The Role of the International Criminal Court in Preventing Atrocity Crimes through Timely Intervention
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From the Humanitarian Intervention Doctrine and Ex Post Facto Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court

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by

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‘[T]he brutal legacy of the twentieth century speaks bitterly’ of the collective inadequacies of international institutions and ‘the profound failure of individual States to live up to their most basic and compelling responsibilities.’

Given the profound and long-lasting costs to a society of engaging in atrocity crimes, strengthening preventative action becomes of utmost relevance.

This is emphasised by the emerging notion of ‘responsibility to protect’. In this inaugural lecture, I will address the role of the International Criminal Court (ICC) in implementing the notion of responsibility to protect through means other than ending impunity for past crimes.

I Humanitarian Intervention Doctrine and Responsibility to Protect

The nineties saw the establishment, by the United Nations (UN), or with the direct involvement of the United Nations, of several international tribunals with jurisdiction over atrocity crimes that had already taken place. These tribunals were characterised by their primacy over national jurisdictions, their temporary nature, and the limitation of their jurisdiction to a specific crisis situation, such as the breakup of the former Yugoslavia or the

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3 In this paper, the term ‘atrocity crimes’ includes the following crimes: genocide, crimes against humanity including ethnic cleansing, and war crimes. See in this regard, D. Scheffer, ‘Atrocity Crimes Framing the Responsibility to Protect’ (2007-2008) 40 Case Western Reserve Journal of International Law 111, 117 [hereinafter Scheffer, ‘Atrocity Crimes’]. See also D. Scheffer, ‘Genocide and Atrocity Crimes’ (2006) 1 Genocide Studies and Prevention 229, 238-9.

4 As UNGA, On Responsibility to Protect (Above n. 2) highlights at para 32, ‘[t]he difference between the two paths can amount to the choice between national potential preserved or destroyed.’

5 UNGA, On Responsibility to Protect (Above n. 2) at p. 2, paras 1-10.

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Rwandan genocide. As explained by Leila Sadat and Michael Scharf, they were part of a broader post-conflict UN strategy, and their primary goal was to facilitate reconciliation.

Extending the basis for judicial intervention, while perpetuating a global system that tolerated atrocity crimes through inaction, was unsustainable. As a consequence, the nineties also saw the greatest development of the humanitarian intervention doctrine, and its application to situations such as those in Somalia in 1993 and Kosovo in 1999. This doctrine is based on the understanding of sovereignty as responsibility, which can be traced back to Francisco de Vitoria and Bartolomé de las Casas. Their ideas led to the 1542 New Laws of the Indies, which abolished native slavery for the first time in European colonial history.


11 The ideas of Francisco de Vitoria (1483/1486-1546) and Bartolomé de las Casas (1485-1566) led to the approval of the ‘New Laws of the Indies for the Good Treatment and Preservation of the Indians’. The New Laws, which abolished native slavery for the first time in European colonial history, were passed to prevent the exploitation of the Indigenous peoples of the Americas by large scale landowners (*Encomenderos*) by strictly limiting their power and dominion. Francisco de Vitoria extrapolated his ideas of legitimate sovereign power to society at the international level. For him, not only relations between states ought to respect the rights of all, but there was also a common good of the world that was superior to the good of each state. As a result, relations between states had to pass from being justified by force to being justified by law and justice. See the translation of those extracts of Vitoria’s works *De Indis* (1532) and *De Jure belli Hispanorum in barbaros* (1532) contained in his posthumous work F. de Vitoria and J.B. Scott (ed.), *Relaetiones Theologicae* (New York, London, Oceania Publications, 1917). They were reprinted by the Carnegie Institution of Washington in 1964 with the edition of Ernest Nys, who highlighted his influence over Hugo Grotius. See also B. de las Casas and N. Griffin (tr.), *Brevissima relation de la destrucción de las Indias (A Short Account of the Destruction of the Indies)* (London, Penguin Classics, 1999). This is a translated version of the 1542 De las Casas work. After the approval of the 1542 New Laws, a debate concerning the treatment of natives of the Indies was held in the Spanish city of Valladolid in 1550 and 1551. It opposed two main positions. On the one hand, Bartolomé de las Casas, Dominican and Bishop of Chiapas, argued that natives of the Indies were free men in the natural order and deserved the same treatment as others, according to Catholic theology. On the other hand, fellow Dominican Juan Ginés Sepúlveda insisted the Indians were natural slaves, and therefore reducing them to slavery or servitude was consistent with Catholic theology and natural law. The New Laws were kept after the triumph of De las Casas’ position. See
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The leading representative of the School of Salamanca, Suárez, underscored that political power originates in the consensus of free wills, and that men are thus entitled to disobey even to the point of deposing an unjust government. Subsequently, Hugo Grotius, John Locke, and the contract theorists of the eighteenth century, developed the notion of sovereignty as responsibility so as to shape it into its current form.

