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Beyond the Juristic Orientation of International Criminal Justice:
The Relevance of Criminological Insight to International Criminal Law and its Control

A Commentary

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Nearly seven years ago, *Paul Roberts* and *Nesam McMillan*² authored a piece titled, “For Criminology in International Criminal Justice,” drawing attention to the relevance of criminological insight on issues of international criminal law and criminal justice to legal scholars and practitioners. Over the course of the past decade, a few criminologists have attempted to draw attention to the relevance of international legal doctrine and procedural norms.³ Nevertheless, the merging of these paradigms and subsequent sharing of insights has been slow to say the least. Certainly, criminologists have much to learn from juristic analysis concerning substantive and procedural processes and issues, likewise legal scholars and practitioners have much to learn concerning the social, political, economic, and cultural phenomenon relevant to crime commission and deterrence.

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² *Paul Roberts* and *Nesam McMillan*. 2003. For Criminology in International Criminal Justice, *Journal of International Criminal Justice* 2003 1: 315-338.

³ See *William Chambliss* 1989. “State Organized Crime.” *Criminology* 27(2):183–208; *William Chambliss* 1995. “Commentary by Chambliss, W.” *Society of Social Problems Newsletter* 26(1):9; *Dave Kauzlarich* and *Ronald Kramer*. 1993. “State-Corporate Crime in the U.S. Nuclear Weapons Production Complex.” *The Journal of Human Justice* 5(1):1–26; *Dave Kauzlarich* and *Ronald Kramer*. 1998. *Crimes of the American Nuclear State: At Home and Abroad*. Boston: Northeastern University Press; *Christopher Mullins* and *Dawn L Rothe*. 2008. *Blood, Power, and Bedlam: Violations of International Criminal Law in Post-Colonial Africa*. New York: Peter Lang; *Dawn L. Rothe* and *Christopher Mullins*. 2006a. *The International Criminal Court: Symbolic Gestures and the Generation of Global Social Control*. Lanham, MD: Lexington Books; *Dawn L Rothe* and *Christopher Mullins* 2007a. “Darfur and the Politicalization of International Law: Genocide or Crimes Against Humanity.” *Humanity and Society* 31(1):83–107; *Dawn L Rothe* 2009. *State Criminality: The Crime of all Crimes*. Lanham, MD: Lexington/Roman and Littlefield.

While juristic and political discussion of international criminal justice pays some attention to the “tenuous connection between trials and deterrence” it generally ignores the complex debates and criminological literature on the efficacy of the general deterrent effect of domestic criminal justice systems.⁴ When it is discussed, it is often in terms of the role, or lack thereof, of political will impacting international criminal justice’s deterrent effect (i.e., *realpolitik*) and fails to consider the overwhelming evidence that suggests a strong deterrent effect of law is problematic. Instead, the efficacy of and/or potential of a deterrent effect is taken as an a’ priori. For example, *Judge Richard Goldstone*, former chief prosecutor of the International Criminal Tribunals for Former Yugoslavia and Rwanda, states with an optimistic declaration, “In establishing the tribunals, the Security Council has struck a meaningful blow against impunity. It has sent a message to would-be war criminals that the international community is no longer prepared to allow serious war crimes to be committed without the threat of retribution.”⁵ Likewise, after the entry of the Rome Statute for the International Criminal Court occurred, an additional mantra on the belief in unconditional deterrence was espoused by many within the international political community:⁶

“...We need a new form of deterrence against such forms of behaviour. The establishment of an International Criminal Court (ICC), which makes impunity illegal and which holds individuals directly accountable for their actions, is that deterrent” (*H.E. Mr. Lloyd Axworthy*, Minister of Foreign Affairs of Canada 2000).

⁴ *James Silk*. 2009: 6. International Criminal Justice and the Protection of Human Rights: The Rule of Law or the Hubris of Law? Working Paper, Yale University Law School (August 21, 2009). Available online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1459513

⁵ Quoted in *Silk* 2009: 6. *ibid*

⁶ The following quotes were taken directly from the ICC UPDATE. 14th edition. CICC Secretariat, New York, NY. 18, October 2000.

