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**THE PUNISHMENT AND PREVENTION OF GENOCIDE:  
THE INTERNATIONAL CRIMINAL COURT AS A BENCHMARK OF  
PROGRESS AND NEED**

*Christine H. Chung\**

INTRODUCTION

Sixty years ago, the drafters of the Genocide Convention envisioned the creation of an “international judicial organ” that would be available to try individuals accused of committing genocide and other crimes under international law.<sup>1</sup> Article VI of the Convention itself specified the possibility that persons charged with genocide be tried by such “international penal tribunal as may have jurisdiction” by agreement of contracting States.<sup>2</sup> Today, following decades of a difficult “birthing” process, the permanent international criminal tribunal anticipated by the drafters of that Convention—the International Criminal Court (ICC)—has been in operation for nearly five years.<sup>3</sup> The ICC has issued eleven arrest warrants relating to war crimes and crimes against humanity committed during three of the gravest ongoing conflicts in the world: in the Darfur region of the Sudan, in northern Uganda, and in the Democratic Republic of Congo (DRC). Its first trial, of an alleged DRC warlord, is scheduled to begin in June 2008.

A handful of years are a slim record upon which to begin reaching any conclusions. Still, in the spirit of commemorating the negotiation and adoption of the Genocide Convention, this article offers observations on the manner in which the earliest operations of the “international judicial organ” foreseen by the Convention drafters demonstrate and underscore: (1)

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<sup>1</sup> See G.A. Res. 260 (III) at 177 (Dec. 9, 1948) (adopting the Genocide Convention and stating the General Assembly’s consideration “that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law.”).

<sup>2</sup> Convention on the Prevention and Punishment of the Crime of Genocide, art. 6, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

<sup>3</sup> The years are counted from the swearing in of the Prosecutor of the ICC in June 2003. The first ICC investigations were commenced in the summer of 2004.

progress in the mission of punishing and preventing genocide and other crimes of international concern, and (2) the difficulties and next challenges in accomplishing the Genocide Convention's objectives.

#### PROGRESS

On the progress front, the ICC has begun fulfilling at least three core aims of the Genocide Convention drafters.

##### A. *Strengthening of the International Rule of Law*

Most fundamentally, the ICC represents and fosters international consensus supporting a rule of law that defines genocide and other mass atrocities as crimes condemned by the civilized world. The Genocide Convention expressed an agreement among States that genocide is a crime under international law and obligated ratifying States to adopt domestic legislation criminalizing genocide, as defined in the Convention.<sup>4</sup> Nearly fifty years after the adoption of the Convention, in signing the treaty at Rome that created the ICC, States again reached consensus that genocide is a crime, under the same definition set forth in the Convention.<sup>5</sup> The signatory States also placed war crimes and crimes against humanity within the ICC's jurisdiction, judging that these crimes, like genocide, were among "the most serious crimes of concern to the international community as a whole."<sup>6</sup> The growing number of countries that continue to ratify the Rome Statute—at latest count, 106 countries<sup>7</sup>—represents the continuing commitment to a rule of law that criminalizes genocide, as well as an expanded consensus that war crimes and crimes against humanity are also crimes of international concern. As with the Genocide Convention, ICC ratification serves as a catalyst for harmonizing domestic standards to an international rule of law, because States that ratify the Rome Statute often also adopt ICC definitions of crimes in their domestic legislation.

The building of the consensus expressed by the Genocide Convention grows in at least three dimensions via the ICC ratification process. First, there is the fact that through joining the ICC, additional countries have

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<sup>4</sup> *Genocide Convention*, *supra* note 2, at arts. 1, 4.

<sup>5</sup> *Compare Genocide Convention*, *supra* note 2, at art.2, with Rome Statute of the International Criminal Court, art. 6, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (entered into force July 1, 2002) [hereinafter *Rome Statute*] (using same definition for genocide as the Genocide Convention). Crimes against humanity and war crimes are placed within the jurisdiction of the ICC in the Rome Statute at articles 7 and 8, respectively. *Id.*

<sup>6</sup> *See Rome Statute*, *supra* note 5, at art. 5.

<sup>7</sup> *See* Press Release, United Nations, Madagascar Ratifies Statute Establishing International Criminal Court (Mar. 17, 2008), <http://www.un.org/apps/news/story.asp?NewsID=26002&Cr=genocide&Cr1=>.

accepted the norm that genocide and other mass atrocities are indeed crimes deserving of international judgment and denunciation. Japan, which recently joined the ICC, is one of eighteen countries that never ratified the Genocide Convention, but have elected to ratify the Rome Statute.<sup>8</sup>

Second, through ratification of the Rome Statute, States bind themselves to enforce the international rule of law within their own borders and agree that, if they fail, the ICC may intervene.<sup>9</sup> This simple commitment represents a huge innovation. Like Odysseus, who bound himself to the mast in anticipation of hearing the Sirens, States that join the ICC have foreseen the possibility of their own frailty and have committed themselves to the fail-safe remedy. Member States pledge to support the permanent international criminal court in its work by means of an international cooperation network. The States also express, through the 128 articles of the Rome Statute, consensus upon the specific procedures, standards, and cooperation mechanisms by which perpetrators of genocide, crimes against humanity, and war crimes should be brought to justice under universal standards of fairness. The Rome Statute, in short, creates both a court and an international criminal justice system.