Based on this premise, the humanitarian intervention doctrine, formulated for the first time by Hersch Lauterpacht in the immediate aftermath of World War II, justifies a right of armed intervention into a state that is unwilling or unable to protect its own population against atrocity crimes. According to its supporters, ‘humanitarian intervention [is] the proportionate transboundary help, including forcible help, provided by governments to individuals in another state who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government.’ See Teson, Humanitarian Intervention (Above n. 10) at 5. See also B.F. Burmester, ‘On Humanitarian Intervention: The New World Order and Wars to Preserve Human Rights’ (1994) 1 Utah Law Review 269; J. Delbruck, ‘A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations’ (1992) 67 Indiana Law Journal 887, 897-901; R. Gordon, ‘Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti’ (1996) 31 Texas International Law Journal 43, 44-6; R. Lillich, ‘Forcible Self Help Under International Law’ (1980) 62 Readings in International Law from the Naval War College Review 129, 134; J. Nafziger, ‘Self-Determination and Humanitarian Intervention in a Community of Power’ (1991) 20 Denver Journal of International Law and Policy 9, 21-6. For these authors, humanitarian intervention was not unlawful under article 2(4) of the UN Charter because (i) it does
to its supporters, humanitarian intervention by the United Nations, or by states with or without UN authorisation, is consistent with the principles of sovereignty and territorial integrity embraced in the UN Charter. Such principles, they argued, aim to protect the citizens of states rather than states as entities. As a result, they cannot apply in favour of states that perpetrate or otherwise fail to prevent atrocity crimes.

Nevertheless, the humanitarian intervention doctrine has been progressively abandoned in the last decade for several reasons. First, it failed to provide precise criteria to define those circumstances giving rise to the alleged right to armed intervention. Second, it did not receive broad consensus as many argued that the UN Charter’s prohibition on the use of force admits of no exception for humanitarian intervention. Third, as the notion of humanitarian intervention was limited to reaction to actual atrocity crimes, it left states with no other option than to choose between two undesirable


18 Lillich, ‘Forcible Self-Help’ (Above n. 17) at 332-8; Lillich, ‘Humanitarian Intervention’ (Above n. 17) at 229; Lillich, ‘Intervention’ (Above n. 17); Moore, ‘Toward’ (Above n. 17) at 24-5; Reisman, ‘Sovereignty’ (Above n. 17).


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choices: (i) standing by in the face of mounting civilian deaths; or (ii) deploying military force to protect the threatened populations.22

With the loss of support for the humanitarian intervention doctrine and the structural limitations of ex-post facto judicial institutions, there was a need to identify new effective mechanisms for preventing atrocity crimes. The notion of responsibility to protect, endorsed by the UN General Assembly at the 2005 World Summit,23 reaffirmed by the UN Security Council in 2006,24 and further elaborated on by the UN Secretary-General in 2009, aims at fulfilling this role.25

Like the humanitarian intervention doctrine, the notion of responsibility to protect is based on the understanding of sovereignty as responsibility. Nevertheless, it has several distinctive features, which, as Carsten Stahn has pointed out,26 have secured its broad acceptance in a short period of time. First, it addresses the dilemma of intervention from the perspective of those

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22 UNGA, On Responsibility to Protect (Above n. 2) at paras 5-6. Moreover, as highlighted by the ICISS, ‘external military intervention for humanitarian protection purposes has been controversial both when it has happened – as in Somalia, Bosnia and Herzegovina and Kosovo – and when it has failed to happen, as in Rwanda.’ ICISS, ‘Responsibility to Protect’ (Above n. 9) at 7.


suffering atrocity crimes rather than from the perspective of those asserting a right to intervention.\(^{27}\)

Second, it does not limit responsibility and intervention to reaction to actual atrocity crimes. On the contrary, the notion of responsibility to protect constitutes a holistic approach to address crisis situations\(^{28}\) based on the premise that an effective response requires a continuing intervention that starts with the adoption of preventative measures.\(^{29}\) Only if such measures fail, reaction to actual atrocity crimes will be needed.\(^{30}\) Moreover, the determination of the most appropriate mechanisms for reaction, including military intervention, must be driven by the need to subsequently fulfil the commitment to build a long-lasting peace, and promote good governance, rule of law and sustainable development.\(^{31}\)

Third, the notion of responsibility to protect is based on a complementarity approach with three main Pillars. According to Pillar I, states whose populations may be at risk have the primary responsibility to protect them from the incitement and commission of atrocity crimes.\(^{32}\) When states concerned are unable to do so because of capacity deficits or lack of territorial control, third states, as well as the international community at large, must support and assist them under Pillar II.\(^{33}\) If assistance measures are of no use...
because of the unwillingness of national leadership or the great deficit of national capacity, responsibility devolves to the international community to take timely and decisive action under Pillar III, including armed intervention in extreme circumstances.

As a result, the notion of responsibility to protect can be said to place a particular emphasis on prevention. This has led, in turn, to a shift in the focus of the debate from the criteria under which military intervention, with or without UN authorisation, may be justified, or even required, to the timely implementation of effective preventative measures.

II The Two Dimensions of the ICC’s Preventative Mandate: General Prevention and Timely Intervention

As the 21st century has witnessed a change in focus from the humanitarian intervention doctrine to the notion of responsibility to protect, it has also experienced a shift from ex post facto judicial institutions to the establishment and consolidation of a permanent International Criminal Court. As Cherif Bassiouni has underlined, the ICC represents a rather different approach to the adjudication of atrocity crimes because it: (i) has been created through an international treaty by the States Parties; (ii) constitutes an independent international organisation with a permanent nature; and (iii) is not part of a broader post-conflict UN strategy.

