The Good Intentions of Law: Effectiveness of the International Criminal Court in Deterring Future International Crimes

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Table of Contents

I. Introduction ................................................................. p. 3

II. Creation of the Court ................................................. p. 6

III. The Need for Deterrence ........................................ p. 8

   A. The Existence of Impunity ...................................... p. 10

   B. Deterrence Theory ............................................... p. 12

IV. The Legal Structure of the ICC ................................. p. 17

   A. Application of the ICC’s Authority ......................... p. 18

   B. Fallacy of the ICC’s Authority .............................. p. 21

V. Finding Real Deterrence ........................................... p. 23

VI. Conclusion .............................................................. p. 26
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I. Introduction

Blood flowed down the aisles of churches where many sought refuge; five priests and twelve women hiding out in a Jesuit center were slaughtered. ... Toddlers lay sliced in half, and mothers with babies strapped to their backs sprawled dead on the streets.... The fighting was hand to hand, intimate and unspeakable, a kind of bloodlust that left those who managed to escape it hollow-eyed and mute.¹

In the spring of 1994, Rwanda was hit by a genocide that killed 10% of its population.² The genocide had its roots planted in inter-ethnic distrust and fear between the Hutu and Tutsi tribes.³ The sudden and suspicious death of the Hutu-born president led the distrust to a boiling point that spilled over into a massive spread of killings by the Hutus.⁴ These attacks were not unbridled bouts of bloodlust; rather, they were planned and systematic attacks focused on tearing down the Tutsi population.⁵

The massacres that marked the Rwandan genocide ended in three months.⁶ It was not until fall 1994, that the United Nations Security Council (“UNSC”) took an active hand in the situation by creating Resolution 955 which called for the creation of the International Criminal Tribunal for Rwanda (“ICTR”), an ad-hoc tribunal created for the purpose of finding those responsible for the genocide and holding them accountable for their violations in international law.⁷ The occurrence of international crimes; such as, genocide, war crimes, and crimes against humanity were not the first to be investigated and adjudicated by the ICTR. Rather, the ICTR is

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³ Id. at 242
⁴ Id. at 241
⁶ Id.
⁷ UNSC Res. 955
a mirror of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), created in 1993, in charge of finding justice for the crimes committed in Eastern Europe.\(^8\)

This need to find justice and accountability is inherent in the criminal justice system. It is a call to this need that nearly 20 years after its creation, the ICTR and ICTY are still conducting trials.\(^9\) As a stronger illustration for the need to have accountability and attain justice, those who were not indicted by the ICTR but committed international crimes, were detained by Rwandan police force.\(^10\)

Before the ICTR and ICTY, the main courts that instilled the idea that individual violators of international law could be held accountable for their conduct, where the Nuremberg and Tokyo trials of World War II. These trials were seen as “victor trials”, but still laid the foundation that ‘crimes against international law are committed by men, not by abstract entities’\(^11\). This individual accountability was held for the “most serious crimes against international law”, such as, genocide, crimes against humanity, and war crimes.\(^12\) While the idea of these types of tribunals can be considered a signal that impunity will not be tolerated, criticism surrounds these courts and their effectiveness. For instance, their temporary establishment is considered problematic; these courts only exist for as long as necessary for the doling out of justice and they are bound by geographical and temporal boundaries drawn by the United Nations (“UN”) when they were created. Moreover, these tribunals have the fallacy of being created after the fact; after genocide or violation of law has occurred rather than being during the violation in order to stave off further injury.

\(^8\) UNSC Res. 827.
\(^9\) ICTY and ICTR website
\(^10\) There are literally thousands that sit in Rwandan prisons, with probably no hope of having a trial for the sheer number of individuals and the weak infrastructure of the Rwandan judicial system. Akhavan, \textit{supra} at 24.
\(^12\) \textit{Rome Statute}, Art. 6,7,8
As a result of the continued violation of international law, the International Criminal Court (“ICC”) was established with the creation and ratification of the Rome Statute.\textsuperscript{13} The ICC’s main purpose is to deter and prevent future violations of international humanitarian law through individual accountability.\textsuperscript{14} This general purpose is built upon decades of international customary law and the ageless idea of \textit{jus cogens}. Ratified in 2000 with 60 signatories, the ICC currently has over 120 signatories almost ten years after its creation.\textsuperscript{15}

Although being in existence for only ten years and having several indictments, criticisms exist about the ICC’s ability to carry out its mission of deterrence and prevention. Currently, the ICC has created 29 indictments, 16 of which are against government officials.\textsuperscript{16} There has only been one conviction in the ICC with Thomas Lubanga.\textsuperscript{17} The ICC has been accused of focusing primarily on the African continent, this allegation supported by all wanted individuals being heads or rebels in various African nations.\textsuperscript{18} Does this focus on Africa affect the legitimacy of the ICC when other violations of international crimes occur in other portions of the world?

