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The Legitimacy of Global Legal Governance: Institutional Power and Human Rights Bias in International Criminal Justice

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**The Legitimacy of Global Legal Governance:
Institutional Power and Human Rights Bias in International
Criminal Justice**

by

Martin J. Burke

A dissertation submitted to the Graduate Faculty in Political Science in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

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This manuscript has been read and accepted for the Graduate Faculty in Political Science in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy

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Abstract

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Advisor: Thomas G. Weiss

As global legal governance institutions exercise increasing coercive power, including through the prosecution and incarceration of individuals, such institutions require greater legitimacy. An essential but often overlooked source is the right of the accused in mass-atrocity trials to effective legal protection, which constitutes a “legal legitimacy” based on liberal norms of criminal justice. The two most important sources of legal legitimacy are: “legality,” that is, the non-retroactive enforcement of crimes and punishment; and “defense parity,” institutional and procedural guarantees of substantive equality between the defense and prosecution before and during trial. The dissertation argues that the implementation of defendant rights and the quality of fairness thereby achieved by trials are weakened by the effect of two political features of international criminal justice: institutional power and human rights bias towards prosecution. First, institutional power is exercised by states and intergovernmental organizations through the creation and modification of the structural and procedural rules that shape the legal interaction between the major participants in trials—judges, prosecutors, and defendants and their counsel.

Second, these political actors demonstrate a bias towards successful prosecution, as a projection of the victim-focus of the international human rights protection regime into criminal justice. These issues are explored through case studies of the Yugoslavia tribunal and the International Criminal Court. The effect of these factors on the pre-trial and trial dynamic between the prosecution and defense is to generate significant weaknesses in the ability of defense counsel to adequately represent their clients. International criminal trials are as a consequence significantly less fair and legitimate than is commonly presumed.

Acknowledgments

During the course of the research I interviewed about 20 individuals involved with international criminal justice. These include defense counsel, prosecutors, other staff at international tribunals, and other individuals outside of the court systems with expertise in this area. I am grateful to all of those who agreed to be interviewed and who graciously gave of their time, providing invaluable personal insights. Some are acknowledged by name in the appendix, while others preferred to be quoted anonymously, and some agreed to speaking solely for background.

I am especially indebted to my advisor, Professor Thomas G. Weiss, for, first of all, teaching such an engaging first-semester class on the United Nations that I switched my subfield focus from comparative politics (the area of my Masters) to IR. Observing how Tom taught the class also improved my own teaching. Tom has also provided me with various challenging research, writing, and editing opportunities. They helped crystalize an interest in international law and organizations, and human rights and humanitarianism, and have significantly improved both my understanding of IR and my writing skills. Our joint research projects also took me in unexpected directions, leading, by a convoluted path of my own meandering, to a focus on liberal norms within global legal governance.

I am grateful to Professor Stephanie Golob for providing valuable and challenging comments and suggestions on drafts, and Professor Peter Liberman for agreeing to serve on my committee. In addition, I am grateful to Professor George Andreopoulos, Professor Maivân Lâm, Professor Dov Waxman, Professor Bruce Cronin, and Professor Susan Woodward for making the department such an engaging and challenging place to study international relations, and to develop intellectually and academically. More broadly the Graduate Center has been a

welcoming and fulfilling place in which to study, work, and conduct research. I would also like to thank Professor Satoshi Miura of Nagoya University for making suggestions which steered me towards the jurisprudence of Lon Fuller. Feedback from participants and discussants at conferences in St. Andrews, San Francisco, and Pasadena has also helped sharpen my focus. Paul Romita, a good friend and fellow PhD candidate in the department, has provided useful advice and encouragement throughout, including frequently by phone since my move to the West Coast. I am especially grateful to my wife, Betsy Garrett. She has been constantly encouraging and supportive, listened patiently to my research-related ramblings, discussed the distinctions between American and international legal procedure, and read drafts of chapters. Despite the distractions of teaching and editing work, our move to San Francisco three years ago for Betsy's new job has also provided a conducive environment in which to finally stop my incessant theoretical reading and get around to solidifying my argument and writing.

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Abbreviations

ADC-ICTY	Association of Defence Counsel practising before the International Criminal Tribunal for the Former Yugoslavia
AMICC	American Non-Governmental Organizations Coalition for the International Criminal Court
AP	Additional Protocol (to the Geneva Conventions)
ASP	Assembly of State Parties (ICC)
BPI-ICB	International Criminal Bar
CBF	Committee of Budget and Finance (ICC)
CICC	Coalition for an International Criminal Court
CSCE	Conference for Security and Co-operation in Europe
CSS	Counsel Support Section (ICC)
DAW	UN Department for the Advancement of Women
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC	Geneva Convention
IBA	International Bar Association
ICB	International Criminal Bar
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICDAA	International Criminal Defence Attorneys Association

ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IL	International law
ILC	International Law Commission
IMT	International Military Tribunal (Nuremberg)
IMTFE	International Military Tribunal for the Far East (Tokyo)
IGO	Intergovernmental organization
INGO	International nongovernmental organization
Interpol	International Criminal Police Organization
IR	International relations
JCCD	Jurisdiction, Complementarity and Cooperation Division (ICC)
JCE	Joint criminal enterprise
KLA	Kosovo Liberation Army
LRA	Lord's Resistance Army
MICT	Mechanism for International Criminal Tribunals
MLC	<i>Mouvement de libération du Congo</i>
NACDL	National Association of Criminal Defense Lawyers
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental organization
OLA	UN Office of Legal Affairs
OPCD	Office of Public Counsel for the Defence (ICC)
OPCV	Office of Public Counsel for Victims (ICC)

OTP	Office of the Prosecutor (ICTY and ICC)
P5	The five permanent members of the UN Security Council
POW	Prisoner of war
SCSL	Special Court for Sierra Leone
SFRY	Socialist Federal Republic of Yugoslavia
SOAS	School of Oriental and African Studies (University of London)
SSR	Soviet Socialist Republic
STL	Special Tribunal for Lebanon
TNC	Transnational corporation
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNBISNET	United Nations Bibliographic Information System
UNYBHR	UN Yearbook on Human Rights
US	United States
USSR	Union of Soviet Socialist Republics

Introduction

Global governance¹ “continues to become a salient, albeit contested, political concept,”² with international institutions exercising significant influence over decision-making in policy areas as varied as security, finance, the environment, and criminal justice. These processes have substantial normative implications. This is especially the case for that subset of global legal governance institutions related to criminal justice. International tribunals potentially exercise enormous power over individuals—provided with the authority to remove the liberty of defendants for decades. The dissertation argues that assessing the legitimacy of such institutions requires an examination of the substantive and procedural law which underpins the fairness towards defendants that is the hallmark of liberal legal standards of criminal justice. This constitutes a “legal legitimacy:” the legitimacy inherent to the operation of a legal system through the implementation of liberal legal norms.

In exploring legal legitimacy, the research demonstrates that the criminal law processes utilized to determine guilt or innocence within international courts are not isolated from political interference from the states and intergovernmental organizations (IGOs) which create them and whose cooperation such courts require for their operation. This lack of separation between legal process and the political goals and preferences of state and IGO actors influences the trial and

¹ Global governance is “the maintenance of collective order, the achievement of collective goals, and the collective processes of rule through which order and goals are sought.” See James N. Rosenau, “Change, Complexity, and Governance in a Globalizing Space,” in *Debating Governance: Authority, Steering, and Democracy*, ed. Jon Pierre (Oxford: Oxford University Press, 2000), 175.

² Richard Higgott and Eva Erman, “Deliberative Global Governance and the Question of Legitimacy: What Can We Learn from the WTO?” GARNET Working Paper No: 53/08, August 2008, www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/garnet/workingpapers/5308.pdf.

pre-trial dynamics between the prosecution and defense, potentially undermining the validity of trial outcomes and the legitimacy of the process of determining guilt or innocence.

High standards of legal justice, free from political influence, are necessary for maintaining the integrity of the fundamental principle of genuine trials: the presumption of innocence of the defendant. Trials operating without effective legal guarantees risk descending into political show trials. Nevertheless, the states, IGOs, and international human rights organizations involved in international criminal justice tend to advocate successful prosecution while paying inadequate attention to the legal rights of defendants.

This ultimately undermines some of the primary objectives of prosecution within the international human rights regime: deterrence, recognition of victim suffering, and transitional justice. Trials which experience political influence run the risk of undermining the search for truth and accountability that is at the heart of criminal justice, and may find innocent people guilty.

In determining the significance of research on legal fairness in international prosecutions, an important question is whether the weaknesses in legal legitimacy explored in this research have led to miscarriages of justice. The answer is twofold. First, in the sense that justice is conceptualized in the research, the answer is “yes:” whenever standards of fairness fall significantly below those examined here, and the accused has not been given adequate opportunities to defend him- or herself, justice has not been served. As stated by European Court of Human Rights (ECtHR), procedural inequalities themselves constitute violations of legal justice.³ Requiring evidence of actual prejudice undermines the value of these rights—a violation

³ ECtHR, *Lanz v. Austria*, no. 24430/94, January 31, 2002, 58.

is the wrong itself. Wrongful conviction would be a further—moral—violation stemming from the normative rights violation.

Second, in the more substantive meaning of miscarriage of justice as actual harm or wrongful conviction, the answer remains “yes.” In many instances it is difficult to determine the extent to which violations of rights have led to wrongful conviction. An external appeals process provides one of the strongest avenues for determining this, yet appeals processes at international courts are heard by chambers sitting within the structure of the original convicting court (the chamber of first instance) and are subject to the same procedural limitations and political influences as those chambers. Determining wrongful conviction also ideally requires assessing the impact of evidence on the judges hearing a case. This is also very difficult to assess.

Nevertheless, weaknesses in legal legitimacy at international courts have on occasion demonstrably affected the outcomes of trials. A prominent example, discussed in Chapter 4, involves the conviction of General Tihomir Blaškić of Croatia by the International Criminal Tribunal for the former Yugoslavia (ICTY). The Croatian government refused to hand over potentially exculpatory evidence to the general’s defense team, being reluctant to cooperate with the court for fear of legitimizing its prosecution of one of the commanders in the country’s war of independence from Yugoslavia. Within days of his conviction in March 2000, the government, realizing that its political stance had backfired, released thousands of pages of documents to the court,⁴ some of which were utilized in his appeal. The ICTY appeals chamber subsequently determined that Blaškić had been wrongfully convicted on 16 of the 19 charges, reducing his sentence from 45 years to nine.

⁴ Gregory S. Gordon, “Toward an International Criminal Procedure: Due Process Aspirations and Limitations,” *Columbia Journal of Transnational Law* 45, no. 3 (2007): 678-9.

Despite these issues, scholarship within international relations (IR) has tended to overlook the importance of criminal procedure to assessments of the legitimacy of global legal governance. Partly responsible is an underappreciation of how legal theory, or jurisprudence, can contribute towards a better conceptualization of how legal processes shape the legitimacy of legal institutions. The dissertation utilizes a jurisprudence that facilitates our understanding of legitimacy within criminal justice institutions by placing legal procedure and the role of the defendant at its heart—with the defendant and their counsel conceptualized not as passive agents but as central actors in criminal justice.

Examining the role of politics in shaping legal processes

The role of power in shaping the nature, trajectory, and legitimacy of global governance is increasingly explored within IR.⁵ Meanwhile the effect of power on the legitimacy of trials through defendant rights at international tribunals remains underexplored. The dissertation addresses these lacunae in IR's understanding of criminal law and procedure, the role of the defendant, and the effects of power on legitimacy.

⁵ See especially the contributions to Michael Barnett and Raymond Duvall, eds., *Power in Global Governance* (Cambridge: Cambridge University Press, 2005). See also the contributors to Jennifer Clapp and Doris Fuchs, eds., *Corporate Power in Global Agrifood Governance* (Cambridge, Mass.: MIT Press, 2009); Molly Ruhlman, *Who Participates in Global Governance? States, Bureaucracies, and NGOs in the United Nations* (London: Routledge, 2014); Rita Abrahamsen, "The Power of Partnerships in Global Governance," *Third World Quarterly* 25, no. 8 (2004): 1,453-67; and Andrew Hurrell, "Power and Legitimacy in Global Governance," paper at workshop on global governance, Princeton, February 2006, www.princeton.edu/~pcglobal/conferences/normative/papers/Session4_Hurrell.pdf.

The research demonstrates that the states that create and maintain international courts wield “institutional power”⁶ in relation to criminal defendants which shapes the legitimacy of trials. This is power exercised through the creation and modification of the structural and procedural rules that shape the legal interaction between the major participants in trials—judges, prosecutors, and defendants and their counsel—including what charges can be brought against an accused, and how investigations and trials can be conducted. The effect of this power over the ability of defendants to gain a fair trial is shaped by the self-interested decision-making processes of states, interstate bargaining during treaty negotiations, and states’ conceptualization of international justice. There is an overemphasis in international criminal justice on the justice of prosecutions, rather than that of the fairness of trials. This leads to success being perceived in terms of the number of convictions, not by the strength of structural and procedural protections for defendants from the power imbalance criminal courts create between the defense and prosecution. The, largely powerful and Western, states which have been most responsible for creating international tribunals tend to perceive international criminal justice as an extension of the international human rights regime, which has led to a laudable focus on victims—on recognition and justice for them—which has had the effect of weakening protections for defendants.

Other relevant factors are the massive scope of international trials (especially those of top leaders), driven by the need to satisfy victim groups and for narrative construction purposes; the tribunal rule changes adopted to respond to UN and state pressure to speed up trial proceedings;

⁶ Michael Barnett and Raymond Duvall, “Power in International Politics,” *International Organization* 59, no. 1 (2005): 39-75, and “Power in Global Governance,” in *Power in Global Governance*, ed. Barnett and Duvall, 15-17.

the incoherent hybrid nature of procedures; and lack of concern with the defense function by the creators of the court, partly due to a lack of understanding of the role of the defense. The dissertation demonstrates that the exercise of institutional power and systematic human rights bias towards successful prosecution have generated a level of legitimacy through fairness towards defendants in international criminal justice that is less robust than is generally claimed within the academic literature.

The limited appreciation of the role of defendants and their legal rights is responsible for the common narrative among historians and political scientists of the development of international criminal justice as one of a good but flawed start followed by immense progress in terms of fairness towards defendants and thereby justice served, to a state of genuine fairness today. The trial origins of international criminal justice at the International Military Tribunal (IMT) at Nuremberg and the International Military Tribunal for the Far East (IMTFE) at Tokyo are assumed or claimed to demonstrate morally acceptable levels of trial fairness towards defendants, but institutional and judicial process issues of fairness towards defendants are rarely discussed.⁷ When problems with these tribunals' fairness are analyzed, the focus is largely on selectivity of defendants chosen to stand trial (the "victor's justice" argument), and the prohibition on defendants discussing alleged Allied crimes.

The retroactive enforcement of crimes against peace and crimes against humanity at these courts has also been explored,⁸ but rarely the institutional and procedural fair trial rights of

⁷ E.g. Adam Jones, *Genocide: A Comprehensive Introduction*, 2nd ed. (London: Routledge, 2011), 533-5; Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press, 1998); and Robert E. Conot, *Justice At Nuremberg* (New York: Carroll & Graf Publishers, 1983).

⁸ E.g. Robert Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge: Cambridge University Press, 2005), 36-47. Legal scholars, however, have addressed

defendants.⁹ The only judicial fairness issues frequently raised are the lack of an appeals process, and the partiality of the judges.¹⁰ In the end, it is commonly accepted that despite the tribunals' faults the Allies eventually chose the legal justice of genuine criminal trials over the political justice alternatives proposed at the time for the Nazi and Japanese leadership—show trials or firing squads.¹¹

High levels of fairness are presumed to characterize the re-awakening of international criminal justice after the Cold War, with the creation of international and hybrid (international–domestic) courts such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Court (ICC), and the Special Court for Sierra Leone (SCSL).¹² It is generally accepted that the fair judicial processes which are assumed to operate in liberal democratic states also do so fully within international courts, and the latter's guilty verdicts therefore represent international justice served.¹³

the trial fairness at Nuremberg, including, Tonya, J. Boller, “The International Criminal Court: Better than Nuremberg?” *Indiana International and Comparative Law Review* 14, no. 1 (2003): 279-314.

⁹ An exception is Dan Plesch, *Human Rights After Hitler* (Washington, DC: Georgetown University Press, forthcoming), which more extensively discusses issues of fairness towards defendants, and concludes that standards were reasonable.

¹⁰ Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), 83-4. IMTFE judges William Web and Delfin Jaranilla had participated in the Australian War Crimes Commission investigations into Japanese atrocities, and had been a prisoner of war on the infamous Bataan Death March in the Philippines in 1942, respectively.

¹¹ E.g. Richard Goldstone and Adam Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (London: Routledge, 2009), 40-64 (even though legal professionals, their analysis follows the standard narrative and has little to say about trial fairness); Dan Plesch, *America, Hitler and the UN* (London: I.B. Taurus, 2011), 101-11; and Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000), 147-205.

¹² E.g. David J. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012); and Daniel Jonah Goldhagen, *Worse Than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity* (New York: PublicAffairs, 2009).

¹³ E.g. Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 2nd ed. (New York: The New Press, 2002), 391-2; David P. Forsythe, “‘Political Trials’?: The UN Security Council and the Development of International Criminal Law,” in *The Ashgate Research Companion to International*

In contrast, the dissertation challenges not only this narrative, but the assumption that global legal governance institutions are able to perform broader human rights and political functions while maintaining sufficient standards of fairness. Arguably the concern with victim rights manifested by international prosecution has swung the pendulum too far towards ensuring successful prosecution, undermining the rights of defendants. The political goal of historical narrative construction may also weaken those rights, especially in the case of high-profile accused, such as Slobodan Milošević and Radovan Karadžić, where Western states and international prosecutors may be keen to present a particular political narrative which delegitimizes the defendants' actions while legitimizing those of their international political rivals.

The research's contribution to IR scholarship

In challenging the narrative of fairness within the evolution of international criminal justice, the research does not propose a new answer to an old question, but rather poses a new question in IR scholarship: How does the legal power dynamic between the individual—in this case defendants—and global legal governance institutions and their creators shape the legitimacy of international criminal courts? Other institutional and procedural input and output criteria discussed in Chapter 2—including autonomy, representativeness, and accountability—are also

Criminal Law: Critical Perspectives, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 492; M. Cherif Bassiouni, "The Perennial Conflict Between International Criminal Justice and Realpolitik," *Georgia State University Law Review* 22, no. 3 (2006): 557; and Richard Goldstone, "The Crime Prevention Potential of the International Criminal Court Depends Upon its Credibility and the Support it Receives from Governments and Especially those of States Parties to the Rome Treaty," in *Contemporary Issues Facing the International Criminal Court*, ed. Richard H. Steinberg (Leiden: Martinus Nijhoff, 2016), 213-19.

acknowledged to be important sources of legitimacy, but legal fairness towards defendants is an overlooked source.

The dissertation contributes to IR research by utilizing legal theory to address two specific lacunae in the literature on the legitimacy of global legal governance: the manner in which law itself generates legitimacy as a distinct social structure and process, leading to a focus on legal principles and criminal procedure; and the importance of analyzing the role of the principal individual in criminal trials, the defendant. The project also contributes to the literature on institutional power by exploring the political effects on defendant rights of the decision-making power of states and IGOs in the establishment and modification of the rules of international criminal tribunals.¹⁴

To address these weaknesses, the dissertation analyzes the intrinsic qualities of liberal legal practice which generate fairness towards legal subjects through their effect on the trial process. These qualities are argued to be a necessary but not sufficient source of legitimacy. In terms utilized by José Alvarez to describe approaches to the democratic legitimacy of global governance, the argument in the dissertation—legal legitimacy through liberal norms—is institutional, vertical, and liberal:¹⁵ the dissertation focuses on global governance institutions and their relationship to individuals, and it takes a substantive and procedural human rights-based approach to the source of legitimacy. Utilizing legal theory, the dissertation argues that law

¹⁴ The literature on institutional power includes examinations of international criminal justice, but not of the impact of rule-making power on legal fairness. For other research on institutional power and tribunals, see, e.g., L. Rush Atkinson, “Knights of the Court: The State Coalition Behind the International Criminal Court,” *Journal of International Law and International Relations* 7 (2011): 66-103.

¹⁵ José E. Alvarez, “Introducing the Themes: Introduction to Symposium on Democratic Theory and International Law,” *Victoria University of Wellington Law Review* 38 (2007): 159-74. Instead of institutional, approaches can be sociological; instead of vertical, horizontal (relationship with other institutions); and instead of liberal, based on representativeness or participation. See the first section of Chapter 2 of the dissertation for a more detailed discussion of these terms.

embodies a distinct social structure and process, whose impact on criminal defendants is central to a determination of the legitimacy of courts. The research utilizes legal theory to identify and examine the most important features of a criminal justice system to its legitimacy through fair trials: these features, which constitute the research's dependent variables, are "legality" and "defense parity."

Legality is the extent to which the standards enforced by a court have achieved the status of law. This involves determining to what extent laws are being enforced retroactively, and the level of clarity and specificity in a law that enables it to effectively communicate to individuals what specific behavior is prohibited. Legality is concerned with the substance of crimes, in this case the mass atrocity crimes of international criminal justice—genocide, crimes against humanity, and war crimes. The international laws prohibiting these crimes were largely developed by states over the course of the twentieth century, due to a concern with the protection of the rights of all individuals, and especially victims.

Defense parity consists of the level of structural and procedural protections provided to defendants before and during trial, in order to ensure a fair trial in the light of the institutional advantages enjoyed by legal authorities, exercised through the prosecution, in relation to the accused. In contrast to legality, the core protections of defense parity are derived from domestic criminal law procedure, are concerned solely with the rights of the accused, and underwent far less international legal evolution during the Cold War. Such protections have instead largely been left to post-Cold War international courts to develop in an ad hoc fashion.

Legality and defense parity are implemented by courts and so enable an exploration of the legal power dynamic between individuals, the primary institutions of global legal governance, and the states and IGOs which create their rules and shape criminal investigations. They also

enable an examination of the two primary components of international criminal law: legality is a principal feature of substantive criminal law, and defense parity of criminal procedure.

The project explores these criteria of legal fairness in relation to two case studies of international courts which represent distinct sources of authority and political context: the ICTY and the ICC. The ICTY has jurisdiction over a single conflict and was created by the Security Council acting under Chapter VII of the UN Charter, while the ICC has potentially global jurisdiction and was created by states through a treaty process. The research demonstrates that the practice of courts in relation to defendants is characterized by continuing significant—and in some aspects worsening—weaknesses in terms of institutional and procedural fairness towards defendants. These problems are significantly due to the institutional power of states as exercised through the creation of the structural and procedural rules of international tribunals.

This power influences fairness through the impact on rule-making bargaining of three primary political factors. First, the structure and operational rules of international courts creates dependence on the support and cooperation of external actors—especially states and IGOs. This leaves tribunals vulnerable to manipulation for state ends and to the concerns of states, and harms the parity in investigations by the prosecution and defense teams.

Second, the conflicting dynamic between the major protection focus of the international human rights regime (that of victims) and that of criminal justice (defendants) has led to insufficient attention by states in the construction and operation of courts to the provision of adequate protections for defendants. This has been exacerbated by an insufficient placement of importance and understanding of the role of the accused and defense counsel by states, the UN, international juridical actors (judges, prosecutors, and court staff), and human rights nongovernmental organizations (NGOs). While a poor understanding of the role of defense is

also prevalent at the domestic level, its consequences are exaggerated at the international level due to the effect of the political goals and concerns of states in relation to international trials. This has weakened both legality and defense parity.

Third, there has been significant political pressure on courts by their funding states to decrease the length and cost of trials. This has led to rule changes that have undermined aspects of defense parity. States have tended to privilege legitimacy through the perceived effectiveness of speedy trials over the normative legitimacy of legal fairness. The dissertation's exploration of legal protections for defendants complements the extensive and growing body of IR research on such normative sources of legitimacy in international law as the content of laws; non-legal inputs, such as transparency and accountability; and institutional outputs such as the effectiveness of institutional decision-making.¹⁶

The importance of research on global legal governance

Defendant rights constitute a significant component of tribunal legitimacy and of the power dynamic within the international system between its traditionally dominant collective actors—states and IGOs—and individuals. The individual has been increasingly acknowledged and incorporated into international law since 1945—especially through the development of international human rights and humanitarian law—and global legal governance is recognized as a key component of this development.¹⁷

¹⁶ See Chapter 2 for a discussion of these sources of legitimacy within international criminal justice.

¹⁷ See, e.g., Manuel Castells, "The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance," *The ANNALS of the American Academy of Political and Social Science* 616 (2008): 78-93; Lloyd Axworthy, "Human Security and Global Governance: Putting People First," *Global*

International criminal law is inherently at odds with the rest of public international law in several ways. The purpose of the latter is the collective self-regulation of the international behavior of states, whereas that of criminal law is shaping the conduct of individuals and punishing non-compliance, especially through imprisonment. General public international law applies largely to states, with the two primary exceptions being piracy—outlawed for over 200 years—and rebel groups in armed conflict.¹⁸ There has traditionally been little accountability for individuals for breaches of international law,¹⁹ and state responsibility is civil, not criminal—it carries no penalties such as imprisonment for officials, only the duty of reparations. In addition, traditionally a state’s obligations under international law are not absolute, but are dependent upon similar compliance by other states—this is the principle of “reciprocity” in international law.

In contrast, international criminal law is a mixture of international humanitarian and human rights law with domestic criminal law that provides for individual accountability.²⁰ International humanitarian law proscribes certain behavior during armed conflict and consists of over 90 treaties. The post-Nuremberg broadening of international criminal responsibility to include actions outside of and during armed conflict against one’s own citizens reflects the incorporation

Governance 7 (2001): 19-23; and Thomas G. Weiss, “Governance, Good Governance and Global Governance: Conceptual and Actual Challenges,” *Third World Quarterly* 21, no. 5 (2000): 795-814.

¹⁸ The civil war provisions of international humanitarian law—Common Article 3 of the Geneva Conventions and Additional Protocol II—apply to all belligerents. The Security Council has applied wide-ranging targeted sanctions—e.g., arms and oil embargoes, and travel ban—on such non-state actors as the National Union for the Total Independence of Angola (1993-8).

¹⁹ The recent and controversial exception is the Security Council’s targeting of individuals—in government and non-state groups—with sanctions but without a process to determine wrongdoing. For example, it applied wide-ranging targeted sanctions—including arms and oil embargoes, and a travel ban—on the National Union for the Total Independence of Angola in resolutions 864 (1993), 1127 (1997), and 1173 (1998).

²⁰ Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2008).

of international human rights law. This individualization of international law is a profound change that broadens the subjects of international law from states, denies immunity to state officials for international crimes, and introduces punishment. Furthermore, international criminal obligations are an important aspect of the modern international legal movement towards absolute community obligations owed to all—international criminal obligations are not dependent upon reciprocal behavior by others.²¹

The operation of criminal justice within a liberal legal system is inherently concerned with protecting the individual against the domestic power of the state. Mediating between that protection and the external goals of the state continues to be a struggle in global legal governance. Nevertheless, the role of the principal individual in criminal trials, the defendant, is little explored in political science research on the legitimacy of courts. In addressing this, the study contributes towards understanding the political dynamics behind the process of incorporating the individual into the international legal system.

The research also attempts to deepen our understanding of the dynamics within the international human rights regime by exploring how the conflicting legal and political goals of international criminal justice harm as well as promote human rights. International prosecution advances the rights of the victims of gross human rights abuses—by acknowledging suffering and providing accountability, for example. However, the political goals of powerful, especially Western, states in creating and cooperating with such courts conflict with the need to maintain fair standards for defendants in order to achieve justice for victims through accurately determining guilt.

²¹ Antonio Cassese, *International Law*, 2nd ed. (New York: Oxford University Press, 2005).

The appropriateness of international prosecution for mass atrocity crimes is also questionable because it assumes individual criminal responsibility, positing that there is an applicable analogy to be made with domestic prosecution for such crimes as murder and rape. However, mass atrocity crimes tend to result not merely from individual actions but from social norms, and often political and social structures, that are at least permissive, if not encouraging, of attacks on the victims, who are frequently from another identity group, which the perpetrators see as an enemy. The dissertation questions whether the political goals of international prosecution—individual accountability, victim recognition, narrative construction, delegitimizing perpetrators, and peacebuilding—make international criminal justice an appropriate vehicle for promoting human rights in the wake of mass atrocity crimes.

Organization of the dissertation

Chapter 1 explains the project's argument, including the contribution of legal theory to IR, and the dissertation's research design. Chapter 2 lays out the theoretical background to the study by exploring the relationship between political science and legal approaches to examining the legitimacy of global legal governance. It explores the utility of legal theory to understanding the nature of law as a set of distinct social processes and structures.

Chapter 3 examines the domestic and international development of legality and defense parity, and their relationship to the evolution of criminal justice. First it examines how legality and defense parity developed as core components of criminal justice at both the domestic and international levels. It then explores the evolution of international criminal justice, including the changing role and protections for defendants. The final section analyzes defense protections at the first modern international criminal tribunal, the IMT at Nuremberg, in more detail in the light

of these developments. This provides an overview of indicators of defendant protections and the influence of institutional power in order to enable a comparison to the standards of current courts in the case studies, and to critically analyze the narrative of international criminal justice in relation to the empowered role of the defendant.

Chapter 4 examines legality and defense parity at the first post-Cold War international criminal tribunal, the ICTY. It begins with an overview of its origins and the political and legal reasons to establish an international court after a hiatus of almost 50 years, and how these issues influenced the initial decisions relating to the project's fairness criteria. These issues are then examined as the court has developed, as trials have proceeded and as state and UN political concerns have come to bear on the court's operation. The chapter analyzes the ways in which the dynamic between the prosecution and defense at the tribunal have been shaped by the institutional power of states and the UN Security Council.

Chapter 5 approaches the issues explored in Chapter 4 in relation to the first permanent court, the ICC. It has been in existence for nine years fewer than the ICTY, and as of October 2016 has completed six trials. The chapter demonstrates how the institutional power of states in establishing the court, and its distinct relationship with state members, have impacted the defense protections the ICC provides, and how these protections have been shaped by the legacy of the ICTY.

The conclusion, Chapter 6, illustrates the disconnect between the general narrative of fairness in international criminal justice and the research indicators of legal legitimacy as demonstrated in the dissertation. It summarizes the case findings as to where legality and defense parity have been most problematic, and the political influences on courts that are responsible, and how these

influences differ due to the distinct political and historical contexts and interactions associated with each court.

1 The Legal Fairness Legitimacy of Global Legal Governance and the Influence of Institutional Power

IR research on the legitimacy of global legal governance has to date little studied the legal rights and procedures that underpin trial fairness, or the role of defendants in the criminal justice system. It has also thereby not adequately accounted for how political actors influence fairness towards defendants. Sources of political influence include the institutional power of states in agenda-setting through the creation of the rules that structure international criminal tribunals; the state goal of delegitimizing enemies and rivals through the stigma of crime; the huge scope of international trials, especially those of high-profile leaders due to pressure to satisfy victim groups and to construct a conflict narrative; the methods adopted to respond to pressure by states and the United Nations (UN) to speed up trial proceedings; and a lack of apparent concern with the defense function by the creators of the court, due to poor understanding of the role of the accused and defense counsel in criminal trials.

The dissertation utilizes legal theory to structure an examination of the legal rights and procedures that shape the fairness of international trials towards criminal defendants. It demonstrates that in creating and modifying the rules which shape the operation of international criminal tribunals, states exercise what Michael Barnett and Raymond Duval have labeled “institutional power” over defendants—the socially diffuse power of spatially and temporally distant political actors to influence those operating within international institutions through

setting the rules of the game which structure the environment within which they must act.¹ In bargaining over the creation of structural and procedural rules states attempt to “lock in” their conceptions of justice and fairness² to the functioning of a court. This conception tends to privilege the role of victims to the detriment of that of the accused, particularly through inadequate attention to the structural and procedural balance between the prosecution and defense that is required for fair trials.

The attitude of tribunal actors towards the accused also shapes trial fairness. Prosecutors are an arm of the international criminal justice system, tasked with finding justice, not simply proving the accused guilty, and yet their utilization of the political advantages of their position leads to further imbalances in the courtroom dynamic between prosecution and defense. These advantages include access to diplomats and to IGOs such as the UN Security Council. The dual role of prosecutors exacerbates the shortcomings in states’ conceptions of justice as the latter provide pre-trial support to the prosecution that is far less frequently available to defense counsel. The powerful state and IGOs actors that are involved in the creation of courts, and support their operation, also demonstrate a bias towards aid to the prosecution and a resistance to aiding the defense. Examples include the United States, France, and the United Kingdom within the Security Council in relation to the ICTY; and the European Union in relation to the ICC. These power dynamics all shape the ability of the accused to gain a fair trial.

¹ Michael Barnett and Raymond Duvall, “Power in International Politics,” *International Organization* 59, no. 1 (2005): 39-75, and “Power in Global Governance,” in *Power in Global Governance*, ed. Michael Barnett and Raymond Duvall (Cambridge: Cambridge University Press, 2005), 15-17.

² Ethan B. Kapstein, “Power, Fairness, and the Global Economy,” in *Power in Global Governance*, ed. Michael Barnett and Raymond Duvall (Cambridge: Cambridge University Press, 2005), 82.

Approaches by legal scholars that focus on the distinctive properties of law have “no counterpart among political scientists, who have shown little interest in the legitimacy of international law as such.”³ In IR, the legitimacy of law is largely explained as stemming from generic characteristics of institutions;⁴ the substance of laws;⁵ democratic input criteria such as accountability and transparency;⁶ or managerial output criteria such as effective problem-solving.⁷ The dissertation essays a remedy to this situation through an analysis of the role that distinctly legal processes play in understanding the legitimacy of global legal governance.

Also undervalued in IR is the importance of understanding the role of criminal defendants to the legitimacy of international courts through the fairness of their trials. Human rights approaches to international criminal justice focus on the role of victims and tend to neglect that of defendants, or effectively write them off as war criminals. The protection of the basic rights of individuals against bodily harm is one of the primary functions of criminal justice in a liberal legal system. However, when crimes occur it is often overlooked that such systems have a normative and legal obligation to protect the human rights of all legal subjects—not just those of ordinary citizens and the victims of crime, but, importantly, those of criminal defendants too. The latter are commonly conceptualized in international human rights discourse as criminals

³ Daniel Bodansky, “Legitimacy in International Law and International Relations,” in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013), 324.

⁴ Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005).

⁵ Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change,” *International Organization* 52, no. 4 (1998): 887-917.

⁶ Jan Wouters and Nicolas Hachez, “Transitional Societies and the Rule of Law: A Benchmarks Approach,” Working Paper No. 47, Leuven Centre for Global Governance Studies, Catholic University Leuven, March 2010.

⁷ Jason Ralph, “Anarchy is What Criminal Lawyers and Other Actors Make of It: International Criminal Justice as an Institution of International and World Society,” in *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, ed. Steven C. Roach (New York: Oxford University Press), 133-53.

whose impunity needs to end. The importance of the accused and their counsel to the legitimacy of criminal justice is insufficiently recognized. As acknowledged by Judge Patricia Wald of the ICTY: “A vigorous, un-intimidated, knowledgeable defense is the sine qua non of a fair trial.”⁸

IR scholars, even those trained as lawyers, rarely have expertise in criminal law and procedure, and thereby lack an adequate understanding of the role of the accused during criminal trials and the function of defense counsel. For the legitimacy of global legal governance to be better understood, research requires a conceptualization of law that adequately takes into account the role of liberal legal norms, and the roles of lawmakers and legal subjects in legal governance.

The dissertation assesses legitimacy by analyzing institutional and procedural issues that contribute towards fairness for defendants by providing them with protections from arbitrary enforcement of law, and opportunities to prepare and conduct a trial. It also explores how this fairness is shaped by the relationship between the accused (and defense counsel) and various juridical actors (prosecutors, judges, and court staff) and political actors (states and IGOs). In relation to the latter, according to Theodor Meron courts require greater autonomy for their legitimacy than other types of IGO,⁹ and this applies not just to the sort of institutional autonomy already explored from IR and comparative politics perspectives,¹⁰ but independence from political inference in the role of courts in protecting the rights of the accused.

⁸ Patricia M. Wald, “The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an international Court,” *Journal of Law and Policy* 87 (2001): 102, quoted in Colleen M. Rohan, “Protecting the Rights of the Accused in International Criminal Proceedings: Lip Service or Affirmative Action?” in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 289.

⁹ Theodor Meron, “Judicial Independence and Impartiality in International Criminal Tribunals,” *The American Journal of International Law* 99, no. 2 (2005): 259-69.

¹⁰ Jonas Tallberg, “The Anatomy of Autonomy: An Institutional Account of Variation in Supranational Influence,” *Journal of Common Market Studies* 38, no. 5 (2000): 843-64; and John Merrills,

The research utilizes the “political jurisprudence” of American jurist Lon Fuller to assess legal fairness.¹¹ This approach conceptualizes the nature of law in the political context of a liberal democratic legal system,¹² rather than being an “analytical jurisprudence”—much more common in legal philosophy—which claims that political context is irrelevant to the nature of law.¹³ Fuller’s understanding of law provides a valuable theoretical foundation for the analysis of legal sources of legitimacy within global legal governance.

Fuller developed an approach to explaining the legitimacy of liberal legal systems that relies upon the distinctive qualities of fair legal process—fair in the sense of equitable in process and likely to generate fair outcomes, especially through diminishing arbitrariness. His insights, which the project applies to global legal governance, include: a social and political conception of law, especially the relationship between law, morality, and law’s cosmopolitan aims of respect and inclusion; and his criteria of fair legal process and their embodiment of the human rights aspects of the criminal rule of law.

Based on this understanding, discussed further below and in Chapter 2, the research examines the extent to which the laws enforced by international criminal tribunals conform to the two core aspects of legal legitimacy: the “principle of legality,” and the institutional and

“International Adjudication and Autonomy,” in *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*, ed. Richard Collins and Nigel Defense White (London: Routledge, 2011), 160-77.

¹¹ Lon Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969). Other relevant works by Fuller include “A Reply to Professors Cohen and Dworkin,” *Villanova Law Review* 10, no. 4 (1965): 655-66; *Anatomy of the Law* (New York: F.A. Praeger, 1968); “Law and Human Interaction,” *Sociological Inquiry* 47, nos. 3-4 (1977): 59-89; and, with Kenneth I. Winston, “The Forms and Limits of Adjudication,” *Harvard Law Review* 92, no. 2 (1978): 353-409.

¹² Dan Priel, “Lon Fuller’s Political Jurisprudence of Freedom,” *Jerusalem Review of Legal Studies*, part of a symposium on “The Morality of Law at 50,” Osgoode CLPE Research Paper No. 55/2013 (2014): 1-27.

¹³ For an especially prominent example of analytical jurisprudence see H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

procedural requirements for attaining a balance between the powers of the prosecution and the defense in the pre-trial and trial phases—here called “defense parity.” Legality requires that laws are not enforced retroactively in order to justify prosecution and punishment for an act that was not illegal at the time of its alleged commission. According to legal scholar Cherif Bassiouni, legality has several purposes central to the achievement of the normative and legal goals of criminal justice: “to enhance the certainty of the law, provide justice and fairness for the accused, achieve the effective fulfillment of the deterrent function of the criminal sanction, prevent abuse of power, and strengthen the application of the rule of law.”¹⁴ Defense parity requires that the accused be provided with institutional support and procedural guarantees to enable sufficient opportunities for argumentation to ensure an adequate defense—that is, a reasonable chance to refute the prosecution’s case. Parity is an essential component of the defendant’s right to a fair trial through achieving adequate opportunities for legal representation.

These two core aspects of legitimacy through legal fairness are central to the emergence of the doctrine of the protection of the individual (*favor rei*, in favor of the accused), which challenged the dominant approach to criminal law in Medieval Europe as a form of community retribution—favoring society over protecting the individual (*favor societatis*).¹⁵ In this sense, the justice for defendants of which legality and parity are central elements developed in conflict with the substantive justice of identifying and punishing alleged perpetrators—criminal courts originally developed as institutionalized mechanisms for legitimizing an arbitrary or politicized

¹⁴ M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), 300.

¹⁵ Antonio Cassese, *International Criminal Law*, 2nd ed. (New York: Oxford University Press, 2008), 38.

determination of guilt. In liberal democratic states today, in contrast, legal fairness for defendants is indispensable to a legitimate realizing of substantive justice.

The core features of legal fairness also provide practical guarantees for the two primary protection functions of criminal justice characterized by liberal legal norms: fair notice of what is prohibited (legality) and fair adjudication of presumed breaches of law (defense parity).¹⁶ They also aid in exploring the power dynamic between individuals (the accused) and global legal governance institutions. Furthermore, legality is an important aspect of the dynamic between the accused and those who create and interpret laws—states, IGOs, and judges—while defense parity is an aspect of the interaction between the accused and the prosecution (and also involves states and other non-judicial actors).

The dissertation does not claim to provide a holistic explanation of the sources of legitimacy within global legal governance. The research acknowledges that there are other procedural (or input) sources of legitimacy—including aspects of democratic process such as transparency and accountability, and institutional sources such as judicial autonomy. There are also numerous substantive (output) sources of legitimacy, including the number of individuals tried, the deterrence value of prosecutions and their impact on transitional justice. The argument here focuses on the distinctive qualities of legal procedure that generate legitimacy. This is a particularly understudied area in international relations and legal scholarship.¹⁷

¹⁶ Paul H. Robinson “Fair Notice and Fair Adjudication: Two Kinds of Legality,” *University of Pennsylvania Law Review* 154, no. 2 (2005): 335-98.

¹⁷ Even though legality has come to “form an increasingly entrenched part of international discourse as a standard of legitimacy.” See Bruce Broomhall, *International Justice & The International Criminal Court: Between Sovereignty and the Rule of Law* (New York: Oxford University Press, 2003), 189.

The chapter begins by explaining the relationship between fairness towards defendants and legitimacy, and the central role of legality and defense parity as indicators of legitimacy. The first section also argues that the institutional power of states in creating tribunal rules is a vehicle for their political goals to shape defendant rights. In the second and third sections, the chapter explains the variables and indicators of legal fairness utilized in the research, and those relating to institutional power and the role of political influences on legal fairness. Finally, the reasoning behind the choice of the research's case studies is explained.

The argument: Legal principles as a fundamental source of legitimacy

This section argues that a utilization of legal theory will enable IR scholars to more effectively understand legitimacy within international institutions. In the research, the approach of jurist Lon Fuller provides the normative basis for identifying certain features of law as fundamental to the legitimacy of global legal governance. There are two primary ways in which Fuller's theory has previously not been well understood, and has therefore been underappreciated, both by international legal and international relations scholars. The first is that it does not constitute a purely legal theory, as common supposed, but a "political jurisprudence" because it aims to conceptualize the nature of law and its effects in a particular political context—that of a liberal democratic legal system.¹⁸ This makes it distinct from dominant approaches to theorizing international law, which claim to conceptualize the operation of law regardless of the nature of

¹⁸ Two exceptions, both from legal scholars who have identified the political nature of Fuller's jurisprudence, are Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Oxford: Hart Publishing, 2012); and Dan Priel, "Lon Fuller's Political Jurisprudence of Freedom," *Jerusalem Review of Legal Studies*, part of a symposium on "The Morality of Law at 50," Osgoode CLPE Research Paper No. 55/2013 (2014): 1-27.

the polity a legal system is embedded within.¹⁹ This contextualization enables the use of Fuller's approach to explore how the practice of law within global legal governance institutions contributes towards their legitimacy.

The second area of misunderstanding is to assume that his legal principles are simply a checklist of how to establish and sustain a legal system—that they constitute the requirements of the rule of law.²⁰ The approach instead has a broader aim: to understand how the operation of law in a liberal legal system is characterized by a reciprocal relationship between legal authorities and legal subjects. Subjects' obligation to obey the law is matched with legal authorities' obligation to adhere to principles of liberal legal practice.

The distinct relationship between law and legitimacy

A normative standard of legitimacy is one with a moral basis that enables a principled critique of authoritative institutions and structures, as opposed to a descriptive legitimacy approach, which is based on breadth of consent or acceptance.²¹ The normative standard argued for here is based on legal principles that protect individual liberty in relation to the coercive power of criminal justice institutions.

Assessments of the legitimacy of international institutions, including courts, tend to focus on general institutional criteria, especially autonomy, accountability, transparency, and

¹⁹ See especially the legal positivism of H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961); and Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley, Calif.: University of California Press, 1967).

²⁰ Rundle, *Forms Liberate*, 91-2.

²¹ Robert A. Dahl, "Can International Organizations Be Democratic? A Skeptic's View," in *Democracy's Edge*, ed. Ian Shapiro and Casino Hacker-Cordón (Cambridge: Cambridge University Press, 1999), 19-36; and Clark, *Legitimacy in International Society*.

inclusiveness or participation.²² Missing from such assessments is an examination of the features of law as a distinct social structure and process, which is largely because IR and international law scholars tend to consider themselves involved in distinct and separate endeavors, with their own theoretical approaches and methods—and so the former tend not to analyze the components of law qua law. The relative dearth of research by IR scholars into international law was examined in recent research on interdisciplinary by Adam Irish, Charlotte Ku, and Paul Diehl, who found that of almost 300 articles published in seven prominent political science journals between 1990 and 2010, fewer than five percent involved research on legal issues. They also found no upward trend towards cross-pollination over this period.²³

One consequence of this disciplinary distance is an understanding of international law by IR scholars primarily as a form of institutionalization of rules.²⁴ Rationalists, such as structural realists and institutionalists, tend especially to adopt an “external perspective” of determining law by what states do—which risks conflating law and its effects on state behavior.²⁵ Legal scholars are generally far more likely than those in IR to adopt an “internal perspective” on how

²² E.g., Marlies Glasius, “Do International Criminal Courts Require Democratic Legitimacy?” *The European Journal of International Law* 23, no. 1 (2012): 43-66; and Daniel C. Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law,” *Yale Law Journal* 115, no. 7 (2006): 1490-1562.

²³ Adam Irish, Charlotte Ku, and Paul F. Diehl, “Bridging the International Law-International Relations Divide: Taking Stock of Progress,” *Georgia Journal of International & Comparative Law* 41, no. 2 (2013): 359, 374-5.

²⁴ This applies to both rationalist-oriented work, for example, Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalization,” *International Organization* 54, no. 3 (2000): 401-19; and such constructivist work as Finnemore and Sikkink, “International Norm Dynamics and Political Change.”

²⁵ Bodansky, “Legitimacy in International Law and International Relations,” 321-41.

international law's subjects see themselves bound.²⁶ However, even legal scholars rarely apply jurisprudence consciously to an examination of international legal issues.²⁷

As global governance institutions and structures increase in terms of their number, influence, and impact on individuals' lives, the need for them to be legitimate—for their power to be authoritative and generate a sense of obligation—is of growing importance, as is the need to understand the sources of that legitimacy.²⁸ This is especially true for criminal justice institutions and processes, as they have the authority to exert the most coercive influence over individuals of any governance institution in peacetime.

The individualization of international law is a profound change that broadens its subjects from states, denies immunity to state officials for international crimes, and introduces punishment. In beginning to directly address individuals as subjects, and to impose coercive sanctions on them, the international legal order is starting to take on some of the primary characteristics of a domestic legal system, something it had not done before 1945. This makes the application of jurisprudence developed to examine domestic law even more relevant and potentially valuable in understanding the nature of the international legal order and its legitimacy.

²⁶ See, e.g., Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995), and *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990); and Harold Hongju Koh, "The 1994 Roscoe Pound Lecture: Transnational Legal Process," *Nebraska Law Review* 75 (1996): 181-207.

²⁷ A notable exception is Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (New York: Cambridge University Press, 2010), who rely on Lon Fuller's work.

²⁸ Michael Zürn, "Global Governance and Legitimacy Problems," *Government and Opposition* 39, no. 2 (2004): 260-87; Allen Buchanan and Robert O. Keohane, "The Legitimacy of Global Governance Institutions," *Ethics & International Affairs* 20, no. 4 (2006): 405-37; and Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein, *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives* (New York: Cambridge University Press, 2013).

To understand the legal legitimacy of global legal governance, it is essential to apply a conceptualization of the nature and operation of law that is distinct to a liberal political context, as opposed to an “analytical” jurisprudence, which claims to understand law in any political context. As stated by Andrew Hurrell: “legitimacy is a political concept and like all political concepts it is quite literally meaningless outside of a particular historical context and outside of a particular set of linguistic conventions and justificatory structures. To paraphrase Ronald Dworkin, legitimacy has no DNA.”²⁹

The principles underlying legal legitimacy

Fuller provides a structural approach to law—one that focuses on the form that law takes in a liberal legal system: authoritative general rules.³⁰ His approach encapsulates “the morality of the enterprise of subjecting human conduct to the governance of rules”—a description which captures the relationship between the interaction of legal authorities and legal subjects, and legitimacy.³¹

The implementation of rules in a liberal legal system requires certain procedural and structural principles that constrain legal authorities.³² These principles demonstrate respect for the autonomy and agency of legal subjects by authorities, and thereby generate a distinctly legal

²⁹ Andrew Hurrell, “Legitimacy and the Use of Force,” *Review of International Studies* 31, special issue (December 2005): 29.

³⁰ Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969); *Anatomy of the Law* (New York: Mentor Books, 1968); and *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth Winston (Durham, NC: Duke University Press, 1981).

³¹ David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007), 102. Fuller was concerned with law as a political and social endeavor—the practice of law—rather than law as an abstract concept, as legal philosophers tend to approach it. The issue of practice tends to be ignored by most contemporary approaches to law. See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Oxford: Hart Publishing, 2012), 96.

³² Fuller, *Morality of Law*.

source of legitimacy.³³ Without these principles, law devolves into the mere imposition of orders in a hierarchy—and is no longer governance through general rules. The principles constitute an “ethos” for legal authorities—that is, they are a normative duty required by the form of law. Their value to the legal subject is a moral one by making consistent and coherent, and thereby fair, demands that enable freedom of social interaction through stable expectations.³⁴

There are eight such principles, which Fuller labels promulgation, clarity, consistency, feasibility, constancy, generality, non-retroactivity, and congruence. They are all concerned with law-making and legal interpretation, except for congruence, which concerns the administration of law.³⁵ They are not conceived of in binary terms, but can be examined along a spectrum of adherence by authorities. No liberal legal system is expected to completely satisfy all the criteria; indeed Fuller called any such ideal-type system a “utopia of legality.”³⁶

The first five are necessary to the effective and legitimate functioning of a liberal legal system, but also contribute towards the effectiveness of giving orders in a hierarchy. Promulgation, or publicity, requires that the contents of a law be made available to those subject to it, so that they can adapt their behavior accordingly, and so that there is opportunity for public

³³ Fuller’s approach, Benedict Kingsbury argues, invokes “legality,” which is to make a particular claim to legitimacy, one that depends on adherence by legal authorities to principles of democratic legal practice. Benedict Kingsbury, “The Concept of ‘Law’ in Global Administrative Law,” *The European Journal of International Law* 20, no. 1 (2009): 39.

³⁴ Rundle, *Forms Liberate*, 136. These principles reflect and enable efficiency in implementation of a government’s policies (i.e. they enable law to be effective)—as positivists such as Hart and Joseph Raz argue; see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979). However, by enabling the treatment of legal subjects as responsible agents they also embody fairness towards them, and so are inherently normative, constituting an “inner morality of law.”

³⁵ David Luban argues that most of Fuller’s criteria—including non-retroactivity—are not procedural but substantive, in that they are “content-based conditions” for law. See Luban, “The Rule of Law and Human Dignity,” 5. While Luban is right that Fuller’s criteria have direct content implications, they are constraints or minimum requirements for the processes of the creation, interpretation, and application of law, and as such are procedural in nature.

³⁶ Fuller, *Morality of Law*, 41.

scrutiny and criticism.³⁷ Clarity requires that a law’s substantive prohibitions avoid ambiguity, so as to more effectively communicate the intent of legislators.³⁸ Consistency requires that a law avoid conflicting provisions and contradicting prior law.³⁹ Feasibility requires that a law is realistic, not asking the impossible of its subjects—further enabling the law to act as an effective guide to conduct. Likewise, constancy through time requires that a law not change its prohibitions so frequently that its subjects have insufficient ability to adjust their behavior.

The other three principles—generality, non-retroactivity, and congruence—are not necessary to giving and obeying orders in a hierarchy, do not improve its efficacy, and cannot be expected by subordinates in such a relationship. These principles are distinct to the creation and operation of law, and are an essential source of law’s normative value to legal subjects.⁴⁰ First, laws should be general, that is, written to apply to a class of people—they are not bills of attainder aimed at

³⁷ Promulgation is considered a “constitutional principle” by the highest British court, for example. See *R. (Anufrijeva) v. Home Secretary* (2004), Lord Stern of the House of Lords, quoted in Denise Meyerson, *Understanding Jurisprudence* (New York: Routledge, 2007), 38. Promulgation operates under the legal fiction that all citizens are aware of the contents of all published laws: in practice, fair notice instead requires “constructive notice,” whereby the information is public and it is the responsibility of its subjects to inform themselves of its existence (ignorance is not an excuse before the law). See David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law,” in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 569-88.

³⁸ Clarity is also a core attribute of fairness: indeterminate rules cannot guide behavior and may lead to juridical abuse.

³⁹ This is related to clarity, and for full effectiveness requires judicial review—the ability of a high court to invalidate a legislative act as unconstitutional—and the existence of a legal system with a hierarchy of court jurisdiction where higher courts can strike down a lower court’s ruling.

⁴⁰ These three principles are sources of legitimacy for law strictly within a context of democratic governance. First, generality is not a requirement when giving orders to a subordinate, as an order-giver may need to depart from a general order to provide a subordinate with specific guidance in a particular situation. Second, non-retroactivity is irrelevant to giving orders as it makes no sense to give a subordinate an order to do something in the past. Congruence, again, it is not relevant that superiors comply with the rules that have been created, as a superior has no necessary requirement to comply with the orders they give their subordinates. See Fuller, *Morality of Law*, 208.

criminalizing the prior acts of specific individuals or groups. “Generality” is not a feature of contention in international criminal law and so is not examined in the dissertation.

Non-retroactivity and congruence are explored in more detail below as these are the central characteristics of legal fairness relied upon to construct the research’s dependent variables of legality and defense parity, respectively. Non-retroactivity is a requirement that a law not be enforced in relation to conduct that occurred before the law was created. Non-retroactivity applies constraints on law-making and prosecution which limit three means of legal control over an individual in relation to when a prosecuted act was committed. It prohibits: i) prosecution for an act committed before the law was created, ii) punishment greater than allowed in law at the time of commission of the act, and iii) a court’s jurisdiction over an individual for courts established after commission of the prosecuted act. Non-retroactivity is the core of what is known as the “principle of legality” in criminal law, which is “a requirement that the specific crimes, punishments, and courts be established legally—within the prevailing legal system.”⁴¹

The purposes of the principle of legality are: protecting individual human rights; promoting the legitimacy of governance; protecting the structure of liberal governance—the separation of powers—by delineating the lawmaking authority of relevant institutions; and encouraging effectiveness in the purposes of criminalization (especially retribution, incapacitation, and deterrence).⁴² Retrospective legal enforcement does not enable law to act as a guide to conduct,

⁴¹ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009), 15.

⁴² Fuller intended his criteria to apply broadly across areas of law. This is a weak argument, however, in relation to some areas: for example tax laws may gain legitimacy from retroactively redressing a perceived wrong. See Charles Sampford, *Retrospectivity and the Rule of Law* (New York: Oxford University Press, 2006), 147-56. As Benjamin Zipursky maintains, Fuller’s criteria provide an effective understanding of criminal law but not various areas of civil law, such as tort law. See Zipursky, “The

and therefore does not respect the agency of legal subjects, capable of adapting to established rules.⁴³ Such enforcement can be used by governments to persecute rivals through the court system. Non-retroactivity also generates legitimacy for law by protecting the separation of powers by restricting avenues of authoritative rule creation by the executive and judiciary.

The last principle, congruence, “the most complex of all,”⁴⁴ requires that legal authorities’ actions be consistent with—not in breach of—already existing law. Congruence is the most important principle or constraint to maintaining the “existence of a relatively stable reciprocity of expectations between lawgiver and subject” that is the basis of legal legitimacy.⁴⁵ Congruence embodies constraints on authorities’ administration of the legal system, by which authorities act to maintain the credibility of the system that is constructed through their adherence to the other seven principles. Various procedural and institutional constraints constitute aspects of congruence, especially in relation to the functioning and practice of courts, such as judicial review, and due process trial protections for defendants. Congruence is explored in the research through the lens of “defense parity,” which incorporates core due process protections as well as structural issues that shape the ability of the accused to gain an adequate defense.

The application of these two fundamental principles of liberal legal practice enables the application of law to embody the fundamental values of human rights: freedom, through self-

Inner Morality of Private Law.” The constraints on lawmakers are given moral meaning in the context of the ability of legal authorities to impose harsh penalties on citizens, including imprisonment.

⁴³ It should be noted that deviations from non-retroactivity that privilege subjects do not diminish the legitimacy of the legal system: for example, abolishing the death penalty and applying the law to all prisoners still alive that had been sentenced to death.

⁴⁴ Fuller, *Morality of Law*, 81.

⁴⁵ *Ibid.*, 209.

imposed constraint on arbitrary treatment by legal authorities, and equality of treatment.⁴⁶ The dissertation argues that this approach can be applied at the international level to assess the legitimacy of global legal governance by exploring the extent to which international criminal tribunals demonstrate this reciprocal relationship towards subjects—specifically criminal defendants—through adherence to these principles.

Research variables

The following section explains the normative and empirical basis for examining legality and defense parity in the case studies as the key components of legal legitimacy through the protection of defendants. It then explains the reliance in the research on the concept of institutional power to encapsulate political influences on legal fairness.

⁴⁶ *Universal Declaration of Human Rights*, UN General Assembly Resolution 217 A (III), December 10, 1948, article 1.

Dependent variable 1: Legality

The principle of legality is arguably the most essential and basic tenet of law; in liberal legal systems it is “the most fundamental requirement of natural justice.”⁴⁷ Legality contains three main requirements: that there is no retroactive criminal enforcement, no retroactive punishment, and no retroactive jurisdiction created for courts.⁴⁸ First, non-retroactivity of crimes requires that lawmakers do not enforce a law in relation to a situation that occurred before the law came into effect (no ex post facto application),⁴⁹ and therefore do not prosecute individuals retroactively.⁵⁰ Second, non-retroactivity of punishment requires that no one be penalized more harshly than the law allowed at the time of the prosecuted act.⁵¹ Third, non-retroactivity of court jurisdiction requires that a court prosecuting an individual was endowed with this legal authority before the occurrence of a prosecuted act, thus prohibiting the construction of special courts for the purpose of trying specific crimes or expanding an existing court’s jurisdiction for that purpose. The

⁴⁷ Luban, “Fairness to Rightness,” 581.

⁴⁸ The principle of legality also contains other, secondary, requirements, including that laws should be consistently applied and a ban on criminalization by analogy to similar laws. See Gallant, *Principle of Legality*, 11-45. These issues are not explored in the research in order to enable a more clear and more easily comparable determination of non-retroactivity.

⁴⁹ Kai Ambos, “Remarks on the General Part of International Criminal Law,” *Journal of International Criminal Justice* 4, no. 4 (2006): 660-73.

⁵⁰ It should be noted that retrospective enforcement does not always constitute a breach of fair process rights. For example, laws which are beneficial to an individual or tax laws whose purpose is to close loopholes exploited by the rich are often uncontroversial and may not be considered to contravene basic rights. However, retrospective criminal legislation which is to the detriment of the accused is a fundamental infringement of basic legal rights. See Charles Sampford, *Retrospectivity and the Rule of Law* (New York: Oxford University Press, 2006).

⁵¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), November 4, 1950, article 7. Non-retroactivity of punishment is commonly described as *nulla poena sine lege*, “no punishment without law.”

normative justifications for the significance to legitimacy of non-retroactivity of crimes and punishment are explained below: these are the aspects of legality explored in the research.⁵²

Non-retroactivity of crimes is a core requirement in distinguishing criminal law from mere retribution: law is essentially that which has been previously prohibited by a source of governing authority. It is also an indicator of legal legitimacy through its role in the protection of individuals (legal subjects). Non-retroactivity is not only a central requirement of criminal law, but without it there is no law, per se, only retribution: “[T]he essence of legality is that a person should reasonably be able to tell what laws will be applied to her or him, and the rest of society should be able to determine if such laws are being applied arbitrarily to her or him.”⁵³ While the legitimacy of the prohibitions contained within international laws can be questioned, as such laws are not created by directly representative legislative bodies (except the European Parliament), the variable of legality captures the liberal features of predictability and consistent constraint on lawmaking, and does not judge the legitimacy of the content of laws per se.

The two primary functions of non-retroactivity of crimes in relation to protecting the individual are that it provides fair notice to legal subjects of what is prohibited, and acts as a constraint on government abuse of power. Fair notice requires that laws are publically promulgated when passed so that the prohibitions they contain provide a reasonable expectation of what behavior is legal.⁵⁴ This justification is driven by one of the primary functions of

⁵² Non-retroactivity of court jurisdiction is a more contentious source of normative force as there are plausible arguments that defendants should not expect international impunity when they are accused of illegal acts. Author conversation with legal scholar Charles Sampford, St Andrews, Scotland, March 22, 2013.

⁵³ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009), 408.

⁵⁴ Fair notice through the promulgation of laws is effectively “constructive notice”—the legal fiction that subjects know of a law because it has been publically announced by a governance institution, and

criminal law: to act as an authoritative guide to socially acceptable conduct.⁵⁵ The non-retroactive enforcement of law also enables all legal subjects to observe that those prosecuted knew their conduct was forbidden by law.⁵⁶

Non-retroactivity of crimes also acts as a constraint on government abuse, by inhibiting exploitative and arbitrary action by the state. This is especially important as the coercive power of the state is directly implicated in criminal law, which exercises its authority in this area with the highest sanctions—imprisonment and, in many jurisdictions, execution. Non-retroactivity of crimes also helps maintain a separation of powers. By ensuring that laws must be created by a body with legislative authority, rather than an executive or the judiciary, it helps limit the ability of these other authorities to usurp legislative power. In a liberal political system this function takes on added significance, as the legislature is the only body (in which at least one chamber is) always directly elected, and thereby directly representative.⁵⁷ In this sense, non-retroactivity of crimes also promotes the maintenance of individual freedom.

therefore ignorance is no excuse before the law. Many domestic jurisdictions take the approach that the graver the act the greater the presumption of awareness of the prohibition: for example, see *United States v. Int'l. Minerals & Chemical Corp.* (1971), 402 US 558, 565. The issue of fair notice through promulgation becomes more problematic in relation to customary international law, which is the basis of crimes against humanity and some war crimes. It is difficult to claim that the subjects of international criminal law—potentially all individuals globally—have been put on, even constructive, notice when customary law is determined by judicial process and not legislation.

⁵⁵ Robinson “Fair Notice and Fair Adjudication.”

⁵⁶ John Calvin Jeffries Jr., “Legality, Vagueness, and the Construction of Penal Statutes,” *Virginia Law Review* 71, no. 2 (1985): 205-10.

⁵⁷ In parliamentary democratic systems the executive is not directly elected but chosen by the legislature. In some democratic political systems one chamber of a bicameral legislature is not directly elected: e.g. the upper chamber of the British Houses of Parliament, the House of Lords, is currently filled by life peers chosen by government and crown; and in the German Bundestag (federal parliament), the upper chamber, the Bundesrat, represents the federal states, or Länder, whose regional governments designate individuals to fill the seats. See Torbjörn Bergman, Wolfgang C. Müller, Kaare Strøm, and Magnus Blomgren, “Democratic Delegation and Accountability: Cross-national Patterns,” in *Delegation and Accountability in Parliamentary Democracies*, ed. Kaare Strøm, Wolfgang C. Müller, Torbjörn Bergman (Oxford: Oxford University Press, 2003), 109-20.

Non-retroactivity of punishment, like that of crimes, is not just a negative right, preventing certain state action. It also encourages positive rights, including consistency of punishment and thereby equitable treatment before the law, and respect for the autonomy of the individual by limiting excessive punishment. Until a few decades ago, non-retroactivity of punishment was often overlooked as a source of significant individual rights, on the basis that individuals should only be protected by non-retroactivity while they are deemed innocent. Once they have been found guilty, protection in determining sentencing was thought less important—it “affects only proven criminals.”⁵⁸ Consequently non-retroactivity of punishment, or “*nulla poena*” in legal terms, has often been seen in domestic legal systems as “the poor cousin of *nullum crimin* [non-retroactivity of crimes].”⁵⁹ This has changed over the last half century, as, especially Western, states have come to view *nulla poena* not merely as a negative right of freedom from arbitrary government coercion, but as a requirement of “positive justice,” in that it promotes consistency in criminal sentencing, helps to protect judicial autonomy (as it guards the judiciary from political pressure to determine the sentence of individuals of executive concern), and thereby protects the integrity of the legal system and the public perception of justice.⁶⁰ Without *nulla poena*, criminal punishment would risk becoming totally individualized, diminishing the protection of individuals before the law and likely leading to broad inconsistency in sentencing.⁶¹

David Luban claims that the arguments in favor of the centrality of non-retroactivity of crimes and punishment to the legitimacy of criminal justice given above do not apply at the

⁵⁸ Jerome Hall, *General Principles of Criminal Law*, 2nd ed. (Clark, NJ: The Lawbook Exchange, 2005), 55.

⁵⁹ Shahram Dana, “Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Sentencing,” *Journal of Criminal Law and Criminology* 99, no. 4 (2009): 857.

⁶⁰ *Ibid.*: 860, 864.

⁶¹ Jerome Hall, “Nulla Poena Sine Lege,” *The Yale Law Journal* 47, no. 2 (1937): 183.

international level.⁶² Fair notice is argued not to reasonably apply to such outrageous acts as genocide—that is, those that may be considered intrinsically wrong due to their egregious nature (crimes that are *mala in se*, or “wrong in themselves,” such as murder). Society does not require these acts to be formally criminalized with specific penalties for individuals to realize that they are wrong: that is, they are not *mala prohibita* acts, those that are considered wrong only because they have been criminalized (such as, arguably, consuming marijuana). In addition, some extreme atrocity circumstances may not be foreseeable and yet may occur in such a way as to make non-retroactive prosecution under international criminal law impossible, and therefore non-retroactivity undesirable. Both of these arguments were used to justify the Nuremberg and Tokyo prosecutions for crimes against humanity by the lawyers and politicians who constructed the courts.⁶³

It is argued here that, to the contrary, at the international level as at the domestic, non-retroactivity of crimes and punishment are essential to the realization of individual human rights and to limit the coercive authority of governance institutions. Fair notice and constraint on government abuse of power are relatively minimalist criteria of legal fairness in that, while they provide human rights protections, these are procedural rather than substantive. In addition, while they originate with liberal conceptions of the rights of individuals, they rely on an unambitious ideal of fairness in the treatment of individuals: protecting criminal defendants from arbitrary and exploitative action by the coercive power of authoritative institutions.⁶⁴

⁶² Luban, “Fairness to Rightness.”

⁶³ Arie J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press, 1998), 138-71.

⁶⁴ Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), 109.

By providing fair notice at any level of governance, non-retroactivity of crimes exhibits respect for the worth and autonomy of the individual—the core of international human rights law. It also ensures community awareness that only those responsible for an atrocity (including co-conspirators and those with command responsibility), will be held criminally accountable—that is, that there will be no collective punishment. In addition to providing notice of legal prohibitions to individuals, non-retroactivity of crimes provides notice to states of their duty under treaty and customary international law to prosecute or extradite for prosecution those individuals in their territory accused of relevant crimes, and to prevent those crimes from occurring. This applies, for example, to states that have ratified the 1948 Convention on the Prevention and Punishment of the Crime of Genocide,⁶⁵ and the 1984 Convention Against Torture.⁶⁶

Nevertheless, non-retroactivity has been a contentious source of legitimacy. The individual legal justice of which it constitutes part is in tension with the collective societal and political justice desire for vengeance that occurs in many post-conflict environments. Legal justice may appear to value procedural protections for criminal defendants above the moral drive to punish offenders. Non-retroactivity in fact is central to the concept and practice of legal justice—to its privileging of adjudication by law above vengeance by the state or community. Before the modern advent of international criminal justice, retributive justice after international conflict took the form of political or social justice—vengeance against the leaders, and often whole

⁶⁵ Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, and Text of the Convention, UN doc. A/RES/260 (III), December 9, 1948, articles 4-6. Hereafter referred to as the Genocide Convention.

⁶⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN doc. A/RES/39 (46), December 10, 1984, articles 4-9.

population, of the losing side. Such collective punishment by victors has run the spectrum from perhaps the most infamous early documented occurrence of genocide—the destruction of the Phoenician civilization at Carthage after its defeat by Rome in the Third Punic War (149-146BC)⁶⁷—to the economically crippling reparations imposed on Germany after World War I by the 1919 Treaty of Versailles.

The argument that non-retroactivity is a barrier to punishing atrocities invokes a continuation of the community justice challenge to legal justice. Political and legal justice are distinct in various ways, including that political justice is legitimized purely by the outcome—have the losers been punished for perceived wrongdoing against the winners, and punished severely enough to satisfy the emotional outrage of the winners and victims? In contrast, while successful prosecutions are important, legal justice is also crucially dependent for its legitimacy on the fairness of its procedures. Procedural protections for individuals at the state and international levels constitute a core aspect of the replacement of collective punishment through private vengeance with the individualization of punishment through public prosecution—the substitution of public for private justice.

Nevertheless, the idea that non-retroactivity is not, or should not be, a principle of global legal governance “remains popular today among supporters of international criminal law as a means to control and punish the worst of the worst in human behavior.”⁶⁸ By failing to distinguish adequately between legal and political justice, defenders of the former ignore not

⁶⁷ Jones, *Genocide*, 29. The author also argues that the destruction of Carthage is an example of “urbicide.” “The obliteration of urban living-space as a means of destroying the viability of an urban environment, undermining the sustainability of its population and eroding the cosmopolitan values they espouse” (ibid).

⁶⁸ Gallant, *Principle of Legality*, 38.

only that which makes legal justice distinct from mere vengeance, but also undermine a key source of the legitimacy of global legal governance institutions for criminal justice.

In terms of the government abuse argument for non-retroactivity at the international level, the weakness of the institutions that constitute international criminal justice mean that such abuse is widely seen as much less likely. However, as with political authority at the state level, global governance institutions exercise one of their greatest coercive powers over individuals within the realm of criminal justice. For example, the first international criminal tribunals of the modern era, the IMT at Nuremberg and the IMTFE at Tokyo, sentenced 12 and 7 defendants to death, respectively. And while there is no death penalty at current international tribunals, they can still impose substantial custodial sentences.⁶⁹ Adherence to the non-retroactivity of crimes makes it more difficult for international courts, and the states and international organizations that authorize them, to use legal means to legitimize their desire for political retribution. On a related note to the governance abuse issue, non-retroactivity also helps to maintain a separation of powers at the international level by ensuring that international courts do not exceed their authority by creating new crimes under their jurisdiction and that the crimes they do prosecute have broad state support.⁷⁰

Arguments in favor of adherence to the non-retroactivity of punishment at the international level rely on similar arguments. Punishment, according to Emile Durkheim, is central to the

⁶⁹ For example, at the ICTY the maximum sentence is life imprisonment, and at the ICC 30 years (although, according to the ICC, “in extreme cases, the Court may impose a term of life imprisonment”). See ICTY website, Judgements and Sentencing, www.icty.org/en/about/chambers/judgements-and-sentencing; and ICC website, What Penalties May Be Imposed by the Court?, www.icc-cpi.int.

⁷⁰ Ward N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (The Hague: TMC Asser Press, 2006), 222-3.

construction and maintenance of norms within society,⁷¹ and institutions of international law can perform similar functions within international society.⁷² Non-retroactivity of punishment protects individuals from the arbitrary, inconsistent, and abusive exercise of coercive authority by global legal governance institutions. Inconsistent sentencing also diminishes the normative value of prosecuting a crime: those with lesser punishments appear to have escaped full justice, those with greater may appear to have been treated unjustly, and inconsistency increases the perception that political considerations have tainted the legal process.

All told, non-retroactivity provides important protections for privileging the individual under international law. This is a profound shift from the traditional era of international law, where the individual was purely subordinated to the state. Indeed until the post-1945 era, under international law the individual had no legal personality, which is “a prerequisite for the capacity to bear rights and obligations,” according to José Alvarez.⁷³ This change is indicative of a shift from purely community to individual rights in the international system, challenging the preeminence of the community at the international level—including in terms of standards of justice.

Antonio Cassese, first president of the ICTY (1993-7) and of the hybrid (domestic-international) Special Tribunal for Lebanon (2009-11), has acknowledged that legal fairness through non-retroactivity of crimes (*nullum crimen sine lege*) is now seen as more important in

⁷¹ Emile Durkheim, *The Division of Labour in Society*, trans. George Simpson (New York: Macmillan, 1933 [1893]).

⁷² Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 2002).

