An International *Marbury v. Madison?* The Deterrent Effects of the International Criminal Court and the Missing Element for Success

By Lindsey Quasney

Outline:

I. Abstract……..……1
II. Intro……2
III. Background……3
a. What is the ICC……....3
b. The ICC's Jurisdiction……..4
c. Governing Law……6
IV. An Examination of Deterrence……7
a. What is Deterrence……7
b. The ICC and Deterrence……...……8
c. Sentencing: The Imperative……10
d. Enforcement: The Crux of Deterrence……...11
e. A Summary of Deterrence in International Law……13
IV. The Bemba Case: Testing the Equipment of the ICC……14
a. Background……...14
b. Is the ICC Ready?.....15
V. Making a Good Thing Better……...20
a. The Missing Element: an International Jail……...20
VI. Conclusion……...24

"Soldiers use sexual assaults and castration on civilians, regardless of gender or age, as well as pluck out eyes and cut off ears in addition to looting, plundering and burning villages and property. They do not even look at these people as humans."[1]

I. Abstract

[1]Matthew Oates, United Methodist News Service, *Darfur Observer Shares Horrors of Modern Genocide*, *at* http://www.umc.org, (2006) (reporting as the Darfurian and South Sudanese refugees listen to a presentation on the plight of their homeland. "The actions of the Janjaweed and the Sudanese government against civilians are chilling." "They do not even look at these people as humans.").

International criminal justice, until recently, has been hard to come by.[2] With 110 nation-states signing on to the International Criminal Court (hereinafter "ICC"), one thing is for sure, the world has not been satisfied with international criminal justice. No doubt these countries are seeking protection, judgment, fairness, and hope.

II. Intro

You may not know it, and depending on your views of international law, you may not like it, but the world has an international criminal court. You would not be alone if you did not realize an international criminal court existed, especially if you live in the United States. But regardless of knowledge, the ICC is slowly gaining power, and that, could be a good thing.

The purpose of this paper is to examine the current deterrent effects of the ICC and to make recommendations for improvement. The third section will introduce the ICC, and will conclude that; overall, the ICC is beneficial for international law. The next section will examine deterrence in general and the potential deterrent effects of the ICC. This section will conclude that the ICC will have a deterrent effect on future international criminals who commit genocide and are used to the reign of impunity. The fourth section will analyze the ICC's ability to render justice in the *Bemba* case and will conclude that the ICC is indeed, ready. Lastly, the fifth section will recommend an international jail be created to make the ICC's tools of justice complete. Finally, this paper will conclude that the ICC is not only a positive addition to the international community as a whole, but that it offers firm justice in the face of impunity.

---

[2] *See* Erik Suy, *Is the United Nations Security Council Still Relevant? And Was it Ever?,* 12 TUL. J. INT'L & COMP. L. 7, 22 (2004) (stating the U.N. is not usually effective when involved in places where conditions have deteriorated so much that U.N. peacekeepers are given early authority to use force).

III. Background

A. What is the ICC?

Unbeknownst to many, the ICC takes its seat in the Netherlands.[3] Hearing only the most serious of offenses, the court can be called upon to deliver of justice in the face of genocide, war crimes, and crimes against humanity.[4] Not to be weighed down with menial matters, the ICC sits, saving action for the gravest of offenders.[5]

After the Cold War, tribunals like the International Criminal Tribunal for the former Yugoslavia and for Rwanda were established to try crimes committed within a specific time-frame and during a specific conflict.[6] As a result one general agreement emerged: an independent, permanent, criminal court was needed.[7] Born of the most noble of beginnings, the ICC was created to end the reign of impunity amongst international Goliaths.[8] Its permanency equips the ICC to defeat those that would previously have been able to escape punishment unscathed.[9]

---

[3] International Criminal Court, *Home, available at* http://www.icc-cpi.int (last visited Dec. 1, 2009) (hereinafter ICC home page).

[4] *Id.*

[5] *Id.*

[6] Richard J. Goldstone & Janine Simpson, *Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism*, 16 Harvard Human Rights Journal 1, 19-20 *,available at* http://www.law.harvard.edu/students/orgs/hrj/iss16/goldstone.shtml# (2003).

[7] ICC home page, *supra* note 1.

[8] *Id.*

[9] Caroline D. Krass, *BRINGING THE PERPETRATORS OF RAPE IN THE BALKANS TO JUSTICE: TIME FOR AN INTERNATIONAL CRIMINAL COURT*, 22 Denv. J. Int'l L. & Pol'y 317, 356 (1994) (Calling for an international criminal court).

The court is a wholly independent institution.[10] It is independent of, but remains in cooperation with, the United Nations.[11] The court is further composed of four branches: the Presidency, the Judicial Divisions, the Registry, and the Office of the Prosecutor.[12] The Presidency is responsible for the overall administration of the court.[13] Ensuring an appropriate combination of criminal law and procedure, the Judicial Divisions are divided into three categories: pre-trial, trial, and appeals.[14] Judges sit in each category and are responsible for conducting proceedings at the respective stages.[15] And last, but certainly not least, the Office of the Prosecutor is responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the court.[16] Finally, the Office of the Prosecutor conducts investigations and prosecutions before the Court.[17]

B. The ICC's Jurisdiction

---

[10] Goldstone & Simpson, *supra* note 6, at 22 (stating the ICC is not solely dependent on a Security Council referral and is therefore less vulnerable to the political will of the Security Council's Permanent Members).