“...We are confident that the establishment of the International Criminal Court will be an efficient step undertaken by the international community towards deterring the possible perpetrators from committing such acts.” (*H.E. Ms. Nadezhda Mihailova*, Minister of Foreign Affairs of Bulgaria 2000)

“...We believe that the International Criminal Court will play an indispensable role here as a deterrent and preventive remedy as well.” (*H.E. Mr. Irakli Menagarishvili*, Minister of Foreign Affairs of Georgia 2000).

“...An effective international court system should be available to bring those who breach these rules to justice, at the same time as serving to deter potential perpetrators. With this in mind, I believe that the greatest achievements towards strengthening the international legal system in recent years have been the establishment of the Criminal Tribunals for the Former Republic of Yugoslavia and for Rwanda and the adoption of the Rome Statute of the International Criminal Court.”

This view arises out of the modern conceptualization of law developed in the wake of the writings of Cesaere Beccaria and Jeremy Bentham and, as we will show below, out of a rationalized enlightenment view of the human mind. The deterrent effect claimed in these statements is optimistic given the criminological research on deterrence. This is not meant to disparage the work of the Tribunals, the International Criminal Court, or of the judicial processes and decisions overall, as they deal with grave and difficult cases and present complex evidentiary and legal challenges. This is also not the only population with a blind belief in the deterrent effects of law. Nonetheless, as an argument for the need of international criminal justice to be more inclusive and less exclusive, criminological insight can only enhance these processes and decisions by highlighting

issues and processes that influence the nature of violations of law and are thus important to understand for case processing in international criminal justice.

The next two sections explore the theoretical and policy bearing of criminological thought to international criminal justice by drawing from the ideology and theory of deterrence and legitimacy. After all, both of these concepts are intertwined and of central relevance to ending impunity for heads of state and high ranking officials and constraining future incidences of international criminal law violations.

Deterrence⁷

“I also fully accept, within the margin determined by the Appellant’s individual guilt, the special emphasis on general deterrence...in particular when it is to prevent commanders in similar circumstances from committing similar crimes in the future”.⁸

The foundation of the rule of law is premised on the notion of social order and with the understanding that the laws that govern the broader social contract serve as specific and general deterrents. Thus, laws *ideally* serve to deter criminality. Prosecutions for such violations serve as a specific deterrent to the offender and as a general deterrent to others by means of solidifying the international norms prohibiting such behaviors by way of example. Deterrence then is a model of obedience.⁹

The *potential* for deterrence to be effective at the international level is not far reaching. As street crime research has shown, social location and position strongly influences deterrence.¹⁰ While an expansion of the more simplistic rational choice model

⁷ This section draws from my previous work, see Dawn L. Rothe. 2009. “Judgement, Prosecutor v. Tihomir Blaškić, July 2004, Case No. IT-95-14-A. Commentary”. Cases of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia. Vol XX. Editors: André Klip and Göran Sluiter. Forthcoming.

⁸ Separate Opinion of Judge Schomburg in Appeals Chamber Judgement XIV p 260.

⁹ See Dawn L Rothe 2009. State Criminality: The Crimes of all Crimes. MD: Lexington/Roman and Littlefield.

¹⁰ See Mike Stafford and Mark Warr. 1993. “A Reconceptualization of General and Specific Deterrence.” Journal of Research in Crime and Delinquency 30:123–35; Raymond Paternoster and Alex Piquero. 1995. “Reconceptualizing Deterrence: An Empirical Test of Personal and Vicarious Experiences.” Journal of Research in Crime and Delinquency 32(3): 251–286; Raymond Paternoster and Sally Simpson. 1992. “A Rational Choice Theory of

this work highlights that different social locations can lead individuals to make cost benefit decisions differently. Simply, the assumption is that the more individuals have at stake to lose, the greater the likelihood they would desist and/or reject additional criminal activity as the absolute cost is higher. As such, this could then be carried over to assume that some of those actors most likely to be involved in international law violations would seem to be those who are most susceptible to legal sanctions given ‘what they have to lose’—social/political position. Individuals within positions of power in recognized nation-states and militaries should feel a strong deterrent effect of law. However, those actors with little to lose will be less deterred.