⁷³ José E. Alvarez, *International Organizations as Law-makers* (New York: Oxford University Press, 2005), 129.

international criminal justice than the political vengeance of trials with weak protections for the accused, which featured so heavily at Nuremberg and Tokyo:

In ICL [international criminal law], for many years courts have applied *nullum crimen* as a doctrine of substantive justice, that is, a doctrine whereby the legal order must primarily aim at prohibiting and punishing any conduct that is socially harmful or causes danger to society, whether or not that conduct has already been legally criminalized at the moment an act took place. The paramount interest is defending society against any deviant behavior likely to cause damage or jeopardize the social and legal system. Hence this doctrine favors society over the individual. Only in recent years has this doctrine been replaced by *nullum crimen sine lege* as a doctrine of strict legality.⁷⁴

Dependent variable 2: Defense parity

This section explains the primary components of defense parity and why it is an essential source of legitimacy for global legal governance institutions for criminal justice. Protecting criminal defendants during prosecution at its most fundamental requires applying the core criminal law principles of the presumption of innocence and the burden of proof lying with the prosecution. Their implementation requires rights to ensure the defense has adequate opportunities to attempt to refute the prosecution's case. It is argued here that institutional parity and procedural guarantees for defendants, collectively termed "defense parity," constitute the fundamental rights to ensure adequate opportunities to respond to the prosecution's case. This acknowledges the essential role of defense counsel in criminal trials. As stated in relation to the US system: counsel

⁷⁴ Antonio Cassese, *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese, s.v. "Nullum Crimen Sine Lege" (Oxford: Oxford University Press, 2009), 438-9.

“serve as the necessary advocates of defendants’ rights. By fulfilling that role, they vindicate limits the Constitution imposes upon government power, and assure that the adversary justice system functions correctly.”⁷⁵

The two primary aspects of the rule of law are procedural due process and defense “opportunities for argumentation.”⁷⁶ Both directly address the rights of criminal defendants and constitute components of Fuller’s principle of congruence. In the context of a criminal trial, the purpose of due process and opportunities to argue is to attempt to equalize the resource and structural advantages of the prosecution, in order to enable the accused to present an adequate defense. The prosecution is supported by the authority and financial and legal resources of the state, which provide enormous advantages in pre-trial investigations—gathering evidence and locating witnesses, for example—and during the conduct of a trial. Defendants require counterbalancing advantages and procedural protections.

Prosecutors at international courts maintain many of these institutional advantages, including greater financial resources,⁷⁷ usually greater access to state territory to investigate crimes, and much greater cooperation in gathering evidence from state authorities, IGOs such as the UN, and human rights NGOs. In addition, when states are hesitant to cooperate with an international criminal investigation, such intransigence tends to benefit the prosecutor and so provides a further hurdle to mounting an effective defense.⁷⁸

⁷⁵ Morgan Cloud, “Forfeiting Defense Attorneys’ Fees: Applying an Institutional Role Theory to Individual Constitutional Rights,” *Wisconsin Law Review* (January/February 1987): 7.

⁷⁶ Jeremy Waldron, “The Concept and the Rule of Law,” *Georgia Law Review* 43, no. 1 (2008): 1-61.

⁷⁷ Except for personally-funded defendants—as opposed to court-supported defense counsel. However, the former group has constituted only around 10 percent of defendants at the ICTY, for example. Interview with a close legal observer of the ICTY, The Hague, October 2015.

⁷⁸ Charles Chernor Jalloh and Amy DiBella, “Equality of Arms in International Criminal Law: Continuing Challenges,” in *The Ashgate Research Companion to International Criminal Law: Critical*

“Equality of arms” is a fundamental legal principle whose purpose is to address these advantages of the prosecution as an arm of legal authority. As criminal law is practiced in the globally dominant common and civil law systems—the legal basis for all purely international tribunals⁷⁹—equality of arms does not encompass the right to substantive equality between defense and prosecution, but instead a right to confront the prosecution on equal terms.⁸⁰ This requires courts to provide institutional and financial resources to the defense, such as immunities and privileges to facilitate investigation, and public provision of counsel. It also requires two primary evidentiary procedural guarantees: prosecution disclosure of evidence to the defense before trial (including exculpatory material), and the “right of confrontation”—that is, the right to cross-examine prosecution witnesses.⁸¹

There is also one area where parity between prosecution and defense could arguably make a significant difference to trial fairness, but tends to be overlooked in analyses of defense protections, and is not typically considered as aspect of equality of arms: the institutional structure of a judicial system.⁸² Structural parity within the institutional framework of a legal system between prosecution and defense addresses distinctions in power between legal governance institutions—and their agents, in this case prosecutors—and their legal subjects. The concept of structural parity also acknowledges the co-equal function of defense counsel in the

Perspectives, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 279-82.

⁷⁹ As opposed to hybrid courts, which are based on a combination of international law and the domestic law of the territory where the criminal situation occurred, and so may include elements not found in the civil and common law systems.

⁸⁰ Cassese, *International Criminal Law*, 384-6.

⁸¹ Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), 81-116, 208-339.

⁸² A prominent exception is Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Cambridge: Intersentia, 2012), which acknowledges the importance of institutional support to the defense.

administration of justice, as stated by the American Bar Association: “A court properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and jury, where appropriate), counsel for the prosecution, and counsel for the accused.”⁸³

The practice of civil and common law domestic legal systems has been to establish an office of the prosecutor as an official court body. In many such system, including that of the United States at the federal and state levels, court systems have also established an office to represent defense counsel within the legal system’s institutional structure. In most US jurisdictions this is a public defenders’ office, which is responsible for allocating and paying for legal representation for defense, as well as representing defendants’ interests within the court system. All contemporary international courts have followed this practice with regard to prosecutors—all have an office of the prosecutor—but they have been far more inconsistent in regards to defense counsel, as explained in the case studies.

The term “defense parity” is used in the research rather than “equality of arms” to distinguish the standards that are applied in the dissertation and those associated with the latter term. In omitting structural issues, equality of arms is too narrow to provide defendants at international tribunals with reasonable opportunities for argumentation. Structural parity is important in shaping the dynamic between prosecution and defense in decision-making forums within international courts, including in relation to such important areas for a fair trial as budgetary and procedural change. Defense parity in the research does include more typical equality of arms

⁸³ American Bar Association, Criminal Justice Section Standards archive, Standard 4, 1.2.a.: The Function of Defense Counsel, www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_dfunc_blk.html.

procedural standards in relation to the gathering and presentation of evidence at trial: disclosure of prosecution evidence and cross-examination of prosecution witnesses.

However, the research also recognizes that the prosecution has a different task than the defense, and in some ways a more difficult one: to conduct forensic and other investigations in order to justify an indictment and to construct a case against the accused at trial. Absent the support provided to domestic prosecutors by police and allied investigatory structures, personnel, and resources, prosecutors at international courts require additional resources in relation to defense to carry out this task. Therefore resource issues are not explored in the research, and the term “defense parity” is not meant to indicate that broad equality is expected between the parties in all areas to demonstrate fairness. The term expresses the requirement specifically for structural parity and evidentiary procedural guarantees.

In contrast to the position taken here, Richard Goldstone, the first chief prosecutor of the ICTY and the International Criminal Tribunal for Rwanda (ICTR), when asked by the author about equality of arms, argued that it can never be achieved in a criminal trial, whether domestic or international, due to the numerous resource and institutional advantages held by the prosecution. Instead of equality he believes that courts should strive to achieve “adequate representation.”⁸⁴ This position is problematic because while strict equality is not achievable—nor desirable, due to the need for resources for international prosecutors to enable them to investigate crimes, for example—defense parity and adequate representation are not mutually exclusive, or different points along a spectrum of fairness to the defense, with the latter presenting a lower standard that courts can more easily be expected to achieve. The dissertation

⁸⁴ Author interview with Richard Goldstone, New York, October 17, 2014.

argues that adequate representation cannot be achieved unless there is pre-trial and trial parity for the defense in terms of institutional support and procedural guarantees to balance the inherent institutional advantages enjoyed by the prosecution. The specific elements of defense parity explored in the research are delineated in the indicators section below.

Defendant parity is an essential source of the legitimacy of a liberal criminal justice system because it contributes towards four of such systems' primary normative, practical, and political purposes: truth determination, moral retribution, a fundamental human right, and constraining the coercive power of public authorities over individuals. First, the primary practical function of a trial is to determine the truth in relation to an apparent breach of law, in order to establish the facts of a potentially criminal act and the criminal culpability of the defendant. This function cannot be achieved if the defendant has inadequate protections from the power of the state as exercised before and during a trial, as, without a reasonable opportunity to refute the prosecution's case, the defendant is much more likely to be erroneously found guilty. Second, moral retribution is severely inhibited by restricting defendants from presenting a sufficient defense. There is no moral or social justice in finding an innocent individual guilty through trial standards that undermine the determination of truth.

Third, defendant rights are justified as inalienable legal rights in a cosmopolitan understanding of universal human rights.⁸⁵ Elements of a "constitutionalization" of the international system can be seen in the international right to a fair trial, as an expression of the

⁸⁵ For example, in Kant's understanding of an international legal cosmopolitanism or "jus cosmopolitanicum." See Immanuel Kant, *Perpetual Peace, and Other Essays on Politics, History, and Morals*, trans. Ted Humphrey (Indianapolis, Ind.: Hackett Publishing, 1983 [1795]).

growing role of the individual as a global citizen.⁸⁶ Fourth, defense parity has distinctly political implications, acting as a limitation on the power of the coercive authority of legal governance institutions. Without a serious attempt to achieve and maintain defense parity, trials can be—and are constantly—misused at the domestic level by political authorities worldwide to delegitimize political rivals and enemies.

For these reasons defense parity is central to the modern concept of legal justice, as opposed to the retributive justice of punishment of perceived offenders in order to satisfy popular and state outrage at the commission of egregious acts. Reasonable protections for the accused before and during trial distinguish criminal justice from community vengeance. Similarly, at the international level, the trial right of defendants to institutional and procedural parity is central to the legitimacy of criminal justice. International criminal justice and its legitimacy tend to be centered on the trials that courts conduct.⁸⁷ Its underlying international human rights and humanitarian norms “build their legitimacy from the bottom up, by the fairness of their proceedings and the moral power they project.”⁸⁸ Therefore protecting the accused from the arbitrary exercise of power by legal governance institutions is the most fundamental aspect of ensuring a fair trial consistent with the liberal legal principle of congruence with the rule of law, and with the dignity and human rights of the individual.

Such concern is only heightened by the inherently political context within which international courts operate. Rather than being created by legislative bodies, as is usual in the

⁸⁶ Anne Peters, “Membership in the Global Constitutional Community,” in *The Constitutionalization of International Law*, Jan Klabbers, Anne Peters, and Geir Ulfstein (Oxford: Oxford University Press, 2009), 153-262.

⁸⁷ Luban, “Fairness to Rightness.”

⁸⁸ *Ibid.*, 588.

domestic democratic context, they are established by the representatives of state executives: by a single state (e.g. the IMTFE), groups of states (the IMT and the ICC), or IGOs (the ICTY and ICTR). Therefore at the international level, defense protections assume the extra burden of counterbalancing the potential perception of political bias by significantly inhibiting the ability of authorities to use the judicial processes to delegitimize opposing states by prosecuting their leaders. This is especially important to provide the judicial process with broad international legitimacy in a post-conflict environment in which a court is primarily prosecuting individuals from one group—such as Nazis at Nuremberg and Hutus at the ICTR.⁸⁹

The independent variable: Institutional power

The dissertation argues that the institutional power of states has significantly shaped defense protections. Following Barnett and Duval, power is defined in the research as “the production, in and through social relations, of effects that shape the capacities of actors to determine their own circumstances and fate.”⁹⁰ Institutional power involves the socially diffuse or indirect use of power by political actors to control others through authority to establish and modify the resources, and structural and procedural rules within which global governance institutions operate. As described by Barnett and Duval, “the conceptual focus [of institutional power] is on the formal and informal institutions that mediate between A and B, as A, working through the rules and procedures that define those institutions, guides, steers, and constrains the actions (or non-actions) and conditions of existence of others, sometimes even unknowingly.”⁹¹ The

⁸⁹ Cryer, *Prosecuting International Crimes*, 191-231.

⁹⁰ Barnett and Duvall, “Power in Global Governance,” 8.

⁹¹ *Ibid.*, 15.

dynamic operates through spatially and temporally diffuse relations of power whereby A (in the dissertation largely states) establishes the conditions within which B (criminal defendants and their counsel) operate.⁹²

Not all actors exercise power equally, with more powerful states tending to be more influential in generating rules consistent with their material interests and normative values. The institutions created therefore tend to reflect the preferences of the most powerful states within the bargaining forum that create them. However, such institutions are not epiphenomenal as the bargaining processes resulting in rules usually reflect a compromise between multiple actors,⁹³ and such issues as asymmetries of information between agents (international institutions) and principals (rule creators, largely states) create opportunities for autonomous action.⁹⁴

Principal-agent theory's explanation of how agent autonomy is enabled by asymmetries of information and differing interests between agents and the principals that delegate authority to them⁹⁵ may appear to provide a productive avenue for exploring the effect on judicial actors of rule-making for international tribunals by states. However, the dissertation does not focus on the autonomy of judicial actors per se—an area already well-explored in the literature on international criminal justice.⁹⁶ Instead the lens of institutional power is a more appropriate tool

⁹² Ibid., 16.

⁹³ Stephen D. Krasner, "Changing State Structures: Outside In," *Proceedings of the National Academy of Sciences* 108, supp. 4 (December 2011): 21,305.

⁹⁴ See research on delegation of policy implementation to institutions, including principal-agent theory work: e.g. Gary Miller, "The Political Evolution of Principal-Agent Models," *Annual Review of Political Science* 8 (2005): 203-25; and Barry Weingast and Mark Moran, "Bureaucratic Discretion and Political Control," *Journal of Political Economy* 91 (1983): 765-800.

⁹⁵ Terry M. Moe, "The New Economics of Organization," *American Journal of Political Science* 28, no. 4 (1984): 739-77.

⁹⁶ E.g., Giandomenico Majone, "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance," *European Union Politics* 2, no. 1 (2001): 103-22; Karen J. Alter, "Agents or Trustees? International Courts in their Political Context," *European Journal of International Relations* 14, no. 1

for the purposes of the dissertation, which examines the effect of rule-making on the implementation of the rights of certain judicial actors (defendants and counsel), rather than the extent and effects of tribunal autonomy.

The dissertation argues that the manner in which institutional power relations operate within global legal governance, between the states that create tribunals and actors within them, weaken the tribunals' legitimacy by impairing the ability of the accused to gain an adequate defense. States have enormous influence on the operation of international courts, and the fairness they afford to defendants, through the negotiating processes that lead to the establishment and maintenance of courts. States' institutional power has been exercised through decision-making in various legal environments, including: temporary alliances, such as that which created the London Charter of the IMT; the UN Security Council, creating the ICTY in resolution 827; and within treaty-negotiating forums such as the Rome Conference that created the statute of the ICC.

States have also created rules of procedure and evidence for some courts, and other subsidiary rules documents, such as definitions of crimes. They have also been responsible for changes to the rules of some courts. The extent to which powerful states have been able to exercise an unequal role in shaping rules has varied by forum. At the London Conference after World War II, for example, only powerful states had a direct role in constructing the IMT's rules. The rules for the ICTY established by the Security Council were especially influenced by the legal preferences of the United States as a powerful permanent member willing to devote significant resources for this exercise, including in terms of legal expertise. The ICC statute was

(2008): 33-63; and Erik Voeten, "International Judicial Independence," in *Interdisciplinary Perspectives on International Law and International Relations*, ed. Dunoff and Pollack, 421-44.

also substantially influenced by US preferences out of concern by other participants to ensure the US delegation signed the statute at the end of the Rome Conference. However, subsequent rule changes have not been shaped by the United States, or other such powerful global actors as Russia and China, as they have not ratified the statute and are therefore not members of the forum responsible for rule changes, the Assembly of States Parties.

The role of institutional power in shaping defense protections is a result of states' material and normative interests, including their concern to limit the power of courts, and to delegitimize other political actors. Also relevant to state decision-making in constructing courts is their particular conception of justice. This tends to privilege the political justice of prosecution over the legal justice of protecting defendant rights, and is influenced by the non-legal goals of international criminal justice, such as transitional justice and historical narrative construction.⁹⁷

Especially the international trials of high-profile military and political leaders can tend to constitute "political theatre," primarily concerned with political goals rather than punishment, which is "almost an afterthought."⁹⁸ This focus partly stems from the normative issue of the inability of any punishment for perpetrators to fit the enormity of their mass atrocity crimes, and therefore the trial process rather than the punishment must bear the burden of providing justice to victims. The political functions of international trials, and their potentially distorting impact on the legal dynamic, means that there is even more pressure than in the domestic context on the

⁹⁷ Kim C. Priemel and Alexa Stiller, eds., *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (New York: Berghahn Books, 2014); Ruti G. Teitel, *Humanity's Law* (New York: Oxford University Press, 2011); and Björn Elberling, *The Defendant in International Criminal Proceedings: Between Law and Historiography* (Oxford: Hart Publishing, 2012).

⁹⁸ Luban, "Fairness to Rightness," 575.

fairness towards defendants to carry the burden of the international criminal justice system's legitimacy.⁹⁹

Three goals and concerns of states in relation to international trials are explored in the research as explanations of state decision-making in relation to the establishment and modification of court rules; all of which tend to be much weaker or absent within liberal legal governance at the domestic level. First, the goal of transitional justice through ending impunity and protecting victim groups leads to conflict between the primary protection focuses on international criminal justice: protecting victims and criminal defendants.

Second, since Nuremberg international courts have self-consciously possessed a historical narrative creation function,¹⁰⁰ whose methods of gathering and presenting historical material it is argued sometimes diverge from the standards for evidentiary procedures necessary for fairness towards defendants. Third, state and UN concern with the cost and length of international trials has led to pressure on courts to reduce both in ways that disproportionately affect the defense. These problems are exacerbated by a weak understanding of the nature of the role of defense in criminal trials—by states, IGOs, juridical actors, and NGOs.

These issues all lead to insufficient attention on the role of the accused and defense counsel during the construction and maintenance of international courts, and in the cooperation afforded by such actors to evidence gathering by legal teams. Defendants tend to be conceived of by all these actors as passive agents, acted upon by the international system to determine their guilt,

⁹⁹ Ibid., 574-7.

¹⁰⁰ Devin O. Pendas, "'Law Not Vengeance: Human Rights, the Rule of Law, and the Claims of Memory in German Holocaust Trials,'" in *Truth Claims: Representation and Human Rights*, ed. Mark Philip Bradley and Patrice Petro (New Brunswick, NJ: Rutgers University Press, 2002), 28.

and they are often socially and politically condemned before their legal culpability is established by trial. Each factor is explained in more detail below.

First, in terms of transitional justice, there is a conflict between the protection regimes of international criminal justice due to the distinct focus of the two primary elements of criminal law: the substantive law that delineates what is prohibited or required, and criminal procedure, which determines how the law is applied in relation to prosecutions. Substantive law is underlain by the responsibility of the state to protect citizens, and the concept of personal responsibility—individuals can be held criminally responsible for breaching their legal obligations. Criminal procedure, on the other hand, is governed by the need to protect the human rights of individuals in relation to state action—in this case, primarily defendants, rather than protecting the victims, which is the focus of substantive law.¹⁰¹

These conflicting protection goals similarly play out in the international context, through the disparate emphases of international human rights and humanitarian law vs. international criminal law and justice. The former are focused on protecting all people from abuses—and providing justice to victims. This leads, in the context of prosecution, to the goal of ending impunity and measuring success through the number of alleged perpetrators convicted—especially when they are high-profile political actors. Liberal criminal justice, on the other hand, aims at protecting the rights of defendants to ensure a fair, legitimate trial, through the principle of the presumption of innocence and the rights and obligations stemming from the principle of the equality of arms. It is by no means clear that political and legal conceptualizations of justice have compatible goals,

¹⁰¹ Kenneth S. Gallant, “Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard, and What Might be Done about One of Them,” *Criminal Law Forum* 14 (2003): 324.

despite the attempt by international criminal justice to utilize legal justice to achieve political justice.¹⁰²

The human rights focus of international criminal justice leads to an under-emphasis on the importance of protecting defendant rights. There is significant resistance to enhancing protections for defendants among states and within the UN, as this is implicitly perceived as diminishing the ability to achieve justice through the conviction of “war criminals.” The quotation marks are used here to indicate the labels used among states, at the UN, by human rights NGOs, and in international media to socially condemn individuals that have not been legally convicted in court.¹⁰³ The public discourse by international media and many governments tends towards the construction of a “narrative of guilt and innocence.”¹⁰⁴ As Hannah Arendt and others have argued, trials themselves may constitute a formalization through public theater of this social and political narrative.¹⁰⁵

Within such an international political environment, a genuinely fair trial encounters significant obstacles absent or much weaker at the domestic level. These include an often much

¹⁰² Mykola Sorochinsky, “Prosecuting Torturers, Protecting ‘Child Molesters:’ Toward a Power Balance Model of Criminal Process for International Human Rights Law,” *Michigan Journal of International Law* 31, no. 1 (2009): 157-229. This argument is an international projection of the conflict Herbert Packer argued between two models of criminal process: the “due process” model of protecting the rights of the accused and the “crime control” model, focused on efficiently ensuring that perpetrators are swiftly punished. *Ibid.*, 159-60. See Herbert L. Packer, “Two Models of the Criminal Process,” *University of Pennsylvania Law Review* 113, no. 1 (1964): 1-68.

¹⁰³ E.g. Jim Hooper, “Dayton’s Mandate for Apprehending War Criminals,” *PBS*, 2014, www.pbs.org/wgbh/pages/frontline/shows/karadzic/trial/hooper.html; and Scott Anderson, “What I Did on My Summer Vacation: Inside the Hunt for Ratko Mladic,” *Esquire*, May 26, 2011, www.esquire.com/news-politics/a689/summer-va-cation-1000/.

¹⁰⁴ Michael Bachmann, “Theatre and the Drama of Law: A ‘Theatrical History’ of the Eichmann Trial,” *Law Text Culture* 14 (2010): 112.

¹⁰⁵ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1963); Immi Tallgren, “The Sensibility and Sense of International Criminal Law,” *European Journal of International Law* 13, no. 3 (2002): 561-95; and Bachmann, “Theatre and the Drama of Law:” 94-116.

greater level of cooperation by international actors—states, the UN, and human rights NGOs—with international prosecutors than with defense counsel, despite the necessary reliance of both on aid beyond the power of the court to grant directly. Pre-trial narratives may undermine a defendant’s ability to gain a fair trial via diminished international cooperation with defense counsel in conducting investigations and accessing evidence.

The reliance by international criminal tribunals on external political actors exacerbates these problems for defendants. International judicial authorities are reliant on external political, human rights, and legal actors for support, including: states for financing, arresting suspects, and providing evidence; the International Criminal Police Organization (Interpol) to issue arrest warrants; and human rights NGOs to provide evidence. The dissertation demonstrates that this dependency has tended to be more problematic for the defense’s ability to adequately prepare for trial than for the prosecution.

Another important consequence of the conflict between human rights and criminal justice approaches is the increasing focus on, and participation by, victims in international court proceedings. Victim participation, especially at the ICC, including the establishment of an Office of Public Counsel for the Victims (OPCV), has arguably added to the burden upon the defense, distorting the judicial dynamic between prosecution and defense by introducing a third party with rights against the defense.¹⁰⁶ While the human rights focus on ending impunity for mass atrocities may not appear incompatible with generating fair trials, in practice the criminal justice

¹⁰⁶ Bridie McAsey, “Victim Participation at the International Criminal Court and its Impact on Procedural Fairness,” *Australian International Law Journal* 5 (2011): 105-25; and War Crimes Research Office, American University Washington College of Law, “Victim Participation Before the International Criminal Court,” ICC Legal Analysis and Education Project, November 2007, 59-60, www.wcl.american.edu/warcrimes/documents/12-2007_Victim_Participation_Before_the_ICC.pdf.

that has resulted from the hybrid of substantial international law and domestic criminal procedure exhibits a bias towards the rights of victims as an outgrowth of the political functions of international courts.

The impairment of defendant rights through differential treatment of defense and prosecution by external actors is exacerbated by the use of international courts by states—those that create them and those that are state parties—to delegitimize or stigmatize enemy states and rebel groups,¹⁰⁷ and their leaders through prosecution and conviction.¹⁰⁸ This has negatively impacted defense protections by making states reluctant to cooperate with investigations by defense counsel. The heinousness of the crimes exacerbates this problem, as states and IGOs do not wish to be perceived as aiding war criminals.¹⁰⁹ Stigmatizing media coverage of suspects and defendants with a presumption of guilt is a further discouragement. A related issue is the use of indictments by prosecutors to stigmatize suspects, especially if they are thought unlikely to be caught or successfully prosecuted—that is, a pre-trial legal device is used to condemn suspects rather than a guilty trial verdict.¹¹⁰

Second, the function of international courts in constructing a historical narrative is explored as a political issue shaping defense protections.¹¹¹ The role of courts in illuminating the “truth”

¹⁰⁷ Frédéric Mégret, “Practices of Stigmatization,” *Law and Contemporary Problems* 76 (2014): 287-318.

¹⁰⁸ A major problem generated by the goal of delegitimization is prosecutorial selectivity: while the IMT and IMTFE notoriously consisted of the winners of World War II solely prosecuting the mass atrocities of the losers, the ICTY has focused primarily on Serb atrocities, the ICTR has virtually ignored alleged Tutsi crimes, and most active situations at the ICC stem from referrals to the court by members of the court’s Assembly of State Parties (ASP) the actions of rebel groups which challenge these states’ authority. Cryer, *Prosecuting International Crimes*.

¹⁰⁹ Neil Vidmar, “Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials,” *Law and Human Behavior* 21, no. 1 (1997): 5-25.

¹¹⁰ Bass, *Stay the Hand of Vengeance*, 223.

¹¹¹ Daniel Joyce, “The Historical Function of International Criminal Trials: Re-thinking International Criminal Law,” *Nordic Journal of International Law* 73 (2004): 461-84. See, for example, comments by

of mass atrocity acts committed and thereby make denial more difficult has been highlighted by internal legal and external political actors.¹¹² The research demonstrates Arendt's contention that courts' political function in constructing history risks undermining the legitimacy of trials by diminishing the rights of defendants,¹¹³ including by limiting the ability of high-profile political defendants to speak—such as Herman Göring at the IMT and Slobodan Milošević at the ICTY.¹¹⁴ Courts fear trials becoming political theater, but this is almost inevitable with high-profile public and inherently politicized trials. As Martti Koskenniemi notes, they risk ultimately becoming show trials.¹¹⁵

Third, the length and cost of trials has been an issue for international courts ever since the IMT and IMTFE, with states and IGOs concerned to complete trials and contain costs,¹¹⁶ and commentators claiming that long, expensive trials diminish the legitimacy of international courts through inefficiency.¹¹⁷ This has led to pressure by states to accelerate trials and contain costs, especially at the ICTY; an agenda which has negatively impacted defense parity through procedural changes that weaken defense counsel's opportunities for argumentation. Procedural

an ICTY prosecutor in *Nikolić*, Trial Chamber, doc. no. IT-94-2-R61, transcript of October 9, 1995, www.icty.org/x/cases/dragan_nikolic/trans/en/951009IT.htm.

¹¹² Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia," *Human Rights Quarterly* 27, no. 3 (2005): 908-42.

¹¹³ Arendt, *Eichmann in Jerusalem*.

¹¹⁴ Björn Elberling, *The Defendant in International Criminal Proceedings: Between Law and Historiography* (Oxford: Hart Publishing, 2012), 199-236.

¹¹⁵ Martti Koskenniemi, "Between Impunity and Show Trials," *Max Planck Yearbook of United Nations Law* 6, no. 1 (2002): 1-35.

¹¹⁶ Otto Kranzbühler, "Nuremberg Eighteen Years Afterwards," *DePaul Law Review* 14, no. 2 (1965): 346; and Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), 104-10.

¹¹⁷ Richard J. Goldstone, "International Criminal Court and Ad Hoc Tribunals," in *The Oxford Handbook on the United Nations*, ed. Thomas G. Weiss and Sam Daws (Oxford: Oxford University Press, 2007), 463-78; and David P. Forsythe, "'Political Trials'? The UN Security Council and the Development of International Criminal Law," in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 475-98.

changes at the ICTY are particularly significant as it is perceived by other international courts, including the ICC, as a model to guide their functioning. There is a trade-off between types of legitimacy here, with fairness diminished by the attempt to improve efficiency.

The influence of these human rights and political concerns on legal proceedings tends to lead to an at least implicit bias against defendants by states, and by IGOs such as the UN and the North Atlantic Treaty Organization (NATO). As the cases demonstrate, this results in problems for defense parity, including a weak or nonexistent structural emphasis—when creating and maintaining courts—on establishing an effective defense office to balance the power of the office of the prosecutor; an imbalance in the international cooperation afforded to the defense during pre-trial investigation; and inadequate attention on effective procedural guarantees for the defense, during courts’ creation and their later development.

The impact of these influences on defense protections is intensified by a poor understanding of the role of defense counsel in criminal justice by states and human rights NGOs, and even international judicial actors (judges, prosecutors, and court staff) and defendants themselves. The roles of defense counsel are as advocate for their clients, and arguably as an officer of the court and minister of justice.¹¹⁸ It is commonly assumed, if not always articulated, that a successful defense requires merely “targeting holes” in the prosecution case, requiring “less time and fewer witnesses,” as stated in a 2005 ICTY appeals chamber judgment.¹¹⁹

A related issue is the impact upon the defendant of the two roles of criminal prosecutors: they are tasked with winning their side of the case as well as expected to be administrators of

¹¹⁸ Roberta K. Flowers, The Role of the Defense Attorney: Not Just an Advocate,” *Ohio State Journal of Criminal Law* 7, no. 2 (2010): 647-52.

¹¹⁹ *Orić*, ICTY, Appeals Judgment, “Interlocutory Decision on Length of Defence Case,” case no. IT-03-68, doc. no. IT-03-68-AR73.2, July 20, 2005.

justice.¹²⁰ These tasks are arguably in conflict and create an unequal dynamic with defendants, as prosecutors' institutional advantages, which aid in winning their case, stem from their role as an arm of criminal justice.¹²¹

The attitude expressed in the 2005 ICTY appeals judgment above underestimates the difficulties for counsel in constructing a defense in the face of the institutional advantages of the prosecution. This poor understanding also applies in the domestic criminal justice context,¹²² but its effect is magnified at the international level due to the impact on defense protections of the political goals and concerns described above.¹²³ It is often insufficiently recognized that defense counsel and their function are integral to achieving the trial goals of truth and legal justice. This also explains why international court structures rarely provide defense with parity to the prosecution, why pre-trial and trial procedures are inadequate to balance out prosecution advantages, and why counsel tend to be provided with inadequate institutional support for defending their clients.

This argument challenges the assumption that there are common norms and knowledge held in epistemic communities.¹²⁴ Such communities, or knowledge authority groups, are argued to

¹²⁰ Rory K. Little, "'It's Not My Problem?' Wrong: Prosecutors Have an Important Ethical Role to Play," *Ohio State Journal of Criminal Law* 7, no. 2 (2010): 685-738.

¹²¹ Alice Woolley, "Prosecutors as Ministers of Justice?" University of Calgary Faculty of Law blog (ABlawg.ca), June 29, 2015, ablawg.ca/2015/06/29/prosecutors-as-ministers-of-justice.

¹²² Alissa Pollitz Worden, Andrew Lucas Blaize Davies, and Elizabeth K. Brown, "Public Defense in an Age of Innocence," in *Wrongful Conviction and Criminal Justice Reform: Making Justice*, ed. Marvin Zalman and Julia Carrano (London: Routledge, 2014), 209-26; and Richard A. Lawrence, "The Role of Legal Counsel in Juveniles' Understanding of Their Rights," *Juvenile & Family Court Journal* 34, no. 4 (1983): 49-58.

¹²³ Jalloh and DiBella, "Equality of Arms in International Criminal Law," in *The Ashgate Research Companion to International Criminal Law*, ed. Schabas, McDermott, and Hayes, 251-87.

¹²⁴ Peter M. Haas, *Saving the Mediterranean: The Politics of International Environmental Cooperation* (New York: Columbia University Press, 1990); Peter M. Haas, "Introduction: Epistemic Communities and International Policy Co-ordination," *International Organization* 46, no. 1 (1992): 1-36; Martha

accept the “same cause-and-effect relationships, truth tests to assess them, and share common values.” They also share “acceptance of a common body of facts,” and a “common interpretive framework.”¹²⁵ In relation to international criminal justice, such communities are argued to consist variously of practicing international criminal lawyers¹²⁶ or international law scholars.¹²⁷

However, the position of other commentators is that lawyers do not constitute such communities in relation to criminal justice.¹²⁸ This position, which is that taken in the dissertation in relation to international criminal justice, is that:

[I]t is not easy to apply the model of epistemic communities to international legal experts. As epistemic communities require shared principled beliefs and a common effort to affect policy, they cannot be equated with disciplines or professions as a whole, such as the community of international law professionals. Moreover, one can doubt whether more specific groups of international lawyers can count as epistemic communities at all, given the need for shared causal beliefs derived from methods and techniques accepted in the discipline or profession they practice.¹²⁹

Finnemore, “International Organizations as Teachers of Norms: The United Nations Educational Scientific and Cultural Organization and Science Policy,” *International Organization* 47, no. 4 (1993): 565-97; Karen T. Litfin, *Ozone Discourses: Science and Politics in Global Environmental Cooperation* (New York, NY: Columbia University Press, 1994); and Peter M. Haas and Ernst B. Haas, “Learning to Learn: Improving International Governance,” *Global Governance* 1, no. 3 (1995): 255-84.

¹²⁵ Haas, *Saving the Mediterranean*, 55.

¹²⁶ Mark A. Drumbl, “International Criminal Law: Taking Stock of a Busy Decade,” *Melbourne Journal of International Law* 10, no. 1 (2009): 40-1.

¹²⁷ Daniel W. Drezner, “On the Balance Between International Law and Democratic Sovereignty,” *Chicago Journal of International Law* 2, no. 2 (2001): 324.

¹²⁸ Wouter G. Werner, “The Politics of Expertise: Applying Paradoxes of Scientific Expertise to International Law,” in *The Role of “Experts” in International and European Decision-Making Processes: Advisors, Decision Makers or Irrelevant Actors*, ed. Monika Ambrus, Karin Arts, Ellen Hey, and Helena Raulus (Cambridge: Cambridge University Press, 2014), 44-62.

¹²⁹ *Ibid.*, 60-1.

As argued in the dissertation, there is no juridical epistemic community sharing norms and values in relation to international criminal trials. The inherently competitive and confrontational nature of criminal justice—especially as international courts utilize an adversarial common law trial structure—is partially responsible; as is the tension between the political protection goals of international criminal justice (victims) and legal protection focus (defendants).

Research indicators

The section below details the indicators of the dependent variables, legality and defense parity, and of the independent variable, institutional power, and related political dynamics, along with the sources of data examined. Measuring legal indicators requires not just examining them as formal attributes of law but also their implementation to assess the extent to which principles actually operate in practice to constrain the power of international courts and provide protections for defendants.¹³⁰

Indicators of legality

The two primary features of legality are explored in the research: non-retroactivity of crimes and of punishment.¹³¹ The former necessitates that no one is prosecuted for an act which was not a

¹³⁰ The individual indicators are not aggregated into a single indicator of democratic legal legitimacy, as this “consists of many dimensions, many of which are also multifaceted (e.g., judicial independence or fair trials). It is unclear whether anything can be gained by aggregating the various aspects into a single broad indicator. Looking at the components individually also has the advantage of making unnecessary any sort of aggregation rule that—absent a complete and generally accepted theory—would necessarily be arbitrary.” See research by Stefan Voigt on rule of law indicators: Stefan Voigt, “How to Measure the Rule of Law,” Joint Discussion Paper Series in Economics by the universities of Aachen, Gießen, Göttingen Kassel, Marburg, and Siegen, No. 38-2009, 2009, 10-11.

¹³¹ There appear to be no indicators of non-retroactivity established in legal or political research on international law. Stefan Voigt has come the closest to creating indicators of Fuller’s criteria with

crime when committed. The contrary is indicated when laws “alter the future legal consequences of past actions and events to the detriment of their subjects.”¹³² Determining breaches of the legality of crimes requires assessing, as stated by the US Supreme Court in *Weaver v. Graham*: “whether the law changes the legal consequences of acts completed before its effective date.”¹³³

Non-retroactivity is examined by comparing the substantive law of each crime before the court—with its effective date being the date the statute came into force—with the substantive law as understood to exist internationally at the time of the commission of acts before each court. This in turn requires assessing the nature and extent of prohibitions contained in operative treaties and customary international law as determined by courts and legal scholars. The sources examined are courts’ statutes and associated legal documents,¹³⁴ and existing law as determined from the assessment of contemporary treaty and customary law, and legal scholarship. The legality of interpretation¹³⁵ of crimes by judges at each court is then examined through assessment of international criminal tribunals’ case law, including the legal reasoning of courts, dissenting judicial opinions, and scholarly analysis.

speculation as to how to measure several of his other principles, but not non-retroactivity. Stefan Voigt, “How to Measure the Rule of Law,” Joint Discussion Paper Series in Economics by the universities of Aachen, Gießen, Göttingen Kassel, Marburg, and Siegen, No. 38-2009, 2009, 20, www.uni-marburg.de/fb02/makro/forschung/magkspapers/38-2009_voigt.pdf.

¹³² Sampford, *Retrospectivity and the Rule of Law*, 22.

¹³³ *Weaver v. Graham*, 450 U.S. 24, 31 (1981), quoted in Harold J. Krent, “Should Bouie Be Buoyed?: Judicial Retroactive Lawmaking and the Ex Post Facto Clause,” *Roger Williams University Law Review* 3, no. 1 (1997): 36, note 8.

¹³⁴ For example, for the ICC, the details of the substantive law within its jurisdiction are laid out in a document entitled “Elements of Crimes.” See International Criminal Court, Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, Official Records, Part II(B): Elements of Crimes, doc. no. ICC-ASP/1/3, New York, September 3-10, 2002, 108-155.

¹³⁵ For example, the ICTY interpreted international war crimes prohibitions from the Geneva Conventions to apply to civil wars; and the ICC sexual crimes. See, respectively, William A. Schabas, “Punishment of Non-State Actors in Non-International Armed Conflict,” *Fordham International Law Journal* 26, no. 4 (2002): 907-33; and Diane Lupig, “Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court,” *Journal of Gender, Social Policy & the Law* 17, no. 2 (2009): 431-96.

Compliance with the legality of crimes by courts also has secondary requirements: the clarity and specificity of legal prohibitions.¹³⁶ Their evaluation involves a qualitative and subjective analysis of the level of ambiguity and vagueness contained in the language used to describe prohibitions, and thereby whether they permit excessive judicial discretion. Their exploration in the case studies relies on the assessments of international legal scholars and an examination of the case law of each court to determine the effect of the level of clarity and specificity of each law on their application and interpretation by the chambers. An international court can be considered to be clarifying existing law in conformity with the principle of legality as long as “it is a measured clarification or interpretation and the result is consistent with the essence of the offense and could be reasonably foreseeable...[I]t should not permit judges the freedom to create law aimed at correcting *lacunae* of international criminal law.”¹³⁷

Legality has usually been assessed by legal authorities, including the US Supreme Court, in binary terms: a law and its application in a particular case are either retrospective or prospective.¹³⁸ This approach does not take into account the complexities of determining legality from its various components and requirements, and so the dissertation’s assessment provides an assessment along a spectrum with a total breach of legality and complete conformity at the extremes. To illustrate the inherently subjective nature of the assessment of legality through legal

¹³⁶ These indicators have also been applied by other theories to explain the legitimacy of and compliance with international law: see Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990), where clarity and specificity are called “determinacy;” and Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal, “The Concept of Legalization,” *International Organization* 54, no. 3 (2000): 401-19, where they are called “precision.”

¹³⁷ Michael G. Karnavas, “Is the Emerging Jurisprudence on Complicity in Genocide before the *Ad Hoc* Tribunals a Moving Target in Conflict with the Principle of Legality?” in *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, ed. Ralph Henham and Paul Behrens (Aldershot, UK: Ashgate Publishing, 2007), 100.

¹³⁸ Jill Fisch, “Retroactivity and Legal Change: An Equilibrium Approach,” *Harvard Law Review* 110 (1997): 1,067.

interpretation, there was dispute over the legal basis of the decision by the appeals chamber of the Special Court for Sierra Leone to reject a defense challenge to the court's jurisdiction in relation to their conviction for the recruitment of child soldiers. The challenge claimed that there was no international law prohibiting this action at the time of its commission—that is, before recruitment was included in the ICC Rome Statute's definition of war crimes, which the Sierra Leone court relied upon. The court determined that recruitment had already been outlawed in customary law before Rome, but one judge dissented, in agreement with the position of the UN secretary-general.¹³⁹

Non-retroactivity is examined in relation to the three crimes that have been prosecuted by contemporary international tribunals:¹⁴⁰ war crimes, crimes against humanity, and genocide.¹⁴¹

¹³⁹ William A. Schabas, *An Introduction to the International Criminal Court*, 4th ed. (Cambridge: Cambridge University Press, 2011), 140-1.

¹⁴⁰ Aggression—called “crimes against peace” at the Nuremberg and Tokyo IMTs—is a customary law crime that has not been codified by treaty and has not been prosecuted internationally since the postwar tribunals. Aggression is defined differently in the major legal sources of the offense—the UN Charter; the London Charter, or statute, of the Nuremberg Tribunal; and the 2010 amendment to the ICC's Rome Statute—but is broadly understood as the unprovoked use of military force against another state that does not constitute an act of self-defense. While the updated Rome Statute may appear to constitute a treaty basis for aggression, the statute's jurisdiction only applies to the ICC, and has no direct legal implications for domestic prosecution or criminalization. It is different to a treaty, such as the Genocide Convention, which places obligations on states to prosecute breaches in domestic courts. However, the definition of a crime in an international court's statute can achieve customary law status—as occurred with the Nuremberg Charter's definition of crimes against humanity.

¹⁴¹ The term “international criminal law” does not include in their own right so-called “transnational crimes”—such as money laundering and drug crimes—which are not criminalized under international law, but in relation to which there are treaties requiring states to criminalize them domestically. See Neil Boister, “Transnational Criminal Law?” *European Journal of International Law* 14, no. 5 (2003): 953-76. Also excluded from this research are ethnic cleansing, terrorism, and torture as individual crimes. While they constitute underlying offenses of genocide, war crimes, and crimes against humanity, they have not been prosecuted internationally in their own right, and the latter two meet the definition of transnational crimes. Terrorism as a crime in its own right is within the jurisdiction of one court, the Special Tribunal for Lebanon (STL), which is a hybrid court outside the scope of this project. Also no prosecutions have been completed yet at the STL (see STL website, Cases, www.specialtribunalforlebanon.com/en/the-cases). See Fiona de Londras, “Terrorism as an International Crime,” in *Routledge Handbook of*

This enables a comparison between the ICTY and ICC case studies, in Chapters 4 and 5, respectively, with the origins of the international criminal justice system at the IMT at Nuremberg, analyzed at the end of Chapter 3. War crimes¹⁴² are currently conceived of as grave breaches of the 1949 Geneva Conventions¹⁴³ and 1977 Additional Protocols,¹⁴⁴ and what are known as “the laws and customs of war”—largely the Hague Conventions of 1899 and 1907.¹⁴⁵ War crimes depend for their determination upon the context of an international or civil conflict, and consist of violations committed against different groups—those not or no longer taking part in hostilities (civilians, POWs, and medical personal, etc.) or enemy combatants—and using prohibited means or methods of warfare. Prohibited means of warfare include, for example, poison gases, and prohibited methods include targeting civilians, excessive use of force, and extreme damage to the environment.¹⁴⁶

International Criminal Law, ed. William Schabas and Nadia Bernaz (New York: Routledge, 2013), 169-80.

¹⁴² While the crime’s international origins are found in the First Geneva Convention of 1864, the first use of the term “war crimes” in a humanitarian treaty was in 1977, in the Additional Protocols to the Geneva Conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977, articles 75.7 and 85.5.

¹⁴³ Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949; Geneva Convention (III) Relative to the Treatment of Prisoners of War (Geneva Convention III), August 12, 1949; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949.

¹⁴⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), June 8, 1977; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), June 8, 1977.

¹⁴⁵ Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, July 29, 1899; and Hague Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907.

¹⁴⁶ Cassese, *International Criminal Law*, 88-92.

Not codified by treaty, the definition of crimes against humanity is largely determined by the statutes and case law of international tribunals, and customary law, and has varied over time. Consistent in customary understandings of crimes against humanity has been the existence of various underlying offenses—including murder, torture, and rape—that must be committed against civilians. Elements currently also include that these offenses must be committed as part of a widespread or systematic attack against a civilian population, and that the perpetrator is aware of this fact.¹⁴⁷

Genocide is codified in the Genocide Convention as having occurred when underlying acts—including murder and preventing births—are committed against certain protected groups (on the basis of ethnicity, nationality, or religion) with the intent to destroy that group.¹⁴⁸ In this sense, the substantive law of genocide is similar to that of crimes against humanity and war crimes: its determination requires underlying offenses committed within a particular context. A major difference, however, is that the context for genocide requires that the attack on a protected group is intended to destroy that group. This is known as “special intent.”¹⁴⁹ All international crimes contain both a physical aspect (the act committed) and a mental element (the intent to cause the harm committed). Determination of genocide therefore requires two kinds of intent in its mental element: that to cause the underlying offenses and to ultimately attempt to destroy a protected group through these acts—a particularly high bar in terms proving criminal culpability.¹⁵⁰

¹⁴⁷ See, e.g., Rome Statute of the International Criminal Court, July 17, 1998, article 7.

¹⁴⁸ Genocide Convention, article 2.

¹⁴⁹ See Katherine Goldsmith, “The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach,” *Genocide Studies and Prevention* 5, no. 3 (2010): 238-57.

¹⁵⁰ For example, during the whole of the Balkans conflict only one atrocity has been determined by the ICTY to constitute an act of genocide—the Bosnian Serb acts at Srebrenica in July 1995. In relation to that attack, in August 2001 Radislav Krstić became the first person convicted of genocide at an

Assessing the second primary indicator of legality, the level of non-retroactivity of punishment, requires examining the sentencing guidelines in the relevant international law—including the operative court statute, secondary rules, and case law—and relevant domestic law—if the statute requires this—and comparing these to the actual sentences handed down by each court. Guidelines include sentencing ranges for years of imprisonment, and a delineation of the manner and extent to which mitigating and aggravating factors may be taken into account.

An important secondary indicator of the legality of punishments is consistency in sentencing. It is also an indicator of legal fairness through equality of treatment before the law:¹⁵¹ “[o]ne of the fundamental principles of justice is consistency—like cases should be treated alike.”¹⁵² As international legal scholar Mark Drumbl argues, “erratic sentencing practice [can] also affect the coherence and legitimacy of the punishing institutions and even...bring the law into contempt.”¹⁵³ Consistency of sentences for convictions for similar crimes is therefore examined within each case study by comparing sentences with the crimes for which individuals were convicted. Also taken into account was the consistency with which judges exercised sentencing discretion by incorporating such factors as mitigating and aggravating circumstances into their decision-making to determine the extent to which the courts have demonstrated a “coherent judicial approach” to sentencing.¹⁵⁴ The sources utilized to examine legality of punishment were court documents, and secondary legal sources that have analyzed internal consistency within a court, and that between state and international sentencing.

international court. See www.icty.org/en/press/radislav-krstic-becomes-first-person-be-convicted-genocide-icty-and-sentenced-46-years.

¹⁵¹ Andrew J. Ashworth, “Sentencing Reform Structures,” *Crime and Justice* 16 (1992): 184.

¹⁵² Barbara Holá, “Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law,” *Amsterdam Law Forum* 4, no. 4 (2012): 3.

¹⁵³ Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge, 2007), 66.

¹⁵⁴ Holá, “Sentencing of International Crimes at the ICTY and ICTR:” 4.

Indicators of defense parity

The dissertation focuses on the two most important areas of defense parity that reflect the nature of the official dynamic between defense and prosecution, and that enable a comparison between courts: institutional support and evidentiary procedural guarantees. The research excludes such resource indicators of parity as court provided financing for defense counsel. The prosecution requires far more resources than the defense at the international level in order to conduct investigations, as they cannot rely on a police force for this, as would normally occur within a domestic jurisdiction.¹⁵⁵ Therefore financial resources are a less illuminating aspect of parity to examine at the international level.

The analysis assesses the tendency of each indicator to influence the ability of defendants to gain a fair trial, which ultimately depends on the relative ability of defense and prosecution attorneys to utilize the material at their disposal within the courtroom to persuade the judges of the guilt or innocence of the defendant. This is therefore a subjective task. The research provides examples to illustrate their significance in particular cases.¹⁵⁶ It is in the practice of courts that their fairness is ultimately expressed. As stated by Justice Robert Jackson in arguing for a court at Nuremberg that would conduct fair trials: “Courts try cases, but cases also try courts.”¹⁵⁷

¹⁵⁵ Virtually all prosecutors and a significant number of defense attorneys interviewed agreed on this issue.

¹⁵⁶ A determination of defense parity weaknesses does not, however, endeavor to demonstrate harm to the defense through a negative impact on trial outcomes. Harm is caused through breaches of parity, regardless of their ultimate impact. See Trechsel, *Human Rights in Criminal Proceedings*, 98.

¹⁵⁷ Robert Jackson, “The Rule of Law Among Nations,” speech to the American Society of International Law, Washington, DC, April 13, 1945, 15, www.roberthjackson.org/wp-content/uploads/2015/01/Rule_of_Law_Among_Nations.pdf.

The normative standards of fairness utilized to assess the indicators of defense parity are those stemming from the international case law. The primary sources analyzed are the main bodies that have established case law in relation to the related issue of equality of arms:¹⁵⁸ the European Commission on Human Rights (1954-98), the European Court of Human Rights (which allowed individual direct access only from 1998), and the UN Human Rights Committee (which assesses implementation of the 1966 International Covenant on Civil and Political Rights).

The approach to examining institutional support is described below, then evidentiary procedural issues. Two primary indicators of institutional support to defendants are analyzed in the research: structural parity between prosecution and defense in the institutional framework of a court, and court facilitation of pre-trial investigation by legal teams. Structural parity is a strong indicator of the ability of the defense to gain an equal voice in court negotiations over rule changes and allocation of budgetary resources, and therefore also affects the resource and procedural dynamic with the prosecution. Structural parity refers to the formal position within the court system of official representation for the prosecution—usually the office of the prosecutor—and the defense—an office of defense counsel or representation for defense by another body within the court structure.

Structural parity was assessed by examining the *de jure* status of the defense office relative to that of the prosecutor's office, as delineated in each court's statute and other operative legal documents. Then, how the structural dynamic has shaped the defense voice in negotiations *vis-à-*

¹⁵⁸ As discussed earlier, equality of arms includes the procedural issues analyzed under “defense parity” in the research, but not most of the institutional issues.

vis prosecution was explored through public institutional documents and interviews with prosecutors, defense attorneys, and other close court observers.

The second aspect of institutional support explored is court facilitation of pre-trial investigations, including through providing immunities and privileges. Courts may also encourage cooperation with states and compel witnesses to attend, through applying pressure on states through public criticism, for example, and issuing subpoenas to witnesses. Known as the right to compulsory process, court aid in securing evidence for defendants has become an important feature of criminal justice fairness.¹⁵⁹ Compulsory process issues are explored in the research to determine the extent of institutional support for the prosecution and defense in conducting pre-trial investigations.¹⁶⁰ The examination also explores the cooperation of states with prosecution and defense teams, the impact this has on trial fairness, and the mechanisms courts utilize to address obstacles to state cooperation. Data utilized include court documents (e.g. statutes, motions, and judgments), state and UN Security Council documents (e.g. resolutions), media reports, memoirs of political and legal actors such as state diplomats and international court prosecutors, secondary historical sources, and interviews with court observers.

Evidentiary procedural guarantees are examined during the pre-trial and trial phases of proceedings against a criminal defendant. The pre-trial phase is explored from the time an

¹⁵⁹ In the US context it is one of the core criminal justice rights found within the Sixth Amendment to the Constitution. See US Constitution, Amendment VI. The Compulsory Process Clause, as it is known, is the phrase “to have compulsory process for obtaining witnesses in his favor,” referring to the accused.

¹⁶⁰ Other resource-related issues include financing to enable indigent accused to pay for counsel before and during trial, and to enable the defense team to construct a defense, including through paying for administrative costs, investigating in the field, communicating with defendants, bringing witnesses, and examining evidence. These are not addressed directly in the research as they have proved more difficult to compare between courts and much information is not publically available.

accused is provided with counsel. The need for strict evidentiary procedures results from distinctions between the ability of defense counsel and prosecution to investigate, and the need to provide the defense with reasonable opportunities to rebut the prosecution's case.

Two evidence-related procedural guarantees for defendants are examined in the research: disclosure of prosecution evidence, and the right to cross-examine prosecution witnesses. Disclosure is an evidence-access balancing procedure found in common law domestic legal systems which requires the prosecution to provide the defense, before trial, with all the evidence (including witness lists) that the prosecution will rely on during trial. It also requires the prosecution to hand over not only incriminating but also exculpatory evidence in their possession. Disclosure is especially important for parity in international trials because of their mixture of common law procedure (an adversarial trial) with civil law rules of evidence. The latter are far more relaxed than in a common law system, with hearsay and other more questionable material allowed. Pre-trial disclosure to the defense therefore enables counsel to respond to the much broader range of disputable evidence that will likely be used against their clients.¹⁶¹ Prosecutorial disclosure also aids in balancing the disadvantage the defense suffers in terms of investigative resources: financial, legal, and support from such external actors as states, IGOs, and human rights NGOs.¹⁶² It is considered fundamental to the right to a fair trial by the European Court of Human Rights.¹⁶³

¹⁶¹ Colleen M. Rohan, "Protecting the Rights of the Accused in International Criminal Proceedings: Lip Service or Affirmative Action?" in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 292.

¹⁶² Jalloh and DiBella, "Equality of Arms in International Criminal Law," in *ibid.*, 252.

¹⁶³ ECtHR, *Natunen v. Finland*, Judgment, application no. 210022/04, March 31, 2009, para. 39. See Legal Aid Reformers Network (LARN), ECtHR case summary *Natunen v. Finland* (31/03/2009), May 11,

The comprehensiveness and timeliness of disclosure are assessed in the research. Data on disclosure are not available in a broad and systematic fashion for international courts. Instead the analysis constructs a picture of disclosure through reliance on court documents, including censure mentions against prosecutors; secondary sources discussing the issue; and interviews.

The ability to cross-examine prosecution witnesses is a protection procedure provided to not only balance the prosecution's ability to cross-examine defense witnesses, but to enable defendants to face their accusers—a core principle of liberal criminal justice—and to challenge the evidence being used to attempt to convict them. Assessing opportunities for cross-examination involved exploring the proportion of witnesses that defense counsel were able to cross-examine in person, and trends over time. Sources of data examined include court statutes and rules of procedure and evidence, judgments and other official court documents, secondary academic materials, and interviews with court observers.

Indicators of institutional power

Institutional power was primarily explored by examining the role of states and IGOs in establishing and modifying the structural and procedural rules of international criminal tribunals. This involved analyzing the decision-making processes that generated the rules, and interpreting the reasoning behind state and IGO decisions as an outcome of political bargaining. Factors explored to assess the extent to which political influences shaped rule-making include references to actors' conceptualizations of justice and its requirements—such as privileging the prosecution, and delegitimizing rivals and enemies—and references to the importance that rules reflect the

2011, www.legalaidreform.org/european-court-of-human-rights/item/203-ecthr-case-summary-natunen-v-finland-31/03/2009.

requirements of such political goals as transitional justice and narrative construction. The role of judicial actors (primarily the prosecution and judges) was also examined to assess: their role in establishing, interpreting, and implementing rules; the manner in which the rules shaped their interaction with the defense; and the extent to which the rules structure permitted political influences on judicial actors to shape their interaction with the defense.

Sources examined include official documents delineating decision-making debates, drafts of statutes and subsidiary rules documents, court legal and administrative documents, IGO documents, the memoirs of participants, interviews, and secondary literature analyzing rule-making bargaining by participants and scholars.

Political issues explored as possible influences on the extent of defense protections afforded by international tribunals are: transitional justice through ending impunity and protecting victim groups (and the related issue of the delegitimization or stigmatization of enemies); the construction of a historical narrative; and the length and cost of trials. Their negative effect on defense protections is examined through an exploration of the cooperation with courts provided by states, IGOs, and human rights NGOs with pre-trials investigations. Sources include court documents; media reports; the memoirs of political and legal figures; secondary historical, legal, and political material; and interviews.

Also examined was discourse by court and external actors on the trial process, including pre-verdict references to the guilt of defendants to determine whether there was an effective presumption of innocence among external supporters of each court, and the acknowledgment of the importance of defense protections to trial legitimacy through a focus by external actors on the fairness of the court process. Sources analyzed include political and media debates on trials, and secondary historical material. The exploration of non-legal concerns demonstrates the continuing

role of external actors in diminishing the legitimacy of global legal governance through weakening the power of the defendant.

Case studies

The two cases of international tribunals explored in the research are the ICTY (from its creation in 1993 to 2016), and the ICC (from its establishment in 2002 until 2016). For a critical comparison of contemporary legal fairness legitimacy with that at the origins of international criminal justice, Chapter 3 also includes an examination of the research indicators at the IMT at Nuremberg (1945-6).

The case study method advantage of case comparability is balanced by the disadvantage of the potential lack of representativeness of the cases for the larger set of units—in this case international criminal tribunals.¹⁶⁴ Where there are few cases examined, as here, there is also a greater potential likelihood of selection bias, in this case by choosing courts with a particularly high or low level of legality and defense parity. In the environment of global legal governance, few criminal tribunals have ever existed, and this study attempts to compensate for the constraints of selection bias by choosing cases where there is significant variation in the potential causes and influences upon the dependent variables, including the source and context of the courts' creation, and the legal basis of their establishment and maintenance.

The ICTY, the first case, was the first international criminal tribunal established since the IMT and IMTFE, and has been the model for the later ad hoc, permanent, and hybrid criminal courts. As such, the ICTY has had enormous influence on the development of the post-Cold War

¹⁶⁴ John Gerring, "What Is a Case Study and What Is It Good for?" *American Political Science Review* 98, no. 2 (2004): 341-54.

international criminal justice system, and the level of legitimacy the system has been able to achieve through legality and defense parity. The tribunal also has the most comprehensive historical record for assessment of any international court. It is nearing the completion of its mandate, having finished most of its own prosecutions and transferring other cases to local courts, as part of its official Completion Strategy.¹⁶⁵ As of October 2016, it has completed 102 trials, compared to 75 for the Rwanda tribunal, nine for the Special Court for Sierra Leone, and five for the ICC. Because of the length of time the tribunal has been in existence, and because various attorneys have already left (and have tended to be therefore more willing to speak openly), I was able to interview a significant number in relation to the ICTY.

The ICC, the second case, is broadly perceived as exemplifying the future of global legal governance in relation to criminal justice.¹⁶⁶ This is partly due to its permanent status—it is the first and to date the only international criminal tribunal that was not established to try suspects in relation to a single territorially- and/or temporally-bound conflict.¹⁶⁷ It also enjoys a broad level of state support, although significantly less so in Africa, and virtually universal jurisdiction (literally universal in the sense that any situation can be legally referred to the court by the UN

¹⁶⁵ See, e.g., UN Security Council Resolution 1503, August 28, 2003, which split the prosecutorial duties for the ICTY and ICTR, and called on the prosecutors to end investigations and trials within a certain time-line; and Security Council Resolution 1534, March 26, 2004, which called on the ICTY and ICTR prosecutors to decide on transferring cases to “competent national jurisdictions” (para. 4).

¹⁶⁶ David J. Scheffer, “The International Criminal Court,” in *Routledge Handbook of International Criminal Law*, ed. William Schabas and Nadia Bernaz (London: Routledge, 2013), 67-84; Steven Ratner, Jason S. Abrams, and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd ed. (Oxford: Oxford University Press, 2009), 230-45; and Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 2nd ed. (New York: The New Press, 2002), 346-92.

¹⁶⁷ For several years the African Union has moved towards establishing a criminal chamber within the African Court of Justice and Human Rights, which is seen by some as a challenge to the authority of the ICC in Africa. See Chacha Bhoke Murungu, “Towards a Criminal Chamber in the African Court of Justice and Human Rights,” *Journal of International Criminal Justice* 9, no. 5 (2011): 1067-88.

Security Council). The ICC has only tried a handful of cases to date, meaning that its examination in the research perforce is able to rely less on case documents and other evidence of trial practice and the interaction of prosecution and defense attorneys with state and other outside agencies. This is especially true in comparison to the ICTY case. Nevertheless, the court was chosen because of its prominence in debates on the legitimacy and future of global legal governance. Defendant protections at the ICC have also been shaped considerably by the precedent of the creation and operation of the ICTY, and so its inclusion enables an exploration of the dynamic between courts on this issue. Fewer individuals were interviewed in relation to the ICC than the ICTY, partly due to the greater number of current and former legal staff members at the ICTY, creating a larger pool of potential interviewees, but also due to greater reluctance of ICC staff to be interviewed.

An assessment of the research indicators in relation to the IMT is also included in Chapter 3 in order to provide historical context for the more extensive assessment of the ICTY and ICC in Chapters 4 and 5, respectively. This enables a critical appraisal of the narrative of the progress of international criminal justice in terms of defense standards, and a sense of the continuity of the political concerns that continue to influence these standards, as well as to assess the impact of different contexts—political, legal, and historical—on these standards within international courts. The IMT is the first modern international criminal tribunal, and is attributed with creating international criminal justice, including through the establishment of major mass atrocity crimes (crimes against humanity and, effectively, genocide), and setting a precedent for the international prosecution of high-level suspected mass atrocity perpetrators.

In the standard narrative of the development of international criminal justice, the IMT is claimed to have provided a flawed start with regards to trial fairness. Since the early 1990s, when

international courts were again created, this problem has been assumed to have largely disappeared, with contemporary courts characterized as legitimate in terms of trial fairness. However, the research demonstrates that, while enjoying far greater standards of defense protection than Nuremberg, current courts still exhibit some challenges with regard to legality, and especially significant problems with defense parity, and therefore are far weaker in terms of legitimacy through protection of defendants than is acknowledged within IR.

2 The state of research on the legitimacy of global legal governance

This chapter explores the theoretical background to an analysis of the legitimacy of global legal governance institutions. The first section describes the normative need for such institutions to be legally legitimate; provides a critique of the international relations and international legal scholarship on the subject; and explains the place of the dissertation's argument within it. In terms utilized by José Alvarez to describe approaches to the legitimacy of global governance, the argument is: institutional (focused on the effects of the structures, and associated processes, of international criminal courts), vertical (concerned with institutions' relationship to individuals), and liberal (based on assessing the impact of institutions on procedural and substantive rights).¹

The chapter's second section explains the limitations of the IR literature in understanding international law resulting from the literature's jurisprudential underpinnings—primarily legal positivism and natural law. The section moves on to demonstrate the value to understanding international law's legitimacy of a legal theory which: focuses on what makes law (and thereby legal norms) distinct from other forms of social ordering; and is contextualized to liberal legal systems. This approach is utilized in the research, as discussed in Chapter 1. The third section of Chapter 2 explores the value to the dissertation of literature on institutional power, and the goals and concerns of political actors in relation to international criminal justice that may impact the indicators of legitimacy explored in the research.

The legitimacy of global governance

¹ José E. Alvarez, "Introducing the Themes: Introduction to Symposium on Democratic Theory and International Law," *Victoria University of Wellington Law Review* 38 (2007): 159-74.

Especially since 1945, intergovernmental organizations, international laws, and their associated regimes² have been developed by states in order to overcome practical cross-border problems of interstate cooperation, such as generating increased trade, smoothing financial transactions, and dealing with air and water pollution.³ States have also coordinated to create institutions and laws to generate social justice outcomes, such as improved civil and political human rights.⁴ This agglomeration of institutions, legal regimes, and processes has come to be called “global governance,” with governance understood in James Rosenau’s terms as “the maintenance of collective order, the achievement of collective goals, and the collective processes of rule through which order and goals are sought.”⁵

Thomas G. Weiss and Rorden Wilkinson conceptualize “international institutions” as “merely one specific, historically contingent element” of global governance⁶—international law constitutes the other major structural component. The institutions, agents, and processes of global governance are seen in formal, treaty-based, international institutions, laws, and regimes—in the case of trade, for example, including the World Trade Organization and the

² Stephen Krasner defines international regimes as “sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.” See Stephen D. Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables,” *International Organization* 36, no. 2 (1982): 186.

³ Thomas G. Weiss, *Global Governance: What? Why? Whither?* (Cambridge: Polity Press, 2013), 8-26. Some have argued that global governance arrangements began to emerge as early as the fifteenth century: see e.g. Craig N. Murphy, “Global Governance: Poorly Done and Poorly Understood,” *International Affairs* 76, no. 4 (2000): 789-90.

⁴ Margot Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law* (Oxford: Oxford University Press, 2007).

⁵ James N. Rosenau, “Change, Complexity, and Governance in a Globalizing Space,” in *Debating Governance: Authority, Steering, and Democracy*, ed. Jon Pierre (Oxford: Oxford University Press, 2000), 175.

⁶ Thomas G. Weiss and Rorden Wilkinson, “Global Governance to the Rescue: Saving International Relations?” *Global Governance* 20 (2014): 30.

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁷ Global governance also consists of informal arrangements such as the Basel Committee,⁸ which provides a forum for international banking supervision by the heads of the central banks of various states.⁹

Despite the dominance of states and IGOs, the individual has increasingly been addressed by global governance arrangements since 1945.¹⁰ This includes via international humanitarian and human rights legal protections,¹¹ the ability to bring litigation against an individual's government

⁷ TRIPS constitutes Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco, 15 April 1994. See the World Trade Organization, Agreement on Trade-Related Aspects of Intellectual Property Rights, https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

⁸ See Bank for International Settlements, Basel Committee on Banking Supervision, <http://www.bis.org/bcbs>.

⁹ Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68, no. 3 (2005): 15-62.

¹⁰ Armin von Bogdandy, Philipp Dann, and Matthias Goldmann, "Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities," in *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law*, ed. Armin von Bogdandy, Rudiger Wolfrum, Jochen von Bernstorff, Philipp Dann, and Matthias Goldmann (New York: Springer, 2010), 3-32; Manuel Castells, "The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance," *The ANNALS of the American Academy of Political and Social Science* 616 (2008): 78-93; Lloyd Axworthy, "Human Security and Global Governance: Putting People First," *Global Governance* 7 (2001): 19-23; and Thomas G. Weiss, "Governance, Good Governance and Global Governance: Conceptual and Actual Challenges," *Third World Quarterly* 21, no. 5 (2000): 795-814.

¹¹ E.g. The Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948; Geneva Conventions I-IV, August 12, 1949; Additional Protocols I and II to the Geneva Conventions, June 8, 1977; and Convention on the Rights of the Child, November 20, 1989.

for breach of rights,¹² and prosecution for mass atrocity crimes through international criminal justice.¹³

The term “global governance” is an “analytical tool” for understanding political change,¹⁴ and this dissertation analyzes an underexplored source of the legitimacy of global legal governance—liberal legal principles—in order to further our understanding of the role of the individual in international relations since 1945. International criminal tribunals, as the primary institutions of international criminal justice, and a significant component of global legal governance, impinge upon most of the features of governance mentioned in Rosenau’s definition above: by pursuing the goals of order and justice by attempting to achieve punishment and deterrence through the processes of domestic criminal justice projected at the global level. The dramatic coercive implications for the individual of prosecution within global legal governance—incarceration, possibly for decades—require a basis of legitimacy that is distinct among global governance institutions.

Legitimacy within IR

Legitimacy as a concept in political science generally refers to the acceptance of the rules of institutions such that they are obeyed, or that they have the right to exercise authority. IR research on the legitimacy of institutions and law can be broadly divided into that which focuses

¹² E.g. individuals and other contracting states can pursue legal action against a government member of the 1950 European Convention on Human Rights which also accepts the jurisdiction of the European Court of Human Rights. See European Court of Human Rights, “How the Court works,” www.echr.coe.int.

¹³ Through prosecution for violations of international criminal law at international and “hybrid” (international-domestic) tribunals. See Richard J. Goldstone and Adam M. Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad* (London: Routledge, 2009).

¹⁴ Weiss and Wilkinson, “Global Governance to the Rescue:” 29.

on normative standards¹⁵—whether an institution has the right to govern, or a law or legal system ought to be followed—and a descriptive, or sociological, approach¹⁶—whether that authority is accepted by its subjects or others. Normative and descriptive legitimacy are conceptually distinct but are often conceived of as coinciding, such as in the following definition of legitimacy from criminal psychology: “[people] believe that the decisions made and rules enacted by others are in some way right or proper and ought to be followed.”¹⁷ At other times the distinction in IR scholarship is clearer: “When people disagree over whether the WTO is legitimate, their disagreements are typically normative. They are not disagreeing about whether they or others *believe* that this institution has the right to rule; they are disagreeing about whether it *has* the right to rule.”¹⁸ In large part, “the *concept* of legitimacy, mercurial as it is, has remained under-scrutinised, leading to confusion and misuse.”¹⁹

A methodological weakness within much IR research on descriptive legitimacy is that it tends to be defined in terms of rule compliance: in which case legitimacy is conflated with

¹⁵ E.g. Robert A. Dahl, “Can International Organizations Be Democratic? A Skeptic’s View,” in *Democracy’s Edge*, ed. Ian Shapiro and Casino Hacker-Cordón (Cambridge: Cambridge University Press, 1999), 19-36; and Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005).

¹⁶ E.g. Ian Hurd, “Legitimacy and Authority in International Politics,” *International Organization* 53, no. 2 (1999): 379-408; and Christian Reus-Smit, “International Crises of Legitimacy,” *International Politics* 44, nos. 2-3 (2007): 157-74.

¹⁷ Tom R. Tyler, “Psychological Perspectives on Legitimacy and Legitimation,” *Annual Review of Psychology* 57 (2006): 376.

¹⁸ Allen Buchanan and Robert O. Keohane, “The Legitimacy of Global Governance Institutions,” *Ethics & International Affairs* 20, no. 4 (2006): 405. Italics in original.

¹⁹ C.A. Thomas, “The Concept of Legitimacy and International Law,” LSE Law, Society and Economy Working Papers 12/2013, London School of Economics and Political Science, 2013, 1 www.lse.ac.uk/collections/law/wps/WPS2013-12_Thomas.pdf. Italics in original.

compliance, rather than generating it.²⁰ Normative accounts used to rely purely on state consent as providing a legitimacy based on international legality, but it is now generally agreed that this provides an inadequate explanation.²¹ Normative accounts tend now to be broader, and either input-based—focusing on the principles expressed through processes,²² especially democratic value, such as accountability and transparency²³—or output-based—relying on whether outcomes are, say, efficient, effective, or fair in distributive terms,²⁴ or in problem-solving.²⁵

In social science, the most prominent analyst of legitimacy remains Max Weber, who described the basis of the authority of the modern state as rational-legal—stemming from the effectiveness and efficiency of impersonal rule-making bodies.²⁶ While Weber thereby linked legitimacy with institutional processes, IR research on legal, political, and bureaucratic processes has tended to conceive of their legitimacy as stemming solely from that of the institutions that generate them. Such approaches tend to conflate the legitimacy of institutions with that of the procedures themselves, ignoring potential sources of legitimacy generated by the specific

²⁰ Kal Raustiala and Anne-Marie Slaughter, “International Law, International Relations and Compliance,” in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth Simmons (London: Sage, 2002), 538-58.

²¹ Daniel Bodansky, “Legitimacy in International Law and International Relations,” in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013), 333.

²² E.g. Jens Steffek, “The Legitimation of International Governance: A Discourse Approach,” *European Journal of International Relations* 9, no. 2 (2003): 249-75.

²³ E.g. Jan Wouters and Nicolas Hachez, “Transitional Societies and the Rule of Law: A Benchmarks Approach,” Working Paper No. 47, Leuven Centre for Global Governance Studies, Catholic University Leuven, March 2010.

²⁴ E.g. Daniel C. Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law,” *Yale Law Journal* 115, no. 7 (2006): 1490-1562.

²⁵ E.g. Jason Ralph, “Anarchy is What Criminal Lawyers and Other Actors Make of It: International Criminal Justice as an Institution of International and World Society,” in *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, ed. Steven C. Roach (New York: Oxford University Press, 2009), 133-53.

