

The Pursuit of Justice:

Assistance Needed to Tackle the International Criminal Court's Prevention Component

by Jason Elbert

Accountability, in form of punishment, is crucial to prevention.¹

Don't be a bystander, don't let it happen again."² Henry Greenbaum, a Polish survivor of the Auschwitz Concentration Camp, gave these parting words of prevention to a small group of students from the United States Army's Command and General Staff College.³ Greenbaum survived several years in the Starachowice ghetto, incarceration in the Buna-Monowitz subcamp of Auschwitz, and a death march toward Dachau before liberation. He endured the deaths of his mother, sisters, nieces, and nephews. Despite witnessing horrific inhumanity, he focused the group of officers on shared understanding and the prevention of genocide. He did not seek revenge. He only asked that his audience think and intervene. Unfortunately, since his liberation in April 1945, humanity has repeatedly demonstrated an inability to support Greenbaum's request.⁴

The International Criminal Court (ICC) has the potential to support Greenbaum's wish and play a vital role in the prevention of mass atrocities. For the ICC to effectively deter crimes against humanity, however, the international community must tighten the nexus between the court and its member states.⁵ The United Nations (UN) must refine the international community's ability to investigate mass atrocities and unite apprehension efforts. The ICC should also leverage the complementarity provision of the Rome Statute of the ICC to supervise national court systems and prosecution. Most importantly, the international community must recognize the ICC's inability to deter genocide and mass atrocities alone. Investigations, indictments, and judicial results must support other international efforts in the prevention of mass atrocities.

This article discusses the ICC's charge to contribute to the prevention of genocide and mass atrocity and evaluates the court's ability to effectively prevent crime on an international level. Within this context, this article focuses on domestic deterrence theory, highlights several prevention

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authorities, and shapes the value of deterrence at the international level; explains the Court's organization and referral processes; examines the ICC's limitations and future potential; and provides recommendations to the UN's force structure packaging to improve success during post-conflict transition and reformation stages.

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The Prevention Component of Criminal Law

Generally, preventative criminal law theory targets rationally-thinking, risk-adverse perpetrators presumed to fear punishment.⁶ Laws seek to balance enforcement resources, risk of apprehension, and anticipated punishment to deter crime.⁷ On an international stage with scarce law enforcement resources, limited funding, and potentially irrational rulers, this balance becomes problematic. Moreover, the ICC's Office of the Prosecutor (OTP) has established a narrow charging philosophy. OTP investigations seek to find "those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation."⁸ In practice, this philosophy targets rulers at the highest level, crimes of extreme violence, and large victim groups.⁹ Whether this focus can influence human behavior stirs extensive debate and has caused many to question the validity of the ICC.¹⁰

Domestic deterrence theory

At the national level, potential criminals can weigh relative risk and punishment before committing a crime. Perpetrators have a general sense of the likelihood of apprehension and the severity of future punishment. Stable

court systems, the regular presence of law enforcement, and societal understanding of sentencing norms create trust in the rule of law.¹¹

Sentencing philosophies generally include principles such as "rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution."¹² Under classical deterrence theory, decisionmakers attempt to craft laws and strategies that will persuade individual actors to comply within the parameters of the government's resource constraints.¹³ In theory, punishment will specifically deter individual recidivism and send a general message to inhibit criminal action. Factors such as certainty of punishment, severity of punishment, and a perpetrator's level of rational thinking influence judicial effectiveness.¹⁴

Professor James Fearon describes the domestic crime model in terms of a decision point.¹⁵ Assuming the perpetrator is a rational decisionmaker, he makes a decision at the time of the crime knowing the risk of apprehension and likelihood of punishment.¹⁶ The risk of increased punishment decreases the likelihood of future misconduct.¹⁷ Therefore, law must outweigh criminal incentives with the risk of apprehension and the cost of punishment. Even at the domestic level, deterrence does not work alone. Deterrence supports the other sentencing philosophies and institutional methods to prevent crime.¹⁸ Unfortunately, the effects of criminal convictions are often hard to measure, and justification for deterrence theory grows tenuous on the international stage. Despite criticism, however, the role of judicial deterrence in the prevention of mass atrocities remains a critical element across the international community.¹⁹

Prevention authorities

The international community and the ICC echo a focus on the prevention of genocide and mass atrocities.²⁰ Then UN Secretary General Kofi Annan addressed the importance

of the ICC’s prevention component at the Rome Statutes inception stating: “We hope [the ICC] will deter future war criminals and bring nearer the day when no ruler, no state, no *junta*, and no army anywhere will be able to abuse human rights with impunity.”²¹ The preamble to the Rome Statute recognizes the prevention purpose as well: “The States Parties to this Statute ...Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...Have agreed as follows...” Although the effectiveness of the international community and the ICC’s ability to prevent genocide and mass atrocities is rightfully under question, the rhetoric of its importance is clearly outlined in national policy and international agreement.²² Somehow, national and international courts must support the prevention goal through criminal prosecution.