[11] ICC home page, *supra* note 1.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] DIANE MARIE AMANN, M.N.S. SELLERS, *AMERICAN LAW IN A TIME OF GLOBAL INTERDEPENDENCE: U.S. NATIONAL REPORTS TO THE XVITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW: SECTION IV The United States of America and the International Criminal Court,* 50 Am. J. Comp. L. 381, 389 (2002) (describing the ICC judgeships and stating Statute permits each member state to put forward one candidate to compete for eighteen ICC judgeships).

[16] ICC home page, *supra* note 1.

[17] *Id.*

The ICC's jurisdiction is "complementary" to national courts.[18] In practice, this means that the Court will only act when countries themselves are unable or unwilling to investigate or prosecute.[19] The International Criminal Court will complement national courts so that they retain jurisdiction to try genocide,[20] crimes against humanity,[21] war crimes,[22] and crimes of aggression.[23] If a case is being considered by a country with jurisdiction over it, then the ICC

---

[18] Rome Statute Rome Statute of the International Criminal Court art. 1, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

[19] ICC home page, *supra* note 1.

[20] Rome Statute, supra note 18, at art. 6 (defining genocide: For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

[21] Rome Statute, supra note 18, at art. 7 (Defining crimes against humanity: For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health. Sections 2 and 3 provide further definitions.

[22] Rome Statute, supra note 18, at art. 8 (defining war crimes: For the purpose of this Statute, 'war crimes' means: (a) Grave breaches of the Geneva Conventions of 12 August 1949, . . . (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, . . . (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, . . .(e) Other serious violations of the laws and customs applicable in armed
conflicts not of an international character.

[23] Rome Statute, supra note 18, at art. 5(2) (defining aggression: The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the

cannot act unless the country is unwilling or unable genuinely to investigate or prosecute.[24] A country may be determined to be "unwilling" if it is clearly shielding someone from responsibility for ICC crimes.[25] A country may be "unable" when its legal system has collapsed.[26] The Court has jurisdiction over states that are a party to the Rome Statute and over states that accept and comply fully with the Court's jurisdiction.[27] Cases before the Court can be initiated from a State Party, the Prosecutor, or the United Nations Security Council.[28]

C. Governing Law

The ICC is controlled by the Rome Statute of the International Criminal Court.[29] The Statute entered into force on July 1, 2002.[30] As dictated by the Statute, the Court will first apply the Statute, then applicable treatises and the principles and rules of international law, and if

---

crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.)

[24] ICC home page, *supra* note 1.

[25] *Id.*

[26] *Id.*

[27] Rome Statute, supra note 18, at art. 12.

[28] Rome Statute, supra note 18, at art. 13.

[29] *See generally*, Rome Statute, supra note 18.

[30] http://www.icc-cpi.int (60 days after the 60th ratification needed to create the Court was received on April 11th at a special event at the United Nations, when 10 countries simultaneously deposited their instruments of ratification).

neither proves sufficient, the Court may resort to principles of law derived from appropriate national legal systems.[31]

IV. An Examination of Deterrence

a. What is Deterrence

Deterrence is a theory that criminal laws are passed with well-defined punishments to discourage individual criminal defendants from becoming repeat offenders and to discourage others in society from engaging in similar criminal activity.[32] One of the primary objects of criminal law is to discourage members of society from committing criminal acts by fear of punishment.[33] It is unrealistic to believe that any criminal justice system could ever offer complete deterrence.[34] Nevertheless, fear of punishment does deter future crimes.[35] The important question addresses the extent of deterrence. For, to be effective at all, deterrence requires the would-be criminal to possess some degree of reflective capacity before the crime is

---

[31] Rome Statute, supra note 18, at art. 21.

[32] The Free Dictionary, *Deterrence, available at* http://legal-dictionary.thefreedictionary.com/Deterrence, (last visited Dec. 1, 2009) (stating deterrence requires the would-be criminal to possess some degree of reflective capacity before the crime is committed, at least enough reflection to consider the possible consequences of violating the law if caught).

[33] *Id.*

[34] *Id.*

[35] *See* C.L. Ten, Is Punishment Fair?, In Crime and Punishment: Philosophical Explorations 324, 330 (Michael J. Gorr & Sterling Harwood eds., 1995).

committed; at least enough reflection to consider the possible consequences of violating the law if caught.[36]

b. The ICC and Deterrence

Noting that effective deterrence must strike the "reflective capacity" of would-be criminals,[37] the ICC faces a most daunting task. The difficulty lies in the fact that the ICC must address the reflective capacity of hundreds of thousands of people canvassing 110 different countries. Some of those countries value restorative justice.[38] Others yet, condone corporal punishment.[39] Some countries vehemently repudiate capital punishment while others find it constructive.[40] Due to differing societal norms, international deterrence just got complicated.

---

[36] Deterrence, *supra* note 32.

[37] Deterrence, *supra* note 32.

[38] *See* Prison Fellowship International Center for Justice and Reconciliation, Restorative Justice Online, Recent Changes to Restorative Justice Online, *available at http://www.restorativejustice.org/editions/2004/January/recent* (January 2004) (describing Mediation in Northern Ireland as providing several services in the area of conflict resolution, including training in conflict resolution).