²⁶ Max Weber, *Economy and Society: An Outline in Interpretive Sociology*, ed. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978).

characteristics of these processes. Ian Clark, for example, in a book-length study of international legitimacy, demonstrates this conflation of institutional and procedural legitimacy when he defines procedural legitimacy as where “rules may be deemed appropriate...because they emanate from a ‘rightful source of authority.’”²⁷

The “legal legitimacy” of global legal governance

This section identifies the dissertation’s approach to analyzing the legitimacy of global legal governance as one characterized by a focus on the relationship between institutions and individuals, as mediated by liberal individual rights. States increasingly transfer decision-making power to global governance institutions. This potentially weakens the quality of liberal democratic norms at the state level by removing the ability of citizens to shape policies as well as weakening such aspects of liberal democratic oversight as transparency and accountability.²⁸ This transfer also poses questions about the liberal quality of decision-making at the interstate level.²⁹

The justifications for the transfer of authority to global governance institutions and decision-making to international legal forums has tended to revolve around issues of practical problem-solving, largely ignoring issues of legitimacy. Yet—or perhaps because of this—Andrew Moravcsik claims that the extent of a deficit of liberal democratic norms in global governance “is emerging as one of the central questions—perhaps the central question—in contemporary world

²⁷ Clark, *Legitimacy in International Society*, 18.

²⁸ David Held, “Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective,” in *Global Governance and Public Accountability*, ed. David Held and Mathias Koenig-Archibugi (Malden, Mass.: Blackwell Publishing, 2005), 240-67.

²⁹ Michael Zürn, “Global Governance and Legitimacy Problems,” *Government and Opposition* 39, no. 2 (2004): 260-87.

politics.”³⁰ He argues, however, that there is no such deficit in global governance, and claims that those who argue otherwise are relying on an ideal of how liberal norms operate at the domestic level rather than how they work in practice.³¹

Giandomenico Majone similarly argues that delegation of governance functions to IGOs that operate on the basis of expertise, such as the European Central Bank, do not suffer from a democratic deficit as such institutions even at the domestic level are expected to operate autonomously from liberal democratic control, and are more effective precisely because they are insulated from political influence over decision-making.³² Their legitimacy stems from technical expertise, not criteria of liberal norms. In a similar vein, Jens Steffek argues that, as global governance arrangements currently do not have the same level of policy-making and policy-implementing authority as states, they do not need to be judged on a strict standard of democratic legitimacy.³³

This dissertation argues, in contrast, that as global legal governance institutions with criminal law jurisdiction exercise enormous power over individuals—with the potential to remove their liberty for decades—to acquire legitimacy such coercive capability requires justification through the operation of legal norms typically characteristic of liberal democratic states. Democratic deficit theorists identify two main types of weakness within global governance arrangements:

³⁰ Andrew Moravcsik, “Is There a ‘Democratic Deficit’ in World Politics? A Framework for Analysis,” *Government and Opposition* 39, no. 2 (2004): 336. This is evident, for example, in critiques of institutions for unequal power between states in the UN Security Council, the similar issue of lack of voting parity between member states of the IMF, and the weak accountability of the European Central Bank.

³¹ *Ibid.*: 336-63.

³² Giandomenico Majone, “Delegation of Regulatory Powers in a Mixed Polity,” *European Law Journal* 8, no. 3 (2002): 319-39.

³³ Steffek, “The Legitimation of International Governance.”

sociological³⁴ and institutional. The dissertation's argument explores the latter, which concerns the democratic basis, or origin, of an institution—whether it was created through a democratic process (e.g. popular elections)—or whether it operates through democratic processes,³⁵ especially accountability, transparency, and engagement.³⁶ José Alvarez identifies three main types of institutional arguments: ideological,³⁷ horizontal,³⁸ and vertical.³⁹ The dissertation's argument falls into the third category, which is explored below.

³⁴ Sociological approaches stem from several normative perspectives. First, “communitarian” approaches conceive of democracy as an expression of the general will. See Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, Mass.: MIT Press, trans. 1990 [1983]); and James Bohman, *Democracy across Borders: From Dêmos to Dêmoi* (Cambridge, Mass.: MIT Press, 2007). Second, “liberal” approaches argue that legitimacy stems from a respect for fundamental human rights. See Johan Karlsson Schaffer, Andreas Føllesdal, and Geir Ulfstein, “International Human Rights and the Challenge of Legitimacy,” in *The Legitimacy of International Human Rights Regimes: Legal, Political and Philosophical Perspectives*, ed. Andreas Føllesdal, Johan Karlsson Schaffer, and Geir Ulfstein (New York: Cambridge University Press, 2013), 1-31. Third, “republican” approaches conceive of political legitimacy stemming from institutional arrangements that diminish domination. See the various contributions to Samantha Besson and José Luis Martí, eds., *Legal Republicanism: National and International Perspectives* (Oxford: Oxford University Press, 2009).

³⁵ E.g. Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press, 2011).

³⁶ E.g. Glasius, “Do International Criminal Courts Require Democratic Legitimacy?”

³⁷ The ideological critique argues that the substantive goals pursued largely reflect the normative preferences of dominant states. See Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and The Critique of Ideology* (Oxford University Press: New York, 2003). Such goals include free trade, the “Washington Consensus” approach of low government intervention in the domestic economy, and the promotion of equal civil and political rights above economic.

³⁸ Horizontal issues relate to the inequality between states in international decision-making fora. In addition to the privileged status of the P5 in the UN Security Council, Alvarez mentions the outsized decision-making role of wealthy shareholder states in powerful financial institutions such as the IMF and World Bank. However, Steve Charonovitz warns that it is inappropriate to project the idea of “one person, one vote” to the interstate level: states are collectivities which represent vastly different numbers of individuals and so providing an equal role in decision-making to China, with over one billion people, and one of the many states with under one million inhabitants is not democratic. See Steve Charnovitz, “The Emergence of Democratic Participation in Global Governance,” *Indiana Journal of Global Legal Studies* 10, no. 1 (2003): 45-77. According to Joseph Weiler, the consent of states to decisions which affect them—such as agreeing to treaties—which stems from the sovereign equality of states, the foundation stone of international politics, is at odds with the functioning of the democratic concept of “one person, one vote” in most democratic states, where decisions are made by some form of majority vote yet are binding on all citizens. See J.H.H. Weiler, “The Geology of International Law—Governance, Democracy and Legitimacy,” *ZaöRV* (Heidelberg Journal of International Law) 64 (2004): 547-62.

Vertical issues are concerned with the relationship between individuals and the governance arrangements that shape their lives. There are three main vertical democratic deficit arguments: in relation to representativeness,⁴⁰ participation,⁴¹ and liberal. The latter, which Alvarez calls “substantive rights,”⁴² characterizes the nature of the dissertation’s argument. The liberal approach argues that the value of democracy is in its ability to protect fundamental substantive and procedural rights. These include due process rights for individuals accused of wrong-doing: for example, a prohibition on retroactive prosecution or punishment without legal protection for defendants. Note that while Alvarez calls this third vertical deficit a “substantive, not procedural”⁴³ issue, some of the examples of rights he provides, including legality or non-retroactivity (a core issue explored in the dissertation), arguably involve procedural rights as much as substantive ones.

The place of criminal justice in liberal democracy has been little studied in recent democratic theory, which Melissa Williams states “is surprising insofar as much of the theory of democracy

³⁹ José E. Alvarez, “Introducing the Themes: Introduction to Symposium on Democratic Theory and International Law,” *Victoria University of Wellington Law Review* 38 (2007): 159-74. Alvarez also notes that some problems with global governance may be attributable to all three forms of critique, such as some actions of the Security Council, which Craig Forcece argues constitute “hegemonic federalism.” See Craig Forcece, “Hegemonic Federalism: The Democratic Implications of the UN Security Council’s ‘Legislative Phase,’” *Victoria University of Wellington Law Review* 38, no. 2 (2007): 175-97.

⁴⁰ Non-democratically elected institutions make significant decisions, including passing laws. Daniel Esty identifies these as issues of legitimate policy-making or “right process” in the administrative law context, known at the international level as “good governance,” including transparency and accountability. See Daniel C. Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law,” *Yale Law Journal* 115, no. 7 (2006): 1490-1562.

⁴¹ Citizens are not involved in deliberative decision-making processes, and so they lack transparency and public participation. John McGinnis, “Foreign to Our Constitution,” *Northwestern University Law Review* 100, no. 1 (2006): 303-29; and Kingsbury, Krisch, and Stewart, “The Emergence of Global Administrative Law.” Note that lack of participation is identified by Esty as a lack of electoral representativeness.

⁴² Natasha Affolder, “Democratising or Demonising the World Heritage Convention,” *Victoria University of Wellington Law Review* 38, no. 2 (2007): 341-61; and Forcece, “Hegemonic Federalism.”

⁴³ Alvarez, “Introducing the Themes:” 161.

concerns how shared norms become binding law, and where are shared norms more forcefully expressed or enforced than in the domain of criminal law?”⁴⁴ She suggests the answers may lie in disagreement among democratic societies over the purposes of criminal justice: whether it is primarily punitive, restorative (for the victims), about creating order and stability, and/or rehabilitating offenders.⁴⁵

There is a significant and longstanding literature on the sources of legitimacy for criminal justice at the state level that can be applied to understanding international criminal justice, including the community justice approach associated with Emile Durkheim,⁴⁶ and Max Weber’s formal-rational justice.⁴⁷ Legal scholar Aaron Fichtelberg argues for taking an institutional, vertical, and liberal approach to understanding the legitimacy of the ICC, along the lines taken in the dissertation.⁴⁸ The legitimacy value of liberal norms lies primarily in their ability to protect substantive and procedural rights, rather than in the nature of international courts’ establishment and consent,⁴⁹ or the process for establishing a court’s jurisdiction over people.⁵⁰ Fichtelberg

⁴⁴ Melissa S. Williams, “Criminal Justice, Democratic Fairness, and Cultural Pluralism: The Case of Aboriginal Peoples in Canada,” *Buffalo Criminal Law Review* 5, no. 2 (2002): 451.

⁴⁵ Ibid: 451-95.

⁴⁶ Emile Durkheim, *The Division of Labour in Society*, trans. George Simpson (New York: Macmillan, 1933 [1893]). It argues that traditional penal justice represents “collective consciousness” and so requires a “demos” or culturally self-identifying community. Philippe Nonet and Philip Selznick expand on Durkheim’s approach by arguing that law develops in three stages in society, characterized by elite coercion as well as the general will. See Philippe Nonet and Philip Selznick, *Law & Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Transaction Publishers, 2001 [1978]).

⁴⁷ Weber, *Economy and Society*, ed. Roth and Wittich.

⁴⁸ Fichtelberg, “Democratic Legitimacy and the International Criminal Court.”

⁴⁹ E.g. Glasius, “Do International Criminal Courts Require Democratic Legitimacy?” 44.

⁵⁰ E.g. Morris, “The Democratic Dilemma of the International Criminal Court.”

does not pursue this approach empirically,⁵¹ however, and does not identify specific rights that should be analyzed.

The value of jurisprudence to understanding the legitimacy of law

This section demonstrates the value of jurisprudence in examining the rights of defendants as an aspect of the legal legitimacy of international tribunals. First it highlights the drawbacks of the dominant approaches—natural law and especially legal positivism—for such a task. It then argues for the utility of an alternative jurisprudence, the legal-principles-based jurisprudence of Lon Fuller.

Ronald Dworkin states that “[l]aw is a political concept...and...political concepts are concepts of value”—that is, law can only be constructed by reference to values.⁵² The jurisprudence that attempts to explain the value of legality, he argues, lies within three main schools, those based around the political values of “accuracy,” “efficiency,” and “fairness.”⁵³

First, natural law approaches perceive accuracy in law to the extent that its content conforms to previously established (religious or secular) standards of morality.⁵⁴ Second, and in contrast, those in the legal positivist school argue, *inter alia*, that law promotes efficiency in the accomplishment of governments’ wishes, by enabling legal subjects to foresee government

⁵¹ As Fichtelberg notes, at the time he was writing, no prosecutions had yet been completed at the ICC. Fichtelberg, “Democratic Legitimacy and the International Criminal Court:” 781.

⁵² Ronald Dworkin, “Hart’s Postscript and the Character of Political Philosophy,” *Oxford Journal of Legal Studies* 24, no. 1 (2004): 19, 23.

⁵³ *Ibid.*: 26. While not exclusively focusing on a single value, the three schools represent a core focus on a value as predominant in their understanding of law.

⁵⁴ Prominent examples of such natural law approaches include John Finnis, *Natural Law & Natural Rights*, 2nd ed. (New York: Oxford University Press, 2011); and Hugo Grotius, *De Jure Belli Ac Pacis (On the Law of War and Peace)*, trans. Francis W. Kelsey (Oxford: Clarendon Press, 1925 [1625]).

demands and to adapt their behavior to it. According to positivist approaches, law is thereby conceptually distinct from morality—the law is solely what a sovereign decrees,⁵⁵ or is determined by a constitutional rule established by ruling authorities.⁵⁶

Third, fairness as a value of legality refers to the role of law in securing political equality and a lack of arbitrariness in the exercise of coercive authority through adequate notice of the law's requirements, consistency in applying legal standards, and equal treatment before the law. Dworkin argues that this approach describes his own theory of “law as integrity:” moral reasoning is intrinsic to the law—unlike in positivism—and is determined through principles of fairness in application of the law—unlike natural law, where the morality of law is determined by substance. Law includes not only substantive rules but “the principles that provide the best moral justification for those enacted rules,” which Dworkin calls “structuring fairness principles.”⁵⁷

Dworkin's interpretivist approach shares a similarity of outlook with that of legal philosopher Lon Fuller. Both argue that moral reasoning is inherent to the law, is determined through principles of fair procedure—in the case of Fuller—and procedure and substantive morality—Dworkin—and that these principles are justified by respect for, and the need to provide equal treatment for, all individuals. Fundamentally, they both conceive of the legal subject as occupying a privileged place in a legal system.⁵⁸

⁵⁵ See especially Jeremy Bentham, *A Fragment on Government*, ed. Ross Harrison (Cambridge: Cambridge University Press, [1776] 1988); and John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1955 [1832]).

⁵⁶ Most prominently, see H.L.A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961).

⁵⁷ Dworkin, *Justice for Hedgehogs*, 402, 411.

⁵⁸ According to Kristen Rundle, Fuller is distinguished from Dworkin in his emphasis on how the form that law takes, that of general rules, generates the reciprocal relationships that the morality of a legal system rests on. The generality of rules presupposes a conception of the legal subject as a responsible

However, Fuller’s approach differs from all three categories described by Dworkin. The value of legality, according to Fuller, lies partly in efficiency for legal authorities (as positivists claim) and that of moral value for legal subjects (as natural law claims). Unlike natural law approaches, however, Fuller argues that the morality of law stems not from legal outcomes, but from the dignity that legal subjects are afforded by their treatment as responsible agents by legal authorities (e.g. legislators, judges, and prosecutors). Fuller does not accept positivism’s conceptual separation of law and morality, and finds fault with its underappreciation of the role played by subjects within a legal system—they are active participants, not mere passive receivers of legal commands.

Despite its flaws in terms of understanding the bases of law’s legitimacy, the jurisprudence in Dworkin’s first category, legal positivism, underlies much IR analysis of international law, especially neoliberal institutionalist approaches.⁵⁹ The following sections explore the nature and limitations of positivism and natural law for exploring the legitimacy of international law in order to move the discussion to Fuller’s jurisprudence, which the dissertation argues is far more useful for exploring legitimacy in relation to global legal governance.

agent by the authorities that create and enforce the law, and not merely a passive receiver of legal commands. See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* (Oxford: Hart Publishing, 2012), 180, 189. The value of law as stemming, in Fuller’s conception, from the conception of legal subjects as inherently requiring treatment as responsible agents “is *prior* to Dworkin’s value of political integrity, or equality before the law, because Fuller’s speaks to the shape, content and presuppositions of law’s distinctive form in a way that Dworkin’s does not.” Also, “Fuller’s understanding of the value of legality can also be distinguished from Dworkin’s in how it directly addresses a question that Dworkin’s jurisprudence neglects; namely, the question of what makes law distinctive, that sets it apart, from other modes of social ordering.” See Rundle, *Forms Liberate*, 181. Italics in original.

⁵⁹ Martha Finnemore and Stephen Toope, “Alternatives to ‘Legalization’: Richer Views of Law and Politics,” *International Organization* 55, no. 3 (2001): 743-58. Neoliberal institutionalist approaches in IR tend to explain norms and law as rational solutions to collective action problems. See e.g. Robert Keohane, *After Hegemony* (Princeton: Princeton University Press, 1984); and Joseph Nye, “Nuclear Learning and US-Soviet Security Regimes,” *International Organization* 41 (1987): 371-402.

Natural law

Natural law⁶⁰ has a long intellectual history, originating in ancient Greece,⁶¹ but had been largely discredited in Anglo-American legal circles by the nineteenth century, though it still informs the approach to international law of some constructivist and “English school” research in IR.⁶² Law is understood to be defined by its moral content. Obligation to obey human-made laws, and their legitimacy, stem from the extent to which the content of that law (generating substantive legitimacy) and the justice of a particular outcome (distributive fairness legitimacy) conform to the dictates of “natural” law. The latter derive from the idea that there is a higher law to human-made laws, which contains moral standards discoverable through rational thought and that originate in the inherent nature of humans or in a deity.

Natural law approaches argue, in their most extreme form, not only that law and values cannot be separated, but that rules are legal only when their content exhibits society’s, or universal, moral values. Theorist John Finnis argues more moderately that natural law acts as a

⁶⁰ Natural law was later incorporated into Christian thought by theologians such as Augustine of Hippo (354-430) and especially Thomas Aquinas (1225-74). From the seventeenth century onwards, however, natural law in European thought obtained an increasingly secular cast and is associated with the development of natural or human rights as the requirement of respect for the dignity of people as humans as self-evident truths—as stated in the 1776 American Declaration of Independence—and originates largely with the thought of Hugo Grotius (1583-1645) and the European Enlightenment. See Hugo Grotius, *On the Law of War and Peace* (Whitefish, Mont.: Kessinger Publishing, 2004 [1625]); and Denise Meyerson, *Understanding Jurisprudence* (New York: Routledge, 2007), 33.

⁶¹ See, for example, Aristotle, *Nicomachean Ethics*, trans. Terence Irwin, 2nd ed. (Indianapolis, Ind.: Hackett, 1999); Thomas Aquinas, *Summa Theologiae* (Lander, Wyo.: The Aquinas Institute, 2012); and Hugo Grotius, *The Rights of War and Peace*, ed. David J. Hill (Rockville, Md.: Wildside Press: 2011).

⁶² E.g. Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000); and Barry Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation* (Cambridge: Cambridge University Press, 2004). See also Hedley Bull, “Natural Law and International Relations,” *British Journal of International Studies* 5, no. 2 (1979): 171-81.

guide to the justness of human-made laws.⁶³ Contemporary approaches tend to understand certain aspects of international law, especially international humanitarian and human rights law, as embodying the values of the international society of states.⁶⁴ Natural law also arguably provides the most effective legal justification for the posited existence of *jus cogens* international legal standards.⁶⁵

Natural law's focus on the legitimacy-generating quality of the substantive content of international law is useful in relation to understanding human rights and humanitarian law, but is largely limited to areas with significant broad agreement on the value of the underlying rights. There is very little global agreement, for example, on many individual civil and political rights, as they conflict with local values and interests.

Legal positivism

While little concern with legitimacy was demonstrated in IR research during the Cold War, since then “there has been an explosion of interest, both among international lawyers and international relations scholars, in the legitimacy of international institutions.”⁶⁶ However, less studied is what is distinctive about the law itself, which is arguably a result of a conflation of the legitimacy of law with that of institutions, and an underappreciation of the contribution of legal philosophers to understanding the nature of law and a legal system as a distinctive form of rule structure.

⁶³ John Finnis, *Natural Law & Natural Rights*, 2nd ed. (New York: Oxford University Press, 2011).

⁶⁴ E.g. Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2008), 11. Cassese sees these values expressed in such legal documents as the 1945 UN Charter, the 1948 Universal Declaration of Human Rights, the 1949 Geneva Conventions, and the 1970 UN Declaration on Friendly Relations.

⁶⁵ Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005), 35-9.

⁶⁶ Bodansky, “Legitimacy in International Law and International Relations,” 321-2.

Partly due to the Cold War dominance of structural realism in IR, which views international law as epiphenomenal, there has traditionally been an underappreciation in IR scholarship of the utility of jurisprudence to understanding international law.⁶⁷ This is partly due to the long-term pre-eminence in international jurisprudence of the school of legal positivism, which defines law in terms of the form that a rule takes (e.g. a general order issued by a recognized legal authority), and contends that there is a complete conceptual separation between law and morality. This is not to state that positivists perceive no connection between law and morality—they acknowledge many. They argue that there is no *necessary* link—law and morality are distinct subjects, and law does not inherently generate legitimacy.

In its original version, positivism claimed that rules are only law to the extent that they are backed by the coercive enforcement of a sovereign.⁶⁸ The centrality of sovereign enforcement made legal positivism a poor approach to understanding international law, which is far more disparate than domestic law in its sources of creation and enforcement.⁶⁹ However, a more sophisticated, mid-twentieth-century restatement of positivism by legal philosopher H.L.A. Hart has become prevalent among Anglo-American legal scholars.⁷⁰ Hart views governments not as unbounded sovereigns, but as constrained by a “rule of recognition,” such as a constitution, that

⁶⁷ Ibid., 324.

⁶⁸ Jeremy Bentham, *A Fragment on Government* (Cambridge: Cambridge University Press, 1988 [1776]); John Austin, *The Province of Jurisprudence Determined* (London: Weidenfeld & Nicolson, 1955 [1832]); and Thomas Hobbes, *Leviathan* (New York: Hackett, 1994 [1651]). The primary normative concern is the maintenance of internal order, and the source of obligation to obey is external to the legal subject—the threat of negative material consequences.

⁶⁹ This situation was not changed by the prominence—at least in Europe—of Hans Kelsen’s Continental school version of positivism, which relies on the presupposition that a “Grundnorm” or higher legal norm, such as a constitution, provides validity to and thereby an obligation to obey law. See Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley, Calif.: University of California Press, 1967).

⁷⁰ Brian Leiter, “Legal Realism and Legal Positivism Reconsidered,” *Ethics* 111 (2001): 278-301. See especially, Hart, *The Concept of Law*, and *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983).

delineates the authority that legal institutions may exercise.⁷¹ Law is a system of rules, consisting of primary rules, which impose duties on their subjects, and secondary rules, which provide the procedures for the former's creation, interpretation, and implementation.⁷²

A significant problem with applying legal positivism to understanding international law is that the former is an “analytical” approach, not dependent upon a particular social or historical context.⁷³ Hart's positivism embodies a “pretention to universality...a model purportedly applicable to legal phenomena whenever and wherever they arise.”⁷⁴ He effectively makes a false analogy to natural science, claiming to establish a theory that applies broadly across political, social, and historical contexts in scientific-law-like ways, exhibiting the “neglect of history and...relentless presentism” of which Andrew Hurrell has accused rationalist IR.⁷⁵

⁷¹ The existence of secondary rules distinguishes a legal system from what Hart called “primitive” legal communities, which only have primary, constraining, norms, without rules to determine which norms generate a legal obligation and which are purely social.

⁷² The source of obligation to the law in this account is not sanction—the previous positivist view—but subjects' “internal point of view” towards the law, which generates duty to obey the law based on their acceptance of the rule of recognition. The theory of obligation here is thereby sociological, rather than based on attitudes towards political authority. The weakness here is in Hart's vague and fluctuating explanation of the reason for the internal point of view to generate obligation. He variously mentions that it can be tradition, self-interest, and socialization, but there is no actual theory of how this—especially self-interest—generates obligation. Hart also originally states that citizens in general accept the internal point of view, but later claimed it was only legal officials, especially judges. This later move is built on the claimed institutional legitimacy of courts, which conflates the legitimacy of law with that of institutions. See H.L.A. Hart, *The Concept of Law*, 3rd ed. (Oxford: Oxford University Press, 2012), 88-91, 100-123; Kenneth I. Winston, “Three Models for the Study of Law,” in *Rediscovering Fuller*, ed. Willem J. Witteveen and Wilbren van der Burg (Amsterdam: Amsterdam University Press, 1999), 60-1 and 65; and “Introduction,” in Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth Winston (Durham, NC: Duke University Press, 1981), 21.

⁷³ Hart, *The Concept of Law*, 3rd ed., 239.

⁷⁴ Nicola Lacey, “Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate,” *New York University Law Review* 83 (2008): 1078.

⁷⁵ Andrew Hurrell, “Foreword to the Third Edition,” in *The Anarchical Society: A Study of Order in World Politics*, Hedley Bull (New York: Columbia University Press, 2002), xiii.

In addition, constructing such a purely conceptual, or analytical, jurisprudence of law is a futile task as it ignores the inherently normative dimension of law.⁷⁶ The conceptual separation of law and morality demonstrates a confusion about the nature of law, as understanding law and its implementation by courts requires interpretation with reference to the purposes of legislators. Therefore understanding the “is” of law requires an incorporation of the “ought”: “Facts cannot be divorced from values.”⁷⁷

Nevertheless, Hart’s positivism is accepted by most Western international lawyers, who extrapolate a legal sources doctrine that relies upon formal validity—a rule is law if it is created by states through agreed formal processes.⁷⁸ The best-known attempt to meld Hart’s positivism with IR institutionalism is the “legalization” approach of Kenneth Abbott, Robert Keohane, Andrew Moravcsik, Anne-Marie Slaughter, and Duncan Snidal.⁷⁹ Legalization is posited as the institutional development of a norm along three dimensions: obligation (the extent to which a rule creates binding commitments); precision (the level of clarity and specificity); and delegation (the extent to which authority has been granted to credible third parties to interpret, implement, or enforce). An increase along any dimension indicates a “hardening,” or bindingness, of law.

⁷⁶ Ronald Dworkin, *Justice in Robes* (Cambridge, Mass.: Harvard University Press, 2006), 2-10.

⁷⁷ Neil Duxbury, *Patterns of American Jurisprudence* (New York: Oxford University Press, 1995), 228. This attitude towards law originates in the United States with eminent federal judge Learned Hand, who stated that “judges...must engage in the purposive interpretation of legal rules.” See Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), 104.

⁷⁸ Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (New York: Cambridge University Press, 2010), 10.

⁷⁹ Kenneth Abbot *et al.*, “The Concept of Legalization,” *International Organization* 54, no. 3 (2000): 401-19.

Legalization has been significant in “communicat[ing] the message that international legal phenomena were worthy of sustained scholarly attention by political scientists.”⁸⁰

Legalization is limited, however, by its socially-weak positivist understanding of law as determined purely by form: it ignores the centrality of the social dynamic between legal authorities and subjects in constituting law. Legalization also undervalues customary law and the practice of IGOs, focuses on law as outcome to the neglect of process, and provides an inaccurate characterization of the elements of international law. While the legalization dimension of precision is a useful indicator of law, obligation—indicated in the research by treaty language—conflates state consent with a felt sense of obligation (legitimacy), and delegation conflates institutional with legal authority.⁸¹

The legal positivist emphasis on state consent marries well with the core assumptions of institutionalist and rational choice approaches to IR, which view international law as resulting from interest-based bargaining by states.⁸² By claiming that compliance results from instrumental calculations—a logic of consequences⁸³—and not a felt sense of obligation, rationalist IR approaches, however, do not distinguish what is distinctive about legalized rules: they perceive little or no effective difference in the international system between social and legal norms. They

⁸⁰ See Jeffrey L. Dunoff and Mark A. Pollack, “International Law and International Relations: Introducing an Interdisciplinary Dialogue,” in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013), 9.

⁸¹ Finnemore and Toope, “Alternatives to ‘Legalization.’”

⁸² E.g. George Downs, David Rothe, and Peter N. Barsoom, “Is the Good News about Compliance Good News about Cooperation?” *International Organization* 50, no. 3 (1996): 379-406.

⁸³ James G. March and Johan P. Olsen, “Rules and the Institutionalization of Action,” in *Rediscovering Institutions: The Organizational Basis of Politics*, ed. James G. March and Johan P. Olsen (New York: Free Press, 1989), 21-38.

also tend to conflate law with institutions, generally assuming that law is irrelevant without enforcement.⁸⁴

The following subsection explains how an alternative approach to understanding law—that of Lon Fuller—can provide greater insight than the dominant jurisprudence into the legitimacy of global legal governance. The rest of the current section explains Fuller’s critique of legal positivism. Fuller was involved in the 1950s and 1960s in a public debate with Hart over how best to understand law.⁸⁵ The former argued that the enterprise of analytical jurisprudence is futile, as law is always constructed within a particular social and political environment that shapes its purposes and functioning.⁸⁶

Contemporary positivism, Fuller claimed, also disregards the issue of the abuse of law, ignores the reciprocities (between legal authorities and subjects) necessary to maintain a functioning legal system, and fails to achieve its aim—of moving positivism away from the conceptualization of law as rules imposed through coercive enforcement. Without significant limitations on the power of legal authorities, law is still merely a “one-way projection of authority”⁸⁷—the position of positivism since its origins. There is no “suggestion that the citizen’s voluntary cooperation in obeying law...must be ‘matched by the corresponding cooperative effort on the part of government.’”⁸⁸ Within positivist conceptions of law, only the

⁸⁴ Finnemore and Toope, “Alternatives to ‘Legalization.’”

⁸⁵ H.L.A. Hart, “Positivism and the Separation of Law and Morals,” *Harvard Law Review* 71, no. 4 (1958): 593-629; Lon L. Fuller, “Positivism and Fidelity to Law—A Reply to Professor Hart,” *Harvard Law Review* 71, no. 4 (1958): 630-72. See also Lacey, “Philosophy, Political Morality, and History”; and the various contributions to Peter Cane, ed., *The Hart-Fuller Debate in the Twenty-First Century* (Oxford: Hart Publishing, 2010).

⁸⁶ Lon L. Fuller, *The Morality of Law*, 2nd ed. (New Haven: Yale University Press, 1969), 95-151.

⁸⁷ *Ibid.*, 215-6.

⁸⁸ Rundle, *Forms Liberate*, also quoting Fuller, *Morality of Law*, 216.

attitudes of legal authorities towards the law are significant to the functioning of a legal system—the attitudes of legal subjects are irrelevant.⁸⁹

This overemphasis on legal authorities is due to a focus on law to the neglect of its purpose—arguing that laws and the goals of legislators in creating them can be distinguished without negatively affecting our understanding of the nature of law. In contrast, Fuller defined law as “the enterprise of subjecting human conduct to the governance of rules,”⁹⁰ which captures his emphasis on both the purpose and practice of law. This understanding of the inherent normative quality of law adds a missing dimension to existing conceptions of the legitimacy of legal institutions as a form of social ordering:⁹¹ the interaction between legal participants—legal authorities and subjects—is a component of the law itself.

Lon Fuller: A political jurisprudence of democracy

Fuller is the initiator and most well-known advocate of the American school of “process” jurisprudence.⁹² This attempts to understand legal decision-making not as a result of deductive logic or the attitudes of legal officials, as previous approaches in American jurisprudence had

⁸⁹ Indeed Hart claims that subjects may be “deplorably sheeplike” in their attitude towards obedience to the legal system. See Hart, *The Concept of Law*, 3rd ed., 117.

⁹⁰ Fuller, *Morality of Law*, 106.

⁹¹ Kenneth I. Winston, “Introduction,” in Lon L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth I. Winston (Durham, NC: Duke University Press, 1981), 23. In contrast natural law’s focus is on the normative quality of the substance of laws, not legal process.

⁹² Neil Duxbury, *Patterns of American Jurisprudence* (New York: Oxford University Press, 1995), 205-99. The school’s intellectual foundations are in the work of prominent early twentieth-century jurists John Chipman Gray, Roscoe Pound, Benjamin Cardozo, and John Dickinson. See John Chipman Gray, *The Nature and Sources of the Law* (New York: Columbia University Press, 1916 [1909]); Roscoe Pound, *An introduction to the Philosophy of Law* (London: Yale University Press, 1922); Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, Conn.: Yale University Press, 1921); and John Dickinson, *Administrative Justice and the Supremacy of Law in the United States* (Cambridge, Mass.: Harvard University Press, 1927).

done, but as a result of properties inherent to law itself. Fuller is considered “one of the most influential thinkers on jurisprudence outside America,”⁹³ but his jurisprudence has received relatively little attention in his own country—where he is known in law schools for his work on contracts law, and more recently as an “intellectual father” of the alternative dispute resolution field.⁹⁴

Fuller rejects the positivist position that law is conceptually distinct from morality, arguing that adherence to certain principles of legality embodies moral value in restricting the arbitrary and abusive exercise of power; and in thereby making morally good outcomes—such as the protection of human rights—more likely.⁹⁵ These principles of legality are those usually associated with a “thin” or formal conception of the rule of law.⁹⁶ Indeed, Fuller is frequently cited within such research as the identifier of the quintessential requirements of the rule of law, such as clear, unambiguous laws which cannot be applied retroactively.⁹⁷

However, to function effectively, the rule of law requires, according to Fuller, a “cooperative effort,”⁹⁸ characterized by the “interlocking role expectations”⁹⁹ of legal-subject compliance with

⁹³ Willem J. Witteveen, “Rediscovering Fuller: An Introduction,” in *Rediscovering Fuller*, ed. Witteveen and Van der Burg, 21.

⁹⁴ Helen H.L. Cheng, “Beyond Forms, Functions and Limits: The Interactionism of Lon L. Fuller and Its Implications for Alternative Dispute Resolution,” *Canadian Journal of Law and Jurisprudence* 26, no. 2 (2013): 257.

⁹⁵ Philosopher John Rawls also argues that such procedural constraints are central to a just society. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 238.

⁹⁶ Amichai Magen, “The Rule of Law and Its Promotion Abroad: Three Problems of Scope,” *Stanford Journal of International Law* 45, no. 1 (2009): 51-115; and Thomas Carothers, “The Rule of Law Revival,” *Foreign Affairs* 77, no. 2 (1998): 95-106.

⁹⁷ David Dyzenhaus, “Aspiring to the Rule of Law,” in *Protecting Human Rights: Instruments and Institutions*, ed. Tom Campbell, Jeffrey Goldsworthy, and Adrienne Stone (New York: Oxford University Press, 2003), 195-209; Evan Fox-Decent, “Is the Rule of Law Really Indifferent to Human Rights?” *Law and Philosophy* 27, no. 6 (2008): 533-81; and Lacey, “Philosophy, Political Morality, and History.”

⁹⁸ Fuller, *Morality of Law*, 219.

legal prohibitions, matched by authorities' compliance with constraining legal principles.¹⁰⁰ Therefore his approach is far more than a mere checklist of rule of law criteria, as it has often been perceived, as implicit within these principles is a certain conception of the legal subject—as a responsible agent, treated with dignity by legal authorities.¹⁰¹

To the extent that legal principles exhibit procedural fairness, they generate a “legal morality,” which Fuller described as “that special morality that attaches to the office of law-giver and law-applier, that keeps the occupants of that office, not from murdering people, but from undermining the integrity of the law itself.”¹⁰² This argument was underappreciated at the time of writing partly due to the author's own limited exploration of the broader underlying legal theory in most of his work. In a book of essays published shortly after his death, *The Principles of Social Order*, Fuller laid out his theory in more detail,¹⁰³ and a few legal scholars have attempted to clarify his arguments.¹⁰⁴

⁹⁹ This combines the phrases “interlocking expectations” and “role expectations,” in Fuller, *Morality of Law*, 217, 218.

¹⁰⁰ A common misunderstanding of Fuller involves perceiving his principles of legality as a mere checklist for identifying law or the rule of law. This overlooks the far more important issue, which is that these principles exist and are adhered to by lawmakers (to the extent that they are) because of “the distinctive kind of relationship between power and those subject to it” that constitutes a democratic legal system.” Rundle, *Forms Liberate*, 10.

¹⁰¹ *Ibid.*, 92.

¹⁰² Lon L. Fuller, “A Reply to Professors Cohen and Dworkin,” *Villanova Law Review* 10, no. 4 (1965): 660. This type of approach goes back to sixth-century religious scholar Bishop Isidore of Seville. See Witteveen, “Rediscovering Fuller,” 29; and Robert Henle, “Principles of Legality: Qualities of Law—Lon Fuller, St. Thomas Aquinas, St. Isidore of Seville,” *American Journal of Jurisprudence* 39, no. 1 (1994): 47-70. It has also increasingly been explored from a social psychology perspective in relation to the American criminal justice system since the late 1980s. See especially the foundational work of Tom R. Tyler, including *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures* (Chicago: American Bar Foundation, 1987), *Why People Obey the Law* (Princeton: Princeton University Press, 2006), and Tom R. Tyler ed., *Legitimacy and Criminal Justice: International Perspectives* (New York: Russell Sage Foundation, 2007).

¹⁰³ Fuller, *Principles of Social Order*.

¹⁰⁴ See Rundle, *Forms Liberate*; Jeremy Waldron, “Why Law—Efficacy, Freedom, or Fidelity?” *Law and Philosophy* 13, no. 3 (1994): 259-84, and the other contributors to this Special Issue on Lon Fuller;

While institutions are necessary for the creation, implementation, and enforcement of law, legal positivists, and rationalist IR scholars, fail to address what is distinct about *legal* institutions—as a result of the particular nature and qualities of law. Legal obligation, in Fuller’s account, is owed not to legal institutions per se, but to the legal system, stemming from the extent to which the institutions conform to procedural fairness standards. Legal institutions are conceived of as the social agencies of legal procedure.¹⁰⁵

In this approach, being a subject in a liberal legal system means being “a *subject of law*,” not being “*subject to* the direction of another.”¹⁰⁶ Legal subjects are conceptualized by the system as possessing “agency”: the ability to adapt to general rules, which create a “relatively stable reciprocity of expectations” between subjects, as long as authorities adhere to legal principles which generate and sustain that stability.¹⁰⁷ This presents a similar conceptualization of the legal subject to that of natural law philosopher John Finnis when he states, quoting the 1779 Massachusetts Declaration of Rights, “Individuals can only be *selves*—i.e. have the ‘dignity’ of being ‘responsible agents’—if they are not made to live their lives for the convenience of others but are allowed and assisted to create a subsisting identity across a ‘lifetime.’”¹⁰⁸

Fuller’s approach therefore provides a more valuable conceptual vehicle for exploring the legitimacy of global legal governance than traditional approaches to law. It argues that law is distinct from a simple exercise of hierarchical power, for three main reasons: law’s structure as

Willem J. Witteveen and Wilbren van der Burg, eds., *Rediscovering Fuller* (Amsterdam: Amsterdam University Press, 1999); and David Luban, “The Rule of Law and Human Dignity: Reexamining Fuller’s Canons,” Georgetown Public Law and Legal Theory Research Paper No. 10-29, May 2010.

¹⁰⁵ Lon L. Fuller, “Freedom: A Suggested Analysis,” *Harvard Law Review* 68, no. 8 (1955): 1312.

¹⁰⁶ Rundle, *Forms Liberate*, 134. Italics in original.

¹⁰⁷ Fuller, *Morality of Law*, 209.

¹⁰⁸ John Finnis, *Natural Law & Natural Rights*, 2nd ed. (New York: Oxford University Press, 2011), 272. Italics in original. A similar approach is also presented in Nigel Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

general rules in a liberal legal system; the relationship between lawmakers and legal subjects that law's structure requires; and the centrality of legal practice and constraints on lawmaking power to the legitimacy of a legal system. The third issue is the basis of the argument in Chapter 1, and is explained there. The first two issues are explored below as they relate to understanding a legal system's legitimacy.

First, the political nature of Fuller's jurisprudence has been largely ignored by legal scholars.¹⁰⁹ Yet it is central to his conception of law, which argues that legal practice can be an important source of legitimacy in a liberal legal system. This contextualization, and taking into account the purpose of law in such a system, are essential to understanding the legitimacy of law. That purpose is to provide the freedom that enables subjects to interact effectively. This approach relies on a positive conception of liberty as "freedom to" achieve a purpose, as opposed to the more limited "freedom from" interference in one's choices that John Stuart Mill advocated.¹¹⁰ The latter provides a poor understanding of the freedom that matters to most people because it is an individualistic and asocial idea of freedom as personal autonomy, whereas a broader, more realistic understanding of freedom as a component of the liberal quality of global legal governance is that which embodies social interaction—which requires public institutions to sustain.

¹⁰⁹ Dan Priel, "Lon Fuller's Political Jurisprudence of Freedom," *Jerusalem Review of Legal Studies*, part of a symposium on "The Morality of Law at 50," Osgoode CLPE Research Paper No. 55/2013 (2014): 1-27.

¹¹⁰ Fuller, "Freedom: A Suggested Analysis." See John Stuart Mill, *On Liberty* (New York, Pearson, [1859] 2006).

The purpose of public institutions, including those that constitute the legal system, is to generate the conditions for a social form of freedom.¹¹¹ The purpose of law is to “provid[e] the citizenry with a sound and stable framework for their interactions with one another, the role of government being that of standing as a guardian of the integrity of this system.”¹¹² The purpose of law is not—as argued by positivists—to direct “other persons how to accomplish tasks set by a superior.”¹¹³

In Fuller’s understanding, the structure or form that law takes in order to fulfill this purpose is that of “governance through general rules.”¹¹⁴ The property of generality indicates that law permits or prohibits a type of conduct, rather than applying solely to a particular case. The generality of law means that it provides legal subjects with a “baseline for self-directed action”—law is not a set of detailed instructions by authorities directing subjects in order to achieve specific goals.¹¹⁵

This moves the analysis to the second feature of Fuller’s approach: the reciprocity between authorities and subjects which characterizes liberal legal practice. Reciprocity, along with generality, mediates the power of legal authorities by requiring a relationship with subjects that acknowledges their agency and dignity as free individuals. While the understanding of law’s

¹¹¹ Fuller goes on to state: “When we discuss freedom as a problem of law, or politics, or economics, or ethics, we are really addressing ourselves to the question: How can the freedom of human beings be affected or advanced by social arrangements, that is, by laws, customs, institutions, or other forms of social order that can be changed or preserved by purposive human actions?” Ibid.: 1309.

¹¹² Fuller, *Morality of Law*, 210. This has been ignored by positivist critics of Fuller, who tend not to be interested in issues of the practice of law and roles. See Rundle, *Forms Liberate*, 107-8.

¹¹³ Fuller, *Morality of Law*, 210.

¹¹⁴ Ibid. The phrase is from David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007), 110, who concisely captures Fuller’s idea.

¹¹⁵ Fuller, *Morality of Law*, 210.

structure as general rules is widely accepted in jurisprudence,¹¹⁶ one of Fuller’s key original claims is that generality distinguishes law from other forms of social interaction and control—such as the orders of a superior to a subordinate in a hierarchical authority relationship.

Law in a system of liberal democratic governance is portrayed by legal positivists as emphasizing the role of “superiors” to the neglect of “subordinates”—terms which apply to giving orders, but not to legal process. To be effective, general rules instead require a reciprocal relationship between legal authorities and subjects due to the onus law places on subjects to understand its requirements: “law is a kind of governance that works by treating subjects as capable of altering their conduct because they grasp that there is a rule with which they are expected to comply.”¹¹⁷ Generality in a liberal legal system therefore requires an acceptance by authorities that legal subjects have the responsible agency to conform to the requirements of law without specific controlling guidance.

Kristen Rundle describes Fuller’s conception of the legal subject as an agent as “a person ‘capable of purposive action,’ in possession of her capacities, and who is to be regarded as an end in herself. An agent, therefore, is more than someone simply capable of responding to direction by legal authorities, even if that direction is entirely favourable to her. She is instead a bearer of dignity.”¹¹⁸ Law does not act upon the legal subject as an imposition, but inherently requires the subject be conceived of as a dignified agent and requires forbearance on the part of legal authorities in the form of certain legal principles that enable general rules to be effective while also acknowledging the agency and dignity of legal subjects. To embody liberal legal

¹¹⁶ Rundle, *Forms Liberate*, 9.

¹¹⁷ Benjamin C. Zipursky, “The Inner Morality of Private Law,” *The American Journal of Jurisprudence* 58, no. 1 (2013): 35.

¹¹⁸ Rundle, *Forms Liberate*, 10, quoting Fuller, “Freedom:” 1305, 1307.

standards, the exercise of legal authority requires an attitude towards legal subjects characterized by “a sense of trusteeship,”¹¹⁹ which is “the duty of the lawmaker to show respect for the agency of legal subjects.”¹²⁰

The relationship between legal participants—authorities and subjects—is fundamental to understanding law, and an effective legal theory needs to maintain an equal focus on the role and responsibilities of both groups. Law is a social process, generated and sustained by communication and interactional expectancies between law-makers and law’s subjects.¹²¹ In a context of liberal governance lawmakers are constrained in their exercise of power and legal subjects are not mere obedient sheep: while subjects are expected to comply with the law, authorities are reciprocally expected by subjects to adhere to legal principles that are intrinsic to law as a distinct form of social ordering, and that provide a constraint on lawmaking and application. A legal system is legitimate to the extent that legal authorities adhere to these principles—from which the research dependent variables of legality and defense parity, discussed in Chapter 1, are derived.

¹¹⁹ Fuller, *Morality of Law*, 42.

¹²⁰ Jonathan Crowe, “Between Morality and Efficiency: Reclaiming the Natural Law Theory of Lon Fuller,” *Jurisprudence* 5, no. 1 (2014): 117.

¹²¹ This idea is also associated with eighteenth-century French philosopher Montesquieu, and was later taken up by nineteenth-and-twentieth-century German sociologist Georg Simmel, who was a significant influence on Fuller. See Charles de Montesquieu, Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989 [1748]); and Georg Simmel, *On Individuality and Social Forms* (Chicago: University of Chicago Press, 1972).

The legal legitimacy of global legal governance

A few international legal scholars have specifically acknowledged the role of procedural criteria of legitimacy that rely on the nature of law itself—most prominently Thomas Franck.¹²² A handful of legal scholars have also begun to utilize Fuller’s approach to understand international law.¹²³ Jutta Brunnée and Stephen Toope rely on Fuller’s conceptualization of and criteria of law in assessing the legitimacy of international laws relating to climate change, torture, and the use of force.¹²⁴ Nevertheless, the authors apply all of his criteria, without regard to their appropriateness for analyzing international law, and in a non-systematic fashion, leading to an imprecise and inadequate assessment of legal process legitimacy in the areas they examine.

There has been little acknowledgment of the relevance of Fuller’s conception of law by IR and international law scholars to an understanding of international criminal justice, where it has arguably greater salience.¹²⁵ Two legal philosophers have done so, Larry May and David Luban. May has made the normative argument that a more complete adherence to Fuller’s principles would provide an ethically minimalist middle ground between legal positivism and natural

¹²² Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990). Two of Franck’s criteria of legitimate law-making and -application overlap with Fuller’s. “Determinacy” is rule clarity and specificity, generated by legal texts and authoritative, especially judicial, interpretations. “Coherence” is the consistency, as opposed to arbitrariness or selective national interest, in implementation. Nevertheless, Franck’s understanding of law is positivist, relying largely on treaty law, and one of his criteria (“adherence”) relies on Hart’s “rule of recognition,” which is difficult to apply at the international level.

¹²³ E.g. Brunnée and Toope, *Legitimacy and Legality in International Law*; and Jan Klabbbers, “Constitutionalism and the Making of International Law,” *No Foundations: Journal of Extreme Legal Positivism* 5 (April 2008): 84-112. Klabbbers utilizes Fuller to explore a theory to identify valid sources of international law.

¹²⁴ Brunnée and Toope, *Legitimacy and Legality in International Law*. They discuss the limitations of the dominant jurisprudential underpinnings of IR scholarship and demonstrate that Fuller’s conceptualization can be applied to understanding international law.

¹²⁵ This is especially curious as Fuller’s criteria apply particularly to criminal law, which, as he stated, is “most obviously and directly concerned with shaping and controlling human conduct”—the primary purpose of law in the domestic context and arguably of international criminal justice. See Fuller, *Morality of Law*, 59.

law.¹²⁶ Luban has made a brief and nonsystematic attempt at an empirical argument along these lines.¹²⁷ In contrast, in IR research on the legitimacy of international criminal law and justice, the focus has been on the output of courts, including via analyses of the number of trials and prosecutions, the cost, and expediency of trials, and the broad institutional legitimacy of courts—that is, non-legal institutional issues such as autonomy.¹²⁸ There has been little exploration of the legitimacy of legal practice within IR research on global legal governance.

The role of power in understanding legal fairness legitimacy

This section analyzes the literature on the role of politics and political actors in shaping international criminal justice. It also describes how the concept of institutional power provides a useful analytical tool for assessing the effect of rule-making on the legal fairness of international tribunals.

Juridical actors in liberal polities—especially judges and prosecutors—often claim a position known as “legalism:” that their legal decision-making is purely the result of legal considerations,

¹²⁶ Larry May, *Crimes Against Humanity: A Normative Account* (Cambridge: Cambridge University Press, 2005); “International Criminal Law and the Inner Morality of Law,” in *The Hart-Fuller Debate in the Twenty-First Century*, ed. Peter Cane (Oxford: Hart Publishing, 2010), 79-96; and *Global Justice and Due Process* (Cambridge: Cambridge University Press, 2011).

¹²⁷ David Luban, “Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law,” in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 569-88.

¹²⁸ Jason Ralph, “Anarchy is What Criminal Lawyers and Other Actors Make of It: International Criminal Justice as an Institution of International and World Society,” in *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, ed. Steven C. Roach (New York: Oxford University Press), 133-53; and Erik Voeten, “International Judicial Independence,” in *Interdisciplinary Perspectives on International Law and International Relations*, ed. Dunoff and Pollack, 421-44.

and not affected by political influences.¹²⁹ Gary Bass argues that this attitude is also held by juridical actors at international trials.¹³⁰ Rachel Kerr argues that while law and politics influence each other at the ICTY, politics does not affect the courtroom¹³¹—and thereby does not undermine the legal fairness of trials. Kerr, and many legal actors themselves, demonstrate an inadequate appreciation that political decisions taken outside the courtroom shape the dynamic between the defense and prosecution inside, especially at the international level.

Realists and neoliberal institutionalists argue that powerful states tend to exert significant political influence over international criminal tribunals. Realists claim that such organizations are dominated by states in order to facilitate the achievement of their—largely military and security-related—interests, and that courts enjoy little autonomy.¹³² Neoliberal institutionalists tend to argue that international courts, while not completely controlled by powerful states, are subject to the material influence of members and are likely to be sidelined by states when they are perceived as not useful in achieving collective goals, such as the delegitimization of rivals.¹³³

¹²⁹ Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, 2nd ed. (Cambridge, Mass.: Harvard University Press, 1986).

¹³⁰ Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), 7-8.

¹³¹ At least during the ICTY's first 8-10 years of operation—the time span of her research. Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, 3.

¹³² John J. Mearsheimer, "The False Promise of International Institutions," *International Security* 19, no. 3 (1994-5): 5-49. They also argue that if they had autonomy international courts would be ineffective. See Jack Goldsmith, "The Self-Defeating International Criminal Court," *University of Chicago Law Review* 70, no. 1 (2003): 89-104; and John R. Bolton, "The Risks and Weaknesses of the International Criminal Court from America's Perspective," *Law and Contemporary Problems* 64, no. 1 (2001): 167-80.

¹³³ Kenneth Abbot and Duncan Snidal, "Why States Act through Formal International Organizations," *Journal of Conflict Resolution* 42, no. 1 (1998): 3-32.

According to David Bosco, in discussing the ICC, “this understanding yields two likely patterns of major-power behavior towards...court[s]: marginalization and control.”¹³⁴

There is little exploration by IR scholars of the issue of political influence on the fairness of trials through the lens of the protection of defendants’ legal rights. Nevertheless, research has explored more broadly how political goals, such as transitional justice and historical narrative construction, have shaped the operation of international tribunals, and this research is relevant to the current study.

First, as a transitional justice mechanism, courts have been argued to aid reconciliation and post-conflict peacebuilding.¹³⁵ Others have been critical of this role, partly because international courts mediate between concern with the rights of victims and those of criminal defendants.¹³⁶ There is a potential conflict in the protection regime built into the nature of criminal law: the function of substantive international criminal law is the protection of the right of all individuals, depending upon the context, against certain forms of egregious bodily harm, while that of procedural criminal justice is the protection of the rights of defendants.¹³⁷ This issue is evident at the domestic level, but scholars point to exacerbating factors at the international level, such as the utilization of trials to stigmatize states’ military and political enemies and rivals, and the

¹³⁴ David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford university Press, 2014), 11.

¹³⁵ Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law* 95, no. 1 (2001): 7-31; and Kieran McEvoy, “Beyond Legalism: Towards a Thicker Understanding of Transitional Justice,” *Journal of Law and Society* 34, no. 4 (2007): 411-40.

¹³⁶ Laurel E. Fletcher and Harvey M. Weinstein, “Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation,” *Human Rights Quarterly* 24, no. 3 (2002): 573-639.

¹³⁷ Kenneth S. Gallant, “Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard, and What Might be Done about One of Them,” *Criminal Law Forum* 14 (2003): 324.

related concern of states not wishing to be seen to be aiding criminal defendants publically stigmatized as war criminals.¹³⁸

Second, states and legal actors at international courts, including judges and prosecutors, have argued that such courts perform a valuable historical narrative construction function by making denial of atrocities more difficult to sustain, and thereby enabling reconciliation on the basis of acknowledgment of past wrongs.¹³⁹ Others have argued that this function interferes with legal fairness.¹⁴⁰ For example, Hannah Arendt contends that courts' political function in constructing history means they become political theater and risk undermining the legitimacy of trials by diminishing the rights of defendants,¹⁴¹ including by limiting the ability of high-profile political defendants to speak.¹⁴² International trials ultimately risk becoming show trials.¹⁴³

Another issue potentially affecting legal fairness for defendants is the lack of consensus over what constitutes human rights and how it can be pursued through international criminal justice. This has generated multiple narrative frameworks and discourses, including those of universal

¹³⁸ Frédéric Mégret, "Practices of Stigmatization," *Law and Contemporary Problems* 76 (2014): 287-318.

¹³⁹ Tim Meijers and Marlies Glasius, "Expression of Justice or Political Trial? Discursive Battles in the Karadžić Case," *Human Rights Quarterly* 35, no. 3 (2013): 720-814; Alan Tieger and Milbert Shin, "Plea Agreements in the ICTY: Purpose, Effects and Propriety," *Journal of International Criminal Justice* 3, no. 3 (2005): 666-79; Richard Ashby Wilson, "Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia," *Human Rights Quarterly* 27, no. 3 (2005): 908-42; Daniel Joyce, "The Historical Function of International Criminal Trials: Re-thinking International Criminal Law," *Nordic Journal of International Law* 73 (2004): 461-84; and Devin O. Pendas, "'Law not Vengeance: Human Rights, the Rule of Law, and the Claims of Memory in German Holocaust Trials,'" in *Truth Claims: Representation and Human Rights*, ed. Mark Philip Bradley and Patrice Petro (New Brunswick, NJ: Rutgers University Press, 2002), 28.

¹⁴⁰ Björn Elberling, *The Defendant in International Criminal Proceedings: Between Law and Historiography* (Oxford: Hart Publishing, 2012), 199-236; and Daniel Joyce, "The Historical Function of International Criminal Trials: Re-thinking International Criminal Law," *Nordic Journal of International Law* 73 (2004): 461-84.

¹⁴¹ Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1963).

¹⁴² Elberling, *The Defendant in International Criminal Proceedings*.

¹⁴³ Koskeniemi, "Between Impunity and Show Trials."

ideology,¹⁴⁴ law,¹⁴⁵ entitlements,¹⁴⁶ duties,¹⁴⁷ and post-colonial power politics.¹⁴⁸ The dominant framing has increasingly become a fusion of individual criminal law with universal ideology.¹⁴⁹ Nevertheless, international media discussion of atrocities and prosecutions does not demonstrate a universal public acceptance of a legalist perspective to criminal trials: instead of a universal, neutral concern with truth and justice, and the presumption of innocence, there is also often a public assumption of guilt.¹⁵⁰ This potentially leads to weaker investigative support offered by states, IGOs, and NGOs to defendants than prosecution at international courts, weakening parity for the former during proceedings.

A valuable contribution to conceptualizing the role of power within global governance institutions, with implications for the effect of politics on legal rules within international criminal justice, has been made by Michael Barnett and Raymond Duval.¹⁵¹ They argue that power is a social concept that exists along two dimensions. The first is kinds of social relations, which exist

¹⁴⁴ Roger Normand and Sarah Zaidi, *Human Rights at the UN: The Political History of Universal Justice* (Bloomington: Indiana University Press, 2008).

¹⁴⁵ Tony Evans, "International Human Rights Law as Power/Knowledge," *Human Rights Quarterly* 27, no. 3 (2005): 1046-68.

¹⁴⁶ Jack Donnelly, "The Social Construction of Human Rights," in *Human Rights in Global Politics*, ed. Tim Dunne and Nicholas J. Wheeler (Cambridge: Cambridge University Press, 1999), 71-102.

¹⁴⁷ Makau Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002).

¹⁴⁸ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004).

¹⁴⁹ Tony Evans, *The Politics of Human Rights: A Global Perspective* (London: Pluto Press, 2005); and Charlotte Ku, *International Law, International Relations, and Global Governance* (London: Routledge, 2012).

¹⁵⁰ Diana Johnstone, *Fools' Crusade: Yugoslavia, NATO, and Western Delusions* (New York: Monthly Review Press, 2002), 100; and Fatou Bensouda, Theodor Meron, and Abiodun Williams, "The ICC and the Yugoslav Tribunal: Upholding International Criminal Law?" International Law Programme Meeting Summary, Chatham House, April 2, 2014, 7, www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20140402ICCYugoslavTribunal_0.pdf.

¹⁵¹ Michael Barnett and Raymond Duvall, "Power in Global Governance," in *Power in Global Governance*, ed. Michael Barnett and Raymond Duvall (Cambridge: Cambridge University Press, 2005), 1-32.

in polar terms of interaction (a power relationship between distinct, “pre-constituted” actors) or constitution (power between actors whose identities are mutually constituting¹⁵²). The second dimension is the specificity of social relations, along a spectrum from spatially and temporally direct and immediate to socially indirect or diffuse (the latter is a relationship mediated at a distance through intervening actors or over time through the construction of rules, say). From these dimensions the authors generate a fourfold taxonomy of power: compulsory (direct interaction), institutional (diffuse interaction), structural (direct and mutual constitution), and productive (diffuse constitution).

The second concept, that of institutional power, provides a valuable conceptual tool for analyzing the role of states and IGOs in creating the rules by which international criminal tribunals are structured and operate, and how this shapes the interaction of the defense and prosecution. As argued by Barnett and Duval, institutional power refers to the role of actors, working through formal and informal institutions, in establishing policies which shape and constrain the behavior of other actors.¹⁵³ The institutional power literature has examined agenda-setting,¹⁵⁴ the creation of structural and procedural rules,¹⁵⁵ and the effect of institutional structures on the ability to shape institutional values and interests.¹⁵⁶ The dissertation contributes to the literature on institutional power by examining its role within the processes of the creation

¹⁵² Alexander Wendt, “On Constitution and Causation in International Relations,” *Review of International Studies* 24, no. 1 (1998): 101-17.

¹⁵³ Barnett and Duvall, “Power in Global Governance,” 15-17.

¹⁵⁴ Mark A. Pollock, *Engines of Integration* (New York: Oxford University Press, 2003); and Stephen D. Krasner, *Structural Conflict: The Third World Against Global Liberalism* (Berkeley: University of California Press, 1985).

¹⁵⁵ Lloyd Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton, NJ: Princeton University Press, 2000)

¹⁵⁶ Greg Shaffer, “Power, Governance, and the WTO: A Comparative Institutional Approach,” in *Power in Global Governance*, ed. Michael Barnett and Raymond Duvall (Cambridge: Cambridge University Press, 2005), 130-60.

and operation of international criminal tribunals, and by assessing its effect on the legal courtroom dynamic between two of the most important actors within that environment—the prosecution and defense.¹⁵⁷

Conclusion

Analyses of the legitimacy of global legal governance have tended to ignore what is distinct about legal institutions. This partly results from a lack of understanding of the distinctive features of law as a system of social norms. It is also a consequence of applying jurisprudence that is poorly suited to understanding the legitimacy of international law. The jurisprudence of Lon Fuller provides a little-explored approach that is better suited to analyzing legitimacy than current natural law and positivist approaches.

Research on the role of power in shaping the behavior and relationships of actors within international tribunals has tended to overlook the dynamic between the prosecution and defense, which is essential to understanding such institutions' fairness and legitimacy. Similarly neglected has been the effect of rule-making actors on this dynamic. The concept of institutional power provides a useful approach to exploring the relationship between the rule-making authority of states and the prosecution-defense dynamic.

¹⁵⁷ The judges are the other indispensable actor.

3 Liberal legal norms in the evolution of international criminal justice

This chapter explores the legal and historical development of the research indicators and their role in international criminal justice in order to provide context and illuminate the normative, political, and historical context to an analysis of the contemporary case studies in Chapters 4 and 5. This chapter begins by describing the historical development of the dependent variables, legality and defense parity, as further explanation of their significance to the legitimacy of international criminal courts. Next, the historical development of international criminal justice is analyzed, emphasizing how the political context of international courts has shaped fairness towards defendants. Finally, the research indicators are explored in relation to the IMT at Nuremberg¹ in 1945-6 in order to provide a basis of comparison for the case study analysis in later chapters, and to enable a critical assessment of the narrative of the progression of fairness in the development of international criminal justice.

¹ Note that the term “Nuremberg” as used throughout the dissertation refers to the IMT trial, unless stated otherwise. There were various other trials in the postwar period held at Nuremberg, and referred to as “Nuremberg trials,” including those in the American zone of occupation under Allied Control Council Law No. 10. See, e.g., Kevin Heller’s detailed examination of the legal aspects of the US trials: Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011).

The development of the principle of legality

This section explains the evolution of the principle of legality in domestic and international law, focusing on its core aspects, the prohibition on retroactive enforcement of criminal law and punishment. First, legality is analyzed in relation to the evolution of Western common and civil law systems, as they constitute the basis of the structure of trials and procedural protections for defendants in international criminal justice. Second, legality's development as a core principle of criminal justice in international law is explored. This discussion focuses on underscoring the role of legality as a fundamental norm of liberal legal practice—in both domestic and international criminal justice.

Domestic development

Non-retroactive enforcement of law and punishment has been discussed since at least ancient Greece: for example by the historian Diodorus and the orator Demosthenes.² However, it may have been lauded more as a means of preserving traditional culture from future change than due to any concern with legal fairness.³ Non-retroactivity was arguably first clearly distinguished as a core principle of fair legal practice in the Roman Republic and Empire, while the law of Medieval European states owes an enormous debt to Roman and Byzantine law.⁴ A prominent early European example is references to legality in the English Magna Carta of 1215, which

² Douglas M. MacDowell, *Demosthenes the Orator* (Oxford: Oxford University Press, 2009), 240-56.

³ Charles Sampford, *Retrospectivity and the Rule of Law* (New York: Oxford University Press, 2006), 9-10.

⁴ Jerome Hall, "Nulla Poena Sine Lege," *The Yale Law Journal* 47, no. 2 (1937): 167-8.

suggest that non-retroactivity was a legal principle limiting the law-making powers of the sovereign.⁵

Middle Eastern religious texts provide important, if often vague or ambiguous, references to the undesirability of ex post facto legislation. In the New Testament, Saint Paul, in his Epistle to the Romans, states that “where there is no law, neither is there any transgression.”⁶ In the Koran, Allah states that “we never punish before I have sent a messenger,”⁷ but there is no clearer reference.⁸ In the Hadith—the reported sayings and acts of the prophet Muhammad—there are references to non-retroactivity of crimes in relation to usury laws.⁹

The European Enlightenment of the seventeenth and eighteenth centuries led to the establishment of non-retroactivity of crimes and punishment as core features of criminal law in Western states.¹⁰ Their development is deeply connected to the development of democracy within European states, as they were conceived of as a protection against executive power: only a legislative body—constituted by the people—can define what is illegal and what punishments should apply.

Two of the first distinct references to the undesirability of the retroactive enforcement of law in a constitutional document occur in the 1776 Delaware Declaration of Rights and Fundamental

⁵ Ben Juratowitch, *Retroactivity and the Common Law* (Oxford: Hart Publishing, 2008), 29. See Magna Carta article 39 at the Avalon Project: avalon.law.yale.edu/medieval/magframe.asp.

⁶ The New Testament, Romans 4:15. However, Christian scholars often claimed that God’s law was “natural law”—that all people had been given advance notice of what is legal by God and were thereby fairly liable for disobedience.

⁷ Koran, Su’rat 17 (*al-Israa*), v.15.

⁸ Sampford, *Retrospectivity and the Rule of Law*, 11-12.

⁹ Muhammad Salim al-’Awwa, “The Basis of Islamic Penal Legislation,” in *The Islamic Criminal Justice System*, ed. M. Cherif Bassiouni (Dobbs Ferry, NY: Oceana Publications, 1982), 127-47.

¹⁰ Stefan Glaser, “Nullum Crimen Sine Lege,” *Journal of Comparative Legislation and International Law* 24, no. 1 (1942): 29-37; and Aly Mokhtar, “Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects,” *Statute Law Review* 26, no. 1 (2005): 41-55.

Rules, and the 1780 Massachusetts Bill of Rights.¹¹ Some of the first occurrences at the state level are in the 1787 Austrian penal code, and in two documents signed in 1789 that have been fundamental to disseminating fair legal practice and defendant protections internationally: the French Declaration of the Rights of Man and of the Citizen, and the US Bill of Rights.¹²

The most dramatic increase in the global incorporation of non-retroactivity into domestic law has occurred since the beginning of the Cold War. Of 69 states for which there was information in research conducted by the United Nations into state legal systems in 1946-7, 36 percent had a strong provision protecting against ex post facto criminal laws, and 32 percent each had a weak or no non-retroactivity provision in their constitution or statute.¹³ I determined a strong provision with reference to the necessity for the existence of prior law for prosecution, or specific references to retroactivity. A weak version of non-retroactivity was determined as where there was mention simply that people can only be prosecuted for a breach of law.

Extrapolating the level of non-retroactivity from data on state constitutions collected in 2007 makes clear that, 60 years later, in an international system characterized by almost four times as

¹¹ Section 11 and article 3, respectively.

¹² Articles 1, 5 and 8; and Constitutional Amendments 4-9, respectively. See, The Avalon Project: Documents in Law, History and Diplomacy, Yale Law School, avalon.law.yale.edu/18th_century/rights1.asp, and avalon.law.yale.edu/18th_century/rightsof.asp, respectively. The preamble to the current, Fifth, French constitution of 1946 reiterates individual entitlement to the rights in the 1789 declaration.

¹³ While preparing to draft the Universal Declaration of Human Rights (UDHR), the UN Commission on Human Rights researched UN member states' constitutions for provisions similar to those of each article in the UDHR. The resulting list, gathered by John P. Humphrey, the principal drafter of the UDHR, is found in the 1947 International Bill of Rights: Documented Outline: UN Economic and Social Council, Commission on Human Rights Drafting Committee, International Bill of Rights: Documented Outline, UN doc. E/CN.4/AC.1/3/Add.1, 11 June 1947, articles 25-6, www.un.org/depts/dhl/udhr/docs_1947_1st_draftcom.shtml. Complementary to the Documented Outline is the 1946 research conducted by the UN on constitutional human rights provisions, as it covers all states, not just UN members, and some territories not independent at that time, such as India and Transjordan. This information is found in the 1946 UN *Yearbook on Human Rights*: UN Department of Social Affairs, *Yearbook on Human Rights 1946 (UNYBHR 1946)* (Lake Success, NY: United Nations, 1948), UN Sales no. 1948.XIV.1 (reproduced by William S. Hein & Co., 1996).

many independent states, 91 percent of states have a strong non-retroactivity provision, while only 6.5 percent have a weak provision, and 2.5 percent no provision.¹⁴ During the period 1947 to 2007, therefore, the proportion of states with a strong provision increased by 57 percentage points, and those with no provision declined by nearly 30 percentage points. It is evident that concern that there be strong constitutional or statutory constraint on retroactive criminal law enforcement has become almost universal among states and territories.

It should be noted that there is a major distinction among states in the application of non-retroactivity: between those with a common law (Anglo-American) legal system and those which follow a civil law (continental European) model. The former tend to apply it less rigorously, partly due to the existence of common law crimes (crimes not found in written statutes) and the greater role of judges in making law.¹⁵ This makes the determination of retroactive enforcement at the international level more difficult: are judges interpreting existing law (that is, “discovering” law, in common law parlance) or creating it *ex post facto*? This issue has generated contention in determining the level of non-retroactivity in the practice of international criminal tribunals.

In present day Islamic, *Shari'a*, legal systems, non-retroactivity only applies to certain types of law.¹⁶ All states that utilize this form of legal system have ratified at least one treaty that incorporates the principle¹⁷—these treaties are discussed in the following section. According to

¹⁴ Percentages determined by author from data in Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009), 438-539 (Appendix C). I used the same method of determining categories as in the previous paragraph.

¹⁵ Antonio Cassese, *International Criminal Law*, 2nd ed. (New York: Oxford University Press, 2008), 36-8.

¹⁶ M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), 296.

¹⁷ Gallant, *Principle of Legality*, 400.

Cherif Bassiouni, in current Islamic law, *quesas* crimes—largely murder and assault—tend to adhere to non-retroactivity in most states that enforce this category of crimes. Since independence, most Islamic states have incorporated non-retroactivity provisions into their legal system—through statute or constitution.¹⁸

Recognition in international law

During the Cold War, the prohibition on non-retroactivity in criminal law became incorporated into most major international human rights and humanitarian legal instruments, and thereby progressively recognized as a fundamental legal right at the domestic and international levels. The drafters of post-Cold War international criminal tribunals, starting with that for Yugoslavia, accepted this right as constituting a restriction on their ability to construct new law.

First, in 1948, the Universal Declaration of Human Rights (UDHR) included the non-retroactivity of crimes and punishment as unrestricted domestic and international rights: “No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”¹⁹

The following year, Geneva Conventions III and IV became the first multilateral humanitarian legal documents to contain criminal law procedural rights—for prisoners of war

¹⁸ M. Cherif Bassiouni, “Qesas Crimes,” in *The Islamic Criminal Justice System*, ed. M. Cherif Bassiouni (Dobbs Ferry, NY: Oceana Publications, 1982), 203-9.

¹⁹ UN General Assembly, *Universal Declaration of Human Rights*, UN doc. A/RES/217A (III), December 10, 1948, article 11.2. The UDHR was supported by an overwhelming majority of states, with the initial General Assembly vote among the UN’s 56 member states being 48 in favor, none against, and 8 abstentions.

and civilians, respectively—including the right to non-retroactivity of crimes and punishment.²⁰ They are also the first legally binding instruments, as the UDHR was initially merely expressive of the intent of its signatories—although there is a “growing consensus” that all or most of the rights contained in the declaration have since attained customary law status, and so are now binding on all states.²¹ Non-retroactivity is also a legal right in the 1966 International Covenant on Civil and Political Rights (ICCPR)—in fact it is one of several provisions that are non-derogable, even in time of national emergency.²²

Non-retroactivity of crimes and punishment are also among the rights guaranteed to those under military occupation in international and civil wars, respectively, in the 1977 Additional Protocols I and II to the Geneva Conventions;²³ and non-retroactivity for crimes in the 1989 Convention on the Rights of the Child.²⁴ While Additional Protocol II does not contain a provision for non-derogation of non-retroactivity, the document specifically applies to civil war—where many rights are routinely suspended under state-of-emergency laws—so its

²⁰ Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949, articles 99 and 102 (on crimes and punishment, respectively); and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, articles 65 and 67 (on crimes and punishment, respectively).

²¹ Olivier De Schutter, *International Human Rights Law* (New York: Cambridge University Press, 2010), 50.

²² ICCPR, article 4. The covenant was adopted unanimously by all 104 UN member states. See UN doc. A/PV.1496, 16 December 1966, www.un.org/depts/dhl/resguide/r21_en.shtml.

²³ Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, article 75.4.c; and Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, article 6.2.c. Non-retroactivity of enforcement and punishment is found on both. Protocol I, article 75.4 also includes non-retroactivity of court jurisdiction.

²⁴ Convention on the Rights of the Child, UN General Assembly doc. 44/25, November 20, 1989, article 40.2.a.

acceptance by more than 160 states is particularly significant as an indicator of the level of state support for non-retroactivity as a fundamental right.²⁵

Non-retroactivity of crimes and punishment are also guaranteed in most major regional human rights treaties created during and after the Cold War. This includes the 1950 European Convention on Human Rights,²⁶ the 1969 American Convention on Human Rights,²⁷ the 1981 African Charter on Human and Peoples' Rights,²⁸ and the 2004 revised Arab Charter on Human Rights.²⁹

The incorporation of non-retroactivity as a legal right in the constitutions and statutes of the vast majority of states, described above, is a significant indicator of the acceptance in state practice that is required for the determination that a principle has attained international customary law status.³⁰ Its incorporation into nearly all major global and regional human rights and humanitarian treaties since 1945 is further evidence of the consistency of state acceptance. Practice since 1993 by international criminal tribunals has also generally been consistent, although there are weaknesses, as explored in Chapters 4 and 5. Overall, non-retroactivity of crimes and punishment are broadly argued to have attained customary law, and possibly *jus*

²⁵ Gallant, *Principle of Legality*, 208.

²⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, article 7.1. Article 7.2 contains a restriction on legality in that a crime is legal as long as it conform to "general principles of law recognised by civilised nations." This is a significant weakening of the principle in that anything legal under applicable domestic law is not an international breach.

²⁷ The American Convention on Human Rights, November 22, 1969, article 9. The article also includes non-retroactivity of court jurisdiction.

²⁸ The African Charter on Human and Peoples' Rights, June 27, 1981, article 7.2.

²⁹ Revised Arab Charter on Human Rights, May 22, 2004, article 15.

³⁰ The determination of the existence of customary international law, "as evidence of a general practice accepted as law" (Statute of the International Court of Justice, article 38), requires two components: *usus*, or evidence of consistent and widespread state practice; and *opinio juris*, that is, evidence that the practice derives from a felt sense of legal obligation. See Antonio Cassese, *International Law* (Oxford: Oxford University Press, 2005), 153-69.

cogens, status.³¹ *Jus cogens* consists of international legal norms that are peremptory over all other legal rules (examples include genocide and apartheid). The *jus cogens* status of non-retroactivity would introduce procedural norms to the small list of heretofore substantive peremptory legal norms.³²

The development of concern with defense parity

This section analyzes the development of defense parity in civil and common law systems. First the evolution of fair trial standards more broadly in domestic law is described, before an explanation of the place of defense parity within those standards. Finally, the importance of defense parity as a principle of criminal justice is explored by analyzing its acceptance within international law. The discussion aims to clarify the role of defense parity as a norm of international criminal law practice.

Domestic development of fair trial standards

The institutional and procedural basis of international criminal justice is provided by the two most common forms of legal system globally today: common law and civil law. They both originated in Medieval Europe, where criminal trials were instituted in the early post-Roman era (after c.500AD). In some territories, such as the German states, trials were initially private—not directly involving government agents or institutions—and the guilt or innocence of the accused

³¹ Gallant, *Principle of Legality*, 352-403.

³² *Ibid.*

was primarily determined by “trial by ordeal”—such as combat or submersion in water.³³ This effectively presumed the guilt of the accused—if successful in the ordeal they were still punished by banishment for example. Over centuries this system changed towards public trials with increasing protections for the accused, although some of the defense parity aspects of due process—such as institutional support for defense counsel investigations—are of much more recent origin, as explained below.

Most continental states of Western Europe, largely with a developing civil law tradition, introduced trial procedures between approximately 900 and 1400, with often a single government official performing the primary modern criminal justice roles of investigator, prosecutor, jury, and judge. The inquisitorial trial model, introduced in German territories from Italy in the sixteenth century, left little room for an active role by the defendant—the accused was reduced to one feature in a process of attempting to ascertain the truth and not granted special privileges. Defense parity protections consequently were slow to develop.³⁴

As certain Continental states, such as France, became absolute monarchies from the seventeenth century the sovereign became the highest judicial authority.³⁵ This began to change in Europe especially during the eighteenth century as the Enlightenment reshaped attitudes towards the role of the individual vis-à-vis the state. As citizens legitimizing the existence of the state, individuals began to gain protections from government, including from the arbitrary and

³³ Christoph Safferling, *Towards an International Criminal Procedure* (New York: Oxford University Press, 2001), 5-6.

³⁴ Ken Pennington, “Law, Criminal Procedure,” in *Dictionary of the Middle Ages: Supplement 1*, ed. William Chester Jordan (New York: Charles Scribner’s Sons-Thompson-Gale, 2004): 309-20.

³⁵ Roland E. Mousnier, *The Institutions of France under the Absolute Monarchy, 1598-1789, Vol. II: The Organs of State and Society*, trans. Arthur Goldhammer (Chicago: University of Chicago Press, 1984), 634-73. Previously, the feudal political structure and Catholic Church jurisdiction limited the authority of the sovereign over judicial issues.

abusive use of coercive authorities involved in the criminal justice system.³⁶ In France, Republican ideas brought to prominence by the revolution of 1789 generated such prosecutorial changes as public trial, by jury, and via an accusatorial approach, with rights and privileges for the accused that had been denied under the prior, inquisitorial, proceedings. The 1789 French Declaration of the Rights of Man and of the Citizen included trial principles such as the presumption of innocence for the accused, and due process provisions such as habeas corpus (no imprisonment without legal charge).³⁷ Such legal-principle-related and procedural developments are illustrative of the enhancement of defense parity by elevating the position of the defendant in institutional proceedings.

England was more removed from the center of Roman power than the empire's continental western European territories, and Roman institutions were soon eroded by the invasion of Germanic peoples after the fifth century.³⁸ Trial for the accused was only introduced after the French Norman invasion in 1066, when official prosecution became institutionalized as a means of avoiding private vengeance and maintaining public order.³⁹ Even then, there was no requirement of an unbiased jury and the accused had no rights under this system.⁴⁰

³⁶ This was encouraged by influential philosophers such as Montesquieu and Voltaire, and led to changes including the abolition of torture in Prussia in 1756 and Bavaria in 1806. See Safferling, *Towards an International Criminal Procedure*, 7.

³⁷ Articles 7 and 9, respectively. See, The Avalon Project: Documents in Law, History and Diplomacy, Yale Law School, at: avalon.law.yale.edu/18th_century/rightsof.asp. In Germany, conversely, juries were abolished in 1924 and replaced by judges.

³⁸ Roman processes were replaced with Anglo-Saxon systems of criminal justice, involving, for example, a payment—known as “weregild”—to the family of a murder victim by that of the accused.

³⁹ Edward Augustus Freeman, *The History of the Norman Conquest of England: Its Causes and its Results*, Vol. 5 (Oxford: Clarendon Press, 1876), 451-2. Local officials, such as justices of the peace, were authorized to investigate crimes, collect evidence, and conduct trials, utilizing a “grand jury” of selected local people who might have some knowledge of the circumstances of the crime.

⁴⁰ While never legal under English law, torture was utilized for confessions in the sixteenth and first half of the seventeenth centuries. See Safferling, *Towards an International Criminal Procedure*, 12.

As in civil law states, trial by jury gradually replaced trial by ordeal. However, for centuries the accused had no defense parity protections such as the ability to call witnesses and prosecutorial disclosure, and they were not allowed legal counsel.⁴¹ Only from the seventeenth century did prosecutions begin to approximate a fair trial and move towards parity between the defense and the prosecution in terms of judicial structures, procedures, and resources. The development of criminal due process has paralleled, and constitutes an element of, the development of democracy—in England and in Europe more broadly.

Changes gradually occurred in England over the next two centuries, with the nineteenth century in particular seeing a transformation in the rights of the accused. Changes included increased autonomy for judges, the right to not incriminate oneself, the right to defense counsel, defense presence during witness testimony, and two central defense parity issues analyzed in the research: pretrial disclosure of evidence, and the right to cross-examine prosecution witnesses. The creation of a police force in 1829 also removed investigative functions from prosecutors, and led to greater impartiality in the judiciary.⁴² The jury is still out, so to speak, on why the common law system in England generally developed protections for the accused earlier than Continental civil law systems, and made much less use of torture, but neither system attained what are today considered full fair trial protections until the twentieth century.

In some of the American colonies prior to independence, various fair trial rights developed early on, partly in reaction to injustices in the European legal systems which the colonists had

⁴¹ The jury was also far from independent: jurors could be prosecuted if they returned a verdict different from that preferred by the state. See *ibid.*, 11.

⁴² Bruce P. Smith, “The Emergence of Public Prosecution in London, 1770-1850,” *Yale Journal of Law & the Humanities* 18, no. 1 (2013): 29-62.

fled.⁴³ The tendency towards increasing protections for defendants continued after independence—deprivation of trial by jury, for example, was among the list of complaints against the English Crown in the 1776 Declaration of Independence. The first constitutional document at the state level to contain a substantive listing of due process trial rights is the US Bill of Rights of 1789.⁴⁴ After 1845 the modern division of functions within a trial developed: with the jury determining the facts of a case and the judge deciding on the applicable law.⁴⁵

Constitutional and statutory trial rights were, however, often breached in practice in the United States, especially for slaves and racial minorities, and varied significantly by state. Increasingly from the mid-nineteenth century, however, federal court decisions insisting on higher standards at the state level led to a significant improvement in fairness standards, including the defense parity provisions of disclosure, witness cross-examination, and in the 1960s institutional support for defense counsel for those who cannot afford one.⁴⁶

The relationship between trial fairness standards and defense parity

International criminal law scholar Christoph Safferling describes the principle of a fair criminal trial as encompassing “a whole range of different rights and obligations” in relation to defendants

⁴³ For example, the 1641 Massachusetts Body of Liberties contained the right to counsel, to an expeditious trial, to trial by jury, and a prohibition on repeat prosecution—“double jeopardy”—and on torture. See Safferling, *Towards an International Criminal Procedure*, 14.

⁴⁴ These rights constitute four of the ten articles, and include trial by jury; the right to a speedy, public, and impartial trial; and no double jeopardy. See the US Constitution, Amendments 5-8, avalon.law.yale.edu/18th_century/rights1.asp.

⁴⁵ Stephen A. Weiner, “The Civil Jury Trial and the Law-Fact Distinction,” *California Law Review* 54, no. 5 (1966): 1867-1938.

⁴⁶ On the latter issue, the right was granted in the Supreme court case of *Gideon v. Wainwright*, 372 US 335 (1963), www.law.cornell.edu/supremecourt/text/372/335. The right applies in felony cases only.

that have developed in various legal systems over centuries.⁴⁷ He conceives of these as constituting a single right, but one whose components fall within three categories: “institutional guarantees,” “moral principles,” and first and second generation human rights (civil and political, and economic and social rights, respectively).⁴⁸ Only the first has received much attention in IR research on international courts, while all three are analyzed in the dissertation.

First, institutional guarantees are addressed primarily to legislators, and include such factors as the independence and impartiality of courts.⁴⁹ Second, moral principles guide implementation by authorities within the criminal justice system: for example, the presumption of innocence and “equality of arms” between the prosecution and defense. These are legal principles in the sense used by Ronald Dworkin, as guides to legal implementation and interpretation.⁵⁰ Third, first and second generation human rights for defendants stem from these moral principles. First generation rights for criminal defendants are those to be free of government action that diminishes the dignity of the individual, including the right to freedom from torture to extort a confession. Second generation rights to be provided with resources by government include that to court-provided defense counsel.

In the research, an institutional aspect of defense parity often overlooked is explored: institutional parity in a court’s structure. The project also relies on the second issue, moral-legal

⁴⁷ Safferling, *Towards an International Criminal Procedure*, 30.

⁴⁸ *Ibid.*, 30-1.

⁴⁹ At the international level, see Erik Voeten, “International Judicial Independence,” in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, ed. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013), 421-44; and Theodor Meron, “Judicial Independence and Impartiality in International Criminal Tribunals,” *The American Journal of International Law* 99, no. 2 (2005): 359-69. At the domestic level, see, e.g., the contributions to Steven B. Burbank and Barry Friedman, eds., *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (New York: Sage Publications, 2002).

⁵⁰ Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986).

principles, as establishing the underlying normative guidelines delineating the boundaries of a fair trial, and the third issue (defendant rights), as laying out the specific legal obligations towards defendants stemming from these principles.

Defendants rights are what may be called “status human rights,” attaching to an individual according to their status in the legal proceeding, as contrasted with “pure” human rights, such as freedom from torture, which attach to all individuals, regardless of status.⁵¹ The primary legal status rights and legal principles that defendants require for protection of their dignity and to discover their guilt or innocence include: the principle of the burden of proof lying with the prosecution; the corollary principle of the presumption of innocence, and from that, expeditiousness of trial; the right to counsel; that counsel is adequately prepared—requiring sufficient financial and institutional resources and time to prepare a reasonable defense; and such procedural due process protections as the right of disclosure of prosecution evidence, and the right to present defense witnesses and cross-examine prosecution witnesses.

Most of these individual rights are encapsulated within the principle of the “equality of arms” between the prosecution and defense. In the research—as explained in Chapter 1—the term “defense parity” is utilized instead of equality of arms, as the focus is specifically on institutional and procedural issues—as opposed to the more resource-oriented understanding of equality of arms. This is to enable greater comparability between courts, and provides a more relevant and applicable means of exploring the power dynamic between the prosecution and defense counsel in the international judicial environment.

⁵¹ Yvonne McDermott, “Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law,” in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Naimh Hayes (Farnham, UK: Ashgate, 2013), 166.

Recognition of fair trial rights and defense parity in international law

A significant weakness in the development of a coherent system of international criminal justice is the ad hoc nature of trial protections for defendants, with each court developing its own standards. While substantive law has developed a broad degree of consistency, criminal procedure has lagged far behind.⁵² International humanitarian and human rights law contain broad but often unspecified trial protections. Geneva Convention III of 1929 is the first multilateral treaty to contain aspects of the right to a fair trial;⁵³ and the UDHR marks the first time that trial rights were included in an international human rights legal document.⁵⁴

Geneva Convention IV of 1949, relating to the treatment of civilians, contains various fair trial rights for defendants.⁵⁵ Especially significant are: the right to a speedy trial and to be informed of charges in a language the accused understands; the right to present evidence, call witnesses, and the right to defense counsel (provided by the court if the accused cannot afford their own), and the provision of an interpreter if required; and the right of appeal. These protections are also included in the ICCPR,⁵⁶ the Additional Protocols to the Geneva Conventions,⁵⁷ and the Convention on the Rights of the Child;⁵⁸ as well as numerous regional agreements, including the American Declaration of Rights and Duties of Man;⁵⁹ the European

⁵² Elise Groulx, "Champion of Justice Speech," National Association of Criminal Defense Lawyers, 30 July 2004, 165-6.

⁵³ Geneva Convention (III) Relative to the Treatment of Prisoners of War, July 27, 1929, articles 61-6.

⁵⁴ UDHR, articles 7-11.

⁵⁵ Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, articles 71-6.

⁵⁶ ICCPR, article 14.

⁵⁷ Additional Protocol I, articles 45, 75, 85; and Additional Protocol II, article 6.

⁵⁸ Convention on the Rights of the Child, November 20, 1989, article 40.

⁵⁹ American Declaration of Rights and Duties of Man, May 2, 1948, article 26.

Convention on Human Rights (ECHR);⁶⁰ the American Convention on Human Rights;⁶¹ and the African Charter on Human and Peoples' Rights.⁶²

States have acknowledged the existence of prosecutorial advantages in relation to the defense in the conduct of criminal trials through the incorporation of elements of defense parity as core criminal justice rights in various international human rights and humanitarian laws. These include the Geneva Conventions,⁶³ and their Additional Protocols;⁶⁴ the ICCPR,⁶⁵ the Convention on the Rights of the Child;⁶⁶ and the European,⁶⁷ African,⁶⁸ and American⁶⁹ human rights conventions.

However, while most of these documents reference the legal principles of the presumption of innocence and one or two specific equality-of-arms issues—such as the right to counsel, paid for by the court if necessary—the precise rights defense parity entails for criminal defendants are left largely unspecified in international law. This partly accounts for the inconsistency in the inclusion of parity rights in the statutes of international tribunals, as discussed in Chapters 4 and 5.

In customary law, significantly deriving from international case law, the European Court of Human Rights (ECtHR) has produced by far the most rulings clarifying the human rights of criminal defendants, domestically and internationally. Masha Fedorova, in the first book-length

⁶⁰ ECHR, November 4, 1950, articles 6 and 7.

⁶¹ American Convention on Human Rights, November 22, 1969, article 8.

⁶² African Charter on Human and Peoples' Rights, June 27, 1981, article 7.

⁶³ Geneva Convention IV, article 72.

⁶⁴ Additional Protocol I, article 75.4; and Additional Protocol II, article 6.2.

⁶⁵ ICCPR, article 14.3.

⁶⁶ Convention on the Rights of the Child, article 40.2.

⁶⁷ ECHR, article 6.3.

⁶⁸ African Charter on Human and Peoples' Rights, article 7.1.

⁶⁹ American Convention on Human Rights, article 8.2.

study of equality of arms in international criminal justice, quotes the court as stating that equality is “an essential guarantee of the right to defend oneself,”⁷⁰ which “implies a balance of fairness between parties.”⁷¹ She includes two fundamental rights that have been incorporated into the principle of parity applied in the research: disclosure of prosecution evidence, and cross-examination of prosecution witnesses.⁷²

The case law is inconsistent concerning whether a defendant’s right to parity has been violated when any of the relevant guarantees have been breached, or whether demonstrating a violation requires evidence that the breach has been harmful to their defense.⁷³ Demonstrating prejudice to the outcome for a defendant is problematic because it involves the determination of a bias introduced to the decision-making of the trial judges, who are themselves making the determination of whether a violation has occurred. Perhaps due to the difficulty of proving that a violation has prejudiced a defendant, most prosecutors I interviewed claimed that the procedural violations which we discussed had not been a problem for defendants in the trials they had prosecuted because the breaches did not demonstrably affect the outcome of any trial. The dissertation takes the more cautious approach of the ECtHR in *Lanz v. Austria*—cautious from

⁷⁰ Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Cambridge: Intersentia, 2012), 46, quoting ECtHR, *Foucher v. France*, app. no. 22209/93, Judgment of March 18, 1997.

⁷¹ *Ibid.*, 46, n. 117, quoting ECtHR, *Gorrainz Lizzarraga and others v. Spain*, app. no. 62543/00, Judgment of April 27, 2004, para. 56.

⁷² *Ibid.*, 46, quoting ECtHR, *Foucher v. France*. The judgment also states that parity includes the right to counsel and to adequate time and facilities.

⁷³ E.g., in *Lanz v. Austria* the ECtHR stated that: “[T]he principle of equality of arms does not depend on any further, quantifiable unfairness flowing from a procedural inequality.” Whereas in *Kremzow v. Austria* the court claimed that there was no violation of equality from a procedural breach because “the defence was not in any way prejudiced by the difference.” See ECtHR, *Lanz v. Austria*, no. 24430/94, January 31, 2002, 58; and ECtHR, *Kremzow v. Austria*, Series A, no. 268-B, September 21, 1993, 75. Both are quoted in Stefan Trechsel, *Human Rights in Criminal Proceedings* (Oxford: Oxford University Press, 2005), 98.

the perspective of protecting the rights of defendants—of highlighting breaches of guarantees whether or not they have been determined by the court to have prejudiced the defense.

Additional sources, which the International Committee of the Red Cross (ICRC) considers constitute aspects of the customary law of fair trials and defendant protections,⁷⁴ include the 1990 Cairo Declaration on Human Rights in Islam,⁷⁵ and the 1991 Draft Code of Crimes against the Peace and Security of Mankind by the United Nations' International Law Commission (ILC).⁷⁶ However, they contain vague references to fairness and add little to treaty or customary law.

Defense protections and politics in international criminal justice

This section explores the development of international criminal justice from the early twentieth century to the early post-Cold War period, focusing on the evolution of liberal legal fairness standards. This is to provide background to the case study chapters on the ICTY and ICC, and to provide context for the later analysis in this chapter of legality and defense parity at the IMT.

Before World War II

⁷⁴ For the list see ICRC, www.icrc.org/customary-ihl/eng/docs/v2_rul_rule100.

⁷⁵ Cairo Declaration on Human Rights in Islam, August 5, 1990, article 19.e. The declaration was made by member states of the Organisation of the Islamic Conference (now the Organisation of Islamic Cooperation), www1.umn.edu/humanrts/instree/cairodeclaration.html. It contains a reference to “all the guarantees of defence.”

⁷⁶ ILC, Draft Code of Crimes against the Peace and Security of Mankind, adopted by the International Law Commission, reprinted in Report of the International Law Commission on the work of its forty-third session, April 29-July 19, 1991, UN doc. A/46/10, 1991, article 8(a). The report, with commentaries, is available at: legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf. The reference is to “a fair and public hearing.”

There is a medieval European history of courts trying individuals for international crimes, but this history has had no discernable impact on twentieth century developments.⁷⁷ That a political consensus was developing towards accountability by the early twentieth century is indicated by two attempts to try individuals for crimes committed during World War I involving German and Turkish nationals. The 1919 Treaty of Versailles after the war accused the wartime German head of state, Kaiser Wilhelm II, of international crimes; and it stated the Allied powers' intention to establish a "special tribunal" to try him, to be composed of judges from each of the victor states. It also declared the Allies' right to establish military tribunals to try German military personnel for war crimes.⁷⁸ The Netherlands, however, where the Kaiser had fled following the war, refused to extradite him, arguing that the crimes for which he was wanted did not exist internationally, and so would be a breach of legality through the retroactive enforcement of law.⁷⁹

There were also Allied demands to prosecute Turkish commanders in charge of the deportation of the Armenian Christian minority from Turkey between 1915 and 1917. Some 2

⁷⁷ One of the first domestic trials was in 1268, when the 16-year-old Duke of Swabia, Conradin von Hohenstaufen, was tried and executed by a court of the Count of Anjou for the crime of aggression (unjust war). The first arguably international trial took place in 1474. The Burgundian knight Peter von Hagenbach was put on trial in the city of Breisach for mass atrocities—"crimes against the laws of nature and man"—and convicted, by a court of the Holy Roman Empire, for acts committed during the sack of the city while governing parts of Alsace for the Duke of Burgundy during the previous five years. See Timothy L.H. McCormack, "From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime," in *The Law of War Crimes: National and International Approaches*, ed. Timothy L.H. McCormack and Gerry J. Simpson (The Hague: Kluwer law International, 1997), 38.

⁷⁸ The Treaty of Versailles, articles 227 and 228. The former article accused the Kaiser of "a supreme offence against international morality and the sanctity of treaties."

⁷⁹ Germany agreed to try those accused of war crimes, but these domestic trials, held in Leipzig in 1921, came to little as the new Weimer government sought to put an end to the harsh domestic criticism the trials aroused. Only 12 low-level offenders of the approximately 900 accused by the allies were brought to trial. See M. Cherif Bassiouni, "World War I: 'The War to End all Wars,'" *Denver Journal of International Law and Policy* 30, no. 2 (2002): 280-1.

million Armenians are estimated to have died from systematic brutality during the expulsion,⁸⁰ including many documented acts of mass murder, sexual violence, and starvation, in what the US ambassador to the Ottoman empire at the time, Henry Morgenthau, described as “race extermination”⁸¹ and has since been widely labeled as genocide.⁸² It also spurred the first recorded diplomatic use of the phrase “crimes against humanity.”⁸³ While the first peace deal between the Allies and the post-Ottoman Turkish government, the 1920 Treaty of Sèvres, declared the right of the Allies to set up courts to try Turks for the Armenian atrocities, it was not ratified by any of its signatories and the ultimate settlement, contained in the 1923 Treaty of Lausanne, omitted this provision.⁸⁴

While the suggestion of prosecuting a head of state for international crimes was radical, none of these trials took place. Nevertheless, the situation set an “incomplete precedent” for governmental responsibility and for prosecution for “crimes against peace” which were implemented less than 30 years later at Nuremberg and Tokyo.⁸⁵ As stated by the ILC in 1950: “After the termination of the First World War, the conviction crystallized in the minds of

⁸⁰ Daniel Jonah Goldhagen, *Worse Than War: Genocide, Eliminationism, and the Ongoing Assault on Humanity* (New York: PublicAffairs, 2009), 38.

⁸¹ United States Department of State, Communiqué from Ambassador Morgenthau to the US Secretary of State, July 16, 1915, www.armenian-genocide.org/us-7-16-15-text.html.

⁸² E.g., Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 2nd ed. (New York: The New Press, 2002), 17; William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 24-6; and Adam Jones, *Genocide: A Comprehensive Introduction*, 2nd ed. (London: Routledge, 2011), 149-87.

⁸³ This was in an official response by the British, French, and Russian governments to the Turkish atrocities, published in dispatch 796 (file no. 867.4016/67), The Ambassador in France (Sharp) to the Secretary of State, Paris, 28 May 1915, published in *Papers Relating to the Foreign Relations of the United States, 1915, Supplement* (Washington DC: US Government Printing Office, 1928), 981.

⁸⁴ British pressure did lead to the prosecution of a few low-level offenders by Turkish military tribunals, but the most senior accused were prosecuted in absentia, as they had fled to Germany after the war.

⁸⁵ M. Cherif Bassiouni, “International Criminal Justice in Historical Perspective: The Tension Between States’ Interests and the Pursuit of International Justice,” in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), 132.

thinking people that the horrors of war must be spared to men, that war is a crime against humankind and that such a crime must be prevented and punished.”⁸⁶ The ILC also noted that “[p]ublic opinion in favour of the establishment of an international criminal jurisdiction continued to manifest itself through the thought and action of official bodies, scientific institutions and leading jurists.”⁸⁷

At a 1925 Washington DC conference, the Inter-Parliamentary Union explored the idea of a legal code to help prosecute for the crime of instigating a war of aggression—with the inclusion of the principle of legality. The 1926 Brussels conference of the International Association of Penal Law endorsed the idea that the Permanent Court of International Justice⁸⁸—the first international court to adjudicate legal disputes between states—acquire individual criminal jurisdiction and that treaties be drawn up—thus avoiding retroactivity.⁸⁹

Between World War I and II, two notable attempts were also made to create the world’s first permanent international court to try individuals. First, in 1920 the judicial advisory committee created prior to the Permanent Court of International Justice recommended that the latter also try individuals for international crimes. The League of Nations, to which the new court would be

⁸⁶ International Law Commission, “Report on the Question of International Criminal Jurisdiction,” by Ricardo J. Alfaro, Special Rapporteur, Extract from the Yearbook of the International Law Commission 1950, vol. II, UN doc. A/CN.4/15 and Corr.1, 2, legal.un.org/ilc/documentation/english/a_cn4_15.pdf.

⁸⁷ *Ibid.*, 3.

⁸⁸ The court was established in 1922 and ceased to exist in 1945, when it was replaced by the International Court of Justice, or World Court, a subsidiary body of the new United Nations, which itself replaced the now defunct League of Nations.

⁸⁹ International Law Commission, “Report on the Question of International Criminal Jurisdiction,” 3-5. It also noted international criminal jurisdiction being discussed by the Advisory Committee of Jurists appointed by the council of the League of Nations to draw up plans for an International Court of Justice; the idea of an international criminal court discussed at the 1922 conference of the International Law Association in Buenos Aires; and a draft statute presented at the 1924 Stockholm conference, with the organization endorsing the idea of such a court at its 1926 Vienna conference.

attached, rejected the proposal due to the almost total lack of political will among states to endorse such an expansion of international jurisdiction.⁹⁰

Second, on October 9, 1934, King Alexander I of Yugoslavia and the French foreign minister, Louis Barthou, were assassinated in an attack by a Bulgarian nationalist in Marseilles. Later that year the French government made proposals to the League of Nations to prosecute terrorism, which led to the drafting of two treaties: one to criminalize terrorism under the domestic law of signatories, and one to create a permanent court to prosecute it. The court would have in effect have been a “hybrid” tribunal, applying domestic law in an international court.⁹¹ Again there was insufficient political will to move either treaty forward.⁹²

The IMT at Nuremberg and the IMTFE at Tokyo

Attitudes towards international prosecution began to change in 1942 as the wartime Allies began to consider the idea of holding the Axis Powers responsible for atrocities during World War II, and the following year, in the Moscow Declaration, they stated their intention to prosecute Axis soldiers for war crimes.⁹³ The UN War Crimes Commission (UNWCC), established by 17 Allied states in October 1943, provided legal recommendations, which arguably developed the

⁹⁰ The international crimes considered were “a breach of international public order or against the universal law of nations.” See Walter George Phillimore, “An International Criminal Court and the resolutions of the Committee of Jurists,” *British Yearbook of International Law* 3, no. 1 (1922-3): 79-86, quote at 80.

⁹¹ Historical Survey of the Question of International Criminal Jurisdiction: Memorandum Submitted by the Secretary-General, United Nations General Assembly, International Law Commission, 1949 (UN doc. A/CN.4/7/Rev.1), 16-18.

⁹² L.C. Green, “International Crimes and the Legal Process,” *The International and Comparative Law Quarterly* 29, no. 4 (1980): 567-584.

⁹³ M. Cherif Bassiouni, “The Perennial Conflict Between International Criminal Justice and Realpolitik,” *Georgia State University Law Review* 22, no. 3 (2006): 553.

customary international law of crimes against humanity applied by international and domestic war crimes trials after 1945.⁹⁴

Nevertheless, at a September 1944 meeting in Québec, British prime minister Winston Churchill and US president Franklin D. Roosevelt still agreed that the political solution of summary killings was appropriate for the enemy leaders—only ordinary soldiers should be prosecuted.⁹⁵ Soviet premier Joseph Stalin stated that he would prefer prosecution—almost certainly a show trial, similar to those he had instigated against his own military officers before the war, and German prisoners of war (POWs).⁹⁶

At this time, no concern was evident among the Allied leaders that international criminal jurisdiction need be exercised over defeated wartime leaders in order to punish them. They would in effect be punished retroactively and without recourse to any evidentiary standards—a key aspect of defense parity—to determine if they had committed such crimes.⁹⁷ The Allied concerns at this point were purely political—legal principles seem to have been irrelevant to Churchill and Roosevelt’s thinking until 1945.⁹⁸ Churchill did not even seem to grasp the

⁹⁴ For example, Allied representatives at the UNWCC were using the term “crimes against humanity” by at least the spring of 1944. The UNWCC from its origins seems to have been concerned to extend war crimes prosecutions beyond its traditional boundaries, for actions committed outside of war. See Dan Plesch and Shanti Sattler, “Changing the Paradigm of International Criminal Law: Considering the Work of the United Nations War Crimes Commission of 1943-1948,” *International Community Law Review* 15, no. 2 (2013): 203-23; and Egon Schwelb, “The Work of the United Nations War Crimes Commission,” in *The British Year Book of International Law* 23 (1946): 373, archive.org/stream/britishyearbook031843mbp/britishyearbook031843mbp_djvu.txt.

⁹⁵ Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill: University of North Carolina Press, 1998), 80, 87-9.

⁹⁶ *Ibid.*, 66-70.

⁹⁷ Gallant, *Principle of Legality*, 74.

⁹⁸ Curiously though, Churchill seems concerned to work within a British legal framework, as his cabinet discussions show he attempted to revive the old English legal designation of “outlaw” for the Axis leaders, which had been a designation for suspects of serious crimes who did not appear for trial—they could be legally killed by anyone who captured them. See Kochavi, *Prelude to Nuremberg*, 215.

concept of the rule of law internationally beyond the idea of punishing a defeated enemy under the guise of legal terminology—he was even prepared for Britain to commit war crimes in direct retaliation for German atrocities.⁹⁹

The Allies were persuaded to establish actual trials for the Axis leadership by several political, normative, and, most weakly, legal factors. On the American side, there was opposition within the US cabinet, yet Secretary of State Cordell Hull was persuaded to support trials by Secretary of War Henry Stimson, who argued that they were “consistent with the advance of civilization.”¹⁰⁰ The death of Roosevelt and his replacement by Vice President Harry S. Truman in April 1945 was perhaps the most significant issue leading to the US change of heart: Truman had “an idealistic belief in the beneficent power of law and the wisdom of judges.”¹⁰¹ Churchill seems to have been concerned about German retaliation against British POWs and by the evolving US position.¹⁰²

Other reasons include publicizing the evidence of Axis atrocities so as to preclude later denials—the political goal of narrative construction—and the related issue of educating the citizens of the defeated nations about their leaders’ crimes—delegitimizing the enemy.¹⁰³ That is, the reasons for establishing trials were primarily political, with arguably only Truman among the major Allied leaders concerned with the legal legitimacy of criminal justice standards.

⁹⁹ The minutes from a 1942 cabinet meeting note that “The Cabinet discussed the possibility of reprisals for the savage cruelties being practised by the Germans in Czechoslovakia. The PM [Prime Minister Churchill] suggested wiping out German villages (three for one) by air attack.” See British War Cabinet, 74th Mtg., 15 June 1942, www.nationalarchives.gov.uk/releases/2006/january/january1/war_crimes.htm.

¹⁰⁰ Robertson, *Crimes Against Humanity*, 228.

¹⁰¹ Ibid.

¹⁰² Kochavi, *Prelude to Nuremberg*, 89-90.

¹⁰³ Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (London: Routledge, 2007), 56.

The Allies convened the International Conference on Military Trials (the London Conference), from June 26 to August 8, 1945, to establish the ground rules for a military tribunal for the Axis leaders. One of the most significant impacts of the resulting treaty, the Charter of the International Military Tribunal¹⁰⁴—or London Charter—on the development of international criminal justice was that it provided a definition of crimes against humanity. While that definition has shifted over time—there is no longer any necessary connection to armed conflict, for example—its core features are still discernable today and crimes against humanity has become central to international criminal prosecution. The creation of the crime was intended by the Allies to enable prosecution for offenses against civilians in occupied territory, especially the Holocaust in central and eastern Europe. The retroactive enforcement of this new law consequently constituted a major trial fairness weakness at the IMT.

General issues relating to legal fairness standards for defendants at the IMT and the International Military Tribunal for the Far East (IMTFE) at Tokyo are discussed here, including their contribution to the development of international criminal justice. Specific issues relating to the research indicators at the IMT, however, are analyzed in detail in the last section of the chapter.

The international humanitarian law upon which international criminal justice is significantly based was intended to have a largely preventive function and had not been designed with individual punishment as a core feature. So while international criminal law contains significant substantive prohibitions it provides little guidance on criminal prosecution. This has enabled courts—starting with the IMT—to have a vastly greater role than typically found in an

¹⁰⁴ Charter of the International Military Tribunal (London Charter), London, August 8, 1945.

established domestic legal system in creating the procedural rules that shape the conduct of trials and provide them with—or not—the legitimacy of a fair trial with adequate protections for the accused.¹⁰⁵

The complete Allied victory in World War II made possible the international prosecution of senior war criminals. This established at the outset a connection within international criminal justice between the level of coercive state power involved in the establishment of an international court, and its effectiveness: this is demonstrated, in particular, by the ease or otherwise for courts to obtain suspects and evidence.¹⁰⁶ In Europe, the victorious Allied states—the United States, the Soviet Union, the United Kingdom, and France—established the IMT at Nuremberg in 1945 to try the Nazi leadership for crimes against peace, war crimes, and crimes against humanity. The trial lasted from November 20, 1945 until final statements were made on August 31, 1946. The verdicts were announced on October 1 of the latter year: of the 24 individuals who were initially indicted, 19 were convicted,¹⁰⁷ three were acquitted, one was found unfit for trial, and one committed suicide before the trial began.

The United States alone created a similar court in Tokyo in 1946, the IMTFE, under the control of the supreme Allied commander, General Douglas MacArthur, to try high-level Japanese offenders for the same crimes.¹⁰⁸ In the end only crimes against peace were prosecuted.

¹⁰⁵ Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (New York: Oxford University Press, 2004), 94.

¹⁰⁶ Contrast, for example, the relative ease of capturing key surviving suspects for the IMT—e.g. Hermann Göring—with the difficulty for the ICTY of securing the top suspects in the Yugoslavia wars, Radovan Karadžić and Ratko Mladić.

¹⁰⁷ One of the 19, Martin Bormann, was never captured and was tried in absentia. Bormann was Hitler's private secretary and one of the most powerful individuals in Nazi Germany during the later war period.

¹⁰⁸ The IMT operated from November 1945 to October 1946, and the IMTFE from April 1946 to November 1948. In addition to the IMT, the Allies in Germany established other courts to try a larger number of lower-level offenders under Control Council Law no. 10, issued by the Allied occupation

Eleven judges were appointed, all by MacArthur. The legal basis for the court's creation was very different to that of the IMT: instead of the latter's multilateral treaty (the London Charter)—which excluded Germany—the IMTFE's basis was the 1945 Instrument of Surrender of Japan to the United States, and therefore the tribunal arguably possessed the legal consent of the occupied state. When the trial came to a close in November 1948, of the 28 accused, all 25 of those who had lived until the verdict was presented were convicted.¹⁰⁹

There were also prosecutions held for lower ranking offenders in each of the Allied Zones of Occupation, and in East Asia by the United States. Under Control Council Law No. 10 the Allies prosecuted German defendants for the same crimes as under the IMT. In the Philippines, Japan, and elsewhere the Allies prosecuted around 6,000 Japanese.¹¹⁰ Some of these trials developed substantive criminal law, including command responsibility as a mode of criminal liability.¹¹¹

For the purposes of the dissertation, the IMT is important for establishing that, as stated in the Nuremberg judgment, in international trials defendants are to “receive a *fair trial* on the facts and *law*,” encapsulating both features of legitimacy explored in the research.¹¹² However, what

authority in Germany. The United States established such trials at Nuremberg and Dachau under US domestic jurisdiction. Lower level tribunals in Japan also tried thousands for war crimes.

¹⁰⁹ IMTFE Judgment, November 4, 1948, in *Documents on the Tokyo War Crimes Tribunal: Charter, Indictment and Judgments*, ed. Neil Boister and Robert Cryer (Oxford: Oxford University Press, 2008), 598-626.

¹¹⁰ Richard Pritchard, “The International Military Tribunal for the Far East and the Allied National War Crimes Trials in Asia,” in *International Criminal Law, Vol. 1*, ed. M. Cherif Bassiouni (Ardsley, NY: Transnational Publishers, 1999), 135-6.

¹¹¹ Under the liability mode of command, or superior, responsibility, an individual in a position of authority is held criminally liable for crimes committed by subordinates even if he or she did not authorize those actions. The commander should have known and been in a position to stop them: the commander is being held accountable for permitting the crimes. This originates with the US trial of General Tomoyuki Yamashita in the Philippines in December 1945. See Antonio Cassese, Guido Acquaviva, Mary Fan, and Alex Whiting, *International Criminal Law: Cases & Commentary* (Oxford: Oxford University Press, 2011), 422-31.

¹¹² International Military Tribunal (Nuremberg), Judgment of October 1, 1946, 444. Italics added.

constitutes fairness has been subject to much debate, as discussed below. The London Charter established an adversarial trial structure at Nuremberg, with prosecutors attempting to persuade the court's four judges—one appointed by each of the major Allied states—of the guilt of the defendants, who had access to legal counsel. The primary concessions to the civil law system were trial by judges rather than jury (the former would decide guilt or innocence as well as sentence), and very loose rules of evidence (including reliance on hearsay, not typically admissible in common law jurisdictions).

In broad terms, “[e]xcept for guaranteeing a right to counsel...[the IMT and IMTFE] paid very little attention to the rights of the accused.”¹¹³ Positive aspects of fairness towards defendants at the IMT include the right to counsel, to present evidence and cross-examine prosecution witnesses, and to be presented with the charges and with a translation.¹¹⁴ Additional rights were contained in the court's Rules of Procedure, including that of the defense to request the court's assistance in locating evidence.¹¹⁵ The trials were also translated into the defendants' own languages, and defendants had access to a detailed indictment. The IMTFE Charter and Rules of Evidence established basic defense rights in relation to the indictment, counsel, evidence, and translation.¹¹⁶ Despite the similarity of fair trial provisions between the tribunals, fairness at the IMTFE was in practice significantly weaker, due to the control over the

¹¹³ Kenneth S. Gallant, “Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard, and What Might be Done about One of Them,” *Criminal Law Forum* 14 (2003): 318.

¹¹⁴ London Charter, article 16.

¹¹⁵ Rules of Procedure (IMT), October 29, 1945.

¹¹⁶ International Military Tribunal for the Far East (IMTFE) Charter, Tokyo, January 19, 1946, articles 9-10; and Rules of Procedure (IMTFE), Tokyo, April 26, 1946, rules 1, 2, 6.

proceedings exercised by General MacArthur, who was more concerned with how the trial might negatively affect the US occupation of Japan than with the fairness of the trial itself.¹¹⁷

Fairness weaknesses at both tribunals include limited access to copies of many prosecution evidence documents (i.e. poor disclosure); inability of defense counsel to travel abroad to conduct investigations; all prosecutors and judges were from Allied states; defense lawyers could only come from Germany, and so were unused to the Anglo-American adversarial trial system used by the tribunals; there were limited facilities for defense to prepare their cases; and there was no appeals process.¹¹⁸ The defendants were also prohibited from using the *tu quoque* legal argument: you have also committed the crimes that I have.¹¹⁹

The IMTFE trial was characterized by pressure to come to a swift conclusion, with harmful effects on defense parity, including evidentiary standards. There was lax judicial oversight of evidence the prosecution wished to introduce, in contrast to standard practice in adversarial trial proceedings. The judges gave increasingly less scrutiny over time, allowing a great deal of dubious documentation to be presented against the defendants, including documents without authentication, excerpts, and written statements without the presence of the witness for cross-examination.¹²⁰ When it came time for the defense to present its case the judges applied stricter

¹¹⁷ Steven Ratner, Jason S. Abrams, and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd ed. (Oxford: Oxford University Press, 2009), 211.

¹¹⁸ London Charter, article 3.

¹¹⁹ This weakened the ability of counsel to construct a reasonable defense: in international customary law, establishing that an action was broadly undertaken by states during the same conflict aids in confirming its status as a customary practice, and therefore its legality. Of course the practice could still be prohibited under treaty law. See Robertson, *Crimes Against Humanity*, 230.

¹²⁰ Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008), 104-10.

standards for evidentiary inclusion—claiming now that the opposite approach for the other side would help to speed up the trial.¹²¹

Both tribunals suffered from the partiality of all judges and prosecutors being chosen by the Allies, and only the losers being tried, leading to the charge of victor's justice.¹²² In addition, allegations of bias were aimed at two of the IMTFE judges: William Web, for his participation in the Australian War Crimes Commission investigations into Japanese atrocities; and especially Delfin Jaranilla, who had been a prisoner of war on the infamous Bataan Death March in the Philippines in 1942, on which thousands of Filipino and American POWs died due to their brutal treatment at the hands of their Japanese captors.¹²³ Additionally, MacArthur, as mentioned, appointed all 11 judges and the prosecutor at the IMTFE.¹²⁴

The Nuremberg tribunal has had a greater impact on the development of international criminal justice than the Tokyo tribunal partly because of the greater partiality of the latter.¹²⁵ The French judge at the IMTFE, Henri Bernard, suggested that the very fact that the Allies had not just executed Japan's leadership out of hand, which it might easily have done, was enough to justify the trials. They were conceived of as the best justice the leaders could expect: the legal status of the trials was justified on normative grounds, not legal.¹²⁶

¹²¹ Ibid., 111-14.

¹²² Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (New York: William Morrow, 1988), 63-71.

¹²³ Boister and Cryer, *The Tokyo International Military Tribunal*, 83-4.

¹²⁴ Jennifer K. Elsea, "Selected Procedural Safeguards in Federal, Military, and International Courts," Congressional Research Service—The Library of Congress, Report for Congress RL31262, updated 18 September 2006, 9.

¹²⁵ Ratner, Abrams, and Bischoff, *Accountability for Human Rights Atrocities in International Law*, 211.

¹²⁶ Separate Opinion of Justice Henri Bernard, 12 November 1948, 2-3, 105 IMTFE Records, cited in Gallant, *Principle of Legality*, 76.

Post-Nuremberg developments

In the immediate postwar period, the IMT generated interest in substantive law and a possible permanent court. However, the UN General Assembly consistently postponed consideration of a court, primarily due to disputes about the definition of aggression and the basis for establishing jurisdiction.

The UNWCC had recommended in 1944 that a post-war international criminal tribunal have jurisdiction over crimes committed “because of race, nationality, religious or political belief,” and regardless of where committed.¹²⁷ This appears to be the first discussion in an official legal context of prosecution for Axis crimes during World War II committed on the basis of the identity of the victim. Three of these forms of social identity (all but political beliefs) also found their way into the 1948 Genocide Convention. The term “genocide” was first utilized legally at the international level in the context of the IMT—the American delegation to the 1945 London Conference had even proposed that genocide be prosecuted as a specific crime.¹²⁸

¹²⁷ UNWCC 20th meeting, 30 May 1944, 1.

¹²⁸ Planning Memorandum Distributed to Delegations at Beginning of London Conference, article IV, 9(a), reprinted in Robert H. Jackson, “Report of Robert H. Jackson United States Representative to the International Conference on Military Trials,” London, 1945, 37, avalon.law.yale.edu/subject_menus/jackson.asp. In addition to other crimes, the memorandum proposed the inclusion in the tribunal’s remit of: “Genocide or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) sterilization and castration; (3) depriving them of clothing, shelter, fuel, sanitation, medical care; (4) deporting them for forced labor; (5) working them in inhumane conditions.” While incorporating the core aspects of Raphael Lemkin’s definition of genocide, the memorandum’s definition was far more detailed in relation to the underlying acts contributing towards the crime. Elements of the crime as later described in the Genocide Convention were already present: that the conduct must be directed against a group, at least partially defined in cultural terms, and the listing of specific prohibited acts which could bring about genocide. Later drafts of the memorandum, however, did not refer to genocide. See Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), 194. The word “persecution” was substituted in the Nuremberg Charter—as an underlying offense of crimes against humanity. However, the treaty law origins of the crime of genocide lie here, as various components of genocide as later codified in the 1948 convention are present in the charter’s definition of crimes against humanity.

During the Cold War, there were various developments in substantive international criminal law, including the creation of the Genocide Convention; and the 1949 Geneva Conventions and the 1977 Additional Protocols, which developed the elements of war crimes. There were also developments of procedural protections for defendants, but no international tribunals were created, and so there was no evolution in the practice of legal fairness standards.¹²⁹

Over 40 years after the IMTs, the collapse of superpower rivalry generated a major shift in the global political environment, which led to improved prospects for cooperation in the UN Security Council. The early post-Gulf War euphoria about the possibilities for robust council action quickly soured in the wake of the debacle in Somalia in 1993, the inability to end the war and atrocities in the former Yugoslavia, and the lack of political will among major powers in the Security Council to stop the genocide in Rwanda. Instead of military action, the council created tribunals to prosecute those responsible for atrocities in the latter two contexts.

In resolution 827 in May 1993 the council created the International Criminal Tribunal for the Former Yugoslavia, based in The Hague, Netherlands. In November the following year, the International Criminal Tribunal for Rwanda, based in Arusha, Tanzania, was established in resolution 955. The legal basis for the tribunals was initially controversial because the UN Charter does not explicitly provide the Security Council with the authority to establish judicial bodies. The objection that the council was acting *ultra vires*—beyond its legal authority—was raised during negotiations over both tribunals, especially by China and Brazil.¹³⁰ However, the

¹²⁹ The only significant trial for international crimes during the Cold War was the genocide trial of Adolf Eichmann under domestic jurisdiction in Israel in 1961. Eichmann's defense claimed that genocide was being enforced retroactively in his case, but this was dismissed by the court. See Schabas, *Genocide in International Law*, 426-9.

¹³⁰ Eric Rosand, "The Security Council As 'Global Legislator': Ultra Vires or Ultra Innovative?" *Fordham International Law Journal* 28, no. 3 (2004): 566.

secretary-general's argument became accepted: that the legal basis for the tribunal lay in the council's Chapter VII authority to respond to threats to international peace and security with non-military measures that are binding on all member states.¹³¹

The secretary-general and the Security Council demonstrated far greater concern with legality and defense parity than was demonstrated by the Allies in creating the IMT. The secretary-general's report made basic recommendations for guaranteeing the rights of the accused,¹³² and these were included in the court's statute.¹³³ Specific issues relating to the research indicators are analyzed in Chapter 4.

The establishment of the International Criminal Court in 2002 can be traced back to a coalition of 16 Caribbean and Latin American states led by Trinidad and Tobago,¹³⁴ which encouraged the General Assembly in 1989 to request the ILC to study the possibility of creating a court to combat drug trafficking.¹³⁵ The ILC continued its research into a draft code of international crimes,¹³⁶ producing a draft court statute in 1994.¹³⁷ Building on the momentum of the initial operations of the ad hoc Security Council tribunals, and learning from their experience,

¹³¹ UN Secretary-General, "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)," UN doc. S/25704, May 3, 1993, Section I.

¹³² *Ibid.*, paras. 99-107.

¹³³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN doc. S/25704 at 36, annex (1993) and S/25704/Add.1, adopted by the Security Council on May 25, 1993, UN Doc. S/RES/827, articles 18-21 and 23-28.

¹³⁴ Andrew Novak, *The International Criminal Court: An Introduction* (Basel: Springer, 2015), 18-19.

¹³⁵ General Assembly resolution 44/39, 4 December 1989.

¹³⁶ See, for example, International Law Commission, *Ninth Report on the draft Code of Crimes against the Peace and Security of Mankind*, UN doc. A/CN.4/435 and Add.1 & Corr.1., 1991.

¹³⁷ International Law Commission, Draft Statute for an International Criminal Court, adopted at the ILC's 46th session, 1994. Appears in Yearbook of the International Law Commission, 1994, vol. II (Part Two), with commentaries, legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf.

the ILC's draft became the basis for the founding Rome Statute of the ICC in 1998.¹³⁸ Legality of crimes and punishment in particular were acknowledged explicitly in the statute,¹³⁹ though there are concerns with its implementation, as there are for defense parity.¹⁴⁰

In broad terms, fairness towards defendants has improved significantly since the first international criminal tribunal was created in 1945. However, as explained in Chapters 4 and 5, when the most important indicators of legal legitimacy are examined, the trajectory towards a modern system of international criminal justice with very high levels of defense protection is not so clear cut.

The IMT: Institutional power and bias towards prosecution

This section provides an exploration of the research indicators in relation to the IMT at Nuremberg, and the role of institutional power and other political factors in shaping the legal dynamic between the prosecution and defense at the tribunal. This enables a comparison to the more detailed examination of these indicators at the ICTY and ICC in later chapters. First, the legality of crimes and punishment is examined in relation to the two mass atrocity crimes

¹³⁸ Rome Statute of the International Criminal Court, circulated as doc. A/CONF.183/9, July 17, 1998. Ironically drug-related offenses do not feature in its jurisdiction.

¹³⁹ Ibid., articles 22-3.

¹⁴⁰ Due to concerns among Security Council members about the cost of the ad hoc tribunals and the council's time they were absorbing, no purely international tribunals have been established since the ICTR. Instead, the UN has opted for "hybrid" courts, staffed by domestic and international judges, applying a mixture of international and domestic law, and mostly financed outside of the UN. One type of hybrid operates in territories under UN or UN-approved governance: those established in Kosovo (1999), East Timor (2000), and Bosnia and Herzegovina (2005). Another variation of hybrid, established with UN assistance, provides international staff and financing after a request from a post-conflict government. Such assistance is designed to compensate for weak domestic judicial capacity and diminish the perception of victor's justice. These consist of the Special Court for Sierra Leone (2002); the Extraordinary Chambers in the Courts of Cambodia (2003); and the Special Tribunal for Lebanon (2009), which is the first international tribunal to solely apply domestic law.

prosecuted at Nuremberg: war crimes and crimes against humanity.¹⁴¹ Second, the defense parity indicators of institutional support and procedural guarantees are examined. The institutional support sub-indicators of court structure and court support for investigation and evidence gathering are explored, followed by the procedural guarantee sub-indicators of disclosure and the cross-examination of witnesses. The data sources utilized include the London Charter and Rules of Procedure, the trial judgment and other IMT documents, UNWCC documents, personal memoirs, and secondary historical sources.

See Table 3.1 below for a summary of defendant information. Some of the defendants and their counsel are referred to in the analysis below. Columns three and four, detailing crimes charged and sentence, relate to the legality of crimes and punishment, respectively.

Table 3.1 Defendants at the IMT at Nuremberg

Defendant ¹⁴²	Chief counsel	Crimes charged (and verdict) ¹⁴³	Sentence
Bormann, Martin (<i>in absentia</i>)	NA	WC (G), CAH (G)	Death
Dönitz, Karl	Otto Kranzbühler	WC (G)	10 years

¹⁴¹ Genocide was not prosecuted as a separate crime at the IMT, but was effectively incorporated into “persecution:” an underlying offense of crimes against humanity in the charter. See London Charter, article 6.c: “persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.”

¹⁴² Two other defendants were originally scheduled to be tried: Gustav Krupp von Bohlen und Halbach and Robert Ley. The trial of the former was cancelled because of illness, while the latter committed suicide before the trial started.

¹⁴³ In this column only mass atrocity crimes are stated: WC=war crimes, CAH=crimes against humanity; and (G)=guilty, and (NG)=not guilty. Some defendants were also prosecuted for crimes against peace.

Frank, Hans	Alfred Seidl	WC (G), CAH (G)	Death
Frick, Wilhelm	Otto Pannenbecker	WC (G), CAH (G)	Death
Fritzsche, Hans	Heinz Fritz	WC (NG)	Acquitted
Funk, Walther	Walther Funk	WC (G), CAH (G)	Life
Göring, Hermann	Otto Stahmer	WC (G), CAH (G)	Death
Hess, Rudolf	Günther von Rohrscheidt	WC (NG), CAH (NG)	Life ¹⁴⁴
Jodl, Alfred	Franz Exner	WC (G), CAH (G)	Death
Kaltenbrunner, Ernst	Kurt Kauffmann	WC (G), CAH (G)	Death
Keitel, Wilhelm	Otto Nelte	WC (G), CAH (G)	Death
Neurath, Konstantin von	Otto Freiherr von Ludinghausen	WC (G), CAH (G)	15 years
Papen, Franz von	Egon Kubuschok	None	Acquitted ¹⁴⁵
Raeder, Erich	Walter Siemens	WC (G)	Life
Ribbentrop, Joachim von	Fritz Sauter	WC (G), CAH (G)	Death
Rosenberg, Alfred	Alfred Thoma	WC (G), CAH (G)	Death
Sauckel, Fritz	Robert Servatius	WC (G), CAH (G)	Death
Schacht, Hjalmar	Herbert Kraus	None	Acquitted ¹⁴⁶
Schirach, Baldur von	Fritz Sauter	CAH (G)	20 years

¹⁴⁴ Hess received his life sentence for guilt in relation to crimes against peace.

¹⁴⁵ Von Papen was tried for crimes against peace and found not guilty.

¹⁴⁶ Like Von Papen, Schacht was tried for crimes against peace and found not guilty.

Seyss-Inquart, Arthur	Gustav Steinbauer	WC (G), CAH (G)	Death
Speer, Albert	Hans Flächsner	WC (G), CAH (G)	20 years
Streicher, Julius	Hanns Marx	CAH (G)	Death

Source: Robert E. Conot, *Justice At Nuremberg* (New York: Carroll & Graf Publishers, 1983); Roderick Stackelberg, *The Routledge Companion to Nazi Germany* (New York: Routledge, 2007), 172; Eugene Davidson, *Trial of the Germans: Account of the Twenty-two Defendants Before the International Military Tribunal at Nuremberg* (New York: Collier Macmillan, 1969); the United States Holocaust Memorial Museum, “Nuremberg Military Tribunal: The Defendants,” www.ushmm.org/wlc/en/article.php?ModuleId=10007070; and various IMT documents at Yale Law School, The Avalon Project, “Nuremberg Trial Proceedings,” avalon.law.yale.edu/subject_menus/imt.asp.

Legality indicator 1: Non-retroactivity of crimes

This section first discusses broad issues of the legality of the crimes prosecuted at the IMT, and then specifically in relation to the enforcement of war crimes and crimes against humanity. The American, British, and French delegations to the London Conference, which created the IMT charter, expressed concern that the offenses they wished to prosecute were not established as crimes in international law and so could be challenged within the IMT. In response, the British chief representative—and chairman of the conference—David Maxwell Fyfe stated during one of the final conference discussions, in regard to the proposed charter: “I want to make it clear in

this document what are the things for which the tribunal can punish the defendants...It should not be left to the tribunal to say what is or is not a violation of international law.”¹⁴⁷

André Gros, the assistant to the French representative, disagreed—arguing that this constituted retroactive lawmaking.¹⁴⁸ However, the French delegation came around to accepting the British position, and the final charter draft reflected the eventual joint Allied position that the tribunal would be unable to challenge the Allied political declaration—as opposed to legal determination—of what constituted existing law.¹⁴⁹ As Cherif Bassiouni states, this position was “clearly tautological and self-serving.”¹⁵⁰ The Allied debates in relation to constructing the IMT illustrate how the legality of crimes, from the very beginning of international criminal prosecution, has been shaped as much by the institutional power of dominant states, bargaining over their political preferences within influential decision-making forums, as it has by legal determinations.

In relation to determining the legality of prosecution for war crimes, by the time period of the commission of the acts for which the IMT defendants were on trial—the late 1930s to 1945—some acts by soldiers in war had been outlawed by treaty: in the Hague Conventions of 1899 and 1907, and the Geneva Conventions I to III of 1864, 1906, and 1929, respectively.¹⁵¹ Germany,

¹⁴⁷ Comment of Sir David Maxwell Fyfe, Minutes of Conference Session of July 23, 1945, in Jackson, “Report of Robert H. Jackson,” 328.

¹⁴⁸ Comment of André Gros, in *ibid.*, 335.

¹⁴⁹ London Charter, article 3.

¹⁵⁰ Bassiouni, *Crimes Against Humanity*, 325.

¹⁵¹ Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, July 29, 1899; Hague Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907; Geneva Convention (I) for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, August 22, 1864; Geneva Convention (II) for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, July 6, 1906; and Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, July 27, 1929.

whose citizens were prosecuted at the IMT, had ratified the 1907 Hague Convention (with reservations), though not the 1899 one; and had ratified Geneva Convention III, relating to POWs.¹⁵² Also various authorities during the war, including Allied state representatives at the UNWCC, agreed that individuals could be tried for violations of the laws and customs of war.¹⁵³ Nevertheless, the British Foreign Office expressed concern during the war that prosecuting Axis leaders for war crimes would be in breach of the principle of legality, as no specific provision for prosecution for violations of the Hague and Geneva Conventions was envisaged when they were created.¹⁵⁴

However, precedents were set for prosecution for war crimes during the war which have been argued to demonstrate that it had attained customary law status by 1945.¹⁵⁵ The Soviets were the first to prosecute German POWs during the war, at Kharkov in Ukraine.¹⁵⁶ The United States prosecuted a few Germans captured on American soil, though concern that its own POWs might be prosecuted encouraged the United States to lead the German government to believe that it would not prosecute German POWs in Europe.¹⁵⁷ The British government consistently maintained the right to try German POWs throughout the war.¹⁵⁸ From the prior existence of war crimes law, in treaty and customary form, and the wartime practice of prosecuting German

¹⁵² Sheldon Glueck, “The Nuremberg Trial and Aggressive War,” in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford university Press, 2008), 82.

¹⁵³ Gallant, *Principle of Legality*, 70.

¹⁵⁴ Robertson, *Crimes Against Humanity*, 227-8.

¹⁵⁵ Gallant, *Principle of Legality*, 70.

¹⁵⁶ Michael J. Bazylar and Frank M. Tuerkheimer, *Forgotten Trials of the Holocaust* (New York: New York University Press, 2014), 16.

¹⁵⁷ Kochavi, *Prelude to Nuremberg*, 72-3.

¹⁵⁸ The British concern in relation to its own POWs was when they were punished without trial—the government protested this for its soldiers out of uniform (in violation of the laws of war) on special operations. *Ibid.*, 71-3.

POWs, war crimes are generally agreed to have attained a high level of non-retroactivity of enforcement at the IMT.

In relation to the legality of prosecution for crimes against humanity, some of the atrocities committed during World War II had similarities to those during World War I in that they were not covered under the existing international law of war crimes. This included acts perpetrated by a government or individuals against the state's own population; persecution on a political or racial basis in occupied territory; and attacks on the population of states not formally under occupation.¹⁵⁹ Providing the IMT with jurisdiction over this new category of crime gave the allies a way to prosecute such acts by the German government, including for the atrocities of the Holocaust—"genocide" only came into existence as a non-retroactively enforceable crime in its own right with the creation of the Genocide Convention in 1948.¹⁶⁰

The UNWCC provided legal and judicial recommendations that developed the customary international law of crimes against humanity applied by international and domestic war crimes trials after 1945.¹⁶¹ Its Allied representatives were using the term "crimes against humanity" by at least the spring of 1944: from its origins the UNWCC seems to have been concerned to extend war crimes prosecutions beyond its traditional boundaries into actions committed outside of war.¹⁶²

¹⁵⁹ The latter category includes Austria and Czechoslovakia, annexed by Germany in 1938 and 1938-9, respectively. Cassese, *International Criminal Law*, 103, n14.

¹⁶⁰ Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, and Text of the Convention, UN doc. A/RES/260 (III), December 9, 1948.

¹⁶¹ Plesch and Sattler, "Changing the Paradigm of International Criminal Law:" 203-23.

¹⁶² Egon Schwelb, "The Work of the United Nations War Crimes Commission," in *The British Year Book of International Law* 23 (1946): 373. The full text of the 1946 year book is available at: archive.org/stream/britishyearbooko031843mbp/britishyearbooko031843mbp_djvu.txt.

The lack of agreement and consistency of national positions, however, on whether individuals should be prosecuted for crimes against humanity is evident in UNWCC votes on a motion for expanding its investigations to include atrocities committed by German citizens against Axis citizens, and a motion on whether crimes against humanity “are war crimes within the jurisdiction of the UNWCC.” In the former, votes in favor included Czechoslovakia, the Netherlands, and the United States, while those against included Greece, the Netherlands, and the United Kingdom.¹⁶³ On the latter, those in favor included the Western states of Australia, Belgium, Czechoslovakia, Denmark, the Netherlands, Poland, the United Kingdom, and Yugoslavia, plus India. While there were no votes against, the following Western states abstained: France, Canada, New Zealand, Norway, and the United States, plus China.¹⁶⁴

This suggests that there was little agreement on the existence of the crime during the war. However, evidence for the legality of enforcement of crimes against humanity is suggested by an Allied declaration during World War I in response to reports of systematic attacks on Armenians by the Ottoman government: “In view of these new crimes of Turkey against humanity and civilization, the Allied governments announce publically to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.”¹⁶⁵ This is significant not only for being the

¹⁶³ UNWCC, *Complete History of the United Nations War Crimes Commission and the Development of the Laws of War* (London: HM Stationery Office, 1948), 175-7. Available at: UN War Crimes Project—History of the UNWCC, SOAS, www.cisd.soas.ac.uk/documents/un-war-crimes-project-history-of-the-unwcc,52439517, chapter 9 file.

¹⁶⁴ Plesch and Sattler, “Changing the Paradigm of International Criminal Law,” 214, note 75.

¹⁶⁵ The declaration is published in dispatch 796 (file no. 867.4016/67), The Ambassador in France (Sharp) to the Secretary of State, Paris, 28 May 1915, published in *Papers Relating to the Foreign Relations of the United States, 1915, Supplement* (Washington DC: US Government Printing Office, 1928), 981. Available at: uwdc.library.wisc.edu (The University of Wisconsin Digital Collections).

first official use of the term “crimes against humanity,” but also for the claim by major powers that individuals should be held criminally accountable.

After World War I, a commission set up by the allies to investigate war responsibility recommended in its report to the Paris Peace Conference, which established the terms of the postwar settlement, that an international tribunal be created to try the defeated states for, among other crimes, acts “in violation of the elementary laws of humanity” and individuals for “offenses against...the laws of humanity.”¹⁶⁶ The report lists 32 specific offenses, some of which constitute what have become the core underlying offenses of crimes against humanity, including murder, rape, and torture. However, due to the objection by US representatives that this would require applying law retroactively, crimes against humanity were not included in the proposed court’s remit.¹⁶⁷ Therefore while there was discussion of prosecution for this nascent offense, there was no agreement among states that would constitute the basis for claiming customary law status before World War II—partly due to concern about retroactive enforcement.

Dan Plesch and Shanti Sattler nevertheless argue that crimes against humanity were not created retroactively by the London Charter, as they were in the process of becoming customary law during the work of the UNWCC, from 1943 to 1948. This is implausible, as many of the crimes prosecuted at the IMT were committed before 1943 and it is questionable to claim that a customary law had crystalized before that point—i.e. before the commission of the crimes, which would be necessary for prosecution to avoid retroactivity. Furthermore, even the UNWCC did

¹⁶⁶ Report Presented to the Preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, in *Treaty of Peace with Germany*, Hearings before the Committee on Foreign Relations, United States Senate, Sixty-Sixth Congress, First Session on the Treaty of Peace with Germany, Signed at Versailles on June 28, 1919, by the President of the United States (Washington DC: Government Printing Office, 1919), 325-7.

¹⁶⁷ Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2008), 102-3.

not investigate actions other than those constituting war crimes.¹⁶⁸ At this stage, there was no consensus among Western states on the breadth of scope that international criminal law should have going forward beyond the IMT. The legality of the prosecutions for crimes against humanity at the IMT and IMTFE was also questioned at the time by such legal notables as Supreme Court Justice William Douglas and an Indian judge at the Tokyo tribunal, Rahadbinod Pal.¹⁶⁹

Christian Tomuschat argues that non-retroactivity of crimes is not applicable at the international level. Its purpose is to protect “legitimate confidence” by legal subjects in the legality of their acts: if subjects cannot reasonably be conceived of as being confident that their acts were legal then they may be legally prosecuted, whether or not a specific law exists at the time of commission: “Nobody should be prosecuted on account of a conduct, the punishable character of which he was not aware of, and could not be expected to have been aware of, when he practised that conduct.”¹⁷⁰ As he goes on to argue in relation to the crime under discussion: “crimes against humanity are not only morally objectionable, but deserve to be punished and must be punished because of their abhorrent character if peaceful coexistence in human society is to be maintained.”¹⁷¹ His argument is entirely normative and political, disregarding the legal character of the principle and conflating legal and substantive justice.

The IMT charter did not include non-retroactivity of crimes as a defendant right. Despite this the court considered a defense motion challenging the legality of enforcement for crimes against

¹⁶⁸ Gallant, *Principle of Legality*, 71.

¹⁶⁹ John F. Kennedy, *Profiles in Courage* (New York: Harper and Row, 1964), 190.

¹⁷⁰ Christian Tomuschat, “The Legacy of Nuremberg,” *Journal of International Criminal Justice* 4 (2006): 830-44, 835.

¹⁷¹ *Ibid.*, 835.

humanity.¹⁷² This is significant as “one beginning of a doctrine of international legal personality of individuals,” whereby individuals can assert international rights in relation to states and IGOs.¹⁷³ Nevertheless, the Nuremberg judges dismissed the motion, arguing that neither the defense nor prosecution had authority under the IMT charter to challenge the court’s substantive jurisdiction over crimes.¹⁷⁴

According to Antonio Cassese, the demands of political justice significantly overrode pressure for legal justice in terms of non-retroactivity.¹⁷⁵ Instead, the IMT judgment in 1946 makes clear that the tribunal saw political justice—that is, the political goals of the tribunal—as supreme over legal justice at the international level: “the maxim ‘*nullum crimen sine lege*’ [non-retroactivity of crimes] is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue.”¹⁷⁶ The judgment went on to argue that: “The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized

¹⁷² Motion Adopted by All Defense Counsel, November 19, 1945. *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, Nuremberg Trial Proceedings Vol. 1, avalon.law.yale.edu/imt/v1-30.asp. The motion was rejected on November 21, 1945.

¹⁷³ Gallant, *Principle of Legality*, 114.

¹⁷⁴ See London Charter, article 3: “Neither the Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel.”

¹⁷⁵ Antonio Cassese, “Crimes Against Humanity,” in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (New York: Oxford University Press 2002), 353-5.

¹⁷⁶ IMT, *Göring and Others*, Judgment and Sentence (Nuremberg Judgment), October 1, 1946, in *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946*, avalon.law.yale.edu/subject_menus/judcont.asp.

world.”¹⁷⁷ The judges claimed that political authorities—the Allied states—had the right, or jurisdiction, to perform legislative functions and determine what constitutes law—unrestricted by any principles of legality that define what constitutes law.

Thus, crimes against humanity were enforced retroactively at the IMT. Despite some disagreement among contemporary lawyers, the court’s dismissal of such a fundamental breach of legal protections for criminal defendants was nevertheless largely accepted at that time¹⁷⁸—although it has sustained greater criticism since.¹⁷⁹ Contemporary acceptance was partly due, as mentioned, to concern with achieving the court’s political goals, and the acknowledgment that its justice was the best the defendants could expect—better, that is, than the alternative of extra-judicial execution. Acceptance was also due to the lack of any international humanitarian or human rights legal provision at that time prohibiting retroactive enforcement of crimes.

Ultimately the IMT decided that while non-retroactivity of crimes was an accepted principle of domestic law, and arguably even of international law at that time due to consistency of state practice, it was not a limitation of the legal right of the Allies to create law binding on the tribunal and its defendants. That is, the judges argued that at that time legality was a binding principle in domestic law, and an international normative standard, but not a binding

¹⁷⁷ Ibid., quoted in Gallant, *Principle of Legality*, 113.

¹⁷⁸ Nina H.B. Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2003); and Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (New York: Alfred A. Knopf, 1946).

¹⁷⁹ Bassiouni, *Crimes Against Humanity*, 334. According to Michael Scharf, criticism of the retroactivity at the IMT in 1946 in a speech by Senator Robert Taft of Ohio was largely forgotten until it was reproduced in John F. Kennedy’s *Profiles in Courage*. See Michael P. Scharf, “Have We Really Learned the Lessons of Nuremberg?” conference paper presented at “Nuremberg and the Rule of Law: A Fifty-Year Verdict,” The Judge Advocate General’s School, United States Army, Charlottesville, Virginia, November 17-18, 1995, 2, www.pegc.us/archive/DoD/docs/Lessons_of_Nuremberg.doc; and Kennedy, *Profiles in Courage*, 228-30.

international legal principle.¹⁸⁰ The judges privileged substantive justice over legal justice, diminishing the legitimacy of the trial. This judgment has been relied upon since 1945 to argue that the IMT prosecutions were not in breach of legality.¹⁸¹ Ultimately, however, the dissertation agrees with Marko Milanovic, vice-president of the European Society of International Law, who argues that such an approach is not “intellectually honest.”¹⁸²

Legality indicator 2: Non-retroactivity of punishment

No punishment guidelines for committing war crimes are delineated in the applicable international treaty and customary law of war crimes during World War II, and as crimes against humanity were not established in either form of law there were, similarly, no punishment guidelines for commission of that offense. Therefore, while war crimes were not in breach of the retroactivity of crimes, and crimes against humanity were, the enforcement of both crimes at the IMT disregarded the principle of legality in regards to punishment.

An important concern in regards to the legality of punishment was the extent to which judicial discretion in determining sentences was guided and restricted by law—thereby diminishing the opportunities for judges to apply excessive, and inconsistent, discretion in sentencing practice. With no punishments laid out in treaty or customary law at that time for any international crime, such guidance can only be found in the London Charter: in regard to all crimes prosecuted by the court, it states that “[t]he Tribunal shall have the right to impose upon a

¹⁸⁰ Nuremberg Judgment, 38-40.

¹⁸¹ E.g. ECtHR, *Kononov v. Latvia*, app. no. 36376/04, judgment of the Grand Chamber (appeals court), May 17, 2010.

¹⁸² Marko Milanovic, website of *The European Journal of International Law*, “EJIL: Talk!” blog, “Was Nuremberg a Violation of the Principle of Legality?” May 18, 2010, www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality.

Defendant, on conviction, death or such other punishment as shall be determined by it to be just.”¹⁸³

This is problematic for a breadth and vagueness that provided effectively no judicial guidance and allowed for excessive discretion—in addition to the death penalty, absolutely any custodial sentence could be applied. Furthermore there was no possibility of appeal, with the charter stating: “The judgment of the Tribunal as to the guilt or the innocence of any Defendant shall give the reasons on which it is based, and shall be final and not subject to review.”¹⁸⁴ No further guidance for judges as to punishment was provided in the Rules of Procedure and Evidence. This is especially problematic as, of the 19 defendants convicted at the IMT, 12 were sentenced to death. As Table 3.1 shows, the other seven were given custodial sentences: life (three defendants), 20 years (two), 15 years (one), and 10 years (one).

The court’s judgment made little reference to the issue of retroactivity of sentencing, despite devoting considerable attention to dismissing the accusation of retroactivity of crimes.¹⁸⁵ At this time, sentencing issues do not appear to have been considered a significant moral, let alone legal, constraint on the powers of international courts.

Ultimately legality was breached in a more definitive and expansive manner in terms of punishment than of crimes. The irony is that the breaches of legality at Nuremberg and Tokyo—both of crimes and punishment—led to the later determination that prosecution and punishment by international courts for breaches of war crimes and crimes against humanity were legal. The

¹⁸³ Nuremberg Charter, article 27.

¹⁸⁴ *Ibid.*, article 26.

¹⁸⁵ Shahram Dana, “Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Sentencing,” *Journal of Criminal Law and Criminology* 99, no. 4 (2009): 884.

breach of legality created the legal precedent relied upon to establish prosecution and punishment in the post-Cold War period.

Defense parity indicator 1: Institutional support

This section first discusses parity in relation to the defense and prosecution's official positions within the IMT's institutional structure. It then analyzes the support afforded by the court to both sides in pre-trial investigations.

While the IMT prosecutors were given distinct duties in the London Charter, as a whole they lacked any official institutional status within the court's structure. However, the charter did establish within the IMT a "committee for the investigation and prosecution of major war criminals," consisting of the four chief prosecutors.¹⁸⁶ They were charged with such duties as recommending rules of procedure for the trial to the judges, and deciding on the indictment and the evidence to be submitted. The prosecution did not possess an official status to enable them to formally request procedural decision-making changes.

