

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.¹ 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."² 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."³

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.⁴ 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 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.

¹ Benjamin E Goldsmith, Charles R. Butcher, Dimitri Semenovitch and Arcot Sowmya, "Forecasting the onset of genocide and politicicide: 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>.

² United Nations General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, <https://www.refworld.org/docid/3ae6b3a84.html>.

³ 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.

⁴ 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."

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.⁵ 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.⁶ A growing camp of scholars argued that international courts should be more modest in their goals, focusing on accountability rather than prevention through deterrence.⁷

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.⁸ 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 reasoning, they argued for greater consideration for amnesties, which they found to be more effective at ending atrocities than prosecutions.⁹

⁵ Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* 95, no. 1 (2001).

⁶ Mark A. Drumbl, “Collective Violence and Individual Punishment: The Criminality of Mass Atrocity,” *Northwestern University Law Review* 99, no. 2 (2005).

⁷ Drumbl 2005; Mirjan R. Damaska, “What is the Point of International Criminal Justice?” *Chicago-Kent Law Review* 83, no. 1 (2008).

⁸ 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).

⁹ Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice,” *International Security* 28, no. 3 (2004).

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.¹⁰ 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.¹¹ Some scholars have recently argued that the ICC can contribute to a “normative shift toward accountability” but little in the way of direct deterrence,¹² while others have argued that the positive and negative effects of criminal accountability on the likelihood and duration of atrocities are “intimately linked.”¹³ Kate Cronin-Furman articulated the challenges of importing the concept of deterrence from the realm of domestic criminal law to international criminal law.¹⁴ 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.¹⁵ 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.¹⁶ Scholars later argued that truth commissions promote democratization and human rights--and subsequently a reduction in violence--by recommending institutional reforms.¹⁷ Martha Minow suggested that truth commissions’ focus on institutions rather than individuals makes them more effective in prevention,¹⁸ whereas Tricia Olsen et al. found that only in

¹⁰ Hunjoon Kim and Kathryn Sikkink, “Explaining the Deterrent Effect of Human Rights Trials for Transitional Countries,” *International Studies Quarterly* 54, no. 4 (2010).

¹¹ 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).

¹² Tom Buitelaar, “The ICC and the Prevention of Atrocities: Criminological Perspectives,” (working paper, The Hague Institute for Global Justice, The Hague, 2016).

¹³ Krcmaric (2018).

¹⁴ Kate Cronin-Furman, “Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity,” *The International Journal of Transitional Justice* 7 (2013).

¹⁵ 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).

¹⁶ Stephan Landsman, “Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions,” *Law and Contemporary Problems* 59, no. 4 (1996).

¹⁷ 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 and Mass Violence* (Beacon Press: 1998); Eric Brahm, “Uncovering the Truth: Examining Truth Commission Success and Impact,” *International Studies Perspectives* 8, no. 1 (2007).

¹⁸ Minow 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).

conjunction with trials and amnesties could truth commissions improve human rights.¹⁹ 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.²⁰

Though scholars have begun to probe the preventive capacity of other transitional justice tools including memorialization, amnesties, and reparations,²¹ 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.²² 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?
- 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.

¹⁹Tricia 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).

²⁰ Brahm 2007; David Mendeloff, “Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?” *International Studies Review* 6, no. 3 (2004).

²¹ 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).

²² Krcmaric 2018.

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.²³

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.²⁴

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.²⁵ Structural prevention takes as its starting point the “root causes” of and resiliencies to atrocities.²⁶ By remedying structural problems, it aims to eliminate risk

²³ 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.

²⁴ 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.

²⁵ 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).

²⁶ McLoughlin (2014): 2.

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.²⁷ 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.²⁸ 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.

²⁷ 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.

²⁸ *Progress Report on the Prevention of Armed Conflict* (2006): 5.