From Nuremberg to The Hague: The Civilizing Mission of International Criminal Law

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I INTRODUCTION

> The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated.... Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive.... The real complaining party at your bar is Civilization.[1]

> Mr. President, this is no ordinary trial, for here we are waging a part of the determined battle of civilization to preserve the entire world from destruction.... A few throughout the world, including these accused, decided to take the law into their own hands and to force their individual will upon mankind. They declared war upon civilization. They made the rules and defined the issues. They were determined to destroy democracy and its essential basis — freedom and respect of [sic] human personality; they were determined that the system of government of and by and for the people should be eradicated and what they called a 'New Order' established instead.[2]

Civilization. A term so readily and evocatively invoked by the Chief Prosecutors at the unprecedented trials of individuals under international law before the Nuremberg and Tokyo Tribunals after World War II. What is meant, though, by "civilization"? Why did the Chief Prosecutors assume that the prosecution of individuals for international crimes vindicated and affirmed civilization? Who falls within the ambit of the term? Who is excluded?

The aim of this article is to explore the significance of civilization in international criminal law. It suggests that international criminal law, and

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1 Opening Statement of Robert Jackson at the Nuremberg Tribunal, cited in Kei, *Beyond the "Judgment of Civilization"* (2003) 7.

2 Opening Statement of Joseph Keenan at the Tokyo Tribunal, cited in Kei, ibid 4.

its animating concept of individual responsibility for international crimes at international law, is imperialistic. By imperialism, what is meant is not only the formal or informal process or policy of one state controlling the political sovereignty of another,[3] but also the equally oppressive practices by which states may seek to redefine the world in their image, by defining a "universal" in opposition to an "other" — the idea of the "dynamic of difference" — and seeking to bring the other within the universal by way of the "civilizing mission". The mission is "civilizing" because the universal is defined by reference to a "standard of civilization" made up of idealized European or Western norms to which all must conform.[4] Such imperialism can be seen in the practices of powerful Western states at international law after 1945.[5]

By adopting the methodology of Antony Anghie and tracing the "dynamic of difference" and the "civilizing mission" through international criminal law's history and present structures, it is possible to explore how a body of law that purports to be based on universal values of all humanity may be animated by exclusions, notions of civilization, and imperialism. In particular, it enables us to scrutinize the traditional narrative of progress and increasing universality in international criminal law, with a view to questioning and critiquing the present model of international criminal justice. This article seeks to ground this critique in a consideration of the intervention of international criminal law in Uganda, which serves as a reminder that the international criminal justice system affects real people and societies caught up in terrible conflicts, and that the system should be developed, critiqued, and improved with those people in mind.

II THE UGANDAN CONFLICT

The nascent International Criminal Court ("ICC") is currently dealing with four "situations", all of which are in Africa, with a view to prosecuting those responsible for atrocities. One of these is the conflict in Uganda.

History of the Ugandan Conflict

For the last 20 years Uganda has been in the grip of a violent internal conflict between the rebel Lord's Resistance Army ("LRA"), led by Joseph Kony, and the Ugandan Government.[6] This conflict reflects the tension

3 Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005) 11 ["*Imperialism*"].

4 Ibid 84–85.

5 Ibid 12–13.

6 See Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court" (2005) 99 AJIL 403, 406–409 ["Uganda"]; El Zeidy, "The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC" (2005) 5 Int Crim Law Rev 83.

between northern and southern Uganda, which stems from economic and ethnic divisions exacerbated during the British colonial period, and is part of a history of conflict dating from Uganda's independence in 1962.[7] The aim of Joseph Kony and the LRA is to take control of Uganda, and run the country according to the Ten Commandments.[8] In pursuing this end the LRA has committed widespread atrocities against the Acholi people of northern Uganda, including brutal killings and abductions, particularly of children who are used as child soldiers and sex slaves. By terrorizing the civilian population the LRA has instituted a culture of brutality and fear in northern Uganda.[9] In addition to the atrocities of the LRA, there is evidence that the Ugandan army, the Uganda People's Defence Force ("UPDF"), has also taken part in many atrocities. The UPDF's policing of internal displacement camps is particularly notable because of the many accusations of brutality that have arisen from these activities.[10] Complicating this brutal internal conflict has been the involvement of the Sudanese Government in supporting the LRA,[11] while the Ugandan government has supported rebel groups in Sudan.[12] Peace talks have been intermittent in the last few years, with promising moves towards a truce being made in 2006 and 2007.[13] On 29 June 2007, the parties signed an agreement on principles for "accountability and reconciliation", and further, in February 2008 an annex relating to the implementation of these measures was agreed to.[14] To help the move towards peace the Amnesty Act 2000 (Uganda) was passed, giving full amnesty to all who had taken part in the conflict since 1986.[15] However, the long history of conflict and the great deal of mistrust by both sides has made moving forward towards peace extremely difficult.

The International Criminal Court in Uganda

The referral of the situation to the ICC by the Ugandan government in December 2003 and January 2004 has complicated efforts to move towards peace.[16] The investigation by the Prosecutor has resulted in the issuing

7 See Apuuli, "The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda" (2006) 4 JICJ 179, 180–181; El Zeidy, supra note 6, 84–87; Ssenyonjo, "Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court" (2005) 10 Journal of Conflict and Security Law 405, 408–410.

8 Apuuli, supra note 7, 182.

9 See "Abducted and Abused: Renewed Conflict in Northern Uganda" Human Rights Watch (2003) <http://www.hrw.org/reports/2003/uganda0703/> (at 6 August 2008); "Uprooted and Forgotten: Impunity and Human Rights Abuses in Northern Uganda" Human Rights Watch (2005) <http://hrw.org/reports/2005/uganda0905/> (at 6 August 2008) ["Uprooted and Forgotten"].

10 See e.g. Human Rights Watch, Uprooted and Forgotten, supra note 9, 24–37.

11 Akhavan, Uganda, supra note 6, 409.

12 Apuuli, supra note 7, 182.

13 See "Uganda Relents to Northern Rebels" BBC News (2007) <http://news.bbc.co.uk/go/pr/fr//2/hi/africa/6596383.stm> (at 6 August 2008).

14 "Uganda: New Accord Provides for War Crimes Trials" Human Rights Watch (2008) <http://www.hrw.org/english/docs/2008/02/19/uganda18094.htm> (at 23 May 2008) ["New Accord"].

15 Akhavan, Uganda, supra note 6, 409; Ssenyonjo, supra note 7, 419–422.

16 See generally Akhavan, Uganda, supra note 6; Ssenyonjo, supra note 7, 422–431.

of indictments against Joseph Kony and four top LRA commanders for crimes against humanity and war crimes that have occurred since 1 July 2002, thus falling within the jurisdiction of the ICC.[17] Joseph Kony, for example, has been charged with 33 counts of crimes against humanity and war crimes.[18]

International arrest warrants have been issued on the basis of these indictments: the first arrest warrants in the history of the ICC.[19] In a statement on the arrest warrants, the Prosecutor of the ICC said:[20]

> Civilians in Northern Uganda have been living in a nightmare of brutality and violence for more than nineteen years. I believe that, working together, we will help bring justice, peace and security for the people of Northern Uganda.

However, questions have been raised as to how prosecutions by the ICC really fit with the calls for a peaceful end to the conflict and the amnesty offered in Uganda since 2000.[21] By 2006, the LRA command took the position that for peace talks to continue the international arrest warrants would need to be revoked, and President Museveni offered an amnesty to the LRA if peace was secured.[22] More recently, there have been talks of a compromise involving national prosecutions meeting standards acceptable to the ICC.[23] Many religious and community leaders in northern Uganda oppose the ICC's involvement, preferring to focus on peace and the use of traditional reconciliation mechanisms.[24] The desires of the innumerable victims of the LRA atrocities may not be so apparent.

It is clear, then, that not everyone shares the ICC's confidence that its intervention is the best way forward for bringing peace and justice to Uganda. There is, thus, a need to question the application of international criminal justice mechanisms that do not consider the context of the situation and the requirements of those involved in the process. The remainder of this article is concerned with assessing the utility and desirability of applying international criminal law to situations such as that in Uganda, without consideration of the extent to which it is apt to deal with them.

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17 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90, art 11 (entered into force 1 July 2002) ["Rome Statute"].

18 International Criminal Court, *Warrant of Arrest Joseph Kony* ICC-02/04-01/05-53 (2005).

19 International Criminal Court, Office of the Prosecutor, *Statement by the Chief Prosecutor on the Uganda Arrest Warrants* (The Hague, 14 October 2005).

20 Ibid.

21 See e.g. Moy, "The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity" (2006) 19 Harv Hum Rts J 267.

22 Allen, "LRA Victims Seek Peace with the Past" BBC News (2006) <http://news.bbc.co.uk/2/hi/africa/5341474.stm> (at 7 August 2008).

23 Human Rights Watch, New Accord, supra note 14.

24 See generally Apuuli, supra note 7; Moy, supra note 21, 270.

III RE-READING TRADITIONAL NARRATIVES

The traditional narrative of international criminal law would have us believe that international criminal law is a universal good, and that no question of its applicability to situations like Uganda ought to be entertained. This article proposes to describe and re-read this traditional narrative, along with those of international law and international humanitarian law, with a view to understanding how and why a purportedly universal system may be profoundly exclusive.

