

**DETERRENCE: A DIFFICULT CHALLENGE FOR THE
INTERNATIONAL CRIMINAL COURT**

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Gustavo Gallón, Kellogg Visiting Fellow for spring 1998 through spring 1999, has been Director of the Colombian Commission of Jurists since its creation in 1988. Gallón obtained his JD (1974) and a specialization in public law from the Universidad Externado de Colombia and completed postgraduate studies in political sociology at the University of Paris and the École des Hautes Études en Sciences Sociales (1976–82). Before and during his tenure at the Commission of Jurists he has taught state theory and constitutional law at several Colombian universities. Presently he is also a member of the boards of the Center for Justice and International Law (Washington) and the International Service for Human Rights (Geneva) and a member of the International Commission of Jurists (Geneva) and the Andean Commission of Jurists (Lima). He has served as an independent expert on special Colombian government commissions for peace (1991) and the reform of the military criminal code (1995) and as Special Representative of the United Nations Commission of Human Rights for Equatorial Guinea (1999–present). His recent publications include *Retos del siglo XXI para los derechos humanos en Colombia* (Ideele-Diakonia, 1996) and *Colombia, derechos humanos y derecho humanitario* (edited volume, CCJ, 1997). He is the recipient of the 1989 Human Rights Watch and the 1997 Lawyers Committee for Human Rights awards for international human rights monitors.

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ABSTRACT

This paper addresses the question of whether the international criminal court can deter future violations of human rights. The author argues that this endeavor, while promising, is still in an incipient stage and that the general expectation that human rights violations will be deterred through the mere establishment of the court is ill founded. Neutralization—that is, depriving perpetrators of the power to commit more violations—is a precondition for deterrence, and developing an effective capacity to neutralize violations should be the court's foremost purpose.

RESUMEN

Este artículo procura determinar si la Corte Criminal Internacional puede prevenir futuras violaciones de los derechos humanos. El autor sostiene que este emprendimiento, aunque promisorio, está todavía en un estadio incipiente y que la expectativa general de que el mero establecimiento de la corte puede disuadir de violaciones a los derechos humanos es infundada. La neutralización—esto es, el despojar a los perpetradores del poder para cometer más violaciones—es una condición de la disuasión. El propósito fundamental de la corte debería ser el desarrollo de una capacidad efectiva para neutralizar violaciones.

In this paper I address the question of whether the international criminal court (ICC) can deter future violations of human rights. In fairness to the importance of the establishment of the ICC, I would like to answer the question positively. There is no doubt that heinous violations of human rights should be prevented and that the ICC can contribute to this. Individual and general deterrence produced by sanctions applied by the court is a universal hope.

However, in an attempt to be practical and address one of the biggest challenges to the effective functioning of the ICC, I am afraid I have to answer the question negatively. Before addressing the issue as to whether the punitive function of the court can achieve any of the purposes of punishment—be it general or individual deterrence, retribution, restraint, rehabilitation, or redress to victims—the effective action of the court against perpetrators of mass or systematic violations of human rights needs to be addressed.

Posing the question of deterrence prior to the actual operation of the court seems a bit premature. The general expectation that human rights violations will be deterred through the mere establishment of the court is ill founded—above all, because deterrence, either individual or general, will not take place unless the ICC is effective in sanctioning violators. This implies that the ICC must be successful in attaining procedural and substantive coercion over violators—especially in cases where the national justice system have failed in trying and punishing violators.

In exercising this coercion over violators, the ICC would actually be contributing to the neutralization of present and future violations. I believe that this exercise of jurisdiction would have a neutralizing or chilling effect on the perpetration of gross violations, that is, the perpetrator is deprived of the power to commit more violations. In this line of thought, I suggest that neutralization is a precondition for achieving some of the purposes of punishment, including deterrence.

I do not want to imply that the action of the ICC will not deter human rights violations or that the court is a useless mechanism. Rather, I want to celebrate the important advances made so far towards the establishment of an international criminal court; at the same time, however, pressing the debate towards the continued development of an effective mechanism for the prosecution and punishment of perpetrators of gross violations—thus, contributing, among other things, to individual and general deterrence. I will advance this thesis by developing the concept of neutralization.