Finally, the ICC's existence simultaneously strengthens the instrument that will always constitute the primary "line of defense" against genocide and other crimes under international law—domestic punishment of those crimes. The Genocide Convention recognized that the operations of any international judicial organ must be complementary to the enforcement efforts of States.<sup>10</sup> The ICC, likewise, complements national enforcement mechanisms in that it possesses authority to act only when States are "unwilling" or "unable" to do so.<sup>11</sup> By its existence and operations, however, the ICC raises the bar of domestic accountability, even while pursuing international prosecutions. For example, knowledge that the ICC was ready to exercise its jurisdiction created the incentive for the then-transitional gov-

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<sup>8</sup> For status of ratifications of the Genocide Convention, see Office of the United Nations High Commissioner for Human Rights, *Convention on the Prevention and Punishment of Genocide New York, 9 December 1948*, <http://www.ohchr.org/english/bodies/ratification/1.htm>. The status of ratifications of the Rome Statute is reported in, "Multilateral Treaties Deposited with the Secretary-General," at ch. 18, pt. 10, *Rome Statute of the International Criminal Court*, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>; see also The State Parties to the Rome Statute, <http://www.icc-pi.int/statesparties.html> (listing the 106 State parties to the Rome Statute); see also Coalition for the International Criminal Court, *Ratification of the Rome Statute*, <http://www.iccnw.org/?mod=romeratification>.

<sup>9</sup> See *Rome Statute*, *supra* note 5, at art. 17 (providing that a case can only be deemed admissible, and thus susceptible of prosecution by the ICC, if a State which otherwise would have jurisdiction is "unwilling or unable" to prosecute it).

<sup>10</sup> *Genocide Convention*, *supra* note 2, at arts. 5, 6.

<sup>11</sup> See *supra* note 8.

ernment of the DRC to invite an investigation into crimes committed in that country which otherwise would have escaped scrutiny. The DRC government self-referred the investigation of crimes allegedly committed in the DRC to the ICC after ICC Prosecutor Luis Moreno-Ocampo made public statements that he was prepared to use *proprio motu* powers to initiate an investigation.<sup>12</sup>

The spread of the domestic enactment of ICC standards also strengthens State enforcement. In the United Kingdom, the International Criminal Court Act of 2001, which was enacted in connection with the ratification of the Rome Statute, became the basis for military charges brought in 2005 against soldiers in the British Army for allegedly committing war crimes against civilian prisoners in Iraq.<sup>13</sup> In the Netherlands, Dutch prosecutors publicly identified statements in which the Prosecutor of the ICC had encouraged the investigation of the “criminal business” of war, as motivation for two domestic prosecutions relating to war crimes and human rights abuses in the Middle East and Africa: one in which a Dutch businessman was charged with furnishing chemicals to Saddam Hussein,<sup>14</sup> and another in

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<sup>12</sup> Luis Moreno-Ocampo, Lecture at Case Western Reserve University School of Law, The International Criminal Court: Seeking Global Justice (Oct. 16, 2007) (describing events leading to the ICC investigation in the DRC) available at <http://law.case.edu/centers/cox/webcast.asp?dt=20071016&type=wmv>; see also Luis Moreno-Ocampo, *The International Criminal Court: Seeking Global Justice*, 40 CASE W. RES. J. INT'L L. 215 (2008). Under the Rome Statute, the Prosecutor may initiate an investigation but if he or she does so, the judges of a Pre-Trial Chamber must also authorize the investigation. See *Rome Statute*, *supra* note 5, at art. 15. Investigations may also be commenced by means of referral by a State Party, or referral by the U.N Security Council. See *id.* at arts. 13, 14.

<sup>13</sup> See, e.g., *U.K. Soldiers Face War Crimes Trial*, BBC NEWS, July 20, 2005, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk/4698251.stm> (noting that three U.K. citizens are being prosecuted for alleged “inhumane treatment of persons” under the International Criminal Court Act of 2001); *U.K. Soldier Jailed over Iraq Abuse*, BBC NEWS, Apr. 30, 2007, <http://news.bbc.co.uk/1/hi/uk/6609237.stm> (describing the first conviction, after a guilty plea, of a U.K. citizen under the International Criminal Court Act of 2001).

<sup>14</sup> See Marise Simons, *Holding Arms Dealers Accountable at Home*, INT'L HERALD TRIBUNE, May 3, 2006, available at <http://www.iht.com/articles/2006/05/02/news/hague.php?page> (noting that prosecutions of Frans van Anraat and Guus van Kouwenhoven, while a Dutch initiative, were prompted in part by the presence in The Hague of the ICC and the Prosecutor's expressions of hope that national jurisdictions would join the ICC in investigating the “criminal business” of war). Dutch businessman Frans van Anraat was sentenced to seventeen years in prison for selling chemicals to Saddam Hussein used in poison gas weapons that killed Kurdish villagers. See Openbaar Ministerie/Frans van Anraat, *Gerechtshof 's-Gravenhage*, [Hof] [Court of Appeal, The Hague], Den Haag, 9 mai 2007, BA 4676 (Neth.) (English translation of judgment available at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BA6734&u\\_ljn=BA6734](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BA6734&u_ljn=BA6734)); see also TRIAL Watch: Frans van Anraat, [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/frans\\_van-anraat\\_286.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/frans_van-anraat_286.html) (last accessed Jan. 1, 2008) (reporting that the Appeals Court acquitted Anraat of complicity in genocide, but upheld his conviction for com-

which another Dutch citizen was alleged to have provided support, including militia, to Charles Taylor.<sup>15</sup>