International Law and Antony Anghie

The traditional narrative of modern international law begins with the birth of the modern sovereign state out of the treaties of the Peace of Westphalia in 1648, which "constitute a watershed in the evolution of the modern international community".[25] From that point the focus of international law becomes the question of order amongst sovereign states.[26] Some scholars look back to antiquity, the Middle Ages, the Renaissance, and thinkers of the sixteenth and seventeenth century to support the development of the modern international law of sovereign states.[27] The Congress of Vienna, at the end of the Napoleonic wars, begins an international system based on a European balance of power, and a Eurocentric, positivist international law, at the core of great empires.[28] European states make use of their sovereignty in encounters with non-European, non-sovereign states, exporting international law to them and, over time, universalizing the European model of sovereignty.[29] The First and Second World Wars interrupt the orderly development of international law, and are followed by attempts at collective security; the former by the failed League of Nations, the latter by the United Nations. Indeed, the advent of the United Nations inaugurates a new era in international law, characterized by a prohibition on the use of force, the advent of universal human rights and decolonization, with the sole stumbling block to ultimate success being the Cold War. After the Cold War international law is finally freed from political deadlock, and can now move forward to become a universal system for peace and security.

Antony Anghie's work on imperialism and international law questions this traditional narrative. Anghie's central thesis is that imperialism played an important constitutive role in the formation of the central doctrines of international law.[30] His methodology consists of re-reading the history of international law in a way that focuses on the constitutive effect of the

25 Cassese, *International Law* (2 ed, 2005) 24.

26 Anghie, *Imperialism*, supra note 3, 5.

27 See e.g. Shaw, *International Law* (5 ed, 2003) 14–24.

28 Ibid 26–28.

29 Anghie, *Imperialism*, supra note 3, 4–6.

30 Ibid 3.

imperial project and its attendant concepts, rather than on the usual reading of how order is created amongst sovereign states.[31] Anghie's claim goes beyond the idea that international law was complicit in the imperial project, and looks to the underlying structures and doctrines of international law to find the extent to which imperialism is implicated in them.

Anghie isolates a number of key concepts and processes in this rethinking of the colonial history of international law, the two most important being the "dynamic of difference", and the "civilizing mission".[32] The civilizing mission is defined by Anghie as follows:[33]

> [T]he grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe.

Crucial to the civilizing mission is the essential cultural differentiation between the civilized and the uncivilized — what Anghie calls the "dynamic of difference":[34]

> [T]he endless process of creating a gap between two cultures, demarcating one as 'universal' and civilized and the other as 'particular' and uncivilized, and seeking to bridge the gap by developing techniques to normalize the aberrant society.

This dynamic is self-sustaining, continually defining an "other" in opposition to the "universal", which is to be civilized and brought within the universal (European) culture in furtherance of international law's civilizing mission.

For Anghie the civilizing mission and the dynamic of difference do not end with formal colonialism. Rather, they constitute "a set of structures that continually repeat themselves at various stages in the history of international law",[35] from the sixteenth century through to today's "war on terror".[36] This article will do the same in respect of international criminal law. But first it is necessary to look at narratives of one of international criminal law's foundational bodies of law — international humanitarian law.

International Humanitarian Law and Frédéric Mégret

The traditional narrative of international humanitarian law acknowledges that in the distant past international humanitarian law may have been

31 Ibid 5, 311.
32 Ibid 3–4.
33 Ibid 3.
34 Ibid 4.
35 Ibid 3.
36 Ibid.

colonial, racist, and exclusionary, but maintains that this is now clearly confined to history.[37] The trend from the nineteenth century was the gradual humanizing of war and the laws of war, which were being extended to include ever more classes of people. The Hague Conferences of 1899 and 1907, and their resulting Conventions, feature in the narrative as the beginning of the codification of the laws of war; what may look like political compromises in context become grand statements on the part of states to limit their means and methods of warfare, and to respect humanity as a whole.[38] Continuing this trend, the intervention of World War II, and the Nuremberg and Tokyo Tribunals, and the introduction of universal human rights, definitively ensure that any colonial and racist origins no longer have a bearing on "modern" international humanitarian law. All are now included in the framework of international humanitarian law, which begins to focus on its link to international human rights law and its increasing ability to take account of Third World perspectives.[39] The laws of war have been fundamentally humanized and cover all those in need of protection. Now, their gravest breaches are punishable by the ICC, the new bastion of humanity and civilization after war.

Like Anghie in respect of international law, Frédéric Mégret questions this traditional narrative of international humanitarian law, laying the groundwork for a comprehensive critical theory of international humanitarian law by looking at the exclusions of this body of law.[40] In particular, he looks at the possibility that, for all its claims of inclusivity, international humanitarian law features significant exclusions that may have roots in the ambiguous origins of the law itself and be legitimized by it.[41] He moots that the laws of war are both inclusive and exclusive, in that for every protection gained there is an "other" excluded from such protection.[42] The "other", which he sees as central to, and constitutive of, the laws of war, is the colonial "other": the "uncivilized", the "barbarian", the "savage".[43]

Mégret traces "patterns of exclusion" from the birth of modern international humanitarian law in the nineteenth century through to today's "war on terror", revealing a body of law that relies heavily on distinctions

37 The narrative summarized here can be found in Mégret, "From 'Savages' to 'Unlawful Combatants': A Postcolonial Look at International Humanitarian Law's 'Other'" in Orford (ed), *International Law and its Others* (2006) 295–298 ["International Humanitarian Law"]. For a detailed critique of the traditional narrative see Jochnick and Normand, "The Legitimation of Violence: A Critical History of the Laws of War" (1994) 35 Harv Intl L J 49.

38 See e.g. the exaltation of the Martens Clause from the 1899 Hague Convention as the foundation of humanity in the laws of war, discussed by Jochnick and Normand, supra note 37, 74. Bassiouni in particular places great store in the Martens Clause as representing a key foundation for the concept of crimes against humanity. See Bassiouni, *Crimes against Humanity in International Criminal Law* (1999) 60–69 ["*Crimes against Humanity*"].

39 For example, in the upgrading of wars of decolonization to international armed conflicts in Protocol I to the 1949 Geneva Conventions. See Mégret, International Humanitarian Law, supra note 37, 297–298.

40 Ibid 265–317.

41 Ibid 266.

42 Ibid.

43 Ibid 267.

between civilized and uncivilized; a body of law reliant on an essentially European conception of "civilized" war that excludes non-European peoples.[44] This stereotype of European war becomes the universal standard on which the laws of war are based, and all must conform to the "fantasy" in order to be given its protection.[45] In the conventional narrative of international humanitarian law, the laws of war were "de-Westernized" after the Second World War and through the period of decolonization.[46] The intervention of international human rights law deeply altered the conception of the laws of war and made it difficult to deny that they were not universally applicable, and, thus, over time, "the whole of humanity" was brought within the laws of war.[47] However, in analysing the events surrounding the "war on terror", Mégret reveals "the persistence of the exclusionary strand embedded within the laws of war",[48] so that while the explicit discourse of civilized versus savage may have disappeared, and while non-Europeans are no longer formally excluded, the pattern of exclusion persists. This pattern of exclusion is reliant on the idea of legitimate warfare, the Western method of waging war, which is embedded and universalized in the laws of war,[49] so that those who do not conform are continuously excluded from the protection of the law.[50] Thus, the laws of war become "a project of Western imperialism",[51] by which a stereotype of Western warfare is disseminated and universalized, forcing non-Western nations to conform and make the laws of war their frame of reference.[52]

Why, though, are the exclusions in international humanitarian law relevant to international criminal law? Traditionally, international humanitarian law was concerned with state responsibility for breaches. The 1949 Geneva Conventions are primarily concerned with such responsibility, consistent with the general thrust of international law,[53] but also provide for individual responsibility in the case of grave breaches of certain provisions,[54] with these provisions being further extended in

44 Ibid 266.

45 Ibid 288, 304–308.

46 Ibid 295.

47 Ibid 297.

48 Ibid 298.

49 Ibid 304.

50 Ibid 308.

51 Ibid.

52 Ibid 310.

53 See Common Article 1 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); Geneva Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); Geneva Convention relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) [collectively "1949 Geneva Conventions"].

54 Ibid arts 50, 51, 130, 147.

the 1977 Additional Protocol I.[55] This turn towards greater individual responsibility likely owed much to the post-World War II prosecutions for violations of the laws of war, where prosecutions for violations of the laws of war were seen as the least novel category, having an extensive body of law behind them and the idea of international criminal responsibility having been attached to them in the Treaty of Versailles after World War I.[56] Thus, prosecutions for war crimes became the enforcement mechanism for certain norms of international humanitarian law deemed criminal, and international humanitarian law became one of the foundations of international criminal law.

The suggestion is that this foundational body of law is imperialistic, and an understanding of its patterns of exclusion is crucial to understanding the potential imperialism and exclusions of international criminal law itself. Does the fact that international criminal law arose at the point in the traditional narrative when international humanitarian law and international law were said to shed their dark colonial pasts, and to embrace their universal inclusivity, mean that the patterns of exclusion do not apply to it? Or, does international criminal law take its lead from international humanitarian law, purporting to be universal while being profoundly exclusive in a variety of ways?

IV A CRITICAL HISTORY OF INTERNATIONAL CRIMINAL LAW: RE-READING THE TRADITIONAL NARRATIVE

This article's aim is to utilize the methodology and concepts of Anghie and Mégret in order to re-read the history of international criminal responsibility. Its focus will be on the extent to which international criminal law constructs an "other" in opposition to universal norms or values, how it seeks to bridge the gap between the "other" and the universal, and to what extent this can be seen as a furtherance of the civilizing mission. The construction of an uncivilized "other" in opposition to a civilized universal — Anghie's "dynamic of difference" — will be explored by tracing patterns of exclusion through the history of international criminal law. These exclusions will be examined to see whether they reveal a dynamic of difference underlying a civilizing mission in this body of law: something that might explain the Prosecutor's invocation of "civilization" in the post-World War II prosecutions. To do this, it is first necessary to look at the history of international criminal law and the ICC in the context of the traditional progressivist narrative from an unenlightened age of

55 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3, arts 11, 85 (entered into force 7 December 1979) ["Protocol I"].

56 Luban, "The Legacies of Nuremberg" (1987) 54 Social Research 779, 798.

impunity to the enlightened age of the ICC, and then to re-read this history by exploring its many exclusions.