The assumptions of human nature that undergird the theory of deterrence are grounded in the belief that humans are rational actors, even if it is a bounded rationality.¹¹ This construction of decision making as an expressly rational cost-benefit analysis, even when bound by limited information and/or time and space, does not allow for consideration of irrational decision-making. Social theorists and philosophers have long contemplated the nature of man, presenting both, man as rational and man as irrational being. *Vilfredo Pareto*¹² suggests that humans are not rational beings producing action. However, humans have a need to espouse their actions as logical and rational so they invent a posteriori logical reasons to justify their acts. They “wish to represent involuntary acts as voluntary and non-logical actions as logical ones, conjure up strangely imaginary reasons, which they try to use to deceive themselves as well as others about the true motives of their actions.”

Corporate Crime.” Pp. 194–210 in *Crimes of Privilege—Readings in White-Collar Crime* edited by Neal Shover and John Paul Wright. New York: Oxford Press; *Raymond Paternoste and Sally Simpson* 1996. “Sanction Threats and Appeal to Morality: Testing a Rational Choice Model of Corporate Crime.” *Law and Society Review* 30:549–83.

¹¹ See *Simon, Herbert*. 1956. *Models of Man*. New York: Wiley and Sons.

¹² See *Vilfredo Pareto* 1991: 35. *The Rise and Fall of Elites*, Transaction, New Brunswick, NJ,

While this approach to theorizing man may be the minority within the criminological/sociological literature, there is reason to not discount the idea in whole. There is ample evidence that suggests much crime commission is driven by non-rational elements in decision making. In the USA, homicide has the highest clearance rates of crimes and thus the highest certainty of punishment. Further, the law holds out severe sanction, including in certain jurisdictions, capital punishment. If criminal behavior were the end product of rational thought, criminal law should produce deterrence here above all other crimes. Yet, a voluminous body of research that has sought to find a deterrent effect of capital punishment specifically in this context has done so in vein. The absence of this effect is highlighted by criminological research showing that the majority of all homicides in the US are emotive in context, being the product of an escalation of aggressive interactional reactions between parties. Furthermore qualitative studies suggest that many other types of crimes are committed during the processes of irrational thought, sentiment or emotions. *Wright and Decker*¹³ establish that the *in situ* contexts for committing a burglary or armed robbery are framed within an offenders' experiencing a 'pressing need for cash' produced through participation in a street-life subculture. As ADAM and New ADAM data collected in both the United States and the United Kingdom has shown, the majority of offenders are intoxicated at the time of their arrest and typically at the time of the commission of the crime.¹⁴ Such irrationality is not

¹³ *Richard Wright and Scott Decker*. 1994. *Burglars on the Job: Streetlife and Residential Break-ins*. Boston: Northeastern University Press and 1997. *Armed Robbers in Action: Stick Ups and Street Culture*. Boston: Northeastern University Press.

¹⁴ See *Trevor Bennet*. 2000. *Drugs and Crime: the results of the second developmental stage of the NEW-ADAM programme*. Home Office Research Study 205 Research, Development and Statistics Directorate. London, UK; *Richard Wright, Fiona Brookman and Trevor Bennett*. (2006) *The Foreground Dynamics of Street Robbery in Britain*, *British Journal of Criminology*. 46 (1): 1-15; *US Dept of Justice, National Institute of Justice*. 2003. *Drug and Alcohol Use and Related Matters Among Arrestees*. Washington DC: US DoJ.

limited to violators of ordinary crimes. Much testimony given before the Tribunal for Rwanda has highlighted the heavy use of alcohol and marijuana by the *Interahamwe*. Child soldiers in Sierra Leone were often drugged before combat. *Dutton et al*¹⁵ also highlight the agitated and stressed emotional state that soldiers are in during armed conflict situations, which can overpower reason and spill over into atrocity level violence. These emotive states will short circuit deterrent effects of law, thus national prosecutions of low-level offenders may have a retributive value but not a deterrent one as the mindset of the individual on-the-ground is not utilizing rational decision making mechanisms.

In the case of those most responsible for violations of international criminal law—-rationality can be overshadowed by the sentiments of ideology, religion, nationalism and at the most basic level, power and politics. If we discount this and return to the premise that deterrence can work; that heads of state and other high ranking officials that orchestrate violations of law are rational and would not risk their social location or position; we may want to consider what other factors must come into play for general deterrence to materialize.