International prevention potential

Perhaps to truly prevent genocide, all people everywhere must act. As Greenbaum requested, we must not watch—we must intervene in some way. Certainly, to bring the idea of “never again” to fruition, all people must adhere to certain principles. The rule of law must encourage those values. During the 2015 Command and General Staff College Ethics Symposium, General (Retired) Carter Ham asked the student body to personally ask, “Do I possess the moral courage to make the hard ethical choice, or is it someone else’s job?” People surrounded by atrocity face the same dilemma.

Apprehending and prosecuting a high-level head of state, government official, or senior military commander will not prevent future genocide by itself. Instead, prevention requires the international community to educate one another and instill a sense of unity against acts intended to destroy national, ethnical, racial, or religious groups.²³ That unification must reach heads of state. It must also permeate individual

actors across the world.

The politician must advocate against, the lawyer must reject implementation of, and the police must refuse enforcement of laws intended to destroy national, ethnical, racial, or religious groups. The media must accept all groups and prevent genocidal propaganda. The military leader must defend the weak. The soldier must refuse unlawful orders. The neighbor must reject economic advantages, risk their own safety with noncompliance, and shelter friends. In order to truly prevent genocide and mass atrocity, people at all levels of life across all nations must unify. This requirement is difficult and often requires personal sacrifice and risk.²⁴ Prosecution of crime cannot create change alone.

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Although the ICC’s effectiveness has come into question since the Court’s 2002 inception, ICC investigation, indictment, and conviction must play a role in the evolution of global prevention. It is designed to represent a permanent judicial presence across the international community. The Court’s permanence sends a message to perpetrators. The international community recognizes that certain “grave crimes threaten the peace, security, and well-being of the world,” and that it will break the veil of impunity under certain conditions.²⁵

Prior to the Rome Statute, the international community relied on *ad hoc* tribunals to address prosecution of genocide and mass atrocity. International tribunals such as the World War II Nuremberg trials, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) receive criticism as merely reactive

courts.²⁶ The international community establishes these courts to stigmatize war criminals and bring a sense of resolution to a specific time and territory *ex post facto*.²⁷ Although these tribunals bring hope of influence and deterrence, they are incapable of acting during an ongoing conflict.

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The ICC brings the possibility of in-conflict justice and a more realistic venue to pierce the veil of impunity and prevent genocide.²⁸ Its permanent nature provides an enduring threat of punishment to perpetrators, complementary influence, and warrant authority. The OTP opens the possibility of quick response.²⁹ It may remove authority from perpetrators by issuing warrants and indictments. Ideally, the ICC creates an immediate deterrence effect across the international community. In theory, the OTP's ability to act quickly without the UN Security Council's political delay cultivates this deterrence. In practice, however, the ICC structure and political dynamics often delay its response.³⁰

International Criminal Court Overview

United States military practitioners often have a cautionary response to the idea of ratification of the Rome Statute. Despite concerns for international jurisdiction over soldiers, military leadership should understand the basic makeup and operation of the ICC.³¹ As the U.S. military draws down and relies more heavily on coalition partners, it might find itself operating to assist court operations by modifying missions to conform to ICC precedent or subject to Security Council resolutions related to an ICC

investigations.³² Military leaders might find that ICC investigatory authority or prosecution may best support mission accomplishment.

The ICC is composed of the Presidency, the Chambers, the Registry, and the OTP.³³ Another body, the Assembly of States Parties (ASP), oversees court actions.³⁴ The ASP monitors the OTP most closely. Arguably, the effectiveness of the OTP, which directs the scope of prosecutorial investigations and makes charging decisions, relates most directly to ICC's ability to assist in the prevention of genocide and mass atrocity.

The Presidency consists of three judges serving three-year terms.³⁵ It maintains overall function and administration of the entire Court except for the OTP, which operates independently. The Chambers house eighteen other judges that hold the responsibility of conducting the Court's legal proceedings. Pre-trial, trial, and appeal divisions make up the Chambers. The Registry performs as the non-judicial head of the Court's administrations. Finally, the independent OTP manages investigations and case processing. Depending on the situation and referral authority, the OTP has significant discretion regarding the scope of each investigation, the individuals charged, and crafting appropriate charges.³⁶

Criminal referral and authority

Article 5 of the Rome Statute limits ICC subject-matter jurisdiction to genocide, crimes against humanity, war crimes, and crimes of aggression.³⁷ Based on one of three triggers, the OTP may open a preliminary investigation examining whether these four crimes have arisen in a particular conflict situation. A state party may refer a situation to the OTP, the UN Security Council may refer a situation, or the Prosecutor may decide to initiate a preliminary examination using *proprio muto*. Additionally, to initiate the preliminary investigation, the OTP must have jurisdictional authority.³⁸