The traditional narrative of international criminal law is one of progress: progress leading inexorably from Nuremberg to the establishment of a permanent international criminal court.[57] This narrative inevitably traces the development of the idea of individual criminal responsibility through history to its fully formed state post-World War II. Some start the search in antiquity, some look to Islam and Judaism, and all to Christianity.[58] European codes of chivalry provide precedents for limits on the waging of warfare and the imposition of responsibility for the violations of these limits.[59] It is in this context that the "first modern war crimes trial" in 1474 of Peter von Hagenbach is often identified.[60] The thinking of the scholars of sixteenth and seventeenth centuries is frequently a feature, with many looking to Grotius, Vitoria, Gentili, and others for the origins of individual criminal responsibility at an international level.[61] Scholars seek to show not only that the international crimes are both timeless and universal across all civilizations,[62] but also that the idea of holding individuals responsible for violations of the laws of war is an ancient, universal, and intercivilizational one.[63]

National military codes and punishment under them, particularly in the context of the American Civil War, are also used to flesh out the idea of individual criminal responsibility.[64] Frequently, the increasing codification of the laws of war is seen to support the progress toward Nuremberg.[65] There is inevitably mention of the (failed) attempt to impose individual criminal responsibility following World War I against the Germans, in particular Kaiser Wilhelm, and against the Turks for the Armenian genocide.[66] Lack of political will is often blamed for the failure of the

57 See Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005) 9, where Cryer calls it "Whig history"; Koskenniemi, "Between Impunity and Show Trials" (2002) 6 MBYUNL 1, 34, who notes the popularity of a progress narrative from Nuremberg to the Hague; Mégret, "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project" (2001) 12 Finnish Yearbook of Int'l L 193, 195 ["Three Dangers"], who notes the prevalence of "[g]rand(iose) narratives"; Bloxham, "Beyond 'Realism' and Legalism: A Historical Perspective on the Limits of International Humanitarian Law" (2006) 14 European Review 457, 463 who calls it "a progressivist intellectual-cultural master narrative".

58 See e.g. Cryer, supra note 57, 9–13; McCormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime" in McCormack and Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 32–37; Bassiouni, *Crimes against Humanity*, supra note 38, 49–54. See also Green, "The Relations between Human Rights Law and International Humanitarian Law: A Historical Overview" in Breau and Jachec-Neale (eds), *Testing the Boundaries of International Humanitarian Law* (2006).

59 See e.g. Meron (ed), *War Crimes Law Comes of Age* (1998); Cryer, supra note 57, 13–21.

60 See e.g. Bassiouni, *Crimes against Humanity*, supra note 38, 517; Bassiouni, "The International Criminal Court in Historical Context" (1999) St Louis-Warsaw Transatlantic LJ 55, 56 ["International Criminal Court"]; Cryer, supra note 57, 17–21 goes beyond simply using this trial as an example and examines the problems with its precedential value.

61 See e.g. Cryer, supra note 57, 21–26.

62 See e.g. Bassiouni, *Crimes against Humanity*, supra note 38, 44–60.

63 See e.g. McCormack, supra note 58, 37; Ibid 60.

64 See e.g. McCormack, supra note 58, 40–41.

65 See e.g. Bassiouni, *Crimes against Humanity*, supra note 38, 56.

66 See e.g. Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court" (1997) 10 Harv HR J 11, 16–17, 18–21 ["Versailles to Rwanda"].

Allies to follow through, distinguishing this missed opportunity from the post-World War II efforts.[67] Nuremberg (and to a far lesser extent, Tokyo) are the focal point for international criminal responsibility. The Cold War is the inevitable explanation for the failure to enforce individual criminal responsibility at an international level between the post-World War II trials and the ad hoc tribunals of the 1990s.[68] The ad hoc tribunals finally revive the legacy of Nuremberg, without its associated problems of legality, partiality, and selectivity.[69] Once revived this leads inexorably to the establishment of the ICC, which represents the embodiment of the universal ideal conceived after World War II. This is a history showing that the ICC is meant to be, and has always been, the pinnacle of international criminal law's progress.[70] Civilization has triumphed; barbarity will (in time) be no more.

V A CRITICAL HISTORY OF INTERNATIONAL CRIMINAL LAW: PATTERNS OF EXCLUSION FROM NUREMBERG TO THE HAGUE

The aim in this section is to give an account of the multiple legacies of exclusion in the history of international criminal law, and then to seek to explain them by reference to the dynamic of difference, and the civilizing mission. Unlike the traditional narrative, no assumed positive value is placed on an impartial, international criminal court as the end point of this narrative, although its existence necessarily structures it.

External Exclusion

External exclusion[71] indicates the idea that only certain conflicts will be subjected to international criminal law. This section considers the exclusion of colonial conflicts from the ambit of international criminal law, building on the legacy of exclusion from international humanitarian law, as well as the issue of selective prosecution in the setting up of the ad hoc tribunals in the 1990s.

67 Ibid 17, 21.

68 Ibid 39.

69 Alvarez, "Crimes of States/Crimes of Hate: Lessons from Rwanda" (1999) 24 Yale J IL 365, 377.

70 See e.g. Bassiouni, Versailles to Rwanda, supra note 66; Bassiouni, International Criminal Court, supra note 60; Bassiouni (ed), *International Criminal Law Vol III: Enforcement* (2 ed, 1999) ["*International Criminal Law*"]; Bassiouni, *Crimes against Humanity*, supra note 38.

71 The concept of distinguishing between external and internal forms of exclusion/selectivity is identified by Mégret, Three Dangers, supra note 57, 225–226.

1 Excluding the Colonial

Conflicts in the colonies were not subject to the same laws of war as European wars,[72] and, thus, individuals were not subject to international criminal responsibility for breaches of the laws of war or the (at the time) amorphous crimes against humanity. International law was not concerned with atrocities committed within states by colonizing powers until European peoples were subject to atrocities within a state in World War II.[73] The lack of concern for colonial violence in international criminal law was not due to any lack of colonial violence worth condemning. Choosing from one of the many examples available,[74] the violence perpetrated by Imperial Germany against the Herero people of South-West Africa between 1904 and 1908 is illustrative of colonial violence that must have risen to the level of crimes against humanity, if not the supreme crime of genocide.[75] During the Herero-German war, which began in 1904, General von Trotha issued his famous "extermination order", telling German soldiers to shoot at all Herero, including women and children, and to drive them off the land.[76] This deliberate policy of killing and atrocity resulted in no less than 80 per cent of the Herero losing their lives.[77]

It could be contended that because the conflict with the Herero took place in the first decade of the twentieth century, no norms of individual criminal responsibility for violations of international law existed at the time that could be invoked to condemn this conduct. However, in accordance with the traditional narrative's portrayal of international crimes as timeless, universal, and inter-civilizational, crimes against humanity, derived "from the usages established among civilized people, from the laws of humanity ... from the dictates of public conscience", and affirmed in the 1899 and 1907 Hague Conventions,[78] were already well-established at this time.

The exclusion of the colonial was not a pattern that ceased when the world entered its new era of "enlightenment" with the establishment of the Nuremberg and Tokyo Tribunals post-World War II. Colonial violence continued to be excluded from the ambit of individual criminal responsibility under international law. A clear example is that of French colonial violence

72 1949 Geneva Conventions, supra note 53. See generally Mégret, International Humanitarian Law, supra note 37 and Douzinas, "Postmodern Just Wars and the New World Order" (2006) 5 Journal of Human Rights 355, 358.

73 Anghie and Chimni, "Third World Approaches to International Law and Individual Responsibility in Internal Conflicts" (2003) 2 Chinese J Int'l L 77, 88.

74 See Jones (ed), *Genocide, War Crimes and The West: History and Complicity* (2004) and Moses and Stone (eds), *Colonialism and Genocide* (2007).

75 See generally Zimmerer, "The Birth of the Ostland out of the Spirit of Colonialism: A Postcolonial Perspective on the Nazi Policy of Conquest and Extermination" in Moses and Stone, supra note 74, 101–123 and Gewald, "Imperial Germany and the Herero of Southern Africa: Genocide and the Quest for Recompense" in Jones, supra note 74, 59–77.

76 Gewald, supra note 75, 61–62.

77 Ibid 59.

78 Martens Clause from the Preambles of the 1899 and 1907 Hague Conventions, cited in Bassiouni, *Crimes against Humanity*, supra note 38, 42.

in Algeria.[79] At the same time as delegates were gathered in San Francisco adopting the Charter of the United Nations, the French were massacring 15,000 Algerians in the town of Sétif under the rubric of "maintaining order", after those who had joined the victory celebrations began to make noises about national self-determination.[80] This was certainly not the end of colonial violence in Algeria. The war in Algeria in the 1950s and 1960s was characterized by the brutal practices of the French, which included widespread internment, summary execution, and torture.[81]

The legal instruments of the post-World War II tribunals also went to lengths to exclude the colonial. Features of the London Charter, signed by the Allies to set up the Nuremberg Tribunal, specifically avoided calling into question the violence used in the colonies (as well as the violence used in Russia and segregationist policies in the United States for that matter).[82] For example, the linking of crimes against humanity and war crimes to an international crime of aggressive war in the London Charter served to confine those crimes to instances where there was an *international* war of aggression. These crimes could only be committed in international armed conflicts, a definition from which colonial wars were excluded until the adoption of Protocol II to the Geneva Conventions in 1977.[83] The Allies did not have to be concerned that the law they created at Nuremberg could be used against them with regard to their actions in the colonies or at home. This was a comfortable position for the Allies and an aspect of the definition that would have been largely uncontroversial at Nuremberg given that colonialism itself was considered "fitting and uncontroversial" at the time.[84]

The London Charter also had the effect of preserving this "fitting and uncontroversial" colonial order in another way that was identified by Justice Pal in his dissenting judgment at the Tokyo Tribunal.[85] In his Honour's view the effect of Article 6(a) criminalizing wars of aggression was to remove the ability of states under the control of other states to use force to fight the subjugation.[86] This is because the crime of waging aggressive war was essentially about attacking the sovereignty of a state by using armed force. Colonies had no formal sovereignty of their own.[87] The colonizing state held sovereignty over them. Thus an attempt to use force to fight subjugation by another state could well, at the time, have been seen as an attack on its sovereignty consistent with the crime of aggression.

