

The Role of Justice in Preventing Mass Atrocities
2019 Sudikoff Interdisciplinary Seminar on Genocide Prevention

Rapporteurs' Report

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On May 20-21, 2019 the Simon-Skjodt Center for the Prevention of Genocide at the US Holocaust Memorial Museum brought together scholars, civil society representatives, and US government officials to discuss the state of research and practice on justice initiatives and their role in preventing mass atrocities. This rapporteurs' report summarizes major observations and highlights several themes raised during the workshop, including opportunities for new research and resource development.

Introduction & Overview

While justice may advance many goals in the context of mass atrocities, the focus of this seminar was its role in prevention and non-recurrence. The seminar took an expansive definition of justice tools, moving beyond the “transitional” justice framework to explore the potential utility of justice initiatives at all stages of atrocities. Justice interventions are not limited to efforts to prosecute perpetrators after atrocities have occurred, but can also be incorporated early on in at-risk situations and, in some cases, used to stem escalating tensions or violence.

With limited scholarly or practical consensus on the role of justice in prevention and non-recurrence, domestic and international actors need to better understand which justice tools are best suited to various stages of conflict and how to design such tools to more effectively prevent and mitigate risks of atrocities. Breaking down silos between communities working on these issues—academics, international justice experts, policymakers, rule of law practitioners, atrocity prevention experts, local experts, victims, historians—is a first step to addressing this need. Participants agreed, however, that more work needs to be done to more precisely answer these questions and to cross-pollinate what research shows and translate it into practical policies, programs, and learnings that practitioners can use.

The organizers framed the discussion around three distinct approaches to prevention:

1. **Structural Prevention:** Efforts to address underlying risk factors and root causes of atrocities in context.
2. **Operational Prevention:** Efforts to change the decision making processes of individual actors.
3. **Systemic Prevention:** Efforts to address global or transnational risks that fuel atrocities.

Key Themes

Throughout the seminar, participants returned to three conceptual issues and themes with respect to justice tools aimed at preventing mass atrocities: (1) the varying and overlapping pathways by which justice tools might prevent atrocities; (2) the ways the complexity and diversity of mass atrocity situations complicate generalizations about the relationship between justice tools and atrocity prevention; and (3) efforts to bridge the gap between the transitional justice and atrocity prevention communities.

Identifying pathways to prevention for justice tools

Participants were challenged over the course of the seminar to identify the pathways by which specific justice tools might facilitate prevention, and the contextual and design factors that might maximize their preventive effect. Presented with the concepts of operational, systemic, and structural prevention, participants noted that many justice tools fit into multiple categories. For example, reparations might address the grievances of potential perpetrators (operational prevention) while also remedying socioeconomic inequities (structural prevention).

Participants identified key issues within each prevention pathway:

1. Operational prevention

Participants emphasized that depending on the actor, specific justice tools may or may not have a preventive impact, and that conventional justice tools are not designed to accommodate complex actors. In the words of one participant, “[c]riminal justice is bad at binaries.” Child soldiers, participants agreed, are particularly complicated actors for justice tools to address given their victim/perpetrator duality. Heads of state, on the other hand, may be more susceptible to the pressures and incentives certain justice tools impose but to differing degrees. Participants agreed that media influencers are particularly hard to affect via justice tools given the potential for the media as a platform to incite atrocities.

2. Systemic prevention

Participants articulated that in order for justice tools to address the global or transnational risks that fuel atrocities, they must creatively target the set of actors who permit atrocities broadly. Several challenges stand in the way of systemic prevention via justice—namely that it can take many years to see the impact of justice tools on global norms and trends and that there is a lack of incentive for the international community to take bold action. Participants noted that while you can build features into international institutions to promote preventive norms, most successful atrocity prevention policy is domestic. Participants noted several new developments in global justice norms, including the rise of “Al Capone” strategies, the expanded jurisdiction of the International Criminal Court to investigate forced displacement, and the linking of international crimes to transnational organized crime. Participants highlighted the potential preventive drawbacks of these new developments; one participant noted that states may restrict people fleeing atrocities if they fear ICC jurisdiction over forced displacement.

3. Structural prevention

When it comes to the potential for justice tools to address the root causes of atrocities, participants emphasized that local and national actors are key. Participants identified examples of justice tools that backfired because they were perceived by local communities as externally driven. Participants also highlighted several open conceptual questions about the ability of specific justice tools to address underlying causes of atrocities. For example, one participant argued that memorialization is not inherently structurally preventive, but rather requires preventive intent. Another participant questioned whether reparations could go beyond addressing individual actors to addressing the structural causes of violence. In other words, should reparations repair the harm done or the structural factors that led to the harm?

Challenges of studying the relationship between justice and prevention

Participants took note of the heterogeneity characterizing any conversation about mass atrocities, including the types of crime, phases of conflict, and types of actors. As participants endeavored to identify evidence for the preventive capacity of justice tools, they were challenged by the range of conflict stages, the diverse characteristics of perpetrator profiles, and the varying contextual factors of specific case studies. During an exercise in which participants matched justice tools to specific structural risk factors, participants noted their responses would differ greatly based upon the context in which the tools might be employed and the ways in which the tools were designed and implemented. Participants remarked that the challenges of these exercises are emblematic of the challenges associated with studying the relationship between justice and prevention; in particular, they identified a tension between the desire to develop a roster of best practices and the understanding that the most successful justice interventions tend to be those designed specifically for the contextual complexities of the conflicts they seek to address.