Consider that in the form of specific deterrence, control mechanisms typically, come into play long after the criminal actions are over and the viability and integrity of the state which has committed them has been compromised, thus, not swiftly.¹⁶ Additionally, deterrence theories locate the real general deterrent function of law and potential punishment not at the macro-level of society, but at the micro level of *perception*.¹⁷ Even the earliest rational choice models (e.g, Bentham and Beccaria)

¹⁵ Donald G. Dutton, Ehor O. Boyanowsky, Michael Harris Bond 2005. Extreme mass homicide: From military massacre to genocide. *Aggression and Violent Behavior* 10 (2005) 437–473.

¹⁶ *Rothe and Mullins* 2006, supra note 3.

¹⁷ See Ronet Bachman, Raymond Paternoster, and Sandra Wards. 1992. “The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault.” *Law and Society Review* 26(2):343–72;

focused not simply on the intensity of certainty, celerity and proportionality of punishment but rather the individual's perception of these elements.

However, most committers of atrocities do not *perceive* international law or a given country's law as a threat for prosecuting their behavior, especially given the history of impunity and common tactics which are employed to ensure deniability (e.g., propaganda, political pressures, plausible deniability, and techniques of neutralization). We have seen this in recent cases including the United States use of torture and renditions, Sudan's support of the Lord's Resistance Army, Joseph Kony's regrouping and escalation of abductions post the International Criminal Court's warrant issued for his arrest. For the concept of deterrence to materialize in everyday life many factors must come into play at the structural and interactional levels of society (e.g., individual perception of the potential of being caught or held accountable) as the effect of even certainty is also conditioned by the individual's social environment as well as the length or type of punishment. Nonetheless, certainty does lend to the potential of individual adjusted perception of the threat of prosecution. In other words, if international law and its enforcement are not *perceived* as a real threat, general deterrence is negated.

Another central feature of individual perceptions which shapes the deterrent value of law is the individual's perceptions of the law itself. If international criminal law and international criminal justice are not viewed as legitimate, the potential of general deterrence becomes significantly less forceful and regrettably, specific deterrence becomes less enforceable. The assumption then, that the rule of law and past, ongoing and future prosecutions of heads of state and high ranking officials have and/or will serve

Charles Tittle. 1995. *Control Balance: Toward a General Theory of Deviance*. Boulder, CO: Westview Press.

as a general deterrent, thus reducing impunity and future law violations, is not grounded in sound empirical evidence or within criminological research. The notion of deterrence is not black and white for either general or specific deterrence, thus; the above assumption is not only premature but also naïve of the complexities, nuances and subtleties associated with effective deterrents, one of which is the perceived legitimacy of the law.

Legitimacy

Within the juristic and socio-legal literature, legitimacy is most often discussed in terms of or risk thereof, international institutions of control and/or their processes and procedures. As noted by the late German sociologist, *Niklas Luhman*¹⁸, “Legitimacy is strongly linked to impartiality, fairness and neutrality in procedure and proceedings.” Criminologists, on the other hand, look at issues of legitimacy in regard to policing, courts and the relationship of effective social order maintenance.¹⁹ What is not discussed in either bodies of literature however, is how issues of legitimacy are also central to deterrence.

Criminological theories, dating back to the 1930’s and *Edwin Sutherland’s* Differential Association (DA), have long noted that individuals’ definition of the law as favorable or unfavorable have a bearing on the decision-making processes to offend or not offend²⁰. For example, DA theory highlights the impact of individuals’ definition of a

¹⁸ *Niklas Luhman* (1978: 302). Quoted in Hans-Jorg Albrecht, *Legitimacy and Criminal Justice: Inequality and Discrimination in the German Criminal Justice System*. In *Legitimacy and Criminal Justice*. Edited by Tom Tyler 2007.