Further, the United States and China have not signed on to the Rome Statute.\textsuperscript{19} They have also gone as far as not fully supporting the UNSC’s deferment of the Darfur situation to the ICC.\textsuperscript{20}
Does the lack of support from two of the most politically powerful countries in the UN affect the legitimacy and effectiveness of the ICC?

This paper will attempt to analyze the effectiveness of the ICC in its mission to deter and prevent future violations of international humanitarian law. The first section will be background on the creation of the ICC through the Rome Statute. The second section of this paper will analyze impunity, deterrence, and prevention theory and its application in the Rome Statute. The ICC is built upon the Western idea of deterrence and prevention; however, is faced with world that does not adhere to these ideals fully. There is not a vast amount of information of how deterrence and prevention work within the ICC, as such, American and European structure will be placed upon the ICC. The third section will discuss the ICC’s ability to actually prevent international crimes. In the fourth section, I will suggest how the ICC could better accomplish its mission of deterrence.

II. The Creation of the Court

*Until the day when the international community can demonstrate that those who ultimately bear the responsibility for violations of the most fundamental rules for the protection of human being[s] are brought to justice, history will repeat itself.*

The ICC is important because no longer would geography or temporal restrictions be enough to allow violators of international laws to live without punishment. The ICC is a permanent court, separate from the political web created in the UN. Its purpose is to seek individual accountability and justice for those who have witnessed or been victims of heinous crimes. The creation of the ICC is by the Rome Statute; a treaty that outlines the mission and framework – procedural and substantive –of the ICC.

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22 Frequently Asked Questions on the ICC at [http://www2.icc-cpi.int/menus/icc/about%20the%20court/frequently%20asked%20questions/8](http://www2.icc-cpi.int/menus/icc/about%20the%20court/frequently%20asked%20questions/8) accessed 11/12/2012.
When the ICC was established it was clear that it would be separate from the UN. This separation between the organizations is intentional and seen as a way to ensure that countries with significant political capital would not become tyrants over smaller, less powerful nations. This is illustrated in the ICC committee’s refusal of the US’s suggestion that the UNSC have authorization power over cases the ICC investigates. While the US argued that the ICC’s enforcement capability would be significantly weakened without support from more powerful nations on the UNSC.

Such a condemnation speaks to the uncertainty that even the makers of the ICC had in the court’s ability to effectively function. As will be discussed later, the US’s concern in this particular aspect was partially correct. Being a treaty, only those who sign the treaty or submit to the Court’s authority are obligated to abide by the Rome Statute. As a result, this tension between signatories and non-signatories holds the ICC in a tenuous global position. Another facet that the ICC must face with signatories and non-signatories is the overarching power of sovereignty. All states are seemingly equal in their right to handle internal situations as they please; however, the ICC, and earlier international criminal tribunals, have placed limitations and as such comes against a country’s sovereignty and the government’s ability to lead its people as it chooses. Even though the ICC is supported by international law, it does not mean that this law is mandatory. These concerns have manifested into real troubles that impact the ICC’s ability to effectively fulfill its mission statement.

24 Id.
25 Id.
27 Much of the tension created is in response to the obligations of signatories versus the sovereign rights of non-signatories. For instance, Article 24 of the Rome Statute clearly revokes the immunities of state officials of signatories; however, Article 98 re-enforces the immunity of non-signatories, essentially tying the hands of signatories who have an obligation to follow through with the Court’s judgments.
III. The Need for Deterrence

_The pursuit of justice and accountability fulfills fundamental human needs and expresses key values necessary for the prevention and deterrence of future conflicts._

Justification for international courts is in their assumption that they will deter future atrocities. By being able to administer judgment and punishment, the probability of future violations will decrease. This logic is entrenched in the Rome Statute’s preamble. This hope for ending impunity through accountability is an unstated goal in resolutions for the ICTY and ICTR.

For the purpose of this article, there will be a division between deterrence and prevention. Deterrence - the omission of a criminal act because of the fear of sanction or punishment – lies within the concept of prevention. There are several ways to prevent crimes and within that concept is deterrence usually through punishment, education, rehabilitation, or pressure.

Therefore, through the concern of the ICC being able to prevent further atrocities through deterrence is the central concern of this paper.

The basic objectives of a criminal justice system are punishment and deterrence of future crimes. The ICC is no different. Just as past tribunals, the ICC’s existence is justified by a purpose to put an end to international atrocities and to take effective measures to bring to justice the persons responsible for them. The court exists to apprehend those who have committed

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29 The Rome Statute’s preamble clearly expresses the goal of ending impunity for the “perpetrators of these crimes and thus to contribute to the prevention of such crimes”.
30 Both the ICTY resolution and the ICTR resolution both determined to end the violations and find those responsible for the crimes.
31 Paternoster, _supra_ at 766.
32 Ku & Nzelibe, _supra_ at 782.
33 _Id._ at 779.
crimes while illustrating to future would-be wrong doers what punishment could be administered to them if they were prosecuted for the same crimes.\textsuperscript{34}