Nevertheless, the chief prosecutors were provided with significant influence over the proceedings through their function, as stipulated in the charter, of devising the court's Rules of Procedure.¹⁸⁷ The rules they created derived mostly from the practice of American military commissions, with the emphasis in their construction primarily not on legal fairness standards, but "workability and expedition."¹⁸⁸ The rules themselves were inconsistently applied, but the

¹⁸⁶ Ibid., article 14. There were four chief prosecutors—one for each of the Allied powers at the IMT: the United States, Russia, the United Kingdom, and France.

¹⁸⁷ Rules of Procedure (IMT), October 29, 1945. London Charter article 14.e provides the chief prosecutors with the power to recommend rules of procedure to the court.

¹⁸⁸ Evan J. Wallach, "The Procedural And Evidentiary Rules of the Post World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?" *The Columbia Journal of*

most significant problem lay in their being “so flexible they were open to abuse.”¹⁸⁹ The prosecution’s central role in constructing the procedural and evidentiary rules of the court therefore provided it with an enormous advantage in its courtroom confrontation with defense counsel. Counsel had no official institutional status within the court’s structure. It is indicative that counsel is only mentioned within three articles of the IMT charter, as opposed to eight for the prosecution.¹⁹⁰

Attitudes towards defense counsel at the IMT are arguably an indicator of how the issue of the heinousness of international crimes interferes with the presumption of innocence in international trials. It illustrates the different dynamic between a court and the prosecution, and the court and defense counsel, despite their ostensibly equivalent courtroom roles in competing to determine the innocence or guilt of the accused. Defense counsel do not seem to have been perceived by the IMT judges and prosecutors as part of a process of pursuing genuine legal justice, but merely as an adjunct of the accused. As described by IMT prosecutor Telford Taylor, “[s]ocially, the...defense counsel were no part of the war crimes community,”¹⁹¹ which consisted of Allied judges, prosecutors, and judicial staff. Taylor acknowledged the distinct way that defense counsel were perceived by the prosecution, tainted by atrocities that they had not been accused of committing and that had not at that point been legally proven against their clients: “the relations between the German lawyers [defense counsel] and ourselves could not be like that

Transnational Law 37, no. 1 (1999): 852. A US military commission “was a military tribunal for the trial of persons who are not members of the armed forces of the United States.” See *ibid*: 852, n11.

¹⁸⁹ *Ibid*: 859.

¹⁹⁰ London Charter, articles 3, 16, 18, 23 for defense counsel; and articles 3, 9, 14-16, 22-24 for the prosecution.

¹⁹¹ Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, 2nd ed. (New York: Skyhorse Publishing, 2013), 209. Taylor’s book is a comprehensive memoir concerning his role—and that of the prosecution more broadly—at Nuremberg, and makes far more extensive references to defense parity-related issues than the vast majority of other historical and legal material on the trial.

of British barristers on circuit, where those who had been at each other's throats in court that day could settle down together that evening for a friendly drink and chat. The appalling organized atrocities of the Nazi leaders lay between us."¹⁹²

The discussion now turns to institutional support for investigation and evidence gathering by the defense in comparison with the prosecution at the IMT. The same conditions of territorial occupation that ultimately led to the accusations of victors' justice in relation to the IMT, also meant that the prosecution had direct access to a vast number documents and witnesses germane to making their case.¹⁹³ The London Charter gave the defense the right to present evidence, but did not provide aid to counsel in conducting investigations or gathering evidence. The Rules of Procedure stated that the defense might request the court's assistance in locating evidence, and the court could then request states to locate the information.¹⁹⁴ States were not required to hand over documents, and the court provided no aid in investigating or securing evidence beyond making these requests. In practice, Allied states were very reluctant to provide information to counsel.

A dramatic demonstration of the lack of parity in evidence gathering and ultimately presentation—and a distinct breach of current standards of access to information—is found in the prohibition on defense counsel access to the Allied-controlled German archives in conducting their investigations. According to Otto Kranzbühler, defense counsel for Admiral Dönitz,

¹⁹² Ibid., 232.

¹⁹³ On the other hand, most of the documents examined by the defense and prosecution were in written German, which hindered the prosecutors as they required translation, but not the defense counsel, who were all German. See comment by prosecutor Taylor, in Medical Case Transcript, December 5, 1946, 37, available at Harvard Law School Library's Nuremberg Trials Project: nuremberg.law.harvard.edu/NurTranscript/TranscriptPages/37_037.html.

¹⁹⁴ Rules of Procedure (IMT), Rule 4.a-b.

counsel were also barred from all domestic records of the Allies themselves.¹⁹⁵ This severely restricted the ability of defense counsel to investigate and search for exculpatory or mitigating material, and thereby to construct an adequate defense.¹⁹⁶

In making the prosecution's case against the defendants, the US chief prosecutor at the IMT, US Supreme Court justice Robert H. Jackson, decided to rely largely on documentary evidence in the trial—primarily gathered within Germany from government archives—as opposed to witnesses.¹⁹⁷ This was partly due to their perceived ability to aid in the construction of a historical narrative—discussed later. It was also because of the availability of a vast trove of documents, a result of the German government's meticulous recordkeeping and its swift collapse and the occupation of Germany, putting much of this material in Allied hands.¹⁹⁸ For example, after Hitler's death, the new government of Admiral Karl Dönitz left huge quantities of government and military records behind when it moved from Flensburg to Mondorf, and German air force files were recovered from a salt mine in Bavaria. At Hitler's retreat in Berchtesgaden were found the plans for the invasion of Czechoslovakia and official reports on the killing of half

¹⁹⁵ Otto Kranzbühler, "Nuremberg Eighteen Years Afterwards," *DePaul Law Review* 14, no. 2 (1965): 336-7.

¹⁹⁶ Exculpatory material consists of documents or witness evidence that may suggest that the accused did not commit the acts with which they are charged. Mitigating material may suggest that the accused is not criminally liable, or not fully liable, for acts which they are accused of and may have committed. Both types of material are potentially of great utility to defense counsel in refuting the prosecution's case. See Lisa M. Kurcias, "Prosecutor's Duty to Disclose Exculpatory Evidence," *Fordham Law Review* 69, no. 3 (2000): 1205-29.

¹⁹⁷ Robert H. Jackson, "Introduction," in *Tyranny on Trial: The Trial of the Major German War Criminals at the End of the World War II at Nuremberg Germany 1945-1946*, Whitney R. Harris (New York: Transaction Publishers, 1997), xxxii.

¹⁹⁸ Also potential witnesses were found to be unreliable and wary of self-incriminating. Robert E. Conot, *Justice At Nuremberg* (New York: Carroll & Graf Publishers, 1983), 89.

a million Galician Jews. Such records were essential to the prosecution's case at the IMT in relation to war crimes and crimes against humanity.¹⁹⁹

Defense parity indicator 2: Evidentiary procedures

Dealing with the large volume of documentary evidence during trial proved problematic for the prosecution in that it risked slowing down proceedings—something Jackson was keen to avoid.²⁰⁰ The prosecution, however, were provided with significant leeway in their presentation of evidence. As the charter stated: “The tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which it deems to be of probative value.”²⁰¹ Perhaps at least partly due to his critical attitude towards the IMT's evidentiary standards, Goldstone, as the first chief prosecutor of the ICTY, stated to the author that he thought there was little in the way of lessons to be learnt for the ICTY from the practice of the IMT.²⁰²

This wording was constructed to facilitate the introduction of any material even vaguely relevant as prosecution evidence without effective legal challenge. Former ICTY chief prosecutor Richard Goldstone and Adam Smith argue that the excessive latitude given to the prosecution in the London Charter seems to have been intended to calm British concerns that a

¹⁹⁹ Ibid., 36-7.

²⁰⁰ Taylor, *Anatomy of the Nuremberg Trials*, 43-55.

²⁰¹ London Charter, article 19.

²⁰² Interview with Richard Goldstone, New York, October 17, 2014.

genuinely fair trial would lead to too many acquittals.²⁰³ The virtually non-existent rules of evidence meant that hearsay evidence—prohibited in most adversarial trial systems—was permitted at the IMT. Such evidence is problematic because it may be very indirect and is more likely to be in error than even direct witness testimony, which is also often suspect.²⁰⁴

The presentation of evidence in the IMT prosecution's case exhibits weaknesses in terms of defense parity that seem to stem at least partly from the Allies' concern that the volume of evidence they intended to introduce would lengthen the trial excessively. Justice Jackson stated during a prosecutors' meeting that his staff had introduced 331 documents as evidence against the accused within the first four hours of the trial. The presentation of the evidence took the form of reading a summary of a brief (that is, a summary of a summary of the original document) which largely declared the validity of the originals in making the prosecution case. Prosecutor Taylor believed that at such a pace and with such methods of introduction, the defense could not follow the case being presented—especially as the briefs were also initially made available to the defense only in English.²⁰⁵

The Allied states which created the tribunal were determined to deal swiftly with the leaders of the losing side of the war—and to find them guilty and execute punishment. This is in spite of the time that is necessary to conduct criminal trials with comprehensive due process protections for defendants at the domestic level in liberal legal systems. The Soviet position at the London Conference and during the trial was especially clear: defense protections were never a concern for the conference negotiators or for the Russian judges and prosecutors, as it was not

²⁰³ Richard J. Goldstone and Adam M. Smith, *International Judicial Institutions: The Architecture of International Justice at Home and Abroad*, 2nd ed. (London: Routledge, 2015), 59.

²⁰⁴ Robertson, *Crimes Against Humanity*, 233.

²⁰⁵ Taylor, *Anatomy of the Nuremberg Trials*, 174.

domestically. The leader of the Soviet delegation to the London Conference, General Iona Timofeevich Nikitchenko, who had been a show trial judge during Stalin's purges in the late 1930s, stated this clearly during the conference debates: "The fact that the Nazi leaders are criminals has already been established. The task of the tribunal is only to determine the measure of guilt of each particular person and mete out the necessary punishment."²⁰⁶

However, institutional power bargaining dynamics are frequently characterized by an inequality of influence over the final rule-making outcomes. This is evident at the conference, as the American and British positions became a far more significant factor in determining the evidentiary procedures provided for in the London Charter than those of Russia and France. The American and British representatives at the conference—and their chief prosecutors at the court—took a far more active role in constructing the tribunal's investigatory and trial procedures. The British government's earlier decision that—under extrapolation from an old English law on the advice of Lord Chancellor Simon—the Nazi leaders should be shot within six hours of apprehension as "outlaws,"²⁰⁷ changed only at the eleventh hour due to the new American position.

The British maintained their concern that strong defendant protections would undermine the goal of successful prosecutions. Even the Americans—who at one point had been the only major Allied government pushing for legal trials (as opposed to purely show trials)—expressed misgivings about the wisdom of a fair trial.²⁰⁸ US State Department staff claimed in a 1944

²⁰⁶ Jackson, "Report of Robert H. Jackson," 303, quoted in Kochavi, *Prelude to Nuremberg*, 240.

²⁰⁷ Richard Overy, *Interrogations: The Nazi elite in Allied Hands, 1945* (London: Allen Lane, 2001), 54.

²⁰⁸ Goldstone and Smith, *International Judicial Institutions*, 59.

memorandum that a fair trial would be dangerous as it might allow the defendants to use the platform of such a trial to grandstand—to justify their actions and attack the Allies.²⁰⁹

In terms of the first evidentiary indicator, the right of defense counsel to disclosure of prosecution evidence before the beginning of trial, the “crude but...workable” solution to merging Anglo-American and Continental trial approaches involved the prosecution providing some evidence to the defense at the indictment stage (before trial), with the right to introduce more evidence later.²¹⁰ This approach went beyond US requirements at the time, but was lower than the contemporary Continental requirement of full disclosure of all prosecution evidence in the indictment, and the common-law practice as it developed during the Cold War towards full disclosure before the start of trial.²¹¹

Provision of evidence to counsel by the prosecution seems to have been inadequate throughout the trial. According to a later account by Otto Pannenbecker, defendant Wilhelm Frick’s chief counsel, on numerous occasions counsel complained that they had not seen evidence before it was presented at trial, clearly leaving little time to adequately respond in defense of their clients.²¹² For example, during the first month of the trial, Judge Geoffrey Lawrence criticized prosecutor Robert Storey for providing hundreds of copies of prosecution documents to the press, but only about five to counsel—less than one for every four

²⁰⁹ Memorandum from the State Department to the Cabinet Committee on Germany, September 5, 1944, reprinted in “Foreign relations of the United States. Conference at Quebec, 1944: The Conference at Quebec 1944,” in US State Department, *Foreign Relations of the United States* (Washington DC: US Government Printing Office, 1944).

²¹⁰ Taylor, *Anatomy of the Nuremberg Trials*, 64.

²¹¹ For example, since the 1960s US federal law has required full disclosure of prosecution evidence to the defense upon request. See Federal Rules of Criminal Procedure, Title IV: Arraignment and Preparation of Trial, Rule 16 (Discovery and Inspection), www.law.cornell.edu/rules/frcrmp/rule_16.

²¹² Otto Pannenbecker, “The Nuremberg War-Crimes Trial,” *DePaul Law Review* 14, no. 2 (1965): 348-58.

defendants.²¹³ Counsel Carl Haensel details prosecution refusal to provide the defense with copies of German documents related to the mass murder of POWs: only indexes were provided, listing documents by name.²¹⁴

Combined with the fact that many documents were presented in court via a brief rather than presenting the documentary evidence directly (the usual practice), these evidentiary access problems led the IMT judges to require changes to how evidence could be introduced: documents had to be read directly into the record during trial (no brief allowed) and a translation typed during the reading and handed to defense at the end of each day. By slowing proceedings the judges ameliorated some of the evidence-related problems generated by the prosecution's trial methods. However, this approach only lasted for a few weeks, as Justice Jackson sought ways to speed up the pace of the trial again.²¹⁵

In an indicative example of the negative effect on disclosure of the prosecution desire for a swifter trial, Kranzbühler, Dönitz's chief counsel, requested a meeting with the judges and prosecutors to discuss his demand that documents be made available to the defense—and in the original German—before their presentation in court.²¹⁶ Jackson's prosecution team had been providing documents to the court in English which had not yet been seen by the defense (in English or the original German). According to Kranzbühler, during the subsequent *in camera* meeting (in judges' chambers, and not in the official record) Jackson stated that it would be too time-consuming and would conflict with the aims of the trial to have to provide the defense with

²¹³ See comments by Göring's defense counsel, Otto Stahmer, at Nuremberg Trial Proceedings Vol. 9, Eighty-Eighth Day, Friday March 22, 1946, Morning Session, avalon.law.yale.edu/imt/03-22-46.asp.

²¹⁴ Carl Haensel, "The Nuremberg Trial Revisited," *DePaul Law Review* 13, no. 2 (1964): 248-59. Haensel was counsel in the groups and organizations trial of the Schutzstaffel (SS) and Sicherheitsdienst (SD). The SD was a Nazi intelligence agency.

²¹⁵ Taylor, *Anatomy of the Nuremberg Trials*, 175-7.

²¹⁶ Kranzbühler, "Nuremberg Eighteen Years Afterwards."

German copies of all documentary evidence. When pressed by Judge Lawrence on what he saw those aims to be, Jackson is claimed to have stated what amounted to political goals of delegitimization and historical narrative construction: to prove that German conduct in the war was unjustified and illegal, as the United States had claimed all along; and “to make it clear to the German people that it deserved severe punishment, and to prepare them for such punishment.”²¹⁷

The prosecution was also not required to disclose exculpatory material to defense counsel, and the latter were given little time to examine what they were given.²¹⁸ This is especially problematic in the context of the IMT because, as mentioned, defense counsel had little ability to gather evidence of their own to present at trial because they had no access to information outside of Germany and were barred from archives in Allied hands.²¹⁹

Many of the evidentiary issues—such as the weight of documentary evidence introduced, its availability and disclosure to the defense, and the language of the summaries—result from the prosecution being overwhelmed with the size of the task at hand considering the time scale the Allies seem to have envisaged, and the consequent desire by Jackson to facilitate the trial by cutting procedural corners. The speed of trial was a constant factor for the defense even when its direct impact was on the prosecution, by disadvantaging the defense in gaining adequate and timely access to the prosecution’s case.

The problems surrounding the volume of evidence introduced were partly caused by Jackson’s desire to use the trial for narrative construction purposes: in order to legitimize the

²¹⁷ Ibid.: 346.

²¹⁸ Robertson, *Crimes Against Humanity*, 230.

²¹⁹ B.V.A. Roling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Cambridge: Polity Press, 1993), 51.

punishment of the losers as well as to construct a historical record.²²⁰ The volume of documentary evidence introduced by the prosecution was vastly greater than that needed to construct its case, and Jackson was hesitant to rely on the testimony of witnesses, whose reliability could not be guaranteed and who might be induced by defense counsel, in Jackson's words, "to waver in their statements."²²¹

Jackson later described the success of the IMT to President Truman partly in terms of the narrative objective: "We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future."²²² The historical narrative goal of the trial was partly responsible for the weaknesses in defense parity resulting from the inability—and unwillingness—of the prosecution to enable defense access to the huge volume of documentary evidence.

Jackson was not the only individual involved in the legal process who shaped legal questions and procedures surrounding the defendants for political ends. Kim Priemel and Alexa Stiller argue that a—largely American and European émigré—epistemic community concerning Nazi Germany constructed the knowledge base on Nazi actions which created the legal categories pursued at the various Nuremberg trials. This community consisted of lawyers, such as Raphael Lemkin and Hersch Lauterpacht, and other relevant experts, such as historian Walter L. Dorn

²²⁰ Peter Maguire, *Law and War: International Law and American History* (New York: Columbia University Press, 2000), 159-86.

²²¹ Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, Conn.: Yale University Press, 2001), 19, quoting Jackson's Report to the President.

²²² Report to the President by Mr. Justice Jackson, "International Conference on Military Trials, London, 1945," October 7, 1946, part III, section 5.

and economist Edward Mason.²²³ Their goals were partly political and partly legal, but one of their greatest influences was over the composition of the indictment and opening statements: “the prime documents to phrase the narratives and arguments.”²²⁴

The discussion now turns to the second evidentiary issue—witness cross-examination.²²⁵ The London Charter provided defendants with the right to present their own witnesses and cross-examine those of the prosecution.²²⁶ The international criminal trial practitioners interviewed for this project almost all agreed that one of the most important issues—if not the most—that aids the accused in presenting an adequate defense is the quality of counsel. They considered quality to reside in significant knowledge of the relevant trial system—adversarial at the IMT (as at all later international courts)—and the skills and judgment to respond effectively to the prosecution’s case, especially in cross-examining witnesses.²²⁷ Cross-examination is “the hallmark of party-managed presentation of evidence,” with “party-managed” referring to an adversarial structure dominated by prosecution and defense, rather than the judge-dominated

²²³ Kim C. Priemel and Alexa Stiller, “Introduction,” in *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, ed. Kim C. Priemel and Alexa Stiller (New York: Berghahn Books, 2014), 6.

²²⁴ *Ibid.*, 7.

²²⁵ A different witness issue that is telling example of the conflict between trial conduct and the political goals of the IMT occurred during the first month of the trial. A prosecutor on Jackson’s American team, William Donovan, attempted to make a deal with Herman Göring, the most prominent of the IMT defendants, to diminish his sentence if he would agree to become a prosecution witness. Jackson rejected this (and Donovan subsequently resigned as prosecutor) partly for practical reasons—Göring was determined to undermine the court and so could not be trusted—but also because it would risk harming the political goals of the trial. According to Telford Taylor—who became chief US prosecutor in October 1946, replacing Jackson—the deal was also overruled because delegitimization of the Nazis would be highly incomplete if it did not include the number two in the Nazi hierarchy behind Hitler (that is, the highest ranking Nazi in Allied hands) and it would be perceived as weakening the cause of promoting human rights. Taylor, *Anatomy of the Nuremberg Trials*, 186.

²²⁶ London Charter, article 16.e.

²²⁷ Anonymous interviewees in San Francisco, London, and The Hague, August 2015–January 2016.

Continental inquisitorial system. In an adversarial system, cross-examination is central to defendants' right to challenge the evidence presented against them.²²⁸

The task of cross-examination is complicated enormously in situations in which defense counsel are unfamiliar with the adversarial system. The IMT charter prohibited the accused from retaining counsel from any country except Germany.²²⁹ Counsel were therefore all experienced in an inquisitorial trial system, and consequently unfamiliar with the central function of cross-examination of prosecution witnesses. In inquisitorial trials, judges rather than the attorneys tend to question witnesses and there is no cross-examination, in which witness statements can be questioned and they can be specifically asked leading questions (not allowed in questioning one's own witnesses).²³⁰

Given this context, the defense attorneys at the IMT have been said to have performed poorly at cross-examining the prosecution's witnesses. The shortcomings include asking questions that had no bearing on defendants' culpability, and others which led to witnesses confirming the accused's responsibility and so ultimately aiding the prosecution.²³¹ This led to the defense calling many more witnesses than the prosecution (61 and 33, respectively), but doing poorly at

²²⁸ Mirjan Damaška, "Problematic Features of International Criminal Procedure," in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), 181.

²²⁹ London Charter, article 23.

²³⁰ Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (New York: Oxford University Press, 2003), 18.

²³¹ For example, counsel for Field Marshall Wilhelm Keitel (Dr. Otto Nelte) and for Foreign Minister Joachim von Ribbentrop (Dr. Fritz Sauter) poorly cross-examined General Erwin Lahousen about meetings he attended in 1939 and 1941 where atrocities committed by the Germans had been discussed. Taylor, *Anatomy of the Nuremberg Trials*, 187-91.

utilizing them to address the issues at hand: instead Justice Lawrence warned counsel that their questions were not relevant.²³²

Cross-examination by the defense, like their access to documentary evidence, was also affected by the prosecution's desire to speed up trial at the expense of defense protections. There were also attempts by the prosecution to block counsel from cross-examining witness testimony at all, by presenting oral transcripts with no appearance by the witness at trial. When preparing to present their case against the German General Staff defendants, Justice Jackson attempted to persuade the judges to allow the prosecution to present sworn affidavits by witnesses in court, where the witnesses would not need to attend. His justification was that not only did the charter not bind the court to "technical rules of evidence" but that cross-examination of witness affidavits would slow down the proceedings excessively. The IMT's rules, however, make no mention of the admissibility of a written witness statement in lieu of live testimony.

The judges largely rejected this maneuver, arguing that, except in very unusual circumstances, affidavits could only be introduced as evidence if the witness could be called for cross-examination upon the request of the defense.²³³ As on various other occasions—some discussed above—the IMT judges acted as a brake on the prosecution's attempt to weaken procedural defense protections in order to speed up the trial. Nevertheless, the use of written testimony at the court was extensive and inconsistent.²³⁴ After the trial, Jackson could boast to President Truman that "If it were not that the comparison might be deemed invidious, I could

²³² Douglas, *The Memory of Judgment*, 15.

²³³ Taylor, *Anatomy of the Nuremberg Trials*, 240-3.

²³⁴ Megan A. Fairlie, "Due Process Erosion: The Diminution of Live Testimony at the ICTY," *California Western International Law Journal* 34 (2003): 52-3; and Richard May and Marieke Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha," *Columbia Journal of Transnational Law* 37 (1999): 749.

cite many anti-trust actions, rate cases, original cases in the United States Supreme Court, and other large litigations that have taken much longer to try.”²³⁵

Conclusion

This chapter has placed legality and defense parity in historical and legal context at the state and international levels to demonstrate their centrality to legitimacy through legal fairness towards defendants in international criminal trials. The explanation of the evolution of protections for defendants throughout the development of international criminal justice illustrates the role of political actors in shaping the fairness standards that they can expect, both through the institutional power states exert in the construction of a court, and in their influence over the conduct of trials through differential support offered to defendants and prosecution.

The analysis of the research’s defense protection indicators at the IMT in the final section of the chapter demonstrates that the court did not meet the standards found within the domestic law of liberal states at the time or international law today, providing little legitimacy through fairness towards defendants. The reluctance of Allied states to agree to trials for the Nazi leadership—when they had much earlier and more easily agreed to prosecute German military personnel—did not bode well for the attention to fairness in terms of legality or defense parity.

The major breaches of legality of crimes and punishment at the London Conference provide a clear illustration of the political goals of prosecution undermining what were already fundamental defense protections at the domestic level in liberal states. Domestic pressure on Allied governments as more atrocities came to light led to the broadening of the charges into new

²³⁵ Jackson, “Report to the President,” avalon.law.yale.edu/imt/jack63.asp.

crimes, which fit conveniently with the Allied desire to delegitimize the Nazi leadership through a public exposure of the full extent of their brutality.

Defense parity issues at the IMT have received less critical attention than legality. This is especially the case within IR, where fair trial analyses of Nuremberg have concentrated upon such issues as selectivity of prosecution, and the partiality of judges and prosecutors. The chapter has demonstrated that institutional support for the defense was extremely weak by contemporary domestic and modern international standards, leaving counsel in a far inferior position to the prosecution by the beginning of the trial due to an inadequate ability to investigate and prepare a defense to the prosecution's case. The Allies, before and during the London Conference, were clear that the primary goals of the trial were retribution and delegitimization of the Nazi leadership, and so parity in institutional support was not a relevant issue to their decision-making regarding the creation of the IMT. These concerns were reflected in the nature of the London Charter, which contained few and vague protections, and left the creation of detailed rules regarding procedure in the hands of one of the competing parties—the prosecution.

In addition, evidentiary procedural standards were harmed by the desire by US chief prosecutor Jackson to conclude the trial quickly and with little opportunity for the defense to present an adequate rebuttal. Evidence disclosure problems were also generated by the goal of historical narrative construction, which shaped the nature and extent of evidence presented by the prosecution. A further problematic issue for defense parity was the apparent lack of understanding of, or deep concern for, the role of defendants in criminal trials by the Allied governments. The criminal trial approaches of the Allies which created the IMT came from two distinct systems: the common law adversarial approach of the Americans and British; and various forms of civil law inquisitorial approach. Yet, according to prosecutor Taylor, “there is

no evidence that either group had given any prior attention to the problem of how, if at all, the two systems could be married,” and how this would affect defendants and their counsel.²³⁶ This lack of understanding, generating confusion between arguably incompatible systems, combined with the political goals of various participants, led to very weak defense parity standards.

It is ironic that the evidence against many of the defendants was so overwhelming that a genuinely fair trial in terms of parity would have almost certainly led to a very similar outcome while offering the defendants full legal protection from the arbitrary power of international legal institutions, and afforded the trial with far higher standards of legal legitimacy, diminishing the charges at the time and subsequently of “victor’s justice” in relation to the trial.²³⁷

There are a number of lessons from the IMT case that we will encounter in Chapters 4 and 5. As a foreshadowing of themes discussed in those chapters, this chapter will end with a brief comparison between the legality and defense parity at the IMT and those at the ICTY and ICC.

In relation to institutional support features of defense parity, the IMT was much less formally structured than post-Cold War courts, which have provided the prosecution with an official institutional status. This has enabled the office of the prosecutor at later courts to formally request procedural decision-making changes, unlike at the IMT. This elevation of the institutional position of the prosecution has not been matched by a similar elevation of the defense.

²³⁶ Taylor, *Anatomy of the Nuremberg Trials*, 59.

²³⁷ Nicola Henry, *Law, Memory and Justice* (New York: Routledge, 2001); Leslie Scheuermann, “Comment: Victor’s Justice? The Lessons of Nuremberg Applied to the Trial of Saddam Hussein,” *Tulane Journal of International and Comparative Law* 15 (2006): 291-310; Futamura, *War Crimes Tribunals and Transitional Justice*; and Danilo Zolo, *Victors’ Justice: From Nuremberg to Baghdad*, trans. M.W. Weir (London: Verso, 2009).

Because the Allies occupied Germany, where many of the IMT crimes allegedly occurred, the prosecution had direct access to enormous volumes of evidence before trial. In contrast, at the ICTY and ICC access to territories for investigation has had to be mediated through domestic legal and political authorities. Prosecutors and defense have therefore been reliant on the cooperation of external authorities, including states, IGOs such as the UN and NATO, and human rights NGOs for authorizing and aiding in investigations and evidence gathering. This has arguably put the defense on a more equal footing, but there have been substantial inequalities generated by unequal institutional support and state bias.

In terms of evidentiary procedures, one of the most important factors shaping tribunals' rules and their application has been state concern to contain costs and accelerate trials. Judges have been less successful at the ICTY and ICC at resisting attempts to speed up trials at the expense of defense parity than they were at Nuremberg. These political influences shaping legality and defense parity are analyzed in depth in the following two chapters.

4 The International Criminal Tribunal for the former Yugoslavia

This chapter examines the legal fairness of the International Criminal Tribunal for the former Yugoslavia (ICTY)¹ in relation to criminal defendants, and how the adequacy of their legal representation has been affected by the institutional power of states, and the political goals of and influences on judicial actors at the court by states, IGOs, and NGO actors. It provides an assessment of the tribunal's legal fairness legitimacy between the effective start of the tribunal's operation in July 1994 and July 2016.

The chapter provides a critique of the common assumption among IR and other social science scholars that the ICTY is characterized by fair trials.² Fairness tends to be assumed from a simplistic assessment that basic due process principles are implemented at the tribunal and that it was not created as a direct expression of victor's justice. Few political scientists appear to have appreciated the knowledge of legal procedure necessary to understand how legal principles are

¹ This name and especially "ICTY" are used throughout the chapter to refer to the tribunal. Note that the court's official full name is the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

² Cherif Bassiouni, for example, in referring to due process at the ICTY and ICTR, mentions the "exemplary manner in which these tribunals have proceeded." See M. Cherif Bassiouni, "The Perennial Conflict Between International Criminal Justice and Realpolitik," *Georgia State University Law Review* 22, no. 3 (2006): 557. Other examples include Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (New York: Oxford University Press, 2004); Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000); David P. Forsythe, "'Political Trials'?: The UN Security Council and the Development of International Criminal Law," in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 492; James Meernik, "Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia," *Journal of Conflict Resolution* 47, no. 2 (2003): 140-62; and Martin Griffiths, Terry O'Callaghan, and Steven C. Roach, *International Relations: The Key Concepts*, 2nd ed. (New York: Routledge, 2008), 165.

implemented and therefore the avenues through which political considerations impact trial fairness.

The research argues that a fusion of legal and political functions at the ICTY has distorted the role of the prosecutor and moved the tribunal away from the legalist position which claims there is complete separation of legal and political decision-making within trials.³ This fusion of functions affects the dynamic between prosecution and defense, demonstrating the weakness in the position of Rachel Kerr on the separation between law and politics at the ICTY: “Whilst they are intertwined, law and politics are not merged: The boundary exists at the doorway to the courtroom...[L]aw informed the political decision to establish and politics determined the application of legal norms for a political purpose—international peace and security.”⁴ Kerr does not consider that political decisions before the courtroom affect what goes on within—due to their effect on the legal dynamic between prosecution and defense. There is no courtroom insulation from political interference in the judicial process.

The chapter begins with an examination of the effect of the nature of the creation of the tribunal by the UN on fairness for defendants. Sections two and three analyze the indicators of the principle of legality: the level of retroactivity in the mass atrocity crimes within the tribunal’s jurisdiction; and its sentencing guidelines and practices. Sections four and five examine indicators of the dynamic between the prosecution and defense in the pre-trial and trial stages. First, the impact of the court’s structure on this dynamic is analyzed, followed by the impact of structure and the external perception of the prosecution and defense on their ability to conduct

³ On legalism at the IMT see Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, 2nd ed. (Cambridge, Mass.: Harvard University Press, 1986). On legalism in international criminal justice more broadly, see Bass, *Stay the Hand of Vengeance*, 7-8.

⁴ Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, 3.

investigations and acquire evidence. Second, procedures relating to evidence presentation and witnesses are examined in terms of how they impact parity during trial.

The evidence relied upon in the research includes the ICTY statute⁵ and Rules of Procedure and Evidence (RPE);⁶ case law, including motions and court judgments; court administrative documents and website data; participant memoirs; interviews with prosecutors, defense counsel, and other close court observers; and secondary legal, political, and historical sources.

Conflation of legal and political justice goals in the creation of the tribunal

In July 1992, as the Security Council began to address reports of atrocities committed during the ongoing armed conflict in the Balkans, it declared that individuals guilty of “grave breaches” of the Geneva Conventions in the former Yugoslavia would be held accountable.⁷ A commission of experts established by the secretary-general to examine evidence of violations recommended in its first interim report in February 1993 the creation of an ad hoc international tribunal to try suspects for gross violations of international humanitarian law.⁸ The Security Council took the

⁵ Its full title is the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY statute), UN doc. S/25704 at 36, annex (1993) and S/25704/Add.1, adopted by the Security Council on May 25, 1993, UN doc. S/RES/827.

⁶ ICTY, Rules of Procedure and Evidence, adopted February 11, 1994. Revision 50, UN doc. IT/32/Rev.50, July 8, 2015, www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev50_en.pdf.

⁷ Security Council Resolution 764, UN doc. S/RES/764, July 13, 1992, para. 10, www.un.org/Docs/scres/1992/scres92.htm.

⁸ UN Secretary-General, “Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),” UN doc. S/25274, February 10, 1993. See also the second interim report, UN Secretary-General, “Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992),” UN doc. S/26545, October 5, 1993, digital.case.edu/downloads/83380p575. The commission’s full name was “The Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Grave Breaches of the Geneva Conventions and other Violations of International Humanitarian Law in the Former Yugoslavia.”

commission's advice and asked the secretary-general to develop specific proposals.⁹ His report included a statute for the ICTY,¹⁰ which the council approved in resolution 827 in May 1993.¹¹

According to Thomas Weiss there was a broad lack of political will by powerful states to countenance substantial action in relation to Yugoslavia.¹² The council's reaction was instead characterized by rhetoric condemning war crimes, authorizing sanctions and weak protection forces,¹³ and supporting a settlement under plans such as the Vance-Owen process.¹⁴ The move towards a legal solution was a half-hearted response when the Security Council had resisted military approaches which required greater commitment.¹⁵ The creation of the ICTY was also driven by domestic political and public pressure on US president Bill Clinton to react to the atrocities in the Balkans, which were depicted widely in the media in the early 1990s.¹⁶

The stage was set for action by the Security Council in 1992, when it indicated that it was willing to consider a broader range of situations to constitute a threat to international peace and

⁹ Security Council resolution 808, February 22, 1993, www.un.org/Docs/scres/1993/scres93.htm.

¹⁰ UN Secretary-General, "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)," UN doc. S/25704, May 3, 1993 ("secretary-general's report"), www.icty.org/x/file/Legal%20Library/Statute/statute_re808_1993_en.pdf. Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia Since 1991, annex to UN doc. S/25704, 36-48.

¹¹ UN doc. S/RES/827, May 25, 1993, preamble, www.un.org/Docs/scres/1993/scres93.htm.

¹² Thomas G. Weiss, "UN Responses in the Former Yugoslavia: Moral and Operational Choices," *Ethics & International Affairs* 8, no. 1 (1994): 1-22.

¹³ For example, in resolution 713, September 25, 1991, the Security Council expressed deep concern over the fighting, and, in para. 6, authorized an arms embargo on Yugoslavia; and in resolution 764, July 13, 1992, the council condemned the fighting in Bosnia and, in para. 2, authorized the deployment of a UN force to protect the Sarajevo airport and humanitarian aid deliveries.

¹⁴ The 1993 Vance-Owen Plan involved attempting to secure peace in Bosnia while maintaining a unified central government, but was not accepted by Bosnian Serbs and was soon defunct. See Steven L. Burg and Paul S. Shoup, *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (New York: Routledge, 1999), 189-262. In Security Council resolution 836, June 4, 1993, para. 6, www.nato.int/ifor/un/u930604a.htm, the council encouraged the local implementation of the Vance-Owen Plan by affirming its importance to peace and stability in the region.

¹⁵ Weiss, "UN Responses in the Former Yugoslavia:" 20.

¹⁶ Forsythe, "Political Trials?" 480.

security—the threshold for invoking Chapter VII of the UN Charter, and thereby passing resolutions that are legally binding on all UN member states. During the Cold War, in contrast, the council interpreted its mandate as almost totally excluding domestic conflicts.¹⁷

In January 1992, a note by the president of the Security Council acknowledged that while the end of the Cold War had brought about positive change, it had also generated “new risks for stability and security”—including economic and humanitarian situations.¹⁸ According to Rachel Kerr, “[t]his set the tone for future UN responses and represented a watershed in the determination of a threat to international peace and security within the terms of Article 39 of the UN Charter. It directly opened the way for the establishment of a Tribunal, since it meant that violations of international humanitarian law could be formally determined a threat to international peace and security.”¹⁹

According to Paul Tavernier, the creation of the ICTY in 1993, and the ICTR one year later, “amounted to allowing the imperative of maintaining peace to take precedence over those of law and justice.”²⁰ From the first post-Cold War tribunal an explicit link was made by powerful states and the UN that international criminal courts were expected to perform the political goals of promoting peace and security as a mechanism of transitional justice. The very decision-making,

¹⁷ Only in relation to Southern Rhodesia in 1986 (resolution 232) and South Africa in 1977 (resolution 418) did the council authorize action under Chapter VII in relation to entirely domestic issues during the Cold War.

¹⁸ Note by the President of the Security Council, UN doc. S/23500, January 31, 1992, www.securitycouncilreport.org/un-documents/document/PKO%20S%2023500.php. The statement was read out by British prime minister John Major, in his capacity as president of the Security Council. See UN Department of Political Affairs, *Repertoire of the Practice of the Security Council: Supplement 1989-1992* (New York: United Nations, 2007), 820, www.un.org/en/sc/repertoire/89-92/Chapter%208/GENERAL%20ISSUES/Item%2028_SC%20respons%20in%20maint%20IPS.pdf.

¹⁹ Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, 19.

²⁰ Paul Tavernier, “The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda,” *International Review of the Red Cross* 321 (1997): 612.

or lack of political will rather, that led to the creation of the ICTY is characterized by a legal mechanism as a substitute for military action and a political solution. The chapter highlights throughout the consequences for the legal fairness of the criminal justice meted out by the tribunal of attempting to utilize a criminal justice mechanism to ameliorate international political problems.

The commission of experts, created by the Security Council in a unanimous vote in October 1992,²¹ was tasked by the secretary-general with investigating violations of international humanitarian law in the former Yugoslavia and to explore responses to ongoing atrocities. Gary Bass argues that despite their positive votes, both France and the United Kingdom saw legal investigations and prosecutions as a possible obstacle to future peace negotiations.²² In addition to the difficulty for democratic governments of dealing with war criminals would be the presumed disincentive for such individuals to compromise politically.²³

²¹ UN Security Council resolution 780, October 6, 1992, www.un.org/Docs/scres/1992/scres92.htm. The voting record information is from the United Nations Bibliographic Information System (UNBISNET), unbisnet.un.org.

²² This attitude is reflective of a long-standing argument that the pursuit of justice for the victims of international crimes diminishes the chances for long-term peace, especially when a conflict is ongoing. The two sides tend to fall along the lines of politics vs. the law, with political leaders tending to argue that the most important concern during a conflict is a swift negotiated settlement, while judges and human rights groups maintain that no peace is sustainable without legal justice for the victims and the potential deterrent effect and normative value of an end to impunity. On the political justice side see, for example, Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2003/04): 5-44. On the legal justice side see Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, doc. no. 1-56432-508-3, July 2009, www.hrw.org/report/2009/07/07/selling-justice-short/why-accountability-matters-peace.

²³ Max Boot, "When 'Justice' and 'Peace' Don't Mix," *Wall Street Journal*, 2 October 2000, in *International Human Rights in Context: Law, Politics, Morals*, 3rd ed., ed. Henry J. Steiner, Philip Alston and Ryan Goodman (New York: Oxford University Press, 2007), 1332-3; and Bass, *Stay the Hand of Vengeance*, 210-11.

The UN Office of Legal Affairs (OLA),²⁴ and especially a British member, Ralph Zacklin, obstructed the work of the commission, according to commissioners and ICTY staff.²⁵ The commission's members seem to have been chosen to ensure a slow work pace, "stuffed with academic 'old fogeys'" according to one commissioner, only one full-time member of staff—an "elderly retired law professor"—and without the resources to meet frequently or investigate effectively. The commission was a "low-budget-scapegoat."²⁶ According to Cherif Bassiouni, who took over leadership of the commission in August 1993, financing issues and investigations were characterized by a complete lack of cooperation from the British and French, and in April 1994 the Secretariat closed the commission. The evidence unearthed implicated political leaders which the major powers were negotiating with, and so "it became politically necessary to terminate the work of the Commission while attempting to avoid the negative consequences of such a direct action."²⁷

The commission's success, despite resistance, is also what led the British to reject the nomination of Bassiouni as first chief prosecutor of the tribunal.²⁸ Richard Goldstone, who became the first chief prosecutor to officially take up the position, reports that political resistance and unwillingness to cooperate were not confined to the UN. Former British prime minister Edward Heath had asked Goldstone why he had accepted such a "ridiculous job," saying that it

²⁴ As stated on its website, OLA "provides a unified central legal service for the Secretariat and the principal and other organs of the United Nations and contribute [*sic*] to the progressive development and codification of international public and trade law," OLA, "Overview," legal.un.org/ola/overview.aspx.

²⁵ Bass, *Stay the Hand of Vengeance*, 211.

²⁶ *Ibid.*

²⁷ M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," *Harvard Human Rights Journal* 10, no. 10 (1997): 41.

²⁸ David P. Forsythe, "Politics and the International Tribunal for the Former Yugoslavia," *Criminal Law Forum* 5, no. 2-3 (1994): 408.

was no concern of the British government if people wanted to kill each other as long as they did it outside of Britain.²⁹

Nevertheless, the ICTY finally became operational in November 1993 when 11 judges began their terms of office in The Hague. After a “protracted, politicized fiasco” over the selection of the first chief prosecutor of the court,³⁰ Goldstone was approved by the Security Council in July 1994 and started working in August—marking the true start of the operation of the tribunal.³¹

At the final tally the ICTY has indicted 161 individuals for these crimes. As of July 2016, cases against nine of them were ongoing: one at trial stage, that of the Bosnian-Serb military commander, Ratko Mladić, and eight at the appeals stage. In relation to the cases that have closed at the tribunal, 81 individuals were convicted (including the Bosnian-Serb political leader, Radovan Karadžić), 19 acquitted, two are to be retried by the Mechanism for International Criminal Tribunals (MICT),³² 13 had their cases transferred to national jurisdictions, 17 died before the start or completion of their trial (including former president of the Federal Republic of Yugoslavia Slobodan Milošević),³³ and the other 20 had their indictments withdrawn. Karadžić’s

²⁹ Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven, Conn.: Yale University Press, 2000), 74.

³⁰ The first chief prosecutor elected by the Security Council was Ramón Escovar-Salom, the attorney-general of Venezuela, in October 1993 (Security Council Resolution 877, October 21, 1993). He quit the post a few months later, before ever officially taking up his appointment. See Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, 49-50.

³¹ Bass, *Stay the Hand of Vengeance*, 217.

³² In 2010 the Security Council created the MICT to help in transferring cases to local courts and act as an appeals court for the final ICTY (and ICTR) cases. See Security Council Resolution 1966, December 22, 2010, www.unmict.org/sites/default/files/documents/101222_sc_res1966_statute_en.pdf.

³³ The most recent defendant to die, closing one of the last two first-instance trials remaining at the court, was Goran Hadžić in July 2016. See Jurist.org, “ICTY War Crimes Defendant Goran Hadzic Dies,” July 14, 2016, www.jurist.org/paperchase/2016/07/icty-war-crimes-defendant-goran-hadzic-dies.php.

appeal to his March 2016 conviction will be heard by the MICT, as will that of Mladić if he is convicted by the ICTY.³⁴

Legality indicator 1: Non-retroactivity of crimes

This section provides an assessment of legality at the court by examining the extent and nature of retroactive enforcement of crimes. It begins by analyzing the UN debate surrounding legality during the process of creating the tribunal. Then the three mass atrocity crimes over which the tribunal has jurisdiction are examined: war crimes, crimes against humanity, and genocide. As an illustration of the relative numerical importance of these crimes within ICTY prosecutions, in the first 19 years of the tribunal's existence, 56.9 percent of all indicted charges were for war crimes (939 counts), 40.6 percent for crimes against humanity (670 counts), and 2.4 percent for genocide (40 counts). Of total convictions at the tribunal, war crimes constitute 58.9 percent (201 counts), crimes against humanity 40.7 percent (139 counts), and genocide less than one percent (one count).³⁵

The analysis explores, where appropriate: first, issues relating to the commission of experts, the secretary-general's report on the creation of the court, and Security Council decision-making; second, the ICTY statute and RPE; and third, the practice of the tribunal. In determining the extent to which the court has adhered to the principle of legality, the analysis applies the admonition quoted in Chapter 1 of the dissertation: conforming case law must involve "a measured clarification or interpretation...[I]t should not permit judges the freedom to create law

³⁴ ICTY, Key Figures of the Case, www.icty.org/en/cases/key-figures-cases; data last updated April 19, 2016.

³⁵ Leila Nadya Sadat, "Crimes Against Humanity in the Modern Age," *The American Journal of International Law* 107, no. 2 (2013): 342-4.

aimed at correcting *lacunae* of international criminal law.”³⁶ Judicial interpretation may shape law without breaching legality,³⁷ but expansion of the law in this manner risks violating the line between clarification and correcting *lacunae*—the latter task is assigned to the legislature in a democratic legal system.³⁸

The UN and the legality of the tribunal’s crimes

The secretary-general’s report directly acknowledged the importance of adhering to the principle of legality.³⁹ This is evident in the recognition of the council’s lack of legislative authority in the report, with the tribunal not provided with legislative competence beyond the council’s own. That is, unlike at the IMT, there would be no establishment of new international crimes.⁴⁰ The report recommended only prosecuting crimes that had attained customary international law status, and which would therefore be considered binding on all UN member states.⁴¹ As stated in the report: “In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* [non-retroactivity of crimes] requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the

³⁶ Michael G. Karnavas, “Is the Emerging Jurisprudence on Complicity in Genocide before the *Ad Hoc* Tribunals a Moving Target in Conflict with the Principle of Legality?” in *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, ed. Ralph Henham and Paul Behrens (Aldershot, UK: Ashgate Publishing, 2007), 100.

³⁷ Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990), 50-66.

³⁸ In practice, judges, especially those within common law systems, are criticized of “judicial activism” for breaching this line. In the United States context, see Archibald Cox, “The Role of the Supreme Court: Judicial Activism or Self-Restraint?” *Maryland Law Review* 47, no. 1 (1987): 118-38.

³⁹ Secretary-general’s report, paras. 33-49.

⁴⁰ Daphna Shraga and Ralph Zacklin, “The International Criminal Tribunal for the Former Yugoslavia,” *European Journal of International Law* 5, no. 3 (1994): 363.

⁴¹ Whereas treaties are only binding on states that have ratified them, customary laws are binding on all states. See Antonio Cassese, *International Criminal Law*, 2nd ed. (New York: Oxford University Press, 2008), 153-82.

problem of adherence of some but not all states to specific conventions does not arise.”⁴² The tribunal itself has also expressed concern that it refrain from creating law, stating that “the principle of legality demands that the Tribunal shall apply the law which was binding on individuals at the time of the acts charged”—that is, customary law.⁴³

Kenneth Gallant argues that the customary law status of legality as a core principle of international criminal justice was in fact established by the UN process surrounding the creation of the ICTY. The secretary-general’s report articulates the *opinio juris*, or juridical determination, of the UN Secretariat that the principle of legality is binding on the UN. The Security Council’s acceptance of this in creating the court demonstrates the practice of states, which forms the other required component for the establishment of the existence of a customary international legal obligation. The acceptance of the secretary-general’s report by the council also demonstrates the council’s *opinio juris* on this issue.⁴⁴

The secretary-general’s report argued that war crimes, crimes against humanity, and genocide had attained customary status by 1993. War crimes were customary due to the almost universal state acceptance of the 1907 Hague Convention IV and 1949 Geneva Conventions I-IV; crimes against humanity through the 1945 IMT charter; and genocide through wide state ratification of the 1948 Genocide Convention.⁴⁵

⁴² Secretary-general’s report, para. 34.

⁴³ *Milutinović et al.*, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, case no. IT-99-37-AR72, May 21, 2003, para. 10, www.eccc.gov.kh/sites/default/files/documents/courtdoc/00207160-00207178.pdf.

⁴⁴ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009), 306.

⁴⁵ Secretary-general’s report, para. 35. The treaty and customary law referred to consists of the Geneva Conventions I-IV (on land and sea warfare, POWs, and civilians, respectively), August 12, 1949; Hague Convention IV (land warfare) and annexed regulations, October 18, 1907; the Charter of the International

However, the secretary-general's strategy of relying on customary law in order to avoid retroactivity in prosecuting crimes is legally questionable. The principle of legality is founded on the normative importance of predictability, and the clarity and specificity of legal prohibitions. The unwritten and often imprecise nature of customary international law means that it arguably provides a poor fit with the requirements of legality.⁴⁶ Nevertheless, when defendants have challenged the legality of any of the crimes at the court, they have rarely been successful.⁴⁷ The ICTY has determined that it can interpret and clarify the elements of crimes without retroactively creating law,⁴⁸ and can even progressively develop the law, as long as it does not stray into creating new law or interpreting the law, as the court stated, "beyond the reasonable limits of acceptable clarification."⁴⁹ This may well be a fine line, however, as the discussion below in relation to each crime illustrates.

War crimes

During Security Council debates on the laws to be included in the ICTY charter, the United States, the United Kingdom, and France argued that customary law should not exhaust the applicable law of war crimes, but that any humanitarian treaty (in addition to Geneva I-IV and

Military Tribunal (London Charter), August 8, 1945; and the Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948.

⁴⁶ Susan Lamb, "Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law," in *The Rome Statute of International Criminal Court: A Commentary, Vol. 1*, ed. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (Oxford: Oxford University Press, 2002), 743.

⁴⁷ William A. Schabas, *The United Nations International Criminal Tribunals* (Cambridge: Cambridge University Press, 2006), 65; and Jonas Nilsson, "The Crime of Persecution in the ICTY Case-law," in *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, ed. Bert Swart, Alexander Zahar, and Göran Sluiter (Oxford: Oxford University Press, 2011), 233.

⁴⁸ *Aleksovski*, Appeals Judgement, case no. IT-95-14/1-A, March 24, 2000, paras. 126-7, www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf.

⁴⁹ *Milutinović et al.*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction, para. 38.

Hague IV) that was applicable to the former Yugoslavia at the time of an offense could be legally enforced by the ICTY,⁵⁰ including the 1977 Additional Protocols.⁵¹ This significantly broadens the law prosecutable by the court from the secretary-general's cautious approach to legality. The tribunal itself later accepted this position, thereby expanding the law from its statute, but only to be applicable in the territory of a former Yugoslav state which had already transposed the treaty provisions into domestic law—an attempt to adhere to legality despite the broadening of crimes.⁵²

In contrast to the Western powers, non-western states on the Security Council, such as Venezuela, seemed concerned to limit the court's jurisdiction over crimes by stating that it should only apply customary law—the position of the Secretariat.⁵³ Venezuela also appeared just as concerned with ensuring that the court perform political functions as legal ones, especially narrative construction: “we suggest that the Prosecutor should not confine himself to bringing cases before the Tribunal, but should also present an overall report on all of the violations of international humanitarian law that come to his knowledge, which will provide him with an historical record of great importance.”⁵⁴ Even less powerful states concerned about providing expansive legal powers to the court saw political functions as key to its purpose. As explained later in the chapter, the prosecution's role in narrative construction—an aspect of the political

⁵⁰ Security Council, Provisional Verbatim Record of the 3,217th Meeting, UN doc. S/PV.3217, May 25, 1993, 11, 15, 19, www.icty.org/x/file/Legal%20Library/Statute/930525-unsc-verbatim-record.pdf.

⁵¹ Additional Protocols I and II to the Geneva Conventions of August 12, 1949 (relating to international and non-international armed conflict, respectively), June 8, 1977.

⁵² *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, case no. IT-94-1-AR72, October 2, 1995, paras. 135 and 143, www.icty.org/x/cases/tadic/acdec/en/51002.htm.

⁵³ Security Council, Provisional Verbatim Record of the 3,217th Meeting, 8.

⁵⁴ *Ibid.*

objective of encouraging transitional justice through the tribunal—has shaped defendant rights, especially in high-profile cases.

In the statute, customary war crimes are defined in articles 2 and 3 as grave breaches of the 1949 Geneva Conventions, and violations of the laws of customs of war, respectively. The latter relied largely on the Hague Conventions of 1899 and 1907.⁵⁵ In the case law, ICTY judges have determined a distinct “division of labour” between these aspects of war crimes, with article 3 encapsulating “all violations of international humanitarian law other than ‘grave breaches’ of the four Geneva Conventions falling under Article 2.”⁵⁶ Article 3 is therefore a broad category, whose list of underlying offenses, including plunder and “wanton destruction of cities,” is illustrative, not exhaustive.⁵⁷

The ICRC, “the world’s leading authority on international humanitarian law,”⁵⁸ had determined in 1993 that “the notion of war crimes is limited to situations of international armed conflict.”⁵⁹ However, in the first case before the tribunal, that of Duško Tadić, a low-level Bosnian Serb militia member, the court expanded the application of the customary law of war to

⁵⁵ ICTY statute, articles 2 and 3, respectively. The underlying offenses of the two categories as stated in the statute partially overlap, including on the excessive use of force and on targeting civilians.

⁵⁶ *Delalić et al.*, Trial Judgement, case no. IT-96-21-T, November 16, 1998, para. 297, www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf. In the second quote, the *Delalić* judgment was quoting *Tadić*, Jurisdiction Decision, para. 87.

⁵⁷ According to the statute: “[s]uch violations shall include, but not be limited to...” ICTY statute, article 3, chapeau. Most definitively, perhaps, the court stated in the *Tadić* case that “Article 3 thus confers on the International Tribunal jurisdiction over *any* serious offence against international humanitarian law not covered by Article 2, 4 or 5.” The court has made it clear from discussion within *Tadić* that the Security Council intended that the tribunal prosecute all violations of international humanitarian law, with article 3 becoming a catch-all for everything not covered elsewhere in the statute under any of the crimes. See *Tadić*, Jurisdiction Decision, para. 91. Emphasis in original.

⁵⁸ Michael P. Scharf, “Have We Really Learned the Lessons of Nuremberg?” conference paper presented at “Nuremberg and the Rule of Law: A Fifty-Year Verdict,” The Judge Advocate General’s School, United States Army, Charlottesville, Virginia, November 17-18, 1995, 3, www.pegc.us/archive/DoD/docs/Lessons_of_Nuremberg.doc.

⁵⁹ ICRC, “Preliminary Remarks of the International Committee of the Red Cross,” February 22, 1993, quoted in *Ibid*.

also apply to internal conflict, which has had profound implications for prosecution at the ICTY and later international courts.⁶⁰ Relying partly on the IMT Trial Judgement,⁶¹ the ICTY rejected Tadić's defense argument that there is no individual criminal responsibility for war crimes in internal conflicts,⁶² and determined that:

[T]he distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.⁶³

Grant Niemann, an ICTY prosecutor at the time, argues that this interpretation is legally sound because the tribunal and the Security Council which created the ICTY are not signatories to and so not bound by the Geneva Conventions. He claims that the ICTY interpretation of humanitarian law—that the states which created the humanitarian conventions did not wish them to be used to permit other states to intervene in their internal affairs—is legally irrelevant. All

⁶⁰ Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 2nd ed. (New York: The New Press, 2002), 312. The court argued that grave breaches of the Geneva Conventions still applied solely to international conflict. During the appeal process Tadić was found guilty on nine counts of war crimes, after being originally acquitted on the grounds that they did not take place during an international armed conflict.

⁶¹ IMT, *Göring and Others*, Judgment and Sentence.

⁶² *Tadić*, Jurisdiction Decision, paras. 128-9.

⁶³ *Ibid.*, para. 97.

that matters is that the UN Charter provides the Security Council the authority, under Chapter VII, to intervene in states' internal affairs.⁶⁴

However, the tribunal claimed to be identifying an already existing customary rule, as well as to be interpreting the purpose of the creators of the court's statute—states in the Security Council—as requiring an expansion of customary law to effectively implement their political goals of security and peace in the Balkans—a conflation of legal and political factors in determining law.⁶⁵ Additionally, this expansion of war crimes was “quite explicitly excluded” by the drafters of the Additional Protocols to the Geneva Conventions in 1977.⁶⁶

The dissertation agrees with Michael Scharf's contention that the court's approach to war crimes constituted a “novel interpretation” that clearly breaches the legality of crimes: “such recognition would constitute progressive development of international law, rather than acknowledgment of a rule that is beyond doubt entrenched in existing law,” and falls foul of “the ex post facto criticism.”⁶⁷ Scharf fears that such a determination will diminish the legal legitimacy of the court: “states will not have faith in the integrity of the Tribunal as a precedent for other ad hoc tribunals and for a permanent international criminal court if the Tribunal is perceived as prone to expansive interpretations of international law.”⁶⁸

From a human rights perspective, in contrast, the expansion of war crimes to internal conflicts was “one of the most significant jurisprudential achievements [of the ICTY] as far as

⁶⁴ Grant Niemann, “The Life and Times of a Senior Trial Attorney at the ICTY from 1994 to 2000,” *Journal of International Criminal Justice* 2, no. 2 (2004): 439.

⁶⁵ Alexander Grabert, *Dynamic Interpretation of International Criminal Law: Striking a Balance between Stability and Change* (Munich: Herbert Utz Verlag, 2015), 40.

⁶⁶ William A. Schabas, *An Introduction to the International Criminal Court*, 4th ed. (Cambridge: Cambridge University Press, 2011), 123.

⁶⁷ Scharf, “Have We Really Learned the Lessons of Nuremberg?” 3.

⁶⁸ *Ibid.*

war crimes are concerned.”⁶⁹ This clash between human rights and criminal justice interpretations of legal determinations illustrates a trade-off of legitimacy at the tribunal. By expanding the enforcement reach of the international humanitarian law of war crimes, the court created new criminal jurisdiction, thereby retroactively creating new law. Ultimately the *Tadić* decision is an “example of a dynamic interpretation which is highly desirable from a human-rights perspective while problematic from the perspective of the principle of legality.”⁷⁰

One of most significant developments in the expansion of underlying offenses at the ICTY in relation to war crimes has been the inclusion of sexual offenses, over which there was no jurisdiction at the IMT. Despite political resistance and lack of support, the commission of experts established by the secretary-general was able to do valuable investigative work, especially in relation to sexual crimes,⁷¹ including by conducting fact-finding missions which determined that Bosnian Serb sexual violence was systematic.⁷² This encouraged NGOs and women’s civil society organizations to analyze sexual violence during the war as a “specific, gendered war strategy.”⁷³ It also led to their prosecution at the tribunal as underlying offenses of war crimes and crimes against humanity, so that “[i]n relation to the sexual exploitation of

⁶⁹ Guénaél Mettraux, *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), 132.

⁷⁰ Grabert, *Dynamic Interpretation of International Criminal Law*, 41.

⁷¹ United Nations Division for the Advancement of Women (DAW) and the Department of Economic and Social Affairs, “Sexual Violence and Armed Conflict: United Nations Response,” in *Women2000* (New York: DAW, 1998), www.un.org/womenwatch/daw/public/w2apr98.htm.

⁷² UN Secretary-General, “Interim Report” (first report), para. 66.c. For an exploration of the systematic nature of the sexual violence during the war, see Amnesty International, “Bosnia and Herzegovina: Rape and Sexual Abuse by Armed Forces,” doc. no. EUR 63/01/93, January 1993.

⁷³ Tanja Djurić-Kuzmanović, Rada Drezgić, and Dubravka Žarkov, “Gendered War, Gendered Peace: Violent Conflicts in the Balkans and their Consequences,” in *Gendered Peace: Women's Struggles for Post-war Justice and Reconciliation*, ed. Donna Pankhurst (New York: Routledge, 2008), 274.

women during the course of armed conflict, the ad hoc tribunals have made a significant contribution to redressing the injustices of the past.”⁷⁴

While Geneva Convention IV does prohibit sexual violence against civilians,⁷⁵ in *Delalić et al.* the court acknowledged that it is not included in the treaty as a grave breach,⁷⁶ nor is it found in Common Article 3,⁷⁷ and so the justices argued that it cannot be prosecuted as an underlying offense of war crimes in its own right.⁷⁸ The court has consequently been careful to demonstrate that prosecutions for sexual offenses are consistent with legality. In the same case, the court identified the prohibitions on rape within the Geneva Conventions and Additional Protocols to determine that rape constitutes an international criminal act—prohibited as an aspect of the underlying offense of torture.⁷⁹ In *Furundžija* the court carefully laid out other existing sources for rape as a war crime,⁸⁰ including the US Civil War-era military Lieber Code,⁸¹ Hague Convention IV,⁸² and the practice of the IMTFE at Tokyo.⁸³ Given the prior existing law and practice, the apparent expansion of the application of war crimes to sexual offenses is clearly an interpretation that is consistent with the principle of legality and so expands the human rights

⁷⁴ Niemann, “The Life and Times of a Senior Trial Attorney at the ICTY from 1994 to 2000:” 445.

⁷⁵ Geneva Convention IV, article 27.

⁷⁶ *Ibid.*, article 147.

⁷⁷ Article 3 of each of the four 1949 Geneva Conventions is identical and lays out minimum treatment standards for protected persons during internal armed conflict.

⁷⁸ *Delalić et al.*, Trial Judgement, para. 475.

⁷⁹ *Ibid.*, para. 476. The list includes Geneva Convention IV, article 27, and Additional Protocol II, article 4.2.

⁸⁰ *Furundžija*, Trial Judgement, case no. IT-95-17/1-T, December 10, 1998, paras. 165-9, www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf.

⁸¹ Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (Washington, DC: Government Printing Office, 1898 [1863]), article 44, www.loc.gov/rr/frd/Military_Law/Lieber_Collection/pdf/Instructions-gov-armies.pdf.

⁸² Hague Convention IV, annexed regulations article 46.

⁸³ Admiral Toyoda and General Matsui were convicted for command responsibility for widespread rape by their troops. See the International Military Tribunal for the Far East, Judgment, November 4, 1948, werle.rewi.hu-berlin.de/tokio.pdf.

legitimacy of increasing substantive protections for all individuals, while not undermining the legal legitimacy of protecting the rights of defendants.

Crimes against humanity

Cherif Bassiouni drafted the definition of crimes against humanity that was submitted by the commission of experts to the secretary-general and subsequently included in the statute by the Security Council. He argues that the commission maintained the IMT legal requirement that the crime be committed within the context of armed conflict (domestic or international) because of concern with breaching the principle of legality.⁸⁴ While a 1950 report by the International Law Commission⁸⁵ had removed this connection, the commission of experts was concerned that this determination did not constitute customary law and would thereby constitute retroactive crime expansion by the ICTY.⁸⁶

Contrary to the commission of experts' advice,⁸⁷ the secretary-general's report removed the armed conflict requirement,⁸⁸ but it was added back in to the final statute by the Security Council.⁸⁹ According to Bassiouni the council shared the commission's concern with the legality

⁸⁴ M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), 342.

⁸⁵ ILC, "Report on the Question of International Criminal Jurisdiction," by Ricardo J. Alfaro, Special Rapporteur, Extract from the Yearbook of the International Law Commission 1950, vol. II, UN doc. A/CN.4/15 and Corr.1, 2, legal.un.org/ilc/documentation/english/a_cn4_15.pdf.

⁸⁶ Bassiouni, *Crimes Against Humanity*, 342.

⁸⁷ Secretary-General, "Interim Report" (first report), para. 14. The commission's final report, issued a year after the secretary-general's report, maintained the armed conflict requirement: UN Secretary-General, "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)," UN doc. S/1994/674, May, 27, 1994, para. 75, www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf.

⁸⁸ Secretary-general's report, para. 47.

⁸⁹ ICTY statute, article 5, chapeau. As a directly related issue, the statute also breaks the requirement established at the IMT between the commission of crimes against humanity and war crimes and crimes

of removing the armed conflict nexus.⁹⁰ This represents a greatly improved attitude towards the non-retroactivity of crimes against humanity than demonstrated by the Allies and IMT judges after World War II, reflecting the growth in acceptance of the applicability of legality to international law.

The legality of crimes against humanity was, however, the most uncertain of the crimes in the ICTY statute as it still lacked a treaty foundation. The ILC had spent decades working on the Draft Code of Crimes against the Peace and Security of Mankind, which provided a determination of international crimes, including crimes against humanity. Nevertheless, while it was adopted by the ILC in 1996,⁹¹ it has not been adopted by the General Assembly.

The court has established what has become a core definition in customary law of the context for the commission of the crime. Underlying offenses must have been committed as part of a widespread or systematic attack on a civilian population, and the perpetrator must have been aware that the offense constituted part of the attack.⁹² The tribunal also clarified that “widespread” refers to the number of civilian victims, and “systematic” to “the organised nature of the acts of violence and the improbability of their random occurrence.”⁹³ To be “systematic” thereby requires planning—effectively a policy which the attacks are designed to implement.

against peace—that is, at Nuremberg the former two crimes were only charged against a defendant who had also been indicted for crimes against peace.

⁹⁰ Bassiouni, *Crimes Against Humanity*, 185-6.

⁹¹ ILC, “Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996,” text located within “Report of the International Law Commission on the Work of its forty-eighth session,” 17-56, legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf. Until 1987 it was known as the Draft Code of Offences Against the Peace and Security of Mankind.

⁹² *Limaj et al.*, Trial Judgment, case no. IT-03-66-T, November 30, 2005, para. 181, www.refworld.org/docid/48ac17cc2.html.

⁹³ *Kunarac et al.*, Appeals Judgement, case nos. IT-96-23 and IT-96-23/1-A, June 12, 2002, para. 94, www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf.

The tribunal also determined the intent element of the crime to require that a perpetrator of an underlying offense is aware that their acts constitute part of this plan.

Bassiouni argues that the existence of a plan (of which the attack constitutes part) is inherent to what constitutes crimes against humanity as a distinctive crime.⁹⁴ However, the ICTY has largely ignored the existence of a policy as a requirement to establish culpability, following a “mistaken” appeals court judgment which determined that the attacks must be either—but are not required to be both of—widespread or systematic.⁹⁵ There is disagreement on this point, however. Antonio Cassese, a judge at the ICTY from 1993 to 2000, and its first president, argues that the tribunal was correct in necessitating only one of these context requirements rather than both.⁹⁶ Another legal commentator argues that, while some domestic case law supports the policy requirement, this constitutes a misunderstanding of national judicial interpretations.⁹⁷

So there is dispute over whether the tribunal has diluted the crime’s distinctive nature and thereby diminished its legality. Arguably one consequence of the tribunal’s weakening of the context requirements has been its ability to prosecute a particularly large number of individuals for the crime—as mentioned earlier, 670 counts, constituting 40.6 percent of all indicted offenses.⁹⁸ The ICTY and ICTR could have solely tried individuals for crimes against humanity

⁹⁴ Bassiouni, *Crimes Against Humanity*, 196-7.

⁹⁵ *Ibid.*, 194-7. The ICTY’s position was later adopted by the ICTR and the Special Court for Sierra Leone (SCSL). There is debate over whether the ICC’s Rome Statute reverts to the position of requiring a policy—see the discussion of the legality of crimes against humanity in Chapter 5.

⁹⁶ Cassese, *International Criminal Law*, 98-9.

⁹⁷ Guénaël Mettraux, “Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda,” *Harvard International Law Journal* 43, no. 1 (2002): 270-1, and *International Crimes and the Ad Hoc Tribunals* (Oxford: Oxford University Press, 2005), 170-3.

⁹⁸ Sadat, “Crimes Against Humanity in the Modern Age.” 342-3.

with little effect on the number of prosecutions:⁹⁹ the ad hoc tribunals have for this reason been labeled “crimes against humanity courts.”¹⁰⁰

The tribunal has also removed the contextual requirement of a connection to armed conflict, a position which the commission of experts and the Security Council believed would be contrary to customary law. Bassiouni perceives no conflict with legality here, arguing that as the crime has developed in customary law it no longer requires the armed conflict connection.¹⁰¹ The policy requirement and the lack of a necessary connection to armed conflict constitute the distinctive aspects of crimes against humanity as a mass atrocity crime.¹⁰² Therefore the court has established one distinctive feature of the crime—no dependence on an armed conflict context—while undermining another arguably defining characteristic—its systematic nature.

The statute lists the underlying offenses of crimes against humanity as murder; extermination; enslavement; deportation; imprisonment; torture; rape; “persecutions on political, racial and religious grounds;” and “other inhumane acts.”¹⁰³ Sexual crimes are therefore clearly included as an underlying offense.¹⁰⁴ However, rape is not found in the IMT charter—the textual basis for the crime in the ICTY statute—and therefore this potentially constitutes a breach of legality. Rape was included in the statute due to findings by the commission of experts on the use

⁹⁹ Schabas, *The United Nations International Criminal Tribunals*, 185.

¹⁰⁰ Göran Sluiter, “‘Chapeau Elements’ of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals,” in *Forging a Convention for Crimes Against Humanity*, ed. Leila Nadya Sadat (Cambridge: Cambridge University Press, 2011), 103.

¹⁰¹ Bassiouni, *Crimes Against Humanity*, 34. The sources he relies on include the 1950 ILC report, the 1996 ILC draft code, the ICTR statute, and the work of the United Nations Preparatory Committee on the Establishment of an International Criminal Court.

¹⁰² Hiram Abtahi, “Crimes Against Humanity and the Armed Conflict Nexus: From Nuremberg to the ICC,” Conference Paper No. 1/2013, European Society of International Law 2013, 5th Research Forum: International Law as a Profession, December 4, 2013.

¹⁰³ ICTY statute, articles 5.a-i., respectively.

¹⁰⁴ *Ibid.*, article 5.g.

of sexual violence as an aspect of ethnic cleansing,¹⁰⁵ a reasoning which would appear a clear breach of legality by inventing crimes for the purpose of ex post facto prosecution. However, customary law has developed since 1945 to recognize rape as an underlying offense, as it had been included implicitly in prior international humanitarian law under such euphemisms as “[f]amily honour and rights.”¹⁰⁶ As a consequence, in 2001 the ICTY became the first international court to convict an individual of rape as a crime against humanity.¹⁰⁷ Nevertheless, as discussed previously, customary law is a less sure basis for determining legality than treaty.

Other underlying offenses have also been clarified and further specified by the tribunal.¹⁰⁸ Most significantly, it has addressed the issue of whether the offense of “other inhumane acts”¹⁰⁹ is so vague and broad that it violates legality.¹¹⁰ The trial chamber in *Stakić* found the defendant not guilty of “forcible transfers”¹¹¹—including the transfer to detention facilities—as a form of “other inhumane acts.”¹¹² The court took a firm stance towards protecting legality by not

¹⁰⁵ International Human Rights Law Group, “No Justice, No Peace: Accountability for Rape and Gender-Based Violence in the Former Yugoslavia,” *Hastings Women’s Law Journal* 5, no. 1 (1994): 93-4.

¹⁰⁶ Hague Convention IV, article 46, www.icrc.org/ihl/INTRO/195. See Bassiouni, *Crimes Against Humanity*, 342, 428.

¹⁰⁷ On February 21, 2001, Dragoljub Kunarac, Radomir Kovać, and Zoran Vuković were convicted on 19 counts, including rape and sexual slavery. Andrew Osborn, “Mass Rape Ruled a War Crime,” *The Guardian*, February 22, 2001, www.theguardian.com/world/2001/feb/23/warcrimes (note: the article title, but not contents, incorrectly refers to war crimes, not crimes against humanity). See *Kunarac et al.*, Trial Judgement, case nos. IT-96-23-T and IT-96-23/1-T, February 22, 2001, www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf.

¹⁰⁸ See, for example, *Krnjelac*, Trial Judgement, 15 March 2002, case no. IT-97-25-T, para. 130 (attacks on human dignity), www.icty.org/x/cases/krnjelac/tjug/en/krn-tj020315e.pdf; and *Kupreškić et al.*, Trial Judgement, case no. IT-95-16-T, January 14, 2000, paras. 567-636 (persecution), www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

¹⁰⁹ ICTY statute, articles 5.h. and 5.i., respectively.

¹¹⁰ *Kupreškić et al.*, Trial Judgement, para. 563.

¹¹¹ *Stakić*, Trial Judgement, case no. IT-97-24-T, July 31, 2003, para. 719, www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf.

¹¹² Some forcible transfers constitute “deportation,” found in article 5.d. of the statute, but some transfers fall outside of this category. The court held that “[t]he crime of ‘other inhumane acts’ subsumes a potentially broad range of criminal behaviour and may well be considered to lack sufficient clarity,

permitting the expansion of the law through the development of vague categories of offenses which effectively constitute the creation of new criminal offenses.¹¹³

Genocide

The secretary-general's report included genocide in the statute,¹¹⁴ relying on a 1951 determination by the International Court of Justice (ICJ) that the convention had already become customary law, primarily on account of the "universal character" of the UN and the unanimous adoption of the convention by the members of the General Assembly.¹¹⁵ The Security Council accepted the secretary-general's position. The customary law status of genocide, and thereby the legality of prosecuting it at the ICTY, was later affirmed by the ICJ in *Bosnia v. Serbia*,¹¹⁶ and

precision and definiteness that it might violate the fundamental criminal law principle *nullum crimen sine lege certa* [the legality of clearly defined crimes]." *Stakić*, Trial Judgement, para.719. The trial judgment quoted from an earlier decision in relation to the defendant: *Stakić*, Decision on Rule 98bis Motion for Judgement of Acquittal, case no. IT-97-24-T, October 31, 2002, para. 131. *Nullum crimen sine lege certa* is a formulation of the principle of legality of crimes which directly states the need for clarity of prohibitions.