*B. The Systematic Review of Allegations of Genocide and Other Mass Atrocities*

A second area of progress that the drafters of the Genocide Convention might identify from the existence and operation of the ICC is the circumstance that there exists for the first time a judicial entity that systematically reviews allegations of mass atrocities to identify situations for investigation and prosecution. One wonders if the Convention drafters would have been gratified or horrified to learn that the ICC Office of the Prosecutor has received thousands of communications and referrals in its first years of operation—from individuals, organizations, and nations in over one hundred countries—recommending investigation and prosecution of atrocities allegedly committed around the world.<sup>16</sup> The achievement is that the ICC now reviews each of these communications and referrals. It determines whether the communications and referrals contain allegations deserving further investigation under the legal standards adopted in the Rome Statute and thus representing, at a minimum, the consensus of the member States of the ICC. As a result of this legal analysis, and of further culling based on its mandate of focusing upon the gravest crimes,<sup>17</sup> the ICC has selected some situations for investigation (thus far, in the DRC, in northern Uganda, in the Darfur

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plicity in war crimes, and extended his sentence by two years because the defendant was excessively motivated by greed).

<sup>15</sup> See Openbaar Ministerie/Gus van Kouwenhoven, Rechtbank's-Gravenhage, [Rb] [District Court, The Hague], Den Haag, 7 juni 2006, AY 5160 (Neth.) (English translation of judgment available at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AY5160&u\\_ljn=AY5160](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AY5160&u_ljn=AY5160)), *rev'd*, Gerechtshof's-Gravenhage, [GG] [Court of Appeal, The Hague], Den Haag, 10 maart 2008, BC 6068 (Neth.), available at [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BC6068&u\\_ljn=BC6068](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BC6068&u_ljn=BC6068); see also TRIAL Watch: Guus van Kouwenhoven, [http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/guus\\_van-kouwenhoven\\_289.html](http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/guus_van-kouwenhoven_289.html) (last accessed May. 15, 2008) (noting the accused was acquitted of war crimes but sentenced to eight years in prison for violating a U.N. arms embargo, that conviction was reversed on appeal, and that Dutch prosecutors have pursued an appeal to the Supreme Court).

<sup>16</sup> See The Office of the Prosecutor of the ICC, *Update on Communications Received by the Office of the Prosecutor of the International Criminal Court* (Feb. 10, 2006), available at [http://www.icc-cpi.int/library/organs/otp/OTP\\_Update\\_on\\_Communications\\_10\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_Update_on_Communications_10_February_2006.pdf) (noting that over 1,700 communications had been received by February 2006).

<sup>17</sup> ICC Office of the Prosecutor, *Paper on Some Policy Issues Before the Office of the Prosecutor* (Sept. 2003), available at [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf) (setting forth policy of the OTP to focus on most grave crimes and most responsible perpetrators); see *Rome Statute*, *supra* note 5, pmbl. (stating that the ICC's jurisdiction is over the most serious crimes of international concern); see *id.* at art. 17(1)(d) (establishing gravity threshold for ICC cases).

region of the Sudan, and in the Central African Republic), while declining others (e.g., in Venezuela and Iraq).

It is impossible, of course, to achieve perfect consensus about which investigations and prosecutions should be accepted or declined. The advance is that a worldwide clearinghouse for the evaluation of allegations of genocide, war crimes, and crimes against humanity, is operational. Further, the evaluation proceeds under known legal standards, to permit an examination of the merits of the decisions ultimately made.<sup>18</sup>

### C. *Prevention of Genocide and Other Mass Crimes*

A final area in which the negotiators of the Genocide Convention might view progress in fulfilling their long-term objectives is the ICC's effort to advance the most difficult aim of the Genocide Convention: the prevention of genocide. In each of the first three investigations it opened, the Office of the Prosecutor undertook to carry out investigation and prosecution in the midst of an ongoing conflict that qualified as one of the worst in the world. In doing so, the Office of the Prosecutor opened itself to every possible complication that accompanies an attempt to carry on a criminal investigation in the middle of a war. These include, most notably, the struggles of conducting field investigations within the war zone, of providing adequate protection to victims and witnesses within that zone, and of keeping ICC field staff safe. In the most extreme case, in Darfur, the Prosecutor decided not to conduct any investigations in Darfur itself because of the danger to victims and witnesses.<sup>19</sup> The perceived benefit of each of the early ICC interventions—a benefit outweighing the disadvantages—was the possibility of maximizing the opportunity to have a preventive effect on the conflict, rather than letting the violence run its course before attempting to punish the perpetrators of past atrocities.

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<sup>18</sup> For example, the reasons that the Office of the Prosecutor declined to open investigations in Iraq and Venezuela were publicized in letters dated February 9, 2006, from the Prosecutor of the ICC. Letter from Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court (Feb. 9, 2006), *available at* [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Iraq\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf) (regarding Iraq); Letter from Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court (Feb. 9, 2006), *available at* [http://www.icc-cpi.int/library/organs/otp/OTP\\_letter\\_to\\_senders\\_re\\_Venezuela\\_9\\_February\\_2006.pdf](http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf) (regarding Venezuela).