79 See generally Branche, "Torture and Other Violations of the Law by the French Army during the Algerian War" in Jones, supra note 74, 134–145.

80 Mégret, International Humanitarian Law, supra note 37, 271; Koskenniemi, supra note 57, 31.

81 See Branche, supra note 79.

82 See Cryer, supra note 57, 206.

83 See Anghie and Chimni, supra note 73, 88–89.

84 Luban, supra note 56, 786.

85 See Borgwardt, "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial" (1991) 23 Int'l Law & Politics 373.

86 Ibid 422.

87 See e.g. Anghie, *Imperialism*, supra note 3, 100–114.

Conversely, a colonizing state using force to quell a violent uprising would not be attacking the sovereignty of another state, and thus would not fall within the definition. This reified the existing international order,[88] potentially criminalizing the use of force in the anti-imperialist struggle.[89]

2 *Exclusion in the Post-Colonial Era*

The exclusion of certain conflicts from international criminal law did not end with formal decolonization post-World War II. Atrocities during the Cold War were not subjected to criminal prosecution at international law despite instances of genocide, crimes against humanity, and war crimes, in the course of not only some 250 armed conflicts, but also an estimated 170 million casualties under tyrannical regimes.[90] Why, then, did the international community decide that it was once again necessary to include some conflicts within the ambit of international prosecutions for violations of international criminal law when it set up International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") in the early 1990s?

Guessing at the intentions and motivations of the international community, or more specifically the Security Council, in creating the ICTY and the ICTR in the 1990s is difficult and undesirable.[91] Apart from the opportunity afforded by the post-Cold War thaw, there are explanations for why setting up these tribunals as a response to the perceived threats to international peace and security was seen as appropriate. The conflict and atrocities in the former Yugoslavia were taking place in Europe, and being broadcast to the world at a time when there was no longer an excuse (the threat of communism) not to do anything about it.[92] At this point the West, having triumphed in the Cold War, had no reason not to uphold the legacy of Nuremberg that prosecution was the appropriate and civilized response to grave atrocities. Prosecution of colonial conflicts and post-colonial conflicts during the Cold War had not been necessary to uphold the standards of the West or call into question the Nuremberg legacy, as they did not take place in a European context. Here, the West could not credibly allow atrocities that it had condemned after World War II to go on in Europe.

Conflicts in Africa, particularly in the colonial context or stemming from decolonization, had not, however, been the subject of international criminal law. In setting up the ICTY the West signalled that the appropriate and civilized response to atrocities was international prosecution, as it had done after World War II. It was clear that the ICTY had set a precedent,

88 Borgwardt, supra note 85, 423.

89 Luban, supra note 56, 786.

90 Bassiouni, *Crimes against Humanity*, supra note 38, 513.

91 Although many try to do so. See e.g. Mutua, "Never Again: Questioning the Yugoslav and Rwanda Tribunals" (1997) 11 Temp Int'l & Comp LJ 167 ["Never Again"].

92 Ibid 174.

such that the UN and powerful states could not reject prosecution for crimes in Rwanda, where it had endorsed prosecution for contemporaneous crimes in Europe.[93] That the ICTR was an "afterthought" or "sideshow" to the ICTY, though, can be seen in the fact that it was grafted on to the latter institution, sharing a Prosecutor and having members of the Appeals Chamber based in The Hague.[94]

Through the establishment of these tribunals, international prosecutions were on their way to becoming the universal response to atrocities, continuing Nuremberg's legacy that civilization required prosecution.

Internal Exclusion

International criminal law has not only been exclusive in terms of the conflicts in which it intervenes. It has also been exclusive in terms of who within those conflicts is the subject of prosecution — the concept of internal exclusion.

1 World War II

Part of this internal exclusion is the familiar notion that the post-World War II tribunals represented acts of victor's justice in that they prosecuted only the crimes of the vanquished and not those of the victors.[95] It is not that both the Allies and the Axis had not committed crimes; it is that only the latter was prosecuted.[96]

The crimes of the Allies consisted of a number of deliberate choices that violated the laws of war. Most famous on the Western Front is the bombing of Dresden, killing large numbers of civilians, as part of a deliberate policy of civilian bombing in order to weaken the German resolve.[97] On the Eastern Front, the Soviet Union's massacre at Katyn forest of numerous civilians stands out.[98] On the Pacific Front the use of atomic bombs on Hiroshima and Nagasaki, causing huge losses of civilian lives, is most obvious.[99] In the view of some, in particular Justice Pal at the Tokyo Tribunal, the dropping of these bombs (along with their colonial records) precluded the Allies from passing any moral or legal judgment on Japan.[100]

The irony of the Allies setting up tribunals to punish war criminals

93 Ibid 178.

94 Ibid.

95 See e.g. Bassiouni, *Crimes against Humanity*, supra note 38, 3, 554.

96 This has set a precedent such that Western political interests and power shape the environment in which international criminal law has developed; see Roach, *Politicizing the International Criminal Court* (2006) 27.

97 See generally ibid 86–89; Lagenbacher, "The Allies in World War II: The Anglo-American Bombardment of German Cities" in Jones, supra note 74, 116–133.

98 Bassiouni, *Crimes against Humanity*, supra note 38, 553.

99 Cryer, supra note 57, 207.

100 Ibid.

while committing criminal acts is not lost on Gerry Simpson, who notes that at the same time the Allies were signing the London Charter to set up the Nuremberg trials in August 1945, the United States dropped its second atomic bomb on Nagasaki, killing at least 70,000 of its mainly civilian inhabitants.[101] This undermined "the idea of universal application of international criminal law to all offenders regardless of affiliation, status or nationality" at its inception.[102]

Nuremberg and Tokyo certainly did not represent such a "universal application". While the crimes of Germany and Japan were horrendous, and perhaps considerably more so than the crimes of the Allies, the Allies nevertheless also committed crimes within the London Charter's definitions. By not being prosecuted, the Allies' actions were vindicated as civilized and defined as outside the scope of international criminal acts — conduct unpunished was conduct condoned.[103]

It is also notable that not all of the defeated powers in World War II faced prosecution before an international tribunal. For example, the United Nations War Crimes Commission ("UNWCC"), set up by the Allies in 1943, listed 750 Italian war criminals in its report. Their crimes related to the use of poison and mustard gas in Ethiopia in 1936, in violation of the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, killing of prisoners of war, and bombarding of hospitals, amongst other war crimes.[104] There were also claims that during World War II Italian occupying forces in Libya, Yugoslavia, and Greece mistreated prisoners of war, killed civilians, and destroyed civilian property.[105] Despite there being a right to prosecute, and a duty to extradite on the part of Italy, no war criminal was ever handed over for prosecution, a failure that was tacitly supported by the United Kingdom and the United States who were more interested in preventing Italy from falling to communism.[106] It appears that the only Italian war criminals prosecuted were 40 individuals prosecuted by the British for offences against British or Commonwealth prisoners of war.[107] It is arguable that despite the fact that the violations were more "textbook" violations of the laws of war than those carried out by the Germans and Japanese, civilized standards did not require the prosecution and punishment of these crimes, nor were they necessary to define Allied actions as civilized. Thus, they were excluded at the very time when the new era of individual responsibility for international crimes was being inaugurated.

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101 Simpson, "War Crimes: A Critical Introduction" in McCormack and Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 4.

102 Ibid.

103 Jochnick and Normand, supra note 37, 91.

104 Bassiouni, *Crimes against Humanity*, supra note 38, 548–549.

105 Ibid.

106 Ibid.

107 See Garwood-Cutler, "The British War Crimes Trials of Suspected Italian War Criminals, 1945–1947" in Carey, Dunlap and Pritchard (eds), *International Humanitarian Law: Origins* (2002) 89–103.

2 *Beyond Nuremberg and Tokyo*

The pattern of internal exclusion did not end, however, with Nuremberg and Tokyo, although it may be less coloured by the taint of victor's justice. The precedent set by Nuremberg of allowing Western states to control the stage for selective prosecution endures, for example, in the approach of the ICTY to the investigation of NATO crimes in Kosovo.[108] In May 1999 a group of lawyers from North and South America presented the ICTY prosecutor with a war crimes complaint against 68 NATO leaders related to their bombing campaign in Kosovo.[109] Of particular concern was the practice of flying at high altitudes to reduce the risk of planes being shot down, a practice that significantly decreased the targeting ability of the pilots dropping the bombs and led to the loss of civilian lives as "collateral damage", and the targeting of sites that could only be tenuously classified as military.[110] Having examined the evidence, the ICTY prosecutor declined to open an investigation with a view to charging any NATO officials for war crimes on the ground that the law was not sufficiently clear or investigations were unlikely to obtain sufficient evidence to substantiate charges.[111]

Similar selectivity can be seen to prevail in the ICTR, and potentially in the ICC with respect to Uganda. In these instances it is the government that has referred the situation to the international community,[112] with the likely expectation on their part that no atrocities they commit are subject to prosecution. In the case of Rwanda, the Rwandan Patriotic Front ("RPF") was successful in ending the genocide and became the new government in Rwanda. In doing so, however, they are said to have committed war crimes and crimes against humanity, which, as yet, there have been no prosecutions for in the ICTR.[113] In Uganda, the Museveni government referred the "situation concerning the Lord's Republican Army" to the ICC for investigation.[114] Thus far only arrest warrants for members of the rebel forces have been issued. This is despite widespread reports of atrocities on the part of government forces in the war in the north of Uganda.[115]

The reason behind these exclusions could be more than just the reality that NATO member states largely fund the ICTY, a simple

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108 See Cryer, supra note 57, 214–220.