The OTP holds jurisdictional authority over

state parties to the Rome Statute, states that independently accept the Court’s jurisdiction, and states involved in situations referred by the UN Security Council. This authority applies to crimes committed within the borders of a state subject to the Court’s jurisdiction and national citizens of states subject to jurisdiction.³⁹ Once a situation is triggered and referred to the OTP, the OTP goes through a four-phased preliminary investigation analysis before investigating the situation completely and creating a case—concrete incidents and specific suspects that emerge from the investigation of a particular situation or conflict”:⁴⁰

- Phase 1, the OTP conducts an initial assessment of all information received by the Court and filters out situations clearly outside of the ICC’s jurisdiction.⁴¹
- Phase 2, the OTP solidifies the jurisdictional analysis by evaluating issues of geographical and personal jurisdiction. It also assesses whether the referral contains evidence of crimes within the ICC’s limitations.⁴² Phase 2 culminates with the formal commencement of a preliminary investigation.
- Phase 3 addresses the principles of complementarity and gravity. As the OTP evaluates whether there is reasonable basis to initiate an investigation, it considers the situation’s positive complementarity and gravity.⁴³
 - First, the ICC is intended as a court of last resort. It should complement national court systems when national systems are “unwilling or unable” to prosecute a crime.⁴⁴ Before the ICC initiates a complete investigation, this threshold must be met.⁴⁵ Additionally, the ICC can generate prevention through encouragement of complementarity. ICC involvement and cooperation should

assist in the development of national court systems.

– Second, gravity attempts to focus the Court on the most serious crimes of international concern.⁴⁶ Unfortunately, gravity “remains a vague expression, referenced throughout a multitude of situations.”⁴⁷ Pretrial Chamber 1 explained that crimes were evaluated on how “systematical or large-scale” they were conducted.⁴⁸ The OTP must also balance complementarity with the overarching “independence, impartiality, and objectivity” requirements of the Rome Statute.⁴⁹

- Phase 4 informs an OTP determination based on these concepts on whether a reasonable basis exists to initiate an investigation in the interest of justice.⁵⁰

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The determination that a reasonable basis exists prompts an investigation and OTP communication with the Pretrial Chambers. Evidence from the investigation assists in the formation of charging decisions and decisions to issue arrest warrants.⁵¹ In practice, the OTP has received broad discretion regarding investigations and crafting criminal charges.

Article 5 limits jurisdiction to the “most serious crimes of concern to the international community.” The 2009–2012 OTP investigation and charging strategy targeted “only the upper echelon perpetrators . . . specifically those ordering, financing, or organizing crimes.”⁵² Fatou Bensouda, who replaced Moreno-Ocampo as Chief Prosecutor in 2012, has not drastically altered the OTP’s small investigation team and targeted-charging strategy.⁵³ Arguably, charges

should conceptualize the totality of the atrocities by selecting a representative sample of crimes depicting the gravest aspects of the perpetrator's actions.⁵⁴ The charges should spring from a comprehensive investigation, so the prosecutor can explain the entirety of the violations through targeted-charging decisions. The Court has been unable to effectively implement this theory because of budgetary, time, investigatory, and sovereignty constraints.

Limited resources, compressed timeline expectations, and the OTP strategy often limit the Court's ability to adequately capture incidents through charging.⁵⁵ Rather than investigating all aspects of a situation, the prosecutor tends to focus investigations on individuals and quickly

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provable crimes. For example, the scope of OTP charges against several individuals involved in situations in the Democratic Republic of Congo appeared limited.⁵⁶ Charges against Thomas Lubanga Dyilo addressed only child soldier crimes and those against Matheiu Ngudolo centered on an isolated attack on a single village.⁵⁷ Limiting the nature of investigations and scope of charging decisions may impede the ICC's ability to deter future criminal behavior.⁵⁸ In order to achieve deterrence, the Court must create a thorough historical record of criminal behavior matched with justified convictions and sentencing decisions.

ICC Effectiveness and Limitations

In over ten years of practice, the ICC has not uniformly convinced the international community of its single-handed prevention

capability. More realistically, the ICC provides an ancillary tool necessary to eliminate impunity, stir debate, and aid in the prevention of mass atrocities.⁵⁹ As one scholar explains:

The prevention of serious international crimes is unquestionably one of the Court's ancillary objectives. However, this goal should not be confused with the ideas of specific and general deterrence . . . [f]or the Court, the notion of deterrence as a component of the prevention of international crimes would be a misguided.⁶⁰

As military leaders consider the value of the ICC using its investigation component or aligning with member states, they should consider the ICC's usefulness as well as its obstacles.⁶¹ This next section discusses some of the legitimacy concerns surrounding the Court and then addresses the Court's potential to promote genocide and mass atrocities prevention.