Information about deterrence and the criminal legal system is vast; however, the focus on deterrence within the international criminal system is noticeably lacking. The difference between national and international criminal system and perpetrators is that while the domestic system is ubiquitous enough to scoop up a majority of individuals, the ICC cannot. First, the ICC is not meant to try every case of international law violation.\textsuperscript{35} Such an endeavor would be too costly and strenuous on the system and to a lesser degree the UN.\textsuperscript{36} Instead, the ICC has the discretion of choosing what situations to investigate.\textsuperscript{37} As a result, the assumption will be that some cases brought to the ICC will be rejected based on a variety of reasons.\textsuperscript{38} Secondly, the jurisdiction of the ICC is narrowly set to crimes of genocide, crimes against humanity, and war crimes.\textsuperscript{39} The scope of these violations means that those who commit these crimes, more than likely, have a vast amount of power and resources at their disposal. As such, the goal of deterrence comes against the strong incentive of attaining power and wealth. For the individual, the choice becomes a cost-benefit analysis. Based on the idea that a rational actor will make rational choices, the hope is that witnessing the “prosecution or related political demise of a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{34} Id.
\item \textsuperscript{35} Bosco, \textit{supra} at 165.
\item \textsuperscript{36} Id. at 166.
\item This stance is further supported by the concern for the cost of cases brought to the ICC. The ICC’s first conviction of Thomas Lubanga only took three years; yet, his trial cost was almost a billion dollars.
\item \textsuperscript{37} Rome Statute, Art. 17, 19.
\item Together, article 17 and 19 of the Rome Statute allow the court and the Prosecutor the discretion in whether or not investigate a situation. Article 17 outlines conditions that can allow the Prosecutor to drop a case, while article 19 allows the Court to decide the admissibility of a case. It should also be noted that throughout the Rome Statute, there is no indication that the Court or the Prosecution must or “shall” investigate a crime.
\item \textsuperscript{38} Id.
\item \textsuperscript{39} Rome Statute, Art. 6, 7, 8.
\end{itemize}
\end{footnotesize}
[political] leaders sends a message that the cost of the ethnic hatred and violence as an instrument of power increasingly outweighs its benefits”. 40

A. The Existence of Impunity

I will quickly discuss the existence of impunity; without which the purpose of the ICC and other international courts would be superfluous. Impunity as defined by Webster is the freedom or exemption from punishment. In the context of international crimes, impunity is a great concern for humanitarian efforts. Impunity is thought to allow those in power an avenue to not take accountability for their actions. As a result, those in power who commit atrocities have no consequences for their actions and future would-be criminals have no model to see the repercussions of their actions.

The purpose of this section is to discuss whether impunity truly exists. It has been posited by Ku and Nzelibe that the purpose of the ICC and other international courts is debatable. Based on empirical evidence, Ku and Nzelibe present statistics that suggest that individuals who attempt coups in African states generally fail and face harsher punishments from domestic governments and the public. 41 This evidence suggests that there is more certainty and severity of punishment within a domestic court than the ICC could ever dole out; part of this conclusion based on the fact that the ICC, following a European legal structure, does not allow the death penalty. Further, the ICC has no enforcement of its legal adjudications, thus domestic courts have a greater ability to capture and punish criminals.

After much postulation, Ku and Nzelibe’s conclusion, which only looks at Africa and no other continent, is somewhat misleading. The idea of impunity is founded on those with power and resources, usually in the government or military, misusing their power and resources for

40 Akhavan, supra at 8.
41 Ku & Nzelibe, supra at 799.
42 Id. at 832.
their own gains. These actions are followed by no accountability, either through a lack of infrastructure domestically in the state or the lack of notice and intervention from outside states. Impunity has consistently been attributed as a factor that supports atrocities because leaders, military and government, use diplomatic powers such as immunity to not be punished or answer for their crimes; leaving victims without any justice. This justice is more than punishment but also recognition that these crimes occur. With recognition, comes the added punishment of shame and knowledge of the leader’s crimes. While Ku and Nzelibe do support the notion that retribution is more likely for those who attempt coups within African nations\textsuperscript{43}, they fail to analyze the likelihood that these punishments may be at the hands of those who are already misusing the power they have. Further, this does not mean that impunity does not exist. The very notion that customary law supports diplomatic immunity in the majority of instances means that leaders have been able to throw off accountability for their actions.\textsuperscript{44} Ku and Nzelibe suggest that criminals are still punished by the domestic system but fail to ask how many of these systems are already under the authority of a tyrant who is just as close to committing atrocities.