Connecting previously siloed fields

Throughout the seminar, participants noted the unique opportunity to dialogue with those outside their field. Generally, academics and practitioners in the fields of atrocity prevention and transitional justice do not interact. Participants noted that justice is not always applied with prevention in mind; likewise, prevention experts do not always see justice tools as a part of their atrocity prevention toolbox. This makes the role of justice in prevention difficult to discern; indeed, the conversation often drifted from the relationship between justice and prevention to separate discussions of each. Some participants expressed doubt that justice has a role in prevention. Others recognized the relationship between the two concepts, but emphasized that much more research was necessary to fully understand and operationalize the relationship.

Additional Themes

Additionally, participants touched on four themes tangential to the role of justice in prevention: (1) when, if ever, a carefully-crafted amnesty may be an appropriate tool; (2) the importance of strategic messaging and outreach around transitional justice knowledge, tools, and initiatives; (3) how to distinguish the goal of preventing mass atrocities from the goal of preventing violent conflict generally; and (4) the role of development initiatives and private business in preventing and promoting justice for mass atrocities.

When is amnesty acceptable?

Participants noted the key distinction between amnesties for individuals who merely participated in the conflict (as encouraged by the law-of-war treaties governing non-international armed conflicts) and blanket amnesties for crimes against humanity and other atrocities. Participants debated whether conditional amnesties or opportunities for sentence reductions may be appropriate for low-level perpetrators, or perpetrators cooperating with disarmament, demobilization, and reintegration, as well as other reconstruction efforts. Selective amnesties for low-level perpetrators, participants said, can facilitate criminal prosecution of leaders who commanded the commission of atrocities. Some suggested that amnesty may be appropriate when children involved in armed conflict are, or become, perpetrators. One participant described a tailored amnesty law proposed in Guatemala, which included an exception allowing the prosecution of international crimes including torture and forced disappearances; but a *de facto* blanket amnesty prevailed because it was too politically dangerous to prosecute the perpetrators of the most serious crimes.

During a simulation of a late-stage conflict scenario (during which the parties were said to be engaged in peace negotiations toward a power-sharing agreement), participants acknowledged that perpetrators would likely enjoy amnesty, at least temporarily, in order for the society to achieve a peace agreement. Participants questioned, however, the wisdom of implementing any explicit or long-term amnesty given

empirical evidence that blanket amnesties, at least, are not associated with a durable peace; some participants suggested creating as many “hooks” as possible in a peace agreement to open the door for prosecutions in the future. Similarly, participants expressed they would consider parties’ avoiding a universal amnesty a success. While amnesty in limited applications may be appropriate (e.g., to prevent rebels from being prosecuted for treason for participating in conflict), a blanket amnesty for crimes against humanity would not be.

Messaging and outreach around justice

Participants emphasized the importance of using outreach to build trust in justice institutions, noting that such institutions must be representative of the people they are designed to serve in order to warrant their trust. Justice interventions may be perceived as efforts to advance foreign or Western goals, and therefore locally driven initiatives, like those in Sri Lanka, must be advertised as such or may risk unjustified backlash. One participant identified the failure to communicate the local origins and control of justice Sri Lanka’s initiatives as the biggest problem in that context today. Similarly, although the international community claimed credit for many successful justice interventions in the Bosnian context, it was Bosnian jurists who did the hard work of developing the legal framework that enabled that success; such local initiative and ownership should be better recognized and communicated to stakeholders. And in Guatemala, messaging failures around transitional justice efforts have enabled entrenched denial and division in a continuing climate of racism.

Participants noted the importance of including minority populations’ views and interests in strategic messaging campaigns around justice issues, and of developing a communications strategy for any court or other formal justice institution that may seem more representative of foreign versus local interests. Regarding such justice institutions and interventions, one participant observed that it is much more difficult to change a community’s impression once it has formed than to influence the impression before it has crystallized. Therefore early, effective messaging should be privileged over perfect but delayed messaging.

Attendees suggested that civilian communities may be less likely to support rebel movements committing atrocities if they were made aware of what abuses those forces committed in their name; this sort of awareness campaign would be part-truth-seeking/truth-telling and part-outreach.

Preventing mass atrocities versus preventing violent conflict

Some participants disagreed about whether the effort to prevent mass atrocities should be distinguished from efforts to prevent conflict, or violence, in general. One group argued the best way to stop atrocities may be to stop warmaking; others maintained that lawful warmaking was not the object of these interventions.

Several participants argued that educating and training rebel leaders in international humanitarian law (IHL) may help prevent mass atrocities. When rebel forces feel certain universal rules apply to them as well as their opponents—and that their adversary will not break the rules so long as they do not—they may be more likely to adhere to lawful war tactics. Other participants suggested any such education should include explanation of, first, the value of IHL in situations of asymmetric conflict; and, second, the value of adhering to IHL even when the adversary does not. Other contributors were concerned this sort of education would legitimize the use of violence in general, arguing that the best way to prevent mass atrocities would be to prevent the use of force in all contexts; this group suggested that emphasizing the public relations value of IHL adherence to violent factions diverted from the project of atrocity prevention.