Legitimacy Concerns

The overall legitimacy of the ICC raises the first international concern. In practice, it has demonstrated a responsive nature much like the *ad hoc* tribunals.⁶² The ICC has completed three trials all related to a situation in the Democratic Republic of Congo.⁶³ On March 14, 2012, the Court convicted Thomas Lubanga Dyilo of "conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities."⁶⁴ After a three-year trial, Lubanga received a fourteen-year sentence. The second completed case closed in December 2012 and acquitted Mathieu Ngudjolo Chui. The third case, closed on March 7, 2014, convicted Germain Katanga for crimes committed in 2003.⁶⁵ Katanga received a twelve-year sentence for murder, sexual slavery, and using children under fifteen to participate in hostilities.⁶⁶

The OTP currently has 24 open cases from 11 investigated situations.⁶⁷ The open cases address incidents in Uganda, the Democratic

Republic of Congo, Darfur, the Central African Republic, the Republic of Kenya, Libya, the Ivory Coast, Mali, Georgia, and Burundi. Of the 40 indicted perpetrators, the Court has control over 7. The OTP has labeled 11 defendants as “at large” or “not in ICC custody.” Additionally, the Court has dismissed and withdrawn cases against several perpetrators.⁶⁸ Great debate centers on the ICC’s legitimacy because it does not give the international community a quick responding, prevention tool.

To reach these results, the Court expended an annual budget of approximately \$36.98 million.⁶⁹ This cost has yielded an acquittal and two relatively low sentences. Moreover, the crimes charged depict a relatively small scope of the actual atrocity committed in each case.⁷⁰ Arguably, these high cost results will not deter future crime, fail to create a criminal history, and do not educate on the legal significance of committing crimes against humanity.

The OTP’s focus on heads of state has also drawn legitimacy criticism.⁷¹ “Wars are started only on the theory and in the confidence that they can be won.”⁷² “Personal punishment, to be suffered only in the event that the war is lost, will probably not be a sufficient deterrent to prevent a war where the warmakers feel the chances of defeat are negligible.”⁷³ Although “masterminds of crimes against humanity tend to be rebel leaders, government officials, or military commanders,” criminal focus on limited, high-ranking state leaders has not demonstrated deterrence.⁷⁴ For example, world events after sentencing of state officials in the ICTY and ICTR suggest minimal influence on officials in Sierra Leon, Chechnya, East Timor, or Darfur.⁷⁵

Many suggest that deterrence theory should not apply on the international level to irrational rulers.⁷⁶ The state leader will not rationally calculate risk, nor fear arrest, trial, or punishment. Even if the ruler does make a calculation, the presence of the ICC may not

achieve the desired deterrence.⁷⁷ For example, fear of the ICC’s authority or apprehension may cause the leader to continue bad acts to prolong impunity. The Court’s involvement may give the leader incentive to continue crimes against humanity. The ICC could also present a jurisdictional choice that may provide safe haven and limited punishment. The perpetrator might find protection from adversaries under the Court’s authority. Moreover, the Rome Statute limits sentencing to “30 years imprisonment or a sentence of life imprisonment in conformity with article 77.”⁷⁸ Comfortable confines at The Hague prison are a better option than a possible death sentence or the continued fear of being targeted. These factors may give a perpetrator incentive to continue atrocities until it is worthwhile to subject himself to the Court’s authority.

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To demonstrate the potential negative influence of the Court, James Fearon cites conflicts in Kenya and Sudan. In Kenya, Fearon advocates that the government had capacity to prosecute, but that referral of the situation to the ICC prior to Kenya’s 2007–2008 elections delayed arrest and allowed criminal officials to participate in the elections. In Sudan, the ICC fosters a “peace versus justice debate.”⁷⁹ The international community must struggle with a particular outcome: criminal justice or reducing violence through diplomacy with a bad ruler.⁸⁰ Omar al-Bashir, a bad man, may have the political influence to calm his nation.⁸¹ The international community’s dilemma handling Sudan and Omar al-Bashir provides an example of the friction between conflict termination and criminal justice.

The inability to enforce decisions through apprehension compounds the ICC's ability to sway irrational rulers. The ability to quickly investigate and issue incapacitating warrants against perpetrators could greatly assist in the prevention of genocide and mass atrocities. Unfortunately, the ICC does not have a law enforcement mechanism without the cooperation of the Assembly of State Parties.⁸² Under the Rome Statute, state parties must apprehend warranted perpetrators within their territories and turn them over to Court authority.⁸³ In practice, however, this agreement often fails. For example, Joseph Koney, the Commander and President of the Lord's Resistance Army, has been a fugitive since 2005.⁸⁴ Similarly, al-Bashir has moved throughout Africa under warrant since 2009, and Muammar Gaddafi avoided apprehension until his death.⁸⁵

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Despite the current apprehension challenges, cooperation of the ASP and enforcement support from the UN Security Council could drastically improve the success of the ICC's ability to incapacitate perpetrators and bring them to justice. In turn, the court may find improved legitimacy and deterrence power.

