

The Relationship between the International Criminal Court and the Prevention of Mass Atrocities

Sheri P. Rosenberg

GPN ORIGINAL

Introduction

The prevention of exceptionally grave international crimes is undoubtedly one of the International Criminal Court's (ICC) objectives. Indeed, in public statements from inside the Court prevention is a recurring theme. The prosecutor and other senior court officials have claimed, on several occasions, that the Court has already had a preventive impact on situations ranging from Colombia to Sri Lanka, and on actors in countries in between. Outside observers have also identified situations where they believe the Court, or at least awareness of the Court, had a preventive effect. Of course the claims are anecdotal, and there is little empirical evidence to support them. In fact, research on the preventive impact of international criminal justice mechanisms in general is limited. Moreover, as some suggest, the deterrent effect of international criminal justice is empirically indeterminate; it cannot be proved or disproved in a methodologically sound way. And it may be just that indeterminacy that causes the court to point to the attainment of prevention in certain circumstances, in the absence of tangible convictions and a significant numbers of indictees at large. In this way, a turn to prevention may serve a pragmatic function for the Court and for the broader atrocity prevention community.

Prevention in the ICC context is most often discussed in terms of deterrence, immediate deterrence and long-term deterrence. Immediate deterrence refers to when the threat of criminal punishment will deter a specific individual or group within society from committing a future criminal act. Long-term deterrence rests on the notion that the threat of criminal punishment, generally, will prevent others from committing crimes, knowing that criminal punishment awaits them. In the international criminal law context, immediate deterrence is deployed through targeted legal interventions. Long-term deterrence is sub-divided into categories of complementarity (passive or proactive) and norm proliferation, i.e., the creation of a normative environment where extraordinary crimes, as described in the Rome Statute are no longer tolerated.

Part I briefly sketches the development of global atrocity prevention mechanisms and institutions, which have developed alongside international criminal justice over the past decade, with specific attention given to the development of the Responsibility to Protect Principle.

Part II deconstructs the prevention arguments for the ICC.

The final section makes specific suggestions for further analyzing the role of the ICC among the actors and institutions that make up the prevention community.

The paper concludes, with the proposition that since Nuremberg there has been an ex-post punishment approach toward mass atrocity, instead of an ex ante effective policy of prevention. And while relevant actors have made some steps in the direction of direct mass atrocity prevention, energized by the Responsibility to Protect Principle, our continued focus on trials has the potential to circumscribe and short-circuit our understanding of the particular prevention tools that should be utilized in a specific situation.

The central goal of prevention remains to identify situations where there are real risks of genocide and to intervene at an early stage before they devolve in mass atrocities. While ICC justice may ultimately contribute to the development of a normative environment where genocide is no longer tolerated, mass atrocities continue – unabated, and the prevention agenda must expand to meet this reality. Ultimately, when we focus on the goal of preventing mass atrocity, there are generally better mechanisms for the international community, including the international legal community to participate in these processes than the ICC.

I. The Evolution of the Prevention Agenda

Across the globe policy makers, researchers and civil society organizations have increasingly turned their attention to the prevention of genocide and other forms of mass atrocity. The increased focus on this longstanding global problem has intensified - rhetorically and substantively - since the mass killings and/or genocide committed in Rwanda, Srebrenica and Kosovo in the mid-1990s. The prevention field has developed around three interrelated international normative, legal, and political developments. The first is the development of UN, regional and state prevention mechanisms and institutions. The second is the evolution of the Responsibility to Protect Principle (R 2 P). The third area of development is international criminal justice, and in particular the creation of the International Criminal Court (ICC). As the field develops around prevention, terminology becomes increasingly more important. One of the central challenges facing the field is agreement on underlying assumptions, which includes at a most basic level, a common lexicon of terms and how and when they are applied.

In its original orientation, prevention efforts focused primarily on conflict prevention, which is related to, but not synonymous with, atrocity prevention. The emphasis was on saving people

from the scourges of war by arresting the development of tensions between groups in order to prevent outright violent conflict. On the policy front this effort has been marked by the slow but steady development of conflict prevention mechanisms and institutions within the United Nations, regional organizations and State governments. There has also been a proliferation of scholarly research by political scientists and international relations scholars on the subject of conflict prevention.