¹⁹ *Hans-Jorg Albrecht* 2007. *ibid*

²⁰ *Edwin Sutherland* (1939) *Principles of Criminology* 3rd edition. Philadelphia: Lippincott. One cannot ignore the long controversy over the lack of Sutherland’s precise definition of what constitutes favorable or unfavorable definitions. From an empirical quantitative testing perspective, this is highly problematic, however, from a qualitative testing point, this vagueness is not as problematic.

law as favorable or unfavorable on the decision to offend along. While unfavorable definitions of the law are not referred to as issues of legitimacy by *Sutherland*, they are one and the same: not viewing a particular law as legitimate is viewing it unfavorably. If one feels a law should not be followed, individuals will not see it as a right and proper restriction of behavior. Research on white collar crime has shown that the best statistical predictor of deterrence (not committing an action) is the individual belief that legal restriction in question is legitimate and morally valid.²¹ If a combination of law as unfavorable and the *perception* of the risks of being caught and potential punishment are high, the impact of general deterrence is negated.

Combining legitimacy with deterrence, the rule of law can be said to only be a general deterrent when the law is viewed favorably by those under its authority and when it is *perceived* at the individual level that there is a certainty of being caught and being held accountable. If for example, the perceived threat of being caught is strong, the particular law need not be viewed as legitimate. On the other hand, if law is viewed as legitimate, the perception of being caught holds less impact as the internalized belief in legitimacy can serve as a self-controlling mechanism. This has been referred to as legitimacy based deference.²² When both are absent, deterrence holds no effectiveness. Take as case in point, the following quote from *Alberto Gonzales*, former legal counselor to George W. Bush, in a memo dated January 25, 2002; “This new situation [the war on terrorism] renders obsolete Geneva’s strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.” In this example, *Gonzales* states that the

²¹ *Raymond Paternoster*, and *Sally Simpson*. 1992. “A Rational Choice Theory of Corporate Crime.” Pp. 194–210 in *Crimes of Privilege – Readings in White-Collar Crime* edited by Neal Shover and John Paul Wright. New York: Oxford Press.

²² *Tyler, T.* 2007. *Supra* note 18.

Geneva Conventions, pertaining to torture and the classification of prisoners as enemy combatants, was no longer legitimate, as such, irrelevant. This, combined with the perception of no threat of punishment, removed any efficacy of the deterrent effect.

Additionally, legitimacy and deterrence are linked via the “legitimate right to intervene.”²³ In other words, if the authorities that are attempting to enforce the norms are not viewed as legitimate or having the authority, deterrence is significantly weakened and enforcement is more likely to have to be forcefully implemented. After all, international criminal justice is complementary and as such, requires voluntary cooperation from the population, which in this case is the international political community. As noted by *Judge Philippe Kirsch*²⁴, past President of the International Criminal Court, “The Court’s mandate must be reaffirmed and respected.” Here, legitimacy is important both at the individual level and the collective level. This issue has been most strongly seen in the International Tribunal for Former Yugoslavia’s initial (and continued) inability to bring certain suspects to trial. The widespread belief among Bosnian Serbs that the tribunal was a political imposition by an outside power severely hampered the tribunal’s early operations. Similarly, large numbers of Liberians fail to see the legitimacy of the Sierra Leone Tribunal’s prosecution of Charles Taylor. The position taken by the African Union in its July 2009 meeting that it will not cooperate with the International Criminal Court in the apprehension of Sudanese suspects, especially President Omar al-Bashir, further highlights the need of collective legitimacy in international criminal justice systems based on complementarities.

²³ See *Albert Reiss* 1971. *The Police and the Public*. New Haven, Conn. Yale University Press.

²⁴ *Judge Philippe Kirsch*. 2008: 10. Address to the United Nations General Assembly. <http://www.icc-cpi.int/NR/rdonlyres/60963BCD-D0D7-4DA3-B8CA-BB80EDD49C70/279616/ICCCPISTPK20081030ENG.pdf>

When regimes and high-ranking officials including those of militias and paramilitaries posit certain international criminal laws and/or jurisdiction of international criminal justice as unfavorable, not legitimate, or see no perceived threat of prosecution, deterrence is negated and legitimacy is weakened. Behaviors are then justified, neutralized, or rationalized in an effort to legitimize the illegitimate. These acts are reclassified, reconfigured, or relabeled to coincide with a favorable definition of the law (i.e., techniques of neutralization) or outrightly denied based on the perception that there is little to no chance of being held accountable or punished for their actions (i.e., plausible deniability—a construct of punishment avoidance). Yet, legitimacy is central to the growing commitment to an international criminal justice system, global social stability and to the efficacy of deterrence.