Harness a Force to Strengthen Prevention and the International Criminal Court

Although the operation of the ICC is ripe with problems, it provides a stable system and process the international community needs as part of its genocide prevention effort. The ICC prevention component is not a stand-alone solution, however. To prevent mass atrocities and genocide, the international community

must come together to educate, implement, and enforce preventative measures.

The international community's future focus should consider a force structure able to manage periods of transition, reformation, and peace, post-conflict. A tailorable organization that includes an array of experienced partners managing interagency operations to "win the peace" would assist the ICC. What Thomas Barnett, a Pentagon strategic planner, describes as the "sysadmin force" could strengthen several ICC foundations.⁸⁶ It could advance the deterrence value of ICC-driven investigations, create legitimacy in the Court's warrant/apprehension function, and increase complementarity value through quasi-criminal jurisdiction.

Thomas Barnett in his TED Talk video, "Let's Rethink America's Military Strategy," advocates for a shift in U.S. military strategic-force management structure. He bifurcates conflict management into a "front half" and a "back half." In the front half, what military members generally think of as armed conflict, he argues for a small aggressive "leviathan" force. He describes this force as "your father's military"—young, trigger happy, and with a chip on its shoulder. The leviathan force is associated with the "M" in the DIME (diplomacy, infrastructure, military, and economics) construct. In Barnett's model, the back half sysadmin force structure targets transitional and peace operations, post armed conflict. It should include a wide array of partners available, interagency operations, and older experienced personnel.⁸⁷

Barnett connects his force structure recommendation to the ICC in terms of timing and jurisdiction. On his timeline, post conflict or organizations favor "great power," "international reconstruction," and justice through the ICC. Barnett argues for more expansive rules of engagement under the leviathan force and opposes ICC's jurisdictional control. Post

conflict, however, he explains that the ICC must have authority over the sysadmin force to bring legitimacy to the force's rebuilding and peace missions.⁸⁸

The international community should adopt Barnett's force structure to prevent genocide. Modifying his structure with investigatory teams, law enforcement/security assets, and judicial reform experts will assist with genocide and mass atrocity investigations, apprehension of state officials under warrant, and monitoring of the ICC's complementarity principle. The altered force structure creates a means of viable enforcement. The sysadmin force structure recognizes the importance of combining organizations under one leadership configuration to unify action. This approach is particularly important while seeking the deterrence of genocide and mass atrocity.

A 2015 study conducted by Geoff Dancy and Florencia Montal finds statistical proof of the deterrence value of ICC investigations.⁸⁹ Their article recognizes the ICC's growing pains, miscalculations, resource shortfalls, and legitimacy concerns, but finds potential in the consequences of unintended positive complementarity.⁹⁰ The article certifies the theory that states want to act properly when the world is watching.⁹¹ In fact, states want to act first to avoid the international community's involvement in their sovereign affairs.⁹² The mere initiation of an ICC preliminary investigation creates positive complementarity. States begin to implement systems to investigate and prosecute mass atrocity crimes at the national and local levels.⁹³

Although state intentions are not always aligned morally with humanitarian efforts, the article clearly demonstrates that international investigations impact the domestic treatment of genocide and mass atrocity crimes.⁹⁴ An international sysadmin-type force structure and coalition could leverage the positive complementarity aspect of the ICC. A force

structure including strong investigatory assets, resources, judicial reform experts, and rule of law teams could assist under-developed states improve domestic justice to reach a higher deterrence rate. The ICC's OTP investigatory teams could play a role in this force structure as well. Cooperative involvement would expand the ICC's investigatory resources, scope, and legitimacy. Most likely, the force structure and partnership would also improve trial results and the Court's political partnership with the ASP.

If the international community intends to rely on justice as a component of prevention, repeated success capturing and prosecuting criminal heads of state could create deterrence.

Coalition formation of a sysadmin force would likely include security elements. Specialized law enforcement organizations or special operations assets could help limit the impunity of criminal leaders by strengthening the Court's apprehension function. The coalition force could "eliminate the criminal's capacity to commit crimes, by removing that individual from society."⁹⁵ Certainly, apprehending a single individual does not solve the complexity problem of genocidal actions. Acts of mass atrocity rely on the work of many. Moreover, organizations that do not rely on a bureaucratic structure of power may quickly replace leadership or simply shift capability to a strong section of the organization. But, the removal of key perpetrators may be a necessary start. Genocide is often associated with "strong, centralized authority and bureaucratic organization."⁹⁶ If the international community intends to rely on justice as a component of prevention, repeated success capturing and prosecuting criminal heads of state could create deterrence. A sysadmin force structure could cultivate cooperation among coalition partners,

the ASP, and the ICC to improve enforcement efforts by creating a “condition of habitual lawfulness.”⁹⁷

The Court could even leverage U.S. assets in this effort. For example, the changes to the State Department’s award program demonstrate government support to enforcing ICC arrest warrants.⁹⁸ Likewise, the U.S. renewed its commitment to bring LRA leadership to justice.⁹⁹ Even without U.S. ratification of the Rome Statute, leveraging cooperation and assets could help bring credibility to the Court and increase its deterrence capability. Creating a standing UN-based, sysadmin force structure could persuade more consistent involvement from the U.S. and other influential states.