Role of development initiatives and the private sector

Participants advocated stronger integration between justice interventions—from prevention to transitional justice—and development and investment efforts. How can the strengths and resources of the private sector be leveraged to address the root causes of violence? How should businesses be advised to avoid contributing to those causes and instead be inspired to contribute to their rectification (e.g., through reparations)? Participants also noted that parties to a conflict may offer, or be offered, development aid as an incentive to renounce violence, as the Colombian government has done.

Participants wondered what sort of involvement in atrocity prevention could be expected from global media and technology companies. For example, participants discussed the role and obligations of social media platforms with respect to rights and conflict, including the tension between platforms' responsibility to protect users' free expression and their obligation to not facilitate, or be complicit in, fomenting atrocities.

Participants also took note of the nexus between extractive industry practices and government exploitation of civilians that may precede escalating tensions within a society. During a simulation of an early-stage conflict scenario, participants suggested that victims may bring litigation against extractive industry businesses that are deemed complicit in criminal activity, suggesting that a war crimes unit operating in Paris is receptive to such cases, and noting that victims could pursue these claims elsewhere under universal jurisdiction. Participants in a simulated post-conflict scenario, meanwhile, suggested launching transitional justice processes may draw private-sector investment and thereby help stabilize a recovering society.

Similarly, during a discussion of a perpetrator case study, contributors suggested that a truth commission on development and investment programs may offer an effective means of addressing the role of industry in conflict. Participants also wondered whether land distribution conversations with affected communities may be used as a preventative intervention, and suggested a reparative process to address property loss—accounting for any role played by businesses in development processes—could be an appropriate mid- or post-conflict intervention.

Opportunities for Additional Research on the Role of Justice in Preventing Mass Atrocities

Participants suggested that the following research questions on the preventive potential of justice tools merit additional attention, through cross-national quantitative studies, qualitative case studies, and other methods:

- How might conditional, moderate, or selective amnesties advance or impede reconciliation, repair, and recovery? Further research informing the design of amnesties may build on existing resources, including Geoff Dancy's dataset for *Deals with the Devil*.¹
- How effective are new methods and approaches to sanctions as a tool for prevention? There has been research on the efficacy of individual sanctions,² but past research is insufficient to assist today's policy makers as they assess the present range of options. Some participants queried

¹ Geoff Dancy, *Deals with the Devil? Conflict Amnesties, Civil War, and Sustainable Peace*, 72 International Organization, 387 (2018), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2978889

² Rebecca Brubaker & Thomas Doerfler, UN Sanctions and the Prevention of Conflict, UN University Center for Policy Research Conflict Prevention Series 4 (2017), available at: <https://cpr.unu.edu/un-sanctions-and-the-prevention-of-conflict.html>

whether sanctions should be considered a justice tool since they may be dismantled if the target changes their behavior.

- To what extent can reparations not only redress wrongs but also address the underlying socio-economic problems contributing to those wrongs? The importance of land restoration and distribution was specifically highlighted.
- While there has been some work on the incentives created by ICC prosecutions,³ participants recommended further study into the peculiarities making some leaders more or less susceptible to outside influence, pressure, and the threat of legal prosecution. A typology of leaders might inform the selection of justice tools with an eye toward prevention. For example, various African leaders have shown a spectrum of reactions to the threat of ICC prosecution, from Bashir in Sudan to Qaddafi in Libya to Jammeh in Gambia. The Dutch criminologist Alette Smeulers' work on perpetrator types may offer a helpful starting point.⁴
- Which tools and interventions have been successful at prevention when used during early stages of conflict? Building on the work of Cyanne Loyle and Helga Binningsbo and their dataset examining the efficacy of in-conflict justice initiatives,⁵ more research is needed to help explain the context in which some tools may have more preventive capacity than others.
- How can practitioners meaningfully involve victims in the design and implementation of justice processes in order to ensure that such processes address root causes of atrocities and promote the non-recurrence of violence?
- How can documentation bodies and repositories collecting conflict data, like those in South Sudan and Syria, best use a bottom-up approach to data collection without retraumatizing victims and survivors?
- How can private-sector investment be leveraged to support the preventive potential of justice initiatives?
- What are the most effective ways justice tools can be sold to the silent majority of people not directly affected by a conflict? In the context of Colombia, for example, one of the greatest impediments to peace was simply that the urban population did not viscerally feel the conflict and therefore had little incentive to compromise.
- What is the best way for companies like Whatsapp and Facebook to operate in places like Burma/Myanmar, where their platforms have been used to convey hate speech and incitement?