34 UNGA Res A/Res/60/1 (Above n. 23) at para 139: ‘In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.’

35 UNGA, On Responsibility to Protect (Above n. 2) at 40, 50, 56.

36 Ibid. at 1-2.


39 The ICC has its own political and financial organs, which include an Assembly of States Parties, as well as a Bureau and a Secretariat of the Assembly, and a Budget and Finance Committee (See art 112 ICC Statute; Assembly of States Parties, ‘ICC Financial Regulations and Rules,’ ICC-ASP/7/5 (21 Nov 2008). Moreover, as provided for in art. 4 ICC Statute, it has international legal personality, and the necessary legal capacity for the exercise of its functions and the fulfilment of its purposes.
In particular, the ICC has been established with a view to act over situations of atrocity crimes that take place after 1st July 2002\textsuperscript{40} in the territory of any of its 114 States Parties,\textsuperscript{41} and even outside such territory when there is a substantial involvement of their nationals\textsuperscript{42} or a UN Security Council’s referral.\textsuperscript{43} Furthermore, the ICC operates on the basis of a complementarity regime, according to which it can only exercise its jurisdiction when states are inactive, or are unwilling or unable to genuinely carry out their own national proceedings.\textsuperscript{44}

There is a clear connection between the notion of responsibility to protect and the ICC’s mandate as both have their focus on future situations of atrocity crimes,\textsuperscript{45} and are based on the primary responsibility of the states concerned. Indeed, last year, UN Secretary-General Ban Ki-moon referred to the ICC Statute as ‘one of the key instruments relating to the responsibility to protect.’\textsuperscript{46}

In this regard, it must be noted that the ICC shares with \textit{ex post facto} judicial institutions a commitment to ending impunity as a means to promote: (i) positive general prevention, consisting of upholding the application of international criminal law and reinforcing the core societal values protected therein; and (ii) negative general prevention or deterrence, resulting from sending the message to the world’s leadership that those engaging in atrocity crimes will not get away with them.\textsuperscript{47} Such commitment is fulfilled by combining judicial proceedings with a number of external relations, outreach and public information activities.\textsuperscript{48} The ICC’s efforts on general prevention may assist UN officials and other stakeholders to emphasise, under Pillars II and III of the notion of responsibility to protect, both the costs of engaging in atrocity crimes and the benefits of abandonment.\textsuperscript{49}

Nevertheless, unlike \textit{ex post facto} judicial institutions, the ICC’s preventative mandate has a second dimension. It consists of timely intervention into

\textsuperscript{40} See art. 11 ICC Statute.
\textsuperscript{41} See art. 12 ICC Statute.
\textsuperscript{42} See art. 12 ICC Statute.
\textsuperscript{43} See arts. 12, 13 (b) ICC Statute.
\textsuperscript{44} See Para 10 of the Preamble ICC Statute; arts 1, 17 ICC Statute. See also \textit{Situation in the Democratic Republic of the Congo} (Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case) ICC-01/04-01/07 0A 8 (25 Sep 2009).
\textsuperscript{45} The notion of responsibility to protect is confined to four specific crimes (genocide, crimes against humanity, war crimes and ethnic cleansing), which, along with the crime of aggression, also constitute the jurisdiction \textit{ratione materiae} of the ICC (Art. 5 ICC Statute). Nevertheless, it is important to highlight that the International Commission on Intervention and State Sovereignty envisioned the notion of responsibility to protect as having a significantly wider scope (See ICISS, ‘Responsibility to Protect’ (Above n. 9)). On the controversy about the potential for a wider scope for the notion of responsibility to protect, see Scheffer, ‘Atrocity Crimes’ (Above n. 3) at 113-6.
\textsuperscript{46} UNGA, On Responsibility to Protect (Above n. 2), at para 19.
\textsuperscript{47} Cryer, \textit{An Introduction} (Above n. 7) at 22-39.
\textsuperscript{48} ICC, ‘Outreach’, <www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Outreach>.
\textsuperscript{49} UNGA, On Responsibility to Protect (Above n. 2) at paras 19, 53.
situations where there are tangible threats of future atrocity crimes, or where atrocity crimes are already taking place. It is mainly discharged by the ICC Prosecutor through his preliminary examinations and investigations, and may cover a broad range of situations as shown by: (i) the 9000 communications received to-date by the Prosecutor from individuals located in more than 140 countries;50 and (ii) the variety of geographical locations in which preliminary examinations or investigations have been started since 2003: Afghanistan, Central African Republic, Colombia, Darfur, Democratic Republic of Congo, Georgia, Guinea, Iraq, Ivory Coast, Kenya, Palestine, Uganda and Venezuela.51

As the notion of responsibility to protect places the emphasis on prevention through timely intervention, the ICC’s timely intervention can make a unique contribution to discharging the responsibility of the international community under Pillars II and III of the said notion.