[39] *See,* Global Initiative to End All Corporal Punishment of Children, *Global Progress Towards Prohibiting All Corporal Punishment*, *available at http://www.endcorporalpunishment.org/pages/pdfs/charts/Chart-Global.pdf,* 2-11, (Aug. 2009) (showing many countries still allow forms of corporal punishment).

[40] *See* Congressional-Executive Commission on China, *Criminal Law of the People's Republic of China* http://www.cecc.gov/pages/newLaws/criminalLawENG.php (displaying capital punishment as an acceptable punishment in China), 1, (Aug. 2008); *see also* Department of Justice Canada, Capital Punishment in Canada, *available at http://www.justice.gc.ca/eng/news-nouv/fs-fi/2003/doc_30896.html,* pg. 1 (July 2009) (explaining that Canada has abolished the death penalty even to the extent that the Supreme Court of Canada has held that prior to extraditing an individual for a capital crime, Canada must seek assurances, save in exceptional circumstances from the requesting state that the death penalty will not be applied).

After all, how could one court address the "reflective capacity" of would-be criminal defendants spanning 110 countries? No one ever said it would be easy. But, perhaps the more important question is will it be worth it?[41] Because, if it is "worth it," the "how" does not really matter. For as William Pace passionately declared "[i]t used to be that murderers would be brought to justice, while genocidaires would retire in luxury. The ICC will end this reign of impunity forever."[42]

If the ICC truly can deter future genocides, the only choice is to accomplish the "how" at all costs. Professor Benjamin Ferencz, Nuremberg Prosecutor, put it best when he said ". . . all of us must join in supporting the ICC to stop the future architects of genocide and other large-scale atrocities. The struggle for a more humane world goes on, but only by persistent determination and hope can we move closer to that goal."[43] The good news is international criminal courts have added teeth to norms that outline internationally punishable conduct.[44] The

---

[41] KYLE REX JACOBSON, *DOING BUSINESS WITH THE DEVIL: THE CHALLENGES OF PROSECUTING CORPORATE OFFICIALS WHOSE BUSINESS TRANSACTIONS FACILITATE WAR CRIMES AND CRIMES AGAINST HUMANITY*, 56 A.F. L. Rev. 167, 228 (2005) (stating "where corporations do business with persons committing serious international crimes, the threat of prosecution can be another arrow in the quiver of deterrence").

[42] NGO Coalition for the International Criminal Court, *Deterring Future Genocides: the International Criminal Court, available at* http://www.iccnow.org/documents/FS-ICCandGenocide.pdf, (last visited Dec. 1, 2009).

[43] *Id.*

[44] Mirjan Damaska, *WHAT IS THE POINT OF INTERNATIONAL CRIMINAL JUSTICE?* 83 Chi.-Kent L. Rev. 329, 329 (2008) (analyzing the problems with the current goals of international courts).

ICC has a particularly deterring "bite," in that it will ambush the powerful criminals over which domestic courts have lost control.[45]

c. Sentencing: The Imperative

In the context of human rights, impunity signifies the failure to provide remedies for victims of abuses.[46] Impunity, in effect, is a complete pardon that spares the offender from serving his sentence.[47] The ICC cuts off impunity by charging, convicting, and then-sentencing.[48]

When imposing a sentence, the ICC may sentence a defendant for a specified number of years not to exceed 30, unless the gravity of the crime and the individual circumstances warrant a life sentence.[49] In addition to imprisonment, the Court may order a fine, and/or a forfeiture of proceeds, property, and assets derived directly or indirectly from that crime.[50] Unlike previous international criminal tribunals, the ICC does provide a mechanism for the court to determine appropriate levels of reparations and to order persons convicted by the court to pay reparations to

---

[45] *See* Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights,* 20 BERKELEY J. INT'L L. 45, 64 (2002) (stating "multinational corporations have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law's ability to impose basic human rights norms").

[46] Milena Sterio, *RETHINKING AMNESTY*, 34 Denv. J. Int'l L. & Pol'y 373, 397 (2006).

[47] *Id.*

[48] *See Id.* (stating, from the viewpoints of both deterrence and retribution, it becomes imperative that perpetrators of such heinous international crimes be held accountable).

[49] Rome Statute, *supra* note 18, at art. 77.

[50] *Id.*

victims as a means of restitution, compensation or rehabilitation.[51] Ensuring justice, the court may consider the gravity of the crime and the individual circumstances of the defendant when rendering any sentence.[52]

d. Enforcement: the Crux of Deterrence

"Law, properly is the word of him, that by right hath command over others"; and "[c]ovenants, without the sword, are but words . . . ."[53] As if international criminal law was not complicated enough already, the final stage truly throws a wrench in the mix. The final stage is enforcement. The wrench is the lack of a uniform prison system. When the ICC does get a referral, does the investigation, finds cause, goes through the entire trial process, finds the defendant guilty, balances the individual circumstances and the gravity of the offense and imposes a sentence. . .what happens next varies.[54] Well, there is no uniform answer.[55] A

[51] REX JACOBSON, *supra* note 41, at 212-213.

[52] *See* Rome Statute, *supra* note 18, at art. 77.

[53] *See* generally Thomas Hobbes, *Leviathan*, 109 & 115, (A.R. Waller ed., Cambridge Univ. Press 1935) (1651).