Opportunities for New Resources to Assist Justice Interventions for Atrocity Prevention

Participants suggested the following resources, grouped thematically below, may be useful in assisting those working to develop and implement justice tools to serve prevention:

Telling the story

- **Media Toolkit:** Several participants suggested the creation of a toolkit of messaging strategies for justice initiatives, especially one for dealing with the media. This could include resources for reporters to know what questions to ask, suggestions for how to think like first responders and

³ Geoff Dancy & Eric Wiebelhaus-Brahm, *The Impact of Criminal Prosecutions During Intrastate Conflict*, 55 (1) *Journal of Peace Research* 47 (2018), available at: ssrn.com/abstract=3099876

⁴ Alette Smeulers, *Perpetrators of International Crimes: Towards a Typology*, *Supranational Criminology* 233 (2008), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383085

⁵ Cyanne Loyle & Helga Malmin Binningsbo, *Justice during Armed Conflict: A New Dataset on Government and Rebel Strategies*, 62 (2) *Journal of Conflict Resolution* (2018), available at: <https://journals.sagepub.com/doi/pdf/10.1177/0022002716655441>

preserve evidence, and guidance on effective ways to tell the story of victims and of justice, especially in difficult and dangerous media environments.

- **Video and Multimedia Development:** As the internet becomes increasingly accessible, multimedia explainer videos continue to grow in popularity and help everyday people understand new concepts. Why not do the same for justice tools? Many academics have also turned to outsourcing tools to create explainer videos for their research, which can help summarize and make accessible the lessons of recent academic projects.

Building a broader coalition

- **Sharing Ideas Locally and Globally:** One identified challenge was disseminating information across languages and cultures, especially into rural and remote areas. More work could be done on translating justice concepts into new languages, plain language, and accessible formats. Especially given the importance of local and bespoke solutions, NGOs, practitioners, and others can help develop ways to best disseminate justice information to local areas and facilitate hyper-local justice initiatives if national or subnational justice is unachievable.
- **Training Militaries:** One participant questioned the withdrawal of international donor support for human rights training for foreign militaries, querying whether there was more that could be done outside of military-to-military engagements, including through the efforts of organizations like Geneva Call.⁶
- **Private Sector Engagement:** Many in the private sector may wish to simply better understand how they can, at a minimum, not make a bad situation worse. Others may actually seek to make a positive contribution to the prevention of hostilities. Practitioners and other actors can do more to provide the private sector with information so that they can better understand risk factors and can also provide tools and opportunities for companies to be productively engaged. One particular way to help would be for large global NGOs and other savvy actors to help liaise between local activists and multinationals. For example, local NGOs in DRC likely have the cultural context and understanding to help YouTube adjudicate what videos should and should not be pulled down, but may not have the connections and know-how to flag such videos. Large NGOs or other players could step in to interpret the needs of locals to the global internet giants.

Bridging the Gap Between Academia and Practice – A Possible Role for the USHMM

The research-practice divide is common across the policy world given the differing incentives and timelines for academics and practitioners. This divide will continue as long as academics are encouraged to publish peer-reviewed journal papers to the exclusion of more practical efforts that would meet the needs of practitioners for short, actionable, and context-specific facts, figures, and recommendations. By helping to fund more policy-informed research, by aggregating useful information in accessible formats, by hosting open databases and repositories, and by convening conferences such as this one at the intersection of policy, research, and practice, the USHMM can serve a powerful role lacking in the United States and the international community. As a public-private partnership itself, perhaps in conjunction with similar organizations like the US Institute of Peace, it is well placed to take actions such as the following:

- **Policy Papers and Case Studies:** The Museum and others could help translate the current state of research into two-page policy papers that could be disseminated not only to US government officials, but to governments, organizations, and individuals around the world. Policy papers would focus on the state of research in a particular area—amnesties, reparations, etc.—and provide a basic understanding as well as links to further research and examples that would help

⁶ An organization founded to raise awareness in Yemen of international humanitarian law. <https://genevacall.org/>

practitioners analogize to the situation they face. This could include more focused case study research on what worked, and did not work, in each particular context.

- **Improving Accessible Online Databases:** While there are some historical databases of facts, figures, and lessons learned from past atrocities, justice initiatives, and transitions, these are often developed by individual researchers in service of academic projects. Building on these individual efforts to create a broadly accessible database for justice tools with practice in mind to ensure all relevant data is collected and updated would be a great advance.
- **USHMM's Early Warning Website Expansion:** The USHMM's early warning website has a heat map identifying potential locations of future conflict. This could be expanded to a historical map that would help people visualize important aspects of databases cataloging the design of various justice interventions and their efficacy.
- **Changing Academic Incentives:** Writing prizes, honorariums, symposiums, and more could help incentivize policy-relevant research, which, if needed, the Museum could help summarize and simplify for others.

Appendix I

Concepts & Definitions

Transitional Justice Tools

For the purposes of this seminar, we define transitional justice tools as strategies--formal and informal, legal and non-legal--employed to address the commission of mass atrocities by providing accountability, redress, and dignity to victims.⁷ Transitional justice tools are designed to address the panoply of societal, community, and individual harms suffered following the commission of these crimes.

Traditionally, the four categories of transitional justice tools include criminal prosecutions, truth-seeking, reparations, and institutional reform.⁸ In this seminar, we will strive to think widely and creatively about the different tools available in transitioning or post-conflict contexts. Examples of transitional justice tools we will address include reparations, memorialization, truth commissions, traditional justice mechanisms, criminal prosecutions, vetting and lustration, and other institutional reforms.

Mass Atrocities

For the purposes of this seminar, we define mass atrocities as large-scale, systematic violence against civilian populations.⁹ Though lacking a formal legal definition, the term most often includes genocide, war crimes, crimes against humanity, and ethnic cleansing.