III The ICC’s Timely Intervention as a result of Tangible Threats of Future Atrocity Crimes

Atrocity crimes are not unavoidable. They take long planning and preparation, as they require a ‘collective effort’ and an ‘organisational context’.52 Moreover, there is usually sufficient information about impending atrocity crimes, which, regrettably, is ignored or minimised by high-level national and international decision makers with competing political agendas.53 Hence, statutory provisions on planning, preparation, incitement and attempt are of the utmost relevance for the effectiveness of preventative efforts through timely intervention. It may thus come as no surprise that, except for the definition of genocide which has always been taken verbatim from the 1948 Genocide Convention,54 the approach taken by the ICC Statute is rather

50 To date the ICC Prosecutor has received 8733 individual communications. See ICC, ‘Communications, Referrals, and Preliminary Examinations’ <www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Communications+and+Referrals.htm>.

51 Ibid.


53 UNGA, On Responsibility to Protect (Above n. 2) at para 6.

54 Genocide is the only exception as its definition, including the references to conspiracy, incitement and attempt, has been taken verbatim by the statutes of ex post facto judicial institutions, such as the ICTY, the ICTR and the Special Court for Sierra Leone, from the language of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, which expressly criminalises in its article 3 conspiracy to commit genocide, direct and public incitement to commit genocide and attempt to commit genocide. See also J. Ohlin, ‘Attempt to Commit Genocide’, in: P. Gaeta (ed.), The UN Genocide Convention: A Commentary (Oxford, Oxford University Press, 2009) 185 [hereinafter Ohlin, ‘Attempt’]; A. Eser, ‘Individual Criminal Responsibility’, in:
different than that taken by the statutes of the ex post facto judicial institutions. In the latter, as William Schabas has explained, provisions on planning, preparation, incitement and attempt would simply have been superfluous and were not included.  

Article 25 of the ICC Statute provides for liability for attempt in relation to all atrocity crimes (not just genocide), and attaches such liability to ‘action that commences the execution of a crime by means of a substantial step’. Although this definition requires more than just planning, the question arises as to where to draw the line between mere preparatory acts, and conduct amounting to a substantial step for the execution of atrocity crimes. Neither the ICC Statute nor the case law of international tribunals provide guidance on this matter. Some national systems, such as Germany’s, have taken a more restrictive approach and require a direct movement towards the completion of the crime. Others, such as the United States’ (US), favour a broader conception by attaching liability for attempt to the possession, collection or fabrication of the means of the crime or the tracking of the victims of the crime.  

As a result, should the ICC case law embrace a less restrictive approach, liability for attempt may encompass situations such as that which occurred in Rwanda, where for sixteen consecutive months starting in January 1993, more than half a million machetes were imported and distributed, along with firearms and grenades, under the guise of a self-defence programme.  

Article 25 of the ICC Statute also attaches criminal liability to acts of ‘public and direct incitement to commit genocide’. Despite its limitation to the crime of genocide, its scope of application may be significant in situations like that in Rwanda where, starting in 1991, the media systematically

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56 See art. 25 (3) (f) ICC Statute.

57 Ohlin, ‘Attempt’ (Above n. 54) at 178.

58 Ibid. at 178, 182-4.

59 See StGB § 22 (Germany). See also Eser, ‘Individual’ (Above note 54) at 812.


62 Regardless of whether genocide actually takes place. See in this regard *Prosecutor v. Akayesu* (Judgement) ICTR-96-4-T (2 Sep 1998) para 561. See also J. Ohlin, ‘Incitement and Conspiracy to Commit Genocide’, in: P. Gaeta (ed.), *The UN Genocide Convention: A Commentary* (Oxford, Oxford University Press, 2009) 192-5. See in particular art. 25 (3)(e) ICC Statute. In this particular area, the ICC Statute is somewhat more restrictive than the Genocide Convention, as well as than the statutes of the other international and internationalised courts and tribunals, which, although limited to the crime of genocide, provided the notion of ‘conspiracy’.
incited Hutus to perpetrate violence against Tutsis, or like that in Cambodia, where for years, the radio of the Khmer Rouge urged listeners to ‘purify’ the ‘masses of the people’ of Cambodia.

With regards to the crime of aggression, the definition approved in June 2010 at the first ICC Review Conference, attaches criminal liability to the ‘planning’ and ‘preparation’ of an act of aggression. This brings the ICC Statute more in line with most national systems, in which criminal liability can arise as a result of agreeing to commit a crime, participating in the design of a criminal plan or contributing to establish the necessary conditions for its execution. Indeed, if today it is broadly accepted at the national level that criminal liability arises for such preparatory acts, there is no justification to say otherwise at the international level in relation to offences of the magnitude and gravity of atrocity crimes.