Simultaneously, a core group of legal scholars and NGOs fought to realize the creation of the International Criminal Court. The progenitors of international criminal justice firmly believe that mass atrocities are facilitated by a “culture of impunity.” Moreover, they argue for the salutary and preventive effects of deterrence and norm proliferation that the development of international justice will bring. The work of the ICC is, therefore, allegedly as important for the perceived justice it brings to its victims as it is for the expressive value it may bring to states living under tyranny and oppression. Incrementally, efforts of these ‘norm entrepreneurs’ paid off. In response to the atrocities in Yugoslavia and Rwanda the Security-Counsel mandated the establishment of the ad-hoc tribunals for the former Yugoslavia and Rwanda. The UN also assisted in establishing the hybrid tribunals in East Timor and Sierra Leone. Finally, after over a decade of work the ICC was created by the Rome Statute in 2002. This will be discussed further in the next section.

More recently, the prevention agenda has expanded beyond conflict prevention to include, among other things, genocide prevention, atrocity prevention, civilian protection, humanitarian assistance, transitional justice and the ‘Responsibility to Protect.’ The developing norm of a right and, indeed, a duty to intervene to protect populations from gross violations of human rights was given voice in 2001 by the International Commission on Intervention and State Sovereignty in its report entitled *The Responsibility to Protect*.

Three important normative shifts are found in the document. First, it recognized a long-developing shift in the human rights v. states sovereignty discourse by propounding that sovereignty entailed responsibility. Second, it moved the debate away from a discourse of whether there is a state has right to intervene into affairs of another state to the notion that there is a responsibility to protect populations threatened by gross human rights violations. In this way, the debate moved from a state-centric to an individual-centric view of protection.

¹Third, R 2 P moves from a rear mirror view of reacting to mass atrocities and genocide to a forward looking view, which aims to prevent the atrocities from occurring in the first place. The Secretary General has oft stated that prevention is the most important component of R 2 P.

This principle was given its most authoritative statement at the UN General Assembly World Summit in 2005 where states adopted – by consensus – paragraphs 138 and 139 of the Summit Outcome Document. Therein heads of states unanimously affirmed that each individual state

has the responsibility to protect its population from genocide, war crimes, crimes against humanity, and ethnic cleansing, including the prevention of such crimes. Member states further agreed that they should assist other states to exercise their prevention and protection responsibilities, and should a state manifestly fail to protect its populations from these atrocity crimes, then the 'international community' collectively has a responsibility to protect using all peaceful means, and military intervention only as a last resort.

In January 2009, UN Secretary General Ban Ki-moon set forth a strategy for the implementation of R 2 P. The strategy is three pillared. Pillar one addresses the protection responsibilities of the state, pillar two addresses the international assistance and capacity building, and pillar three addresses timely and decisive responses when national authorities are manifestly failing to protect their populations. Most recently, in July of 2012, the SG put out a report on pillar three responses in advance of the upcoming (September 5, 2012) debate on this subject before the United Nations General Assembly. Since 2005, the UN Security Council has endorsed R 2 P in several resolutions, including in the preambles to UN Security Council Resolutions 1971 and 1973, concerning the Libya situation in 2011 and in the resolution concerning Cote d'Ivoire. In particular the use of R 2 P language in the context of the highly contested "no-fly zone" in Libya has spawned entirely new R 2 P debates. These debates, however, are outside the scope of this paper. In spite of its relatively recent appearance on the international relations scene, R 2 P has gained widespread acceptance.² It has become the operating language utilized by the UN organization, states and NGOs when confronting large scale humanitarian crises.

II. Deconstructing the Prevention Arguments for the ICC

Alongside the development of UN, state and regional prevention mechanisms and the R 2 P principle, the last two decades have seen a proliferation of international criminal tribunals empowered to punish perpetrators for the international crimes of genocide, crimes against humanity, and war crimes. Since the establishment of the ad hoc tribunals in the 1990s and the permanent International Criminal Tribunal (ICC) with broad jurisdiction over atrocities occurring in the territory of any state party to the Rome Statute, international criminal tribunals have found a prominent place in the international relations prevention agenda.

