generally*, Prosecutor v. Ahmad Harun, Case No. ICC-02/05-01/07, Warrant of Arrest (April 27, 2007).

39. See *generally*, Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (March 4, 2009).

The ICC's Sudan investigation is thus the closest approximation of Nollkaemper's ideal of attributing criminal liability to the system as opposed to mere individuals. By issuing arrest warrants for government ministers and the existing head of state for acts undertaken pursuant to their official authority, the ICC is effectively indicting the entire Sudanese regime that served under Bashir. Bashir is not accused of directly ordering assaults or atrocities.⁴⁰ Rather, he is sought for his oversight and administration of a regime that engaged in certain alleged atrocities.⁴¹ Unlike prior trials of heads of state, such as the famous trial of Slobodan Milosevic, the ICC is openly targeting the existing regime.⁴² It is hard to imagine the ICC achieving its goals without "regime change" and a fundamental revision of the governmental system in Sudan. In a sense, therefore, the ICC is experimenting with Nollkaemper's recommendation to deal with systemic causes in its prosecution of war crimes in Sudan.

Although the Sudan story has yet to play out, the early signs are not encouraging for the system criminality view. In response to the arrest warrants, the Sudanese government expelled all foreign aid organizations.⁴³ The ICC warrants even drew sympathy from other African leaders and the African Union.⁴⁴ The warrants, at least in the short term, have strengthened rather than weakened the "criminal system."

Worst of all, the arrest warrant against Bashir poses a nontrivial threat to a comprehensive peace agreement in Sudan. Under Nollkaemper's view, the underlying causes of the atrocities cannot be dealt with unless the entire system is punished and held accountable in some way.⁴⁵ But, as we see in the case of Sudan, the campaign against the entire system can also undermine efforts to reach a peace agreement with the same "criminal" system. As former U.S. Sudan envoy Andrew Natsios has argued, the continued allegations of a genocide in Sudan, combined

40. *Id.*

41. *Id.* at 6-7.

42. *Id.*

43. Reuters, *Sudan expels aid agencies*, THE INDEPENDENT (UK), Mar. 5, 2009, <http://www.independent.co.uk/news/world/africa/sudan-expels-aid-agencies-1637910.html> (last visited December 10, 2009).

44. *African Union in rift with court*, BBC NEWS ONLINE (UK), July 3, 2009, <http://news.bbc.co.uk/2/hi/africa/8133925.stm>. (last visited Jan. 20, 2010)

45. Nollekamper, *supra* note 5, at 331.

with the ICC's arrest warrants, threatens efforts to implement past peace agreements.⁴⁶

In order to end the atrocities, the international community faces two unattractive choices: 1) seek a peace agreement with a deeply unsavory regime or 2) seek that regime's ouster through military intervention or military support for rebel forces within Sudan. Nollkaemper's approach makes option one nearly impossible. Option two, however, seems unlikely to occur via ICC-issued arrest warrants alone. To the extent that Nollkaemper's option makes a peace agreement impossible, the international community will likely face more atrocities rather than less, at least in the short term.

To be sure, Sudan is not a perfect test case of Nollkaemper's approach, but it does reflect elements of his emphasis on systemic rather than individual causes. And it is not, at least at the time of this writing, a supportive example for system criminality.

Conclusion

Nollkaemper's essay should be saluted for its recognition of the limitations and flaws in the deterrence rationale for international criminal law. In many ways, his essay presumes that, as I have argued in other work, ICL as currently constituted has very little effective deterrence on serious humanitarian atrocities. And while his argument for system criminality as a solution to this problem is well-reasoned, I offer reasons to doubt the efficacy of such an approach. System criminality, I suggest, is just as likely to harden resistance to peace agreements as it is to lead to the reduction or deterrence of humanitarian atrocities. Sudan provides some early evidence of this tragic phenomenon.

46. Andre Natsios, *Why the Arrest Warrant Against Sudan's President Will Serve Neither Peace nor Justice*, FOREIGN AFF., Mar. 23, 2009, <http://www.foreignaffairs.com/articles/64904/andrew-natsios/waltz-with-bashir>.