[54] Frederick K. Cox, Case Western University School of Law, *International Criminal Court,* 4 WAR CRIMES PROSECUTION WATCH 12, (September 14, 2009) (illustrating that perpetrators in some countries are subsequently freed or they simply walk out the door after being sentenced to jail. Although it is not exclusive, this particular example dealt with army and rebel troops in eastern Democratic Republic of Congo alleged to have committed possible war crimes and crimes against humanity).

[55] *See* Rome Statute, *supra* note 18, at art. 103 (leaving enforcement up to states).

sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons.[56]

As of July 21, 2009, 110 countries are State Parties to the Rome Statute of the International Criminal Court. Out of the110, 30 are African States, 14 are Asian States, 17 are from Eastern Europe, 24 are from Latin American and Caribbean States, and 25 are from Western European and other States.[57] Despite the fact that imprisonment conditions are supposed to be equal,[58] it appears the ICC will be ripe for due process attacks as prison conditions alone inevitably vary from country to country.[59] To further muddy the lack of uniformity waters, the ICC may consider, *inter alia,* the views of the person being sentenced *and* their respective nationalities.[60] To avoid furthered impunity, the ICC should place a heavy emphasis on enforcement when considering the nationality of a defendant.[61] Preserving the

---

[56] *Id.*

[57] ICC home page, *supra* note 1.

[58] Rome Statute, *supra* note 18, at art. 106 (2) (requiring: The conditions of imprisonment shall be governed by the law of the State of enforcement and shall be consistent with widely accepted international treaty standards governing treatment of prisoners; in no case shall such conditions be more or less favorable than those available to prisoners convicted of similar offenses in the State of enforcement).

[59] *See* e.g., Amnesty International News, Amnesty International, *Iranian Authorities Must Investigate Death of Detention Centre Doctor, available at* http://www.amnesty.org/en/news-and-updates/news/iranian-authorities-must-investigate-death-detention-centre-doctor (Nov. 18, 2009) (prison doctor received threats regarding his knowledge of inmate abuse in the Kahrizak detention centre south of Tehran).

[60] Rome Statute, *supra* note 18, at art. 103.

[61] *See e.g.,* Olivia Swaak-Goldman, Dutch Ministry of Foreign Affairs, Edited By Bernard H. Oxman, *INTERNATIONAL DECISION: Kambanda v. Prosecutor*. No. ICTR 97-23-A., *available at* http://www.ictr.org>. International Criminal Tribunal for Rwanda, Appeals Chamber, October, 95 A.J.I.L. 656, 660 (July 2001) (discussing the considerable variation from one country to another as to the impact of guilty pleas on sentencing).

ICC's "bite," is the clause in the Rome Statute authorizing the Court to transfer a defendant at any time.[62] Therefore, if a sentence is not being enforced, it is conceivable that the ICC may transfer the defendant to a state that will adhere to enforcement mandates.[63]

e. Summary of Deterrence in International Law

For adequate retribution and deterrence, the guilty should be prosecuted before all mankind.[64] In international law, ending impunity is the "reflective capacity."[65] For, if dictators begin to be punished, little by little, atrocious crimes will decrease.[66] And, when genocide is the topic, no balancing act is needed, a little goes a long way. Think if the use of the ICC saved one percent of genocide victims.[67] Approximately 800,000 people died in the Rwanda genocide.[68] One percent of 800,000 equals 8,000; 8,000 people that is. The "how" becomes unimportant in

---

[62] Rome Statute, *supra* note 18, at art. 104.

[63] *See Id.*

[64] Krass, *supra* note 9, at 356 (quoting Robert-Louis Perret, Doctrinal Basis for International Penal Jurisdiction, in Towards a Feasible International Court 142, note 237, at 335 (Julius Stone & Robert K. Woetzel eds. 1970).

[65] *See* Olivia, *supra* note 61, at 660 (stating the first case in which a head of government has been convicted of genocide, the *Kambanda* case conveys an important symbolic message to the world's leaders; namely, that the time of impunity for crimes committed against their own populations is, if not over, drawing to a close).

[66] *See* C.L., *supra* note 35, at 330.

[67] *See* REX JACOBSON, *supra* note 41, at 221 (stating "[e]ven if the Special Court for Sierra Leone is not the most effective approach, it is a circumstance where the international community may be appreciative for having something rather than nothing. The bigger concern may be in deterring future conduct.").

[68] John Pike, Global Security.Org, *Rwanda Civil War*, *available at* http://www.globalsecurity.org/military/world/war/rwanda.htm , (April 2005) (in the Rwanda Civil War, up to 800,000 had been murdered, another 2 million or so had fled, and another million or so were displaced internally).

the face of large-scale-slaughter.[69] The guilty must be punished to save the innocent, end of story.[70]

V. The Bemba Case-Testing the Equipment of the ICC

a. Background

Gang rapes, mass rapes, and horrific sexual acts were inflicted on women, young girls, the elderly, and men.[71] Such are the allegations before the Office of the Prosecutor.[72] Systematic murder, merciless rape, and pillaging without a thought; torment the people of Central African Republic.[73] Atrocities such as these are incomprehensible. Many have died. Many are scarred. The plight surrounding the people of the Central African Republic is indeed dire; and they are waiting. The fear of a continued reign of impunity looms. The Office of the Prosecutor has promised the people will not be forgotten.[74] Demanding accountability and international justice,

---

[69] M. Cherif Bassiouni, Charles N. Brower, Claudio Grossman, Diane F. Orentlicher, Tina Rosenberg, The Honorable David J. Scheffer, & Paul Williams, *WAR CRIMES TRIBUNALS: THE RECORD AND THE PROSPECTS: CONFERENCE CONVOCATION*: 13 Am. U. Int'l L. Rev. 1383, 1395 (1998) (arguing "[t]he international community must do everything it can to respond quickly enough to confront genocidal actions. The consequences of genocide are not only the horrific killings themselves, but the massive refugee flows, economic collapse, and political divisions which tear asunder the societies that fall victim to genocide. The international community pays a far higher price coping with the aftermath of genocide than if it were prepared to defeat genocide in its earliest stages").