A central justification for prosecuting individuals who commit these crimes is that such prosecutions will deter future atrocities.³ As one of the leading scholars of international criminal law explains, "[t]he pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts."⁴ In fact, the language of deterrence was ubiquitous at the Rome conference in the summer of 1998, where national delegates negotiated the terms of the new International Criminal Court. Delegates and advocacy groups attending the conference insisted that an

independent and effective international court would deter serious violations.⁵ And support for a permanent as opposed to the ad hoc tribunals of the 1990s rests on the argument that a permanent International Criminal Court will be more likely to deter future atrocities.⁶ The preamble to the Rome Statute provides that signatories “are determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”⁷

Elaboration of the relationship between ICC justice and prevention takes two forms. First, some argue that the ICC will prevent international crimes through immediate deterrence -where the threat of criminal punishment will deter a specific individual or a group of individuals from committing a future criminal act. Second, some have argued that ICC justice will prevent atrocities in the long term through more general deterrence. General deterrence provides that the threat of criminal punishment, generally, will prevent others from committing crimes, knowing that criminal punishment awaits them. General deterrence is sub-divided into categories of complementarity (passive or proactive) and norm proliferation, i.e., the creation of a normative environment where extraordinary crimes, as described in the Rome Statute are no longer tolerated.

All forms of the deterrence rationale rely on what Julian Ku and Jide Nzelibe call the “culture of impunity” thesis. This is the assumption that international criminal justice, and ICC justice, in particular, can deter future atrocities by ending the culture that allows perpetrators to escape sanctions for their crimes.⁸ Realizing that an ICC prosecution is possible, perpetrators will be more likely to refrain from committing the atrocities.⁹ Let us take each one in turn.

Immediate Deterrence

Immediate deterrence refers to attempts by the Court to deter specific individuals or groups within society from committing international crimes. The Court engages in this activity in two ways. First, it does so by issuing indictments and arrest warrants. Initially, the Court may have expected or hoped that the arrest warrant would be accompanied by detention of the individual. However, at this point, where more indictees than fewer remain at large, the notion is that the likelihood of prosecution will likely deter them from further criminal activity regardless of detention. Presently, there are over thirteen indictments, the majority of which remain unenforced. Most well-known, are the outstanding arrest warrants for Sudanese president Omar-al-Bashir, and Lords Resistance Army Commander, Joseph Kony. A theory for how deterrence prevents crime rests on two key elements: the certainty and severity of punishment.¹⁰ According to Ku and Nzelibe, taking into account certainty of prosecution and severity of punishment, as well as a particular individual’s preference for risk, international criminal justice is unlikely to deter its most frequent targets, and in fact may exacerbate the situation in some instances.¹¹

Immediate deterrence may also take a broader form. During the preliminary investigation phase, the Office of the Prosecutor (OTP) might seek to prevent a particular set of atrocities through issuing public statements and warnings directed at public or ethnic leaders. For example, when violence broke out in Cote d'Ivoire after a disputed election, the prosecutor publicly warned one individual that his incitements to violence might be prosecuted.¹² In situations where conflict has broken out abruptly, the OTP signaled to combatants that it is scrutinizing events in an attempt to alter the course of hostilities and prevent atrocities. When fighting erupted between Georgian and Russian forces in August 2008, the Court released a statement indicating that it was analyzing alleged crimes committed during combat operations.¹³ Finally, in its strategy document the OTP incorporated the goal of prevention through public monitoring. It states that the office will "make preventive statements noting that crimes possibly falling within the jurisdiction of the Court are being committed [and] make public the commencement of a preliminary examination at the earliest possible stage through press releases and public statements."¹⁴

Similarly, the opening of investigations and issuance of arrest warrants in Darfur and Libya in the midst of ongoing conflict also held the ICC not solely as an ex post facto mechanism, but also an instrument to constrain ongoing violence and atrocity crimes. To the extent that immediate deterrence arguments generally take the form of rational actor calculations, specific deterrence in the international mass atrocity prosecution context has its share of skeptics.¹⁵