<sup>19</sup> See The Office of the Prosecutor of the Int'l Criminal Court, *Third Report of the Prosecutor of the International Criminal Court to the U.N. Security Council Pursuant to UNSCR 1593*, at 2 (June 14, 2006), *available at* [http://www.icc-cpi.int/library/cases/OTP\\_Report\\_UNSC\\_3-Darfur\\_English.pdf](http://www.icc-cpi.int/library/cases/OTP_Report_UNSC_3-Darfur_English.pdf). The evidence gathered before seeking the issuance of warrants of arrest was sought in seventy missions in seventeen countries. See Prosecutor v. Harun, Case No. ICC-02/05, Prosecutor's Application under Art. 58(7), para. 14 (Feb. 7, 2007), *available at* [http://www.icc-cpi.int/library/cases/ICC-02-05-56\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf).

An important qualification is that the Office of the Prosecutor did not target crimes committed as part of ongoing conflicts because of any unrealistic expectation that the ICC, in and of itself, can end violence through its interventions. Rather, it was hoped that by being prompt in pursuing its mandate of seeking accountability and naming perpetrators, the ICC could maximize the prospect that States and other parties could capitalize upon the ICC intervention to aid in ending the conflicts and deterring further crimes.

As might be expected, each situation has been unique and the progress has been varied. In Darfur, where the violence has been the most intense, the Sudanese government has resisted any type of international intervention and State actors are among the alleged perpetrators. It was never anticipated that the ICC intervention would, in itself, end the violence,<sup>20</sup> and no effort thus far—whether in the realm of peacekeeping, negotiation, or enforcement—has curbed that conflict. Nonetheless, as is described below, the international community may be neglecting an important opportunity by failing to press for execution of the ICC arrest warrants naming Sudanese nationals and thereby potentially to deter current and future perpetrators in Darfur. In Uganda, the issuance of ICC warrants of arrest appears to have had a strong positive effect. The warrants of arrest naming the top leadership of the Lord's Resistance Army (LRA) are seen to have motivated that leadership to enter into negotiations to end the twenty-year war that the LRA had been waging against the Ugandan government.<sup>21</sup> Today, whether

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<sup>20</sup> United Nations Security Council Resolution 1593, which on March 31, 2005, referred the Darfur situation for ICC investigation, was adopted soon after the adoption of two other resolutions relating to Darfur. S.C. Res. 1593, U.N. Doc. S/Res/1593 (Mar. 31, 2005). U.N. Security Council Resolution 1590 sought to foster peace in Darfur by establishing the U.N. Mission in Sudan (UNMIS) and encouraging the UNMIS to aid the African Union Mission in Sudan. S.C. Res. 1590, paras. 1–2, U.N. Doc. S/Res/1590 (Mar. 24, 2005). U.N. Security Council Resolution 1591 called on all parties to the conflict in Darfur to continue seeking a negotiated peace. *See* S.C. Res. 1591, para. 2, U.N. Doc. S/Res/1591 (Mar. 29, 2005).

<sup>21</sup> *See, e.g.*, Press Release, Security Council, Under Secretary-General Calls for Greater Security Council Commitment to Ending Conflicts in Democratic Republic of Congo, Northern Uganda, U.N. Doc. SC/8831 (Sept. 15, 2006) (reporting that then Under-Secretary General for Humanitarian Affairs Jan Egeland had informed the Security Council of his belief “that the indictments had been a factor in pushing the LRA into negotiations, and that they should not disrupt the talks, and that there could be no impunity for mass murder and crimes against humanity.”), available at <http://www.un.org/News/Press/docs/2006/sc8831.doc.htm>; The Head of Delegation, *Statement on Behalf of Uganda*, 3, delivered to the Fifth Session of the Assembly of State Parties of the Int'l Criminal Court (Nov. 23, 2006), available at [http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-132-AnxA\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-132-AnxA_English.pdf) (“I would like to emphasize that if was not for the warrants of arrest hanging over the heads of the inditees, the LRA may not have agreed to the peace process.”); *Northern Uganda Peace Process: the Need to Maintain Momentum*, 46 BRIEFING ON AFR. INT'L CRISIS GROUP at 8, 12 (2007) (noting that “[t]he ICC investigation of the LRA has been crucial for promoting peace, improving security in Northern Uganda, and embedding international accountability standards into



the LRA leadership will face arrest and accountability remains unclear, but an undoubted benefit flowing from the ICC intervention is that hundreds of thousands of refugees from the war are now returning to their homes, crop-lands, and schools after spending years living in camps for the internally displaced.<sup>22</sup>

The foregoing suggests just a few of the ways in which the most recent instrument of international justice—the ICC—represents the truly significant gains that have been made, since the Genocide Convention was adopted, in pursuing and fulfilling the mission of punishing and preventing genocide and other mass atrocities. Certainly, there is much to suggest that the drafters of the Genocide Convention would have been impressed that States, albeit after six additional decades of discussion of the need to punish crimes under international law, reached the breadth and depth of consensus reflected in the Rome Statute. The fact that the ICC is now fully operational, despite all of the difficulties during negotiations and efforts to frustrate implementation of the Rome Statute,<sup>23</sup> represents the fulfillment of the fundamental aspiration of the Genocide Convention: that an “international judicial organ” be vested by States with the authority to try perpetrators of crimes against mankind.

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negotiations” and observing that “[t]he threat of international prosecution helped bring the LRA to the bargaining table and remains important”).