Atrocity Prevention

In this seminar, we will examine the ability of transitional justice tools to prevent and mitigate mass atrocities. Our analytic approach identifies three complementary approaches to prevention: systemic, operational, and structural.¹⁰

Structural Prevention

Structural prevention includes strategies to decrease risk factors for and bolster societal resilience to atrocities in specific contexts by strengthening or repairing institutions or addressing social, economic, environmental, or other underlying issues.¹¹ Examples of structural prevention efforts might include truth and reconciliation commissions, which could build social cohesion, or constitutional reforms, which could promote more inclusive governance.

Operational Prevention

⁷ For the purposes of this seminar, we will analyze transitional justice tools used in response to mass atrocities. Transitional justice tools can also be used to address systematic or widespread human rights violations.

⁸ "Other Justice Tools," United States Holocaust Memorial Museum (2019), <https://www.ushmm.org/confront-genocide/ferencz-international-justice-initiative/about/tools>.

⁹ Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention*, Washington, DC: United States Holocaust Memorial Museum (2015): 31.

¹⁰ Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict: Final Report* (Washington, DC: Carnegie Commission on Preventing Deadly Conflict, 1997); *Progress Report on the Prevention of Armed Conflict*, Report of the Secretary-General, UN Doc. A/60/891 (2006): 5.

¹¹ Carnegie Commission on Preventing Deadly Conflict (1997); Barnett R. Rubin and Bruce D. Jones, "Prevention of Violent Conflict: Tasks and Challenges for the United Nations," *Global Governance* 13, no. 3 (2007): 400; Stephen McLoughlin, *The Structural Prevention of Mass Atrocities* (New York: Routledge, 2014).

Operational prevention includes strategies to discourage or disable specific, identified actors from committing atrocities.¹² Examples of operational prevention efforts might include threats of prosecution, which aim to change the calculus of potential perpetrators, or lustration, which aims to remove abusive elements from powerful positions.

Systemic Prevention

Systemic prevention includes strategies to address global or transnational risks that fuel atrocities, often by strengthening peaceful norms, institutions, or regulatory regimes.¹³ Examples of systemic prevention efforts might include the creation of a Crimes Against Humanity convention or the expansion of International Criminal Court jurisdiction, both of which could strengthen global anti-atrocity norms.

¹² Carnegie Commission on Preventing Deadly Conflict (1997); Lawrence Woocher, “The Responsibility to Protect: Toward a Strategy,” in *Prevention of Violent Conflict: Tasks and Challenges for the United Nations*, eds. W. Andy Knight and Frazer Egerton. London (2012): 28.

¹³ *Progress Report on the Prevention of Armed Conflict* (2006): 5.

Appendix II

The Role of Justice in Preventing Mass Atrocities: Evolving Debates and New Directions

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This paper seeks to outline the scholarly debates surrounding the role of justice in preventing mass atrocities and to clarify the approach taken by the 2019 Sudikoff Interdisciplinary Seminar on Genocide Prevention in addressing these debates.

Motivation for convening

Scholars and practitioners agree past atrocities are a strong predictor of future atrocities within a country.¹⁴ Given this, many argue that transitional justice--which aims to help societies deal effectively with past abuses--has an important role to play in atrocity prevention, especially in preventing the recurrence of mass atrocities.

Practitioners and international justice lawyers often assume that effective transitional justice should facilitate atrocity prevention. The Preamble to the Rome Statute of the International Criminal Court (ICC) articulates the Court's determination to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."¹⁵ A 2018 study by the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide discusses the "contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, particularly to the prevention of genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence."¹⁶

Among scholars, the preventive capacity of transitional justice is more contentious. Debates have largely centered on the ability of prosecutions to deter potential perpetrators, and a sharp cleavage has emerged between scholars who believe in the deterrent capacity of international criminal justice and those who doubt it.¹⁷ Meanwhile, there has been a relative neglect of (1) transitional justice tools other than prosecutions, and (2) the ways in which transitional justice tools, including prosecutions, might contribute

¹⁴ Benjamin E Goldsmith, Charles R. Butcher, Dimitri Semenovitch and Arcot Sowmya, "Forecasting the onset of genocide and politicide: Annual out-of-sample forecasts on a global dataset, 1988—2003," *Journal of Peace Research* 50, no. 4 (2013): 449; Barbara Harff, "No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder since 1955," *The American Political Science Review* 97, no. 1 (2003): 62; Scott Straus, *Fundamentals of Genocide and Mass Atrocity Prevention* (United States Holocaust Memorial Museum, 2016): 59-61; *Early Warning Project*, United States Holocaust Memorial Museum (2019), <https://earlywarningproject.ushmm.org/methodology-statistical-model>.

¹⁵ United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, <https://www.refworld.org/docid/3ae6b3a84.html>.

¹⁶ United Nations General Assembly, *Joint study of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence and the Special Adviser to the Secretary-General on the Prevention of Genocide*, A/HRC/37/65, 1 March 2018.