1. Neutralization as the Foremost Purpose of an International Criminal Court

The debate on the rationale for punishment of human rights violations derives from the general purposes of criminal punishment. However, the discussions about punishment of human rights violations tend to focus on retribution and deterrence, leaving aside other purposes of punishment and, specifically, of judicial human rights mechanisms.

The debate has tended to produce a polarization between partisans of retribution and partisans of deterrence.¹ Victims are usually assumed to be partisans of retribution; similarly theorists considered to be idealistic or fundamentalist form part of this current. On the other hand, governmental sectors and pragmatically oriented theorists are frequently identified as partisans of deterrence.

The differing focus on these two purposes would not be problematic if the preference for one did not mean the elimination of the other and, for that matter, the exclusion of any other purpose. The problem is that governments and pragmatically oriented theorists often actually sacrifice retribution on the pretext of achieving deterrence as a superior good, while victims and fundamentalist sectors are accused of endangering institutions, democracy, or social coexistence by trying to obtain retribution at any cost.

This exclusionary debate between retribution and deterrence has overshadowed the existence and the importance of a more fundamental goal of judicial human rights procedures, that is, the neutralization of violations.

As expressed previously, this goal is even prior to the achievement of any theoretical purpose of punishment, including retribution and deterrence. Neutralization is the action by which the perpetrator is deprived of the power to commit more violations. Accomplishment of the neutralization purpose can be reached through means such as: the isolation, the arrest, or the elimination (when justified) of the perpetrator. In the context of an international judicial mechanism, there is no possibility of achieving retribution or deterrence without first *stopping* the violations.

Neutralization: A Judicial Function

Though neutralization has rarely been mentioned as a purpose of judicial action against human rights violations, it has been considered a purpose in broader contexts, such as the protection of public order.² Given the present conditions of human rights violations around the world and the likely operation of the ICC, neutralization should be thought of as a primary goal.

Perhaps one of the main reasons for overlooking neutralization as a goal of international judicial mechanisms is that these bodies have historically operated in contexts where the regime producing the systematic violations had already ended. The Nuremberg and Tokyo tribunals

dealt with military leaders defeated in the war. The Greek and Argentine trials began after the military juntas lost power. In those and other similar cases there was no need to worry about how the judicial procedure could neutralize the violations, because they had already ceased. Rather, major concern and debate centered on the traditional retribution and deterrence purposes.

Neutralization in those cases was the result of military or political action. In other similar cases, it can be the result of police action. In these circumstances conceiving neutralization as a goal or a purpose of the judicial institution is not always obvious. However, placed in the context of ongoing egregious violations—especially, massive violations—with no response from national mechanisms, the need to ensure a more proactive and preventive judicial intervention is apparent, or at least should be apparent.

The effectiveness and celerity of military, political, or police actions oriented toward neutralizing human rights violators could be substantially improved if a strong international justice mechanism were in place, with the mandate to act against those violations. Therefore, the action of an international criminal court should aim to begin at the beginning, namely: stop the violations.³

In order to effectively achieve this neutralization purpose, the acting international judicial mechanism must be very strong and able to guarantee independence and impartiality in its action. Otherwise the international community will be very reluctant to act in support of a neutralizing action. Multiple calculations made by governments, as well as risks of illegitimate intervention, make neutralization a difficult or a dangerous process if it is not chaired by a legitimate and strong international judicial mechanism.⁴

Insufficient Neutralization and Insufficient Deterrence

Perhaps the United Nations were trying to apply this lesson to the gross violations that occurred in the former Yugoslavia and in Rwanda when the Security Council decided to create the ad hoc international criminal tribunals. Unfortunately, the lesson was not applied effectively because the material resources and the coercive support given to the ad hoc tribunals have been inadequate.⁵ Under these conditions, the low or insufficient level of neutralization of human rights violations is not surprising. Insufficient neutralization has obviously been followed by insufficient deterrence and insufficient retribution in Rwanda and in the former Yugoslavia.