<sup>22</sup> See, e.g., U.N. Office for the Coordination of Humanitarian Affairs, *Uganda Humanitarian Situation Report*, Dec. 1–31, 2007, Sec. III, available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/168E810AF80AA685C12573D9003F785C/\\$file/0712+Uganda+Humanitarian+Update+December+2007.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/168E810AF80AA685C12573D9003F785C/$file/0712+Uganda+Humanitarian+Update+December+2007.pdf) (estimating that populations in camps for the internally displaced in northern Uganda have fallen from 1.7 million to about 780,000 from the end of 2005 to May 2007); Moses Odokonyero, *Uganda: Across the Airwaves Comes Reassurance to Come Home*, UNHCR NEWS STORIES, Oct. 31, 2007, <http://www.unhcr.org/news/NEWS/472609fa2.html> (reporting that the improvement in security resulting from peace talks has made it possible for approximately a half million refugees in Northern Uganda to leave camps and return to homes, villages, and parishes of origin).

<sup>23</sup> The most well-known opposition has come from the U.S. government, which passed legislation forbidding the cooperation of governmental agencies with the ICC, and so-called Article 98 agreements, conditioning the ability of other governments to receive U.S. aid upon agreement not to surrender to the ICC any U.S. national named in an ICC arrest warrant. See American Servicemembers’ Protection Act of 2002, 22 U.S.C. § 7421–7433 (2007); see John R. Bolton, Under Secretary for Arms Control and Int’l Security, Remarks at the American Enterprise Institute: American Justice and the International Criminal Court (Nov. 3, 2003), available at <http://www.state.gov/t/us/rm/25818.htm> (remarking that “. . . in order to protect all of our citizens, the United States is engaged in a worldwide effort to conclude legally binding, bilateral agreements that would prohibit the surrender of U.S. persons to the Court.”).

## NEED

ICC operations to date also underscore the difficulties and challenges of seeking accountability for the world's worst crimes. It is not a difficult exercise to identify the failures and shortcomings in ongoing efforts to punish and deter perpetrators of the world's gravest crimes. Still, examining what the ICC has been able to do in its first years—and what it has not done or cannot do—sharpens the exercise. This is because the ICC, since the inception of the idea for such a court, has shouldered the highest expectations of those who support accountability for crimes under international law. It lives in the hopes and imaginations of many as the ultimate instrument of justice. At the same time, the ICC was never intended, nor designed to be, a cure-all instrument. The limitations on its authority, as well as its powers, were carefully drawn and agreed upon by the States at Rome.

The result has been that even in its first years of operation, and despite the not inconsiderable achievements of the ICC to date, an “expectations gap” has been revealed—a space between what observers aspire for the ICC to do and what the ICC has accomplished or attempted. Analyzing the gap, and the degree to which expectations about the ICC are realistic, begins to suggest the next set of challenges for enforcing an international rule of law. Two challenges bear consideration, particularly in light of the preoccupations and aspirations of those who negotiated and drafted the Genocide Convention. These challenges are to continue to build a truly global system of justice, based in complementarity, and to muster and strengthen the political will necessary to make that system effective in combating impunity.

*A. Strengthening of a Global System of Accountability*

First, the ICC has served to emphasize that real progress in the fight against impunity will come through deepening and reinforcing a truly global system of accountability, rather than reliance on the latest instrument or “international judicial organ.” Some aspects of the ICC's design—its permanence and theoretically global jurisdiction—can promote an expectation that the ICC will rapidly bring justice to numerous perpetrators of mass crimes. The degree of selectivity with which the ICC has proceeded thus far—ten persons named in warrants of arrest in four massive conflicts—should serve to moderate any such expectation.

Over time, the ICC will be able to increase its volume of cases, but an important outer limit exists: the ICC, like every internationalized tribunal before it, will never have the capacity to investigate and prosecute more than a small fraction of the perpetrators who fall into the category of the

“most responsible.”<sup>24</sup> States determine the budgets of internationalized courts and it is both rational and likely that States will not fund more than a limited number of representative prosecutions in any single judicial organ. In the ICC’s case, the member States approve the anticipated number of situations and trials during the budgeting process,<sup>25</sup> and thus the workload of the Court and the number of cases it can commence are regulated—not by the Prosecutor or the judges—but by the funders.

The State funders’ requirements can be stringent. In the case of Darfur, the investigation was referred to the ICC by the exceptional measure of a U.N. Security Council Resolution. The Security Council resolution that referred the Darfur investigation, after stating the Security Council’s decision and urging all States to cooperate fully in assisting the ICC,<sup>26</sup> simultaneously provided that none of the expenses of the Darfur investigation would be borne by the United Nations or offset by means other than voluntary contributions by States.<sup>27</sup> Funding constraints also mean that occurrences that are common in law enforcement can trigger budgeting crises. For example, when co-defendants are arrested separately, and separate trials follow, the resource drain correspondingly can double, and the next prosecutorial priority may be crowded out.

The lesson is that the perspective of the States, and the scale of the undertaking they are willing to support, must temper expectations and planning in the ongoing fight against impunity. So far, the ICC has opened investigations arising from four vast and distinct conflicts, based on a smaller budget than the current budgets of the ICTY or ICTR.<sup>28</sup> If one accepts that

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<sup>24</sup> Like all internationalized courts before it, the ICC has adopted a policy of focusing on the most responsible perpetrators. See OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 7 (Sept. 2003), available at [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf).

<sup>25</sup> See, e.g., INT’L CRIMINAL COURT, PROPOSED PROGRAM BUDGET FOR 2008 OF THE ICC, para. 8, 13–25 (July 25 2007), available at [http://www.icc-cpi.int/library/asp/ICC-ASP-6-8\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-6-8_English.pdf) (setting forth the assumptions upon which the budget is based, including the number of investigations and trials).

<sup>26</sup> See S.C. Res. 1593, U.N. Doc. S/Res/1593 (Mar. 31, 2005).