While having presented the basic tenants of deterrence and the relevance of legitimacy, the following section draws together these two concepts with current judicial precedent decision-making. After all, as in some cases, such decisions can prove to be counter-productive to ensuring the efficacy of deterrence, can facilitate the promotion of the de-legitimization of international criminal law, can hinder the perception of potential prosecution, and/or can in the end lead to additional impunity. Of course, the counter point to this is the need to ensure due process and indeed this is a real and grave concern. However, there are and have been cases where criminological research may have provided valuable insight that may have led to a different perception of precedence and

subsequent ruling. As an example, we draw from the concept of command responsibility using the Judgment, Prosecutor v. Tihomir Blaškić, July 2004, Case No. IT-95-14-A²⁵.

Command Responsibility

The doctrine of command responsibility has been engulfed in a quagmire since WWII: most notably the level of knowledge that commanders must possess regarding the actions of their subordinates to be held criminally liable.²⁶ The Additional Protocol I of the Geneva Conventions of 1977 codified the doctrine of command responsibility stating that “the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from ...responsibility...if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or about to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach” (Article 86:2). Responsibility of commanders and superiors, Article 28 (a) of the Rome Statute, sets two different standards:

“(a) A military commander or person effectively acting as a military commander shall be *criminally* responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

²⁵ This section draws from *Rothe, Dawn L* 2009“Judgement, Prosecutor v. Tihomir Blaškić, July 2004, Case No. IT-95-14-A. Commentary”. *Cases of International Criminal Tribunals: The International Criminal Tribunal for the former Yugoslavia*. Vol XX. Editors: André Klip and Göran Sluiter. Forthcoming.

²⁶ *Eugenia Levine* 2005. ‘Command Responsibility: The Mens Rea Requirement’, *Global Policy Forum* 5 available online at <http://www.globalpolicy.org/intljustice/general/2005/command.htm> (visited 3 June 2008)

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.”

On the other hand, Article 28 (b) sets a more lenient standard for superiors.

“(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be *criminally* responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority *and* control, as *a result of* his or her failure to exercise control properly over such subordinates, where:

- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.”

The International Criminal Tribunal for Former Yugoslavia Statute, Article 7 (3), notes that if crimes were committed by a subordinate, the superior is not relieved of criminal responsibility if he *knew* or *had reason to know* that said subordinate was about to or had committed such acts and the superior failed to take reasonable measures to prevent such acts or punish the perpetrators. The meaning of “had reason to know” received conflicting interpretations in the cases of *The Prosecutor v. Delalic et al* (the Celebici case)²⁷ and *The Prosecutor v. Blaskic*.

²⁷ See *The Prosecutor v. Delalic et al* (the Celebici case) IT-96-21-T, 16 November, 1998.

In the case of the Prosecutor v. Blaskic, the Trial Chamber’s interpretation of ‘had reason to know’ was more closely aligned with the Yamashita Tribunal Decision²⁸. The Blaskic Trial Chamber found that ‘had reason to know’ in Article 7(3) of the ICTY Statute imposed a stricter meaning for the ‘should have known’ standard of mens rea. On the other hand, the Appeals Chamber used the more lenient application of command responsibility in that it should be applied only when a person orders an act or omission with the awareness that there is a substantial likelihood that a crime would be committed in the execution of that order—thus finding Blaškić not responsible for ordering the crimes in Ahmici²⁹, the Vitez Municipality, and other targeted regions.

The Chamber states,

“The Appeals Chamber considers that the Celebici Appeal Judgment has settled the issue of interpretation of the standard of “had reason to know.” In that judgment, the Appeals Chamber stated that “a superior will be criminally responsible through the principles of superior responsibility *only if information was available* to him which would have put him on notice of offences committed by subordinates”....There is no reason for the Appeals Chamber to depart from that position. The Trial Judgment’s

²⁸ Decision of the United States Military Commission at Manila, 7 December, 1945, reprinted in Leon Friedman 1972. (ed.) 2 The Law of War: A Documentary History pp. 1596.

Yamashita was charged with ‘unlawfully disregarding and failing to discharge his duty as a commander to control the acts of members of his command by permitting them to commit war crimes.’ In finding Yamashita guilty, the Commission stated that when ‘vengeful actions are widespread offences and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable.’