¹⁷ See Daniel Krmaric, "Should I Stay or Should I Go? Leaders, Exile, and the Dilemmas of International Justice," *American Journal of Political Science* 62, no. 2 (2018): 486. Krmaric argues that the existing conversation on justice and deterrence is "largely a debate between optimists and pessimists."

to prevention outside their (potential) deterrent effect. As a result, policymakers and practitioners have little clear guidance about *how* to maximize the preventive effects of transitional justice efforts.

The 2019 Sudikoff Interdisciplinary Seminar on Genocide Prevention will bring together a diverse group of practitioners and scholars to discuss how transitional justice tools (broadly defined) can potentially help prevent mass atrocities. Through the framework of systemic, structural, and operational prevention, scholars and practitioners will examine the ability of transitional justice tools to address the root causes of conflict (structural prevention), influence the calculus of potential perpetrators (operational prevention), and influence global norms (systemic prevention). Ultimately, the seminar will aim to (1) identify directions for fruitful research on the topic of transitional justice tools and atrocity prevention, and (2) generate ideas for new resources to help practitioners maximize the preventive impact of transitional justice tools.

Evolution of the scholarly debate

The question of the role of transitional justice in preventing future atrocities is long-standing, predating the adoption of the Rome Statute of the ICC. The following section is not intended to be an exhaustive review of the scholarship on this question, but rather a summary of key trends and turning points in the scholarly debate that informed our thinking as we developed the concept for the 2019 Sudikoff Seminar.

With the establishment of the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the mid-1990s and the entry into force of the Rome Statute in 2002, scholars began to speculate about the wider implications of an emerging international criminal justice system. Some articulated hope that the budding global system would offer preventive effects in the form of deterrence and ending impunity.¹⁸ Others argued that factors such as a lack of enforcement mechanisms, the irrationality of perpetrator behavior (and the belief of some perpetrators in the morality of their violent acts), and the impossibility of addressing all preconditions to atrocities rendered the deterrent capacity of the international criminal justice system implausible at best.¹⁹ A growing camp of scholars argued that international courts should be more modest in their goals, focusing on accountability rather than prevention through deterrence.²⁰

As the debate on the deterrent capacity of international criminal justice persisted, there was a relative neglect of (1) transitional justice tools other than prosecutions, and (2) the ways in which transitional justice tools might contribute to prevention other than deterrence. Some scholars began to examine the structural impacts of transitional justice tools through case studies, often of the former Yugoslavia.²¹ Jack Snyder and Leslie Vinjamuri argued that the “logic of consequences” rather than the “logic of appropriateness” should guide the choice of transitional justice tools to be used post-atrocity. By this

¹⁸ Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* 95, no. 1 (2001).

¹⁹ Mark A. Drumbl, “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity,” *Northwestern University Law Review* 99, no. 2 (2005).

²⁰ Drumbl 2005; Mirjan R. Damaska, “What is the Point of International Criminal Justice?” *Chicago-Kent Law Review* 83, no. 1 (2008).

²¹ Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, 2018); James Meernik, “Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia,” *Journal of Peace Research* 42, no. 3 (2005).

reasoning, they argued for greater consideration for amnesties, which they found to be more effective at ending atrocities than prosecutions.²²

In 2010, Hunjoon Kim and Kathryn Sikkink offered the first empirical evidence for the deterrence effect with the finding that domestic and international human rights prosecutions reduce repression in transitional countries. They found that truth commissions also improve human rights in transitional countries, suggesting that the combination of trials and truth commissions has the greatest deterrent effect because it places both material and normative pressure on potential future perpetrators.²³ Recently, some scholars have taken innovative empirical approaches to examine the deterrent capacity of transitional justice, probing variation in deterrent capacity across legal stage, by actor, and by grievance addressed.²⁴ Some scholars have recently argued that the ICC can contribute to a “normative shift toward accountability” but little in the way of direct deterrence,²⁵ while others have argued that the positive and negative effects of criminal accountability on the likelihood and duration of atrocities are “intimately linked.”²⁶ Kate Cronin-Furman articulated the challenges of importing the concept of deterrence from the realm of domestic criminal law to international criminal law.²⁷ In the years that followed, other scholars introduced new lenses of analysis beyond criminality, such as the security studies framework of “strategic coercion,” to move beyond the “*pro et contra* debate” of whether international criminal justice can deter in principle to explore whether the threat of prosecutions can deter in the same way as the threat of sanctions, force, or political retribution.²⁸ Though these new avenues of inquiry hold promise, the debate on international criminal justice and prevention remains relatively polarized and stalled.

Though international criminal justice comprises the bulk of the literature on transitional justice and atrocity prevention, with the establishment of the South African Truth and Reconciliation Commission, many scholars sought to understand the effects of truth seeking processes. In 1996, Stephan Landsman suggested that truth commissions could promote social healing and that the “threat of disclosure and ostracism” may have a deterrent effect.²⁹ Scholars later argued that truth commissions promote democratization and human rights--and subsequently a reduction in violence--by recommending institutional reforms.³⁰ Martha Minow suggested that truth commissions’ focus on institutions rather than

²² Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* 28, no. 3 (2004).

²³ Hunjoon Kim and Kathryn Sikkink, “Explaining the Deterrent Effect of Human Rights Trials for Transitional Countries,” *International Studies Quarterly* 54, no. 4 (2010).