[70] *See* UN Doc. S/PV.3453, at 14 (1994) (arguing that "it is impossible to build a state of law and arrive at true national reconciliation if we do not eradicate the culture of impunity which has characterized our society since 1959").

[71] ICC home page, *supra* note 1.

[72] *Id.*

[73] *Id.*

[74] *Id.*

the prosecutor has requested the support of all.[75] Jean-Pierre Bemba Gombo ("Bemba") *has* been called to answer.[76]

Bemba is the son of a millionaire, one of the richest men in the Democratic Republic of Congo, and the alleged President and Commander-in-chief of the Movement for the Liberation of the Congo.[77] Bemba was arrested pursuant to a warrant on May 24, 2008.[78] On August 14, 2009, Pre-Trial Chamber II of the International Criminal Court decided to grant interim release to Jean-Pierre Bemba Gombo whose trial is scheduled to start in 2010.[79] Implementation of the decision on interim release has been suspended pending the final decision on the merits of the Prosecution's Appeal.[80] Even the *possibility* of release can diminish the hope of justice for the people of Central African Republic.[81]

b. Is the ICC Ready?

---

[75] *Id.*

[76] *See* Prosecutor v. Bemba Gombo, Case No. ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo, 21, (May 23, 2008) (authorizing the arrest of Bemba Gombo on the following grounds: rape as a crime against humanity, rape as a war crime, torture as a crime against humanity, torture as a war crime, committing outrages upon personal dignity, and pillaging a town or place as a war crime).

[77] *See* CNN, Transcripts, *Congo Inside Africa, Democratic About to Hold Elections*, *available at* http://edition1.cnn.com/TRANSCRIPTS/0607/29/i_if.01.html (July 29, 2006).

[78] ICC home page, *supra* note 1.

[79] *Id.*

[80] *Id.*

[81] *See* The Hauge Justice Portal, Archives, *The ICC Allows Interim Release of Jean-Pierre Bemba Gombo, available at* http://www.haguejusticeportal.net (Aug. 14, 2009) (declaring the ICC has ruled in favor of granting interim release of Jean-Pierre Bemba Gombo).

Bemba could be the first of many to answer for crimes against humanity at the hands of the ICC.[82] As the international community waits and watches, will the ICC prove equipped? Will the ICC's decision, whatever that may be, have a deterrent effect on the Central African Republic and on the world? Time will tell.

Although concerns have been raised about the efficacy of the ICC, international law and constitutional are quite similar.[83] The United States Supreme Court started out slow as well, yet has grown to be powerful.[84] Recall *Marbury v. Madison.*[85] In *Marbury,* a careful Justice Marshall created the power of judicial review.[86] For example, the Supreme Court was created in 1789,[87] yet judicial review was not established until 14 years after the Supreme Court's inception.[88] Even then, the Court did not *exercise* the power it created again until 1857.[89] The

---

[82] *See* Prosecutor v. Bemba Gombo, *supra* note 76, at 21.

[83] *See generally*, Jack Goldsmith & Daryl Levinson, *LAW FOR STATES: INTERNATIONAL LAW, CONSTITUTIONAL LAW, PUBLIC LAW*, 122 Harv. L. Rev. 1791 (2009).

[84] *See* Supreme Court of the United States, *Remarks of The Chief Justice*, *available at* http://www.supremecourtus.gov/publicinfo/speeches (Oct. 21, 2002) (Chief Justice Rehnquist, commenting on the slow beginning of the United States Supreme Court, "I thought it might be interesting to you if I were to briefly sketch a history of appeals within the federal judicial system. We start out in 1790 with the first session of the Supreme Court of the United States. The United States consists of thirteen states spread out along the Atlantic coastline of North America. The Supreme Court is this nation's only appellate court, and understandably it gets off to a very slow start. John Jay, the first Chief Justice, was appointed by George Washington as special envoy to England in 1794 to negotiate what became the Jay Treaty. He was absent for a year, and there is no indication that he was missed in the work of the Supreme Court. That is probably because in its first ten years, that Court decided a total of 60 cases -- not 60 cases per year, but 6 cases per year.").

[85] *Marbury v. Madison,* 5 U.S. 137 (1803) (holding the Supreme Court has the power of judicial review).

[86] *Id.* at 173-174 (establishing judicial review).

[87] *See* Judiciary Act of September 24, 1789 (1 Stat. 73).

[88] *See generally Marbury, supra* note 85.

Supreme Court waited over 50 years to exercise judicial review. Apparently 50 years was worth the wait because judicial review is now the bedrock of American constitutional law.[90] It appears the ICC is headed down the same path. Bemba could become the *Marbury v. Madison* of international criminal justice.[91] The ICC's pace is nothing more than a Marshall picking its *Marbury* moment.