<sup>27</sup> See *id.*

<sup>28</sup> The ICC’s budget for 2007 was approximately €89 million euro, or \$120 million dollars, paid by member States. See Press Release, Int’l Criminal Court, Assembly of States Parties Concludes Its Deliberations of the Fifth Session, ICC-ASP-20061201-190-En (Dec. 1, 2006), available at <http://www.icc-cpi.int/press/pressreleases/214.html>. The ICTY’s biennial budget for 2006–2007 was approximately \$278 million, and the ICTR biennial budget for the same period was approximately \$250 million. See ICTY, *Report of the Int’l Tribunal for the Prosecution of Persons Responsible for Serious Violations of Int’l Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, para. 113, U.N. Doc. A/62/172-S/2007/469, available at <http://www.un.org/icty/rappannu-e/2007/AR07.pdf>; ICTR, GENERAL INFORMATION: BUDGET AND STAFF, <http://69.94.11.53/default.htm> (follow

the ICC's resources are unlikely to be increased by multiples in upcoming years, one must also accept that the ICC is unlikely to pursue anything near the number of prosecutions, in any one situation, that the ICTY or ICTR achieved. As a matter of political reality, and to maximize its unique impact, the ICC must spread its work across numerous different situations, but within each situation focus more stringently on the most responsible perpetrators.

The more promising solution to the inevitable and persistent “impunity gap” is to use the work of the ICC to reinforce the global system of justice, rather than expecting the ICC to grow into an assembly line. The Genocide Convention itself suggests this solution because it recognized that the efforts of any “international judicial organ” should supplement those of other competent courts. In 1948, the only available alternative was a competent tribunal in the State in which the crimes were committed.<sup>29</sup> Sixty years later, and likely beyond the imaginings of the Genocide Convention drafters, there is a menu of judicial mechanisms to bring perpetrators of genocide and other crimes under international law to justice. The *ad hoc* tribunals have tried cases, including cases of genocide, arising from the conflicts in Yugoslavia and Rwanda, hybrid tribunals are operating in Sierra Leone and Cambodia, and domestic prosecutions of alleged war criminals and violators of human rights—such as the prosecutions of Augusto Pinochet and Alberto Fujimori—are gaining in number and credibility. Initiatives have expanded well beyond any single “international judicial organ,” and they share, in addition to a common mission, a growing body of law and experience.

The challenge therefore is to build the complementarity advocated in the Genocide Convention and the Rome Statute: to strengthen the global system of justice by maximizing the effectiveness and impact of the efforts of the combination of judicial organs addressing crimes under international law. Each component of the system is already reinforcing the others, and the objectives of punishment and prevention are best served by actively promoting this reinforcement. The scope, quality, and effectiveness of domestic enforcement work are enhanced by the growth and acceptance of international criminal law standards. Proceedings conducted by the ICC and other internationalized tribunals provide starting points and blueprints for proceedings involving perpetrators in the same conflicts who are tried domestically. The ICC can serve as a strong advocate of the international rule of law, as well as a global monitor of non-compliance, making it easier to pri-

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“About the Court” hyperlink, then follow “General Information” hyperlink) (last accessed Nov. 4, 2007).

<sup>29</sup> *Genocide Convention*, *supra* note 2, at art. 6.

oritize and divide the seemingly limitless work of devising and implementing remedies, including the work of prosecuting violators.

The suggestion is not that all judicial instruments will work equally well. The constant factor, from 1948 to date, is the vastness of impunity and the impossibility of reaching all perpetrators. What has changed, through the robust growth of initiatives to enforce the international rule of law, is the opportunity and responsibility to evaluate and compare outcomes, and to be active and strategic in promoting the combination of remedies that can best advance the objective.

### *B. Constancy in Political Will*

The second challenge in preventing and punishing genocide and other mass crimes, as further exposed by the early operations of the ICC, is the ultimate dependence of the success of each anti-impunity instrument—including the ICC—upon the political will of States. The Genocide Convention both reflected a compact among States to combat genocide and diagnosed that any success in combating the “odious scourge of genocide” would depend on continuing “international cooperation” furnished by States.<sup>30</sup> It can indeed seem a dull truism to declare that mass atrocities can only be prevented and punished through State cooperation and action. But again, the ICC experience is instructive because the expectation seems to have been that this new, permanent “judicial organ” would somehow magically circumvent the hardest problem of mobilizing sufficient will (on the part of States in particular) to compel alleged perpetrators to be brought to justice.

The most conspicuous ICC-related example of the hard reality that State support will always determine the success or failure of an effort to bring accountability is the following circumstance: the ICC has obtained the arrest of only one individual who has been named in an ICC warrant of arrest who was not previously in State custody. Of the three individuals currently in detention at The Hague, only Mathieu Ngudjolo Chui, a former DRC militia leader, was arrested following issuance of an ICC arrest warrant. Thomas Lubanga Dyilo and Germain Katanga were transferred into ICC custody following domestic detention in the DRC. Seven alleged perpetrators—including all of the individuals charged in the course of the Darfur and Uganda investigations—remain at large. These include two Sudanese nationals named in warrants of arrest in April 2007: Ahmad Mohammad Harun, the former Minister of State for the Interior in the Government of Sudan and the alleged orchestrator of the arming and funding of Arab Militia in Darfur, and Ali Muhammad Ali Abd-Al Rahman (known as Ali Kushayb), an alleged Janjaweed militia leader. Also named in as-yet-

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<sup>30</sup> See *id.* at pmb1.

unexecuted warrants of arrest are Joseph Kony, the leader of the LRA, and three other top LRA commanders, Vincent Otti, Okot Odhiambo, and Dominic Ongwen.<sup>31</sup> Bosco Ntaganda, a co-defendant of Lubanga Dyilo, is at liberty and remains an active and high-ranking militia leader in the DRC.