109 See Mandel, "Politics and Human Rights in International Criminal Law: Our Case against NATO and the Lessons to be Learned from it" (2002) 25 Fordham Int'l LJ 95.

110 Ibid 113–115, 120–126; "NATO/Federal Republic of Yugoslavia: 'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force" Amnesty International, (2000) <http://www.amnesty.org/en/library/asset/EUR70/018/2000/en/dom-EUR700182000en.html> (at 8 August 2008).

111 United Nations, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* UN Doc PR/P.I.S/510-E (2000).

112 However, Rwanda did end up voting against the creation of the ICTR in the Security Council, for reasons including its failure to allow for the death penalty as punishment and its failure to sufficiently limit the temporal jurisdiction. See Alvarez, supra note 69, 393.

113 Cryer, supra note 57, 220–221.

114 International Criminal Court, *President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC* ICC-20040129-44-En (2004).

115 See Human Rights Watch, "Uprooted and Forgotten", supra note 9.

recognition of power politics, or a notion of victor's justice. It could go deeper and be informed by a logic of civilization. There is no need to prosecute NATO members because they are civilized countries, acting in the name of civilization through "humanitarian intervention".[116] There is no need to prosecute opposition forces in Rwanda or Uganda because it is better to designate an "other" in need of civilization and vindicate its enemy as civilized, so that the international criminal justice system can be seen to do its job of restoring peace and stability to a country through individual accountability.

Systemic Exclusion

As well as the internal and external exclusions, there are a number of systemic patterns of exclusion within the substance and institutions of international criminal law.

1 Nature of Responsibility

The legacy of the Allies' choice after World War II to set up international tribunals to prosecute individuals for war crimes, crimes against humanity, genocide, and aggression, is one of individual criminal responsibility under international law for specified core international crimes in international armed conflicts.[117] There are a number of elements to this legacy that are the source of enduring exclusions in international criminal law.

(a) Individual Accountability

First, the notion of accountability in the international criminal system is profoundly, and deliberately, individualistic. Based on domestic models of criminal accountability, its purpose is to assign responsibility for atrocities on an individualized basis, and to avoid any notions of collective guilt or amnesty.[118] This foundational assumption of international criminal law stems largely from Western notions of individual accountability, but is often claimed to be a universal truth about all peoples, regardless of their world-view.[119]

In adopting the Nuremberg legacy and embedding this world-view into the system of international criminal law and the way it is applied, other world-views are excluded. Of particular relevance, given that all of the ICCs current investigations are in Africa, is the traditionally communitarian

116 See Mandel, "Opinion: Illegal Wars and International Criminal Law" in Anghie et al (eds), *The Third World and International Law, Politics and Globalization* (2003) 117–132 ["Illegal Wars"].

117 Bassiouni, *Crimes against Humanity*, supra note 38, 526.

118 Cassese, "International Criminal Justice: Is it Needed in the Present World Community?" in Kreijen (ed), *State, Sovereignty, and International Governance* (2002) 250.

119 Cobban, *Amnesty after Atrocity?* (2007) 212.

world-view of many African peoples.[120] In this world-view, the law applies to the group and the importance of the community is emphasized as the context in which individual rights and responsibilities are viewed.[121] The effect of excluding this communitarian view is to privilege the punishing of individual wrongdoers over the interests of restoring social harmony, the latter often being the most vitally important to affected communities.[122]

(b) Structural Violence

In addition to excluding views that do not place individual responsibility at the heart of their system, international criminal law excludes responsibility that does not fall within the "core" international crimes or for which an individual cannot be easily held responsible. International criminal law does not take a broader, contextual view of mass atrocity as it privileges individual agency and fails to look to structural issues — this too can be seen as driven by the logic of "civilization".[123] It fails to account for the structural causes of violence or to look at the role of international institutions or powerful states in creating the conditions under which mass atrocity takes place.[124] For example, there is no scope within the system of international criminal law for the ICTR to examine the colonial roots of the violence and conflict,[125] nor for it to address the failure of the United Nations and Western states to intervene and prevent the genocide from occurring.[126] Further, its limited scope does not allow international criminal law to address the complicity of Western powers, such as France, in aiding those committing the atrocities.[127] In the same way, the ICTY cannot investigate the role of international financial institutions in creating the conditions in which the conflict began,[128] or the historical responsibility of NATO countries for the violence in Yugoslavia.[129] The system privileges crimes that are able to be linked back to direct individual action or inaction, conveniently obscuring and avoiding discussion of the global inequality in which powerful states are profoundly implicated.

120 Khushalani, "Human Rights in Asia and Africa" in Snyder and Sathirathai (eds), *Third World Attitudes Toward International Law: An Introduction* (1987) 322–339, 331.

121 Ibid 331.

122 Thakur, "Dealing with Guilt beyond Crime: The Strained Quality of Universal Justice" in Thakur and Malcontent (eds), *From Sovereign Impunity to International Accountability* (2004) 286.

123 See Mégret, Three Dangers, supra note 57, 232–233.

124 Anghie and Chimni, supra note 73, 90.

125 See Alvarez, supra note 69, 387–389 for discussion of the colonial roots of Rwanda's societal conflict, a trend which is also evident in Uganda; see Apuuli, supra note 7, 180–181; El Zeidy, supra note 6, 84–87; and Ssenyonjo, supra note 7, 408–410.

126 Alvarez, supra note 69, 389–391.

127 Ibid.

128 Anghie and Chimni, supra note 73, 90.

129 Mandel, Illegal Wars, supra note 116, 129–130.

(c) Non-International Armed Conflicts

The Nuremberg legacy only allowed responsibility for crimes committed in an international armed conflict.[130] This was partly due to the desire to exempt colonial violence from the scope of international criminal law and led to a persistent distinction between international and non-international armed conflicts, both in terms of the scope of protection given by international humanitarian law, and in terms of those norms attracting individual criminal responsibility at international law.[131] For a considerable period of time the only protection available to those in non-international armed conflicts was Common Article III of the 1949 Geneva Convention, which provides basic human rights protections.[132] These protections were extended in Additional Protocol II in 1977, but only to conflicts between groups that met the stated criteria:[133]

> [A]rmed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

This reveals a continuing concern that the laws of war only protect those conforming to the stereotypes of conventional European warfare.[134] Further, there was no provision for individual criminal responsibility in respect of breaches of these rules.[135] It did not become clear that there were norms under which individuals could be prosecuted for war crimes in non-international armed conflicts until the Statutes of the ICTY and ICTR provided for such responsibility, and cases under the jurisdiction of these tribunals began to outline the nature and scope of this responsibility in the 1990s.[136]

Although much improved in terms of parity, including a more detailed list of war crimes that can be committed in non-international armed conflicts than ever before, the Rome Statute of the International Criminal Court still includes fewer war crimes in non-international armed conflicts than in international armed conflicts.[137] Crucially, the criminality with respect to abuses against civilians is similar in both kinds of conflict.[138]

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130 Anghie and Chimni, supra note 73, 88–89.

131 See ibid.

132 1949 Geneva Conventions, supra note 53.

133 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 609, art 1(1) (entered into force 7 December 1978) ["Protocol II"].

134 Mégret, International Humanitarian Law, supra note 37, 306–307.

135 Protocol II, supra note 133.

136 Cryer, supra note 57, 267.

137 Ratner and Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (2 ed, 2001) 102–103; Cryer, supra note 57, 283; Rome Statute, supra note 17, art 8.

138 Cryer, supra note 57, 283.

The same, however, cannot be said with respect to methods of warfare. The use of poison weapons, especially harmful bullets, and human shields are listed as crimes in international armed conflicts, but omitted from the list in non-international armed conflicts.[139] This can be seen as a decision to provide less individual responsibility for atrocities against insurgents in a non-international armed conflict than for those against soldiers in an international armed conflict.[140] In terms of the traditional narrative the greater parity reflects the increasing humanity and inclusiveness of the laws of war. However, it stops short of removing the distinction between international and non-international armed conflicts, revealing the persistence of similar exclusions identified by Mégret.

2 *Framework of Prosecution*

The framework of international criminal prosecutions demonstrates patterns of exclusion that privilege a Western liberal view of criminal justice and reflect the legacies of the post-World War II tribunals.[141]

While the procedure that emerged at Nuremberg was a compromise between civil and common law systems, it was weighted in favour of the common law approach — an approach alien to those in Germany and Japan who were being judged by the Allies.[142] Thus, from the beginning the prosecuting states spoke for the international community who dictated the framework of prosecution regardless of the heritage of those being tried. This has not changed, with the international justice system used in the ICTY and ICTR being heavily influenced by common law philosophy and practice when both Rwanda and Yugoslavia have civil law systems.[143]

In addition to a framework of adversarial, common law criminal justice, the Western liberal legal tradition seeks to embed notions of Western human rights into the proceedings, in particular the procedural rights of defendants.[144] This framework of prosecution excludes the models of those most likely to be the victims or perpetrators of atrocities, as they are defined out of the model of civilized criminal justice provided by Western legal systems.[145] This exclusion of the local can be seen as reflecting colonial attitudes towards the inadequacies of local legal systems when measured against the universal civilization of European law.[146] The result of such exclusions are narratives like the one of a Rwandan rape victim testifying before the ICTR, who was used to the civil law system

139 Ibid.

140 Ibid.

141 See generally Drumbl, *Atrocity, Punishment, and International Law* (2007).

142 Bassiouni, *Crimes against Humanity*, supra note 38, 21.

143 Cobban, supra note 119, 48.

144 Drumbl, supra note 141, 7.

145 This is part of the effect of "the global ideology of liberal international criminal justice" identified by Mégret, Three Dangers, supra note 57, 195.