The ICC is ready. As domestic criminal prosecutions often bring charges of nationalistic prejudice or political influence, the ICC's independent and permanent status provide insulation from such allegations.[92] By prosecuting individuals the ICC fills in the gap that the International Court of Justice left behind.[93] The ICC is further equipped through its clearly defined laws. The Rome Statute applies even-handedly, thus immunizing the ICC from claims of inequality.[94] Bolstering its credibility even further is the fact that the Court is backed by 120 countries, granting it a solid home amongst the international community.[95] Funding for the Court is secure.

---

[89] Otis H. Stephens, Jr., *JOHN MARSHALL AND THE CONFLUENCE OF LAW AND POLITICS*, 71 Tenn. L. Rev. 241, 248 (2004).

[90] *See* Crump, Gressman, Day, Rhodes, *Cases and Materials on Constitutional Law, 5th Ed.*, 35 (Lexis Publishing/Matthew Bender 2009) (stating "[t]he rest of American constitutional law derives from the Court's conclusion that judicial review exists").

[91] *See generally Marbury, supra* note 85.

[92] *See e.g., generally,* Milena, *supra* note 46.

[93] *See* Krass, *supra* note 9 (stating that the available international forum presents many obstacles for victims of rape because the International Court of Justice does not prosecute individuals).

[94] *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,* 10 HARV. HUM. RTS. J. 11, 60 (1997) (arguing that ad hoc tribunals raise questions of fairness and of victors' vengeance and that ad hoc tribunals "generally do not provide equal treatment to individuals in similar circumstances who commit similar violations").

[95] ICC home page, *supra* note 1.

Expenses are funded primarily by States Parties.[96] It also receives voluntary contributions from governments, international organizations, individuals, corporations and other entities.[97] Established in 1998, the Court has been gaining experience for eleven years.[98] The slow pace is positive. The ICC is not rushing. It is prudently chartering its course of action and as a result gaining proficiency.[99] Such prudence can build international respect and yield long-term success.[100]

To adequately discuss the future success of the ICC, one must decide what success is. Expecting a tangible result tomorrow is ineffective. Perhaps the expectation of tangible results in general is not the answer. I suggest the answer lies within justice alone. Although imperative, deterrence is an impossible measuring stick because one cannot know who *would have*

---

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *See* Sonja Starr, *EXTRAORDINARY CRIMES AT ORDINARY TIMES: INTERNATIONAL JUSTICE BEYOND CRISIS SITUATIONS*, 101 Nw. U. L. Rev. 1257, 1259 (2007) (describing the ICC as "nascent" and arguing that a *gradual* expansion of the ICC is necessary to overcome potential political obstacles, further urging the ICC to carefully consider the consequences of their actions for their legitimacy and for states' willingness to cooperate with them).

[100] Goldstone & Simpson, *supra* note 6, at 26 (explaining there has been healthy progress over the past century in fashioning global laws against the most serious of international crimes. We stand at the brink of having the first effective international instrument to enforce those laws. With sufficient support, the ICC could be a powerful mechanism, and it could be an especially credible one by virtue of its transparency and commitment to the legal ideals respected by most domestic legal systems.)

committed a crime had the ICC not been in place. If procedural and substantive justice is advanced by the ICC, then the Court could have a significant deterrent effect on future crime.[101]

We have to punish those who are guilty and then rest in justice.[102] If Bemba is held accountable for his crimes against humanity, the world will know.[103] He will serve as the "reflective capacity" for future international criminals,[104] because deterrence is born through example.[105] Some scholars opine that deterrence should not be a priority of international criminal justice because many of the offenders are not so rational as to consider punishment.[106] How can deterrence be brushed off as an unworthy goal based upon effectiveness when there has

---

[101] Goldstone & Simpson, *supra* note 6, at 26 (predicting if in the coming years the ICC acts with efficiency and transparency, there should be no doubt that this Court can be a powerful tool in the fight against terrorism. The important link between peace and prosecution by an impartial court should not be underestimated.)

[102] *See* Harvard Law Review, *THE CULTURAL DEFENSE IN THE CRIMINAL LAW*, 99 Harv. L. Rev. 1293, 1302 (1996) (declaring that to maintain order, it has been argued, societies must lay down a body of positive law that compels the obedience of all regardless of individual notions of morality: if each person were required to adhere to the law only to the extent that it was consistent with her own values, societies would tend toward anarchy. Legal systems attempt to compel this obedience by imposing punitive sanctions in order to deter people from breaking the law.).

[103] *See* Jack B. Weinstein, *ARTICLE: THE ROLE OF JUDGES IN A GOVERNMENT OF, BY, AND FOR THE PEOPLE: NOTES FOR THE FIFTY-EIGHTH CARDOZO LECTURE,* 30 Cardozo L. Rev. 1, 96 (2008) (theorizing that perhaps more important, are unfettered inquiries into executive misuse of power may deter future illegality as government officials come to understand that their conduct will be publicly disclosed, and that they will be held accountable).

[104] *See* Harvard, *supra* note 102, at 1302 (stating that general deterrence is accomplished when punishing the defendant dissuades others from emulating her conduct).

[105] Cf. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5, at 23-27 (1986) (identifying the purposes of the criminal law as prevention) (particular deterrence), restraint (incapacitation), rehabilitation, deterrence, education, and retribution).