Moreover, Ku and Nzelibe’s limited analysis of Africa is too narrow to surmise the existence of impunity. For example, during the Tokyo trials while the court was clear about the inapplicability of diplomatic immunity for international crimes\textsuperscript{45}; this did not stop the court from allowing several individuals to thwart justice. The existence of “comfort women” from this time

\textsuperscript{43} Id. at 803.
\textsuperscript{44} For instance, in the \textit{Arrest Warrant Case}, Belgium tried to charge Democratic Republic of the Congo’s Minister of Foreign Affairs, Abdoulaye Yerodia Ndombasi, for violations of international law. The ICJ was clear that government officials have diplomatic immunity in foreign domestic courts; suggesting that government officials can only be judged by their national court system. There is no record of Ndombasi ever going to trial for these allegations. While this does not mean that Ndombasi committed these crimes, the lack of a trial does suggest that if these crimes were committed by Ndombasi that there would be no trial or judgment for accountability.
\textsuperscript{45} \textit{Prosecutor v. Omar Hassan Ahmad Al Bashir}, ICC-02/05-01/09, para. 24.
has yet to receive the recognition or any legal justice from Tokyo or the West.\textsuperscript{46} This illustrates that impunity does exist; that there will be individuals protected by their government who will participate in acts that can be considered international crimes under the ICC and other international criminal tribunals.

\textbf{B. Deterrence Theory}

The basic idea of deterrence calls for an individual or group to not commit an act where they were likely to do otherwise.\textsuperscript{47} This idea is the foundation of the ICC’s and other international criminal tribunals’ mission. This want for deterrence also underpinned the ICTY and ICTR. Within discussing deterrence, the reason why the path to criminality chosen should also be discussed. As the trials of the ICC are currently play out, those on trial or have indictments characteristically have immense power and control. Of the 29 indictments, 16 of them are against individuals working within the government or military of their respective country.\textsuperscript{48} Seemingly these individuals already have the resources that domestic criminals may not ever be in the position to attain. Thus, the issue becomes what makes these individuals put in jeopardy the power and resources they have already attained. The path to criminality cannot be simplified into a context of an evil individual choosing a course of action because of money or power. Rather, the theory of why individuals choose criminal actions over non-criminal actions has been expounded on for centuries; intertwined with the theory of deterrence.

Research and empirical evidence concerning why individuals chose criminal paths originates from a domestic arena rather than an international situation, which means not all theories are applicable. The main theorist of deterrence, and whose idea appears to be the corner

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\item \url{http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/}
\end{enumerate}
\end{footnotesize}
stone of modern deterrence theory, is Becarria.\footnote{Paternoster, supra at 768.} Dating back to the turn of the 16\textsuperscript{th} century, Becarria argued that punishments should be certain and severe enough to “sufficiently offset the anticipated gains of crime, and arrive immediately after the crime would make for a more effective legal system…”\footnote{Id. at 769.} Certainty, proportionality, and timeliness are all factors necessary to make any legal judgments effective and, hopefully, deter would-be criminals who, more than likely, have their own self-interest at heart.\footnote{Id. at 783.} This early cost-benefit analysis has stayed with the deterrence theory and has become detailed and sophisticated; diving into the utility of the criminals’ resources and time versus the probability of success and punishment.\footnote{Id.}

Moreover, during the late-1900’s, deterrence theory was reshaped somewhat with the introduction of the idea of the criminal’s perception of the punishment, rather than an objective measure of the punishment, and the relationship between those perceptions and behavior.\footnote{Id. at 782.} This theory in the context of the ICC and international crimes is clear; if the perpetrator realizes that the ICC has the ability to enforce its judgments and capture individuals then the likelihood of accomplishing justice and accountability grows exponentially and with it future violators may be more hesitant before committing atrocities.

Modern deterrence theory has culminated into a mix of the two previous theories. Today, a rational deterrence model is followed in the presumption that “human beings are rational enough to consider the consequences of their actions and to be influenced by those consequences”.\footnote{Id. at 782.} Measuring benefits and cost or utility – “the total satisfaction that is derived from a course of action” – the individual will choose the behavior with the greatest benefit.\footnote{Id. at 783.}
figure out cost, the three main factors to consider are certainty, proportionality, and swiftness of punishment. 56 Within these factors, there is an objective and subjective level. 57 Objective measures are the punishments placed by the legal system while the subjective measures are the individual’s perception of the punishment. 58

Of course deterrence cannot only be attributed to the legal system. There will be extralegal circumstances that can cause deterrence just as much as the legal system. 59 Whether it is lack of resources, personal thoughts such as shame or adversaries with greater power, the individual may be unsuccessful in committing fully to the path of criminality. As such, these outside forces should also be included in the process of deterrence, but are more specific to the individual.

Within this deterrence theory, the individual’s own level of acceptable risk should also be a factor. Will and resolve can be powerful, immeasurable factors in an individual’s specific circumstances. 60 While the benefit-cost analysis may equal failure and probable capture, will and resolve could be deciding factors in continuing down the path of criminality. 61 This choice does not mean that the individual is not being rational, but rather extralegal elements have become sufficient to make the benefit worth the cost.

While deterrence is a goal of the ICC, the type of deterrence that is sought should be determined. There are several types of deterrence that criminal systems can intentionally or unintentionally create within a population. General deterrence is the discouragement of criminal activity through fear of punishment among the general public. 62 In this instance, general

56 Id.
57 Id. at 784.
58 Id.
59 Id. at 818.
60 Colin, supra at 279.
61 Id.
62 Bosco, supra at 170.
deterrence is meant to be towards those who have yet to commit a crime. The ICC’s hopes for general deterrence is illustrated in the assumption that the mere appearance of the court would be enough to deter would-be criminals from committing violations. This type of deterrence could be seen in the existence of a geographically independent court like the ICC. The ICC has no geographical boundary unlike the ICTY and ICTR. In having no boundary, it seems as if an automatic warning is created for all states or at least for all signatories of the Rome Statute.