To create deterrence, all people must understand the severity of genocide and its punitive consequences.

The ability to reach beyond state leadership is also critical to the ICC’s ability to positively influence prevention. To create deterrence, all people must understand the severity of genocide and its punitive consequences. After World War II, the Nuremberg trials selected a cross section of Nazi leadership to demonstrate the array of agencies criminally responsible for the Holocaust. Still, the Holocaust Memorial Museum addresses the “quest for justice” with some hesitation:

[C]ommandants, leaders of mobile killing squads, and physicians who carried out sadistic medical experiments on living camp inmates—were sentenced with relative severity. But other groups, including industrialist and high-ranking bureaucrats, received only prison sentence, or no penalty at all.

The ICC attempts to reach individual bystanders

though the concept of complementarity jurisdiction.¹⁰⁰ As the ICC’s first prosecutor, Luis Moreno Ocampo, proclaimed during his first term, “the absence of trials before this Court, because of the regular functioning of national institutions, would be a major success.”¹⁰¹

The Court should stretch its complementarity role to include “quasi-criminal jurisdiction” similar to the role played by the Inter-American Court of Human Rights.¹⁰² Although the Inter-American Court is not a criminal court, it influences deterrence through supervision, investigatory advice, and suggesting case-related, analytical connections.¹⁰³ This model uses a supervisory court structure to sway investigation scope and future prosecutions. If states do not comply, the supervisory court may object and attempt to influence action. Much like the ICC, however, the Inter-American Court must ultimately defer to domestic operations. It operates mainly on trust and cooperation, which presents challenges such as unity of effort and purpose across international, state, local, and individual levels.

The ICC could create quasi-criminal jurisdiction by operating under an expanded reading of the Rome Statute’s “unwilling or unable to genially carry out the investigation or prosecution” requirement.¹⁰⁴ The ICC could use a broad interpretation of “unwilling or unable” to encourage investigatory strategy, judicial reform, and prosecution. This could be as simple as requiring the adoption of the Rome Statute and criminal elements under state law or as detailed as monitoring charging decisions and trial strategy. Again, the sysadmin force could provide the capability to foster local justice, develop sentencing consistency, and support reform. The UN in cooperation with the ICC could package a force, implement its expertise locally, and aid rule of law systems.

Although not perfect, the sysadmin force creates a means for the international community to respond globally in pursuit of genocide and

mass atrocities prevention. Its capability and implementation require high levels of cooperation from the international community; however, the concept could provide an outside check on the ICC and persuade involvement by some of the international community's influential powers that have not ratified the Rome Statute.¹⁰⁵ More importantly, it provides a resource to increase domestic-level understanding and the judicial processing of genocide and mass atrocities.

Conclusion

Acting alone, the ICC will not grant Greenbaum's wish. People will remain bystanders unless they understand the consequences of mass atrocity crimes on a personal level. The OTP's inability to thoroughly investigate situations, apprehend criminal leaders, and persuade international judges to issue severe sentences limits the ICC's deterrence capability. The prevention discussion must include the Court, improving domestic courts, and array of other actors. On an international level, genocide prevention must start with unified cooperation from the members of the UN and the ASP. The international community must dedicate the appropriate resources to expand the scope of investigations, apprehend perpetrators, aid national rule of law systems, and continue education on the prevention of genocide and mass atrocities. **IAJ**

NOTES

- 1 Samuel Totten, *The Prevention and Intervention of Genocide*, Transaction Publishers, Piscataway, NJ, 2008, p. 258 (quoting a 2005 statement from Juan E. Mendez).
- 2 Henry Greenbaum, "How Does Genocide Affect the Individual?" lecture, United States Holocaust Memorial Museum, Washington, April 10, 2015.
- 3 Ibid.
- 4 For example, international tribunal investigations into situations into Sudan (Darfur), Rwanda, Libya, and Uganda. "All Situations," International Criminal Court, <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx>, accessed on April 28, 2015.
- 5 Dr. Tomer Broude, "Prevention Question," International Criminal Court Forum, <<http://iccforum.com/prevention>>, accessed on April 28, 2015.
- 6 Kenneth Anderson, "Prevention Question," International Criminal Court Forum, <<http://iccforum.com/prevention>>, accessed on April 28, 2015.
- 7 Ibid.
- 8 Henry M. Jackson School of International Studies, *The International Criminal Court: Confronting Challenges on the Path to Justice*, Task Force report, 2013, University of Washington, p. 69, <<https://digital.lib.washington.edu/researchworks/>>, accessed on April 27, 2015.
- 9 Ibid.
- 10 See generally, Henry Jackson School of International Studies Task Force 2013. See also, James Fearon, "Deterrence and the ICC," lecture, University of California Los Angeles, Los Angeles, CA, January 22, 2013, <<http://iccforum.com/forum/deterrence-lecture>>, accessed on April 27, 2015.
- 11 Likewise, U.S. military commanders rely on prevention and deterrence to instill good order and

discipline within their formations. Soldiers understand categories of misconduct that result in reprimand, non-judicial punishment, or the more serious scrutiny of the court-martial process. Manual for Courts-Martial, Article 15, Uniform Code of Military Justice, 2012.