Long-term Deterrence

Complementarity

To balance state prerogatives to prosecute with the ICCs effectiveness, the states parties to the Rome Statute created a unique jurisdictional scheme, known as the system of complementarity. Under the complementarity system, the ICC may not exercise jurisdiction over a case if it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."¹⁶ Thus, a state may shield its citizens from ICC prosecution by a sufficient showing of investigation and/or prosecution. Complementarity, has been interpreted - and pursued - more robustly than simply as a negative restraint, where the ICC relinquishes jurisdiction to a national court. Complementarity has been interpreted by commentators and the ICC prosecutor as a positive force for empowering national courts.¹⁷ According to some, complementarity might encourage states to "aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community."¹⁸ Legal scholar William Burke White has gone further and proposed a system of "proactive complementarity" in which ICC would "encourage, and perhaps even assist" with prosecutions in national courts.¹⁹ Proactive

complementarity rests on the view that complementarity should encourage shared responsibilities and relationships between national courts and the ICC; with a view toward enhancing the Court's general deterrent effect through building the deterrent potential of national courts. Burke-White's thesis is one among several recent scholarly theses, which point toward shifting the burden of accountability back to national governments.

Finally, Luis Moreno-Ocampo, the former ICC prosecutor, has recognized the power of leveraging complementarity. He has stated on more than one occasion that an absence of trials in the ICC, if a consequence of the regular functioning of national courts, would signal a major success for the ICC.²⁰ To date, there very little empirical evidence to support whether the ICC has in fact encouraged genuine national prosecutions. There is some evidence to suggest that Sudan and the Democratic Republic of Congo have pursued investigations to head off ICC justice. And some argue that the mainstreaming of criminal justice in international relations [in general] has created an incentive in some instances for 'preemptive' national proceedings.

Norm Proliferation and Expressivism

As Payam Akhavan, former Legal Advisor to the ICTY, has argued, even if prosecutions fail to deter culpable individuals from committing further crimes, prosecutions will nonetheless reinforce applicable international norms, and contribute to the establishment of a political culture that considers the commission of atrocities unacceptable.²¹ Over time, international criminal justice will operate to prevent atrocities by instilling "unconscious inhibitions against crime" or "a condition of habitual lawfulness" in society.²² This notion of norm proliferation is related to another theory known as expressivism; it is what the Court expresses that over time will lead to the general deterrence of individuals considering the pursuit of atrocity crimes. A number of theorists advocate expressivism as a justification for criminal punishment. These theorists "view crime as an expressive act and consider punishment justified when it counters the wrongful expression inherent in the criminal act."²³

The Court's choice of indictments related to the conflict in eastern Congo reflect the OTP's choice to enhance the Court's preventive impact by selecting the prosecution Thomas Lubanga on three counts of crimes against humanity, all of which involve the use of child soldiers. By choosing this theme, the prosecutor may have decided to help stigmatize a practice that is accepted as normal in some places. The prosecutor's opening statement to the Court underscores the point:

"The Lubanga case, beyond the guilt or innocence of Mr. Lubanga, is also a clear message to perpetrators of crimes against children such as enlisting them as soldiers, are very grave and will be persecuted."²⁴

Conclusion

The connection between international prosecutions and actual deterrence of future atrocities is at best a plausible assumption. Actual experience with these efforts is not encouraging.

Beginning in 1941, the United States and the United Kingdom issue a series of highly publicized warnings that violations of the law of wars would be punished. Allied radio and press explicitly warned the German population that there would be criminal trials for the “systematic murder of the Jews of Europe.”²⁵

Similarly, in the former Yugoslavia, atrocities continued in spite of international criminal prosecutions. The expanding field of prevention and international criminal punishment, however, is promising because the interrelationship of the varying preventative mechanisms together with greater certainty of prosecution by a permanent court, makes the deterrent possibility of the Court a greater possibility.

The developing fields of prevention and international criminal justice, however, are not without their skeptics, challenges, and perils. Below are described some of the more pressing questions facing both scholars and practitioners of atrocity prevention and its relationship to the ICC. Each question/challenge -in a nuanced fashion - addresses the meta-question: What is the essential relationship between International criminal justice and prevention? and the normative question: What role should the ICC play in atrocity prevention?