Although the existing provisions on attempt and incitement provide a sufficient basis for the ICC’s timely intervention, extending liability for...
‘planning’ and ‘preparation’ to all atrocity crimes will significantly strengthen the ICC’s preventative role.68

Moreover, as senior leaders are usually directly involved in the planning and preparation of atrocity crimes,69 focusing on this early stage of the *iter criminis* will reduce the controversy over some forms of criminal liability underscored by Kai Ambos,70 George Fletcher,71 Göran Sluiter,72 Herman van der Wilt,73 Elise van Sliedregt,74 Tomas Weigend,75 or Gerard Werle.76

Furthermore, this will be in line with the ICC’s gravity threshold, and Luis Moreno-Ocampo’s policy of focusing on the ‘most responsible persons’.77

As long as an individual communication78 or a referral letter79 contains tangible *indicia* of attempt or incitement to commit atrocity crimes, the ICC

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68 In particular, the exclusion of the notion of conspiracy from the realm of art. 25(3) ICC Statute (including in relation to the crime of genocide) appears to be unjustified, particularly in light of its broad acceptance in national legal systems for lesser crimes. The *rationale* for the criminalisation of the notion of conspiracy is that the design of a common plan to commit a serious offence by two or more individuals seriously increases the risk of harming the societal value which is affected when the relevant offence is committed. This risk is further increased when those who have designed the plan to commit the offence begin taking the first steps towards preparing to implement their criminal plan. Logically, the higher the hierarchical position of those involved in the planning of the crime, the higher the level of risk will be. Likewise, the more egregious an attack on a core societal value is, the more legitimate an intervention at an earlier stage of the *iter criminis* in order to prevent the commission of the crime will be. As a result, it appears that the notion of conspiracy is particularly well-suited to prevent the actual completion of atrocity crimes (the most serious crimes of international concern) by senior political and military leaders. In light of these circumstances, and considering the inclusion of conspiracy in the Genocide Convention, in the statutes of the ad hoc tribunals and in national jurisdictions, its exclusion from the ICC appears to be unjustified. This is more so if we consider that the definition of the crime of aggression, approved in June 2010 at the first ICC Review Conference, includes the criminalisation of conspiracy-like preparatory acts, such as ‘planning’.

69 This situation is normally accompanied by the conscious acquiescence of another sector of the leadership, which refrains from active involvement but does not take the measures within their power to stop such plans and/or preparations.


78 See arts 13(c), 15(1) ICC Statute.

79 See arts 13(a) and (b), 14, 53(1) ICC Statute.
Prosecutor must initiate a preliminary examination. This examination aims to distinguish between (i) those situations that require a formal investigation, and (ii) those other situations better dealt with by other means. To make such a determination, it is not sufficient to gather and analyse information concerning the allegations of attempt or incitement. It is also necessary to review the available information regarding *inter alia:* (i) the admissibility of the relevant situation, due to the inaction, unwillingness or inability of national authorities and the gravity of the violence; and (ii) the possible existence of substantial reasons to believe that the investigation would not serve the interests of justice.

As a result, as Antonio Cassese and David Scheffer have pointed out, the Prosecutor can respond appropriately on grounds of admissibility or interest of justice where national authorities take meaningful steps to actually prevent atrocity crimes. Moreover, according to article 25 of the ICC Statute those who start the execution of atrocity crimes by means of a substantial step shall not be liable if they abandon their efforts to commit such crimes or otherwise prevent their completion. Hence, the Prosecutor can close a preliminary examination into allegations of attempt or incitement if his timely intervention has contributed to successfully defusing the threat of atrocity crimes occurring.

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80 Not only all natural and legal persons have been granted the right to access the ICC by way of individual communications and, in the case of States Parties and the Security Council, referral letters, but they have also been granted the right to be informed of the reasons why the ICC Prosecutor does not intend to proceed with an investigation. See arts 15(6), 53(3) ICC Statute and Rules 104 and 105 of the Rules of Procedure and Evidence. See also H. Olásolo, *The Triggering Procedure of the International Criminal Court* (The Hague, Martinus Nijhoff Publishers, 2005) 65-70 [hereinafter Olásolo, *Triggering Procedure*]


82 According to arts 15(3) and (4), 53(1) ICC Statute, and Rule 48 of the Rules of Procedure and Evidence, these are the different elements of the standard ‘reasonable basis to initiate an investigation’, which must be met for the ICC to initiate a formal investigation into a situation. This was underscored in the recent decision of Pre-Trial Chamber II in the relation to the Kenya situation. *Situation in the Republic of Kenya* (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09-19 (31 Mar 2010) paras 26-35.


85 According to art. 25(3)(f) ICC Statute: ‘Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person’s intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.’ See Ambos, ‘Individual Criminal Responsibility’ (above n. 54) at 764. See also Ohlin, ‘Attempt’ (Above n. 54), at 175-7.
Although the Prosecutor cannot rely at this stage on measures of a coercive nature,\textsuperscript{86} and not all forms of States Party cooperation are available,\textsuperscript{87} the potential of preliminary examinations to incentivise national authorities should not be underestimated. As shown by several preliminary examinations, including Georgia,\textsuperscript{88} Guinea,\textsuperscript{89} and Palestine,\textsuperscript{90} the Prosecutor, in addition to receiving testimony and seeking information from reliable sources,\textsuperscript{91} may: (i) send missions to the relevant states; (ii) receive in The Hague national delegations of members of governments, representatives of high-courts, opposition leaders and NGOs; (iii) provide advice on those measures that should be taken at the national level to defuse the threat of atrocity crimes; (iv) discuss a prevention strategy with the United Nations and other stakeholders; (v) exchange information with national and inter-
national actors; and (vi) address in the media the evolution of events and the degree of cooperation by national authorities.92

Using diplomatic and media channels to bring the world’s attention to the plans of senior leaders to engage in atrocity crimes, along with highlighting the possibility of them escaping ICC prosecution should they abandon their plans and take the necessary preventative measures, can be a powerful tool. Moreover, from the perspective of ensuring a timely reaction to tangible threats of atrocity crimes, the ICC Statute appears to offer unprecedented opportunities. While other organs of the international community, such as the UN Security Council or the UN General Assembly, usually require long negotiations before deciding to intervene in a situation, the ICC Prosecutor need not consult with interested stakeholders prior to opening a preliminary examination.