[106] Mirjan, *supra* note 44, at 334 (arguing that professed goals act to diminish the power of an international court. Specifically noting that in terms of deterrence, because international crime is often so based on powerful passions that the number of cooly rational calculators is minimal.).

never been a punishment to threaten? This argument fails to take into account the fact that impunity has been the law-of-the land.[107]

The victims of massive sexual abuse in the Central African Republic, alone, serve as a painful symbol of the *need* for deterrence.[108] For some crimes, an international court is the only competent adjudicatory organ available.[109] Perpetrators of international crimes must understand that they will be held personally liable.[110] The ICC is essential, and, it is ready.[111]

VI. Making a Good Thing Better

a. The Missing Element-an International Jail

---

[107] *See* George William Mugwanya, *Expunging the Ghost of Impunity for Severe and Gross Violations of Human Rights and the Commission of Delicti Jus Gentium: A Case for the Domestication of International Criminal Law and the Establishment of a Strong Permanent International Criminal Court,* 8 Mich. St. U.-Detroit C. L. J. Int'l L. 701, 711 (1999).

[108] *See* Shaleen Brunsdale, Kara Karlson, Jennifer Goldsmith, Laura Jarvis, & Megan Chapman, *COLUMN: UPDATES FROM INTERNATIONAL AND INTERNATIONALIZED CRIMINAL COURTS & TRIBUNALS*, 16 Hum. Rts. Br. 40 , 40 & 43 (2009) (emphasizing the impact on victims and relaying one victim of war crime's story in the the International Criminal Tribunal for the former Yugoslavia (ICTY): One of the victims includes a 17-year-old Muslim teenager who testified in the case against Bosnian Serb Army commander Radislav Krstic. He related his experience of being captured by the Bosnian Serb army, the Vojska Republika Srpska (VRS), while he was hiding in a forest during an attempted escape from Srebrenica. He had been seized and lined up in a meadow along with dozens of men. The men were shot and killed, but the boy managed to survive, escape, and tell his story. The Tribunal convicted Radislav Krstic and sentenced him to 35 years' imprisonment. Now-Bemba is accused of rape, torture, and murder as crimes against humanity and rape, torture, outrages upon personal dignity, pillage, and murder as war crimes.).

[109] *See* Krass, *supra* note 9, at 356 (written before the inception of the International Criminal Court, and arguing in its favor).

[110] *Id.* at 374.

[111] Paul L. Hoffman, *WARTIME SECURITY AND CONSTITUTIONAL LIBERTY: JUSTICE JACKSON, NUREMBERG AND HUMAN RIGHTS LITIGATION*, 68 Alb. L. Rev. 1145, 1148 (2005) (urging any international system wishing to thwart impunity to establish mechanisms and institutions capable of bringing offenders to justice. One cannot have an international system of this sort without an international tribunal like the International Criminal Court ("ICC")).

Although the ICC is fully capable of handling international criminal justice, why stop at capable?[112] Institutional capacities do affect the success of international courts.[113] What the ICC lacks is an international prison.[114] One of the challenges to the potential deterrent effects of the ICC has been the varied locations of enforcement-solving this dilemma can lead to large-scale effectiveness.[115]

This author recommends an international jail be created in The Hauge, Netherlands.[116] Such an institution could house all defendants who come under the jurisdiction of the ICC.[117] In addition to housing defendants who have been convicted, the international jail could also house defendants awaiting trial. An international jail would end the tension surrounding which State will accept which defendants.[118] An international jail would give peace to victims concerned about their assailant returning to their home land. Additionally, fears of defendants fleeing while on temporary release would be quieted.

---

[112] *See generally*, Goldstone & Simpson, *supra* note 6 (supporting the ICC and its future effectiveness).

[113] *See* Sonj, *supra* note 99, at 1258-1259 (arguing international criminal justice should be expanded beyond that of crisis situations).

[114] Rome Statute, *supra* note 18, at art. 103.

[115] *See* e.g., Swaak-Goldman, *supra* note 65, at 660 (illustrating the variation of sentencing from one country to another).

[116] *See* Jamie Mayerfeld, Project Muse, *Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights,*23 Human Rights Quarterly 93, 96 (2003) (global enforcement of human rights" is a complex idea in need of elaboration).

[117] Philipp Kastner, *ARTICLE & ESSAY: THE ICC IN DARFUR-SAVIOR OR SPOILER?* 14 ILSA J Int'l & Comp L 145, 153 (2007) (stating the ICC has no proper enforcement mechanisms and must therefore rely on the cooperation of the States Parties to the Rome Statute).

[118] *See* Mayerfeld, *supra* note 116, at 94 (asking how can the world institute the global enforcement of fundamental human rights in a manner that is fair and accurate and that does not inflame international tensions?).

The mere threat of international institutionalization would add deterrence.[119] No longer would wealthy violators be able to rest in the comfort of knowing they would be returned to their home state. Schemes of bribery, manipulation, and coercion, which might work in a home state jail, would not prevail in an impartial permanent jail.