12 Manual for Courts-Martial, R.C.M. 1001.

13 James Alexander, “The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact,” *Villanova Law Review*, Vol. 54, 2009, p. 2.

14 *Ibid.*, p. 11.

15 Fearon.

16 *Ibid.*

17 *Ibid.*

18 Alexander, p. 9. This domestic model, prevention and its deterrence component, formulates a key foundation for international criminal justice.

19 *Ibid.* In 2006, the U.S. National Security Strategy (NSS) explicitly stated that, “genocide must not be tolerated.” “It is a moral imperative that states take action to prevent and punish genocide.” The 2010 U.S. NSS again recognized the responsibility to prevent genocide and mass atrocities. “The United States is committed to working with our allies, and to strengthening our own internal capabilities, in order to ensure that the United States and the international community are proactively engaged in a strategic effort to prevent mass atrocities and genocide.” On August 4, 2011, President Barack Obama reaffirmed the policy of prevention by directing Presidential Study Directive-10. “Fact Sheet: President Obama Directs New Steps to Prevent Mass Atrocities and Impose Consequences on Serious Human Rights Violators,” The White House, President Barack Obama, August 4, 2011, <<https://www.whitehouse.gov/the-press-office/2011/08/04/fact-sheet-president-obama-directs-new-steps-prevent-mass-atrocities-and>>, accessed on April 27, 2015. In his directive, President Obama recognized preventing genocide as a “core national security interest” and a “core moral responsibility.”

20 Geneva Convention of 1948, Convention on the Prevention and Punishment of Genocide.

21 Alexander, p. 10.

22 Edward Luck, “The United Nations and the Responsibility to Protect,” *Policy Analysis Brief*, The Stanley Foundation, August 2008.

23 Geneva Convention of 1948.

24 See generally, Dan Bar-On, “The Bystander in Relation to the Victim and the Perpetrator: Today and During the Holocaust,” *Social Justice Research*, Vol. 14, No. 2, June 2001.

25 Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 90, July 17, 1998, entered into force July 1, 2002, (hereinafter Rome Statute), preamble.

26 Philipp Kastner, “The ICC in Darfur-Savior or Spoiler?” *ILSA Journal of International and Comparative Law*, Vol. 14, Fall 2007, pp. 145–153.

27 *Ibid.*, pp. 152–153.

28 *Ibid.*, 153–155.

29 *Ibid.*, p. 154.

30 Michael Newton, “The International Criminal Court,” lecture, Genocide and Mass Atrocities Studies Seminar, Command and General Staff College, Fort Leavenworth, KS, April 21, 2015. Professor Newton described five levels of politics within the ICC: (1) within the structure of the Rome Statute, (2) politics behind the prosecutors use of discretion, (3) the operation of the Assembly of States Parties, (4) displayed in the tensions between court chambers, and (5) the politics of personality within individual actors.

31 “Prevention Question,” International Criminal Court Forum, <<http://iccforum.com/prevention>>, accessed on April 28, 2015.

32 See generally, Michael Newton, “Charging War Crimes: Policy and Prognosis from a Military Perspective,” *Vanderbilt University Law School Public Law and Legal Theory*, Working Paper Number 14-6.

33 Rome Statute, Article 34.

34 Henry Jackson School of International Studies Task Force report, 2013, pp. 13–18.

35 Ibid.

36 Ibid.

37 Rome Statute, Article 5; see also, Roman Statute Elements of Crimes.

38 Rome Statute, Article 12.

39 Rome Statute, Article 12; see also, Newton, “Charging War Crimes: Policy and Prognosis from a Military Perspective,” (arguing how the ICC should enforce Status of Forces Agreements if the Court would otherwise have jurisdiction over an individual but for the agreement).

40 Henry Jackson School of International Studies Task Force report, 2013, p. 7.

41 Ibid., p. 4.

42 Ibid.

43 See generally, Henry Jackson School of International Studies Task Force report, 2013, “Internal Factors Impacting Situation Selection,” (using “positive complementarity” to describe the ICC’s ability to positively influence the national court system into functioning and prosecuting more crimes of genocide and mass atrocity at the national level).