¹¹³ On a related issue, the commission of experts argued that "ethnic cleansing" constitutes an underlying offense of crimes against humanity. See UN Secretary-General, "Interim Report" (first report), paras. 55-6. The commission's position was clarified further in its "Final Report," paras. 129-50. It was not included in the list of offenses for any crime in the statute, but the court later determined that it constituted an element of both crimes against humanity and genocide—in the former case under the offense of persecution. See *Kupreškić et al.*, Trial Judgement, para. 606. For genocide it was determined as an element of generating "conditions of life calculated to bring about its physical destruction in whole or in part" (ICTY statute, article 4.2.c. See William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 293. While there was earlier inconsistency in the application of persecution and ethnic cleansing, the case law seems to have clarified, and they do not appear to breach legality through expansion of law. See Nilsson, "The Crime of Persecution in the ICTY Case-law," 227-33. The same court approach has applied to ethnic cleansing as a form of the underlying offense of persecution.

¹¹⁴ Secretary-general's report, para. 45.

¹¹⁵ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Advisory Opinion, May 28, 1951, 21, www.icj-cij.org/docket/files/12/4283.pdf.

¹¹⁶ ICJ, *Bosnia v. Serbia*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), February 26, 2007, para. 161, www.icj-cij.org/docket/files/91/13685.pdf.

by the tribunal itself.¹¹⁷ The ICTY became the first international court to specifically try the crime of genocide,¹¹⁸ and so the first to implement the Genocide Convention's provision calling for trials before "such international penal tribunal as may have jurisdiction."¹¹⁹

The statute's definition of genocide,¹²⁰ its underlying offenses, and modes of liability are a verbatim copy of articles 2 and 3 of the convention. For conviction, these require evidence of the physical element of the crime: the accused committed an underlying act against members of a protected identity group.¹²¹ It also requires two mental elements (of intent): the "ordinary" intent to commit an underlying offense,¹²² and the "dolus specialis" or special genocidal intent to destroy the group.¹²³

Special intent makes genocide particularly difficult to convict for, which has made prosecutors reluctant to bring charges for the crime at the tribunal.¹²⁴ This caution has been borne out by acquittals in most attempts to convict at the court.¹²⁵ The few convictions for genocide

¹¹⁷ *Krstić*, Trial Judgment, case no. IT-98-33, August 2, 2001, para. 541, www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf.

¹¹⁸ At the IMT at Nuremberg, acts that might now be considered genocide were prosecuted as "persecution," an underlying offense of crimes against humanity. See IMT charter, article 6.c.

¹¹⁹ Genocide Convention, article 6.

¹²⁰ ICTY statute, article 4.

¹²¹ *Ibid.*, article 4.2.

¹²² *Ibid.*, articles 4.3 and 7.1.

¹²³ *Ibid.*, article 4.2.

¹²⁴ Schabas, *Genocide in International Law*, 2nd ed., 457.

¹²⁵ Radislav Krstić's conviction was overturned on appeal: *Krstić*, Appeals Judgement, case no. IT-98-33-A, April 19, 2004, www.icty.org/x/cases/krstic/acjug/en/krs-aj040419e.pdf. The 2005 conviction of Vidoje Blagojević for aiding and abetting was also overturned on appeal: *Blagojević et al.*, Appeals Judgement, case no. IT-02-60-A, May 9, 2007, www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf.

means that, according to the ICTY itself, “there is little case-law on genocide,”¹²⁶ allowing for more flexibility in the determination of each trial chamber.

The word “genocide” has a “specific power” as representing the “crime of crimes.”¹²⁷ This has given it a distinct “role in the vicious cycle of competitive victimhood in the Balkans,” as stated by Marko Milanovic, vice-president of the European Society of International Law.¹²⁸ He predicts that Karadžić’s 2016 acquittal on one count of genocide, in relation to seven municipalities in Bosnia during 1992, will encourage the authorities in the Bosnian Serb autonomous region of Republika Srpska in their argument that the political entity is legitimate. This is a response to accusations such as those of Bosniak politician and Bosnian presidency member Haris Silajdžić, who has called the Republika Srpska a “genocidal creation.”¹²⁹

Karadžić’s prosecution for genocide constitutes an important aspect of the clash of historical narratives of the war in Bosnia in relation to the creation of Republika Srpska in the 1995 Dayton Peace Agreement.¹³⁰ Genocide has a distinctive place in the historical narrative function of the tribunal, especially in the case of high-profile figures such as Karadžić, who, along Slobodan

¹²⁶ ICTY, “Radislav Krstic becomes the First Person to be Convicted of Genocide at the ICTY and is Sentenced to 46 Years Imprisonment,” press release, doc. no. OF/P.I.S./6093, August 2, 2001, www.icty.org/en/press/radislav-krstic-becomes-first-person-be-convicted-genocide-icty-and-sentenced-46-years.

¹²⁷ William A. Schabas, “Genocide in International Law: A Discussion with William Schabas,” United States Holocaust Memorial Museum, March 30, 2004, www.ushmm.org/confront-genocide/speakers-and-events/all-speakers-and-events/genocide-in-international-law-a-discussion-with-william-schabas.

¹²⁸ Marko Milanovic, “ICTY Convicts Radovan Karadzic,” EJIL: *Talk!* blog (*European Journal of International Law*), March 25, 2016, www.ejiltalk.org/icty-convicts-radovan-karadzic.

¹²⁹ Mark Lowen, “Ethnic Rifts Overshadow Bosnia Election,” BBC News, October 1, 2010, www.bbc.com/news/world-europe-11451644.

¹³⁰ See Norman M. Naimark, “Srebrenica in the History of Genocide: A Prologue,” in *Memories of Mass Repression: Narrating Life Stories in the Aftermath of Atrocity*, ed. Nanci Adler, Selma Leydesdorff, Mary Chamberlain, and Leyla Neyzi (New Brunswick, NJ: transaction Publishers, 2009), 3-20; and Michael Keating, “Territorial Autonomy in Nationally Divided Societies: The Experience of the United Kingdom, Spain, and Bosnia and Herzegovina,” in *Territorial Pluralism: Managing Difference in Multinational States*, ed. Karlo Basta, John McGarry, and Richard Simeon (Vancouver: University of British Columbia Press, 2015), 121-47.

Milošević and Ratko Mladić, is the most significant figure prosecuted at the ICTY in relation to the Bosnian war. Most convictions for genocide at the tribunal have been for the modes of criminal liability of “aiding and abetting,” “complicity,”¹³¹ and “joint criminal enterprise.”¹³²

These modes have largely been utilized by the court to convict individuals without the core requirement of special genocidal intent.¹³³ In *Krstić*¹³⁴ and *Blagojević et al.*¹³⁵ the court held that the defendants were guilty of genocide because they had been aware of the intent of the perpetrators that they aided, even though they were not proven to share that special intent themselves. Knowledge of another’s intent was taken as proof of intent for the defendants, contrary to customary legal practice.¹³⁶

Consequently, the court’s chambers have been “interpreting the Genocide Convention in a broad and contradictory fashion and are diluting the essence of the crime when they apply the

¹³¹ ICTY statute, articles 7.1. and 4.3.e., respectively. Note that modes of liability (indicating the mental element of the crime), including conspiracy, incitement, and complicity, constitute part of the definition of genocide in the statute: genocide is the only crime before the court which contains its own modes of liability. This generates an overlap, or potentially a conflict, with the modes of liability listed for all the crimes, under article 7, which delineates individual criminal responsibility.

¹³² In 2001 Radislav Krstić became the first individual convicted directly of genocide. However, this was overturned by an appeals chamber, with only the conviction for “aiding and abetting” genocide standing. In a joint trial, Vujadin Popović and Ljubiša Beara were found guilty of genocide and conspiracy, and Drago Nikolić of aiding and abetting, all through participation in a joint criminal enterprise. These convictions were upheld on appeal. Zdravko Tolimir was convicted of genocide and conspiracy in 2012. Most significantly, Radovan Karadžić was convicted in 2016 of JCE in relation to genocide. See *Krstić*, Trial Judgment, case no. IT-98-33, August 2, 2001, and Appeals Judgement, case no. IT-98-33-A, April 19, 2004; *Popović et al.*, Trial Judgement, case no. IT-05-88-T, June 10, 2010; ICTY, “Appeals Chamber Upholds Convictions of Five Senior Bosnian Serb Officials for Srebrenica and Žepa Crimes,” press release, doc. no. CT/CS/PR1618e, January 30, 2015; *Tolimir*, Trial Judgement, case no. IT-05-88/2-T, December 12, 2012; and *Karadžić*, Trial Judgement, case no. IT-95-5/18-T, March 24, 2016, respectively.

¹³³ Karnavas, “Is the Emerging Jurisprudence on Complicity in Genocide before the *Ad Hoc* Tribunals a Moving Target in Conflict with the Principle of Legality?” 97-111.

¹³⁴ *Krstić*, Appeals Judgement, paras. 138-41.

¹³⁵ *Blagojević et al.*, Trial Judgement, case no. IT-02-60-T, January 17, 2005, paras. 655-70, www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf.

¹³⁶ Karnavas, “The Emerging Jurisprudence on Complicity in Genocide,” 103-5.

statutory modes of liability to the crime of genocide.”¹³⁷ Similarly to Bassiouni’s argument that the court has ignored what is distinctive about crimes against humanity—the requirement of a policy—the ICTY has insufficiently taken into account the centrality of special intent to the crime in convicting defendants for genocide.

The court determined that Karadžić demonstrated special genocidal intent in relation to a joint criminal enterprise (JCE) concerning the massacre at Srebrenica.¹³⁸ The rationale for JCE, according to Cassese, is that “if all those who take part in a common criminal action are aware of the purpose and character of the criminal action and share the requisite criminal intent, they must perforce share criminal liability, whatever the role and position they may have played in the commission of the crime.”¹³⁹

However, according to Milanovic, “the Prosecution’s case was essentially circumstantial, requiring the Chamber to draw inferences from indirect evidence, which is what it did.”¹⁴⁰ These were inferences about Karadžić’s intent solely from third party reports of his conversations with Miroslav Deronjic, whom Karadžić had appointed as the administrator of Srebrenica. From this evidence, genocidal intent on the part of Karadžić is “a reasonable inference...[I]t’s not as clear that this is the ONLY such reasonable inference, which is what they [sic] beyond a reasonable doubt evidentiary standard requires. For example, the phone conversation with Deronjic could be interpreted as Karadžić’s agreement with the forcible removal of the Bosniak males, but not necessarily with their extermination.”¹⁴¹

¹³⁷ Ibid., 98.

¹³⁸ *Karadžić*, Trial Judgement, paras. 5,736-830.

¹³⁹ Cassese, *International Criminal Law*, 191.

¹⁴⁰ Milanovic, “ICTY Convicts Radovan Karadzic.”

¹⁴¹ Ibid.

While Karadžić's conviction for superior responsibility for crimes against humanity is reasonable in this context, the conviction for genocide as well is arguably a case of the court applying the crime in a legally dubious manner because of its dramatic rhetorical nature linked to its historical narrative importance in relation to Karadžić. Securing a conviction for genocide against the individual with ultimate political authority over the Bosnian Serb forces which conducted the Srebrenica massacre is an important capstone to the tribunal's legal history. Ultimately genocide has been prosecuted far less frequently at the court than the other crimes, but its application suffers from a weakening of the special intent feature, again undermining what is distinct about the crime and permitting its prosecution more broadly than merited by the nature of the applicable modes of liability.

Legality indicator 2: Non-retroactivity of punishment

This section analyzes sentencing procedures at the tribunal. First the impact of the UN debate on the sentencing guidelines is assessed, as well as the guidelines themselves, as delineated in the statute and RPE. Second, the level of coherence and consistency between the sentencing guidelines and the tribunal's practice is analyzed. Finally, punishment in relation to the doctrine of command responsibility is explored, as it provides a particularly telling and controversial example of sentencing practices.

Sentencing rules: UN and judicial decision-making

The statute does not contain specific penalties for the crimes within its jurisdiction.¹⁴² The only guidelines for sentencing limit penalties for all crimes to imprisonment, as the death penalty was “quite emphatically rejected” in the secretary-general’s report to the Security Council on the court’s establishment.¹⁴³ The statute provides most guidance through its mention that punishment “shall” be—suggesting a requirement on the judges—consistent with sentencing practices “in the courts of the former Yugoslavia.”¹⁴⁴ However, the phrase “have recourse to” national practices suggests guidance rather than a requirement.¹⁴⁵ The only other reference in the statute is to vague guidance in relation to aggravating and mitigating circumstances: to “take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”¹⁴⁶

Part of the reason for this lack of specificity is that the customary and treaty law upon which the definitions of the court’s crimes are based similarly do not specify penalties. The Hague and Geneva Conventions, and the Genocide Convention were intended primarily to encourage national prosecution, with sentencing left up to each state to approach according to the guidelines of their national implementing legislation.¹⁴⁷ In light of this, states within the Security Council, while debating the creation of the tribunal, seemed concerned to avoid breaching legality of punishments through the creation of penalties to fill this gap. The Italian permanent

¹⁴² The ICTY’s RPE contains effectively no greater clarification and specificity than the statute: it delineates life in prison as the maximum sentence (rule 101.A.), and includes similar references to the statute in relation to aggravating and mitigating circumstances (rule 101.B.i.-ii.), and national practice (rule 101.B.iii.-iv.).

¹⁴³ Ralph Zacklin, “Some Major Problems in the Drafting of the ICTY Statute,” *Journal of International Criminal Justice* 2, no. 2 (2004): 365.

¹⁴⁴ ICTY statute, article 24.1.

¹⁴⁵ Shahram Dana, “Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Sentencing,” *Journal of Criminal Law and Criminology* 99, no. 4 (2009): 888.

¹⁴⁶ ICTY statute, article 24.2.

¹⁴⁷ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd ed. (Alphen an den Rijn, Netherlands: Kluwer Law International, 1999), 125-6.

representative stated his government's *opinio juris* that to adhere to the legality of punishment, an international court would thereby require conformity to national standards existing in the territory where the crimes prosecuted were committed: "the need to respect the *principle nullum crimen, nulla poena sine lege* [non-retroactivity of crimes and punishment], the basis of fundamental human rights, has induced the [Commission of Italian Jurists] to decide in favor of the penalties set forth by the criminal law of the State of the *locus commissi delicti* [location of the crimes]." ¹⁴⁸

Similarly, a proposal for a Yugoslav tribunal under the Conference for Security and Co-operation in Europe (CSCE) Moscow Human Dimension Mechanism, ¹⁴⁹ submitted to the UN, argued that a tribunal must avoid retroactivity of punishment, by following Yugoslav domestic practice. ¹⁵⁰ This proposal was contained in one of several reports submitted to the commission of experts established by the secretary-general, and was based on a text created by Bassiouni and published by the International Association of Penal Law. ¹⁵¹ Similar attitudes were voiced during

¹⁴⁸ UN Secretary-General, Letter from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General, UN doc. S/25300, February 16, 1993, quoted in Dana, "Beyond Retroactivity to Realizing Justice:" 875.

¹⁴⁹ The CSCE is now known as the Organization for Security and Co-operation in Europe (OSCE). The Moscow Human Dimension Mechanism was "a system of fact-finding human rights missions which do not require the consent of the state to be visited." See CSCE, Office for Democratic Institutions and Human Rights, *Bulletin* 1 (Winter 1992-3): 8, www.osce.org/odihr/17603?download=true.

¹⁵⁰ UN Secretary-General, "Proposal for an International War Crimes Tribunal for the Former Yugoslavia," by rapporteurs Hans Corell, Helmut Türk, and Gro Hillestad Thune (Report of the CSCE Rapporteur Mission under the Moscow Human Dimension Mechanism, February 9, 1993), UN doc. S/25307, February 18, 1993, 68-9. Reprinted in Virginia Morris and Michael Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis, Vol. 2* (Leiden: Nijhoff, 1995), 262-3.

¹⁵¹ M. Cherif Bassiouni, "Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal," *Fordham International Law Journal* 18, no. 4 (1994): 1,203.

Security Council debates by The Netherlands and Russia.¹⁵² Slovenia also expressed concern with specificity, but not adherence to customary law, arguing that the statute should include both maximum and minimum penalties. The United States, France, and the Organization of the Islamic Conference on the other hand expressed no specific concern with avoiding retroactivity of punishment.¹⁵³

The lack of any specific punishments, and the poor clarity and specificity in the sentencing guidelines provided by the statute and RPE, arguably constitute a significant breach of the legality of punishment: the authority creating the court had not delineated the specific law of penalties it was to implement. Bassiouni in contrast argues that the prior existence of specific penalties in the codes of the territories of the former Yugoslavia for crimes within the ICTY's jurisdiction means that the tribunal has not enforced punishments retroactively.¹⁵⁴ This argument only applies to war crimes and genocide, as crimes against humanity had not been codified in the region's legal systems.

While arguably not directly breaching the legality of punishment, the court's guidelines may have applied it weakly due to insufficient clarity and specificity. The legal foundation of punishment at the court has provided the judges with "large amounts of sentencing discretion and is not sufficient to ensure a development of consistent jurisprudence."¹⁵⁵

¹⁵² Dana, "Beyond Retroactivity to Realizing Justice:" 875, referring to Morris and Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 2, 443.

¹⁵³ William A. Schabas, "Sentencing by International Criminal Tribunals: A Human Rights Approach," *Duke Journal of Comparative and International Law* 7, no. 2 (1997): 471-3. Schabas quotes from various *notes verbale* and letters during early 1993 from the permanent representatives of these states to the UN secretary-general.

¹⁵⁴ Bassiouni, *Crimes Against Humanity*, 347.

¹⁵⁵ Barbara Holá, "Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law," *Amsterdam Law Forum* 4, no. 4 (2012): 5.

Sentencing practice

The tribunal early on exercised its discretion in ways inconsistent with the position of the Security Council, deciding that it would not be bound by the statute's national guidelines provision.¹⁵⁶ In constructing their own rules on punishment within the RPE, the judges included the possibility of life imprisonment,¹⁵⁷ despite this penalty not existing in the early 1990s in the law of the Socialist Federal Republic of Yugoslavia (SFRY).¹⁵⁸ The republic's law regarding genocide and war crimes provided for a 5-15 year term of imprisonment or the death penalty—the SFRY code also considered life imprisonment a *worse* punishment than a death sentence. In the early case law, the court also determined that it would not be restricted by national Yugoslav practice to sentences of under 16 years.¹⁵⁹ This practice has continued, and in the last ten years the number of individuals sentenced to over 20 years has increased,¹⁶⁰ with little indication the tribunal has taken domestic guidelines into account.¹⁶¹

To determine whether the purposes of punishment have guided the court in determining sentencing the statute is of no utility as it does not mention any such purposes. They are, however, described in the Security Council resolution that created the court, in primarily political rather than solely criminal justice terms: to “put an end to” the perpetration of mass atrocity

¹⁵⁶ Dana, “Beyond Retroactivity to Realizing Justice:” 888-9.

¹⁵⁷ ICTY RPE, rule 101.A.

¹⁵⁸ Criminal Code of the Socialist Federal Republic of Yugoslavia, art. 34, referred to in *Blagojević et al.*, Trial Judgement, para. 829; and Criminal Code of the SFRY, arts. 141-56, 1976, referred to in Dana, “Beyond Retroactivity to Realizing Justice:” 889.

¹⁵⁹ *Delalić et al.*, Appeals Judgement, case no. IT-96-21-A, February 20, 2001, para. 814, www.icty.org/x/cases/mucic/acjug/en/ce1-aj010220.pdf. Quoting the trial judgment, the appeals chamber noted that “the view that a higher penalty than that available under the SFRY would violate the principle of legality and *nulla poena sine lege* was ‘erroneous and overly restrictive.’” See *Delalić et al.*, Trial Judgement, para. 1,210.

¹⁶⁰ Dana, “Beyond Retroactivity to Realizing Justice:” 900.

¹⁶¹ Nadia Bernaz, “Sentencing and Penalties,” in *Routledge Handbook of International Criminal Law*, ed. William Schabas and Nadia Bernaz (London: Routledge, 2013), 297.

crimes, and to “bring to justice,” which would “contribute to the restoration and maintenance of peace.”¹⁶²

For more clarity in relation to ICTY practice, the beginning of the sentencing portion of trial judgments can be examined, as the purposes of the punishment in each conviction is expressed here. The tribunal has demonstrated a considerable range of sentencing goals in its trial judgments, including: “retribution, justice, deterrence (general and specific), rehabilitation, expressivism, reprobation, stigmatisation, affirmative prevention, incapacitation, protection of society, social defence and finally restoration/maintenance of peace and reconciliation.”¹⁶³ In 2000, the appeals chamber emphasized that while deterrence was one of the most important criteria, “[a]n equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes.”¹⁶⁴

Such a broad array of legal, normative, and political aims has combined with lack of statutory clarity on penalties to generate weak consistency in sentencing. Patricia Wald, a trial judge at the tribunal between 1999 and 2001, was critical of sentencing practices during the first decade of its operation: “my ICTY experience led me to conclude there are presently insufficient norms or guidelines to control sentencing discretion.”¹⁶⁵ The lack of clarity on how the court determines sentencing, and the inconsistency of judicial practice, continued in the subsequent decade, undermining support for, and the legitimacy of, the court.¹⁶⁶

¹⁶² UN doc. S/RES/827, May 25, 1993, preamble.

¹⁶³ Holá, “Sentencing of International Crimes at the ICTY and ICTR:” 6.

¹⁶⁴ *Aleksovski*, Appeals Judgement, para. 185.

¹⁶⁵ Patricia Wald, “Punishment of War Crimes by International tribunals,” *Social Research* 69, no. 4 (2002): 1,132.

¹⁶⁶ Holá, “Sentencing of International Crimes at the ICTY and ICTR:” 24.

Especially in the light of the lack of legal guidance, and unwillingness to rely on national legislation, sentencing practices have tended to rely heavily on the determination of aggravating and mitigating circumstances in relation to such issues as level of culpability.¹⁶⁷ The chambers have themselves justified lack of coherence and their discretion by arguing that this enables them to individualize punishments to the circumstances and gravity of the offenses convicted. Aggravating factors include the directness of involvement in the crime and the level of premeditation; mitigating ones include duress, a guilty plea, and victim-related factors such as expressing remorse, and providing assistance to, and attempting redress toward, victims. Two other sentencing factors that have also been relevant are the principle of proportionality to the gravity of the offense (what harm was done and to how many people),¹⁶⁸ and the principle of gradation or the significance of the convicted individual's acts in relation to the broader context of violence.¹⁶⁹

In terms of sentencing practice, between May 1997, when the first sentence was handed down, and May 2006, there were 49 final (post-appeals) sentences, ranging between 2.5 and 40 years—no life terms survived appeal.¹⁷⁰ These sentences do not reflect a coherent policy of effective individualization, but “an erratic quantification of sentence,” that has been further exacerbated by “fairly active appellate intervention lead[ing] to additional discretion and unpredictability.”¹⁷¹ Research in 2009 claimed to be able to account for 60 percent of the variation in ICTY sentencing, concluding that this provided a reasonable degree of predictability

¹⁶⁷ Marisa R. Bassett, “Defending International Sentencing: Past Criticism to the Promise of the ICC,” *Human Rights Brief* 16, no. 2 (2009): 23.

¹⁶⁸ *Kupreškić et al.*, Trial Judgement, para. 852.

¹⁶⁹ Holá, “Sentencing of International Crimes at the ICTY and ICTR:” 9-10.

¹⁷⁰ Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge, 2007), 56.

¹⁷¹ *Ibid.*, 59, 66.

in sentencing practice, with the other 40 percent accounted for by the individual (mitigating and aggravating) circumstances.¹⁷² The research also acknowledged, however, that it was “difficult to judge the adequacy” of the 60 percent number.¹⁷³ More recent sentencing practice continues to be characterized by a “lack of transparency and clarity.”¹⁷⁴

Another relevant factor in determining the legality of punishments is the doctrine of command responsibility: the criminal liability of a superior under international criminal law for the illegal acts of their political or military subordinates. This does not require complicity or providing direct orders. In the prosecution of General Tomoyuki Yamashita by the US military in the Philippines in 1945—the case which led to the “first fully fledged enunciation of the doctrine”¹⁷⁵—the defendant was found guilty of “unlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war crimes.”¹⁷⁶ Responsibility for the acts of Yamashita’s subordinates ultimately rested with the general, regardless of his intent with regards to these acts.¹⁷⁷

¹⁷² Barbara Holá, Alette Smeulers, and Catrien Bijleveld, “Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice,” *Leiden Journal of International Law* 22 (2009): 79-97.

¹⁷³ *Ibid.*, 95.

¹⁷⁴ Christine Bishai, “Superior Responsibility, Inferior Sentencing: Sentencing Practice at the International Criminal Tribunals,” *Northwestern Journal of International Human Rights* 11, no. 3 (2013): 107.

¹⁷⁵ Cassese, *International Criminal Law*, 237.

¹⁷⁶ United States Military Commission, *Yamashita*, case no. 21, October 8–December 7, 1945, lawofwar.org/Yamashita%20Commission.htm.

¹⁷⁷ Peter Robinson, Karadžić’s chief legal advisor, stated in a *Guardian* interview a week before his trial verdict was announced: “We called JCE ‘just convict everyone’ because it was so broad.” Robinson’s position on other modes of liability was explained as “if ICTY rules on aiding and abetting were applied in Syria, Barack Obama would be guilty of war crimes by arming Syrian rebels who committed atrocities.” See Matthew Weaver, “Radovan Karadžić’s Lawyer Expects Guilty Verdict over War Crimes,” *The Guardian*, March 18, 2016, www.theguardian.com/world/2016/mar/18/radovan-karadzic-lawyer-war-crimes-trial-hague-appeal.

The ICTY's provisions for command responsibility have generated excessively broad responsibility for superiors, constituting "vicarious liability."¹⁷⁸ The tribunal has gone beyond the existing doctrine by deciding that, according to the *Kunarac* judgment, "the criminal culpability of those leading others is higher than those who follow."¹⁷⁹ However, the tribunal has been reluctant to actually enforce harsher penalties for command responsibility on the basis of joint criminal enterprise, leading to sentencing that has not been consistent with this determination. In the most high-profile case of command responsibility that led to a conviction, Karadžić received a 40 year sentence for 10 counts, including one of genocide¹⁸⁰—whereas some victims argued he should have received a life sentence.¹⁸¹ This compares to Duško Tadić's 20 year sentence for killing and torture as a prison camp guard.¹⁸² Former ICTY prosecutors Mark Harmon and Fergal Gaynor argue that sentencing for JCE at the tribunal has amounted to "a slap on the wrist" and therefore "a slap in the face of the victims."¹⁸³

The tribunal's problems with consistency and coherence in sentencing stem significantly from the lack of guidance provided by the UN secretary-general and the Security Council. While

¹⁷⁸ Kai Ambos, "Remarks on the General Part of International Criminal Law," *Journal of International Criminal Justice* 4, no. 4 (2006): 671-2.

¹⁷⁹ *Kunarac et al.*, Trial Judgement, para. 863.

¹⁸⁰ *Karadžić*, Trial Judgement, para. 6,070.

¹⁸¹ Marlise Simons, "Radovan Karadzic, a Bosnian Serb, Is Convicted of Genocide," *The New York Times*, March 24, 2016. It should also be noted that, as Karadžić is 70 years old, if his conviction is upheld he will spend the rest of his life in prison. In terms of consistency in sentencing for the mode of liability, this compares to the life sentence of Milan Lukić for the much lower level of command responsibility over a paramilitary group that committed murder and torture in Bosnia. See *Lukić et al.*, Trial Judgement, case no. IT-98-32/1-T, July 20, 2009, para. 1,101, www.icty.org/x/cases/milan_lukic_sredoje_lukic/tjug/en/090720_j.pdf; and *Lukić et al.*, Appeals Judgement, case no. IT-98-32/1-A, December 4, 2012, para. 669, www.icty.org/x/cases/milan_lukic_sredoje_lukic/acjug/en/121204_judgement.pdf.

¹⁸² *Tadić*, Sentencing Judgement, case no. IT-94-1-T, July 14, 1997, para. 74, www.icty.org/x/cases/tadic/tjug/en/tad-sj970714e.pdf.

¹⁸³ Mark B. Harmon and Fergal Gaynor, "Ordinary Sentences for Extraordinary Crimes," *Journal of International Criminal Justice* 5, no. 3 (2007): 683-712.

acute to the need to provide a specific framework on the substance of laws, they provided little guidance in relation to penalties. The lack of Cold War development of international criminal procedure led to weak agreement on sentencing within the Security Council, in contrast to the elaboration of international human rights and humanitarian law, which generated far greater agreement on the substance of crimes the ICTY should prosecute.

This lack of prior development has arguably harmed the post-Cold War development of international criminal justice by permitting too great a discretion to judges, who have not developed a consistent structure of penalties, which makes claims of selective justice easier to sustain. As legal scholar Mark Drumbl states, “[i]n the end, although individualizing the penalty certainly is desirable, the benefits thereof dissipate when there is no coherent framework in which to predictably consider the factors germane to, or the goals of, sentencing,” which diminishes the legitimacy of the tribunal.¹⁸⁴

Defense parity indicator 1: Institutional support

In this section, first the defense’s position within the court’s institutional structure vis-à-vis that of the prosecution is analyzed, as well as its implications for adequacy of defense representation. Second, the institutional support provided by the ICTY to prosecutors and defense counsel to investigate on-site through immunities and privileges is compared, as well as the investigatory support provided in relation to external actors.

Structural parity

¹⁸⁴ Drumbl, *Atrocity, Punishment, and International Law*, 59.

Structurally, the tribunal consists of three primary organs: Chambers (initially two trial chambers and an appeals chamber, with a president chosen from the appeals chamber); an Office of the Prosecutor (OTP); and Registry.¹⁸⁵ The latter is the tribunal's administrative body, and provides support to the other two organs, as well as assistance to defense counsel, victims, and witnesses.¹⁸⁶

Before a restructuring of the OTP in 2008, its Investigations Division, now eliminated, conducted pre-trial investigations.¹⁸⁷ The “muscle tissue” of the OTP, according to former chief prosecutor Carla Del Ponte, consists of “trial attorneys and jurists, forensic experts, police officers, and analysts of the history, culture, languages, and other aspects of the former Yugoslavia.”¹⁸⁸ According to the tribunal, its researchers have mostly had “backgrounds in police work,” expertise aiding enormously in their task of collecting evidence, including through the identification and questioning of witnesses and conducting on-site investigations.¹⁸⁹ The OTP's Prosecution Division selects evidence and conducts first instance trials. See Figure 4.1 below for the organizational structure of the court.

¹⁸⁵ ICTY statute, article 11.

¹⁸⁶ ICTY, About the ICTY, www.icty.org/en/about.

¹⁸⁷ The OTP maintains around 50 investigators within the Prosecution Division. See ICTY, Office of the Prosecutor: Investigations, www.icty.org/en/about/office-of-the-prosecutor/investigations.

¹⁸⁸ Carla Del Ponte and Chuck Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (New York: Other Press, 2008), 40.

¹⁸⁹ ICTY, Office of the Prosecutor: An Introduction, www.icty.org/en/content/office-prosecutor-introduction.



ORGANISATION OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

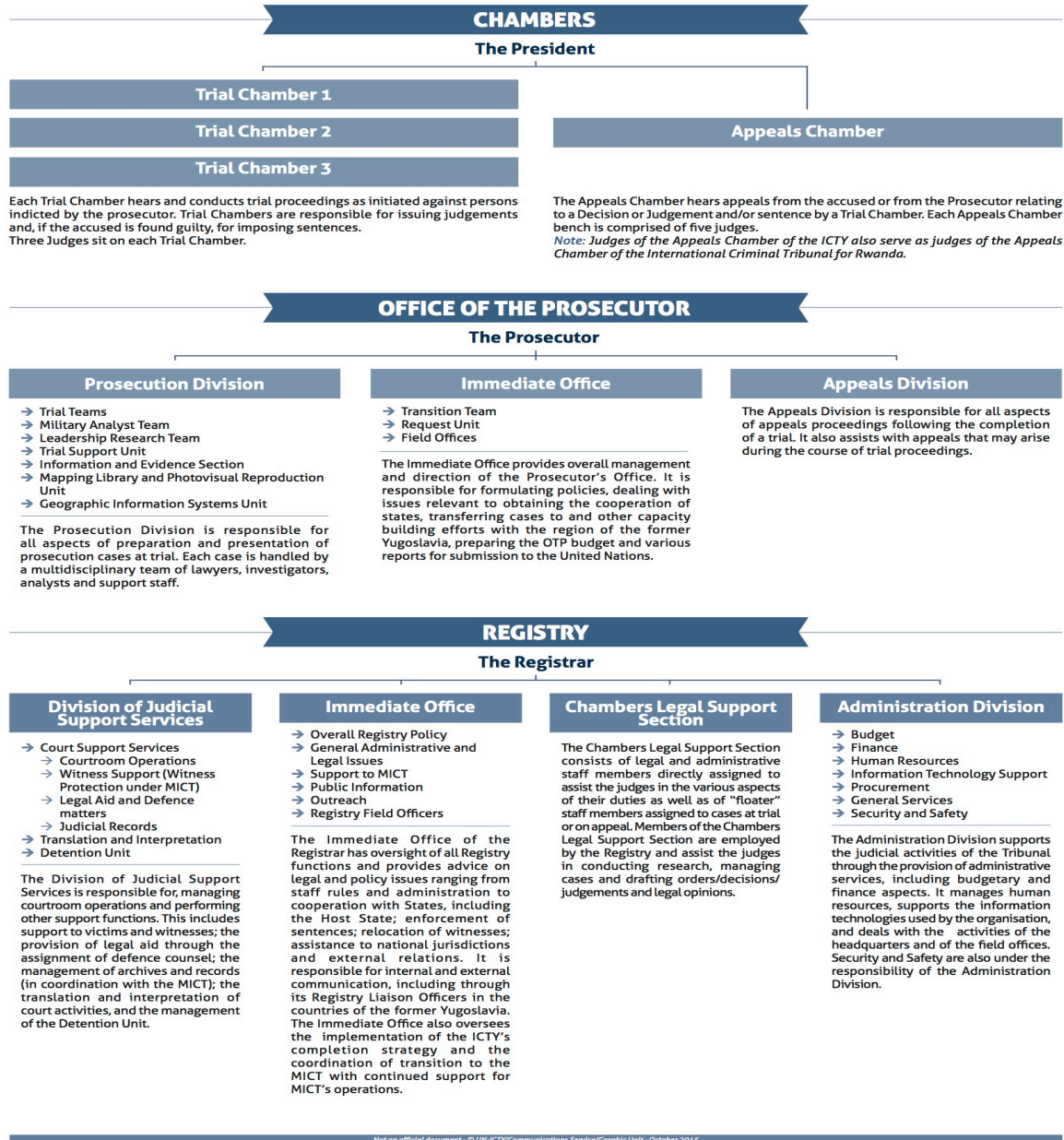


Figure 4.1 Organizational structure of the ICTY

Source: ICTY, Organisational Chart, October 2015, www.icty.org/en/about/tribunal/organisational-chart.

The OTP's Immediate Office also has functions that impinge upon the courtroom dynamic with the defense: including providing the prosecution with a voice in decision-making with the other organs of the court concerning rule changes; and liaising with states, which involves ensuring cooperation with investigations.

In stark contrast to the position of the prosecution, the statute did not designate any official position within its structure for defense counsel. The structural position of the accused was largely overlooked in the construction of the court, as Registrar John Hocking acknowledged in 2010: "In the early days of ICTY, support for defence counsel was rudimentary. The Statute did not foresee defence counsel as institutionally part of the Tribunal, and defence counsel were at times treated with mistrust. They were not allowed to freely access the ICTY building and had to be escorted to and from the courtrooms by security."¹⁹⁰ While the dissertation agrees with Hocking that the situation has improved since then, as the analysis below makes clear, defense counsel continue to lack an autonomous institutional position within the court, and the consequences of this structural imbalance for decision-making influence persist.

Defense counsel have always been considered independent of the ICTY, with their official representation occurring solely through the Registry. The primary liaison for defense is the Registry's Office of Legal Aid and Defense (OLAD),¹⁹¹ whose defense responsibilities include

¹⁹⁰ John Hocking, "Legal Aid and Defence Support at the ICTY," Address of Mr. John Hocking, Registrar, United Nations International Criminal Tribunal for the former Yugoslavia, Meeting of Registrars of Final/Appellate, Regional and International Courts, Ottawa, Canada, April 14-16, 2010, 6, www.icty.org/x/file/Press/Statements%20and%20Speeches/Registrar/100414_reg_hocking_ottawa.pdf.

¹⁹¹ The Office of Legal Aid and Defense is located within the Court Support Services Section of the Registry's Division of Judicial Support Services. OLAD was previously known as the Office of Legal Aid and Detention Matters, and before that the Defence Counsel Unit. See ICTY, "Report of the

providing legal aid for accused unable to pay for their own defense,¹⁹² and determining which attorneys qualify to represent accused at the court and assigning counsel.¹⁹³ The Registry is the only official organ of the court with authority in relation to defense issues, ostensibly representing its interests at the court—including in budgetary and rule-change decision-making forums. However, the Registry also represents the interests of the other major parties at the court: the Chambers, the prosecution, and victims and witnesses. It cannot effectively represent defense interests in intra-court communications and decision-making negotiations as it remains neutral as an administrative body for all major actors at the court. Frustration with lack of perceived support has led “some defence counsel [to] consider the Registry as their worst enemy.”¹⁹⁴

ICTY judge David Hunt has criticized the Registry for not requiring staff to have a legal background or experience representing criminal defendants in a domestic or international context, while it provides the sole communication and coordination mechanism for counsel

International Tribunal for the Former Yugoslavia” (twenty-second annual report), UN doc. A/70/226–S/2015/585, July 31, 2015, para. 64, www.icty.org/en/documents/annual-reports.

¹⁹² Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, 50. Indigent defendants, which must rely on the court to supply financing for counsel, tend to have far fewer lawyers—often one or two—than privately funded defendants and than the prosecution that they must face at trial. This significantly impacts the ability of accused to investigate and so prepare an adequate defense. See Charles Chernor Jalloh and Amy DiBella, “Equality of Arms in International Criminal Law: Continuing Challenges,” in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 266–7. A related issue is the poor level of remuneration of defense counsel compared to that available in most Western states. While this has improved since the 1990s, it has arguably impacted the ability of the court to attract talented and experienced defense counsel from the domestic level. Interview with Peter Robinson, ICTY defense counsel and former ADC Executive Board member, San Francisco, 27 August 2015. As of December 2013, 121 of 133 accused had received full or partial legal aid through the office (81 received full aid, and 40 partial). See ICTY, *About the ICTY: Legal Aid*, www.icty.org/en/about/registry/legal-aid. During the most recent reporting period (July 2015–July 2016) OLAD provided financial aid to 18 of the 20 remaining defendants on trial or appeal and oversaw in excess of 170 defense attorneys and investigators. See ICTY, twenty-second annual report to the UN, para. 70.

¹⁹³ ICTY RPE, rules 44–5.

¹⁹⁴ Jarinde P.W. Temminck Tuinstra, *Defence Counsel in International Criminal Law* (The Hague: T.M.C. Asser Press, 2009), 78.

within the ICTY's structure. He argued this was a result of a lack of understanding of the role and needs of counsel at the ICTY.¹⁹⁵ Numerous instances of "abuse" of the Registry's authority in regard to such defense issues as assigning counsel have been acknowledged, and occasionally rectified, by the court.¹⁹⁶

This imbalance between the position of the prosecution and defense in the structure of the ICTY is replicated in most international courts,¹⁹⁷ and is an ongoing problem in international criminal justice.¹⁹⁸ According to Elise Groulx, a former honorary president of the International Criminal Bar (BPI-ICB), and head of the advisory board of the Business and Human Rights project of the American Bar Association Center for Human Rights, the defense constitutes a missing "third pillar" in the structure of international courts:

In addition to an independent judiciary and prosecution, the international criminal justice system requires an independent legal profession (including both defence and victims' counsel). The incorporation of a 'third pillar' will help to legitimize the new justice system

¹⁹⁵ Separate opinion of Judge David Hunt, in *Milutinović et al.*, Decision on Interlocutory Appeal on Motion for Additional Funds, case no. IT-99-37-AR73.2, November 13, 2003, para. 41.

¹⁹⁶ For example, in *Martić* the trial chamber ordered the Registry to reassess its decision to deny a defendant counsel of his choice; counsel was subsequently affirmed. See *Martić*, Decision on Appeal against Decision of Registry, case no. IT-95-11-PT, August 2, 2002, www.icty.org/x/cases/martic/tdec/en/09122227.htm.

¹⁹⁷ The singular exception is the Special Tribunal for Lebanon, whose Defence Office is one of the four primary organs of the court—co-equal in status with the Office of the Prosecutor. See STL, Structure of the STL: Defence, www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence-2.

¹⁹⁸ The UN Secretariat eventually acknowledged the negative impact on trial fairness of the structural weaknesses of the earlier tribunals the UN had established. It recognized the importance of greater institutional parity in relation to the proposed Special Tribunal for Lebanon: "[t]he need for a defence office to protect the rights of suspects and accused has evolved in the practice of United Nations-based tribunals as part of the need to ensure 'equality of arms,' where the prosecutor's office is an organ of the tribunal and is financed in its entirety through the budget of the tribunal." See UN Secretary-General, "Report of the Secretary-General on the Establishment of a Special Tribunal for Lebanon," UN doc. S/2006/893, November 15, 2006, para. 30, www.stl-tsl.org/en/documents/un-documents/un-secretary-general-reports/256-report-of-the-secretary-general-on-the-establishment-of-a-special-tribunal-for-lebanon.

and strengthen the rule of law by providing a formal voice for lawyers and enabling the protection of individual rights.¹⁹⁹

Cassese acknowledged in a 2006 report to the Special Court for Sierra Leone that the creation of the latter's Defense Office "has proved successful by giving the various defence teams an institutional voice that is not present at the ICTY."²⁰⁰ In 1997, for example, in order to cut costs the ICTY Registry decided to reduce the maximum number of hours counsel could bill for and reduce the number of investigators they could hire.²⁰¹ Defense counsel had no institutional voice with which to resist such cuts, unlike the OTP.²⁰²

In recognition of the need for a third pillar organization for the defense at the ICTY, providing them with such a voice, in September 2002 ICTY judges, working with defense counsel, created a bar association: the Association of Defence Counsel practising before the International Criminal Tribunal for the Former Yugoslavia (ADC-ICTY).²⁰³ It represents the collective interests of the accused and defense counsel at the court while remaining outside the court's structure,²⁰⁴ and was "an effort to offset some of the disadvantages of the Defence not

¹⁹⁹ Elise Groulx, "Equality of Arms: Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System," *Oxford University Comparative Law Forum* 3 (2006), text before note 1, ouclf.iuscomp.org/articles/groulx.shtml. Italics in original.

²⁰⁰ Antonio Cassese, "Report on the Special Court for Sierra Leone," December 12, 2006, para. 52, www.rscsl.org/Documents/Cassese%20Report.pdf.

²⁰¹ Richard J. Wilson, "Assigned Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach," *International Criminal Law Review* 2 (2002): 177.

²⁰² Brianne McGonigle, "De Facto v. De Jure Equality in the International Criminal Tribunal for the Former Yugoslavia," *Human Rights Brief* 13, no. 1 (2005): 10.

²⁰³ ADC-ICTY, History, www.adc-icty.org/#!/history/c1n8o. It is now officially the Association of Defence Counsel Practising Before the ICTY and Representing Counsel Before the MICT, having been officially recognized by the MICT in August 2015. See MICT, About the MICT: Defence, www.unmict.org/en/about/defence.

²⁰⁴ Association of Defence Counsel Practising Before the ICTY, Constitution, 3rd General Assembly of the ADC, October 23, 2004, www.adc-icty.org/#!/documents/o2up6.

being institutionally represented.”²⁰⁵ It took so long to create such an organization partly due to the decentralized nature of defense counsel. Unlike prosecutors, who live in the Hague area, working for the court full-time, many counsel are on a list of those the Registry (and now ADC) deems to be qualified to serve at the court, but many only live at the Hague when they have been assigned to a case. This provides counsel with far less cohesion, and institutional memory, even since the creation of the ADC.²⁰⁶

The ICTY’s RPE was modified after the creation of the ADC to require that all defense counsel are in good standing with an association of counsel practicing at the tribunal recognized by the Registry—of which the ADC is the only one.²⁰⁷ The ICTY describes the ADC’s role as that of providing a voice for defense counsel within the tribunal’s committees and projects, including consultation on policies affecting them, such as those relating to legal aid.²⁰⁸

The ADC president from 2013 to 2015, Colleen Rohan, claims that the organization has had a significant positive impact on accused and defense counsel at the tribunal. Changes include acquiring more substantive aid to facilitate defense, including through counsel training, which the ADC provides in relation to substantive and procedural international criminal law and

²⁰⁵ John Hocking, “Legal Aid and Defence Support at the ICTY,” Address of Mr. John Hocking, Registrar, United Nations International Criminal Tribunal for the former Yugoslavia, Meeting of Registrars of Final/Appellate, Regional and International Courts, Ottawa, Canada, April 14-16, 2010, 7, www.icty.org/x/file/Press/Statements%20and%20Speeches/Registrar/100414_reg_hocking_ottawa.pdf.

²⁰⁶ Jarinde P.W. Temminck Tuinstra, *Defence Counsel in International Criminal Law* (The Hague: T.M.C. Asser Press, 2009), 90.

²⁰⁷ ICTY, RPE, rule 44.A.iii. In August 2015, the ADC-ICTY was also officially confirmed as an association of counsel practicing before the MICT. See MICT, Rules of Procedure and Evidence, doc. no. MICT/1, June 8, 2012, rule 42. This recognition was officially confirmed in August 2015. According to Rohan, the ADC-ICTY was, at least until late 2013, the only such independent bar association to be recognized before an international court. See Colleen M. Rohan, “Foreword,” in Association of Defence Counsel Practicing before the ICTY, “ADC-ICTY Legacy Conference: Conference Proceedings,” The Hague, November 29, 2013, 4, adc-icty.org/Documents/Legacy%20Conference%20Publication%202015.pdf.

²⁰⁸ ICTY website, Defence, www.icty.org/sections/AbouttheICTY/Defence.

courtroom skills.²⁰⁹ According to former ADC Executive Board member and ICTY Rules Committee member Peter Robinson, the ADC's effect has been "positive, but not significant"—it has fought for increased resources and training for counsel, with mixed results.²¹⁰

The ADC sits on the Rules Committee and the Disciplinary Board and Disciplinary Panel,²¹¹ which Rohan argues has given the organization a useful voice in policy-making, which it did not effectively have before 2002.²¹² Other positive changes include ADC amicus briefs²¹³ being increasingly considered by the court, providing the organization with more of a role in aiding counsel in adequately representing their clients.²¹⁴ Nevertheless, the organization has "had to struggle over the years to effectuate" its vision of a partnership with the court to create greater trial fairness, "and overcome resistance to it from those who did not understand the scope of the Defence function or the importance of a Defence voice in the development of the law and practices within the international courts."²¹⁵ There is also only limited evidence of ADC influence in decision-making. Robinson, for example, proposed three rule changes while serving as an ADC representative on the ICTY Rules Committee, none of which were accepted.²¹⁶

²⁰⁹ Interview with Colleen Rohan, Berkeley, Calif., November 12, 2015.

²¹⁰ Interview with Peter Robinson, San Francisco, Calif., August 27, 2015.

²¹¹ Yvonne McDermott, "Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law," in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Naimh Hayes (Farnham, UK: Ashgate, 2013), 305; and ICTY, About the ICTY: Defence, www.icty.org/en/about/defence.

²¹² Interview with Colleen Rohan.

²¹³ Amicus briefs, or *amicus curiae*, are "friend of the court" briefs, submitted to a court by an individual or group that is not a party to that particular case. See ICTY, Information Concerning the Submission of *Amicus Curiae* Briefs, UN doc. IT/122/Rev.1, February 16, 2015, www.icty.org/x/file/Legal%20Library/Miscellaneous/it122_amicuscuriae_briefs_en.pdf.

²¹⁴ Interview with Gregor Guy-Smith, defense counsel before the ICTY and former president of the ICTY Association of Defence Counsel, San Francisco, August 12, 2015.

²¹⁵ Colleen M. Rohan, "Foreword," in "ADC-ICTY Legacy Conference: Conference Proceedings," 4.

²¹⁶ Interview with Peter Robinson. The rule changes he proposed were: permitting provisional release for accused, on the basis that they are presumed innocent until proven otherwise; a motion to discuss use of

According to Gabrielle McIntyre, chef de cabinet, or most senior legal advisor, to four presidents of the ICTY, and current chef de cabinet of the MICT, significant advantages for the prosecution of having a permanent office are better dissemination of information through structural cohesion, and institutional memory. The OTP “employs hundreds of people to carry out investigations and gather evidence in relation to all sides of the conflict. As such, it has the benefit of being a homogeneous body, in that material secured by it will be available to prosecutors concerned with other cases.”²¹⁷ The OTP’s Military Analyst Team (MAT) and Leadership Research Team (LRT) are staffed by former military officers and regional specialists, respectively, and support requests for assistance from trial prosecutors.²¹⁸ They have been especially important sources of institutional memory for the prosecution in relation to local knowledge, expert witnesses, and identifying evidence.²¹⁹

This advantage especially applies in cases that relate to a situation already litigated at the court. Multiple cases repeating the same situation occur only infrequently in most domestic contexts, but is a common feature of ICTY prosecutions. Rohan confirms that while defending clients at the tribunal she has faced better prepared prosecutors due to prior experience with the facts of a case whose situation was previously litigated. Some prosecutors have read many of the relevant documents before the beginning of such a case, and have dealt with many of the same witnesses and experts before. In the process, the prosecution is honing its strategy, whereas a

written witness statements; and obtaining a review of (wrongful) conviction based on new facts. While all were denied at that time, he acknowledged that the former issue was later changed to the benefit of defendants.

²¹⁷ Gabrielle McIntyre, “Equality of Arms: Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia,” *Leiden Journal of International Law* 16, no. 2 (2003): 279.

²¹⁸ ICTY, About the ICTY: Investigations, www.icty.org/en/about/office-of-the-prosecutor/investigations.

²¹⁹ Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), 80-3.

defense lawyer for whom this is the first case dealing with a particular situation is at a distinct disadvantage in terms of familiarity with and knowledge of the documentary evidence.²²⁰

In relation to the dual roles of prosecutors, Rohan feels that overall the chief prosecutors at the tribunal have not acted effectively as officers of justice, misusing their public profile to skew public perception against defendants. She feels it is inappropriate for a prosecutor to comment on the merits of a pending case in that way. For example, speaking about defendant Ramush Haradinaj²²¹ during his trial, Chief Prosecutor Carla Del Ponte stated in an interview with *Der Spiegel* that “there is no doubt about his guilt.”²²² It is the task of the trial chamber to determine the guilt or innocence of a defendant—not that of the prosecution. The chief prosecutor was conflating her roles as an officer of the court—with a responsibility to ensure that justice is done—with her role as a competitor with the defense in an adversarial trial, arguable misusing her officer-of-the-court position, with its advantages of a high international profile, to make a public case.

Rohan, who was counsel for Idriz Balaj during the *Haradinaj et al.* trial, filed a motion claiming that Del Ponte’s remarks were inappropriate, and in violation of the Standards of Professional Conduct for Prosecution Counsel at the ICTY.²²³ In its decision, the court was ambiguous about whether the prosecutor had breached the standards and her obligation for

²²⁰ Interview with Colleen Rohan; and Sonja B. Starr, “Ensuring Defense Counsel Competence at International Criminal Tribunals,” *UCLA Journal of International Law and Foreign Affairs* 14, no. 1 (2009): 176.

²²¹ See *Haradinaj et al.*, Trial Judgement, case no. IT-04-84-T, April 3, 2008, www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf.

²²² Renate Flottau, “Interview With War Crimes Prosecutor Carla Del Ponte: ‘Politics Have Interfered With Our Work,’” *Der Spiegel*, October 18, 2007.

²²³ See Standards of Professional Conduct for Prosecution Counsel, Prosecutor’s Regulation No. 2, 1999, para. 2.c, www.icty.org/x/file/Legal%20Library/Miscellaneous/otp_regulation_990914.pdf.

neutrality outside the court, denying the motion on the grounds that it could not be proven that the statement had negatively affected the trial.²²⁴

This is an example of an issue which occurs in relation to many circumstances within international courts, and has been the subject of debate by the European Court of Human Rights: whether a breach of court standards that exist to protect the accused is sufficient to demand remedy, or whether actual harm needs to be proven.²²⁵ As discussed in Chapter 3, the dissertation adopts the more cautious approach, from the perspective of protecting the rights of defendants, of recognizing breaches of guarantees whether or not they have been determined by a court to have prejudiced a trial.

Investigatory support and cooperation

To enable effective investigations and evidence gathering, the statute provides “the judges, the Prosecutor and the Registrar...[with] the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law” and “[t]he staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII”²²⁶ of the Convention on the Privileges and Immunities of the United Nations, including functional immunity and the right to use UN “laissez-passer” travel documents.²²⁷ Functional immunity provides prosecutors with immunity

²²⁴ *Haradinaj et al.*, Decision on Idriz Balaj’s Request for Evidentiary Hearing Regarding Interview of Carla Del Ponte, case no. IT-04-84-T, January 29, 2008, www.icty.org/x/cases/haradinaj/tdec/en/080129.pdf.

²²⁵ See European Court of Human Rights, *Lanz v. Austria*, no. 24430/94, January 31, 2002, 58, and *Kremzow v. Austria*, Series A, no. 268-B, September 21, 1993, 75.

²²⁶ ICTY statute, articles 30.2 and 30.3.

²²⁷ UN General Assembly, Convention on the Privileges and Immunities of the United Nations, February 13, 1946, www.un.org/en/ethics/pdf/convention.pdf.

from local criminal jurisdictions in relation to actions performed in an official capacity—that is, while investigating crimes for the ICTY.²²⁸ UN laissez-passer travel documents facilitate faster acceptance of visa requests, faster travel, and access to diplomatic envoy facilities for prosecutors.

Court provision of legal protections during pre-trial investigation can also be central to the ability of defense counsel to effectively defend their clients: “In the international criminal tribunals, where investigation occurs on the territory of states, but representation occurs in an international court, international law doctrines of privileges and immunities of actors in international organisations may well define the ability of defence counsel to prepare and present their clients’ cases.”²²⁹ Yet such protections were not directly afforded in the statute to defense counsel. Instead, more vaguely, the statute mentions that: “Other persons, including the accused, required at the seat of the International Tribunal shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal.”²³⁰

The meaning of this phrase for defense investigators only became an issue at the court when Croatian authorities filed an indictment against Marin Ivanović, a member of the *Gotovina* defense team, in November 2008, charging him with concealing archival documents,²³¹ and in

²²⁸ The ICTY later clarified that functional immunity for prosecutors and Registry staff applied in relation to all states, not just those of the former Yugoslavia. See *Gotovina et al.*, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, case no. IT-06-90-T, March 12, 2010, para. 52, www.icty.org/x/cases/gotovina/tdec/en/100312.pdf.

²²⁹ Kenneth S. Gallant, “Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard, and What Might be Done about One of Them,” *Criminal Law Forum* 14 (2003): 325-6.

²³⁰ ICTY statute, article 30.4.

²³¹ *Gotovina et al.*, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, case no. IT-06-90-AR73.5, February 14, 2011, para. 5, www.icty.org/x/cases/gotovina/acdec/en/110214.pdf.

December 2009 arresting him and several other members of the team on this charge.²³² The ICTY appeals chamber later ruled in relation to the situation that functional immunity also applies to defense counsel and ordered Croatia to cease all criminal proceedings against those arrested.²³³ The tribunal therefore eventually settled the immunity issue on the basis of parity.

The statute institutionalizes other investigative imbalances between prosecution and defense, including in terms of state cooperation. The statute requires states to cooperate “in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law,” including in locating individuals and documentary evidence, and arresting suspects and transferring them to the tribunal.²³⁴

Prosecutors and the chambers can apply diplomatic pressure to states to cooperate with investigations and can report lack of cooperation to the Security Council.²³⁵ These advantages privilege the prosecution’s cooperation with states and provide them with greater access to information. The prosecution is a primary organ of the court whose requests for assistance are considered the conduct of official court business, whereas defense counsel, as independently operating individuals, do not have their requests for assistance considered official court business

²³² *Gotovina et al.*, Decision on Requests for Permanent Restraining Orders Directed to the Republic of Croatia, para. 3.

²³³ *Gotovina et al.*, Decision on Gotovina Defence Appeal Against 12 March 2010 Decision, para. 36. A trial chamber had originally determined that defense investigators are not provided with functional immunity. See *Gotovina et al.*, Decision on Requests for Permanent Restraining Orders, paras. 50 and 57.

²³⁴ ICTY statute, article 29.

²³⁵ One mechanism of complaint is through the annual reports to the ICTY submits to the UN. See ICTY statute, article 34. Another is personal appearances before the council by the chief prosecutor. See, for example, ICTY, “Address by Ms. Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, to the United Nations Security Council,” press release no. FH/P.I.S./791-e, New York, October 9, 2003, www.icty.org/en/press/address-ms-carla-del-ponte-chief-prosecutor-icty-un-security-council.

by external political and legal actors, such as states' foreign offices and justice departments, with a consequently lower priority attached to those requests.²³⁶

The statute also provides the chief prosecutor with a political role that has implications for his or her ability to acquire evidence. The chief prosecutor is nominated by the UN secretary-general and appointed by the Security Council,²³⁷ and the latter has required the prosecutor to report on certain activities. For example, in resolution 1503 the council requested “the Presidents of the ICTY and the ICTR and their Prosecutors, in their annual reports to the Council, to explain their plans to implement the ICTY and ICTR Completion Strategies.”²³⁸ Chief Prosecutor Del Ponte addressed the council on this issue, also discussing progress on gaining cooperation from reluctant states, including Croatia.²³⁹ This political function provides a voice and a forum for encouraging cooperation and requesting assistance in investigations.

The chief prosecutor also has a diplomatic role that has been used to urge states to cooperate. In May 1996, for example, Richard Goldstone met with top US officials—Secretary of State Warren Christopher, Secretary of Defense William Perry, and Chairman of the Joint Chiefs of Staff John Shalikashvili—to encourage them to use NATO troops to arrest Karadžić and Mladić.²⁴⁰ Goldstone also acknowledges that he secured changes to the tribunal's RPE to aid him

²³⁶ Geert-Jan Alexander Knoop and Robert R. Amsterdam, “The Duality of State Cooperation Within International and National Criminal Cases,” *Fordham International Law Journal* 30, no. 2 (2006): 270-5.

²³⁷ ICTY statute, article 16.4.

²³⁸ Security Council, UN doc. S/RES/1503, August 28, 2003, para. 6, www.unmict.org/specials/ictr-remembers/docs/res1503-2003_en.pdf.

²³⁹ ICTY, “Address by Ms. Carla Del Ponte.”

²⁴⁰ Jane Perlez, “War Crimes Prosecutor Vents Frustrations,” *The New York Times*, May 22, 1996, www.nytimes.com/1996/05/22/world/war-crimes-prosecutor-vents-frustrations.html.

in encouraging states to hand over confidential material during “personal visits” with top state officials.²⁴¹

In her official capacity, Del Ponte attended such major international political gatherings as the World Economic Forum in Davos, and met with the heads of NATO and the European Commission, as well as Western diplomats.²⁴² In a meeting with US secretary of state Colin Powell, she encouraged him to condition US financial aid to Yugoslavia on its cooperation with her investigations. According to Del Ponte, in a secret meeting in March 2001, six months after Milošević’s ouster as president of Yugoslavia, the prime minister, Zoran Djindjić, acknowledged that the United States had threatened to cut off aid if it did not cooperate. At the meeting Del Ponte agreed to coordinate her requests to Yugoslavia in such a way as to bolster the prime minister’s political position vis-à-vis the new president, Vojislav Koštunica.²⁴³

The lack of a comparable institutional voice, and diplomatic position, access, and influence for defense counsel creates enormous disparity in gaining assistance with investigations, including gathering documentary evidence and accessing witnesses.²⁴⁴ There are various other ways in which defense counsel are also structurally disadvantaged in conducting investigations. They are, for example, reliant upon the court for diplomatic or legal action to encourage or compel external assistance.²⁴⁵ This generates a significant inequality in official mechanisms for

²⁴¹ Richard Goldstone, “A View from the Prosecution,” *Journal of International Criminal Justice* 2, no. 2 (2004): 381.

²⁴² Del Ponte and Sudetic, *Madame Prosecutor*, 99-101.

²⁴³ *Ibid.*, 102-6.

²⁴⁴ Jalloh and DiBella, “Equality of Arms in International Criminal Law,” 264.

²⁴⁵ Steven Kay and Bert Swart, “The Role of the Defence,” in *The Rome Statute of the International Criminal Court: A Commentary, Vol. 2*, ed. Antonio Cassese, Paola Gaeta, and John Jones (Oxford: Oxford University Press, 2002), 1,425.

gaining state cooperation,²⁴⁶ despite the fact that on-site investigations tend to be seen as essential by defense teams in order to obtain exculpatory evidence and to attempt to adequately refute the prosecution's case by assessing the accuracy and validity of prosecution evidence.²⁴⁷ As a practical matter, local authorities in states with a civil law system also expect a prosecutor to perform all investigations—not defense counsel—and so are unprepared for, and more resistant to, requests from defense investigators.²⁴⁸

States outside the region are also reluctant to aid the defense of those that international media have already condemned. According to Henri Astier of the BBC, a news database search in 2000 listed more than one thousand instances of the term “indicted war criminals” that year,²⁴⁹ one of which was by the BBC itself to refer to the Yugoslav defense minister at the time, Dragoljub Ojdanić. Astier warns that “[a] trainee on a local newspaper who referred to someone charged with selling crack cocaine as an ‘indicted drug dealer’ would get a rap over the knuckles from his editor and a stern lecture on the presumption of innocence. Yet major news organizations ignore this basic principle in reporting on war crimes cases.”²⁵⁰ This is typical, he argues, of international media coverage of the ICTY, which largely takes the perspective of the prosecution.

²⁴⁶ Krit Zeegers, “Defence Counsel Immunity at the Ad Hoc Tribunals,” *International Criminal Law Review* 11, no. 5 (2011): 881.

²⁴⁷ Jenia Iontcheva Turner, “Defense Perspectives on Law and Politics in International Criminal Trials,” *Virginia Journal of International Law* 48, no. 3 (2008): 554-5.

²⁴⁸ Bert Swart, “General Problems,” in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 2, ed. Antonio Cassese, Paola Gaeta, and John Jones (Oxford: Oxford University Press, 2002), 1,600.

²⁴⁹ Henri Astier, “Rights of the Despised,” *The American Prospect* 11, no. 18 (2000): 31. News sources including the term included the BCC, *The Washington Post*, *The Financial Times*, and the Associated Press.

²⁵⁰ *Ibid.*

Similar attitudes towards cooperating with the tribunal as synonymous with cooperating solely with the prosecution are seen within states. During a US House of Representatives hearing on the ICTY and ICTR, an attorney from a major law firm called as a witness, was asked by a Congressman about US cooperation with the tribunals. He responded that “when we decide in the name of international justice to prosecute someone, we ought to have the backbone to stand behind that...There is no reason why we should be ashamed or afraid to have our witnesses go and testify...And if they have relevant information, it ought to be heard. And if we are not prepared to do that, then we should not be convicting these people.”²⁵¹ A 2008 research monograph by an American IR scholar on cooperation between states and the ad hoc tribunals focuses exclusively on cooperation with prosecutions.²⁵² Outside the ICTY, defense counsel are considered as non-official and almost peripheral actors, and “the accused is, oddly, the great forgotten figure of the international criminal trial.”²⁵³

In the first 15 years of the tribunal’s operation, Serbia was extremely reluctant to cooperate, arguing that Serbs could not receive a fair trial there, leading to various fruitless complaints by the president of the court to the Security Council.²⁵⁴ This significantly worsened after President Slobodan Milošević was indicted by the tribunal in 1999.²⁵⁵ A letter from the Serbian minister of

²⁵¹ US House of Representatives, Hearing Title: “Markup on H. Res. 339 and Hearing Entitled ‘The U.N. Criminal Tribunals for Yugoslavia and Rwanda: International Justice or Show of Justice?’” serial no. 107-71, February 28, 2002, 137,

commdocs.house.gov/committees/intlrel/hfa77896.000/hfa77896_of.htm.

²⁵² Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008).

²⁵³ Frédéric Mégret, “‘Bring Forth the Accused!’ Defendant Attitudes and the Intimate Legitimacy of the International Criminal Trial,” Social Science Research Network paper, December 2005, 1, papers.ssrn.com/sol3/papers.cfm?abstract_id=2744905.

²⁵⁴ Bass, *Stay the Hand of Vengeance*, 223.

²⁵⁵ The initial indictment was *Milošević et al.*, Indictment, case no. IT-99-37, May 22, 1999, www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ii990524e.htm.

justice, Petar Jojić, in May 2000, responding to the chief prosecutor's request for cooperation in arresting a Serbian colonel, opened with "To the Whore Del Ponte, Self-Proclaimed Prosecutor, Criminal Hague Tribunal."²⁵⁶ This attitude began to shift with changes of government and Milošević's death in March 2006. International pressure, especially from the European Union, offering the possibility of accession talks,²⁵⁷ led to Serbia surrendering the last two remaining major ICTY indictees, Karadžić and Mladić, in 2008 and 2011, respectively.²⁵⁸ This is a particularly prominent example of the kind of significant political pressure that Western states have, selectively, applied to aid the court's attempts to prosecute individuals, but that is rarely available to the defense.

Initially there was reluctance from NATO and the Croatian government to cooperate with the prosecution at the tribunal. However, this declined in the late 1990s, leading to the majority of indictees being in the tribunal's custody by 2001.²⁵⁹ Del Ponte acknowledged reluctance to investigate and indict NATO personnel in relation to the 1999 air campaign in Serbia: "If I went forward with an investigation of NATO...I would render my office incapable of continuing to investigate and prosecute the crimes committed by the local forces during the wars of the 1990s" due to the need for NATO intelligence and security on the ground during investigations.²⁶⁰ She

²⁵⁶ Del Ponte and Sudetic, *Madame Prosecutor*, 57.

²⁵⁷ Julie Kim, "Balkan Cooperation on War Crimes Issues," Congressional Research Service: CRS Report for Congress, January 14, 2008, www.fas.org/sgp/crs/row/RS22097.pdf; Ian Bancroft, "Can Serbia Now Deliver Mladic to The Hague?" *The Guardian*, July 22, 2008, www.theguardian.com/commentisfree/2008/jul/22/radovankaradzic.serbia; and Ian Traynor, "Ratko Mladic Arrested: What it Means for Serbia's EU Membership," *The Guardian*, May 26, 2011, www.theguardian.com/world/2011/may/26/ratko-mladic-serbia-eu-membership.

²⁵⁸ Ian Traynor, "Radovan Karadzic to Appear Before War Crimes Judge in The Hague," *The Guardian*, July 31, 2008, www.theguardian.com/world/2008/jul/31/radovankaradzic.warcimes; and Marlise Simons, "Mladic Arrives in The Hague," *The New York Times*, May 31, 2011.

²⁵⁹ Adam Jones, *Genocide: A Comprehensive Introduction*, 2nd ed. (London: Routledge, 2011), 536.

²⁶⁰ Del Ponte and Sudetic, *Madame Prosecutor*, 60.

consequently experienced a significant increase in cooperation with investigations a result of the NATO bombing campaign, with the United States, Britain, France, and Germany eager to provide information to aid in prosecutions of Yugoslav leaders.²⁶¹

Again the Croatian turnaround is substantially due to Western state pressure to prosecute indictees. President Franjo Tuđman initially resisted handing over Croatian general Tihomir Blaškić, who was indicted in November 1995,²⁶² due to reluctance to cooperate with the court. Tuđman did not wish to appear to be aiding the court and thereby legitimizing its prosecutions.²⁶³ However, after the United States put pressure on Croatia, by threatening to cut off aid, the general was handed over in April 1996.²⁶⁴

In terms of cooperation with defendants, in the appeal of Tadić, the first individual convicted by the court, the appellant alleged “lack of cooperation” and “obstruction” by the government of Republika Srpska, contending that the resultant lack of ability to present evidence from relevant witnesses prejudiced the outcome of his trial.²⁶⁵ General Blaskić’s case also provides a particularly egregious example of state political motivations in decisions to release evidence to

²⁶¹ Luc Côté, “Independence and Impartiality,” in *International Prosecutors*, ed. Luc Reydam, Jan Wouters, and Cedric Ryngaert (Oxford: Oxford University Press, 2012), 375.

²⁶² *Blaškić*, Indictment, case no. IT-95-14, November 10, 1995, www.icty.org/case/blaskic/4.

²⁶³ Jacob Katz Cogan, “International Criminal Courts and Fair Trials: Difficulties and Prospects,” *Yale Journal of International Law* 27 (2002): 122.

²⁶⁴ Philip Shenon, “Croatian General Plans to Surrender To Hague Tribunal,” *The New York Times*, March 31, 1996, www.nytimes.com/1996/03/31/world/croatian-general-plans-to-surrender-to-hague-tribunal.html; ICTY, Case Information Sheet: Tihomir Blaškić, www.icty.org/x/cases/blaskic/cis/en/cis_blaskic.pdf; and Bass, *Stay the Hand of Vengeance*, 256.

²⁶⁵ *Tadić*, Appeals Judgment, case no. IT-94-1-A, July 15, 1999, paras. 29 and 32, www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf. According to the appeal, by the time the pre-trial prosecutorial investigations occurred, most prosecution witnesses were living in Western European countries, whose governments had cooperated with the tribunal, whereas defense witnesses were located in Republika Srpska, which had not cooperated with requests to locate witnesses.

the tribunal. At the trial stage, the Croatian government refused to release evidence requested.²⁶⁶ However, days after Blaskić's conviction by the tribunal the government handed over thousands of pages of documents which it claimed were exculpatory.²⁶⁷ Relying on this evidence, the defendant's appeal experienced significant success, reducing the number of charges on which he was convicted from 19 to three, and his sentence from 45 years to nine.²⁶⁸

When states have been unwilling to cooperate, the court has determined that it possesses the international legal authority to compel compliance with orders to provide witnesses or evidence from states and government officials.²⁶⁹ In 1999 this led to the adoption of an additional rule in the RPE, rule 54*bis*, which describes the right of the prosecution and defense to request that the tribunal order a state to cooperate in providing information to the parties. This right was slow in coming for the defense, vindicating Bassiouni's assessment in 1993 that the accused's right to

²⁶⁶ *Blaškić*, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, case no. IT-95-14-AR108*bis*, October 29, 1997, paras. 2-18, www.icty.org/x/cases/blaskic/acdec/en/71029JT3.html#II-B-1.

²⁶⁷ Gregory S. Gordon, "Toward an International Criminal Procedure: Due Process Aspirations and Limitations," *Columbia Journal of Transnational Law* 45, no. 3 (2007): 678-9.

²⁶⁸ *Blaškić*, Appeals Judgment, case no. IT-95-14-A, July 29, 2004, 258 (within Part XIII: Disposition), www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf.

²⁶⁹ The determination arose from a challenge by Croatia to the legal authority of the court in ordering its defense minister to hand over documents. *Blaškić*, Judgment on the Request of The Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, paras. 25-31. This authority stems from article 29 of the ICTY statute. The chamber argued that "the term 'subpoena' (in the sense of injunction accompanied by threat of penalty) cannot be applied or addressed to States" as the court has no ability to apply sanctions, and any such sanctions as could be applied would not be penal in nature, as "States, by definition, cannot be the subject of criminal sanctions akin to those provided for in national criminal systems" (*ibid.*, para. 25). However, this has the appearance of a technical, legal distinction with limited political implications, as the judgment continued that the court can impose binding orders on states, on the basis that this authority was provided by the Security Council, acting under Chapter VII of the UN Charter (*ibid.*, para. 26). In that particular case, Croatia was eventually obliged to hand over documents to the prosecution but its delays meant that they were not introduced in the *Blaškić* case. See Sean D. Murphy, "Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia," *The American Journal of International Law* 93, no. 1 (1999): 82.

access information “is largely neglected even though its importance to a defense is immeasurable.”²⁷⁰

According to ICTY and MICT chef de cabinet McIntyre, the prosecution has been able to utilize the court to compel cooperation much more effectively than has the defense.²⁷¹ For the court to issue an order compelling a state to cooperate, the party requesting the information must establish that the documents contain evidence likely to be relevant to their case.²⁷² They cannot conduct a “fishing expedition” in the hope of finding something relevant, in the words of Judge David Hunt.²⁷³

In contrast, the prosecution’s mandate from the Security Council to investigate allegations of crimes within the court’s jurisdiction²⁷⁴ means that the OTP has much more latitude than defense counsel in terms of requests for state cooperation. Instead of an order, a prosecutor can request a warrant to seize documents in a state’s archives, which does not require demonstrating direct relevance. According to Judge Hunt, for the OTP this is “a very powerful weapon in its hands,” which additionally denies the defense direct access to that potential evidence—counsel can only later access that subset of documents acquired through a warrant by the OTP that the prosecution decides to disclose to the defense.²⁷⁵ This denies counsel the ability to search such documents for exculpatory material—they are reliant on the prosecution identifying such documents during

²⁷⁰ M. Cherif Bassiouni, “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions,” *Duke Journal of Comparative and International Law* 3, no. 2 (1993): 279.