146 See Fitzpatrick, "Terminal Legality: Imperialism and the (De)composition of Law" in Kirkby and Coleborne (eds), *Law, History, Colonialism: The Reach of Empire* (2001) 21.

and traditional reconciliation mechanisms, and found the experience of being cross-examined in a courtroom revolving around the accused difficult, dissatisfying, and ultimately not able to serve her needs.[147] This could be viewed as a general critique of the adversarial system, but in this context what it also represents is a questioning of the ability of the structures and institutions of international criminal law to respond to the context of particular conflicts, in particular societies, and to the particular needs of the victims.

3 Privileging Prosecution

International criminal law privileges prosecution as a response to mass atrocity above all other options.[148] The legacy of Nuremberg and Tokyo is that prosecuting individuals responsible for atrocities is the only civilized response — any other response would be "a negation of democratic principles of justice".[149] The quotations with which this article began clearly indicate that those involved in the process believed that civilization required these trials. Civilization could ignore such atrocities only at its peril. Revenge, summary execution, and the like are the ways of barbarity.[150] The result was thus:[151]

> Throughout the latter decades of the twentieth century, international rights activists — many of them inspired by, and seeking to replicate, the achievements of the 1945–1946 Nuremberg Tribunal in Europe — urged that the first order of business in postatrocity situations should be to launch criminal prosecutions against as many as possible of at least the higher-level suspects accused of responsibility for those acts — and also, to disallow any provision of amnesties to such persons.

The creation of the ad hoc tribunals and the ICC achieves this aspiration. The legacy of Nuremberg — privileging prosecutions in the Western liberal mould over all other responses — is now, more than ever, deeply embedded in international criminal law. This legacy is profoundly exclusive. It not only consigns truth commissions and the potential of amnesties to, at best, second-rate alternatives, but also potentially precludes their use altogether. In addition, it excludes national prosecutions and traditional mechanisms of accountability, justice, and reconciliation, which do not comply with the dictates of the "civilized" system. These dictates include the imperatives of the international criminal justice system: to preserve collective memory

147 Cobban, supra note 119, 1–3.

148 Thakur, supra note 122, 284; Drumbl, supra note 141, 4–5.

149 Bassiouni, *Crimes against Humanity*, supra note 38, 15, quoting the American Memorandum presented at San Francisco in 1945.

150 See Cassese, supra note 118, 249.

151 Cobban, supra note 119, 6.

through the creation of a historical account, to prevent the reoccurrence of atrocities and to punish those guilty of them, to assist the victims, to affirm the national and international rule of law, and to promote national reconciliation.[152] In the paradigm of international criminal law, international trials are seen as the only way to achieve these ends, and these imperatives are privileged along with prosecution.

The ICC and the Legacy of Exclusion

Does the ICC, a universalist institution that is "a triumph for all peoples of the world",[153] and designed to deal with "unimaginable atrocities that deeply shock the conscience of humanity",[154] reflect the patterns of exclusion that characterize the critical history of international criminal law? Some of the exclusions, for example the distinction between non-international armed conflicts and international armed conflicts, have become less pronounced over time. Other exclusions have become deeply embedded within the system: for example, the focus on individual accountability and Western-style criminal justice. Those that have become embedded in the system seem to have become part of a more dominant and overarching pattern of exclusion, one that privileges individual prosecution in the Western liberal model for all atrocities covered by international criminal law. This is the legacy of exclusion that is now the embodiment of the civilizing mission, and that is reflected in the structure of the ICC. In this section, then, this article considers how the structure of the ICC promotes prosecution as the only civilized response to mass atrocity.

Following on from the establishment of the ICTY and ICTR, which mandated prosecution as the model for dealing with atrocities, the structure of the ICC requires that crimes within the jurisdiction of the Court, that is war crimes, crimes against humanity, and genocide, be prosecuted at either a national or international level. Under the Preamble and Article 1 of the Rome Statute the Court is complementary to national jurisdictions, meaning that the Court does not take jurisdiction unless the Court determines under Article 17 that "the State is unwilling or unable genuinely to carry out the investigation or prosecution".[155] The Court is to determine unwillingness "having regard to the principles of due process recognized by international law".[156] Whether national legal systems are unwilling to prosecute will be a decision of the Court, made on principles of due process largely shaped by Western nations.

It is true that Article 53(2)(c) of the Rome Statute provides a power to the Prosecutor not to prosecute where it "is not in the interests of justice"

152 Alvarez, supra note 69, 374.

153 Bassiouni, *Crimes against Humanity*, supra note 38, 555.

154 Rome Statute, supra note 17, Preamble.

155 Ibid art 17(1)(a).

156 Ibid art 17(2).

to do so.[157] However, the Preamble of the Statute, and the structure of complementarity show that the ICC has been shaped by the legacy of individual accountability for international crimes to the exclusion of other options. "Justice", when read in the context of the Rome Statute and the history of international criminal law, "is an indispensable component of peace",[158] and is only served through individual accountability for mass atrocities.[159] In addition, in light of the systemic exclusion of standards other than those fitting the Western liberal model of prosecution, whether or not prosecution is in the interests of justice could also involve an assessment of the local justice system, and its ability to meet the standards of fairness required by the international system.[160]

Thus, the ICC makes clear that the only appropriate response to human rights violations is a legalistic one — prosecution on the Nuremberg model at a national or international level.[161]

VI HISTORY LESSONS: INTERNATIONAL CRIMINAL LAW'S IMPERIALISM

The re-reading of the traditional narrative of international criminal law reveals a body of substantive international law characterized by deep exclusions. Today, the most prominent example is the privileging of "prosecution" to the exclusion of all other responses to atrocities. This section will situate these patterns of exclusion in the context of the dynamic of difference, and the civilizing mission to assess how these are at work in international criminal law today. This article then suggests that it may follow that international criminal law can be characterized as imperialistic.

International Criminal Law and the Dynamic of Difference

1 Constructing the Uncivilized Other

In setting down a list of crimes to be prosecuted at international law, the international system can be seen as setting out standards of uncivilized behaviour, in opposition to civilized behaviour, which if transgressed is to

157 Ibid art 53(2)(c). See generally Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court" (2003) 14 EJIL 481.

158 Bassiouni, Versailles to Rwanda, supra note 66, 58.

159 Rome Statute, supra note 17, Preamble; Sadat, *The International Criminal Court and the Transformation of International Law* (2002) 47. For an opposing view see Akhavan, Uganda, supra note 6, 416.

160 See El Zeidy, supra note 6, 116–117.

161 Czarnetsky and Rychlak, "An Empire of Law: Legalism and the International Criminal Court" (2003) 79 Notre Dame L Rev 55, 61, 94–98.

be punished.[162] The civilized standards against which the behaviour offends are explicitly universal: they apply to "humanity" as a whole. The "other" in this world is the "war criminal" — the individual who crosses the line into uncivilized behaviour and must be punished for it.[163] The quotations from the opening addresses of the Chief Prosecutors at Nuremberg and Tokyo, cited at the beginning of this article, explicitly reveal this logic, as they "emphatically set forth a common framework of identifying the accuser with civilization and the accused with barbarism".[164] The "other" must be prosecuted and punished, not only to ensure that he and his society are civilized, but also to vindicate the universal civilization of the prosecuting party.[165] Thus, in constructing the Japanese as the barbarian "other" at Tokyo, the United States could vindicate its actions at Hiroshima and Nagasaki, saying that, because such actions were not prosecuted, they were, therefore, civilized actions.[166] In the same way, the establishment of the ICTY and the ICTR vindicate the actions of the international community, in particular the Western states.[167] The setting up of tribunals creates an uncivilized "other" responsible for the atrocities, which is in need of the civilizing force of the international community. Moreover, the international community's actions are redeemed as universal and civilized.[168] As such, an international criminal trial is determinative of the divide between civilized and uncivilized — "one of the purposes of the trial is to associate the prosecuting States with absolute good just as surely as the accused become synonymous with ultimate evil".[169]

2 *Constructing the Civilized Universal*

In opposition to the "other" there must be a "universal". This universal can be found in the values and norms "that are widely thought of as having their roots in the European Enlightenment – such as human rights, democracy, and the efficacy of science and technology", and that are presently "thought to be embraced by, or are at least aspirations of, a large majority of humanity".[170] These values and norms were explicitly European, and now, are clearly Western. However, in the context of international criminal law, and international law generally, they are assumed to be universal. Thus,

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162 Consistent with the repetitive structures identified by Anghie, "legal doctrines play the crucial role of identifying the other ... and then proceeding to develop the doctrines necessary to suppress, transform, redeem the other". See Anghie, "On Critique and the Other" in Orford (ed), *International Law and its Others* (2006) 389, 394 ["On Critique"].

163 Mégret, International Humanitarian Law, supra note 37, 317.

164 Kei, supra note 1, 8.

165 Simpson, supra note 101, 21–24.

166 Ibid 23.

167 Ibid 24.

168 See Mégret, Three Dangers, supra note 57, 232–239.

169 Simpson, supra note 101, 21–22.

170 Bowden, "In the Name of Progress and Peace: The 'Standard of Civilization' and the Universalizing Project" (2004) 29 Alternatives 43, 44.

international criminal law not only uses them to define the boundaries between civilized and uncivilized, but it also embeds their imperatives within its structures, and aims to deliver them to the uncivilized through the civilizing mission. For example, the assumption of the universality of Western values espoused by the international community is particularly supported by the discourse of universal human rights,[171] which is founded largely on notions of individualism and the intrinsic rights of humanity.[172] International criminal law is by definition individualistic, essentially ignoring world-views of a communitarian nature, and is largely incapable of allocating responsibility for structural violence that in many ways represents the prioritization of civil and political rights over economic, social, and cultural rights.