Challenges

- An enduring challenge to the prevention field is its inability to reach a consensus on the scope and definition of the concept itself. The concept is indeterminate. The inchoate nature of prevention is due, in part, to the traditional conception of ‘structural’ versus ‘proximate’ or ‘operational’ prevention that continues to dominate the field. The result is conceptual confusion and muddled strategies.
- Some definitions are so expansive as to include everything – economic development, institution building, rule of law, etc. Others insist on a very narrow definition, which limits prevention strategies and tactics. Theoretical conceptions of ‘structural’ and ‘proximate’ prevention no longer accurately describe the circumstances under which preventive actions may, or are, being taken.
- The atrocity prevention agenda is sometimes conflated or confused with other related agendas by scholars, policy makers, and advocates. This results in confusion within the discourse on prevention leading to muddled prevention objectives and outcomes.

- Tension between conflict prevention, conflict resolution and atrocity prevention needs to be resolved or at least better understood. Many suggest that conflict prevention and resolution aim toward a neutral and stabilized outcome among combatants or potential combatants. Pursuing these goals, however, may conflict with the goals of atrocity prevention and protection of populations, namely accountability and deterrence.
- Through the regionalization of mass atrocity prevention, a regionalization of discourse about genocide prevention can be observed. How does one ensure a lack of fragmentation in thinking about prevention while still making sure that prevention is a localized issue?
- What is the challenge posed by discussion about prevention sometimes replacing preventive action in different national contexts? (Basically, talk about prevention without acting until societies descend into chaos and prevention is not an option).
- What is the relationship between R 2 P and the ICC? To date, an ICC referral appears to be a necessary step in the continuum of R 2 P actions. In the case of Libya, this led to a conflation of military and judicial intervention. What is the relationship between the notion of 'shared responsibility' under R 2 P and complementarity under ICC justice?
- What are the effective arenas of prevention? Most efforts are UN-centered. Why is there not more of an engagement at local level?

While it is too soon to tell what kind of preventive impact ICC justice is having or will have in any meaningful way, we do know that ICC justice has and may have the potential to allow member states of the UN to avoid their responsibility to protect by engaging in their responsibility to prosecute, as witnessed by the fact that crimes under the jurisdiction of the court were referred to the ICC two years after the conflict in Darfur, Sudan broke out. When we focus on the goal of preventing mass atrocity, there are generally better mechanisms for the international community, including the international legal community to participate in these processes than the ICC.

This is not to say that the ICC has no role to play in atrocity prevention, but rather, that it should be modest about what it can achieve in this regard. Moreover, we in the legal and prevention communities should not be trying to foist the prevention role on the Court in an attempt to mitigate each community's weaknesses and salvage each community's reputation, instead of focusing on how to best achieve our aims.

Presented at the Hebrew University Symposium on Genocide, Jerusalem, Israel, September 2012.

¹ International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect*, IDRC (2001).

² The normative and legal content of R 2 P is still in its developmental infancy. R 2 P remains a vague and inchoate principle. This, however, is both its strength and weakness. On the one hand, it allows for a broad political consensus. On the other hand, it makes implementation of the Principle challenging. Moreover, I would be remiss if I did not acknowledge that while the overall Principle is generally accepted, certain states and regional organizations are reluctant to embrace R 2 P's agenda, due to a narrow focus on R 2 P's reaction (military intervention) component.

³ See, e.g., David J. Scheffer, *War Crimes, and Crimes Against Humanity*, 11 PACE INT'L L. REV. 319,328 (1999) ("As instruments of deterrence, the tribunals are formidable partners that cannot be lightly ignored in the future.")

⁴ M. Cherif Bassiouni, *Justice and Peace: The importance of Choosing Accountability over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191,192 (2003).

⁵ representative example includes a statement by the South Korean Representative ("Bringing to justice the perpetrators of crimes of international concern would serve as an effective deterrent"), U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 2nd plen. Mtg. ¶ 81, U.N. Doc. A/CONF.183(vol. II)(June 15, 1998).