Despite the absence of conclusive evidence at this stage, it appears that the preliminary examination in Afghanistan, contributed to NATO (and in particular the United States) subsequently tightening its airstrike policy.93 The United States also appears to have reaffirmed its commitment to its internal mechanisms of investigation and prosecution,94 which may have led to the opening in April 2010 of a high profile military inquiry into civilian deaths allegedly caused by US Special Forces.95

In turn, the preliminary examination in Iraq, which started upon the receipt of numerous individual communications since 2003, was closed in light of the proceedings initiated in the United Kingdom with regard to each instance of war crimes allegedly involving British nationals.96

Moreover, the preliminary examination in Kenya appears to have strengthened the message sent by former UN Secretary-General Kofi Annan...
to caution Kenyan authorities that there will be no impunity for those engaging in atrocity crimes.  

Whenever a preliminary examination is unsuccessful in incentivising national authorities, the investigation stage, in which the Prosecutor can rely on coercive measures and all forms of State Party cooperation, may prove to be a useful mechanism to fulfil the ICC’s preventative mandate. Article 53 of the ICC Statute empowers the Prosecutor to close an investigation when ‘there is no sufficient basis for a prosecution’. This standard is comprised of similar criteria to those applicable during the preliminary examination. As a result, the Prosecutor can close an investigation if it has served to prompt reluctant national authorities to take meaningful steps to actually prevent the commission of atrocity crimes.

IV The ICC’s Timely Intervention When Atrocity Crimes Are Already Taking Place

The ICC’s timely intervention can also take place in situations in which atrocity crimes are already occurring. The focus in these situations will be on stopping ongoing atrocity crimes.

Moreover, abandonment of future crimes will not exclude liability for those already committed. Therefore, preliminary examinations and investigations could only be brought to an end by the Prosecutor on admissibility or interest of justice grounds.

97 See the research paper by C. Bjork and J. Goebertus, from Harvard Law School, ‘Parallel Paths and Unintended Consequences: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya’ (forthcoming) works.bepress.com/christine_bjork/1/. See also Kofi Annan Foundation, ‘Remarks by Kofi Annan on Conclusion of the Visit to Kenya, 2-8 December 2009’ (Press Release Dec 2009) <kofiannanfoundation.org/newsroom/press/2009/12/remarks-he-kofi-annan-conclusion-visit-to-kenya-au-panel-eminent-african>. Nevertheless, far more empirical research is necessary to have more certainty about the impact of the Preliminary Examination of the ICC.

98 In this cases, a qualitative approach to the gravity threshold may still justify the start of an investigation into a situation where atrocity crimes have not been yet committed, or are starting being committed. For a definition of a qualitative approach to the gravity threshold see Prosecutor v. Abu Garda (Decision on the Confirmation of Charges) ICC-02/05-02/09 (8 Feb 2010) paras 31-3; Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya) ICC-01/09 (31 Mar 2010) para 62.

99 See arts 54-7 ICC Statute.

100 Compare art. 53 (2) ICC Statute with art. 53 (1) ICC Statute and rule 48 of the ICC Rules of Procedure and Evidence.

101 Moreover, under article 19, paragraph 11, of the ICC Statute, the Prosecutor may decide to suspend his investigation and monitor the development of events at the national level prior to formally close it.
In this context, prompting national authorities to stop ongoing atrocity crimes goes hand in hand with: 102 (i) encouraging and assisting them to comply with their duties to investigate and prosecute those crimes already occurred (‘positive complementarity’); 103 and (ii) dividing with the ICC, particularly in cases of substantial capacity deficits, the burden of adjudicating the crimes (‘cooperative complementarity’). 104 As a consequence, supporting receptive states to strengthen their judicial systems and carry out national proceedings is a core component of the ICC’s timely intervention.

As stated by William Burke-White105 and Christopher Hall,106 the Prosecutor, in order to fulfil this mandate during his preliminary examinations and investigations, may rely on those measures referred to in the previous section. In particular, the Prosecutor may train national actors in the adjudication of atrocity crimes, and may assist them in the establishment of protection programmes for victims and witnesses and effective systems of information management. He can also monitor and provide feedback regarding the development of national proceedings, and work in coordination with other ICC organs to increase the efficacy of overall preventative efforts.