44 Ibid.

45 Ibid.; Rome Statute, Article 17.

46 Henry Jackson School of International Studies Task Force report, 2013.

47 Ibid., p. 20.

48 Ibid.

49 Ibid.

50 Ibid., p. 14.

51 Rome Statute, Articles 53 and 58.

- 52 Henry Jackson School of International Studies Task Force report 2013, p. 62.
- 53 Ibid.
- 54 Ibid., p. 70.
- 55 Ibid.
- 56 Ibid.
- 57 Ibid., pp. 74–75.
- 58 Ibid., p. 74.
- 59 Broude. “Crime prevention should rather be understood as a much broader, systemic and long-term concept.” Critics of the ICC must consider its value in work in conjunction with actions taken by states, intergovernmental organizations, and civil society and evaluate whether, over time, those efforts will lead to a global reduction in crime.
- 60 Ibid.
- 61 Newton. During his lecture, Newton suggested that responding to crimes against humanity should become a core military competency.
- 62 Ibid. Newton discussing how limited jurisdiction and post conflict action undercut deterrence.
- 63 International Criminal Court, “All Situations,” <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx>, accessed on April 28, 2015.
- 64 Ibid.
- 65 Ibid. Congolese authorities surrendered Katanga to the ICC in October 2007.
- 66 Ibid.
- 67 Ibid.
- 68 Ibid. The ICC has publicly indicted 40 people. The ICC has issued arrest warrants for 32 individuals and summonses to 9 others. Proceedings against 48 are ongoing: 9 are at large as fugitives, 2 are under arrest but not in the Court’s custody, 16 are in the pre-trial phase, and another 11 are at trial. Proceedings against 14 have been completed: 9 have been convicted, 1 has been acquitted, 6 have not been confirmed, 3 have been terminated, and 2 have died before trial. See also, Henry Jackson School of International Studies Task Force report 2013, p. 64.
- 69 Henry Jackson School of International Studies Task Force report, 2013, p. 64. The budget increased by 1.04 percent in 2012 and has since dealt with a zero-growth budget.
- 70 Compared to the spending and conviction results of the ad hoc tribunals, the ICC spends far more to process a small amount of atrocity crimes. Alexander, pp. 38–39 (assigning a cost per conviction at the ICTY of approximately \$11.1 million and \$13.9 million at the ICTR).
- 71 Henry Jackson School of International Studies Task Force report, 2013, p. 29.
- 72 International Criminal Court, “All Situations.”
- 73 Totten.

74 Alexander, p. 23; Kastner, pp. 150–152.

75 Kastner, pp. 151–152.

76 Fearon.

77 Ibid.

78 Rome Statute, Article 76

79 Alexander, p. 30; Kastner, pp. 145–163.

80 Fearon.

81 Ibid.

82 Rome Statute, Article 59.

83 Ibid.

84 International Criminal Court, “All Situations.”

85 Ibid.

86 Thomas Barnett, “Let’s Rethink America’s Military Strategy,” lecture, TED Talks, February 2005, http://www.ted.com/talks/thomas_barnett_draws_a_new_map_for_peace?language=en, accessed on April 27, 2015.

87 Ibid. The partners available should include cooperation of organizations like the Department of State, Department of Justice, U.S. Agency for International Development, emergency relief organizations, nongovernmental organizations, and private organizations. It could be akin to a whole government approach under a single leadership chain.

88 Ibid.

89 Geoff Dancy and Florencia Montal, “Unintended Positive Complementarity: Why International Court Investigations Increase Domestic Human Rights Prosecutions,” <<http://tulane.edu/liberal-arts/political-science/upload/Dancy-Montal-IO-2014.pdf>>, accessed on April 27, 2015.

90 Ibid.

91 Ibid.

92 Ibid.

93 Ibid.

94 Ibid., pp. 34–35. States may feign willingness to cooperate with the ICC. For example, Uganda attempts to persuade the ICC that its court system is strong enough to handle mass atrocity crimes internally with strong evidence suggesting otherwise. Kenya, another example, demands reform, but lacks the capacity to create a solution.

95 Alexander, p. 23.

96 Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide Analyses and Case Studies*, Yale University Press, New Haven and London, 1990.

97 Alexander, p. 26 (quoting Akhavan).

98 Henry Jackson School of International Studies Task Force report, 2013, p. 174; International Criminal Court, “All Situations.”

99 Henry Jackson School of International Studies Task Force report, 2013, p. 174.

100 Rome Statute, Article 1.

101 Alexandra Huneus, “International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts,” *American Journal of International Law* Vol. 107, January 2013, p. 21.

102 *Ibid.*, 9–13.

103 *Ibid.*, p.11.

104 Rome statute, Article 17.

105 Newton, “The International Criminal Court,” lecture (explaining the basis of the United States was unwillingness to ratify the Rome Statute). The United States defines checks and balances much differently than most of the international community. It requires an outside organization such as the United Nations Security Council to serve as a check instead of relying on statutory checks within an organization.



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