⁶ Julian Ku, Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777,784 (2006).

⁷ Rome Statute of the International Criminal Court, Preamble, July 12, 1998, 2187 U.N.T.S. 900 [hereinafter Rome Statute].

⁸ Ku and Nzelibe, *supra* note 5, at 789.

⁹ Some evidence for this thesis is offered, though not empirically, by the ICC prosecutor and other court officials: for example, the prosecutor has claimed that the cases it pursued on child soldiers in Africa have had a deterring impact in Colombia and Sri Lanka; see, Luis Moreno-Ocampo, *Address to the Assembly of States Parties, Eighth Session*, 3 (Nov. 18, 2009); crimes by the LRA in northern Uganda "have dramatically decreased" as a result of the ICC indictment and the group's recruitment efforts "dried up almost instantly after indictments", Hans-Peter Kaul, *Second Vice-President of the Int'l Criminal Court, Peace Through Justice? The International Criminal Court in The Hague* 15 (Nov. 2, 2009). Anecdotally, the prosecutor has claimed: "In 2003 an Australian military pilot conducting operations in Iraq realized that if he executed the order received, he could be prosecuted in accordance with the Rome Statute. He returned to his base without dropping the bombs." Luis Moreno-Ocampo *Remarks at the Qatar Law Forum on the Role of International Judicial Bodies in Administering the Rule of Law* 7 (May 30, 2009). Observers from outside the Court, including ICC advocate Samantha Power and Human Rights Watch have also shared anecdotes of deterrence.

¹⁰ *Id.* at 777.

¹¹ *Id.*

¹² See Press Release, ICC, Statement by ICC Prosecutor Luis Moreno-Ocampo, on the situation in Cote d'Ivoire (Dec. 21 2010), <http://www.icc-cpi.int/NR/exeres/EB76851B-C125-4E70-8271-D781C54E2A65> (last checked, August 24, 2012).

¹³ See Press Release, Int'l Criminal Court, ICC Prosecutor Confirms Situation in Georgia Under analysis (Aug. 20, 2008), <http://www.icccpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20c282008%/icc%20prosecutor%20confirms%20situations%20in%20georgia%20under%20analysis>.

¹⁴ Office of the Prosecutor, Prosecutorial Strategy 2009-2012, para. 39 (February 1, 2012).

¹⁵ David Wippman, Atrocities, Deterrence, and the Limits of International Justice 23 Fordham Int'l L. J. 473, 476

¹⁶ Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 available at [http://www.icc.int/library/about/official journal/Rome_Statute_English.pdf](http://www.icc.int/library/about/official%20journal/Rome_Statute_English.pdf) [hereinafter Rome Statute].

¹⁷ International Criminal Court Office of the Prosecutor, Report on Prosecutorial Strategy, at 5 (Sept. 14, 2006), http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf (noting how this system encourages national resolution of cases and fosters international cooperation).

¹⁸ Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L. L. 215, 223 (2003-2003).

¹⁹ William W. Burke-White, Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice, 49 HARV. INT'L L.J. 53, 57-58 (2008).

²⁰ See Luis Moreno-Ocampo, Statement to the Assembly of States Parties to the Rome Statute of the International Criminal Court (Apr. 22, 2003), available at <http://www.iccnw.org/documents/MorenoOcampo22Apr03eng.pdf>.

²¹ Payam Akhavan, Justice in The Hague, Peace in the Former Yugoslavia? 20 HUM. RTS. Q. 743,751 (1999).

²² Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AJIL, 7, 12 (2001).

²³ Margaret M. deGuzman, Choosing to Prosecute: Expressive Selection at the International Criminal Court, 33 MICH. J. INT'L L. 265, 313 (citing Dan Kahan, The Anatomy of Disgust in Criminal Law, 96 MICH. L. REV. 1622, 1641 (1998)(claiming that "an expressively effective punishment must make clear that we are in fact disgusted with what the offender has done."))

²⁴ Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/05, Opening Statement, 29 (Jan. 26, 2009).

²⁵ Benjamin Ferencz, International Criminal Courts: The Legacy of Nuremberg, 10 PACE INT'L L. REV. 203,210 (1998).