Another example of insufficient neutralization is the case of Pinochet. Violations diminished in Chile during the late 1970s and 1980s because of the international political reaction, among other factors. This situation resulted in a partial neutralization complemented later by the domestic referendum that politically defeated the dictatorship. But even if massive human rights violations ceased once the new democratic period began, there never was a total neutral-

ization of violators because they continued to have enormous power derived from the terror caused by the grave and numerous violations that remained—almost all—unpunished.

Moreover, the reactions in Chile to the proceedings against Pinochet in England in 1998 and 1999 demonstrate that the 1989 referendum did not achieve deterrence either. To date, Pinochet and his numerous supporters—almost a third of Chileans—openly continue to justify the violations committed as ‘necessary’ to save the nation from the so-called danger of communism and insist on stating that they would repeat these violations again if necessary.⁶ These types of violations were not deterred at all, particularly because there was no effective judicial neutralization when the dictatorship ended.

Neutralization of perpetrators is thus a condition for deterring and providing retribution to victims of human rights violations. It is not only the result of a military, political, or police action. Neutralization is, and has to be, the first purpose of the judicial action against human rights violations.

The problem is that neutralizing seems to be more difficult than deterring. Neutralizing implies confronting the violator before the violations become massive. It implies also confronting numerous perpetrators, which in turn is a responsibility that policymakers and societies try to avoid. It seems more useful and more comfortable not to act directly against the violators—against all the violators—but to act against none or a few of them, expecting that the rest will be deterred from committing violations again.

The same rationale frequently leads governments to decide not to punish past violations, but rather to declare their commitment to seriously punishing any that occur in the future. In this kind of rhetoric the expectation is that there will not be any new violations because the announced commitment to seriously punish them will suffice to deter them.

Deterrence is a normal and understandable aim of authorities and societies and a legitimate and adequate one in certain conditions. It is even “the ultimate end of every good legislation,” according to Beccaria.⁷ But deterrence of anonymous, future potential violators can be a dangerous illusion, with painful consequences, if it is not preceded or accompanied by an effective neutralization of the known violators of the past and of the present.

2. Total Deterrence as an Unattainable Purpose, by Definition

Deterrence can also be a dangerous illusion if it leads us to assume that no more violations will be committed after the actual establishment of an international criminal court. Or if it leads us to assume that most heinous crimes that humanity has known so far will not be repeated, because of the deterrent effect of such a court. Unfortunately, such an effect is not attainable.

No legal system can ensure the elimination of criminal activity. On the contrary, the existence of criminal legal systems is related to the conviction that crimes will continue to take place and will need to be dealt with, not to the expectation of the disappearance of criminal activity. Obviously, under certain conditions of effectiveness, a criminal system will achieve some level of general deterrence—the prospect of punishment does deter some crime.⁸

A legal system does not guarantee absolute deterrence; prospective criminal activity will not be obviated by the system itself. Criminal legal systems are maintained precisely because of the need to punish criminals, who will continue to disrespect others' rights despite the existence of sanctions. The existence of the system responds to the continued need to protect individuals' rights and to provide redress to victims of violations. Therefore, by definition and due to its nature, the level of deterrence of every criminal system is limited.

In regard to the future operation of the ICC, this limitation does not mean that the court's general deterrent effect on future violations and crimes is unimportant. However, we must realize that there will not be a total deterrence of heinous or gross human rights violations. Individuals like Hitler or Pol Pot would not abstain from massively violating human rights because of the deterrent effect of the existence of a court. They would have to be stopped by the *action* of the court.

It is exactly the potential capacity of an international court to neutralize violators in their tracks that should concentrate our attention, rather than the hope or expectation that it will deter prospective violations. We should think of the ICC as a mechanism to restrain and suppress grave violations rather than expect it to carry out a potential deterrent purpose that national legal systems fail to accomplish in the midst of human rights violations.

Illusory Neutralization

If a deterrent effect—even limited or partial—is desired, efforts to neutralize perpetrators must be significant and opportune. In this light, deterrence is in a directly proportional relationship to neutralization: that is, the more violators are neutralized, the higher the deterrent effect will be. If a considerable number of violators are not neutralized by the court, it is quite possible that the deterrent effect will be minimal. The same can happen if the neutralization is illusory, as in the case of prosecuting scapegoats or innocent parties.