Specific deterrence is the discouragement of subsequent criminal activity by those who have already been punished. This type of deterrence in terms of the ICC is almost superfluous because individuals convicted for committing international criminal violations would probably not be in the position to commit the same act again. This deterrence as far as it concerns ICC convictions can be seen in a ‘to be determined’ phase because the closet individual who satisfies the elements of being convicted and then released would be Thomas Lubanga of Uganda. Lubanga’s rebel group the Union of Congolese Patriots (UPC) is still a functioning group that has turned to politics. The possibility of the UPC turning back to war tactics once Lubgana is released is unknown and probably unlikely but is still a possibility.

Targeted deterrence concerns the Court’s attempts to deter specific individuals or groups within a society. The avenue of targeted deterrence is less about actually putting the individuals on trial and more about outputting a minimum of resources, such as an arrest warrant

63 Id.
64 Id. at 174.
65 Id. at 170.
66 Id.
68 It would not be too far stretch for the UPC to turn back to committing atrocities. Jean-Pierre Bemba, who is currently on trial for crimes against humanity, was once the Vice-President of the Democratic Republic of the Congo (“DRC”) and the head of the Movement for the Liberation of Congo (“MLC”), a former rebel group turned political party. The MLC and Bemba were accused of committing atrocities in Central African Republic (“CAR”) during the time when the MLC was a political party in the DRC.
69 Bosco, supra at 170.
or a summons, in the hopes that it will be enough to deter the individual from committing anymore criminal activity.\textsuperscript{70} The purpose is to stop the furtherance of the violations; however, there may be no “justice” or accountability that the ICC seeks. This occurrence actually supports the thought that the ICC is not meant to try all cases of international law violations. By making examples of certain individuals, those who are aware of the court and the law would be more likely to change their actions that have a catastrophic impact on a population.

Lastly, there is restrictive deterrence; this type of deterrence looks to minimize or “diminish the risk or severity of a legal punishment, a potential offender engages in some action that has the effect of reducing his or her commissions of a crime”.\textsuperscript{71} This minimization can take the form of a general or rebel leader instructing individuals to not massacre a particular group – stopping any genocide claim— but allowing crimes of rape, or forced displacement to occur.\textsuperscript{72} This restrictive deterrence may mean that an individual was a part in the furtherance of an international crime; however, because these crimes are lesser than that of crimes like genocide, it is considered a successful deterrent. This deterrence is tricky for the fact that international crimes could still be committed, allowing the ICC to have jurisdiction.

These types of deterrence have all been illustrated in past ICTs and the criminal system in general. The ability for the ICC to achieve this type of deterrence is difficult to measure because of the enfant age of the ICC. For example, there is no way to know if the ICC is successful in the realm of specific deterrence when Lubanga, who received the first ICC conviction, will not be released until almost 2021.\textsuperscript{73}

\textsuperscript{70} Id.
\textsuperscript{71} Id. at 171.
\textsuperscript{72} Id.
\textsuperscript{73} http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx
IV. Legal Structure of the ICC

While the ICC has an international character similar to the UN, the ICC is considered to be a judicially independent organization from the UN and any other international organization. This independence of the court is meant to insure that political influence is precluded from the judicial process. Moreover, while the court can be considered distinct from the nature of domestic courts based on the creation of its jurisdiction, it is meant to act complimentarily to national courts. The placement of the ICC both internationally and domestically, means that the court holds a tenuous amount of power depending on the situation.

The UN and the ICC maintain the same goals of international security; however, there is no clearly stated relationship between the two organizations. The Rome Statute does reaffirm the “purposes and principles” of the UN Charter. The UN Charter preamble lists as one of the purposes of the UN is to “maintain international peace and security”, and to that end; to take “effective collective measures for the prevention and removal of threats to the peace”. The meaning of, “maintain international peace and security” was illustrated with the UNSC’s Resolution 1593. The UNSC determined that the situation in Darfur, Sudan constituted a “threat to international peace and security”. Further, UNSC’s resolution encouraged cooperation with the ICC in an attempt to combat impunity in Darfur. Aside from this mutual goal of ensuring “international peace and security”, there is no clear connection between the UN and the ICC.