The misperception is that the ICC is the party responsible for executing these arrests and for moving the Darfur and Uganda cases past the pre-trial stage. The fact is that the ICC, by conscious design, was never given a police force or authority to arrest. Rather, the States, via the Rome Statute, retained this responsibility.<sup>32</sup> This means that the mission of rendering punishment for atrocities—at the ICC as at any other judicial mechanism—cannot move forward absent state support in furtherance of investigations and cases.

The history and status of the ICC's intervention in Darfur illustrates the division of responsibilities and the continued centrality of the issue of political will. The Security Council's referral of the situation in Darfur to the ICC for investigation in March 2005 was an achievement in expressing an international consensus that the perpetrators of the horrific violence and crimes in Darfur should be held accountable. When, in April 2007, the ICC issued the arrest warrants, those warrants named individuals squarely within the power of the Sudanese government to turn over. Harun is currently serving as the Minister of Humanitarian Affairs, and Kushayb, according to the Sudanese government, was made to face domestic charges proceedings, of which he was reportedly acquitted. The Sudanese government has stated repeatedly that it will surrender no Sudanese national to the ICC's jurisdiction.<sup>33</sup>

The question is now by what mechanism will Harun or Kushayb—or for that matter any other individuals who might be named in any warrants

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<sup>31</sup> Joseph Kony reportedly ordered the killing of Vincent Otti in October 2007, because Otti favored peace, but the ICC proceedings against Otti have not yet been formally terminated. *See, e.g.,* Francis Kwera, *Deputy of Uganda's LRA Executed—Deserter*, REUTERS, Nov. 30, 2007, <http://www.alertnet.org/thenews/newsdesk/L30552222.htm>. A fifth LRA commander for whom a warrant of arrest was issued, Raska Lukwiya, died while fighting Ugandan troops in August 2006, and the proceedings against him were thereafter terminated. *See* Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiya (July 11, 2007), *available at* [http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-248\\_English.pdf](http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-248_English.pdf).

<sup>32</sup> *Rome Statute*, *supra* note 5, at art. 89 (providing that arrest and surrender shall be carried out, at the request of the Court, by any State within which the person named in the warrant may be found).

<sup>33</sup> *See, e.g., Sudan Adamant on Darfur 'Atrocities' Suspects*, SUDAN TRIB., Jun. 10, 2007, *available at* <http://www.sudantribune.com/spip.php?article22297> (quoting statement of Presidential Assistant Nafaa Ali Nafaa that the position of the government is "clear and there is no room for bargaining" on the subject of arresting persons sought by the ICC).

relating to the atrocities in Darfur—be brought to face justice?<sup>34</sup> What steps, if any, will be taken to enforce U.N. Security Council Resolution 1593, which both referred the situation in Darfur for ICC investigation and obligated the Sudanese government to cooperate “fully” in the ICC’s investigation?<sup>35</sup> Will States and the Security Council accept the stalemate between the ICC and the Sudanese government? The resolution to all of these questions, and therefore the success of the overall objective of bringing accountability in Darfur, lies not in the hands of the ICC, but within the power of the Sudanese government and the international community.

In Uganda, the question is also whether sufficient resolve exists or can be galvanized in furtherance of the mandate to bring justice. The remarkable achievement of a permanent end to violence in Northern Uganda may soon be realized, but nearly three years after issuance of warrants of arrest naming the top LRA leadership, the leadership remains at large, and progress toward the aim of accountability is at a standstill. Joseph Kony and other LRA leaders continue to deny having perpetrated any crimes and to refuse to release abducted women and children.<sup>36</sup> These leaders have offered peace only at the price of obtaining immunity from ICC prosecution.<sup>37</sup>

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<sup>34</sup> See Press Release, Security Council, International Criminal Court Prosecutor Tells Security Council Sudan’s Government Not Cooperating in Darfur Investigation, Massive Crimes Continue, U.N. DOC. SC/9186 (Dec. 5, 2007) (reporting that Sudanese government has not complied with its legal obligations and urging Security Council to request compliance with U.N. Security Council Resolution 1593), available at <http://www.un.org/News/Press/docs/2007/sc9186.doc.htm>.

<sup>35</sup> See S.C. Res. 1593, *supra* note 26.

<sup>36</sup> E.g., *U.N. Envoy Sees Uganda Rebel Chief*, BBC NEWS, Nov. 12, 2006, <http://news.bbc.co.uk/1/hi/world/africa/6139554.stm> (reporting that request for LRA to free abducted children had not been successful and that Joseph Kony denied holding women or children against their will); Press Release, Security Council, Security Council Press Statement on Situation in Northern Uganda, U.N. DOC. SC/9167, AFR/1618 (Nov. 13, 2007) (“The Security Council members again urged the Lord’s Resistance Army to release immediately all women, children and other non-combatants.”), available at <http://www.un.org/News/Press/docs/2007/sc9167.doc.htm>.