Neutralization can also be illusory even in cases when real perpetrators are prosecuted. There are at least three possible scenarios in which this situation can occur. In the first scenario the leading violators are left immune and only their supporters (a few or many) are prosecuted. It is evident that if leaders feel free from prosecution, they will be able to continue committing human rights violations, even if it is more difficult for them to recruit new supporters to take the risk of being prosecuted.

In the second scenario only the leaders involved in violations are prosecuted—not their supporters or subordinates.⁹ Characteristically, some of those former subordinates tend to replace their former heads and become new leaders in prompting and committing human rights violations. They will try to avoid repeating the mistakes that resulted in the neutralization of their leaders, but they will not necessarily be deterred from committing new violations, especially those aimed at eliminating witnesses or investigators who eventually could represent a danger to the impunity they enjoy.

The third scenario of illusory neutralization occurs when prosecution is focused only on one target—either an individual or a particular group of persons—considered as the key element in explaining every violation that has taken place. This is a very frequent temptation in ordinary life and in the history of the struggle against criminality. Once a notorious subject or group is identified as the source of every evil, it is easy to conclude that restraining or ‘getting rid’ of this individual or group is sufficient to address the situation. (The logic of this paper fell into this temptation in using known violators, such as Hitler, Pol Pot, and Pinochet, to illustrate a particular point.)

The issues raised by this last scenario are quite complex, and my mention of it is intended to underscore how often we tend to concentrate on well-known figures when what we are really confronting are extremely complex networks. In situations of massive or systematic human rights violations there is usually more than one major leader and greater decentralization of the actors than one can imagine. Thus, we should not fall in the trap of thinking that by neutralizing the most visible head we will deter others from committing more violations. What often happens in these situations is that other multiple heads continue to reproduce the artifices and schemes of violations.

A nonillusory neutralization policy has to face the challenge of stopping all of the leaders and key supporters through preemptory action, instead of hoping that they will be deterred as an automatic consequence of neutralizing some of the violators or the most visible figure(s) tied to the violations.

Complementation between Deterrence and Retribution

If prevention and deterrence of violations are not assumed as the effects of a passive circumstance—i.e., the mere existence of an international criminal court—but rather as the effects of assertive actions oriented to truly neutralizing violators, it is likely that a certain level of deterrence can be achieved. In order to truly neutralize violators and avoid the risk of falling into forms of illusory neutralization, deterrence and retribution need to be seen in a complementary fashion and not in a state of opposition.

Policies based on deterrence as the exclusive or the most important purpose tend to ignore or minimize the value of the proportional relation between neutralization and deterrence. As neutralization is a difficult task, an understandable aspiration is to reach the maximum deterrent effect through the minimum neutralization effort. However, this nearsighted strategy is almost guaranteed to fail in obtaining a deterrent effect or confronting violations in a significant way. In order to reach a minimum level of deterrence, a maximum effort of neutralization has to be undertaken. Due to the implications, this is not an easy conclusion to put into practice; nevertheless, the traditional approach has not led to satisfactory results. The implementation of the principle of minimum effort to reduce human rights violations has been disastrous, as is illustrated by the second half of the twentieth century.¹⁰

On the other hand, building a judicial policy against human rights violations based on retribution as the basic purpose is not exempt from difficulties; particularly since retribution—like deterrence—is limited by definition. The nature of violations is so outrageous in these situations that it is difficult or impossible to attain a degree of satisfactory retribution. The quantity of violations is also so large that it is difficult or impossible to ensure retribution for every one of them. The pain and damage suffered by the victims are so great that it is not always possible to prevent vengeance from prevailing over retribution. Though these problems and others are inherent in a retributive intent, by no means should this perspective be obviated. Rather, the problems that are inherent to it need to be properly considered.

Retribution is a legitimate purpose. Persons whose rights have been violated by criminal actions have an undeniable right to truth, to justice, and to reparation, as has been clearly stated by the set of principles against impunity currently under discussion by the United Nations' Commission on Human Rights.¹¹ Additionally, retribution can serve as a reliable guide to orient the purpose of neutralization. Victims usually know, better than anyone, the identities of the actual perpetrators. Their particular awareness, based on their own suffering, is a very useful aid in identifying and acting against violators. In this light, by increasing neutralizing actions that have a retributive effect, the purpose of preventing or deterring future violations can also be achieved. If retribution and deterrence are seen in this order, they will not generate conflicting interests but rather be complementary in nature.