²⁷¹ McIntyre, “Equality of Arms:” 278.

²⁷² ICTY RPE, rule 54bis.A.ii.

²⁷³ *Delalić et al.*, Separate Opinion of Judge David Hunt on Motion by Esad Landžo to Preserve and Provide Evidence, case no. IT-96-21-A, April 22, 1999, www.icty.org/x/cases/mucic/acdec/en/90422EV37230.htm#3.

²⁷⁴ ICTY statute, article 16.

²⁷⁵ Judge Hunt, “Reconsideration of order of 9 May 2002,” case no. IT-02-55-Misc4, July 17, 2002, www.icty.org/x/file/Legal%20Library/jud_supplement/supp39-e/misc.htm.

their examination, and then disclosing them in a timely manner. As discussed in the evidentiary procedures section below, timely disclosure of prosecution evidence to the defense has been a significant concern at the court.

The ICTY has decided that as issues of non-cooperation by external actors with investigations by defense counsel are outside of its direct control they are not the tribunal's responsibility to resolve.²⁷⁶ That is, if the court cannot directly ensure parity—in relation to access to information, or other issues—it cannot be brought to the court as a matter for redress. Because of this, according to defense counsel and former ADC president Gregor Guy-Smith, lack of access to exculpatory material has significantly impacted the ability of counsel to mount an effective defense and thereby threatens to undermine the credibility of the proceedings.²⁷⁷

The tribunal attitude towards defense problems outside of its direct control is concerning as it indicates that the court does not acknowledge that an actual disadvantage to a defendant in gathering evidence can be caused by their weaker institutional position within the court and the reluctance of states to cooperate.²⁷⁸ This approach is consistent with the position of the court that

²⁷⁶ *Tadić*, Appeals Judgment, paras. 49 and 52-5.

²⁷⁷ Interview with Gregor Guy-Smith.

²⁷⁸ McIntyre, "Equality of Arms:" 272-5. The United States also relied on ICTY jurisprudence in claiming in 2001, in front of the Inter-American Commission on Human Rights, that issues of cooperation with other states that are outside of the government's control, do not require a remedy from the court. This was a petition challenging the death penalty sentence and equality of arms during trial in a US federal criminal case, *Garza v. United States*. In relation to the latter issue the petition claimed that a United States treaty enabled it to collect evidence from Mexico, access to information which was denied to the defendant. The United States responded to the petition by acknowledging the disparity, but arguing that equality of arms is a procedural right and not a substantive one, and so the disparity in actual information-gathering ability in that case was not a breach of due process for the defendant. See the Inter-American Commission on Human Rights, *Juan Rual Garza*, report no. 52/01, case no. 12.243, April 4, 2001, para. 55, cidh.org/annualrep/2000eng/chapteriii/merits/usa12.243.htm. Interestingly, the US position relied upon the ICTY judicial determination in *Tadić* discussed above that equality for the defense is not a substantive right, and so actual disadvantages are not a breach of a defendant's rights. See Jalloh and DiBella, "Equality of Arms in International Criminal Law," 257, note 38, and 263, note 74.

the right to parity between the parties is only procedural and not substantive—if the procedures are followed but the defense is disadvantaged in their outcome it requires no action from the court to rectify.²⁷⁹ Therefore a poor ability to effectively exercise status procedural rights is not perceived by the court as a challenge to due process. According to McIntyre, this attitude is problematic for defense parity because procedural guarantees require institutional power to effectuate them: “In a practical sense...the institutional advantages of the Office of the Prosecutor as an organ of the Tribunal with an independent budget means that there is a great disparity in identifying and locating evidence.”²⁸⁰

Mechanisms for compelling external actor cooperation with international tribunals to ensure a reasonable parity of access to potential evidence remain inadequate,²⁸¹ enabling states to exercise significant influence over evidence gathering: “While international law formally addresses the issue of state cooperation through the core legal instruments of international criminal law, trial practice is informally marked by the invisible state actor in the public gallery.”²⁸² The multi-level governance structure of international criminal justice ensures that cooperation is dependent upon the political will and interests of external actors,²⁸³ but reluctance to cooperate seems to be a far greater problem for defendants than prosecutors.

²⁷⁹ *Tadić*, Appeals Judgment, para. 50.

²⁸⁰ McIntyre, “Equality of Arms: Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia,” *Leiden Journal of International Law* 16, no. 2 (2003): 279.

²⁸¹ Jalloh and DiBella, “Equality of Arms in International Criminal Law,” 282.

²⁸² Rosemary Byrne, “The New Public International Lawyer and the Hidden Art of International Criminal Trial Practice,” *Connecticut Journal of International Law* 25, no. 2 (2010): 297.

²⁸³ Marianne L. Wade, “Prosecutors in Multi-Level Governance Structures: Introduction,” *Crime, Law and Social Change* 59, no. 4 (2013): 359-70.

A potential remedy, proposed by defense counsel interviewed, would be suspending proceedings until a state begins to cooperate with the defense by permitting access.²⁸⁴ Otherwise, if the defense is unable to investigate adequately to prepare for trial, there can be no adequate defense. Such problems should be the responsibility of the court to deal with, especially because they have capacities and resources that could ameliorate these problems, including a complaint to the Security Council.²⁸⁵ However, according to Robinson, Karadžić's chief legal advisor, the court is reluctant to provide such aid as it does not want to be perceived as aiding the defense of those widely perceived before trial to be war criminals.²⁸⁶

The prosecution is also able to rely on investigatory aid from the UN, NGOs, and individual states. Even before the creation of the tribunal, the UN commission of experts had conducted fact-finding missions. Its final report, in May 1994, detailed investigations and substantive findings concerning: an alleged genocide in Opština Prijedor, the siege of Sarajevo, detention facilities, sexual violence, mass graves, and the destruction of cultural property.²⁸⁷ The report led to the initiation of various investigations by the tribunal's OTP. While some of the material was too general to be of direct use, it provided leads to more relevant evidence.²⁸⁸ According to Richard Goldstone, the work of his office was augmented by investigations by the ICRC,

²⁸⁴ Interviews with Peter Robinson and Colleen Rohan.

²⁸⁵ Of course such complaints often led to little counsel action. See, for example, Human Rights Watch, "Action Urged Regarding Non-Cooperation with ICTR and ICTY: Letter to Security Council Members," October 25, 2002, www.hrw.org/news/2002/10/25/action-urged-regarding-non-cooperation-ictr-and-icty.

²⁸⁶ Ibid.

²⁸⁷ UN Secretary-General, "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)," paras. 151-305.

²⁸⁸ Michelle Jarvis and Najwa Nabti, "Policies and Institutional Strategies for Successful Sexual Violence Prosecutions," in *Prosecuting Conflict-Related Sexual Violence at the ICTY*, ed. Serge Brammertz and Michelle Jarvis (Oxford: Oxford University Press, 2016), 88.

Amnesty International, the Lawyers Committee for Human Rights,²⁸⁹ and Human Rights Watch.²⁹⁰ According to former ICTY prosecutor Elliott Behar, the latter organization interviewed a number of victims and witnesses to the Kosovo conflict, on the ground, in 1999. This greatly assisted the OTP's access to information in the Kosovo case he helped to prosecute.²⁹¹ Goldstone also remarked that his initial prosecution team was provided with training in international criminal law, paid for by the American Bar Association.²⁹²

David Scheffer, senior advisor to Ambassador Albright, and later the first US ambassador-at-large for war crimes issues, details significant investigatory aid to the OTP from the United States.²⁹³ Scheffer co-chaired an Interagency Working Group on War Crimes Evidence, created specifically to investigate crimes in the Balkans conflict, and which interviewed witnesses, including refugees, collected intelligence, and attempted to construct “a ‘paper trail’ tying atrocities to the military and civilian leaders at senior levels.”²⁹⁴ This amounts to an enormous volume of investigatory aid and support that states and NGOs are rarely willing to make available to defendants and counsel.

Defense parity indicator 2: Evidentiary procedures

²⁸⁹ The Lawyers Committee for Human Rights is now known as Human Rights First. See www.humanrightsfirst.org.

²⁹⁰ Richard A. Goldstone, “A View from the Prosecution,” *Journal of International Criminal Justice* 2, no. 2 (2004): 382. It should be noted that some of this evidence was not usable because of the possibility of its being tainted by the manner of witness questioning by NGOs, for example. See Jarvis and Nabti, “Policies and Institutional Strategies for Successful Sexual Violence Prosecutions,” 89.

²⁹¹ Interview with Elliott Behar, San Francisco, Calif., January 30, 2016; and Elliott Behar, *Tell It to the World: International Justice and the Secret Campaign to Hide Mass Murder in Kosovo* (Toronto: Dundurn, 2014), 9.

²⁹² Goldstone, “A View from the Prosecution.” 382.

²⁹³ David J. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012), 35-44.

²⁹⁴ *Ibid.*, 35.

This section analyzes issues relating to the effect of documentary and witness evidence on the courtroom dynamic between prosecution and defense. The first section explores the problems created by the hybrid nature of the trial system at the tribunal and the large scope of international trials, and addresses the procedural defendant right of disclosure of prosecution evidence. The second section discusses witness procedures in the statute and rules before analyzing in more detail those permitting the introduction into the record of affidavits—written witness statements and transcripts in lieu of in-person testimony. These are a core feature of witness rules that affect the dynamic between prosecution and defense.

The report of the secretary-general to the Security Council recommending the establishment of the tribunal acknowledged the need for international criminal justice to go far beyond the defense protection standards employed at Nuremberg and Tokyo. The tribunal's first president,²⁹⁵ Antonio Cassese, was also aware of the necessity for the court to implement substantial rights for defendants in order to achieve both normative and sociological legitimacy: "Justice must not only be done but must be seen to be done."²⁹⁶ The report also stated that "[i]t is

²⁹⁵ According to the ICTY, its president is "elected by a majority of the votes of the permanent judges for a two-year term and is eligible for re-election once. The President presides over the proceedings of the Appeals Chamber and is also responsible for the assignment of judges to the Appeals Chamber and Trial Chambers. In addition, the President presides over all plenary meetings of the Tribunal, coordinates the work of the Chambers, supervises the activities of the Registry, and issues Practice Directions addressing detailed aspects of the conduct of proceedings before the Tribunal. The President performs diplomatic and political functions related to the work of the Tribunal and supervises the Registrar in his or her role as the Tribunal's channel of communication. The President is required under the Statute to submit an annual report on the activities of the Tribunal to the General Assembly as well as biannual assessments to the Security Council, setting out in detail the progress made towards the implementation of the Tribunal's Completion Strategy." ICTY, Chambers, www.icty.org/en/about/chambers.

²⁹⁶ Antonio Cassese, "Foreword by the former President of the International Criminal Tribunal for the former Yugoslavia," *International Review of the Red Cross* 321 (1997): 601-2.

axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused.”²⁹⁷

Nevertheless, the report was vague on procedural standards regarding core evidentiary issues, unwilling to establish procedures when there was no agreement on the specifics of these standards and how to implement them in international law.²⁹⁸ It made basic recommendations for guaranteeing due process, including the rights of the accused,²⁹⁹ in particular those found in the International Covenant on Civil and Political Rights,³⁰⁰ and these were included in the court’s statute.³⁰¹ These procedures were a hybrid of those found in the adversarial common law and inquisitorial civil law trial systems, with the former predominant, as the statute was largely drafted by common law tradition lawyers in the UN Department of Legal Affairs, with US assistance.³⁰²

The Security Council made no changes to the statute as received in the report, perceiving such issues to be technical details best left to the court to decide for itself. That is, they were seen as peripheral, not as essential to the council in establishing the credibility and legitimacy of the court—as the rhetoric it used implied.³⁰³ During council debates on the court’s creation, states tended to express a concern that crimes be prosecuted, but not with careful trial deliberation to ascertain truth or that the rights of the accused be respected. That is, they focused on outcomes, not process, even though the latter is precisely what distinguishes genuine criminal justice from

²⁹⁷ Secretary-general’s report, para. 106.

²⁹⁸ Ibid., paras. 83-4 and 106-7.

²⁹⁹ Ibid., paras. 99-107.

³⁰⁰ ICCPR, article 14.

³⁰¹ ICTY statute, articles 18-21 and 23-28.

³⁰² Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, 95. The drafters also presumably relied on the precedent for the adversarial approach set by Nuremberg and Tokyo.

³⁰³ Tavernier, “The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda:” 612.

show trials. The US permanent representative to the UN at that time, Madeline Albright, for example, stated during a council meeting in May 1993 that her country “hope[d] to contribute to this critical process of developing the rules that the Tribunal can expeditiously adopt so that the Prosecutor will then be in a position to begin prosecuting cases without further delay.”³⁰⁴ Speed in prosecuting, not legal fairness, has always been the primary procedural focus of the Security Council in relation to the tribunal.

The statute is consequently much more detailed on substantive than procedural law; providing the judges with the authority to decide upon rules of procedure and evidence themselves, which were adopted in February 1994,³⁰⁵ after the tribunal had received suggestions from states,³⁰⁶ as provided for by the Security Council.³⁰⁷ The most influential suggestions were from the United States, among the approximately 75 pages of material it submitted, which was a significant factor in the establishment of a largely adversarial trial model.³⁰⁸ A danger in authorizing the court’s judges to construct their own rules is that, as stated by Judge Wald, “ICTY Judges are chosen by the UN General Assembly, from countries across the globe, many of which have dubious records on human rights or observance of international humanitarian law.”³⁰⁹ This background could also lead to poor decision-making by trial and appeal chambers, yet, according to Wald, the judges have “faithfully [followed] the rules and procedures agreed

³⁰⁴ Security Council, Provisional Verbatim Record of the 3,217th Meeting, 15.

³⁰⁵ See ICTY statute, article 15; and ICTY Rules of Procedure and Evidence, February 11, 1994.

³⁰⁶ Megan A. Fairlie, “Due Process Erosion: The Diminution of Live Testimony at the ICTY,” *California Western International Law Journal* 34 (2003): 50.

³⁰⁷ Security Council Resolution 827, May 25, 1993, para. 3, [www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/827\(1993\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/827(1993)).

³⁰⁸ Morris and Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia*, Vol. 2, 177.

³⁰⁹ Patricia M. Wald, “ICTY Judicial Proceedings: An Appraisal from Within,” *Journal of International Criminal Justice* 2, no. 2 (2004): 466.

upon by the Court.”³¹⁰ However, this attitude demonstrates no acknowledgment that this largely means following the rules that the judges themselves created.

By 1997, within three years of the RPE’s creation, it had been amended several times, “which may give the impression of a certain amount of improvisation” by the judges.³¹¹ By July 2015 it had been revised 50 times, and currently consists of 127 rules (and multiple sub-rules) covering a broad range of issues for all significant participants at the court in the pre-trial, trial, appeals, and post-appeal stages.³¹² Such amendments are not subject to any oversight by the Security Council or any other body.³¹³ This is problematic in the light of some of the evidentiary procedural changes discussed below.

Documentary evidence and disclosure

The RPE contain extremely permissive evidentiary standards, especially by adversarial trial standards, allowing any material to be admitted as evidence in trial, by either party, which an ICTY chamber “deems to have probative value.”³¹⁴ This standard was challenged by the defense in an early case before the court, arguing that it reflected an essentially civil law approach of permitting virtually any relevant information to be used as evidence, including hearsay.³¹⁵ The

³¹⁰ Ibid.

³¹¹ Tavernier, “The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.” 612.

³¹² For the most recent revision see ICTY, Amendments to the Rules of Procedure and Evidence, doc. no. IT/282, July 10, 2015.

³¹³ Tavernier, “The Experience of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda.” 612.

³¹⁴ ICTY RPE, rule 89.C.

³¹⁵ *Blaškić*, decision regarding the admissibility of hearsay evidence (no exact document name available), case no. IT-95-14, January 21, 1998. See ICTY, “Blaskic Case: Defence Objection to the Admission of Hearsay Is Rejected,” press release, doc. no. CC/PIO/286-E, January 23, 1998, www.icty.org/en/press/blaskic-case-defence-objection-admission-hearsay-rejected.

defense argued that this standard was too lax and was inappropriate to the adversarial common law trial procedure utilized by the tribunal. Legal systems applying the adversarial model usually restrict what evidence can be introduced—especially hearsay.³¹⁶

The trial chamber rejected this argument, stating that the tribunal’s trial system conformed to neither trial model, but was instead “*sui generis*” and “moving towards a more hybrid system.”³¹⁷ This a problematic position from the perspective of protecting the rights of the accused because the ICTY’s trial procedure is actually largely adversarial, in that it consists of two competing parties independent of the bench,³¹⁸ which present and challenge the evidence on behalf of their client—the defendant on one side, and the court, or arguably the Security Council, on the other. Clearly Prosecutor Del Ponte saw that she was representing a broad political constituency during trials. In commencing her opening statement at the beginning of the trial of the former president of Yugoslavia she stated: “I bring the accused, Milošević, before you to face the charges against him. I do so on behalf of the international community and in the name of all member-states of the United Nations.”³¹⁹

Scholars of international criminal justice have gradually moved away from conceptualizing the defining feature of the tribunals’ legal systems as a “clash of legal cultures”—conflict between arguably incompatible adversarial and inquisitorial systems—“to one which recognizes

³¹⁶ The purpose of such restrictions is to not permit the entry of evidence which might unduly sway a jury. However, civil law procedure usually relies of on judges as finders of fact rather than a jury.

³¹⁷ *Blaškić*, decision regarding the admissibility of hearsay evidence.

³¹⁸ The largely adversarial nature of the tribunal’s trial approach partly reflects the increasing move towards adversarial structures in previously inquisitorial national systems at the domestic level, where it is “strongly gaining favor.” See Bassiouni, “Human Rights in the Context of Criminal Justice:” 266, inc. note 141.

³¹⁹ Del Ponte and Sudetic, *Madame Prosecutor*, 144.

the convergence of influences at play in developing a *sui generis* body of law.”³²⁰ However, that clash is still enormously significant for the parity achieved by defense counsel, as they struggle with the consequences of a system built on conflicting conceptualizations of the role of defense and the parity it is therefore deemed to require for trials to be considered fair.

While the tribunal largely follows the adversarial model in its courtroom procedures, its rules of evidence, as mentioned above, are the more permissive ones associated with an inquisitorial system.³²¹ This does arguably create a form of hybrid, but one poorly suited to preserving the trial rights of defendants, with neither the expectation of a neutral search for truth of an inquisitorial approach nor the extra protections provided for defendants in a competitive adversarial procedure. As stated by legal scholars Stephanos Bibas and William Burke-White on the problem of creating a hybrid legal system at the tribunal that adequately protects defendant rights:

Fundamentally, adversarial and inquisitorial systems specify very different roles for judges, prosecutors, and even defendants. Adversarial judges are detached umpires, with prosecutors and defense counsel serving as zealous investigators and advocates for their clients. In contrast, inquisitorial judges and investigating magistrates are active truth-seekers, collecting and reviewing evidence to determine facts.

Our argument is not that a pure adversarial or inquisitorial system is preferable. Our fear is that the mishmash of the two systems has abandoned some distinctive checks on which

³²⁰ McDermott, “Rights in Reverse,” 178.

³²¹ Murphy, “Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia,” 80.

each system depends. The lack of appropriate mental models for the role of judges, prosecutors, and defense counsel results in confusion and perhaps even systemic failure.³²²

They provide the example of a French judge at the tribunal criticizing an American defense attorney for introducing procedural objections on behalf of his client—an expected and necessary right for counsel within an adversarial trial approach: “If the system is going to be adversarial...it needs to allow zealous adversarial testing of the evidence instead of censuring American lawyers for playing their roles. If, however, the system is going to be inquisitorial at root, it needs to retain more inquisitorial safeguards.”³²³

A former ICTY prosecutor provided an account in a case he tried of defense counsel pursuing perhaps not the most effective tactical choices in the courtroom. Counsel tended to

³²² Stephanos Bibas and William W. Burke-White, “International Idealism Meets Domestic-Criminal-Procedure Realism,” *Duke Law Journal* 59, no. 4 (2010): 695.

³²³ *Ibid.* Another problem at the court in relation to evidentiary procedures has been to erroneously assume that the protection of parity between prosecution and defense exists to protect both parties. This ignores the very reasoning for the need to secure parity for the accused—the institutional advantages enjoyed by the prosecution. By ensuring procedural parity for the prosecution the court has sometimes weakened the position of the defense. In the first case before the court, *Tadić*, the prosecution filed a motion to demand presentation of defense witness statements, whereas in adversarial trial systems, such disclosure is usually only a requirement of the prosecution. Initially the court accepted the prosecution’s position, before reversing that ruling, and acknowledging that parity requirements exist exclusively for the protection of the defense. See *Tadić*, Decision on Prosecution Motion for Production of Defence Witness Statements, case no. IT-94-1, November 27, 1996, www.icty.org/x/cases/tadic/tdec/en/61127ws2.htm; and *Tadić*, Separate Opinion of Judge Vohrah on Prosecution Motion for Production of Defence Witness Statements, case no. IT-94-1, November 27, 1996, www.icty.org/x/cases/tadic/tdec/en/61127ws21.htm. In Colleen Rohan’s first case at the ICTY, *Popović et al.*, in which she represented Milorad Trbić, a prosecutor responded to her request for exculpatory material by requesting her defense strategy—then the prosecution would know what sort of potentially exculpatory material to look for. She stated that no competent defense lawyer would ever give such information to the prosecution, and that the request came from a prosecutor trained in the civil law system who was unfamiliar with an adversarial trial dynamic between prosecution and defense. Another reason for such problems is that the lawyers are dealing with millions of pages of documents. This goes to an essential fact of international prosecutions: “The sheer magnitude of the cases,” which become “ridiculous.” The defense, she argues, can never read all of the information that is disclosed to them. Interview with Colleen Rohan. See *Popović et al.*, case no. IT-05-88. The cases for defendants Milorad Trbić and Vinko Pandurević were later separated from *Popović et al.* into *Pandurević et al.*, case no. IT-05-86.

deny facts and the occurrence of events which he says were difficult to disprove and did not need to be disproven to make the defense case. Another perhaps questionable choice was focusing attention on unrelated acts of violence committed by the victimized ethnic group, which may have given the appearance that counsel were trying to justify their client's role in atrocities. Viewing the trial and acting through a broader ethnic lens also tends to occur much less frequently in domestic trials.³²⁴

Judge Wald argues that the expansiveness of the court's evidentiary standards is one of the most significant problems for defense protection at the tribunal. She rejects the argument that a panel of judges requires less guidance in examining evidence than a jury, stating that "It is simply not true, in my opinion, that only juries—not judges—need such restrictions. Donning a robe does not enshroud its occupant with a seventh sense of whether something written on paper is true or false. In that sense, the judge is on a par with the juror, who must rely on his or her human instincts in evaluating the person doing the testifying."³²⁵

Judge Bakone Moloto acknowledged the harm that dubious evidence can cause to judicial perceptions when he objected to the introduction of a certain book as evidence during trial: "we, the Chamber, cannot accept that we hear what you are going to say only to throw the book out later. The book might be out, but the mind—it's still in the mind. And the purpose for admissibility is to make sure that the mind of the Chamber is not coloured by what might turn

³²⁴ Anonymous interview with former ICTY prosecutor.

³²⁵ Wald, "ICTY Judicial Proceedings:" 473.

out to be inadmissible.”³²⁶ The problem of hearsay evidence is also discussed in the witness testimony subsection below.

In relation to the core due process procedural guarantee of the disclosure of prosecution evidence to the defense, the tribunal’s RPE requires all evidence presented in the indictment be made available within 30 days of the first pre-trial appearance of the accused in court.³²⁷ Evidence that will be presented at trial—including archival materials and other documents, and witness statements—must be made available within a time period set by the pre-trial or trial chamber,³²⁸ and evidence discovered after the time limit must be handed over to the defense immediately.³²⁹ There is also an obligation on the prosecution to disclose any potentially exculpatory material in their possession.³³⁰ This last requirement is particularly important, as disclosure of “information that suggests *actual innocence*...is fundamental to notions of due process under...international law.”³³¹

There are, however, substantial limitations on disclosure imposed by the court. Most importantly, all documents from states or other third parties relied upon by the prosecution may only be released to the defense with the permission of the providing entity.³³² This even applies

³²⁶ *Haradinaj et al.*, transcript of trial for Thursday August 18, 2011, case no. IT-04-84*bis*-T, 225, www.icty.org/x/cases/haradinaj/trans/en/110818ED.htm.

³²⁷ ICTY RPE, rule 66.A.i.

³²⁸ *Ibid.*, rules 66.A.ii and 65*ter*.E.

³²⁹ *Ibid.*, rule 67.D.

³³⁰ *Ibid.*, rule 68.

³³¹ Laura Moranchek, “Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY,” *The Yale Journal of International Law* 31 (2006): 488. Italics in original

³³² ICTY RPE, rule 70.B. Prosecutors can also apply to a trial chamber for permission to withhold from the defense any evidence—including exculpatory material—which “may prejudice further or ongoing investigations, or for any other reasons may be contrary to the public interest or affect the security interests of any State.” See *ibid.*, rules 66.C and 68.iv.

to exculpatory material.³³³ To keep from defendants material that suggests their innocence is clearly an absurdity in any trial system with pretensions to fairness. Witnesses may also not be ordered to testify in relation to such evidence.

This restriction was designed to protect sensitive information provided by states, and so to encourage them to hand over intelligence information that might be useful to the OTP.³³⁴ While the restriction no doubt achieved its aim, it was only ever designed to aid the prosecution—there is no parity in access to evidence through such rules. For the defense it means that information may not have been disclosed prior to trial, making it more difficult for counsel to provide an adequate response to the evidence against their clients—even leaving aside the issue of exculpatory material.³³⁵

Much state confidential evidence has not been presented during ICTY trials—to maintain its confidentiality providing states have often required that such material only be used to lead the prosecution to other evidence. However, with a state’s permission such evidence can be presented in court, subject to the approval of the chambers, and the judges have been reluctant to exclude such information. In *Brđanin*, the defense moved for the exclusion of evidence obtained through phone conversation intercepts, arguing that electronic surveillance was illegal under Bosnia and Herzegovina state law and that it was in breach of the right to privacy in the International Covenant on Civil and Political Rights and the European Convention on Human Rights.³³⁶ The judges ruled against the defendant,³³⁷ unwilling to expand defendant protections

³³³ *Ibid.*, rule 68 disclosure obligations come with the caveat that exculpatory material is “[s]ubject to the provisions of Rule 70” on confidential documents.

³³⁴ Moranchek, “Protecting National Security Evidence While Prosecuting War Crimes:” 484.

³³⁵ Interviews with Gregor Guy-Smith and Colleen Rohan.

³³⁶ *Brđanin*, Decision on the Defence “Objection to Intercept Evidence,” case no. IT-99-36-T, October 3, 2003, paras. 10-11, www.icty.org/x/cases/brdanin/tdec/en/031003.htm.

through reliance on existing and international and state law as they had been willing to rely on it to expand the definition of crimes.³³⁸ This is one of several problems for the defense created by the necessary reliance of the court on external actors for evidence gathering.

In terms of court practice, legal scholar Jenia Turner states that, in interviews with her, ICTY defense attorneys criticized prosecutors for tardiness in disclosing evidence, and reluctance to hand over exculpatory material.³³⁹ It was also one of the strongest criticisms of prosecution behavior made by counsel I interviewed. Defense attorneys claim especially that delays in releasing exculpatory material to defendants at the tribunal are an:

ongoing problem...even though the prosecution's obligation to disclose exculpatory evidence is essential to providing the accused with adequate time and facilities to prepare a defence.

Timely disclosure of exculpatory evidence is also, as an ethical matter, prerequisite to the prosecution discharging its duty to assist the Trial Chamber in arriving at the truth and to providing 'justice for the international community, victims and the accused.'³⁴⁰

According to defense attorneys interviewed, this occurs mostly because the prosecution is overwhelmed with the sheer volume of evidence it has to deal with, and in that mammoth task, finding and handing over information to the defense is not a high priority.³⁴¹ This is a prosecutorial resources issue that negatively impacts defense counsel. Therefore the situation is

³³⁷ Ibid., paras. 61-8.

³³⁸ Moranchek, "Protecting National Security Evidence While Prosecuting War Crimes:" 487-8.

³³⁹ Turner, "Defense Perspectives on Law and Politics in International Criminal Trials:" 557.

³⁴⁰ Colleen M. Rohan, "Protecting the Rights of the Accused in International Criminal Proceedings: Lip Service or Affirmative Action?" in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 294. The internal quote is from the ICTY Standards of Professional Conduct for Prosecution Counsel, Prosecutor's Regulation No. 2, 1999, para. 2.h. This position was confirmed in interviews with ICTY defense attorneys Peter Robinson and Gregor Guy-Smith.

³⁴¹ Interviews with Gregor Guy-Smith and Peter Robinson.

not as simple as summed up by former chief prosecutor Goldstone when asked about resources at the court. He argues that the under-resourcing of the OTP that he experienced as chief prosecutor in 1994-6 was directly advantageous to defense counsel.³⁴²

Counsel claim that disclosure has always been a major problem and has not improved.³⁴³ While they sympathize with prosecutors as human beings who are reluctant to hand over evidence that might undermine the case they are trying to make, at the same time prosecutors are an arm of the international criminal justice system, tasked with finding justice, not just proving the accused guilty. One knowledgeable observer close to the court defended the OTP against accusations of tardiness in handing over evidence, arguing that the disclosure requirements at the court are very exacting, perhaps too much so considering the volume of evidence involved, and considerably higher than in the United States.³⁴⁴ Former prosecutor Behar, who had worked in this role in Canada before moving to The Hague, felt that, from his background as a Canadian prosecutor, disclosure standards were not excessive at the Hague—they were lower than those in Canada.³⁴⁵

On occasion the court has strongly criticized prosecutors for disclosure violations. In 1998, a trial chamber censured prosecutors and issued a formal complaint to the OTP for “conduct close to negligence” relating to disclosure, listing numerous examples.³⁴⁶ However, it also noted that there was no code of conduct for prosecutors at the tribunal and that the chambers had no power

³⁴² Interview with Richard Goldstone, New York, October 17, 2014.

³⁴³ Rohan, “Protecting the Rights of the Accused in International Criminal Proceedings,” 292-7.

³⁴⁴ Interview with anonymous court observer.

³⁴⁵ Interview with Elliott Behar.

³⁴⁶ ICTY, Registry Page, RP D902-4, June 2, 1998; and *Furundžija*, The Trial Chamber’s Formal Complaint to the Prosecutor Concerning the Conduct of the Prosecution, case no. IT-95/17/1-PT, June 5, 1998, para. 3, www.icty.org/x/cases/furundzija/related/en/980605e.pdf. The examples include various failures to hand over documents, including witness statements expeditiously, and failing to respond adequately to the trial chamber’s critique over this conduct (see *ibid.*, paras. 9-10).

to discipline them; it also acknowledged that defense counsel were so bound and could be sanctioned.³⁴⁷ The court had in fact just prior to this determined that it had no power to even consider the issue of a code of conduct for the prosecution.³⁴⁸

One of the most telling examples of lack of prosecutorial accountability occurred more recently, in 2012, when the court reprimanded a prosecutor—without professional or financial penalties—for purposeful failure to hand over information that might have discredited a prosecution witness.³⁴⁹ The appeals chamber reversed the censure, holding that only the OTP can be censured by the court, not individual prosecutors. Nevertheless, the court did not reprimand the office.³⁵⁰ Colleen Rohan, who was defense counsel in that case, has not heard of any sanctioning of prosecution for misconduct acknowledged by the court.³⁵¹ She argues that this disparity in accountability for procedural violations between prosecution and defense is a serious problem as it disadvantages the latter through providing little incentive for prosecutors to comply with their disclosure obligations, and creates “a climate of impunity regarding disclosure violations.”³⁵²

³⁴⁷ *Furundžija*, The Trial Chamber’s Formal Complaint to the Prosecutor, paras. 4 and 12. This is the Code of Conduct for Defense Counsel Appearing Before the International Tribunal, doc. no. IT/125, June 12, 1997.

³⁴⁸ *Kovačević*, Order on Defendant’s Motion for a Prosecutorial Code of Conduct, case. no. IT-97-24-PT, May 12, 1998, www.icty.org/x/cases/kovacevic/tord/en/80512MS2.htm.

³⁴⁹ *Haradinaj et al.*, Decision on Joint Defence Motion for Relief from Rule 68 Violations by the Prosecution and for Sanctions Pursuant to Rule 68*bis*, case no. IT-04-84*bis*-T, October 12, 2011, paras. 18, 46, and 48, www.icty.org/x/cases/haradinaj/tdec/en/111012.pdf.

³⁵⁰ *Haradinaj et al.*, Decision on Prosecutor’s Motion for Reconsideration of Relief Ordered Pursuant to Rule 68*bis* with Partially Dissenting Opinion of Judge Hall, case no. IT-04-84*bis*-T, March 27, 2012, Part V.i., www.icty.org/x/cases/haradinaj/tdec/en/120327.pdf.

³⁵¹ Interview with Colleen Rohan.

³⁵² *Ibid*; and Rohan, “Protecting the Rights of the Accused in International Criminal Proceedings,” 296. The ICTY statute and RPE do not address prosecutorial misconduct. There is only a vague accountability mechanism in the RPE which may be argued to relate to the prosecution, by which the ICTY judges “may decide...on sanctions to be imposed on a party which fails to perform its disclosure obligations.” See

Some of the problems for defense rights caused by unreliable disclosure are a result of the broad scope of ICTY trials.³⁵³ The sheer volume of evidence presented by prosecutors at the trial due to the large number of charges often brought places a significant burden on the limited resources of the defense. There are thousands and sometimes millions of pages of documents disclosed, often with inadequate time for the defense to make adequate use of them: introduced immediately before the trial begins, during the trial, or immediately before closing arguments, for example.³⁵⁴ While some defense counsel argue that prosecutors purposefully time disclosure so as to disadvantage the defense,³⁵⁵ those I interviewed largely ascribed the problem to the scope of trials, as mentioned placing a disclosure burden on the prosecution that they have insufficient resources to adequately respond to.³⁵⁶

Close court observers sympathetic to the prosecution also recognize that there have been problems with disclosure and agree that it is due to the overwhelming volume of material

ICTY RPE, rule 68*bis*. Defense counsel have a Code of Professional Conduct, created and enforced by OLAD, which is similar to domestic codes. The most recent version is revision three: ICTY, Code of Professional Conduct for Counsel Appearing Before the International Tribunal, doc. no. IT/125/REV.3, August 6, 2009,

www.icty.org/x/file/Legal%20Library/Defence/defence_code_of_conduct_july2009_en.pdf. The Standards of Professional Conduct for Prosecution Counsel, in contrast, is “brief and abstract,” providing few specific practical standards. See Standards of Professional Conduct for Prosecution Counsel, Prosecutor’s Regulation No. 2, 1999. See Milan Markovic, “The ICC Prosecutor’s Missing Code of Conduct,” *Texas International Law Journal* 47, no. 1 (2011): 203. The RPE provides the Registry with the authority to oversee the conduct of counsel (rule 46.C), and the chambers with the authority to apply sanctions, including barring them from representing defendants at the tribunal (rule 46.A).

³⁵³ When Rohan first arrived at the ICTY, a lawyer there gave her some advice that she says she has found to be true: “you are not going to be able to do a case here like you did in your domestic court. You think that you need to read every single thing that the prosecutor is giving you and that you will not be competent unless you’ve done that. Accept it as a reality that you will never be able to read everything.” This results in defense counsel “having vast quantities of information dumped on you and you don’t know where to look... For all you know there’s some huge piece of exculpatory evidence that you never saw because you literally did not have the time to get through that information.” Interview with Colleen Rohan.

³⁵⁴ Turner, “Defense Perspectives on Law and Politics in International Criminal Trials:” 557.

³⁵⁵ *Ibid*: 558.

³⁵⁶ See, for example, interview with Peter Robinson.

gathered by the OTP for each trial. The problem may have been ameliorated by the introduction of an electronic system for storing documents, with many files text searchable.³⁵⁷ Former chief prosecutor Del Ponte has acknowledged, however, that many documents are often not uploaded to the system, leading to a continuation of disclosure problems due to the volume of evidence: “we did not even know whether the mounds of documents in our custody held exculpatory evidence.”³⁵⁸

The scope of trials is an ongoing problem created not only by the nature of mass atrocity crimes, but also by prosecutorial charging decisions. According to Judge Wald:

Judges have sometimes seemed perplexed and even irritated as to why particular indictments or particular suspects have been brought at particular times. This was especially true when 60 or more separate counts were loaded in one indictment of a relatively low-level perpetrator. The ICTY Statute has been construed reasonably as allowing Judges to reject an indictment only if the evidence proffered [sic] by the Prosecutor does not make out a *prima facie* case, and not on grounds that the Judges think that a particular case is a waste of the Tribunal’s time.³⁵⁹

One argument for the large number of charges is a politicization of the prosecutorial charging decision resulting from the international and political context within which ICTY trials occur.³⁶⁰

With international media attention and pressure from victim groups to see justice done for them, prosecutors are argued to enlarge the scope of the charges brought against accused. A well-

³⁵⁷ Anonymous interviews with court observers.

³⁵⁸ Del Ponte and Sudetic, *Madame Prosecutor*, 125. The words are those of prosecutor Brenda Hollis, quoted by Del Ponte from a conversation.

³⁵⁹ Wald, “ICTY Judicial Proceedings:” 469. The judges ability to reject a case on the basis of initial prosecutorial evidence is found in ICTY statute, article 19.1 and RPE, rule 47.E.

³⁶⁰ Interview with Peter Robinson.

informed legal source has seen no evidence of charging decisions at the ICTY being affected by such political considerations.³⁶¹ Former prosecutor Behar felt that there may well be perceived public or political pressure to pursue a broad range of charges, though he acknowledged that he had no direct experience with making such charging decisions. He also felt that there may be particular public attention paid to certain charging decisions—for example, in relation to crimes of sexual violence, given a current focus on these issues—but that ultimately the prosecution must be able to substantiate these charges with sufficient evidence to prove them in court.³⁶²

The Karadžić trial provides a prominent illustration of the harm caused to adequacy of representation for defendants in relation to documentary evidence by the scope of international trials. According to Karadžić’s chief trial legal advisor, Peter Robinson, the defense received two million pages of evidence from the prosecution—of the nine million in the latter’s possession relating to the case.³⁶³ There was so much material that the prosecution was required to prepare a list of the evidence disclosed on a monthly basis.³⁶⁴ In February 2009 alone the prosecution reported handing over 6,016 items, totaling 68,668 pages.³⁶⁵ Disclosure at similar levels continued during Karadžić’s trial.³⁶⁶

One of the reasons for the amount of evidence in his trial was the number of charges made by the prosecution—a total of 11. Of these, two were for genocide (Srebrenica and seven Bosnian municipalities), five for crimes against humanity (persecution, extermination, murder,

³⁶¹ Interview with anonymous court observer.

³⁶² Interview with Elliott Behar.

³⁶³ Interview with Peter Robinson.

³⁶⁴ Rohan, “Protecting the Rights of the Accused in International Criminal Proceedings,” 293, note 23.

³⁶⁵ *Karadžić*, Prosecution Periodic Disclosure Report, case no. IT-95-5/18-PT, February 13, 2009, paras. A.1.a.-c., www.icty.org/x/cases/karadzic/pros/en/090213.pdf. The totals combine the exculpatory and inculpatory figures from the report.

³⁶⁶ Rohan, “Protecting the Rights of the Accused in International Criminal Proceedings,” 293, note 23.

deportation, and inhuman acts), and four for war crimes (murder, terror, unlawful attacks on civilians, and taking hostages).³⁶⁷ His trial lasted 499 days, with 337 prosecution and 248 defense witnesses called.³⁶⁸

Robinson argues that Karadžić's notoriety, the political need for the court to secure a prosecution, and pressure from victim groups were factors leading prosecutors to charge him with an especially large number and scope of offenses.³⁶⁹ Academics are also not immune from media influence. European Society of International Law vice-president Marko Milanovic stated a week before the Karadžić verdict was announced: "Broadly speaking he got a fair trial, it was certainly fairer than he would have got anywhere else." He does not seem to require a high standard of legal fairness, presumably arguing that the ICTY is fairer than a Bosnian court would have been. Milanovic then undermined his argument entirely by going on to say "there's no way he can be acquitted."³⁷⁰

Former prosecutor Behar argues that international trials can have a strong historical narrative dimension. Pursuing that dimension may encourage the prosecution to introduce more witnesses and victims than necessary to tell their stories in court. However, this has to be balanced by competing pressures on the prosecution, such as the court's concern with the length of the trial—leading the judges to limit the number of witnesses both prosecution and defense can introduce.³⁷¹

³⁶⁷ ICTY, Case Information Sheet: Radovan Karadžić, www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf; and *Karadžić*, Prosecutor's Marked-Up Indictment, case no. IT-95-5/18-PT, October 19, 2009, www.icty.org/x/cases/karadzic/ind/en/markedup_indictment_091019.pdf.

³⁶⁸ ICTY, Case Information Sheet: Radovan Karadžić.

³⁶⁹ Interview with Peter Robinson.

³⁷⁰ Weaver, "Radovan Karadžić's Lawyer Expects Guilty Verdict over War Crimes."

³⁷¹ Interview with Elliott Behar.

The trial of Milošević also suffered from the emphasis on the trial as a public political event, and the concern with narrative construction. During the accused's first appearance at the court in July 2001 he rejected the right to have his indictment read out in court. Prosecutor Del Ponte later said that this was unfortunate, as "[t]his was an historic moment—the first trial of a head of state before the international tribunal. Reading the indictment aloud, live on television in Serbia, would have provided the public with a dramatic, definitive statement of the charges against the man who had once been their leader."³⁷² The chief prosecutor's reasoning for this procedural trial preference relied on the political goal of delegitimizing the defendant at home by utilizing the trial to reshape the narrative of his time as president.

Del Ponte was also critical of her prosecution team's choice of the first witnesses presented at Milošević's trial, fearing that his cross-examination (he acted as his own counsel), shown on television, was allowing him to "score political points in Serbia." "This,' I told them, 'is not the trial we wanted to present to the world.'...I wanted to see insider witnesses. I wanted to see ranking diplomats and leaders from the international community who had dealt with Milošević during the war. I did not want to see evidence of shootings and rapes and other crimes."³⁷³ There was no clear-cut separation between legal and political decision-making in relation to the prosecution's presentation of its case, again challenging the claim that politics outside the ICTY courtroom have not affected the fairness of legal proceedings within it.³⁷⁴

Del Ponte was attempting to use the trial to create political theater. Martti Koskenniemi argues that the prosecution's decision-making during the Milošević trial was inherently political,

³⁷² Del Ponte and Sudetic, *Madame Prosecutor*, 120.

³⁷³ *Ibid.*, 146.

³⁷⁴ See Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, 1-11.

and could only be so when prosecuting a political leader: “To accept the terms in which the trial is conducted—what deeds are singled out, who is being accused—is to already accept one interpretation of the context among those between which the political struggle has been waged”—that is, between the West and Serbia.³⁷⁵ The prosecution strategy in *Milošević* can be interpreted as the theater of demonstrating the validity of a Western interpretation of the Yugoslavia conflict and combatting the alternative interpretation being offered by the accused. As Koskenniemi argues, the international trial of political leaders requires the examination of evidence relating to the broader political context of the conflict and the alleged atrocities in dispute: “This is where a trial becomes inevitably a history lesson, and the dispute at the heart of it a political debate about the plausibility of the historical ‘interpretations.’”³⁷⁶

The trial goal of constructing a historical narrative of the Balkans conflict affected charging decisions by the OTP. Narrative construction for the conflict has required a comprehensive approach to the actions prosecuted at trial. The tribunal has constructed narratives of guilt in order to avoid the perception of impunity. This is especially problematic for accused with a high level of notoriety, such as Milošević, Karadžić, and Mladić. In such cases the court is eager to ensure the appearance of fairness to avoid the perception of a political trial of defeated leaders (and to avoid successful defense appeals), but at the same time there is public, political, and victim group pressure to ensure the conviction of the most notorious alleged war criminals from the conflict. In this inevitably politicized and highly public context, “when the interests of the criminal defendant and victims both vie for judicial attention, a point is soon reached beyond

³⁷⁵ Martti Koskenniemi, “Between Impunity and Show Trials,” *Max Planck Yearbook of United Nations Law* 6, no. 1 (2002): 16-17.

³⁷⁶ *Ibid.*, 17.

which the desire to satisfy the victims' interests begins to impinge on considerations of fairness toward the defendants."³⁷⁷

Returning to the issue of disclosure during the Karadžić trial, there was also information the defense requested that was not released. Robinson filed 101 disclosure violation motions with the judges for refusal to hand over relevant material, of which the judges found for the defense in 85.³⁷⁸ The judges were nevertheless reluctant to allow a remedy because of the cost and time it would require.³⁷⁹ Robinson believes the court acknowledges the problem of poor prosecutorial disclosure but is not willing to effectively address the issue due to bureaucratic constraints—unwilling or unable to provide the defense with more time and money.

According to Colleen Rohan, who acted as legal consultant to Karadžić's Standby Counsel Team,³⁸⁰ there were 38 prior related cases at the ICTY to the situations litigated in *Karadžić*—that had either gone through a full trial, had a guilty plea, or were sent back to be tried locally—so that material also needed to be looked at by the defense team for exculpatory material. She called this “an overwhelming task.”³⁸¹ There were 10 prior cases in relation to Srebrenica alone.³⁸² Without interns working for free for the Karadžić defense team—there were over 100 altogether—Rohan believes that it would have been impossible to put together a defense: “Is that

³⁷⁷ Mirjan Damaška, “What is the Point of International Criminal Justice?” *Chicago-Kent Law Review* 83, no.1 (2007): 334.

³⁷⁸ Weaver, “Radovan Karadžić's Lawyer Expects Guilty Verdict over War Crimes.”

³⁷⁹ Interview with Peter Robinson.

³⁸⁰ Radovan Karadžić conducted his own defense, with a team of legal advisors appointed by the court.

³⁸¹ Interview with Colleen Rohan.

³⁸² *Erdemović, Obrenović, Krstić, Blagojević and Jokić, Orić, Nikolić, Popović et al., Tolimir, and Perišić*. See the Hague Justice Portal, Srebrenica in summary: An Overview of the Legal Proceedings Relating to the 1995 Genocide, August 7, 2008, www.haguejusticeportal.net/index.php?id=9564.

the way we want to run a system of justice, based on essentially slave labor, with people who happen to be able to afford to work with you for three months?”³⁸³

The incoherent hybrid nature of the tribunal’s trial system, combined with the huge scope of international mass atrocity prosecutions, have had a significant effect on the ability of the accused to present an adequate defense based upon access to the case against their clients. These problems are perhaps inevitable in the legal and political environment of an international criminal court. Such weaknesses in the ability to provide adequate protections for defendants call into question the appropriateness of such courts for handling such cases.

Witnesses and defense cross-examination

The statute includes the right for the defense to cross-examine prosecution witnesses,³⁸⁴ which effectuates the fundamental abstract right of a criminal defendant to challenge their accusers. Corollary rights which protect the effectiveness of the right of cross-examination are found in the RPE and include adequate prior notice of witness information and statements.³⁸⁵

In 2000, the appeals chamber established in *Kordić et al.* that it had an “express preference for live, in-court testimony,”³⁸⁶ which is a core factor in the implementation of the right to cross-examine. In person testimony by witnesses was in fact the usual approach for the first several years of the court’s existence.³⁸⁷ It is also in line with common law system practice to safeguard

³⁸³ Interview with Colleen Rohan.

³⁸⁴ ICTY statute, article 21.4.e

³⁸⁵ See, for example, ICTY RPE, rules 66.A.ii and 71.C.

³⁸⁶ *Kordić et al.*, Decision on Appeal Regarding Statement of a Deceased Witness, case no. IT-95-14/2-AR73.5, July 21, 2000, para. 19, www.icty.org/x/cases/kordic/acdec/en/00721EV313608.htm.

³⁸⁷ Patricia M. Wald, “To ‘Establish Incredible Events by Credible Evidence:’ The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings,” *Harvard International Law Journal* 42, no. 2 (2001): 543.

the rights of the accused by enabling testimony against them to be challenged. For example, in the US federal court system, witnesses are required to testify in person, under oath, and with the defense right to cross-examine, with only exceptional circumstances permitting deviation.³⁸⁸

However, the length and cost of trials at the tribunal have led to pressure since the late 1990s to reduce both, with significant implications for defense parity through witness procedures, as explained below. The cost of the first trial was around \$20 million,³⁸⁹ with the average cost of a trial throughout the ICTY's existence estimated to be around \$14 million.³⁹⁰ The tribunal's 2014-15 budget was \$180 million—down from \$286 million in 2010-11 as the court winds down, finishing existing trials and transferring others to local courts.³⁹¹ The court's total operating costs will have been around \$2.7 billion by the time it closes.³⁹² In terms of the speed of trials, in its first ten years each lasted on average nine months, with some running to two years.³⁹³ The more complex trial of Radovan Karadžić lasted six and a half years³⁹⁴—not including the appeal.³⁹⁵

This does not compare poorly with the United States. A 2003 study of murder trials in eight Southern states by researchers at Iowa State University found an average cost of around \$24

³⁸⁸ United States Federal Rules of Evidence, article VIII (Hearsay). See Cornell University Law School, Legal Information Institute, www.law.cornell.edu/rules/fre/article_VIII.

³⁸⁹ Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* (Durham, NC: Carolina Academic Press, 1997), 224.

³⁹⁰ Gordon N. Bardos, "Trials and Tribulations: Politics as Justice at the ICTY," *World Affairs* 176, no. 3 (2013): 22, worldaffairsjournal.org/article/trials-and-tribulations-politics-justice-icty.

³⁹¹ ICTY, The Cost of Justice, www.icty.org/en/about/tribunal/the-cost-of-justice.

³⁹² This assumes the tribunal remains in operation until 2017. Stuart Ford, "Complexity and Efficiency at International Criminal Courts," *Emory International Law Review* 29, no. 1 (2014): 3.

³⁹³ Kelly D. Askin, "Reflections on Some of the Most Significant Achievements of the ICTY," *New England Law Review* 37, no. 4 (2003): 914.

³⁹⁴ The trial commenced on October 26, 2009 and ended with the trial chamber judgment on March 24, 2016. See ICTY, Cases: Karadžić (IT-95-5/18), www.icty.org/case/karadzic/4.

³⁹⁵ Karadžić's appeal will be heard by the MICT. See MICT, Cases: Karadžić, Radovan (MICT-13-55), www.unmict.org/en/cases/mict-13-55.

million, while trials for especially violent offenders cost of \$150-160 million each.³⁹⁶ However, the United States has unusually high costs for domestic violent crime trials, and many defendants plea bargain, so many cases do not go to trial. In comparison, in the United Kingdom, according to the British Treasury, the total cost, per murder, to the criminal justice system and health services combined, is approximately \$250,000.³⁹⁷

International trials present particular challenges that slow down and increase the cost of proceedings, including the need to call a large number of witnesses from multiple countries, and in relation to various different events, especially when prosecuting for command responsibility. These witnesses' preferences on timing need to be taken into account by the court as it can be difficult to compel them to appear. Investigations, including exhuming mass burial sites, can take years. Language is another complication: judges and other court officers often do not share one in common with witnesses, and documents have to be translated.³⁹⁸

Furthermore, the vast majority of cases go to trial,³⁹⁹ whereas in most common law systems—whose trials take longer partly because of the reliance on oral testimony—many cases are plea bargained, as is typical in the United States. In contrast, few individuals are willing to

³⁹⁶ Matt DeLisi, Anna Kosloski, Molly Sween, Emily Hachmeister, Matt Moore, and Alan Drury, "Murder by Numbers: Monetary Costs Imposed by a Sample of Homicide Offenders," *The Journal of Forensic Psychiatry & Psychology* 21, no. 4 (2010): 501-13.

³⁹⁷ Richard Ford, "Average Cost of a Murder Rises to £1.8 Million," *The Times*, May 15, 2014, www.thetimes.co.uk/tto/news/uk/crime/article4092699.ece?CMP=OTH-gnws-standard-2014_05_16. The actual figure is £174,000. Of course it should be kept in mind that the figures are not exactly equivalent, as the cost per murder is not the same as cost per murder trial.

³⁹⁸ Wald, "ICTY Judicial Proceedings:" 468.

³⁹⁹ One of the few guilty plea cases was that of Dražen Erdemović. He was sentenced to five years imprisonment after agreeing to a plea bargain with the prosecution for war crimes (after he had withdrawn a plea of guilty to crimes against humanity). See *Erdemović*, Sentencing Judgment, case no. IT-96-22-Tbis, March 5, 1998, www.icty.org/x/cases/erdemovic/tjug/en/erd-tsj980305e.pdf.

admit to committing mass atrocity crimes.⁴⁰⁰ There is also no provision in the ICTY statute or RPE for encouraging plea bargains between accused and prosecution, and the court is not bound by such agreements between the parties.⁴⁰¹ The tribunal has also assumed costs usually borne by other aspects of the criminal justice system in a domestic context, such as investigators' travel, and the detention of defendants before and during trial, in addition to legal aid for defendants. The latter cost alone accounts for 11 percent of the tribunal's annual budget.⁴⁰²

Responding to pressure from states to address concerns about the length and cost of ICTY trials,⁴⁰³ in 1998 the UN General Assembly requested the secretary-general to conduct a review "evaluating the effective operation and functioning" of the ICTY in order to improve efficiency.⁴⁰⁴ The report of the expert group assembled by the secretary-general recommended procedural changes to expedite trials, including through an increased reliance on written testimony, as live testimony takes up the most trial time—on average witnesses testify for one whole day.⁴⁰⁵ In its seventh annual report to the UN, the tribunal itself acknowledged the pressure to speed up proceedings, and that it came not only from the need to satisfy court actors, but from state and UN pressure, to satisfy "the ever growing expectations of the international

⁴⁰⁰ Cassese, *International Criminal Law*, 387.

⁴⁰¹ See *Erdemović*, Sentencing Judgment, case no. IT-96-22-Tbis, para. 19.

⁴⁰² ICTY, About the ICTY: The Cost of Justice, www.icty.org/sid/325.

⁴⁰³ Hafida Lahiouel, "The Right of the Accused to an Expeditious Trial," in *Essays on ICTY Procedure and Evidence: In Honour of Gabrielle Kirk McDonald*, ed. Richard May, David Tolbert, John Hocking, Ken Roberts, Bing Bing Jia, Daryl Mundis, and Gabriël Oosthuizen (Leiden, The Netherlands: Brill, 2001), 197.

⁴⁰⁴ General Assembly Resolution 53/212, December 18, 1998.

⁴⁰⁵ Secretary-General, "Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR)," UN doc. A/54/634, 1999. See Wald, "To 'Establish Incredible Events by Credible Evidence:'" 535-6.

community.”⁴⁰⁶ As a result, since the late 1990s the Security Council has taken various actions to speed up trials as part of its “completion strategy” for the court.⁴⁰⁷

Greater legitimacy might be argued to stem from the right of defendants to an expeditious trial, which is undermined when they spend years behind bars before a verdict is delivered. Rachel Kerr argues that a major political consideration in the Security Council’s push towards speedier trials was that successfully completed prosecutions—presumably with guilty verdicts—would aid transitional justice within the region⁴⁰⁸—bringing swifter and therefore more credible justice to victims in order to aid in reconciliation and peacebuilding.⁴⁰⁹ The pressure also seems to have stemmed from assessments of the poor achievements of the tribunal, which relied

⁴⁰⁶ ICTY, “Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,” UN doc. A/55/273–S/2000/777, July 31, 2000, para. 331. Seventh annual report, www.icty.org/en/documents/annual-reports.

⁴⁰⁷ The Security Council passed resolutions modifying the court’s charter by adding more judges, including a pool of *ad litem* judges that serve on a temporary basis. The following Security Council resolutions modify the ICTY’s statute (all relate to judges): 1166 (May 13, 1998), 1329 (November 30, 2000), 1411 (May 17, 2002), 1431 (August 14, 2002), 1481 (May 19, 2003), 1597 (April 20, 2005), 1660 (February 28, 2006), 1837 (September 29, 2008), and 1877 (July 7, 2009). In 2002 the council also accepted a completion strategy drawn up by the tribunal, which relies on transferring some cases to national courts. See UN Security-General, “Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts,” UN doc. S/2002/678, June 19, 2002, www.un.org/en/ga/search/view_doc.asp?symbol=S/2002/678. It envisaged, optimistically, the end of first instance trials by 2008 and of appeals by 2010. In 2003 the council also created a separate prosecutor for the ICTR to expedite the completion of trials in both courts. See Security Council resolution 1503, August 28, 2003, para. 8, www.unmict.org/specials/ictr-remembers/docs/res1503-2003_en.pdf. In 2010 the council also created the MICT to help in transferring cases to local courts. See Security Council Resolution 1966, December 22, 2010.

⁴⁰⁸ Kerr, *The International Criminal Tribunal for the Former Yugoslavia*, 98.

⁴⁰⁹ Gideon Boas, “Developments in the Law of Procedure and Evidence at the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court,” *Criminal Law Forum* 12, no. 2 (2001): 167.

primarily on the number of total indictments and convictions—a measure of success appropriate more for show trials than genuine criminal justice.⁴¹⁰

Returning to the 2000 *Kordić* appeals chamber decision mentioned earlier—which reiterated the court’s early preference for oral testimony—trial judges reacted to the decision by changing the witness procedures in order to permit greater speed of trials through written testimony. Later that year, at the twenty-third plenary session of the tribunal’s Judicial Practices Working Group, it introduced a new rule to the RPE⁴¹¹ that has enabled a significantly greater reliance on written witness testimony since then,⁴¹² rule 92*bis*.⁴¹³ In 2006 the court moved to increase the reliance on written testimony further by introducing rules 92*ter* and 92*quater*.

Rule 92*bis* allows the introduction of a written statement or transcript in lieu of the witness’s appearance in court, as long as their testimony “goes to proof of a matter other than the acts and conduct of the accused”⁴¹⁴—that is, to establishing historical background and other aspects of the context of the situation(s) examined in the case, known as the “crime base.”⁴¹⁵ Rule 92*ter* permits such testimony to be introduced even when it goes to the acts and conduct of the

⁴¹⁰ George S. Yacoubian, Jr., “Evaluating the Efficacy of the International Criminal Tribunals for Rwanda and the Former Yugoslavia: Implications for Criminology and International Criminal Law,” *World Affairs* 165, no. 3 (2003): 134.

⁴¹¹ See ICTY, “Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,” UN doc. A/56/352–S/2001/865, September 17, 2001, para. 55. Eighth annual report, www.icty.org/en/documents/annual-reports.

⁴¹² Steven Kay, “The Move from Oral Evidence to Written Evidence,” *The Journal of International Criminal Justice* 2, no. 2 (2004): 495–502.

⁴¹³ A provision in RPE rule 90 stating the tribunal’s strong preference for oral testimony was also removed.

⁴¹⁴ ICTY RPE, rule 92*bis*.A.

⁴¹⁵ Rule 92*bis*.i delineates the permissible crime base evidence: confirming prior oral testimony by other witnesses; relating to “relevant historical, political or military background;” relating to “the impact of crimes upon victims;” relating to “the character of the accused;” or relating to issues concerning sentencing decisions.

accused, as long as the witness is available in person for cross-examination. Rule 92*quater* allows written testimony which goes to their acts and conduct even if the witness is unable to appear before the court.⁴¹⁶

The introduction of these rules has led to a substantially increased reliance on written testimony.⁴¹⁷ In the tribunal's first trial,⁴¹⁸ all evidence received from witnesses was oral except for statements contained in an expert report provided by a witness who was a member of the commission of experts established by the Security Council to investigate war crimes in the former Yugoslavia.⁴¹⁹ Less than ten years later, in *Krajišnik*, the prosecution was permitted by the chamber to introduce 168 affidavit (92*bis*) witnesses vs. 101 oral:⁴²⁰ only 38 percent of witnesses provided live testimony.

Court observers and former prosecutor Behar defend these rule changes, arguing that they have helped speed up proceedings while not negatively affecting defendants' rights.⁴²¹ They claim that 92*bis* witness statements are not problematic. Evidence admitted under this rule cannot relate to the acts and conduct of the accused. Furthermore, such evidence cannot be used as the sole basis to convict an accused.

⁴¹⁶ If the testimony goes to the acts or conduct of the accused this is a factor taken into account by the chamber in deciding whether the evidence is admissible, but it is not automatic grounds for exclusion of such evidence. See ICTY RPE, rule 92*quater*.B.

⁴¹⁷ Patricia M. Wald, "The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an international Court," *Journal of Law & Policy* 5 (2001): 104.

⁴¹⁸ *Tadić*, case no. IT-94-1-T. His case ended in 1999 with his appeal verdict.

⁴¹⁹ Kay, "The Move from Oral Evidence to Written Evidence:" 495.

⁴²⁰ *Krajišnik*, Decision on Prosecution Motions for Judicial Notice of Adjudicated Facts and for Admission of Written Statements of Witnesses Pursuant to Rule 92*bis*, case no. IT-00-39-T, February 28, 2003, para. 26, www.icty.org/x/cases/krajsnik/tdec/en/kra-dec030228e.pdf.

⁴²¹ Anonymous interviews with court observers; and Behar, *Tell It to the World*, 19.

In contrast, Judge Wald warned as early as 2004 that the increasing use of such testimony was a concern for justice, and that if the trend continued it would “seriously undermine the hard-fought respect for [the tribunal’s] processes.”⁴²² Permitting the introduction of testimony against a defendant without the ability to question the witness, she argued, “threatens to squander the ICTY’s most precious asset—its reputation for fairness and truth seeking.”⁴²³ In fact in its first annual report to the UN, in 1994, the tribunal acknowledged that cross-examination (in this case during depositions) of oral testimony was allowed “[i]n order to protect ‘equality of arms’ (and, in particular, the rights of the accused).”⁴²⁴

This attitude changed, to the detriment of defendants, when the length and cost of international trials became apparent. In its sixth annual report to the UN, the ICTY had acknowledged the concern with the length of trials, but had also noted that it was nevertheless important to maintain the centrality of oral testimony, despite its contribution to the problem: “unlike the Nurnberg and Tokyo tribunals, a great deal of reliance is placed on the testimony of witnesses rather than on Affidavits [at the ICTY], and the tribunal is committed to ensuring that the rights of the accused are fully respected in accordance with contemporary human rights norms.”⁴²⁵ In its eighth report—in which the court noted the introduction of *92bis*—only two

⁴²² Wald, “ICTY Judicial Proceedings:” 473.

⁴²³ Ibid.

⁴²⁴ ICTY, “Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,” UN doc. A/49/342–S/1994/1007, August 29, 1994, para. 79. First annual report, www.icty.org/en/documents/annual-reports.

⁴²⁵ ICTY, “Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,” UN doc. A/54/187–S/1999/846, August 25, 1999, para. 13. Sixth annual report, www.icty.org/en/documents/annual-reports.

years later, “such declarations were notably absent.”⁴²⁶ The eighth report similarly only mentions a major change in the policy of the court towards written testimony in an endnote. This was the deletion of the rule stating a “preference for oral testimony” and replacing it with one “providing for the Chamber to receive the evidence of a witness in written form, where the interests of justice allow.”⁴²⁷

A year after the introduction of 92*bis*, Judge Wald called the move “a 180 degree turn” from the preference for live testimony.⁴²⁸ In 2003 legal scholar Salvatore Zappalà expressed concern at the trend, noting that affidavits “present the same drawbacks as hearsay evidence, since they are out-of-court statements...Defendants are clearly not confronted with the source of evidence. Additionally, affidavits lack those elements of orality and direct examination that should characterize the presentation of evidence in adversarial trials.”⁴²⁹ Therefore the defense’s fundamental due process “right of confrontation” of one’s accusers is diminished. This is why such testimony tends to be forbidden or extremely limited in adversarial trials; such testimony is a feature instead commonly seen in inquisitorial trials.⁴³⁰

In relation to 92*bis*, Gideon Boas, a former legal advisor to the ICTY trial chambers, acknowledges that the effective implementation of the constraint against using written testimony

⁴²⁶ Fairlie, “Due Process Erosion:” 71.

⁴²⁷ ICTY, eighth annual report, para. 51, note 1. See Fairlie, “Due Process Erosion:” 72. Rule 89.F replaced rule 90.A.

⁴²⁸ Wald, “To ‘Establish Incredible Events by Credible Evidence:” 544.

⁴²⁹ Salvatore Zappalà, *Human Rights in International Criminal Proceedings* (New York: Oxford University Press, 2003), 137.

⁴³⁰ Some states with inquisitorial systems permitting reliance on written testimony have shifted towards an adversarial model reliant on oral testimony precisely because of concerns with the rights of defendants in a non-oral setting. See, for example, the move in this direction by Mexico, due to be complete by 2016: Paul J. Zwier and Alexander Barney, “Moving to an Oral Adversarial System in Mexico: Jurisprudential, Criminal Procedure, Evidence Law, and Trial Advocacy Implications,” *Emory International Law Review* 26, no. 1 (2012): 189-225.

for acts of the accused is dependent upon the highly subjective interpretation of the judges.⁴³¹ In interviews counsel confirmed this concern, arguing that, despite prosecutors' protestations to the contrary, some of them have interpreted the rule too liberally, putting together statements that breach the often fine line between background and direct relevance to the accused's conduct.⁴³²

Judge Wald argues that:

In my time at the ICTY, I have seen countless statements made years earlier by a witness that the same witness repudiates, contradicts, or ignores in his or her courtroom testimony. There is no question in my mind that a very different aura surrounds a witness giving live testimony to the judges in front of the accused and cross-examined by defense counsel than in an interview with a prosecutor (or a defense) representative out of court, not subject to cross-examination. I have grown suspicious of many out-of-court statements that are the product of a witness speaking one language to an interrogator speaking another who writes it down in the interrogator's language and has it read back to the witness in the witness's native tongue by a third party. There is much margin for error in such a system, and indeed in the courtroom years later, many witnesses say they were misunderstood or misquoted in the earlier statement. It is therefore essential, in my view, that any written statements truly be limited to non-incriminating evidence.⁴³³

The shift towards written statements potentially harms defendants by eliminating the effect of live testimony on the judges—who decide cases—and often denies defense counsel the right to cross-examine witnesses, which constitutes a weakening of their trial right to confront their

⁴³¹ Gideon Boas, "Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility," *Criminal Law Forum* 12, no. 1 (2001): 82.

⁴³² Interviews with Colleen Rohan and Gregor Guy-Smith.

⁴³³ Wald, "To 'Establish Incredible Events by Credible Evidence:'" 545.

accusers. It also arguably undermines the principle of the presumption of innocence and the burden of proof lying with the prosecution. Despite these serious concerns, written witness testimony has been frequently and increasingly utilized at the court for incriminating evidence in order to speed up trials.⁴³⁴ As the court completes its final cases there has not been a slowing down, but rather a further “accelerated pace” in proceedings,⁴³⁵ attested to by defense counsel.⁴³⁶

Conclusion

The ICTY was the first international criminal tribunal created since the IMTFE. It faced a very different context of international criminal law to the postwar tribunals, which made its legality of crimes far less problematic. The agreement among powerful postwar states to create the IMT and IMTFE, and the broad state agreement during the Cold War leading to the creation of global and regional humanitarian and human rights legal instruments meant that the core crimes of the ICTY were relatively well established by the beginning of the court’s jurisdiction in 1991.

The dissertation therefore disagrees with the assessment of William Schabas, who argues that “[a]lthough formally professing rigid adherence to the *nullum crimen* principle, in practice the judges at the *ad hoc* tribunals have taken a relatively relaxed approach, much in spirit to their predecessors at Nuremberg.”⁴³⁷ It instead argues that while the lack of any provisions in the statute protecting legality may have enabled some flexibility with interpreting crimes, the ICTY

⁴³⁴ The court has itself acknowledged the weakness of written statements in noting discrepancies with oral testimony. See, for example, *Limaj et al.*, Trial Judgment, para. 321.

⁴³⁵ UN, “Accelerated Pace Palpable as Criminal Tribunals Strive to Conclude Caseload, Transfer Balance to Residual Mechanism, Security Council Hears in Briefings,” Security Council Meetings Coverage, UN doc. SC/11917, June 3, 2015.

⁴³⁶ Interviews with Gregor Guy-Smith, Peter Robinson, and Colleen Rohan.

⁴³⁷ William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006), 63.

did not breach legality by enforcing laws that had not existed before, which had happened at the IMT.⁴³⁸

The tribunal has developed crimes from their treaty and customary origins through interpretations that have been positive from a broad human rights perspective of protecting individuals. The tribunal's interpretations have sometimes been questionable, especially in relation to the context and underlying offenses of the crimes.⁴³⁹ The tribunal, however, generally evinces a relatively high level of legality of crimes, at least compared to the only two previous international tribunals.

The legality of penalties, however, has been significantly more problematic than that of crimes. The UN was loath to compensate for the lack of Cold War development of international criminal procedure by directly breaching legality through creating specific punishments. This lacuna provided the tribunal with excessive leeway in creating its own sentencing practice, ineffectively guided by the few specifics the judges created in the RPE. Incoherent and inconsistent practice has generated little faith in the tribunal's justice among victims.

⁴³⁸ For a legal position largely in agreement with the conclusions drawn here see Gallant, *Principle of Legality*, 307-8.

⁴³⁹ Arguably the strongest breach of legality at the ICTY involves a non-mass atrocity crime: "Contempt of the Tribunal." The crime was not agreed by the Security Council or included in the ICTY's statute. Instead it is found in the RPE (rule 77), which were created by the court's judges. The court has directly addressed the issue of the legality of prosecuting contempt, arguing that while the crime did not exist in customary international law, it did in general principles of law, as a power of courts in most domestic legal systems, including the common and civil law systems that the ICTY's procedures are based upon. See *Aleksovski*, Judgement on Appeal by Anto Nobile against Finding of Contempt, case no. IT-95-14/1-AR77, May 30, 2001, para. 38, www.icty.org/x/cases/contempt_nobile/acjug/en/nob-aj010530e.pdf. Particularly problematic for legality is prosecutions of journalists for contempt. This has broadened the jurisdiction of the court from defendants, counsel, and witnesses to potentially any individual worldwide, regardless of territorial jurisdiction. See Gallant, *Principle of Legality*, 311. According to the RPE: "The Tribunal... may hold in contempt... *any person* who... discloses information relating to [its] proceedings" (rule 77.A.ii., emphasis added). While the declaration of the crime and its punishment (up to seven years in prison and 100,000 euros fine [rule 77.G.] in the RPE arguably provide "fair notice" of its existence as a criminal offense to the applicable legal subjects—the world's population—this does not provide an adequate legal justification and this remains a an arguably significant breach of legality by the court.

The legality of crimes and punishments was also shaped by the Security Council decision to create the tribunal through a Chapter VII resolution, as an attempt to provide a swift political response to armed conflict through legal means—or at least swift after the council finally decided to take action. Creation through a treaty, while more time-consuming, would have provided greater impetus towards generating clarity and specificity in relation to crimes and punishments, as was the case with the ICC’s Rome Statute in 1998—discussed in the following chapter.

The factors that determine defense parity were understood by the Security Council mostly in terms of access to counsel and basic procedural guarantees, reflecting a lack of understanding of the role of defense in criminal trials, and a lack of concern due to the emphasis on prosecution, and on controlling the costs of the tribunal and the length of trials. This focus on basic procedures is to the detriment of an emphasis on the structural dynamic within the court. Structural parity is important to legal fairness because the institutional position of the defense in a criminal justice system has a significant effect on their ability to secure adequate resources and to maintain a voice in procedural policy reform. Structural parity therefore potentially shapes defense counsels’ entire ability to fairly represent their clients. The extreme structural imbalance at the tribunal, partially ameliorated by the creation of the Association of Defence Counsel, reflects poorly on the legal fairness towards defendants originally envisioned by Security Council members and practiced by the tribunal, and has shaped its ability to successfully address problems affecting the ability of counsel to provide adequate representation.