²⁴ Michael Patrick Broache, “Evaluating the Effects of International Criminal Court Prosecutions on Atrocities During Ongoing Armed Conflict,” (dissertation, Columbia University, 2015); Hyeran Jo and Beth Simmons, “Can the International Criminal Court Deter Atrocity?” *International Organization* 70, no. 3 (2016); Geoff Dancy and Eric Wiebelhaus-Brahm, “The Impact of Criminal Prosecutions during Intrastate Conflict,” *Journal of Peace Research* 55, no. 1 (2018); Cyanne E. Loyle and Benjamin J. Appel, “Conflict Recurrence and Post-Conflict Justice: Addressing Motivations and Opportunities for Sustainable Peace,” *International Studies Quarterly* 61, no. 3 (2017).

²⁵ Tom Buitelaar, “The ICC and the Prevention of Atrocities: Criminological Perspectives,” (working paper, The Hague Institute for Global Justice, The Hague, 2016).

²⁶ Krmaric (2018).

²⁷ Kate Cronin-Furman, “Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity,” *The International Journal of Transitional Justice* 7 (2013).

²⁸ Marc Schack, “‘Going to the Hague’ as Coercive Leverage: The Palestinian ICC Policy during the 2014 Operation Protective Edge,” *Journal of International Criminal Justice* 15 (2017).

²⁹ Stephan Landsman, “Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions,” *Law and Contemporary Problems* 59, no. 4 (1996).

³⁰ Margaret Popkin and Naomi Roht-Arriaza, “Truth as Justice: Investigatory Commissions in Latin America,” *Law and Social Inquiry* (1995); Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide*

individuals makes them more effective in prevention,³¹ whereas Tricia Olsen et al. found that only in conjunction with trials and amnesties could truth commissions improve human rights.³² In spite of growing attention to the preventive potential of truth commissions, there remains an over-reliance on case studies and significant lack of empirics to back up claims.³³

Though scholars have begun to probe the preventive capacity of other transitional justice tools including memorialization, amnesties, and reparations,³⁴ most tools other than prosecutions remain relatively neglected in the literature. The question of the role of transitional justice in atrocity prevention is therefore in need of reframing and reinvigoration.

Analytic approach

The conversation on justice and deterrence has been called “a debate between optimists and pessimists,” or even between believers and non-believers.³⁵ It may be impossible to answer empirically with high confidence whether international criminal justice can deter future perpetrators. However, revisiting the analytical approach to the larger question of the relationship between transitional justice tools and atrocity prevention offers an opportunity to revitalize the scholarly debate and draw useful conclusions for practitioners seeking to operationalize atrocity prevention through transitional justice tools.

Asking which transitional justice tools “work” to prevent atrocities and which do not is empirically difficult and implies a uniformity of effects across situations that vary tremendously (e.g., in the nature of atrocities, types and motivations of perpetrators, and/or status of political transition). The challenge for policymakers and practitioners is to select from a limited set of transitional justice tools to respond to the specifics of an atrocity situation. The 2019 Sudikoff Seminar will seek to address questions that should inform those choices, including:

1. In which contexts or under what conditions are specific transitional justice tools likely to be effective in preventing mass atrocities?
2. How can specific transitional justice tools be designed and implemented in ways that maximize their chance of preventing mass atrocities?

In addition to these two key policy questions are several overarching questions of policy design and impact, to be considered throughout the seminar:

- How does the mixing and sequencing of different transitional justice tools affect their preventive impact?
- How do certain transitional justice tools affect different actors differently?
- How do transitional justice tools interact with the wider set of atrocity prevention tools?

and Mass Violence (Beacon Press: 1998); Eric Brahm, “Uncovering the Truth: Examining Truth Commission Success and Impact,” *International Studies Perspectives* 8, no. 1 (2007).

³¹Minow 1998; Martha Minow, “The Hope for Healing: What Can Truth Commissions Do?”, in *Truth v. Justice: The Morality of Truth Commissions*, eds. Robert I. Rotberg and Dennis Thompson. Princeton (2000).

³²Tricia D. Olsen, Leigh A. Payne, Andrew G. Reiter, and Eric Wiebelhaus-Brahm, “When Truth Commissions Improve Human Rights,” *The International Journal of Transitional Justice* 4 (2010).

³³ Brahm 2007; David Mendeloff, “Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?” *International Studies Review* 6, no. 3 (2004).

³⁴ Kerry E. Whigham, “Remembering to Prevent: The Preventive Capacity of Public Memory,” *Genocide Studies and Prevention* 11, no. 2 (2017); Loyle and Appel (2017); Geoff Dancy, “Deals with the Devil? Conflict Amnesties, Civil War, and Sustainable Peace,” *International Organization* 72, no. 2 (2018).

³⁵ Krcmaric 2018.

- What unintended or ancillary consequences (positive and negative) are associated with the use of specific transitional justice tools?

It is our hope that these overarching questions infuse each component of the seminar and remind participants of the practical concerns and constraints facing policy makers.

Conceptual framework

In addition to re-framing the questions that guide the conversation on transitional justice and atrocity prevention, the 2019 Sudikoff Seminar aims to give attention to (1) transitional justice tools other than prosecutions, and (2) the ways in which transitional justice tools might contribute to prevention other than deterrence. To do so, we employ the concepts of (1) transitional justice tools, and (2) structural, operational, and systemic prevention.