None of this is to say that war crimes, crimes against humanity, and genocide are not universally condemned. Like Mark Drumbl, the author accepts that a case can be made for the universality of the wrong-doing.[173] However, also like him, the author does not accept that it follows that international criminal law ought to provide a universal method for dealing with such wrong-doing.[174] It is possible to accept that there are some universal standards without necessarily accepting that such standards are reflected in the line an international criminal trial draws between the "universal" and the "other", or that prosecution is the only means of condemning violations of these universal standards.

3 Universal Application?

Although the dynamic of difference postulates that there are universal civilized standards that are to be upheld by the universal civilized response of prosecution, the logic of civilization means that these standards are not universally applied.[175] While prosecution is the civilized response, civilized standards do not need to be upheld on every occasion; only where the culprit is deemed uncivilized will it be necessary. Clearly, on the basis of the patterns of exclusion and the definitions of the universal, "civilized" is defined as Western, liberal, and democratic — the new "standard of civilization".[176] Anything outside those amorphous concepts can be defined as the uncivilized "other" and be subject to the civilizing mission.

Not only do Western states define the boundaries of civilized and

171 See Anghie, "Universality and the Concept of Governance in International Law" in Quashigah and Okafor (eds), *Legitimate Governance in Africa: International and Domestic Legal Perspectives* (1999).

172 It is not the aim of this article to examine the immense and complex debates over cultural relativism and human rights. For the purposes of this article it is accepted that there may well be certain rights that are universal and protected by international criminal law, but this does not mean that there are not other vital rights and conceptions of rights excluded by the structures of international criminal law. For an alternate conception of human rights in Africa see Khushalani, supra note 120, 331–334.

173 Drumbl, supra note 141, 19.

174 Ibid.

175 Bloxham, supra note 57, 465.

176 Bowden, supra note 170, 54.

uncivilized in international criminal law, but also, because they possess the universal marks of civilization described above, they are inherently civilized and are not subject to the same standards as the uncivilized.[177] As such states are inherently civilized they do not commit atrocities worthy of the intervention of international criminal law; that is, "[d]emocratic states '*wouldn't* do' something atrocious; therefore they 'don't.'"[178] Even when democratic states *do* commit actions strictly falling under the definitions of war crimes, crimes against humanity, or genocide, these actions are defined as legitimate because in the moral and legal landscape shaped by Western states, all of their causes are just and civilized.[179] Thus, colonial violence is not the subject of international criminal law, because it is civilized. Nor is the NATO bombing of Kosovo meritorious of international prosecution. Nor, for that matter, is intervention in Vietnam or Iraq. The acts in these conflicts are committed by civilized powers in just wars. International criminal law has no business here; the civilized do not need civilizing. "'[C]ivilization' ensures that whatever that entity does is inherently virtuous and legitimate even if it appears to violate existing law."[180]

A similar logic can explain when it is considered appropriate for international criminal law to pierce the infamous veil of sovereignty. It has been strongly contended that adherence to universal human rights represents the new standard of civilization by which a state's sovereignty is defined.[181] As in the nineteenth century when civilized states were accorded full sovereignty and uncivilized states limited sovereignty or none at all,[182] human rights-violating states today are said to have decreased sovereign rights, such that it is appropriate for international criminal law to intervene. However, inherently civilized states (in other words those that are Western, liberal, and democratic) are seen as incapable of violating human rights to the extent that international criminal law would seek to challenge their sovereignty. Different standards of civilization mean differing standards of sovereignty.[183] In the ICC context, a civilized state is not really expected to need to submit to the jurisdiction of the ICC, even if they are a State Party. If for some reason they do, any national prosecutions on their part, being likely to adhere to the Western liberal model of criminal justice, are unlikely to be challenged by the Court. However, states that do not meet the criteria for civilized status are expected to subject themselves to the civilizing mission of the ICC, either in the form of international prosecutions or national prosecutions conforming to international standards.

177 Anghie, On Critique, supra note 162, 395.

178 Jones, "Introduction: History and Complicity" in Jones, supra note 74, 11 (Emphasis in original).

179 See Anghie and Chimni, supra note 73, 85–86.

180 Anghie, On Critique, supra note 162, 394.

181 See Webley, "Sovereignty, Society and Human Rights at the International Criminal Tribunals: Uncovering the International Transition within Theories of Transitional Justice" Columbia University (2006) <http://www.columbia.edu/cu/polisci/pdf-files/apsa_webley.pdf> (at 6 August 2008); Bowden, supra note 170.

182 See Anghie, *Imperialism*, supra note 3.

183 Webley, supra note 181, 33.

International Criminal Law and the Civilizing Mission

Within this framework, the international criminal trial is the legal tool used to bridge the gap between the universal and the "other", between the "civilized" and the "uncivilized" — it is the fulfilment of the civilizing mission in the context of international criminal law. This was the case previously at the Tokyo Tribunal where Justice Pal objected to "its infusion with the crusading ideology of the American sponsors, who were striving to create an international legal community in their own image".[184] The legacy of the post-World War II international criminal trials is to privilege responding to atrocities with an international criminal process to the exclusion of all other responses. Prosecution sends "a clear signal to others that ... acts of barbarity will not be countenanced by the civilised world".[185]

The ICC institutionalizes this concept. In this context the establishment of individual accountability for international crimes through trials becomes the universal and civilized response to atrocity. As in the colonial encounter, law represents universal civilization.[186] Its effect is that a state must either respond to atrocities by prosecuting in their own jurisdiction to the standards of civilization set by the ICC, or they must submit to the jurisdiction of the ICC so that the Court itself can prosecute. Thus, the civilizing mission is achieved as the "other" is brought within the universal standards of civilization set by international criminal law.

Why, then, is this imperialistic? What elements of the fulfilment of the civilizing mission ought to cause us to question the universality of this mechanism? The answer is a simple one: context. In holding that the only civilized response to mass atrocities is prosecution, the international criminal system is fulfilling its civilizing mission, while at the same time depriving itself of the ability to respond contextually to situations.[187] In order to fulfil the civilizing mission, the international criminal system must ensure that individualized accountability for core international crimes is established at an international or national level in every instance where civilized standards must be upheld. This must be done using the civilized, liberal Western model, ensuring liberal Western protections, and in the end hoping that the civilizing mission will extend beyond the individual accused and create a democratic society in the Western liberal mould.[188] Thus, international criminal law simultaneously imposes a particular system within the trial and on society that purports to be universal and excludes alternatives at a local level.[189]

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184 Borgwardt, supra note 85, 375.

185 Akhavan, "Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order" (1993) 15 Hum Rts Q 262, 286.

186 Fitzpatrick, supra note 146, 19.

187 See generally Czarnetsky and Rychlak, supra note 161.

188 Alvarez, supra note 69, 374.

189 Thakur, supra note 122, 284–285.

While the doctrine of complementarity may result in international crimes being prosecuted in a wider range of fora, we will likely see increasing similarities in terms of their process and punishment.[190] The effect of this is likely to be the exclusion of local practices in non-Western societies, regardless of the legitimacy that they may have in context, in favour of the dominant Western model.[191] Since international criminal law is more likely to target non-Western societies as the sites of atrocities, local practices are most likely to be excluded in those situations.[192] Thus, it is not merely the actual intervention of the ICC in a particular situation that brings charges of imperialism; rather, it is that in *every* case of mass atrocities the ICC is the body that determines the response — whether that response is an international trial or a national trial on the international model.[193]

The latter effect can be seen in respect of the *Gacaca* Courts in Rwanda — courts for lower level genocide suspects, modelled on traditional restorative justice practices, and set up when it was clear that Western-style prosecution by the ICTR could not work alone.[194] Such courts may be necessary for a society to move forward and achieve peace and stability.[195] However, "there is in fact palpable concern over processing lower-level perpetrators in a manner that deviates from the norms of international institutions"[196] and the courts have come under fire for not conforming to basic international standards for fair trials.[197] Attacks such as these ensure that the interests of the international system in fulfilling its civilizing mission are privileged over the context and the interests of the people in the post-atrocity society.

The privileging of prosecution over other responses can be confidently characterized as an attempt to fulfil the civilizing mission, in that it intends to supplant the "other" with the purportedly "universal", in an act of transformation, so that the post-atrocity society is well on its way to the civilized life of a Western, liberal, and democratic society. This logic leaves little, if any, scope for critique or flexibility in context. Yet such critique is vitally important if we are to assess the effect of international criminal law's imperialism in real world situations. Therefore, it is to questioning the civilizing mission that this article now turns, bringing the discussion full circle in an attempt to understand the impact of an imperialistic international criminal law on the Ugandan situation.

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190 Drumbl, supra note 141, 143.

191 Ibid.

192 Ibid.

193 Cryer, supra note 57, 143–144.

194 Cobban, supra note 119, 64.

195 This is particularly so in Rwanda given the extraordinary number of individuals being held on genocide charges. See Alvarez, supra note 69, 393.

196 Drumbl, supra note 141, 147.

197 Ibid 65.

VII QUESTIONING THE MISSION: THE ICC IN UGANDA

In the civilizing mission of international criminal law, every post-conflict situation is assumed to be amenable to the universal model of Western-style prosecution, regardless of its traditions, values, customs, beliefs, or circumstances.[198] It is assumed that prosecution is necessary to achieve its desired ends — "[i]f peace is not intended to be a brief interlude between conflicts, it must, in order to avoid future conflict, encompass what justice is intended to accomplish: prevention, deterrence, punishment and rehabilitation."[199] This assumes both that these ends are desirable, and that prosecution is the necessary means for achieving them,[200] leaving no room for the people in the post-conflict society to make a decision about the appropriate mechanism for their future. In particular, a key claim by those who promote prosecution is that peace requires justice, and that there can be no peace without justice — justice being defined as individual accountability under international law at either a national or international level.[201] It is crucial in understanding the imperialism of international criminal law to understand that on this approach there may be useful, contextually appropriate tools that are excluded from the civilizing mission. A significant example in this respect is that of Mozambique:[202]

> In a country of 16 million people, between 600,000 and 1 million lost their lives in the bitter 17-year civil war leading to independence. In the peace agreement signed in 1992, all participants in the war were given complete amnesty for acts committed during the war. As warriors, victims, exiles and the displaced came home, communities reverted to traditional healing rituals designed to take the violence out of the individual person and facilitate reintegration into the community. Their belief is that all those affected by the violence – perpetrators and victims alike – need to be purified from its baleful effects.