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74 Article 2 of the Rome Statute only states that an agreement outlining the relationship between the UN and the Rome Statute will be completed and agreed upon. Other than the UNSC ability to refer cases to the ICC or defer cases for 12 months from the ICC, no other relationship is created.
75 Rome Statute Preamble
76 UN Charter, Art. 1
77 Res 1593
78 Res 1593 para. 4
This lack of clear connection affects the legitimacy of the ICC’s authority. The ICC is a treaty and as such no real obligation is created unless a state is a signatory.\textsuperscript{79}

In respect to the legal status of the court, the ICC is considered as having an international legal personality and having the sufficient legal capacity in order to fulfill its stated purpose and exercise its function.\textsuperscript{80} Further, the court may exercise its powers on any signatory of the statute or by “special agreement” on non-signatories.\textsuperscript{81} However, the court will defer a case to a state that has jurisdiction if the state is capable of having a fair and unbiased trial.\textsuperscript{82} Satisfaction of these standards is left to the discretion of the court.\textsuperscript{83} This complimentary system is meant to protect signatories who wish to protect their sovereignty and the legitimacy of their own courts.

A. Application of the ICC’s Authority

It may appear that domestic courts and the ICC are on an equal footing. The ICC is meant to be complimentary to national courts; the ICC “is designed as a ‘court of last resort’ that backs up national jurisdictions rather than [overpowering] them”.\textsuperscript{84} However, the nature of the ICC is distinctly different than that of any national court. First, the ICC has the capability to practice universal jurisdiction. Universal jurisdiction is the ability to prosecute an individual regardless of location. International laws are clear that one state cannot encroach on the sovereignty of another state. This concept is illustrated in diplomatic immunity and the preclusion of domestic prosecution of any foreign head-of-state. For instance, the International Court of Justice (“ICJ”) was clear that diplomatic immunity precluded domestic courts authority; however, this immunity did not preclude an individual from being subject to “certain

\begin{itemize}
\item \textsuperscript{79} Infra p
\item \textsuperscript{80} Rome Statute Art. 4.1
\item \textsuperscript{81} Id. at Art. 4(2).
\item \textsuperscript{82} Id. at Art. 17(1).
\item \textsuperscript{83} Id. at 17(2).
\item The court outlines occasions where
\item \textsuperscript{84} Ljuboja, supra at 772
\end{itemize}
international criminal courts, where they have jurisdiction”. The ICJ expressed that “the future International Criminal Court created by the 1998 Rome Convention” would be included in this category of courts.

Further, as an international court, the ICC does not receive its power from an all-encompassing government, but rather receives its “mandate from the international community”. The Rome Statute is a codified version of customary international law, much of it already subscribed to by the international community. This is illustrated by the Rome Statute expressly precluding itself from “limiting or prejudicing in anyway existing or developing rules of international law”. The Rome Statute seemingly has no limiting feature concerning its provisions other than international law and the “principles and purposes” of the UN Charter.

Therefore, with hardly any oversight from another organ of government, the ICC cannot be regarded as being on equal footing as domestic courts and is distinctly separate in its ability to exercise universal jurisdiction on signatories and, depending upon the situation, non-signatories.

The creation of jurisdiction for the ICC is very narrow; limited to violations of international law with high standards that must be satisfied before allowing the ICC to intervene in any conflict. Jurisdiction is limited to the “most serious crimes of concern to the international community” and is categorized into; (1) genocide, (2) crimes against humanity, and (3) war

86 Id.
The Arrest Warrant Case was solely concerned with diplomatic immunity within a domestic court and not the conduct that violated international law. While Belgium had legislation giving them universal jurisdiction over any violation of international law, this was found to be against customary international law by the ICJ.
87 Malawi case p 17 para 35
88 Geneva Convention built upon much of the treaties that already existed.
89 Rome Statute, Art. 10.
90 Rome Statute, Preamble.
Within each category a laundry list of specifics are given in order to cover all possible situations in which international laws could be violated.

For a case to come before the court there must be satisfaction of subject-matter jurisdiction which is only applicable to signatories of the Rome Statute. The ICC has no jurisdiction over non-signatories and can only achieve jurisdiction through the UNSC or if the non-signatory agrees to submit to the ICC’s authority.

Satisfaction of subject-matter jurisdiction is dependent on satisfaction of the mental element standard set within the Rome Statute. The mental element has a two-pronged requirement of intent and knowledge. The standard to satisfy these requirements is not based on the end result but rather the actions that led to the end result. For instance, a perpetrator does not need to have the intent to commit genocide, but rather the intent to commit actions that would cause injury to a specific group within a population. This specification battles any argument that an offender did not have the intention to commit genocide. Rather, a look at the actions conducted by the individual would be summed up. The Prosecutor must gather information and analyze the conduct and injuries caused. For instance, if there is a bombing against a village that contains a large majority of an ethnic group, the only intention that must be satisfied is that the perpetrator had the intention of harming the village through the use of bombs.