Unless the complementary nature of these two purposes is exploited, both run the risk of being unrealizable. Retributive aims will be constantly reduced to being at the service of prevention or deterrence aims. And the preference for deterrence constantly tends to lead to illusory neutralization, which also leads to illusory deterrence. By contrast, policies based on complementation, rather than opposition between deterrence and retribution, are more apt to lead to a higher level of neutralization. Reaching this objective is undoubtedly a very difficult challenge, but it could also mean a significant level of prevention of human rights violations.

3. Constraints and Possibilities of the International Criminal Court

The statute approved in Rome for the creation of the international criminal court is, no doubt, based on the purpose of deterrence with little, if any, consideration for retributive aims. This focus does not follow from the fact that its jurisdiction is restricted to “the most serious crimes of concern to the international community as a whole,” as the statute repeatedly states (Preamble, art. 1, art. 5).

There is a general consensus on the necessity that an international court should be focused exclusively on very serious crimes that are not prosecuted by domestic courts, according to the principle of complementarity. The international criminal court does not have to prosecute every heinous crime committed in the world but only those serious crimes of genocide, crimes of war, crimes against humanity, and eventually crimes of aggression, that escape the jurisdiction of domestic tribunals.

The problem is that some states have tried to severely limit the interpretation of that consensus in order to narrow the court’s exercise of jurisdiction over “the most serious crimes of concern to the international community as a whole”—limiting jurisdiction to only some of those most serious crimes. This pernicious strategy is aimed at excluding many serious violations from the jurisdiction of the court with the result that many victims—perhaps the majority—who have not been able to attain retribution through national systems will not be able to do so by means of the court.

Additionally, many crimes will be excluded from the jurisdiction of the court, by definition.

Crimes of the Past

First of all, those crimes committed in the past, everywhere in the world, will be excluded (Article 11 of the statute approved in Rome). The line establishing the past will begin with the entry into force of this treaty. In order to accomplish this demarcation, the ratification by sixty states is needed, after which sixty days need to transpire (Art. 126). A few years will have to go by before this occurs; therefore, we cannot yet establish the exclusion of crimes on temporal grounds. Unfortunately, what is certain is that many serious crimes of concern to the international community will continue to be committed before the ICC is able to neutralize and deter criminal acts.

On the other hand, it is encouraging to know that several states (close to the number required for the treaty to come into force) have demonstrated a commitment to the creation of the court. More than 70 countries have already signed the statute, and some of them have ratified it. Many commentators expect that the court will be inaugurated some time during the

second half of 2000. This date responds to the deadline, 30 June 2000, that was established to finish the pending work carried out by the Preparatory Commission of the ICC (the definition of the elements of crimes and the rules of procedure and proof; see Resolution F, adopted by the Rome Conference).

The court will have to define whether it is competent to try a crime that began in the past but continued after the treaty's entry into force. A typical example is the forced disappearance of persons, a crime that ceases only when the victim appears, dead or alive. Nothing in the statute would prevent the court from dealing with such cases. In fact, many of the states that approved the statute are involved in serious cases of forced disappearances that remain unpunished. Therefore, a situation could arise in the future where the court is required to determine whether it has jurisdiction over these matters. One could interpret the states' silence on this issue as tacit acceptance. Nevertheless, the court will have the last word. If the court applies the prevailing interpretations in international law on this issue, it should reach the conclusion that such unending crimes, in fact, belong to its jurisdiction. This determination could increase the court's capacity to neutralize and deter heinous violations.

Crimes of the Future

The crimes committed in the territory of a state not party to the treaty also remain out of the reach of the court (Art. 12). This is a serious deficiency for purposes of neutralization, deterrence, and retribution, because many violations that are committed in territories of powerful states or small regimes can continue unpunished.