²⁹ Appeals Chamber Decision, para. 348 Therefore, the Appeals Chamber is not satisfied that the relevant trial evidence and the additional evidence admitted on appeal prove beyond a reasonable doubt that the Appellant is responsible under Article 7 (1) of the Statute for ordering the crimes committed in the Ahmic’i area on 16 April 1993.

interpretation of the standard is not consistent with the jurisprudence of the Appeals Chamber in this regard and must be corrected accordingly.”³⁰

This is re-established later in the judgment with,

“The Appeals Chamber has stated earlier in this judgment, that the Trial Chamber erred in its interpretation of the mental element “had reason to know”.... Therefore the Appeals Chamber will apply the correct legal standard to determine whether the Appellant had reason to know the crimes had been committed in the Ahmici area on 16 April 1993....the Appeals Chamber considers that the mental element “had reason to know” as articulated in the Statute, does not automatically imply a duty to obtain information.”³¹

Yet, this decision calls into question the stated desire of the tribunal to end the impunity of heads of state and commanders and to serve as a general deterrent given the catalysts typically employed by these actors to ensure plausible deniability. Simply, there is dissonance between the legal interpretation and application herein and the on-the-ground reality of crime commission. There is a profusion of criminological research that supports a stricter interpretation of command responsibility and mens rea given general enactment patterns.³² For example, scholars of organizational crime have pointed out that numerous organizational goals and drives generate criminogenic impulses. Further, as commander of an organization, one is able to bend the capacity of the organization itself

³⁰ Appeals Chamber Decision, para. 63

³¹ Appeals Chamber Decision, para. 405, 406

³² See *Ronald Kramer, Ray Michalowski and Dawn L. Rothe* 2005. “The Supreme International Crime: How the US War in Iraq Threatens the Rule of Law”. *Social Justice*. Vol. 32, 2: 52-81; *Raymond Michalowski and Ronald Kramer* 2006. *State-Corporate Crime: Wrongdoing At The Intersection Of Business And Government*. Editors: Piscataway, N.J.: Rutgers University Press; *Christopher W. Mullin and Dawn L. Rothe*. 2008. *Blood, Power, and Bedlam: Violations of International Criminal Law in Post Colonial Africa*. Peter Lang Publishing; *Christopher W Mullins and Dawn L Rothe*. 2007. “The Forgotten Ones”. *Critical Criminology*. Vol. 15, 2: 135-158; *Dawn L Rothe and Christopher W. Mullins*. 2007. “Darfur and the Politicalization of International Law: Genocide or Crimes Against Humanity.” *Humanity and Society*. Vol.31, 1: 83-107.

to the fulfillment of individual goals of the ones that possess control. Years of state crime and violations of international criminal law research have shown that in many cases military leaders make token efforts to show a level of control of their troops, but fail to systematically enforce these rules as their overall goals are better fulfilled by allowing the commission of crimes, not enforcing the expected norms or rules.³³

In addition to the raw empowerment of controlling a government, paramilitary, or commander of a militia, they typically hold control of the instruments of secrecy and privacy. Simply, due to a bureaucracy's ability to control information flow within itself as well as what information gets released to the outside, it can hide the true nature and extent of certain actions from members in other subunits as well as the world at large.³⁴

Within these military (and quasi military) organizations the innate division of labor, and role specialization, enhances opportunity to utilize plausible deniability: one can use these basic dynamics to avoid both legal and perceived moral culpability. In a large amalgam of people, it is difficult to identify specific perpetrators within actions and direct evidence of a commander's knowledge of their subordinates' actions. It is this that many perpetrators count on.