Further, concerning genocide, there is an additional standard of proof that the attack was

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91 Rome Statute, Art. 5(1).
92 The Prosecutor may begin investigation over any individual proprio motu. However, this does not mean that a formal investigation supported the ICC will begin. There must be sufficient information to satisfy the Pre-Trial Chamber that a situation that falls within the jurisdiction of the Court exists. If this standard is satisfied the court may begin a formal investigation; however, this investigation is only allowable over states parties, states that have submitted to the court, or situations referred by the UNSC.
94 Id. at Art. 30.
95 Id.
“widespread or systematic”. This means that one attack is not sufficient to be labeled genocide, which appears to hold the highest standard within the Rome Statute.96

Enforcement of ICC power is tenuous at best. The ICC depends on state parties and non-governmental organizations (NGOs) involvement to acquire evidence and information on any situation. Without assistance of these parties, the failure of the ICC would be imminent. Thus, “the ICC ‘can never be stronger than the political commitment’ of the treaty signatories.”97

B. Fallacy of the ICC’s Authority

This Achilles Heel of the ICC is illustrated in Prosecutor vs. Omar Al Bashir. Bashir is the president of Sudan, a state that is not a party to the ICC. Once the ICC released their arrest warrant of Bashir98, all signatories were obligated to exercise the ICC’s authority by arresting Bashir if he came into their territory. Malawi, a signatory, did not fulfill its obligation when Bashir was within their territory. While this choice by Malawi was more a result of the tumultuous political relationship between the UN, ICC, and the African Union (AU), legally Malawi was obligated to detain Bashir.99 Bashir remains categorized as a fugitive because he chooses to visit only countries that are not signatories or will ignore the ICC arrest warrant.

This lack of enforcement is starkly different than the authority assigned to the ICTY and ICTR. The UNSC made compliance with the resolutions that made each respective court mandatory. Stating that “all states shall cooperate fully with the [ICTR]” and that ‘states shall

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96 The idea that the Rome Statute holds genocide to a higher standard is illustrated through the amount of evidence that must be collected before genocide can be construed. For instance, Prosecutor Campo had to go back to the Pre-Trial Chamber twice before the PTC extended the violations against Bashir to include genocide.
97 Ljuboja, supra at 773.
98 The ICC was able to get Sudan within its jurisdiction because of UNSC resolution 1593, which deferred the situation to the ICC and removed all Sudan’s government officials’ immunity.
99 The relationship between the ICC and AU is troubled at best. The AU holds that the ICC is hunting down African leaders; this idea is the result of the ICC’s trials; all of which have been against African leaders. The relationship between AU and the UN is also troubled partly because of the ICC and the overall treatment of Africa within UN affairs.
take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute’ made the resolutions applicable to all parties of the UN Charter.\textsuperscript{100}

The ICC has yet to receive any type of support from the UNSC that was displayed for the ICTY and ICTR. While the UNSC deferred the investigation of Bashir to the ICC, the resolution made no such requirement of compliance that were listed in the ICTY and ICTR resolutions.\textsuperscript{101} Resolution 1593 only ‘urged’ cooperation from states and expressed no obligation for non-signatories. This lack of enforcement creates a tangled web when combined with the laws of the Rome Statute and how they affect signatories towards non-signatories.

This tension of questioning what the process should be is illustrated with Bashir. Any signatory to the Rome statute revokes immunity for government officials and those in the military.\textsuperscript{102} Within the Rome Statute is also a provision protecting non-signatories immunity of officials.\textsuperscript{103} These articles come into conflict when the ICC tries to get a signatory to exercise authority over a non-signatory.\textsuperscript{104} This is the current situation with Bashir. Moreover, even though Bashir’s immunity has been revoked, there remains to be a signatory willing to exercise ICC authority over him.\textsuperscript{105} This quandary highlights one of many issues that the ICC faces. Further, this problem only undermines the legitimacy of the ICC, in that it has no ability to enforce its judgment without willing participation from state parties. Therefore, the question becomes if the structure of the ICC’s power is really conducive to its mission of accountability, justice, and deterrence.

\textsuperscript{100} Res 955 and 827 para. 2.
\textsuperscript{101} Res 1593 para. 6.
\textsuperscript{102} Rome Statute, Art. 27.
\textsuperscript{103} Rome Statute, Art 98.
\textsuperscript{104} Rome Statute, Art 27 and 98
\textsuperscript{105} Immunity of state officials of Sudan was revoked with UNSC Resolution 1593 which binds Sudan to the Rome Statue effectively forcing compliance to Article 27 which revokes immunity.
V. Finding Real Deterrence

There is a cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one.\textsuperscript{106}

While the ICC is in its infancy, its success is debatable. The criticisms of the ICC are real problems that prevent the court from achieving its goal of ending impunity through judging individuals accountability in atrocities. The idea that individual accountability for specific violations in international law is sufficient to end impunity is a weak assumption. These atrocities are not accomplished by one individual; rather, these acts are completed by regimes – groups of people following a mission that has been created by an individual. The individual may be the central idealist behind a group’s actions but the actions, which more than likely are done collectively by a group, are the focus of the ICC. As such, I suggest that rather than focusing solely on individual accountability, the ICC should combine two singular ideas of joint criminal enterprise (“JCE”) and “system criminality” to attach real accountability and firm guidance in what individuals can be connected to the violation of international crimes.