Fortunately, the effect of this deficiency can be countered by a few circumstances. First, the Security Council of the United Nations can decide to present the case to the court, by petition of the Prosecutor (Art. 13, paragraph b). Though this is a remote possibility, it has some potential: recall that something similar happened with the creation of the ad hoc tribunals for Rwanda and for the former Yugoslavia, by decision of the Security Council.

Secondly, if the violation is committed by a national of a state party to the treaty, the court can assume jurisdiction over the case even if the crime occurs in the territory of a state that has not accepted the competence of the court. Similarly, this exercise of jurisdiction is a remote possibility, but it can happen. If, for instance, Spain accepts the treaty and a Spanish citizen in Colombia commits a crime of genocide, of war, or against humanity (let us hope it does not happen), the court can assume the case, though Colombia has not ratified the treaty.

Finally, an equally remote possibility for the exercise of jurisdiction exists if a state not party to the treaty accepts the jurisdiction of the court, by petition of the court itself, for specific acts committed before that acceptance (Arts. 11.2 and 12.3).

Inasmuch as the Rome Conference did not directly accept the establishment of the universal jurisdiction of the court, an intense campaign needs to be carried out by the society of each country to achieve the ratification of the treaty or at least acceptance of the court's jurisdiction in specific cases. But even if these goals are not reachable, cases of violations committed within a nonparty state by nationals of a nonparty state could still be submitted to the court, if the Security Council so decides.

Some Crimes of War

There is a third category of crimes remaining beyond the jurisdiction of the court. Some crimes of war, even when committed in the territory of a state party or by a national of a state party, can be excluded from the jurisdiction of the court by a specific request of the state for a period of up to seven years after the ratification (Art.124). This exclusion clause only applies to crimes of war other than genocide and crimes against humanity, which are not subject to exception (Arts.124 and 8).

The exception is extremely strange. It does not seem reasonable that a state can accept a part of the jurisdiction of the court in relation to grave crimes and delay accepting jurisdiction in relation to other crimes that are equally grave.

This unusual regulation is probably the result of the means by which some participants of the Conference were able to get France to accept the statute as applicable to its nationals. The United States and France sought to restrict the court's ability to intervene in crimes committed by nationals of a state by conditioning the exercise of jurisdiction on the consent of the concerned state. As a result of bargaining, the French government accepted the 'seven-year clause' and kept its distance during the last day of the Conference from the position it had shared with the United States.

If the US position had prevailed, the court's power to act independently would be extremely restricted. As the situation stands, we at least have a court that can gradually strengthen its capacity to become an independent, effective, and strong organism. Nonetheless, this bargaining result is extremely detrimental, since it allows room for the possibility of excluding crimes of war from the jurisdiction of the court for a period of up to seven years.

Crimes at the Discretion of the Security Council

Grave crimes that the Security Council wishes to hide can also escape the jurisdiction of the court. This is a fourth possibility prescribed by the statute, which allows the Security Council to have the prerogative of ordering the Prosecutor or the court to abstain from initiating or following the investigation or the trial of a specific crime. This is a power the Council

can execute for twelve months and can renew as many times as it wants to for another twelve months (Art. 16).

There is no doubt that this provision represents an open door to impunity and to non-neutralization or illusory neutralization of human rights violators. The content of this article should not have been accepted. Notwithstanding, the responsibility of preventing the use of this mechanism also lies amongst ourselves and governments, specially the members of the Security Council.

Moreover, though opprobrious, the right to veto, still afforded to the five permanent members of the Security Council, can be useful in this case. If one of these States is in disagreement about impeding the activity of the Prosecutor or that of the court, the investigation or the trial can continue and can be concluded successfully. Suggesting the resort to this procedure is one of those paradoxes of life in which one institution created for obstructing actions is transformed into the means of allowing them.

Even with these tremendous constraints, the international criminal court represents an important mechanism for victims of human rights violations. It might be limited, but it seems greater than any other we have known so far.

A Court with Wings but Also with Strong Enemies

That a possibility of action exists is due to the fact that a key norm was kept in the statute: the potentiality attributed to the Prosecutor to initiate investigations on his or her own (*proprio motu*) (Art. 15). Some states did not want to allow the prosecutor to receive complaints or to initiate inquiries on his or her own initiative. The Prosecutor would thus have been reduced to an agent of the complaints formulated by states or by the Security Council.