It must be stressed that, despite the international cooperation of other stakeholders, the national authorities of receptive states appear to have a strong preference to receive advice and guidance directly from ICC officials. As national authorities are aware that their efforts to adjudicate atrocity crimes will be reviewed by the ICC, the ICC’s advice and guidance is considered of the utmost importance to ensure the success of such efforts. As a result, the potential of the ICC to strengthen through timely intervention the rule of law and improve good governance in receptive states is major.107 The

102 Both positive and cooperative complementarity appear to have been implicitly upheld, to an important extent, by the 22 June 2009 decision of the ICC Appeals Chamber in the Katanga and Ngudjolo case. See Prosecutor v Mr Germain Katanga and Mathieu Ngudjolo Chui (Decision on the Presiding Judge of the Appeals Chamber in the appeal of Germain Katanga against the Decision of Trial Chamber I of 12 June 2009 on the admissibility of the case) ICC-01/04-01/07 OA 8 (10 Jul 2009).


105 Burke-White, ‘Implementing’ (Above n. 92) at 61.

106 Hall, ‘Developing’ (Above n. 92) at 220.

107 See also in this regard, W. Burke-White, ‘Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo’ (2005) 18 Leiden Journal of International Law 557, 589-90. See also in this respect the document issued by the prosecution itself which was published just after this inaugural address was delivered. ICC Office of the Prosecutor, ‘Draft Policy Paper on Preliminary Examinations’ (4 Oct 2010)
preliminary examination in Colombia provides some *indicia* of this potential. Investigations of those paramilitary members demobilised in Colombia since 2003\(^{108}\) did not start until May 2006, when the Constitutional Court upheld the centrepiece of the demobilisation process: the Peace and Justice Law.\(^{109}\) Soon afterwards, the ICC Prosecutor made public his preliminary examination,\(^{110}\) and in October 2007 and August 2008 he personally conducted two on-site visits to Colombia.\(^{111}\)

Since then, the Supreme Court of Colombia has underscored the importance of focusing investigations under the Peace and Justice Law on (i) the pattern of atrocity crimes committed against the civilian population, and (ii) the structure, membership and external support of those paramilitary organisations through which the crimes were committed.\(^{112}\) This has been fully reflected in the sixteen-page *Protocol for the Presentation of Evidence* issued on 23 August 2010 by the Bogotá Peace and Justice Trial Chamber.

Furthermore, since the end of 2007, the Colombian Supreme Court has also been conducting investigations and prosecutions for alleged links with paramilitary groups against a third of the members of the Colombian Parliament,\(^{113}\) as well as against around twenty Governors.\(^{114}\) These proceedings, which are based on confessions made by demobilised paramilitary leaders, have led so far to more than ten convictions, most of them against members of political parties that supported the Colombian Government in 2007. Such confessions have also led to the investigation in lower courts of several

\(^{108}\) The demobilisation process is the result of the Santa Fe de Ralito Accord signed on 15 July 2003. That agreement was between the Colombian national government and the so-called *Autodefensas Unidas de Colombian* (AUC).


\(^{111}\) See ibid.

\(^{112}\) See, *inter alia*, the appeal decisions of the Penal Chamber of the Colombian Supreme Court, in the cases of (i) Wilson Salazar Carrascal (a.k.a. *el loro*), Case Num. 31539 (31 Jul 2009); and (ii) Gian Carlos Gutierrez Suarez (a.k.a. *el tuerto*), Case Num. 32022 (21 Sep 2009).

\(^{113}\) See Verdad Abierta’s information collected up to July 2010 which refers to data provided by the New Rainbow Foundation available at <www.verdadabierta.com/reconstruyendo/1856-estadisticas>.

\(^{114}\) Ibid.
hundred civil servants, local politicians and members of the armed forces and the police.115

It is indisputable that only a handful of high ranking military and police officers are currently facing investigation, and that the application of the Peace and Justice Law is facing significant challenges, such as (i) the lack of publicity of the criteria to select those demobilised paramilitary members investigated under such a Law; (ii) the few convictions entered so far; (iii) the extradition to the United States on drug-trafficking charges of fourteen key high-level paramilitary leaders; (iv) the lack of demobilisation of guerrilla members; and (v) the new increase in the level of violence, spurred partly by armed groups comprised of former paramilitary members.116

Nevertheless, in assessing whether the ongoing Colombian proceedings for atrocity crimes are contributing to strengthening the rule of law and improving good governance, one must take into consideration the long decades of mass violence in which paramilitary groups and their aides enjoyed full impunity in Colombia.

As shown by the visits of the Colombian Attorney General and an ample delegation of the Colombian Supreme Court to the ICC in 2010, the Prosecutor’s preliminary examination appears to be a contributing factor to the new situation in Colombia. Nevertheless, it is difficult to measure its impact on the Colombian national authorities as there appear to be several other contributing factors, such as: (i) the conditions imposed by the US Congress to approve US military aid and favourable trade conditions for Colombia;117 and

115 Ibid.
117 The final certification by the US State Department in connection with the performance by the Colombian armed forces of the conditions relating to compliance with the conditions of respect for human rights imposed by the United States Congress took place on 9 September 2010. See in this regard, United States Embassy in Bogotá, ‘Resolución y Certificación del Gobierno Colombiano y de las Fuerzas Armadas con respect a los Condicionamientos en Derechos Humanos’ (15 Sep 2010) <spanish.bogota.usembassy.gov/pr_117_15092010.html>. It can also be found on the website of the Colombian Commission of Jurists report by the US State Department which analyses in detail whether or not the Colombian armed forces in 2009 complied with the requirements of respect for human rights imposed by the United States Congress. (US Department of State, ‘Memorandum of Justification concerning Human Rights Conditions with respect to Assistance for the Colombian Armed Forces’ (Sep 2010) <www.coljuristas.org/LinkClick.aspx?fileticket=ksYH5X9Cy9%3d&tabid=160&language=es-CO>).
the judgments of the Inter-American Court of Human Rights against Colombia for paramilitary violence.\(^{118}\)