<sup>37</sup> See, e.g., Press Release, U.N. Special Envoy for Areas Affected by Lord’s Resistance Army On Peace Talks between Ugandan Government, Rebel Group, Nov. 13, 2007 (reporting that in context of peace negotiations, LRA leadership had “said they would not submit to the Court. . .”), available at [http://www.un.org/News/briefings/docs/2007/071113\\_Chissano.doc.htm](http://www.un.org/News/briefings/docs/2007/071113_Chissano.doc.htm); *LRA Rebels Want Ugandan Justice*, BBC NEWS, Nov. 2, 2007, <http://news.bbc.co.uk/1/hi/world/africa/7074471.stm> (reporting that LRA negotiator wanted the ICC warrants of arrest withdrawn so that accountability issues could be handled domestically); *U.N. Envoy Sees Uganda Rebel Chief*, *supra* note 36 (reporting that Joseph Kony asked U.N. humanitarian chief for cancelling of ICC warrant of arrest as condition for attending peace talks); *Ugandan Rebels in Amnesty Demand*, BBC NEWS, Sept. 6, 2006, <http://news.bbc.co.uk/1/hi/world/africa/5320254.stm> (quoting Vincent Otti: “No rebel will come out unless the ICC revokes the indictments.”).

The point is that even the advent of new and potentially powerful mechanisms for promoting accountability will not obviate the need to continue tackling the hardest and most eternal problem: that of generating the political will within the international community to bring perpetrators to justice. Whether the perpetrator is Radovan Karadic, or Ahmad Harun, or Joseph Kony, an inability to arrest, as just one example, utterly frustrates the core objective of punishing crimes under international law. It renders theoretical any goal of rendering judgments or meting out punishment.

The difficulty of galvanizing international support for arrests and prosecutions cannot be equated, however, to a lack of progress in the war against impunity. Each judicial organ that embarks on the mission of bringing accountability adds another instrument that can exert moral authority, and thus promote consensus that perpetrators should be brought to account. The power of exposing violence to be criminal under an international rule of law, and of naming perpetrators, cannot be underestimated. The ICC, because it stands as a representative of 106 States, should be the institution most capable of exerting moral suasion resulting in State action. Still, if States, fail to provide the support necessary to advance the cases commenced in the ICC, they will face questions about the depth of their commitment to the goal of actually ending impunity.

The challenge is for all actors who play a strong role in advocating accountability for crimes against mankind—States, the United Nation, regional organizations, civil society, the media, and grassroots organizations—to exert the maximum possible pressure on States to perform their responsibilities of supporting international and domestic mechanisms for protecting populations.<sup>38</sup> It is vital that, at a minimum, the international community carry through criminal justice initiatives that it has directly prioritized or commenced, such as in Darfur. It is also critical that States fulfill obligations of cooperation they have undertaken with respect to the punishment of crimes under international law, by treaty, or by any other means.

The alternative—of permitting these obligations to remain unfulfilled or half-fulfilled—can only diminish the rule of law. It is predictable, for example, that it might be more difficult to muster the will to arrest an alleged perpetrator than to agree in principle to do so. States cannot neglect a treaty obligation to effectuate arrest, however, simply because a Court has specified alleged perpetrators, by exercising independent judgment. The Prosecutor of the ICC has reported that in reaction to the warrants of arrest issued in the Darfur situation, certain States or stakeholders in the ICC urged him to target lower level perpetrators who might be easier to arrest

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<sup>38</sup> In the case of Darfur, for example, activism at the grass roots level, media reporting, and the internet have each played strong roles in creating—to an unprecedented degree—pressure upon the international community to seek to punish and prevent mass crimes.



than ministers of state or militia leaders.<sup>39</sup> The choice is starkly presented: (1) to send a message that powerful perpetrators, at a minimum, can expect impunity, despite the expressed resolve of the U.N. Security Council that punishment be meted; or (2) to find the will and the means to execute the arrest warrants, and thereby reinforce the deterrent effect of the ICC, for perpetrators at all levels of responsibility. No court will pursue precisely the investigations and cases that the States might agree upon or prefer, and it is precisely this circumstance that will compel States to evaluate the advantages and disadvantages of either supporting judicial decision-making as a matter of principle, or of appearing to make politically expedient selections on a case by case basis.

#### CONCLUSION

The Genocide Convention referenced, very much as a prospect for the future, a single “international judicial organ” that would render judgment regarding the most serious crime of international concern, genocide. Sixty years later, it seems that the drafters’ aspirations of advancement were simultaneously too modest and too lofty. Today, there exists a network of judicial mechanisms, domestic and internationalized, for punishing and deterring crimes, including genocide, under international law. This network is fully engaged in strengthening an international rule of law by, among other things, punishing crimes and perpetrators who, in prior times, would never have faced justice. At the same time, the ability of courts to render judgments and impose punishment for the gravest of crimes, even in the case of the Court which fulfilled the hope of an “international judicial organ,” remains firmly tied to the will and power of States to compel the perpetrators of those crimes to be brought to court. Each advance in the ongoing mission of fighting impunity necessitates recreating the momentous achievement of sixty years ago: compelling and expressing a consensus that the civilized world finds certain crimes utterly repugnant to humanity and therefore necessary to punish and eliminate.

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<sup>39</sup> Luis Moreno-Ocampo, Statement of the Prosecutor, *in* COMPILATION OF STATEMENTS: THE ELEVENTH DIPLOMATIC BRIEFING OF THE INTERNATIONAL CRIMINAL COURT 8 (Oct. 10, 2007), available at [http://www.icc-cpi.int/library/about/ICC-DB11-St\\_en.pdf](http://www.icc-cpi.int/library/about/ICC-DB11-St_en.pdf).