The cultural beliefs of Mozambicans place value on a clean break between times of war and times of peace, and a need to reintegrate all those touched by the evil spirits of war into the community.[203] In this world-view, the retributive and punitive approaches of prosecution are as foreign as the

198 See ibid 368.

199 Bassiouni, *International Criminal Law*, supra note 70, 6.

200 See Tallgren, "The Sensibility and Sense of International Criminal Law" (2002) 13 EJIL 561 for an interesting discussion of these issues.

201 See e.g. Bassiouni, Versailles to Rwanda, supra note 66, 58. But see Cobban, supra note 119, 240, who notes that the relatively narrow view of "justice" in Western societies equating it with orderly criminal trials would be strange to many living in societies in transition.

202 Thakur, supra note 122, 285.

203 Ibid 156–175.

idea of some sort of truth-telling forum.[204] Mozambique used amnesty and traditional rituals to heal society and all those touched by the war, in contrast to the approaches taken in Rwanda and South Africa to their post-atrocity transition.[205] In doing so, Mozambique is seen as fundamentally challenging Western notions of accountability and the need to prosecute.[206] Interestingly, Helena Cobban compares its positive progress with that of Rwanda, where prosecutions were pursued with zeal.[207]

The positive results that Mozambique has achieved with its blanket amnesty challenge the contention that peace cannot be achieved without prosecutions, and that prosecutions are the only civilized response to atrocities. In doing so, they also reveal the value of a contextually appropriate response. However, dealing with legacies of atrocity in the way that Mozambique has may be increasingly difficult for Uganda following the creation of the ICC, especially considering the issuing of arrest warrants in the midst of the unresolved insurgency.[208]

Serious questions have been raised in Uganda about the impact of the ICC intervention on the peace negotiations, traditional justice mechanisms, and the Amnesty Act 2000 (Uganda).[209] A Ugandan delegation to The Hague asked the ICC not to issue the indictments because it would remove the valuable bargaining chip of amnesty from local communities who wish to settle the civil war.[210] To them amnesty may be an appealing option for ending the long civil war, not the negation of the civilizing mission of international criminal law. Since the issuing of the indictments, local pressure for peace discussions backed up by amnesty have not abated. Amnesty remains a popular option for the Acholi people in northern Uganda, as it is seen as consistent with traditional mechanisms of forgiveness and reconciliation and the best way forward toward peace.[211]

This concern challenges the ICC's assumption that prosecution ought to be the universal response. In fact, in peace negotiations a guarantee of safety and amnesty was given to Joseph Kony by the Ugandan government in a serious attempt to achieve peace.[212] Consistent with its singular focus on prosecution, the ICC, and the Western states backing it, expressed reservations about this move, pushing for the execution of the arrest warrants and refusing to withdraw them.[213] This reveals the tension between the pursuit of peace, which is the focus of affected local communities, and the imperatives of international criminal law animated

204 Ibid.

205 Cobban, supra note 119, 136–182.

206 Ibid 16.

207 Ibid 194–195, 199.

208 Ibid 24.

209 See generally Apuuli, supra note 7, 184.

210 Drumbl, supra note 141, 145.

211 Southwick, "Investigating War in Northern Uganda: Dilemmas for the International Criminal Court" (2005) Yale J of Int'l Affairs 105, 114.

212 Ibid.

213 Ibid.

by the universal civilizing mission. In this framework, peace cannot be achieved without justice, and the only acceptable definition of the latter is accountability through prosecutions for international crimes, which is the only civilized response. Under an imperial international criminal law the option of amnesties may be taken away from the local communities in northern Uganda, in favour of the civilized response of international prosecutions, ignorant of context.[214]

The logic of an imperialistic international criminal law also imposes a Western ideal of justice, and excludes other mechanisms of achieving justice and accountability. There have been expressions of interest for mechanisms falling outside international criminal law's universalist response:[215]

> [M]embers of victimized communities value traditional approaches such as mato oput [drinking bitter root herb] and nyouo tong gweno [a welcoming ceremony incorporating eggs and twigs]. Many community members feel that these social institutions respect the fact that the line between the victimizers and the victimized, particularly in the case of child soldiers, is opaque.

An international criminal law that privileges prosecution in the Western model over other responses to atrocities could deprive those in victimized communities of the option of pursuing these traditional mechanisms to the ends of restoration, reintegration, and peace.[216]

Recently, as part of the peace talks, the Ugandan government and the LRA have signed agreements signalling a multi-faceted approach to the atrocities, through a combination of national trials for the most serious crimes, a truth commission, reparations, and traditional justice practices.[217] If this approach is in accordance with the Ugandan context and the wishes of the people of Uganda, then it may go some way to answering a number of the concerns raised above. However, it does not suggest that the civilizing mission of international criminal law through the privileging of prosecutions is not still at work. It must be noted not only that prosecution for the international crimes committed is seen as "critical ... to accountability" and "to establishing a durable peace",[218] but also that in praising the adoption of prosecution mechanisms, international human rights groups have focused on the need for such prosecutions to comply with "international fair trial standards" and placed positive emphasis on the fact that it will be the ICC that decides whether such prosecutions meet the required standards.[219]

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214 See ibid 116.

215 Drumbl, supra note 141, 145.

216 See Southwick, supra note 211, 116.

217 See "Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation" Human Rights Watch (2008) <http://hrw.org/backgrounder/ij/uganda0208/> (at 6 August 2008).

218 Ibid 2.

219 Ibid.

Responses outside of prosecution may well be contextually appropriate for northern Uganda. An imperialistic international criminal law that views prosecution as the universal civilized response to atrocities leaves no room for this possibility. For the purposes of this discussion, Uganda provides a concrete example of how the imperialism of international criminal law can deny post-conflict societies options outside the paradigm of individual criminal responsibility under international law. The legacies of exclusion that are part of the structure of international criminal law and the ICC may have a profound effect on the future of both the victims and perpetrators in northern Uganda.

VIII IMPLICATIONS AND CONCLUSIONS

Implications for the International Criminal Justice System

Rather than representing the culmination of a narrative of progress and increasing inclusiveness, the ICC can be seen as a step backwards in terms of the availability of contextually appropriate tools for dealing with post-conflict societies. In its definition of Western-style prosecution as the only civilized response to atrocities, Nuremberg's legacy of exclusion has been fulfilled — a "one-size-fits-all" model has been adopted and the ability of international criminal law to respond contextually has been foregone. The implications of this should be profound for today's system of international criminal justice.

Such implications suggest that it is time for a radical rethink of the structures of the international criminal justice system, to move beyond protecting and justifying the system, and to be critical about the universality of international criminal law and its limits.[220] To do so it is necessary to acknowledge the imperialism of international criminal law and the debt it owes to historical patterns of exclusion: patterns that do reverberate in the present, in some ways more than ever. Such critique and acknowledgment enable us to recognize that justice does not have to be defined by international criminal trials, and that it can be much more if it operates within the context of a wide range of legal and political responses that promote accountability.[221] If international criminal law is applied to situations without consideration of what is appropriate in the context and in the face of opposition by the people who live in those situations, it will not only be the embodiment of the civilizing mission, but it will also start to be viewed as such. With that we risk losing any potential it has to help post-conflict societies achieve peace, justice or accountability.

This may sound like a simple call for further critique and

220 For a similar opinion see Drumbl, supra note 141.

221 Ibid 205.

introspection on the part of those involved with international criminal law. In reality, it is something more. It is asking those in the current system to acknowledge patterns of exclusion that are deeply embedded in the structures of international criminal law, and have become so over the passage of time. This acknowledgement occurs in the context of an international law and an international humanitarian law that are profoundly exclusive and coloured by imperialism, and a need to challenge not only the universality of international criminal law, but also the universality of the international system. It requires an acknowledgment that international criminal law is complicit in the civilizing mission. Without doubt this is difficult for a discipline that has spent a good deal of the last fifty years expounding the virtues of a universal international criminal law, but doing so may ensure that international criminal law achieves the imperatives it desires, and shifts its measure of success away from how many prosecutions it achieves to "how well it reinforces peace and human dignity".[222]

Conclusion

At its inception international criminal law invoked civilization; the complaining party at the bars of the Nuremberg and Tokyo Tribunals was "civilization" and the trials were part of the battle against those who waged war on "civilization". Today, little has changed: the spectre of civilization continues to haunt present day international criminal law and the ICC. This spectre has given rise to an imperialistic international criminal law, built on the exclusions of international law and international humanitarian law. Its critical history reveals profound patterns of exclusion, many of which are embedded in the present structures of international criminal law. Most deeply embedded is the exclusionary legacy of Nuremberg that the only appropriate response to atrocities is prosecution of individuals under international law for their crimes. This is not just seen as the only appropriate response: it is seen as the only civilized response. In the pursuit of its universal civilizing mission through prosecution, international criminal law deprives itself of any ability to respond to context. Such an inability seriously calls into question the validity of the ICC's intervention in situations like Uganda, where the victims of horrendous atrocities want peace and security first and foremost, and are promised it by the international community, but only if they adopt the civilized mechanisms of that community. When people decide that they do not want to be "civilized" by such mechanisms, international criminal law risks becoming a Western anachronism, useless to those to whom it is intended to apply.

222 Southwick, supra note 211, 118.