An international jail would bring efficiency to the ICC.[120] Defendants would be transported to and from court appearances with ease.[121] Thoroughness of investigations would become centralized, as defendants would consistently be readily available.[122] Travel expenses of transporting the defendant back-and-forth would end. The jail could be financed through the ICC, which funds expenses through state parties, voluntary contributions from governments, international organizations, individuals, corporations, and other entities.[123] A specific tax could be created to fund any additional expenses. Each state party signed on to the Rome Statute could contribute a set dollar amount annually to fund the jail. The respective states would benefit from

---

[119] Philipp Kastner, *supra* note 117, at 153 (regarding its global effectiveness, the ICC will have to undergo a difficult test whether it can create deterrence without the direct ability of enforcement, as "deterrence depends on the predictable ability to enforce the law coercively, which often falls short in countries where abuses take place).

[120] *See e.g.,* John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the law of State Responsibility*, 83 Va. L. Rev. 1, 48 (1997) (examining the consistency of the rules of release and remediation, and linking the high transaction costs of reaching nation-state agreements, to, *inter alia,* the lack of an international court).

[121] *See e.g., Id.*

[122] *See e.g., Id.*

[123] *See* ICC home page, *supra* note 1.

a permanent international jail and hence the inconvenience of a tax would be slight in comparison.[124]

Finally, construction of an international jail would solidify the ICC's reputation as a capable international court.[125] A court without its own jail is like a fisherman without a net.[126] The fisherman may hook the fish and in the process will frighten all bystanders, but, without a net, the fisherman will struggle to maintain control of the fish. Likewise, the ICC will frighten other assailants by punishing one. But, without its' own permanent jail, the ICC could struggle to keep some defendants "on the line," and eventually, the other fish will no longer be afraid.[127]

---

[124] This author suggests an additional benefit could lie with an international jail being used for more than merely strengthening the ICC. It could create national unity on the terrorism front, particularly with the prisoners of Guantanamo Bay. A uniform international jail would extinguish concern over disparate treatment because all prisoners of war could be sent to one place. Nation-states could rest assured that they will be satisfied with the justice rendered because they would have signed on to the provisions creating an international jail. There has been much debate about the application of international law to prisoners of war. Because flaccid implementation of international law undercuts its potential potency, the international community is in need of uniformity. *See* Sara A. Rodriguez, *The Impotence of Being Earnest: Status of the United Nations Standard Minimum Rules for the Treatment of Prisoners in Europe and the United States*, 33 N.E. J. on Crim. & Civ. Con. 61, 62 -64 (2007).

[125] *See* Gerry J. Simpson, *CONCEPTUALIZING VIOLENCE: PRESENT AND FUTURE DEVELOPMENTS IN INTERNATIONAL LAW: PANEL II: ADJUDICATING VIOLENCE: PROBLEMS CONFRONTING INTERNATIONAL LAW AND POLICY ON WAR CRIMES AND CRIMES AGAINST HUMANITY: DIDACTIC AND DISSIDENT HISTORIES IN WAR CRIMES TRIALS*, 60 Alb. L. Rev. 801, 819 (1997) (stating international law lacks public enforcement).

[126] Cynthia van Maanen, *What Does Universal Jurisdiction Mean for the Future of the Sovereign State*?, *QUANTITATIVE PEACE*, *available at* http://www.globalpolicy.org/intljustice/universal/2008/0828sovereign.htm (Aug. 28, 2008) (stating "while courts can assert their right to prosecute any crime against humanity, whether it takes place within their territory or not, one must question the value of such legal motions without international enforcement").

[127] *See* Stephanie M. Greene, 45 Am. Bus. L.J. 371, 391 (2008) (explaining how a weak case on enforcement issues could backfire on the entire international community).

The lack of an international jail remains a missing element. Fully developed international law compels the availability of an international jail.[128] Due to the fact that international law is largely consensual, it survives because the alternative is risk of combat.[129] But, the *desire* to thwart combat will not be enough. For whenever there is no credible police power, or where parties cannot make use of a formal system of sanctions, failure will emerge.[130] While the Rome Statute does offer a set of formal sanctions, once a defendant is transferred to a nation-state, enforcement is largely out of the ICC's hands.[131] An international jail would circumvent indirect piece-meal implantation of the regulations provided by the Rome Statute, and therefore birth uniformity. For the ICC to be truly formidable, an international jail is essential.

VII. Conclusions and Recommendations

What this note has attempted to show is that the ICC is good for the international community. The ICC promises punishment to criminals, who, for too long have sat comfortably under the umbrella of impunity, while their victims trembled in fear. By exchanging impunity for punishment, the ICC brings deterrence.

Because the ICC is girded in sound law, supported by numerous nation-states, and has acted with prudence, it is well-equipped to handle the *Bemba* case. Thereby sending a message to the people of the Central African Republic, that their lives are valued; to *Bemba* that neither he, nor

---

[128] *See* Setear, *supra* note 120.

[129] *See* Daniel R. Coquillette, *The Lessons of Anglo-Saxon "Justice"*, *2 Green Bag 2d 251,* 255 (1999).

[130] *See Id.*

[131] *See* Simpson, *supra* note 122, at 815-816 (explaining how a lack of precision can work to the advantage of the accused in terms of enforcement).

anyone else, is above the law; and finally, to the international community, that no longer will the injured be unspoken for, but those that prey on the innocent will answer.

Finally, I suggest that to make the ICC completely established as a powerhouse in the international community, implementation of an international jail is a must. Yes, the ICC is good. Yes, the ICC offers deterrence. But why stop there? Why not give the ICC hands to enforce its sentences. Create true international justice by subjecting all defendants to the same jail, to the same treatment, and simultaneously ensure enforcement. To fully live up to its potential, the ICC needs an international jail.