First, JCE is the ability to attach liability to any individual involved in a “common plan” for all crimes committed in pursuit of breaking international humanitarian law.\textsuperscript{107} JCE is not expressly mentioned in the Rome Statute; rather, the statute suggests JCE through Article 25 which creates liability for those who ‘commit(s) such a crime… jointly with another or through another person’.\textsuperscript{108} This provision is analogous to Article 6(1) of the ICTR’s statute which creates “direct responsibility” by making liable “a person who planned, instigated, ordered, committed” a crime.\textsuperscript{109} JCE is implicit in the ICTR’s article 6(1) and, as will be later discussed,

\textsuperscript{106} Nollkeamper, supra at 314.
\textsuperscript{108} Rome Statute, Art. 25(3)(a).
\textsuperscript{109} Danner and Martinez, supra at 102.
used to attach liability to those who may not have overt evidence of violating international law. Further, JCE recognizes that once crimes are pursued on the collective level by militias or criminal organizations, the “culpability resides at the collective level”. Individual accountability does not allow for collective culpability for the fact that it is believed that these actions stem from one individual.

While JCE was largely created by the ICTY, its roots stem from command responsibility. Briefly, command responsibility attaches liability to military superior over the actions that the unit commits; whether those actions were ordered or a consequence of the superior exercising ‘willful ignorance’. JCE goes a step further but attaching liability to all participants a part of a common plan regardless of their responsibility in the commission of the crime. The scope of attaching responsibility through JCE doctrine was broadly outlined in *Prosecutor v. Tadic*. The court outlined three categories that allowed the use of JCE. The first being individuals who act pursuant to a common plan with the same criminal intentions. The second category was relates to individuals who “demonstrate their adherence to a system of repression”. Within this category the prosecution must prove active participation in and knowledge of an organized system of repression and intent to further that system. Lastly, the there is a category that considers actions that were outside the scope of the common plan but were “nevertheless a natural and foreseeable consequence of the effecting of that purpose”. Essentially what is created is the criminal offense of conspiracy. Conspiracy is a less loop-hole

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110 Eyes on the ICC 50
111 Danner and Martinez, supra at 104.
113 Danner & Martinez, supra at 106.
115 Id. at para. 196.
116 Danner & Martinez, supra at 105.
117 Id.
118 *Tadic*, supra at 204.
ridden doctrine that attaches liability to a greater number of individuals, unlike individual accountability which, as seen with current ICC application, appears to only attach to the individual leading the regime or group.

Prior to the Tadic court, the Nuremberg trials were the first to postulate the ability to prosecute a group rather than an individual. In Nuremberg, it was proposed that the International Military Tribunal (“IMT”) try the criminality of the organizations themselves and subsequently the individuals in these organizations. Further defining criminal organization, the court concluded that the organization existed as a group entity, such that “its members would have understood that they were participating in a collective purpose”. Supporting the use of conspiracy, Murray Bernays, a lawyer for the U.S. Department, concluded that “a criminal organization is analogous to criminal conspiracy in that the essence of both is cooperation for criminal purposes”.

Holding the regime accountable for their actions serves the purpose of heightening the cost-benefit analysis discussed previously, only on a smaller scale. The individual who may not be considered a leader but did further the commission of the crimes could be held accountable, making cost-benefit analysis especially pertinent to individuals who choose to follow those considered leaders by the ICC. International crimes cannot be accomplished by one person but by the group or the regime; without the individuals to carry out the plan the idealist cannot accomplish their goal.

Second, combined with a greater use of JCE, there must be agreement among the states that international law and the ICC will be followed. The Rome Statute is a treaty and as such has no obligations for non-signatories. While the ICC tries to be separate from the UN for political

119 Danner & Martinez, supra at 113.
120 Id.
121 Id. at 115
reasons, it does not appear that it can be truly effective unless all nations agree to support it or at least the most powerful nations. The ICC has no enforcement ability and cannot dole out sanctions against nations that fail to follow through with exercising its authority. There must be a greater chance for punishment, not only to those who violate the law, but also those who do not follow through with obligations.

VI. Conclusion

The end of impunity is seen as goal that will eviscerate the most heinous of crimes against humanity. This idea found its roots with the end of WWII and has developed into an all-encompassing mission that is seen in the preamble of the UN Charter and the Rome Statute. Courts have been created on this idea that international crimes are not the actions of intangible entities but by men of flesh and blood.\textsuperscript{122} What comes in the of allowing the ICC to truly have the ability to prosecute those who commit these crimes, is the established, and necessary, right of sovereignty every nation has. As a result, the ICC, while having good intentions, has the possibility of becoming nothing more than show court; established to parade out individuals the court is lucky enough to get in its custody. Part of the ICC’s ineffectiveness is tied to the political games of the UN and the lack of support from powerhouses like the U.S. and China. How can there be true deterrence when there is no enforcement? A warning or distant threat of punishment is unlikely to be sufficient in dissuading those whose goal is power or the eradication of entire population. Whether the ICC will truly be effective in curbing atrocities will not be known for several years. As of right now, the ICC is nothing more than good intentions supported by a weak system.

\textsuperscript{122} Nollkeamper, \textit{supra} at 314.