It is fortunate that this did not happen, especially since the right of victims to be formal parties in the process was not incorporated into the statute. However, some mechanisms for victims' participation do exist. According to the statute, the Prosecutor is allowed to obtain information from the victims (Art. 15.2) and victims can "make representations to the Pre-Trial Chamber," which has to authorize the investigation of cases (Art. 15.3). This aspect needs to be further defined in the rules of procedure and evidence that are being drafted by the Preparatory Commission. In any case, the statute clearly established the victims' rights to reparation, including restitution, compensation, and rehabilitation (Art. 75).

With the Prosecutor's own authority, many of the deficiencies of the treaty could be corrected in time. This challenge, however, is not an easy task, given that the Prosecutor will have to face a labyrinth of procedural norms through which any state can impede him or her from dealing with a case (Arts. 17, 18, and 19). As the court's jurisdiction is complementary to that

of the states, the treatment of a case by the court is conditioned by the fact that the respective state did not try the case or is not able to try it.

Moreover, an important requisite for the adequate functioning of the court is that the justices of the court need to be independent and honorable people, which, unfortunately, is not always the case. The court also needs to be guaranteed enough economic resources to accomplish its immense task, a necessary condition that has not yet been met.

Additionally, and particularly significant, one of the most serious concerns for the success of the court is the effective cooperation of the states. The statute clearly establishes cooperation with investigation and prosecution as a duty for the state parties (Art. 86) and carefully regulates it in detail (Arts. 86-102). The statute also allows the court to refer the matter to the Assembly of State Parties or to the Security Council when a state fails to comply with a request of cooperation (Art. 88.7). These provisions are to be valued positively. However, international relations and support need to evolve much more in order to ensure that the court will have its own means for implementing its decisions, especially for arresting the persons prosecuted by the court. Otherwise, its capacity to neutralize and deter human rights violators will be very weak, as the experience of the ad hoc tribunals shows.

This needed development and growth in support is not only difficult to achieve but also uncertain, considering the open opposition that some states have expressed against the establishment of the court. Their attempt to reduce the already restricted competence of the court can further affect its potential capacity to neutralize human rights violators. Consequently, these attempts to weaken the capacity of the court also jeopardize, if not obviate, its capacity to deter perpetrators from committing heinous crimes.

As has been expressed, the neutralizing capacity of the court is stalled at the current moment and is likely to be so for many years, according to the Rome statute. However, the approved statute does provide some windows of opportunity for the court to assume proactive stances. These possibilities can help to build the bases—in a long and difficult process—to facilitate court action directed at neutralizing and effectively deterring human rights violations in the future, as well as securing retribution for the victims.

Conclusion

Certainly, the independent, effective and strong court that humanity requires has not yet been created. But an important step has been taken toward that objective. The endeavor to create an organism dealing with individual accountabilities for violations of human rights and humanitarian law did not culminate with the Rome Conference. In fact, this endeavor is in an incipient stage, particularly if future generations are to benefit from international legal mecha-

nisms that can effectively confront atrocities and their impunity. But even at its incipient stage, it is promising. We must, therefore, continue working in order to consolidate this mechanism—and to strength its capacity to neutralize violators—if we really want to confront and deter the most serious crimes of concern to the international community.