Criminological research has also shown that many commanders of military and paramilitary groups often count on the doctrine of plausible deniability by claiming the bad apple or rogue actor scenario, broken or multiple command structures, and/or ineffective lines of communication to ensure impunity. This, plausible deniability, is a political practice, not to be confused with the legal concept of willful blindness. Plausible

³⁴ See Jeffery Ian Ros and Dawn L. Rothe. 2008 "The Ironies of Controlling State Crime". *International Journal of Law, Crime, and Justice* Vol.36, 3: 196-210

deniability occurs when said actor has the knowledge and at times actively participates in crime commission, directly and/or indirectly through orders, though it is guised in an effort to cover-up any factual evidence linking them to the crime. The process can, 1) involve the creation of power structures and chains of command loose and informal enough to be denied if necessary; 2) claiming the rogue actor scenario and/or; 3) create and/or destroy factual proof of command and/or directives to evade fulfillment of the requirements of burden of proof. As previously noted, the opportunity to either create a loose chain of command is relatively easy given the access to resources or the structure can be in its ideal format, yet resources are available to mask the tightness of the organization. An active policy of ensuring plausible deniability protects both the inner political elite circle and military leaders by limiting prosecutions to the lowest levels of involvement. This is the direct opposite of the stated goals of international criminal law and international criminal justice.

There is reason to believe that Blaškić successfully engaged in the use of this political practice. Consider the additional evidence, Exhibits 1, 13, 14, that was allowed during his Appeal that suggested the attack on Ahmici and the surrounding villages were ‘revenge attacks’ by rogue individuals. Recall the rogue actor scenario is a common tool used to divert attention from the chain of command. During the trial, however, Blaškić’s testimony excluded this scenario. His testimony heard by the Trial Chamber claimed the attack was organized and planned at the level of command within a military hierarchical structure, contradicting the admitted evidence used by the Appeals Chamber. Consider *Blaškić’s* own words,

“Q. At the time on TV cameras and addressing the entire population of the Lasva Valley, you said that the crime had been committed in an organised manner, systematically, on the basis of a plan, and under somebody's control or command. Could you explain those four points of your allegations? Why did you say that, first, that it was an organised systematic, planned and controlled operation?”

A. First of all, it could not have been done by a group of three or four drunken persons, drunken soldiers, and that they had done it of their own accord. When I said that it was organised, I felt that there must have been some preparation behind it, preparation for such destruction...and when I say that it was under somebody's control, it means that I was sure that the group that committed it was under the control of an elected commander of its own.”³⁵

In light of the transcript from the trial, the additional evidence provided by the Appellant suggests the most common tactic of plausible deniability was used - chain of command loose and informal enough to be denied if necessary and the use of the few rogue soldiers scenario. While there are other issues with the additional evidence that was used in making their decision,³⁶ this evidence was used in making their judgment of command responsibility.

When the goal of international trials, as stated by the Appeals Chamber, is both, accountability and general deterrence, a lenient interpretation fuels the already well-known and enacted praxis of plausible deniability by claiming failed communication structures, weakened chain of command, and/or separation of consequences, further

³⁵ Trial Transcripts, p. 19031; March 12, 1999. <http://www.un.org/icty/transe14/990312ed.html>

³⁶ See Corrigendum to Judgment and Partial Dissenting Opinion of *Judge Weinberg De Roca*. XV p. 261.

ensuring impunity and weakening the potential of law and future prosecutions' general deterrent effect.

Conclusion

Beyond examinations of deterrence and legitimacy, criminologists have much to contribute to international criminal justice. As noted, there are social, political, cultural, and geographical issues that play a role in not only crime commission, but in the hindrance of and/or facilitation of deterrence. Criminologists are well positioned to show how these connections may facilitate or hinder the broader goals of the legal community.

As previously noted, even though those with the most at risk, significance of social location, are assumed to be the easiest to deter, other factors must come into play before international criminal law and international criminal justice can serve as deterrents. It must be *perceived* at the individual level that there is a certainty of risk of being caught, being held accountable. The enforcement mechanisms and law must be viewed favorable or have legitimacy not just at the collective level but by individuals in the position to violate these laws.

As such, the current rather blind belief in the deterrent impact of international criminal justice remains, regrettably, a bit premature. Additionally, as has been noted, as long as tried and true catalysts such as plausible deniability, use of a scapegoat, sacrificing underlings, or claiming the bad apple or rogue agent, can be successfully engaged and then not recognized and/or ignored in the judicial decision-making processes, a global deterrent effect will regrettably remain in the distant future. Simply, criminology has relevance to the understanding not only of crime commission and subsequent control, but also what impact the criminal justice system, laws, and

subsequent legal decisions have on the broader goals of ending impunity, enhancing international criminal justice legitimacy, and the maintenance of the broader global social order.