Transitional justice tools

Transitional justice tools are strategies--formal and informal, legal and non-legal--employed to address the commission of mass atrocities by providing accountability, redress, and dignity to victims.³⁶ Traditionally, the four categories of transitional justice tools include criminal prosecutions, truth-seeking, reparations, and institutional reform. In this seminar, we will strive to think widely and creatively about the different tools available in transitioning or post-conflict contexts. Examples of transitional justice tools we will address include reparations, memorialization, truth commissions, traditional justice mechanisms, criminal prosecutions, vetting and lustration, and other institutional reforms.

Different transitional justice tools have different logics, theories of change, and desired outcomes. The 2019 Sudikoff Interdisciplinary Seminar on Genocide Prevention hones in on one desired outcome--atrocity prevention--and examines the different logics and theories of change by which transitional justice tools could contribute to this outcome.

Why focus on transitional justice *tools*? In transitioning or post-conflict situations, practitioners are faced with the challenge of operationalizing the abstract goal of atrocity prevention. The study of specific tools can offer clear, pragmatic guidance to practitioners on the different strategies available to prevent atrocities, and the range of effects these strategies may have. Different transitional justice tools also have different internal logics and theories of change, and work differently in various contexts. Thus, a focus on tools is both a response to the needs of practitioners and an examination of the different motivations for and logical pathways to preventing atrocities through transitional justice.

Structural, operational, and systemic prevention

Much of the scholarly debate on the ability of transitional justice tools to prevent atrocities has focused on a single causal pathway: deterrence. For the purposes of this seminar, we employ the concepts of structural, operational, and systemic prevention, adapted from literature on prevention of armed conflict, to encourage thinking about the different preventive logics of transitional justice tools.³⁷

³⁶ For the purposes of this seminar, we will analyze transitional justice tools used in response to mass atrocities. Transitional justice tools can also be used to address systematic or widespread human rights violations.

³⁷ Carnegie Commission on Preventing Deadly Conflict, *Preventing Deadly Conflict: Final Report* (Washington, DC: Carnegie Commission on Preventing Deadly Conflict, 1997); *Progress Report on the Prevention of Armed Conflict*, Report of the Secretary-General, UN Doc. A/60/891 (2006): 5.

Structural prevention includes strategies to decrease risk factors for and bolster societal resilience to atrocities in specific contexts by strengthening or repairing institutions or addressing social, economic, environmental, or other underlying issues.³⁸ Structural prevention takes as its starting point the “root causes” of and resiliencies to atrocities.³⁹ By remedying structural problems, it aims to eliminate risk factors and bolster societal resilience to atrocities in the future. Structural prevention is inherent to the logic of some transitional justice tools; for example, constitutional reform processes are designed to remedy institutional inequities. Other tools may address underlying risk factors indirectly; for example, the truth-seeking goals of truth commissions and at times prosecutions may indirectly promote social cohesion and reduce social risk factors for atrocities.

Operational prevention includes strategies to discourage or disable specific, identified actors from committing atrocities.⁴⁰ Operational prevention strategies take aim at perpetrators as individuals, and thus their success depends on the response of the targeted perpetrator. Tools such as prosecutions or truth commissions might deter potential perpetrators from committing further abuses, thus changing their behavior. Tools such as lustration or security sector reform might degrade the capacity of potential perpetrators to carry out abuses.

Systemic prevention includes strategies to address global or transnational risks that fuel atrocities, often by strengthening peaceful norms, institutions, or regulatory regimes.⁴¹ Systemic prevention strategies are driven by the logic that atrocities can be attributed partly to global patterns, and that these factors can be addressed at the global or transnational level, reducing the risk of mass atrocities everywhere. The establishment of the ICC or promotion of universal jurisdiction for atrocity crimes are examples of systemic prevention inasmuch as they establish norms and processes linked to atrocity crimes across many states.

The conceptual framework of structural, operational, and systemic prevention opens the space for scholars to consider often-neglected pathways to prevention and to question the commonly accepted logics of specific transitional justice tools. In urging scholars to think creatively about the different pathways to prevention and the different tools that can set us on these pathways, the 2019 Sudikoff Seminar strives to spur practical, output-driven conversations and research on the question of transitional justice and atrocity prevention.

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³⁸ Carnegie Commission on Preventing Deadly Conflict (1997); Barnett R. Rubin and Bruce D. Jones, “Prevention of Violent Conflict: Tasks and Challenges for the United Nations,” *Global Governance* 13, no. 3 (2007): 400; Stephen McLoughlin, *The Structural Prevention of Mass Atrocities* (New York: Routledge, 2014).

³⁹ McLoughlin (2014): 2.

⁴⁰ Carnegie Commission on Preventing Deadly Conflict (1997); Lawrence Wocher, “The Responsibility to Protect: Toward a Strategy,” in *Prevention of Violent Conflict: Tasks and Challenges for the United Nations*, eds. W. Andy Knight and Frazer Egerton. London (2012): 28.

⁴¹ *Progress Report on the Prevention of Armed Conflict* (2006): 5.