ENDNOTES

- 1 See Carlos Salvador Nino, *Radical Evil on Trial* (New Haven and London: Yale University Press, 1996), 135–48; Jaime Malamud-Goti, *Game without End* (Norman and London: University of Oklahoma Press, 1996), 10–17.
- 2 Michael Reisman identifies seven goals for the protection, restoration, and improvement of public order, the second one of which is “suspending current public order violations.” This notion of suspension corresponds to our notion of neutralization. See W. Michael Reisman, “Legal Responses to Genocide and Other Massive Violations of Human Rights,” in Cherif Bassiouni and Madeline H. Morris, *Accountability for International Crime and Serious Violations of Fundamental Human Rights, Law and Contemporary Problems*, Vol. 59, n. 4, Autumn 1996 (Durham, North Carolina: The Duke University School of Law), 75.
- 3 As Professor Reisman states: “What can the enlightened sectors of the international community do to prevent and halt the proliferation of genocides and massive human rights violations around the planet? We evade the obvious, albeit costliest answer—to arrest them before, or at least while they are happening, by any means necessary: to stop them by stopping them.” Nevertheless, he avoids the issue of neutralization through judicial action, perhaps because he is critical of “a judicial romanticism in which we imagine that merely by creating entities we call ‘courts’ we have prevented or solved major problems” (Reisman, 75). The advantage of including neutralization or suspension of violations within the frame of action of the judiciary is to reduce the risk of arbitrariness involved in the need or the will to stop violations “by any means necessary.”
- 4 This paper was written before the military action in Kosovo in 1999. Many of the abusive decisions and violations committed by NATO forces in that war arose from the fact that neutralizing the Yugoslavian president, Milosevic, was a decision taken by interested governments and not by an independent judicial body such as the International Criminal Tribunal for the Former Yugoslavia (ICTFY).
- 5 In 1997 the President of the ICTFY summarized his conclusions as follows: “Eighteen public indictments have been issued by the Prosecutor and confirmed by the Judges, 11 indictees have been arrested and brought to The Hague for trial, one trial has been held... while two more trials are under way, a third is to commence later in 1997 and two others to start in 1998... Despite these accomplishments, the Tribunal remains a partial failure—through no fault of its own—because the vast majority of indictees continue to remain free, seemingly enjoying absolute immunity... [The] Tribunal has been created for the very purpose of rendering justice but has been left partially ineffective by the failure of States to make arrests,” Antonio Cassese, Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, United Nations, Document A/52/375 S/1997/729, paras. 173 and 175.
- 6 “While Communism has assassinated many millions of human beings during this century in this continent, and specifically in the countries that condemn me through spurious trials, I am persecuted because I defeated Communism in Chile, virtually saving the country from a civil war. That meant three thousand deaths, almost a third of which [were] uniformed and civilian people who fell victim to extremist terrorism,” from the letter written by Pinochet

in London in November 1996, published as “Carta de Pinochet a todos los chilenos” or “Pinochet rechaza cargos en carta a los chilenos” in *La Tercera en Internet*, (www.latercera.com), section “Encrucijada judicial. Caso Pinochet. Documentos.”

- 7 Because “it is better to prevent crimes than to punish them,” Cesare Beccaria, *On Crimes and Punishments* (Indianapolis and New York: The Bobbs-Merrill Company, Inc., 1963), 93.
- 8 Concerning those conditions, see Richard A. Posner, *Economic Analysis of Law*, 4th edition (Boston, Toronto, and London: Little, Brown and Company, 1992), 217–36.
- 9 “Prosecuting only leaders would, in many contexts, be a mistake. If the international community would likely be satisfied by a few prominent prosecutions, the likely presumption would be that those few prosecutions should be of top-level leaders... These factors would likely make the leaders appear to the international community like the appropriate group to prosecute. Not necessarily so, however, in the perception of the victim population... Obviously, not all leaders and not all followers can be prosecuted in most contexts of crimes of mass violence. But a prosecutorial design that includes followers as well as leaders would serve victim interests better than would a leaders-only design.” Madeline Morris, “Complementarity and Its Discontents: States, Victims and the International Criminal Court,” Duke University, 1999, paper, 12–13.
- 10 Eric Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914–1991* (London: Michael Joseph Ltd., 1994).
- 11 By resolution 1998/53, the Commission on Human Rights decided to ask the Secretary General to invite States, international organizations, and nongovernmental organizations to provide comments on the “Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” prepared by the expert Louis Joinet (Document E/CN.4/Sub.2/1997/20/Rev.1). The set of principles identifies three main victims’ legal rights: their right to know, to justice, and to reparations. According to Principle 3, “[i]rrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim’s fate.” Regarding the right of justice, Principle 18 reaffirms the obligation of the states “to investigate violations, to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that they are prosecuted, tried and duly punished, to provide victims with effective remedies and reparation for the injuries suffered, and to take steps to prevent any recurrence of such violations.” “Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator,” as Principle 33 states.