In this context, further coordination between the ICC’s timely intervention and those other contributing factors will increase the effectiveness in Colombia of the measures taken by the international community pursuant to the notion of responsibility to protect. In this regard, it must be noted that the need for further coordination between the United Nations and the ICC is especially acute,\(^{119}\) particularly in light of their mutual recognition and commitment to cooperation,\(^{120}\) as well as the existing safeguards against ICC interference with the role of the Security Council.\(^{121}\)

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118 See the judgments of the Inter-American Court of Human Rights in Case of the 19 Comerciantes vs Colombia, Series C, No 93 (5 Jul 2004); Case of the Mapiripán Massacre vs Colombia, Series C, no 122 (15 Sep 2005); Case of the Pueblo Bello Massacre vs Colombia, Series C, No 140 (31 Jan 2006); Case of the Ituango Massacre, Series C, No 148 (1 Jul 2006); Case of Manuel Cepeda Vargas vs Colombia, Series C, No 213 (26 May 2010).


120 Paragraph 7 and 9 of the Preamble of the ICC Statute reaffirms the Purposes and Principles of the UN Charter and emphasises the will of the States Parties to have the ICC established in relationship with UN system. Moreover, article 87 (7) of the Statute permits the ICC to send a finding of lack of state cooperation to the UN Security Council for its consideration. Other provisions, such as article 87 (6) of the ICC Statute, provide that the ICC may ask any intergovernmental organisation, including the United Nations, to provide information or documents, as well as other forms of cooperation agreed upon by the relevant organisation. Furthermore, article 115 of the ICC Statute establishes that the expenses of the Court and the Assembly of States Parties may be provided for by the ‘[f]unds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council. In turn, the Negotiated Relationship Agreement between the ICC and the United Nations (elaborated pursuant to article 2 of the ICC Statute) is based on mutual recognition between the UN and the ICC and a commitment to cooperation. Its preamble highlights ‘the important role assigned to the International Criminal Court in dealing with the most serious crimes of concern to the international community as a whole […] and which threaten the peace, security and well-being of the world.’ On the basis of a general obligation of mutual cooperation, coordination and consultation enshrined in article 3, the Negotiated Relationship Agreement elaborates on the modalities of cooperation between both organisations in a number of areas, including UN Security Council referrals (art 17(1) of the Negotiated Relationship Agreement), UN Security Council requests for suspension of ICC investigations and prosecutions (art 17(2) of the Negotiated Relationship Agreement), UN Security Council cooperation under the condition of confidentiality (art 18(3) of the Negotiated Relationship Agreement), and UN Security Council cooperation with the ICC Prosecutor in the context of a preliminary examination (art 18(2) ICC Statute of the Negotiated Relationship Agreement).

121 Articles 12, 13, and 16 of the ICC Statute empower the UN Security Council to refer any post 1 July 2002 situation to the ICC without any jurisdictional limitation, and to request the ICC to suspend an investigation or a prosecution for renewable periods of 12 months. Moreover, the Assembly of States Parties has recently approved by consensus at the First Review Conference that the ICC will only exercise its jurisdiction over the crime of aggression after ascertaining whether the UN Security Council has made a determination of an act of aggression committed by the relevant State. In the absence of such a declaration, the ICC could only proceed if it is acting on the basis of a State Party referral or an individual communication and if the plenary of the Pre-Trial Division gives its authorisation to do so (see Assembly of States Parties, ‘Amendments to the Rome Statute of the International Criminal Court on the Crime of Aggression’ Annex I to Resolution RC/Res.6 (11 June 2010) art. 15 bis, para 6).
V Conclusion

The ICC’s preventative mandate is an important means to fulfil the responsibility of the international community under the notion of responsibility to protect. So far, the focus has been on the ICC’s efforts on general prevention by ending impunity for past atrocities. Nevertheless, the ICC’s contribution to the prevention of future atrocity crimes through timely intervention is potentially even greater.

Realising this potential requires acknowledgment of the ICC’s preventative role through timely intervention by the different organs of the institution. It also requires States Parties to recognise this role so as to provide the necessary resources, and extend to all atrocity crimes criminal liability for ‘planning’ and ‘preparation’. Based on this premise, increased coordination between the ICC, the United Nations and other stakeholders will increase the preventive effect of their timely intervention.

In the end, what is at stake is whether the ICC remains as one among several mechanisms for accountability with a limited general prevention mandate; or whether, instead, it fully develops its potential to prevent atrocity crimes, strengthen the rule of law and improve good governance through timely intervention.

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Finally, to all of you for being here on an unforgettable day; I offer my most heartfelt thanks for your presence.

And on that note, following the advice of my dear Gerda Blok and Carin Schnitger, I conclude this inaugural lecture by stating that ‘Ik heb gezegd’.