Both the prosecution and defense have experienced significant state reluctance to cooperate with pre-trial investigations, resulting from the political concerns of external actors who are necessary for the court to function, and the weak ability of the tribunal to compel their

cooperation. Ultimately, however, the impact has been much greater on counsel's ability to present an adequate defense than on the prosecution's ability to build a case. The former lack the OTP's advantages of institutional status and resources, and political and diplomatic contacts and influence which aid in encouraging and pressuring states to cooperate.

Evidentiary procedure issues at the tribunal demonstrate the problems for defense parity caused especially by: the massive scope of international trials, particularly those of top leaders; the methods adopted to respond to UN and state pressure to speed up trial proceedings; the incoherent hybrid nature of procedures; and lack of concern with the defense function by the creators of the court. Evidentiary procedure issues are also impacted by broader concerns at the court that impinge upon parity, including the tribunal's necessary reliance on external legal and political entities, and the relative accountability for prosecution and defense counsel provided for in the court's rules.

Pressures on the tribunal to decrease the cost and duration of trials have especially encouraged rule changes that have weakened due process protections for defendants. Among defense counsel practicing before the court there is "close to unanimous concern...that the current procedural rules are moving in a direction which, though it may result in quicker trials, will do so at the expense of providing fair trials."⁴⁴⁰ Decreasing the duration of trials is of benefit to the accused by effectuating their right to an expeditious trial, and so ensuring that if they are innocent they will have spent less time incarcerated. However, the court has tended to press for speedier trials except when this would be explicitly in the interests of the accused. The court's

⁴⁴⁰ Rohan, "Protecting the Rights of the Accused in International Criminal Proceedings," 290.

approach is characterized by “[t]he placing of expedience to the forefront in limited and inconsistent instances, while adopting a rather relaxed attitude in other circumstances.”⁴⁴¹

The dissertation agrees with the position of the court and the Security Council that speeding up trials would add to a perception of increased legitimacy from the perspective of efficacy. It disagrees with the court and council, however, that overall this decision adds to the legitimacy of the tribunal: there is a trade off between the—more obvious to casual observers—sociological legitimacy of increased perceived efficacy, and the far more complex normative legitimacy of decreased procedural fairness towards defendants. It is perhaps inevitable that a court created by political actors for largely political purposes would distort the underlying legal framework away from justice towards defendants towards broader perceptions of justice which focus on prosecution. It is inadequately appreciated by political actors that the legitimacy of the tribunal requires the fair legal treatment of a group traditionally scorned, if not despised: alleged war criminals.

Defense protections at the ICTY have been harmed by various factors distinct to international trials: the political origins of the court, the large scope of trials and the political pressure to speed them up, the incoherent hybrid nature of the trial system, and the interference wrought by the political goals of narrative construction and delegitimization. Ultimately, as argued in the conclusion to the dissertation, an international criminal tribunal, created by states and dependent on external political support, may be a far from ideal forum for pursuing criminal justice while achieving a high degree of legitimacy through providing adequate protection for defendants.

⁴⁴¹ McDermott, “Rights in Reverse,” 175.

5 The International Criminal Court

Chapter 5 examines the legal fairness of the International Criminal Court between its establishment in July 2002 and July 2016. It provides an analysis of fairness in relation to criminal defendants, and explores how that fairness has been shaped by political influences on judicial actors at the court, and by states, IGOs, and NGO actors.

As the first permanent international criminal court, the ICC has been portrayed as representing an advancement in international criminal justice by human rights IR and legal scholars in terms of fair trial standards.¹ Others laud the ICC's claims to justice on the basis of prosecuting alleged war criminals and as a potential deterrent, while understating the significance of the rights of defendants in the rules and practice of the court, and giving scant notice to the idea that justice is not served if the rights of defendants are ignored and poorly

¹ International legal scholar and counsel Geoffrey Robertson rejects early US government criticisms of the ICC as “illogical, firstly because the model for it—the Hague tribunal—is *painstakingly fair to the defence*.” See Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 2nd ed. (New York: The New Press, 2002), 391-2, emphasis added. Richard Goldstone, “The Crime Prevention Potential of the International Criminal Court Depends Upon its Credibility and the Support it Receives from Governments and Especially those of States Parties to the Rome Treaty,” in *Contemporary Issues Facing the International Criminal Court*, ed. Richard H. Steinberg (Leiden: Martinus Nijhoff, 2016), 213-19. The chief prosecutor of the ICC, Fatou Bensouda, expresses a legalist perspective on the ICC, arguing that the court's legal processes can remain immune from political influence: “It is my firm belief that recourse to justice should never be compromised by political expediency. The failure to uphold this sacrosanct requirement will not only pervert the cause of justice and weaken public confidence in it, but also exacerbate the immense suffering of the victims of mass atrocities.” She also stated that “the legal rules that apply are clear and decidedly not political under any circumstances,” making reference to “justice,” victims, and the public, but not to defendants. Justice is conceptualized here in terms of victims and peace—not the accused. See Fatou Bensouda, “The Truth about the ICC and Gaza,” *The Guardian*, 29 August 2014. Other examples include human rights NGOs providing often premature assessments based on weak legal evidence: Human Rights Watch, “International Criminal Court a Reality,” press release, April 11, 2002, www.hrw.org/news/2002/04/11/international-criminal-court-reality; and Amnesty International, “The International Criminal Court: Fact Sheet 9—Fair Trial Guarantees,” doc. no. IOR 40/09/00, July 31, 2000, www.amnesty.org/en/documents/ior40/009/2000/en.

understood.² Yet other commentators are critical of the legitimacy of the ICC, on grounds of the selectivity of cases prosecuted (currently confined to Africa),³ lack of autonomy of the court from states and the UN Security Council,⁴ as a poor deterrent to atrocities and providing insufficient justice to victims;⁵ and inefficiency in conducting trials.⁶

In contrast, this chapter demonstrates that there are significant weaknesses in the fairness of trial standards and practice towards criminal defendants at the ICC. In doing so it highlights the dangers of IR scholars and other public commentators claiming that trials are fair without an

² Mark S. Ellis, “International Justice and the Rule of Law: Strengthening the ICC through Domestic Prosecutions,” *The Hague Journal on the Rule of Law* 74, no. 1 (2009): 79-86; David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford university Press, 2014); Steven Ratner, Jason S. Abrams, and James L. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 3rd ed. (Oxford: Oxford University Press, 2009), 240-1; and David Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012), 438-40.

³ Mba Chidi Nmaju, “Relevance of the Law of International Organisations in Resolving International Disputes: A Review of the AU/ICC Impasse,” *African Journal on Conflict Resolution* 14, no. 1 (2014): 155-85. For the position of the African Union see, for example, *The Guardian*, “African Union Members Back Kenyan Plan to Leave ICC,” February 1, 2016. For an analysis of critiques of the court in relation to Africa, see the various contributions to Gerhard Werle, Lovell Fernandez, and Moritz Vormbaum, eds., *Africa and the International Criminal Court* (T.M.C. Asser Press: The Hague, 2014).

⁴ Rosa Aloisi, “A Tale of Two Institutions: The United Nations Security Council and the International Criminal Court,” *International Criminal Law Review* 13 (2013): 147-68; and Abhinav Chandrachud, “Diversity and the International Criminal Court: Does Geographic Background Impact Decision Making?” *Brooklyn Journal of International Law* 38, no. 2 (2013): 487-521.

⁵ Kirsten Ainley, “The Responsibility to Protect and the International Criminal Court,” *International Affairs* 91, no. 1 (2015): 37-54; Luke Moffett, “Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague,” *Journal of International Criminal Justice* 13 (2015): 281-311; Elisabeth Baumgartner, “Aspects of Victim Participation in the Proceedings of the International Criminal Court,” *International Review of the Red Cross* 90, no. 870 (2008): 409-40; and Dawn L. Rothe and Victoria E. Collins, “The International Criminal Court: A Pipe Dream to End Impunity?” *International Criminal Law Review* 13 (2013): 191-209.

⁶ Guénaél Mettraux, Dermot Groome, Shireen Fisher, Alex Whiting, Gabrielle McIntyre, Jérôme de Hemptinne, and Göran Sluiter, “Expert Initiative on Promoting Effectiveness at the International Criminal Court,” Expert Paper, December 2014, dickinsonlaw.psu.edu/sites/default/files/Groome-ICC-Expert-Report-Dec-2-2014.pdf; Stuart Ford, “How Much Money Does the ICC Need?” in *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievement*, ed. Carsten Stahn (Oxford: Oxford University Press, 2014), 84-104; and Jonathan O’Donohue, “Financing the International Criminal Court,” *International Criminal Law Review* 13 (2013): 269-96.

adequate understanding of what fairness towards defendants consists of, and without effectively exploring these issues in relation to the ICC's rules and practice.

In regards to practice, this chapter necessarily provides a more provisional, forward-looking perspective on legal fairness legitimacy than that provided in Chapter 4. The ICTY has completed 102 trials, ending in 81 convictions, 19 acquittals, and two defendants to undergo retrial at the MICT.⁷ The ICC meanwhile had completed six trials by October 2016, with five convictions and one acquittal.⁸ There is therefore far less case law to draw upon to enable a firm assessment of the practice of the ICC in regards to both the legality of crimes and defense parity; and far fewer opportunities for the OTP and defense counsel to interact with external actors such as states and NGOs. The ICTY is also completing its last trials, encouraged by the Security Council's Completion Strategy.⁹ In contrast, the ICC is a permanent court,¹⁰ and so the findings

⁷ ICTY, Key Figures of the Case, www.icty.org/en/cases/key-figures-cases; data last updated April 19, 2016.

⁸ See ICC, homepage, www.icc-cpi.int. The four trials completed as of July 2016 were assessed in the research. Note that on September 27, 2016, after the end-period for the study, the ICC sentenced Ahmad al-Faqi al-Mahdi to nine years in the Mali situation. This was the first conviction by the court for the war crime of cultural destruction, and resulted from the first guilty plea before the court. See ICC, "ICC Trial Chamber VIII Declares Mr Al Mahdi Guilty of the War Crime of Attacking Historic and Religious Buildings in Timbuktu and Sentences Him to Nine Years' Imprisonment," press release, doc. no. ICC-CPI-20160927-PR1242, September 27, 2016, www.icc-cpi.int/pages/item.aspx?name=pr1242; and Marlise Simons, "Prison Sentence Over Smashing of Shrines in Timbuktu: 9 Years," *The New York Times*, September 27, 2016. On October 19, 2016, Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido were found guilty of crimes against the administration of justice, in the first such trial before the court. See ICC, "Bemba et al. Case: ICC Trial Chamber VII Finds Five Accused Guilty of Offences Against the Administration of Justice," press release no. ICC-CPI-20161019-PR1245, October 19, 2016.

⁹ In 2002 the Security Council accepted a completion strategy drawn up by the ICTY, which has been modified since then and has relied on speeding up trial proceedings (as discussed in Chapter 4), transferring some cases to national courts, and transferring retrials and appeals to the MICT). See, for example, UN Security-General, "Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts," UN doc. S/2002/678, June 19, 2002, www.un.org/en/ga/search/view_doc.asp?symbol=S/2002/678.

¹⁰ Rome Statute of the International Criminal Court, circulated as doc. no. A/CONF.183/9, July 17, 1998, preamble and article 1.

here not only provide an assessment of its legal fairness legitimacy in the first 14 years of its operation, but also suggest the future trajectory of defendant protections at the court.

The chapter begins with an examination of the dynamics during the negotiations which led to the creation of the court and their impact on fairness standards for defendants. Sections two and three analyze the principle of legality, focusing on the level of retroactivity in the mass atrocity crimes within the ICC's jurisdiction, and the court's sentencing guidelines and practices, respectively. The next two sections examine the dynamic between the prosecution and defense in the pre-trial and trial stages of proceedings. In section four, the impact of the court's structure on this dynamic is analyzed, along with the effect of the court on defense teams' ability to conduct investigations and acquire evidence. In section five, the procedures relating to evidence presentation and witnesses are examined in terms of how they impact parity during trial.

The evidence relied upon in the research for this chapter includes the ICC's Rome Statute, the Elements of Crimes (EC),¹¹ Rules of Procedure and Evidence (RPE),¹² the Regulations of the Court,¹³ and the Agreement on the Privileges and Immunities of the International Criminal

¹¹ ICC, Elements of Crimes, doc. no. PCNICC/2000/1/Add.2, 2000, September 9, 2002, www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf. See Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First Session, New York, September 3-10, 2002, doc. no. ICC-ASP/1/3, part II.B.

¹² ICC, Rules of Procedure and Evidence, doc. no. PCNICC/2000/1/Add.1, November 2, 2000, www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf. See Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, September 3-10, 2002, doc. no. ICC-ASP/1/3 and Corr.1, part II.A.

¹³ ICC, Regulations of the Court, doc. no. ICC-BD/01-01-04, May 26, 2004, www.icc-cpi.int/NR/rdonlyres/B920AD62-DF49-4010-8907-E0D8CC61EBA4/277527/Regulations_of_the_Court_170604EN.pdf. Six amendments to the regulations were subsequently adopted on December 18, 2007. See Coalition for the International Criminal Court, Regulations of the Court, www.iccnw.org/?mod=regcourtwide.

Court;¹⁴ the court's case law, including decisions and court judgments;¹⁵ court administrative documents and website data; participant memoirs; interviews; and secondary legal, political, journalistic, and historical sources. Also relied upon is the case law of the ICTY, and occasionally that of other international courts, as they constitute the legal context within which the ICC operates for purposes of judicial interpretation of criminal law and procedural matters.

Legal and political justice conflict in the creation of the ICC

The UN International Law Commission produced a draft statute for a permanent international criminal tribunal in 1994,¹⁶ encouraged by a coalition of 16 Caribbean and Latin American states within the General Assembly.¹⁷ The draft was taken up as a starting point by an ad hoc group of mid-sized and smaller states, known as the “like-minded group,” eventually numbering over 60 states.¹⁸ The group formed a prominent faction in the state negotiations leading to the creation of the court's statute at the June and July 1998 Rome Conference. It consisted of various Western European and Latin American states, plus Canada, Australia, and New Zealand.

¹⁴ ICC, Agreement on the Privileges and Immunities of the International Criminal Court, UN Treaty Series vol. 2271, no. 40446, New York, September 9, 2002, [legal.un.org/icc/apic/apic\(e\).pdf](http://legal.un.org/icc/apic/apic(e).pdf).

¹⁵ Unlike at the ICTY, where each case was only related to individuals (or groups of individuals), at the ICC, cases—and case names—refer either to individuals or to “situations” under investigation by the court (e.g. *Situation in the Democratic Republic of the Congo*, case no. ICC-01/04). These situation cases may then lead to the prosecution of individuals (e.g. *Lubanga*, case no. ICC-01/04-01/06, which stemmed from the situation in the DRC, as reflected in the first part of the *Lubanga* case number).

¹⁶ ILC, Draft Statute for an International Criminal Court, adopted at the ILC's 46th session, 1994. Appears in Yearbook of the International Law Commission, 1994, vol. II (Part Two), with commentaries, legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1994.pdf.

¹⁷ Andrew Novak, *The International Criminal Court: An Introduction* (Basel: Springer, 2015), 18-19. See Chapter 3 of the dissertation for general details on the background to the creation of the ICC. The discussion in this chapter is confined to issues relating to legality and defense parity.

¹⁸ M. Cherif Bassiouni, “Negotiating the Treaty of Rome on the Establishment of an International Criminal Court,” *Cornell International Law Journal* 32, no. 3 (1999): 455.

Political scientist David Bosco argues that the like-minded group “conceived of themselves as depoliticized” in that they “lacked strong political interests and strategic entanglements,”¹⁹ and “[b]ecause they were not global powers, they thought of themselves as more able to construct an international architecture that would be perceived as fair and legitimate by the rest of the world. The usually unstated corollary of this thesis was clear: powerful states with complex interests had limited ability to advance impartial international justice.”²⁰ In the ICC negotiations, in distinction to those within the Security Council in relation to the ICTY, institutional power was exercised by less powerful states. This is considerably due to the resistance to the idea of a universal court by China and Russia, and also the United States.

The significance of the like-minded group forms part of Bosco’s overarching argument in the book *Rough Justice* that great-power politics has played a less important role in the creation and working of the ICC than in most previous organizations established by states. His emphasis on the role of traditional notions of political power underplays an issue of central importance in the construction of the court: the inherent political bias towards successful prosecution—which is one of the most important goals of such courts—and the extent to which those in the like-minded group, and most other states at the Rome Conference, undervalued the importance of balance in the powers afforded to the prosecution and defense in the structure and operation of the ICC. There seems to have been a poor understanding among the conference participants that privileging the rights of victims may be detrimental to the rights of accused within the legal structure and processes constructed through the conference. Impartiality in international criminal

¹⁹ Bosco, *Rough Justice*, 19.

²⁰ *Ibid.*, 39.

justice requires looking beyond traditional state power interests to acknowledging the importance to its legitimacy of addressing the human rights bias towards successful prosecution.

The UN General Assembly created two committees to generate a draft statute for the court: the Ad Hoc Committee on the Establishment of an International Criminal Court worked throughout 1995, and this was replaced in December that year with the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom).²¹ Cherif Bassiouni, the chair of the Drafting Committee of the Rome Conference, argues that by 1997 “only an unstructured and substantially unusable compilation of all governmental proposals” had come out of the PrepCom meetings, which was the preference of the P5 within the Security Council.²² A draft statute was then prepared by the committee in Zutphen, Netherlands, in January 1998.²³ While this did not greatly advance the coherence and detail of the earlier proposals, it in turn led to a final draft in April,²⁴ to be considered by the Rome Conference in June and July.²⁵

²¹ For the establishment of PrepCom after receiving the report of the ad hoc committee, see General Assembly resolution 50/46, December 18, 1995, www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/50/46. In January 1997 the assembly decided on meetings for PrepCom throughout 1997 and 1998, and agreed that a conference would be convened in the latter year to finalize the draft statute for a permanent court: General Assembly resolution 51/207, January 16, 1997, www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/51/207.

²² Bassiouni, “Negotiating the Treaty of Rome:” 444.

²³ General Assembly, Zutphen Draft Statute for the International Criminal Court, UN doc. A/AC.249/1998/L.13, Zutphen, Netherlands, February 4, 1998.

²⁴ General Assembly, “Report of the Preparatory Committee on the Establishment of an International Criminal Court: Draft Statute and Draft Final Act,” UN doc. A/Conf.183/2, April 14, 1998, legal.un.org/diplomaticconferences/icc-1998/docs/english/vol3/a_conf_183_2.pdf.

²⁵ Bassiouni, “Negotiating the Treaty of Rome:” 444. The Rome Conference’s official title is The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

The statute was eventually signed by 120 states at the conference,²⁶ and the court came into operation in 2002. The Assembly of States Parties (ASP) of the ICC consists of those states, 124 as of July 2016, which have ratified or acceded to the Rome Statute, and provides oversight of the court, as well as acting as its legislative body.²⁷ The Rome Conference created a Preparatory Commission of the International Criminal Court in 1999, through which the ASP created the subsidiary rules to structure the operation of the court, including the RPE and Elements of Crimes, which are discussed in relation to legality and defense parity throughout the chapter.²⁸

The limited understanding and appreciation of the centrality of the rights of the accused to a fair trial by the states negotiating the Rome Statute is demonstrated by the incoherent placement of these rights as agreed at Rome.²⁹ Five of the 12 articles found in part III of the statute, General Principles of Criminal Law, delineate principles that establish core defendant rights, such as the non-retroactivity of crimes and punishment, and individual criminal responsibility.³⁰ Other rights, such as *ne bis in idem* (no double jeopardy), the presumption of innocence, and a list of specific rights of accused, are found in other sections.

While the research largely focuses on the role of states, institutional power over the ICC was also exercised by other actors involved in the Rome and pre-Rome negotiations. They similarly tended to exhibit a lack of appreciation for the importance of defendant rights, demonstrating an

²⁶ There were also seven votes against and 21 abstentions. The votes against were the United States, Israel, China, Iraq, Yemen, Libya, and Qatar. See Fanny Benedetti and John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference," *Global Governance* 5, no. 1 (1999): 27.

²⁷ The ASP meets once per year to discuss the operation of the court and also holds special sessions to decide ad hoc matters. See ICC, Assembly of States Parties, www.icc-cpi.int/asp. See also the ASP website, asp.icc-cpi.int.

²⁸ See UN, Law: ICC, www.un.org/law/icc/index.html.

²⁹ Bassiouni, "Negotiating the Treaty of Rome:" 454.

³⁰ Rome Statute, articles 22-6.

understanding of human rights that focuses on victims while neglecting the centrality of defendant rights to the construction of a legitimate criminal justice institution characterized by liberal legal norms.

Over 800 human rights NGOs were involved in the pre-Rome negotiations,³¹ with 238 present at Rome, including Human Rights Watch, Amnesty International, the Carter Center, the International Human Rights Law Institute, and the International Commission of Jurists.³² While this may be thought to bode well for the inclusion of rights for all participants in the statute, Geoffrey Robertson cautions that “what was truly ironic was [human rights NGOs’] zeal for a court so tough that it would actually violate the basic human rights of its defendants.”³³ Amnesty International pushed for a prosecutor with the independence to be able to bring prosecutions even “where the evidence is extremely weak,” and called for the court to exclude the defense of duress and to significantly weaken that of self-defense.³⁴

Many human rights NGOs downplayed the rights of defendants due to an eagerness to create a strong court to prosecute atrocities and because of a lack of significant understanding of the importance of balancing the ability of the prosecution to present an adequate case and the accused to present an adequate defense. The broader implications for defendants of the positions and decisions taken at Rome are analyzed in the four sections below.

Legality indicator 1: Non-retroactivity of crimes

³¹ Robertson, *Crimes Against Humanity*, 347-8.

³² Bassiouni, “Negotiating the Treaty of Rome:” 455.

³³ Robertson, *Crimes Against Humanity*, 348.

³⁴ Amnesty International, “The International Criminal Court: Making the Right Choices,” Part I, January 1997, 76-7, quoted in *ibid*.

This section provides an assessment of legality at the court by examining the nature and extent of the retroactive establishment and enforcement of the crimes within the ICC's jurisdiction. It begins by analyzing the debates surrounding legality during the process of creating the court. The contextual requirements and underlying offenses of the three mass atrocity crimes over which the court currently has jurisdiction are then examined: war crimes, crimes against humanity, and genocide.³⁵ The analysis below includes the definition of the crime only if it is directly relevant to the analysis of legality and if it differs significantly from that in the ICTY statute, as the crime definitions were provided at the beginning of the discussion of the legality of each crime in Chapter 4.

The principle of legality in the statute and Elements of Crimes

The Rome Statute is the first founding legal document of an international criminal court to explicitly incorporate the non-retroactivity of crimes as a principle constraining the court's ability to enforce law.³⁶ First, as an international customary law principle, it is found in an article

³⁵ The ICC is the first international criminal court that only exercises jurisdiction in relation to acts committed after the court was established, and so there is no retroactive enforcement of crimes in that sense. After 2017 the ICC will have limited subject matter jurisdiction over the crime of aggression (analogous to crimes against peace, prosecuted at the IMT and IMTFE), but as discussed in Chapter 1, it does not form part of this analysis. At the Kampala Review Conference, May 31–June 11, 2010, the ICC Assembly of States Parties agreed to expand the court's jurisdiction, subject to ratification by state members. See ICC, Assembly of State Parties, Resolution RC/Res.6, doc. no. RC/11, June 11, 2010, asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

³⁶ While not utilized within the research as an indicator of legality, the statute also includes the non-retroactivity of temporal jurisdiction (no prosecution for acts committed before the court came into existence. This is laudable from the perspective of legality and is characterized here as progress in terms of the rights of defendants. Robertson, however, assumes a typical international human rights approach to the standards of international courts when he condemns the ICC for the lack of retroactive jurisdiction: "This global cop-out is dressed up disingenuously as an application of the well-recognized rule against retroactive criminal prosecutions." See Robertson, *Crimes Against Humanity*, 389. He ignores the court

titled “Applicable Law:” “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights.”³⁷ The statute goes further by listing the prohibition against retroactive law in its own article, constituting the first provision in its “General Principles of Criminal Law” section. This states that “[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court,” and requires that judges do not interpret legal provisions in ways inconsistent with legality.³⁸ This provides a stronger protection against non-retroactivity of crimes than that found in customary international law as it prohibits any penalties not previously written down in law—therefore ruling out expansion by judicial interpretation.³⁹

There is no direct reference to custom in the sources of applicable law found in the statute, which lists primarily the Rome Statute and associated documents, “applicable treaties and the principles and rules of international law,” and general principles of domestic law.⁴⁰ Only the description of war crimes makes references to “laws and customs” of international and non-international armed conflict.⁴¹ Therefore the ICC is much less subject than the ICTY to the criticism of breaching legality by relying on customary international law, whose application

jurisdiction issue entirely, arguing that prosecution at the ICC is legal because the crimes have already been established in international law.

³⁷ Rome Statute, article 21.3.

³⁸ *Ibid.*, article 22.1. As stated in article 22.2, crime definitions must be “strictly construed” and avoid extension by analogy.

³⁹ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2009), 335. The article delineating the legality of crimes also contains the admonition to the judges that “[i]n case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted,” providing an extra level of protection for defendants. See Rome Statute, article 22.2.

⁴⁰ Rome Statute, article 21.

⁴¹ *Ibid.*, articles 8.2.b and 8.2.e, respectively.

arguably weakens legality due to its imprecise and unwritten nature.⁴² Customary law is also less relevant to the legality of crimes at the ICC because the Rome Statute is a treaty, and is therefore binding on ratifying states, regardless of prior existing international law.⁴³

The Rome Statute and Elements of Crimes are significantly more detailed with regards to the definitions of the crimes within the ICC's jurisdiction than was the statute of the ICTY, providing them with a relatively high level of clarity and specificity—the secondary requirements of the principle of legality of crimes. The Elements of Crimes was created after the statute due to significant disagreement at the Rome Conference among state delegations as to the details of each crime.⁴⁴ Cherif Bassiouni argues that while the addition of later rules is usual in international law, the fact that detailed definitions of crimes were established outside of the legal document containing those crimes is “anomalous” in criminal law,⁴⁵ and exemplifies the manner in which political compromises shaped the legality of the crimes at the court, as discussed in relation to each crime below. Nevertheless, he has elsewhere stated that the inclusion of non-

⁴² Susan Lamb, “*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law,” in *The Rome Statute of International Criminal Court: A Commentary, Vol. 1*, ed. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (Oxford: Oxford University Press, 2002), 743; and Colin Warbrick and Dominic McGoldrick, “Extradition Law Aspects of *Pinochet 3*,” *International and Comparative Law Quarterly* 48, no. 4 (1999): 958-65. A potentially serious breach of legality of crimes could occur when an individual not directly covered by the court's jurisdiction was prosecuted—that is, when a situation is referred to the ICC by the Security Council involving a state or a state's citizens not members of the Assembly of States Parties. Such prosecutions would not be retroactive as long as the crimes involved already constituted part of customary international law or were included in treaties ratified by the relevant state. See Gallant, *Principle of Legality*, 338-40.

⁴³ M. Cherif Bassiouni, *Crimes Against Humanity: Historical Evolution and Contemporary Application* (New York: Cambridge University Press, 2011), 203. For the same reason he argues that the jurisprudence of prior courts may be of dubious legality for the ICC. Note that future short-form citations in this chapter to “Bassiouni, *Crimes Against Humanity*,” refer to this volume. Other volumes by the author with this title in the chapter include the subtitle in the short form.

⁴⁴ Bassiouni, “Negotiating the Treaty of Rome:” 454.

⁴⁵ *Ibid.*, 464.

retroactivity, and the delineation of crimes in the statute and Elements of Crimes, means that the ICC’s founding documents “satisfy the requirements of legality.”⁴⁶

International legal scholar Alain Pellet, in contrast, has criticized the high level of detail of crimes in the ICC rules as an “excess of codification...the result of a veritable brainwashing operation led by criminal lawyers, with the self-interested support of the United States” due to their concern to conform with the principle of legality of crimes.⁴⁷ Pellet downplays the value of the principle to the legal fairness of a criminal court while arguing that greater specificity constrains the flexibility of judges to interpret the law in ways that may lead to the expansion of crime definitions. As discussed below, the desire to allow judges to create new law not only infringes on the separation of functions or powers in a legal system, but is a direct breach of legality.⁴⁸

The definitions of crimes in the statute are a product of diplomatic negotiations between state delegations at Rome—whose goal was consensus. This process led to a document described by Cherif Bassiouni as a “diplomatic mule” which was “seldom in full compliance with legal techniques and legal requirements.” For example, the political selection process for judges—via General Assembly vote—has led to few judges possessing the necessary understanding of and skills in international criminal law. Due to the paucity of ICC jurisprudence to date, however,

⁴⁶ Bassiouni, *Crimes Against Humanity*, 349.

⁴⁷ Alain Pellet, “Applicable Law,” in *The Rome Statute of International Criminal Court: A Commentary*, Vol. 2, ed. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (Oxford: Oxford University Press, 2002), 1,057.

⁴⁸ Pellet’s assertion that the high level of legal detail was intended to constrain the application of the law is also undermined by Bassiouni’s claim that the level of detail at the Rome Conference was partly driven by the preferences of the delegation of the International Committee of the Red Cross. Bassiouni, “Negotiating the Treaty of Rome:” 455.

“the jury is still out” on how the court will deal with the interpretation of complex issues of crime definition in relation to each defendant.⁴⁹

War crimes

The Rome Statute lays out the definition of war crimes and its underlying offenses,⁵⁰ with even more detail provided in the Elements of Crimes and accompanying footnotes.⁵¹ Some of the offenses which constitute war crimes are described in greater detail in the statute than in previous court statutes and humanitarian treaties,⁵² providing a high level of clarity and specificity.

In terms of the context requirements for the commission of war crimes, as discussed in Chapter 4, the ICTY in 1995 controversially expanded the traditional prohibitions on the conduct of armed conflict to non-international situations.⁵³ State acceptance of this dramatic extension was swift, however, as demonstrated by the agreement to similarly expand war crimes at the Rome Conference in 1998. The statute also expanded the protections afforded in interstate armed

⁴⁹ Bassiouni, *Crimes Against Humanity*, 204.

⁵⁰ Rome Statute, article 8.

⁵¹ Elements of Crimes, article 8. Most of the elements of war crimes in the statute derive from Geneva Conventions I-IV, Additional Protocols I and II, Hague Convention IV, and the Convention on the Rights of the Child. See Geneva Convention (I) for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, August 22, 1864; Geneva Convention (II) for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, July 6, 1906; Geneva Convention (III) Relative to the Treatment of Prisoners of War, August 12, 1949; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, August 12, 1949; Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977; Hague Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907; and Convention on the Rights of the Child, UN General Assembly doc. 44/25, November 20, 1989.

⁵² Schabas, *An Introduction to the International Criminal Court*, 125.

⁵³ ICTY, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, case no. IT-94-1-AR72, October 2, 1995, paras. 128-9, www.icty.org/x/cases/tadic/acdec/en/51002.htm.

conflict, as acknowledged by the ICC in 2007, discussed below.⁵⁴ This contextual expansion represents a “progressive development” of law,⁵⁵ as it was backed by broad state agreement and is delineated legislatively in the statute. The inclusion of a broader context for war crimes is therefore not subject to the criticism of breaching legality which Chapter 4 argued in relation to the ICTY, where judges retroactively created new law.⁵⁶

William Schabas notes the “excruciating detail” with which underlying offenses of war crimes are described.⁵⁷ He also argues that there is a “dark side to detailed codification”—that “more loopholes exist for able defence arguments” and that states agreed to more detailed

⁵⁴ *Lubanga*, Decision on the Confirmation of the Charges, case no. ICC-01/04-01/06, January 29, 2007, para. 284, www.legal-tools.org/uploads/tx_ltpdb/doc266175_02.pdf.

⁵⁵ Schabas, *An Introduction to the International Criminal Court*, 125.

⁵⁶ The other major contextual issue is that the court has jurisdiction over war crimes “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes” (Rome Statute, article 8.1). While a pre-trial chamber initially interpreted this as requiring a context of systemic or large-scale attacks (similar to crimes against humanity), later pre-trial and appeals chambers clarified that this is not a requirement. See, respectively, *Situation in the Democratic Republic of the Congo*, Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, case no. ICC-01/04-02/06-20-Anx2, February 10, 2006, para. 47, www.icc-cpi.int/RelatedRecords/CR2008_04250.PDF. See also *Lubanga*, Prosecutor’s Appeal against Pre-Trial Chamber I’s 10 February 2006 “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” case no. ICC-01/04-01/06, February 14, 2006, www.legal-tools.org/en/browse/record/821786; and *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” case no. ICC-01/04-169, July 13, 2006, para. 70, www.legal-tools.org/en/browse/record/8c20eb; and *Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, case no. ICC-01/05-01/08, June 15, 2009, para. 211, www.legal-tools.org/uploads/tx_ltpdb/doc699541_01.pdf. This does not effectively modify the existing contextual requirements of an armed conflict for the prosecution of war crimes.

⁵⁷ Schabas, *An Introduction to the International Criminal Court*, 125. He also argues that the judicial development of war crimes by the ICTY was concerning to many states, which in response created detailed crime definitions in the Rome Statute in order to provide less room for expansion via judicial interpretation. This is a case of state self-interest leading, inadvertently, to greater protection to defendants through a higher level of legality. Nevertheless, he also acknowledges that the relative lack of case law on grave breaches since 1945 means that some aspects included in the statute await clarification, including in the grave breach of “wilful killing”—the legal implications of the first word being unclear (Rome Statute, article 8.2.a.i). See *ibid*, 133. According to Bassiouni, the customary law offenses also suffer from the inclusion of vague language, especially inconsistent terms to refer to the mental element of crimes, such as “unlawful.” See Bassiouni, “Negotiating the Treaty of Rome:” 463.

provisions not, as they claimed, to conform to legality, but in order to restrict judges from making “dynamic or evolutive interpretations.”⁵⁸ The danger inherent in this interpretation of the drafters’ approach and attitude towards detailed legislation is that the purpose of the principle of legality is exactly to avoid the sort of judicial expansion of crimes that the author, and Alain Pellet, clearly favor.

Schabas privileges the ability to expand protections for potential victims at the expense of defendants, and at the expense of a clear separation of powers in global legal governance, with a legislative body (the ICC’s ASP) creating the laws and the ICC’s judges interpreting them—but not permitted to expand on them. There is no reasonable legal argument for critiquing a clear and detailed legislative delineation of a crime—only a human rights one that ultimately privileges prosecution over trial fairness. As highlighted throughout the dissertation, this illustrates the tension between the legitimacy of international courts through the protection of victims’ rights to justice and promoting deterrence by enabling greater opportunities for prosecution, and the legitimacy of trial fairness through protecting the rights of the accused.

Despite the contextual expansion of underlying offenses to non-international armed conflict, two groupings of offenses in the statute do not apply to this type of armed conflict: grave breaches of the Geneva Conventions, and “[o]ther serious violations of the laws and customs of international armed conflict” (largely those known as “Hague Law”).⁵⁹ The latter also contain some of the additions to the Geneva Conventions’ grave breaches prohibitions found in

⁵⁸ Schabas, *An Introduction to the International Criminal Court*, 126-7.

⁵⁹ Rome Statute, article 8.2.b and 8.2.c, respectively. While the grave breaches section does not specifically mention *international* armed conflict, this is made clear in the Elements of Crimes, article 8.2.a.i.4. Hague Law consist primarily of regulations found in Hague Convention IV of 1907.

Additional Protocol I.⁶⁰ According to Schabas, this expansion is legally questionable in that Additional Protocol I has not achieved the near universal level of support, and therefore acknowledged customary status, as the grave breaches prohibitions of the Geneva Conventions.⁶¹ However, this position is undermined by the fact that the customary law status of underlying offenses within the Rome Statute is less important to establishing their legality than was the case with those within the ICTY statute. The latter was created by a small group of states—even if within the Security Council acting under Chapter VII—and imposed retroactively for those acts which occurred between the beginning of the ICTY’s jurisdiction, January 1991, and the statute’s creation in February 1993.⁶² The Rome Statute, in contrast, was signed by a majority of states, providing it with broad support, has now been ratified by approximately 60 percent of all states,⁶³ and only applies to acts which occurred after the court’s founding in July 2002.

There are also some new provisions within the laws and customs of war—ones not found in Hague Law or Additional Protocol I, and first codified in the Rome Statute. The prohibition on an occupying power transferring some of its own civilian population into occupied territory⁶⁴ was especially controversial at the statute drafting stage, with Israel voting against the Rome Statute because it felt it this provision was not consistent with customary law and had been

⁶⁰ Some aspects of the grave breaches expansion in the protocol were not included, such as “[a]cts or threats of violence” designed to “spread terror among the civilian population” (Additional Protocol I, article 51.2). See Schabas, *An Introduction to the International Criminal Court*, 134.

⁶¹ *Ibid.*, 136.

⁶² The starting point was a neutral date chosen by the secretary-general instead of any particular declaration of independence or armed intervention so as not to entail any political judgments about the conflict. See Daphna Shrager and Ralph Zacklin, “The International Criminal Tribunal for the Former Yugoslavia,” *European Journal of International Law* 5, no. 3 (1994): 362-3.

⁶³ In June 2016, El Salvador became the 124th state party to the Rome Statute. See ICC, “ICC Welcomes El Salvador as a New State Party,” press release, doc. no. ICC-CPI-20160602-PR1218, June 2, 2016, asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1218.aspx.

⁶⁴ Rome Statute, article 8.2.b.viii.

aimed at criticizing its own activities,⁶⁵ and Arab states insisting on its inclusion for that very reason.⁶⁶ However, the provision reflects a prohibition within the Geneva Conventions⁶⁷ and so, while not previously considered a grave breach, the ICTY has determined that it constitutes a prohibition within international law under “other serious violations,” and so ICC prosecutions for the offense would not violate legality.⁶⁸

Another significant addition to the laws and customs of war offenses is that of causing damage to the natural environment. While laudable from a human rights and environmental perspective, the provision is written in a vague and open-ended manner.⁶⁹ This is problematic for legality because its determination requires judges to assess future events from the perspective of the accused (whether they could have foreseen future environmental damage) and requires them to make “value judgments” about what is excessive.⁷⁰

Sexual war crimes in particular are delineated in significant detail in the statute,⁷¹ due to their inclusion in the ICTY statute and lobbying by women’s human rights NGOs before and during

⁶⁵ David J. Scheffer, “The International Criminal Court,” in *Routledge Handbook of International Criminal Law*, ed. William Schabas and Nadia Bernaz (London: Routledge, 2013), 68. While Israel later signed the Rome Statute, in December 2000, in August 2002 it requested that the UN secretary-general remove its name from the depository’s list of signees. See American Non-Governmental Organizations Coalition for the International Criminal Court (AMICC), Which Countries have Joined the ICC? note 1, www.amicc.org/icc/ratifications/#fn1.

⁶⁶ Bosco, *Rough Justice*, 48.

⁶⁷ Geneva Convention IV, article 49.

⁶⁸ ICTY, *Tadić*, Appeals Judgment, case no. IT-94-1-A, July 15, 1999, para. 92, www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf.

⁶⁹ Rome Statute, article 8.2.b.iv. In relation to the environment, the text states: “Intentionally launching an attack in the knowledge that such attack will cause... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

⁷⁰ Kai Ambos, “Remarks on the General Part of International Criminal Law,” *Journal of International Criminal Justice* 4, no. 4 (2006): 670-1.

⁷¹ Rome Statute, articles 8.2.b.xxii and 8.2.e.vi for international and non-international armed conflict, respectively.

the Rome Conference.⁷² Actions prohibited under the laws and customs of law in the statute include rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization.⁷³ The ICC's first conviction for a sexual war crime, that of rape, was secured in the case of Jean-Pierre Bemba Gombo, in March 2016.⁷⁴

Another violation of the laws and customs of war in the statute demonstrates the role of state self-interest in the institutional power exercised in relation to the establishment of the definition of crimes. The Rome Statute prohibits “[c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”⁷⁵ The provision is based upon language in Additional Protocol I and the Convention on the Rights of the Child, which use the word “recruiting” instead.⁷⁶ Those already existing prohibitions apply solely to states, so the restriction to “national” militaries was specifically included at Rome to allay Arab state fears that the provision could otherwise be used to prosecute for recruitment of Palestinian youth into the *intifada*.⁷⁷

⁷² Schabas, *An Introduction to the International Criminal Court*, 126.

⁷³ Rome Statute, article 8.2.b.xxii. Schabas argues that such specificity may be negative from the point of view of enabling prosecution by narrowing the scope of the “archaic yet potentially larger terms of Geneva Convention IV.” The convention states that: “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault” (Geneva Convention IV, article 27). See Schabas, *An Introduction to the International Criminal Court*, 126.

⁷⁴ *Bemba*, Judgment Pursuant to Article 74 of the Statute, case no. ICC-01/05-01/08, March 21, 2016, paras. 631-8, www.legal-tools.org/en/browse/record/edb0cf.

⁷⁵ Rome Statute, article 8.b.xxvi.

⁷⁶ Additional Protocol I, article 77.2; and Convention on the Rights of the Child, General Assembly doc. 44/25, November 20, 1989, article 38.3.

⁷⁷ Herbert von Hebel and Daryl Robinson, “Crimes Within the Jurisdiction of the Court,” in *The International Criminal Court: The Making of the Rome Statute—Issues, Negotiations, and Results*, ed. Roy S. Lee (The Hague: Kluwer Law International, 1999), 118.

The first individual found guilty by the ICC, Thomas Lubanga Dyilo, was convicted of recruiting child soldiers.⁷⁸ The court decided that “conscripting or enlisting” equates to “recruiting” in the earlier conventions and includes voluntary recruitment.⁷⁹ It also determined that a conviction in relation to children used indirectly to support soldiers had to involve their exposure to danger as a military target.⁸⁰

The incorporation into Rome of the broader conflict context created by the ICTY constitutes a significant improvement from the perspective of protecting human rights while also complying with the principle of legality. Some aspects of the legality of the expansion of underlying offenses remain unsettled, but the inclusion of sexual offenses similarly constitute human rights advances without compromising legality. The generally high level of detail in the definitions of underlying offenses of war crimes is also a significant improvement over prior international courts. The ICC’s case law has yet to significantly modify the interpretation of the court’s rules on war crimes.

Crimes against humanity

Crimes against humanity are described in the statute as various underlying acts committed as part of a widespread or systematic attack on the civilian population. This codified—at least for the purposes of the ICC—two developments in relation to the contextual requirements of the crime stemming from the practice of the ICTY discussed in Chapter 4. These are the removal of the

⁷⁸ *Lubanga*, Judgment Pursuant to Article 74 of the Statute, case no. ICC-01/04-01/06, March 14, 2012, www.legal-tools.org/en/browse/record/677866.

⁷⁹ *Ibid.*, para. 607.

⁸⁰ *Ibid.*, para. 628.

requirement for an armed conflict,⁸¹ and that an attack only needs to be widespread or systematic, not both.⁸² However, the former issue is not settled, and arguably the armed conflict nexus is still a requirement under customary law. Several Arab, African, and Asian delegations to the Rome Conference, including China and India, objected to the removal of this contextual requirement, citing the statutes of the IMT, IMTFE, and ICTY.⁸³ Meanwhile the majority of delegations rejected this position at the conference, arguing that it is not required by the Genocide Convention, the ICTR statute, and the practice of the ICTY.⁸⁴

There was also disagreement among delegates as to the contextual requirement of a widespread or systematic attack, as opposed to both.⁸⁵ Before and during the Rome Conference, some Arab and Asian states, and the Security Council P5, were concerned at the breadth of application that such a lax requirement would permit. However, they eventually agreed to the removal of the double requirement, because the other element in the contextual requirement, of an “[a]ttack directed against any civilian population,” was defined in the statute so as to require an “organizational policy.”⁸⁶

⁸¹ ICTY, *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 140. The armed conflict requirement stemmed from the IMT statute. See the analysis of the legality at the IMT in Chapter 3.

⁸² ICTY, *Limaj et al.*, Trial Judgment, case no. IT-03-66-T, November 30, 2005, para. 181, www.refworld.org/docid/48ac17cc2.html.

⁸³ Beth Van Schaack, “The Definition of Crimes Against Humanity: Resolving the Incoherence,” *Columbia Journal of Transnational Law* 37, no. 3 (1999): 848.

⁸⁴ Von Hebel and Robinson, “Crimes Within the Jurisdiction of the Court,” 92.

⁸⁵ The Rome Statute does not define “widespread” or “systematic” with regard to crimes against humanity. Nonetheless, there is guidance from the practice of the ICTY that the ICC can draw upon to create clear, consistent contextual requirements. See especially ICTY, *Kunarac et al.*, Appeals Judgement, case nos. IT-96-23 and IT-96-23/1-A, June 12, 2002, para. 94, www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf.

⁸⁶ Rome Statute, article 7.2.a.

Nevertheless, this arguably requires a systematic attack or plan, which Bassiouni has argued is essential to the definition of the crime—and for this reason he was critical of the ICTY decision to remove it.⁸⁷ Human Rights NGOs at the Rome Conference encouraged states to remove the policy requirement in the statute’s definition of the crime. This position was a “dragnet definition” that would have permitted a broad range of individuals to be prosecuted.⁸⁸ The eventual compromise occurred on the agreement among states that “a State or organizational policy” is a lower threshold than “systematic,” therefore moving some way towards Bassiouni’s position.⁸⁹

The list of underlying offenses⁹⁰ is the same as that in the ICTY statute⁹¹ (including murder, extermination, and enslavement, etc.), with two additions: enforced disappearance and apartheid.⁹² No offenses were defined in the earlier statute, whereas Rome contains brief

⁸⁷ Bassiouni, *Crimes Against Humanity*, 194-7.

⁸⁸ Robertson, *Crimes Against Humanity*, 357.

⁸⁹ Von Hebel and Robinson, “Crimes Within the Jurisdiction of the Court,” 96-7. Crimes against humanity therefore does require a policy, with its wording arguably including that of non-state actors. Bassiouni argues that this position misinterprets the law, contending that the Rome Statute requires action by a state—which he claims is consistent with his insistence on a systematic policy requirement. See M. Cherif Bassiouni, *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text, Vol. 1* (Ardsley, NY: Transnational Publishers, 2005), 151-2. The ICC has determined that such a policy does not require a state, only an organization which governs territory or has the “capability to commit a widespread or systematic attack.” See *Katanga et al.*, Decision on the Confirmation of Charges, case no. ICC-01/04-01/07, September 30, 2008, para. 396, www.legal-tools.org/en/browse/record/67a9ec. The removal of the state requirement—previously accepted as a contextual requirement in international law—mirrors the expansion of war crimes to non-international armed conflict discussed above, and again was facilitated by the practice of the ICTY. See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: Martinus Nijhoff, 1992), 248-9; Schabas, *An Introduction to the International Criminal Court*, 111; and ICTY, *Tadić*, Opinion and Judgement, case no. IT-94-1-T, May 7, 1997, para. 654, www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf.

⁹⁰ Rome Statute, article 7.1.

⁹¹ ICTY statute, article 5.

⁹² Rome Statute, articles 7.1.i and 7.1.j, respectively.

descriptions,⁹³ and the Elements of Crimes elaborates much further on the nature of the acts and required mental state of the perpetrator.⁹⁴ The listing and definition of the offenses in the statute significantly improves the specificity of crimes against humanity in international law.⁹⁵

In particular, sexual crimes, which were an innovation in the ICTY statute, with the single word offense of “rape,”⁹⁶ are described in the Rome Statute as “[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.”⁹⁷ The Elements of Crimes then provides significant detail and clarity for each offense.⁹⁸ The first conviction for the crime against humanity of rape at the ICC was that of Bemba in 2016.⁹⁹

Rome thereby considerably expanded the coverage of sexual offenses in international criminal law, and its offenses and definitions have now arguably also been incorporated into customary law. This expansion was encouraged at the Rome Conference by NGOs such as the Asian Centre for Women’s Human Rights.¹⁰⁰ The inclusion of sexual offenses was not without controversy, however, with some states at the conference, including Saudi Arabia and Libya, concerned that the inclusion of forced pregnancy under crimes against humanity and war crimes

⁹³ Ibid., article 7.2.

⁹⁴ Elements of Crimes, article 7.1.

⁹⁵ Bassiouni, *Crimes Against Humanity*, 202.

⁹⁶ ICTY statute, article 5.g.

⁹⁷ Rome Statute, article 7.1.g.

⁹⁸ Elements of Crimes, article 7.1.g. There is detail to the level of footnoting the word “invade” in the phrase “The perpetrator invaded the body of a person” in order to clarify that the term is considered gender-neutral, and so does not exclude sexual offenses against males.

⁹⁹ *Bemba*, Judgment Pursuant to Article 74 of the Statute, paras. 631-8.

¹⁰⁰ Ms. Sajor (Observer for the Asian Centre for Women’s Human Rights), 8th Plenary Meeting, Thursday June 18, 1998 at 3:10pm, UN doc. A/CONF.183/SR.8, para. 83. Meeting record located within: UN, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records: Volume II—Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole, UN doc. A/CONF.183/13 (Vol. II), Rome, June 15–July 17, 1998, 120, legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf.

might lead to the provision of abortion facilities for victims.¹⁰¹ This led to the compromise of including forced pregnancy but with the stipulation that the definition “shall not in any way be interpreted as affecting national laws relating to pregnancy.”¹⁰² This definitional bargaining illustrates the inherent politicization and cultural preference clashes at Rome, which are responsible for the extra-legal factors agreed within the crimes’ compromise definitions.

Rome constitutes the first time that sexual slavery was directly prohibited by an international court statute.¹⁰³ As sexual slavery is not defined in any prior international human rights or humanitarian treaty, this is arguably the legal creation of the states at the Rome Conference.¹⁰⁴ However, Antonio Cassese, relying on the jurisprudence of the ICTY, argues that sexual slavery was already prohibited before Rome by customary international law,¹⁰⁵ although, as mentioned, there is dispute as to the legality of customary crimes.

The most vague provision relating to the underlying offenses of any crime in the statute is the crimes against humanity offense of “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”¹⁰⁶ In 2000 the ICTY expressed concern that the offense was so vague in its own statute—which is only slightly

¹⁰¹ Mr. Madani (Saudi Arabia), 3rd Meeting, Wednesday June 17, 1998 at 10:25am, UN doc. A/CONF.183/C.1/SR.3, para. 31 (see UN, United Nations Diplomatic Conference of Plenipotentiaries, 148); and Ms. Shahen (Libyan Arab Jamahiriya), 4th Meeting, June 17, 1998, at 3:20pm, UN doc. A/CONF.183/C.1/SR.4, para. 63 (see UN, United Nations Diplomatic Conference of Plenipotentiaries, 160). The other states which expressed a concern in the UN record were also Muslim: Kuwait, Lebanon, Morocco, and Senegal (meanwhile Jordan stated that “abortion is not the issue:” UN, United Nations Diplomatic Conference of Plenipotentiaries, 332).

¹⁰² Rome Statute, article 7.2.f.

¹⁰³ *Ibid.*, article 7.1.g.

¹⁰⁴ Diane Lupig, “Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court,” *Journal of Gender, Social Policy & the Law* 17, no. 2 (2009): 460.

¹⁰⁵ Antonio Cassese, “Crimes Against Humanity,” in *The Rome Statute of the International Criminal Court: A Commentary*, ed. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (New York: Oxford University Press, 2002), 374-5.

¹⁰⁶ Rome Statute, article 7.1.k.

more vague than the Rome description—that it breached the legality of crimes.¹⁰⁷ Kai Ambos has expressed similar concern in relation to the ICC.¹⁰⁸

The contextual element of a plan or policy arguably remains unsettled, as does its effect on legality. Similarly to war crimes, however, the level of detail of underlying offenses and the more comprehensive inclusion of sexual offenses constitute advances in human rights protections which are essentially consistent with legality.

Genocide

As in the ICTY statute, apart from the introductory phrase, the Rome definition of genocide is identical to that found in the Genocide Convention,¹⁰⁹ indicating its uncontroversial customary law status. However, since its creation in 1948 there has been concern that the convention's definition is too restrictive by excluding cultural acts of destruction, such as suppressing ethnic languages and education.¹¹⁰ This was also a controversial issue at the Rome Conference, with some states concerned about a push to prohibit such cultural suppression within the statute—behavior which occurs at the national level in many states.¹¹¹ In the end the definition was not broadened. Bassiouni sees the statute's definition of genocide thereby as weakened by “shar[ing] the same gaps in the protected categories of victims as does the Convention.”¹¹² The ICC

¹⁰⁷ ICTY, *Kupreškić et al.*, Trial Judgement, case no. IT-95-16-T, January 14, 2000, para. 563, www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf

¹⁰⁸ Ambos, “Remarks on the General Part of International Criminal Law:” 670.

¹⁰⁹ Adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), and Text of the Convention, UN doc. A/RES/260 (III), December 9, 1948, article 2.

¹¹⁰ Beth Van Schaack, “The Crime of Political Genocide: Repairing the Genocide Convention's Blind Spot,” *The Yale Law Journal* 106, no. 7 (1997): 2,259-91; and Johannes Morsink, “Cultural Genocide, the Universal Declaration, and Minority Rights,” *Human Rights Quarterly* 21, no. 4 (1999): 1,009-60.

¹¹¹ Schabas, *An Introduction to the International Criminal Court*, 102.

¹¹² Bassiouni, “Negotiating the Treaty of Rome:” 461.

approach is arguably problematic from a human rights perspective: perpetuating previous legal limitations by failing to prohibit certain arguably genocidal actions. However, it is strong from a position of legality as the convention definition was established well before the creation of the Rome Statute, and is broadly agreed as establishing a universal obligation.¹¹³

The definition of ethnic, national, and religious groups in the convention, as applied by international courts, has also been problematic. Instead of adopting objective criteria by which to decide if a persecuted group falls within one of the protected categories, courts have tended to adopt the subjective criteria of the perpetrator group's perception of whether their victims constituted such a group.¹¹⁴ Nevertheless, while the statute's definition of genocide is no clearer than that of earlier international legal instruments, the Elements of Crimes adds substantial detail to the underlying offenses.

Importantly from a human rights perspective, this includes reference to sexual crimes, missing from prior definitions, within the underlying offense of causing serious bodily or mental harm.¹¹⁵ In fact the ICC is the first international criminal tribunal to specifically delineate sexual offenses for all three mass atrocity crimes in its founding documents.¹¹⁶ In this sense the Rome Statute "marks a victory for humankind in that it...acknowledges the criminality of several

¹¹³ See ICJ, *Bosnia v. Serbia*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), February 26, 2007, para. 161, www.icj-cij.org/docket/files/91/13685.pdf; and ICTY, *Krstić*, Trial Judgment, case no. IT-98-33, August 2, 2001, para. 541, www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf.

¹¹⁴ The ICTR, for example, determined that the categories are essentially cultural, eroding the distinction created by the convention: the concept of protected group "enjoys no generally or internationally accepted definition, rather each concept must be assessed in the light of a particular political, social, historical and cultural context." See ICTR, *Kajelijeli*, Judgment and Sentence, case no. ICTR-98-44A-T, December 1, 2003, para. 811, unictr.unmict.org/sites/unictr.org/files/case-documents/ict98-44a/trial-judgements/en/031201.pdf.

¹¹⁵ Elements of Crimes, Article 6.b.1, note 3: "This conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment."

¹¹⁶ Lupig, "Investigation and Prosecution of Sexual and Gender-Based Crimes:" 452.

gender-based and sex-based crimes.”¹¹⁷ Sexual crimes (as underlying offenses of genocide) were highlighted by the ICC’s Office of the Prosecutor (OTP) in a 2014 policy paper as “an integral component of the pattern of destruction inflicted upon a particular group of people, and in such circumstances, may be charged as genocide.”¹¹⁸ Rape was later referred to as an offense of genocide in the OTP’s request for an arrest warrant for President Al Bashir—the only ICC indictee who has to date been charged with genocide.¹¹⁹

Lubanga was being prosecuted for genocide within the Democratic Republic of the Congo (DRC) before the government agreed to transfer him to the Hague for prosecution for war crimes at the ICC. The court accepted “complementarity” as the reason for not charging the accused with genocide. Complementarity is a limitation of the court’s jurisdiction whereby it cannot open or continue a prosecution where there is also a domestic prosecution—the domestic jurisdiction supersedes that of the ICC, unless “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”¹²⁰ Another likely factor was the OTP’s calculations concerning the difficulty of prosecuting for genocide, considering the “special intent” requirement which has

¹¹⁷ Dorean M. Koenig and Kelly D. Askin, “International Criminal Law and the International Criminal Court Statute: Crimes Against Women,” in *Women and International Human Rights Law, Vol. 2*, ed. Kelly D. Askin and Dorean M. Koenig (Ardsley, NY: Transnational Publishers, 2000), 7.

¹¹⁸ ICC OTP, “Policy Paper on Sexual and Gender-Based Crimes,” June 2014, para. 31, www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf.

¹¹⁹ *Al Bashir*, Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, case no. ICC-02/05-01/09, March 4, 2009, www.legal-tools.org/en/browse/record/e26cf4. Genocide is referred to in paras. 110-208: out of the 95 pages in the decision on the arrest warrant, 40 relate to genocide charges (pp.39-79). Para. 54 refers to rape as an offense of genocide.

¹²⁰ Rome Statute, Article 17.1.

been a significant factor at the ICTY.¹²¹ A broader assessment of the court's approach to defining and prosecuting genocide will have to await genocide trials.

Legality indicator 2: Non-retroactivity of punishment

This section analyzes sentencing procedures at the court. First its sentencing guidelines are examined, as laid out in the statute and RPE, and the impact of the Rome Conference debate. The specific issues of command responsibility as a mode of criminal liability, and the effect of aggravating and mitigating circumstances on sentencing rules, are also analyzed. Second, an assessment of the limited sentencing practice to date is made in relation to these issues.

Sentencing rules: The Rome Statute and RPE

There was extensive agreement among states at the Rome Conference that the ICC's sentencing guidelines should conform to the principle of legality of punishments, and that this required "penalties be defined in the draft statute of the ICC as precisely as possible."¹²² The delegates argued that the principle was necessary to ensure predictability and equality before the law, which "may be an early sign that the positive justice dimension" of the principle "is being considered in the international context."¹²³ As discussed in Chapter 1, the non-retroactivity of punishment can be seen not only as a safeguard on basic defendant rights, but as promoting

¹²¹ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd ed. (Cambridge: Cambridge University Press, 2009), 460-1.

¹²² General Assembly, "Report of the Preparatory Committee on the Establishment of an International Criminal Court," UN doc. A/51/22, March–April and August 1996, para. 304, quoted in Shahram Dana, "Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Sentencing," *Journal of Criminal Law and Criminology* 99, no. 4 (2009): 875.

¹²³ Dana, "Beyond Retroactivity to Realizing Justice:" 876.

justice more broadly by encouraging consistency in sentencing, and protecting judicial autonomy by safeguarding the judiciary from political pressure to determine the sentence of individuals of executive concern, thereby also protecting the integrity of the legal system, as well as the public perception of justice.¹²⁴

The statute's provision on punishment, while brief, provides a restriction on excessive punishments: "A person convicted by the Court may be punished only in accordance with this Statute."¹²⁵ This prohibits the application of new punishments by the judges, and appears to conform to a strict version of legality by requiring the application solely of prior written law.¹²⁶

However, the standard is problematic because it does not prohibit the retroactive application of penalties later added to the statute by the ASP.¹²⁷ It also makes the quality of the restriction on retroactivity contingent upon other provisions within the statute, and possibly the Elements of Crimes and RPE.¹²⁸ This creates a "reverse dependency," which is "an awkward and unfamiliar

¹²⁴ Ibid.: 860, 864. As Dana points out, this approach to sentencing—as a broad protection on the integrity of the legal system—is ignored by Schabas in his discussion of sentencing at international courts, which focuses purely on the issue of retroactivity narrowly defined. See William A. Schabas, "Sentencing by International Criminal Tribunals: A Human Rights Approach," *Duke Journal of Comparative and International Law* 7, no. 2 (1997): 461-518.

¹²⁵ Rome Statute, article 23.

¹²⁶ This is the legal principle of *nulla poena sine praevia lege scripta*, which goes further than the standard legality of punishments provision (*nulla poena sine lege*) by excluding non-written sources of law, such as customary law, common-law system judicial development of the law, and civil-law system extension of law by analogy. See Susana Huerta Tocildo, "The European Principle of Criminal Legality," in *Europe of Rights: A Compendium on the European Convention of Human Rights*, ed. Javier García Roca and Pablo Santolaya (Leiden: Martinus Nijhoff, 2012), 317.

¹²⁷ Gallant, *Principle of Legality*, 341-2.

¹²⁸ The guidelines do not refer the court to national practices where the offenses occurred, unlike at the ICTY—although, as discussed in Chapter 4, the tribunal has rarely referred to national practice. Further sentencing practice at the ICC may illuminate its level of consistency. See Steven Glickman, "Victim's Justice: Legitimizing the Sentencing Regime of the International Criminal Court," *Columbia Journal of Transnational Law* 43, no. 1 (2004): 259.

position for a fundamental principle of criminal law, which is normally independent of subsequent rules.”¹²⁹

Arab states at the Rome Conference pushed for the ICC to apply the death penalty.¹³⁰ This was rejected by a majority of delegates, who agreed that the maximum punishment that may be imposed is 30 years’ imprisonment, except for cases whose “extreme gravity” justifies life in prison.¹³¹ This provides a restriction on both the nature and severity of punishment,¹³² which is arguably consistent with legality as it provides clear limits.¹³³

In terms of command responsibility, the statute provides for liability for military and non-military superiors.¹³⁴ A military commander is criminally liable for the crimes of subordinates “under his or her effective command and control...as a result of his or her failure to exercise control properly over such forces,” as long as they were aware, or should have been aware, that their soldiers were committing or about to commit crimes and failed to take action to “prevent or repress” them or present the matter to legal authorities for criminal investigation.¹³⁵ For conviction of non-military superiors it must to be proven that they “either knew, or consciously disregarded information which clearly indicated”¹³⁶ their subordinates had committed or were about to commit such crimes.

This creates a higher standard of proof for non-military superiors: not the possibility that they were aware (they should have known because they could have had such information in their

¹²⁹ Dana, “Beyond Retroactivity to Realizing Justice:” 906.

¹³⁰ Bosco, *Rough Justice*, 48.

¹³¹ Rome Statute, article 77.1.

¹³² Dana, “Beyond Retroactivity to Realizing Justice:” 906.

¹³³ Antonio Cassese contends, however, that this still provides the court “with a very broad margin of appreciation.” Cassese, *International Criminal Law*, 52.

¹³⁴ Rome Statute, articles 28.a and 28.b, respectively.

¹³⁵ *Ibid.*, article 28. The quoted passages are from article 28.a and 28.a.ii.

¹³⁶ *Ibid.*, article 28.b.i.

possession, for example), but the necessity to prove with certainty that they knew or deliberately ignored such information. Jamie Williamson, an ICRC legal advisor, has expressed concern that this standard, which is higher for such commanders than found at the ICTY, would make it more difficult to prosecute such individuals, while command responsibility has been a “particularly vital conduit for prosecutors at the international tribunals.”¹³⁷ In contrast, legal scholar Kai Ambos argues that the Rome provisions on command responsibility are so broad that they may constitute “vicarious liability,” similar to criticism he leveled at the ICTY.¹³⁸ To date, the effect of these standards on prosecutions is unclear, as only one completed trial has involved command responsibility at the ICC, that of Bemba, a military commander, discussed in the practice section below.

The discussion now moves to the role of aggravating and mitigating circumstances in determining sentences within the court’s rules. In determining the exact sentence in each case the legality of punishments is arguably weakened by the open-ended provision for judges to “in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime in determining penalties.”¹³⁹ Such flexibility in relation to aggravating circumstances arguably provides the court with excessive sentencing discretion in a similar manner to the ICTY statute.¹⁴⁰ Factors mentioned in the RPE include the number of victims and the harm caused by the offenses, the perpetrator’s degree of intent, prior convictions for similar

¹³⁷ See Jamie Allan Williamson, “Some Considerations on Command Responsibility and Criminal Liability,” *International Review of the Red Cross* 90, no. 870 (2008): 308.

¹³⁸ Ambos, “Remarks on the General Part of International Criminal Law:” 671-2. See Chapter 4 of the dissertation for Ambos’ analysis of command responsibility at the ICTY.

¹³⁹ Rome Statute, article 78.1.

¹⁴⁰ The ICTY statute permits the judges to “take into account such factors as the gravity of the offence and the individual circumstances of the convicted person” (article 24.2).

offenses, and abuse of power.¹⁴¹ The list of aggravating circumstances in the RPE is non-exhaustive, providing additional discretion to the judges.¹⁴²

Another reason the aggravating circumstances rules provide weak guidance is because there is no indication as to the weight to assign to each factor, “an aspect of international sentencing that has remained murky since Nuremberg’s tendency to treat aggravating factors as implicit in the offense.”¹⁴³ Similarly to the ICTY, the stated purposes of punishment at the ICC are vaguely expressed, including justice (crimes “must not go unpunished”), and deterrence (“put an end to impunity...and thus contribute to...prevention”).¹⁴⁴ This does little to provide additional sentencing guidance,¹⁴⁵ apparently a result of the lack of concern among state delegates at the Rome Conference with clarifying the purposes of punishment.¹⁴⁶

The RPE also allows for mitigating circumstances to be taken into account. The factors mentioned include reduced mental capacity, duress, acknowledgment of guilt and expressions of remorse, and cooperation with the ICC.¹⁴⁷ Similarly to aggravating circumstances, the manner in which mitigating circumstances guidelines are to be applied, including the weight given to each, is not delineated.

It should be noted that the statute also contains a procedure for strengthening the application of the legality of punishment, by requiring the court to review sentences after defendants have

¹⁴¹ RPE, rules 145.1.c. and 145.2.b.

¹⁴² The list of circumstances starts with the words “*inter alia*” (rule 145.1.c) and lists “Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned” (rule 145.2.b.vi).

¹⁴³ Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge: Cambridge, 2007), 52.

¹⁴⁴ Rome Statute, preamble.

¹⁴⁵ Drumbl, *Atrocity, Punishment, and International Law*, 52.

¹⁴⁶ Ralph Henham, “Some Issues for Sentencing in the International Criminal Court,” *International and Comparative Law Quarterly* 52, no. 1 (2003): 85.

¹⁴⁷ RPE, rule 145.2.a.

served two thirds of their time to determine if it should be reduced—or for life sentences, a review after 25 years served.¹⁴⁸ As Dana argues, this “extends the reach” of the principle of legality beyond the sentencing phase of a trial to the “execution of sentences.”¹⁴⁹ Reviews have taken place in relation to two of the three convictions at the court; they are discussed below.

Sentencing practice

The ICC sentencing phase is separate from that of the main trial,¹⁵⁰ as is the case in the US common law system, and was initially the practice at the ICTY, before a change to merging the phases, presumably to speed up proceedings. The ICC sentencing hearing allows for witness testimony and other evidence not presented during the trial which may be relevant to determining mitigating and aggravating circumstances.¹⁵¹

As of July 2016 there have been three convictions by the court, with sentences ranging from 12 to 18 years.¹⁵² Thomas Lubanga Dyilo was convicted of war crimes in March 2012 in relation to the situation in the DRC and sentenced in July that year to 14 years.¹⁵³ Germain Katanga was

¹⁴⁸ Rome Statute, article 110.3. The time limit before review includes time served in pre-trial detention.

¹⁴⁹ Dana, “Beyond Retroactivity to Realizing Justice:” 916.

¹⁵⁰ Articles 74 and 76 of the Rome Statute require the chambers to provide, for the verdict and sentencing, respectively, a decision in writing and “contain[ing] a full and reasoned statement of the Trial Chamber’s findings on the evidence and conclusions.”

¹⁵¹ Novak, *The International Criminal Court*, 89.

¹⁵² As mentioned at the beginning of the chapter, on September 27, 2016, after the end-period for the study, the ICC sentenced Ahmad al-Faqi al-Mahdi to nine years in the Mali situation. On cursory examination, the verdict and sentence present no inconsistency with the assessment of legality presented in the chapter. On October 19, 2016, Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido were found guilty of crimes against the administration of justice. As of November 28, 2016, no sentence has been handed down: a maximum term of five years is applicable for this, non-mass-atrocity, offense.

¹⁵³ Lubanga was convicted of the war crime of enlisting and recruiting child soldiers. See *Lubanga*, Judgment Pursuant to Article 74 of the Statute; and *Lubanga*, Decision on Sentence Pursuant to Article 76 of the Statute, case no. ICC-01/04-01/06, July 10, 2012, www.icc-

convicted of war crimes and crimes against humanity in relation to the situation in the DRC in March 2014, and sentenced to 12 years in May.¹⁵⁴ Jean-Pierre Bemba Gombo was convicted of war crimes and crimes against humanity in the Central African Republic (CAR) in March 2016, and sentenced to 18 years in June.¹⁵⁵

These punishments are not excessive considering the guidelines and the gravity of the crimes, and do not suggest a wildly disproportionate or incoherent approach to sentencing by the judges. They may indicate a leniency in sentencing, especially in relation to command responsibility (in the *Bemba* case), that the ICTY has been accused of.¹⁵⁶ However, Bemba's conviction was also the first at the court for sexual and gender-base crimes: that the ICC's first conviction for sexual offenses also received the longest sentence has been seen as significant from a human rights perspective.¹⁵⁷

Bemba is the first and so far only individual convicted by the court for command responsibility. This was in relation to actions by rebels under his authority in the CAR between

www.legal-tools.org/en/doc/a9bd07. In Lubanga's sentencing appeal judgment all grounds of appeal by both the prosecution and Lubanga were rejected, confirming the prior sentence. See *Lubanga*, Judgment on the Appeals of the Prosecutor and Mr Thomas Lubanga Dyilo Against the "Decision on Sentence Pursuant to Article 76 of the Statute" case no. ICC-01/04-01/06, December 1, 2014, www.legal-tools.org/en/doc/a9bd07.

¹⁵⁴ Katanga was convicted of the war crimes of murder, an attack against civilians, pillaging, and destruction of property; and the crime against humanity of murder. He was found not guilty of rape, sexual slavery, and recruiting child soldiers. See *Katanga*, Judgment Pursuant to Article 74 of the Statute, case no. ICC-01/04-01/07, March 7, 2014, www.legal-tools.org/en/browse/record/f74b4f; and *Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, case no. ICC-01/04-01/07, May 23, 2014, www.legal-tools.org/en/browse/record/5af172.

¹⁵⁵ Bemba was convicted on all charges: the war crimes of murder, rape, and pillaging; and the crimes against humanity of murder and rape. See *Bemba*, Judgment Pursuant to Article 74 of the Statute; and *Bemba*, Decision on Sentence Pursuant to Article 76 of the Statute, case no. ICC-01-/05-01/08, June 21, 2016, www.icc-cpi.int/CourtRecords/CR2016_04476.PDF. Bemba's conviction is the first at the ICC that includes the use of rape as a weapon of war.

¹⁵⁶ Mark B. Harmon and Fergal Gaynor, "Ordinary Sentences for Extraordinary Crimes," *Journal of International Criminal Justice* 5, no. 3 (2007): 683-712.

¹⁵⁷ Dieneke de Vos, "Bemba: First Sentence for SGBV and Turning Point for the ICC," Justice Hub, June 22, 2016, justicehub.org/article/bemba-first-sentence-sgbv-and-turning-point-icc.

October 2002 and March 2003.¹⁵⁸ The judges decided that Bemba was made aware of the illegal actions of his troops and of the aggravating circumstances surrounding the sexual offenses.¹⁵⁹ While little in the way of firm conclusions can be drawn from this single conviction for the responsibility of a military commander, it does not appear to have involved a tenuous relationship to the crimes: there was significant evidence that Bemba was aware of the allegations of his troops' actions, and dismissed them as propaganda; he received regular communications from field commanders; and made on-the-ground visits.¹⁶⁰

Very little research has been conducted to date on the outcomes of these three trials in relation to aggravating and mitigating circumstances. A review of the trial and sentencing judgments shows that the court sentenced Lubanga to 14 years instead of the maximum of 30 requested by the prosecution due to a lack of aggravating factors, and the mitigating factor of cooperation with the court, arguing that the maximum sentence should only apply where there are aggravating circumstances.¹⁶¹ In *Katanga* the court also did not find any aggravating factors.¹⁶² It did take into account two mitigating factors: his young age and family circumstances (given little weight), and participating in the troop demobilization process was considered, as was cooperation with the court (greater weight).¹⁶³

In Bemba's sentence, the judges decided that two aggravating circumstances applied: that the rapes were committed against especially defenseless victims—including children as young as ten—and were committed “with particular cruelty”—including mass rapes and whole families

¹⁵⁸ *Bemba*, Decision on Sentence Pursuant to Article 76, para. 21.

¹⁵⁹ *Bemba*, Judgment Pursuant to Article 74, paras. 425, 576-8; and *Bemba*, Decision on Sentence Pursuant to Article 76, para. 26.

¹⁶⁰ *Bemba*, Judgment Pursuant to Article 74, paras. 419-26.

¹⁶¹ *Lubanga*, Decision on Sentence Pursuant to Article 76, paras. 96-7.

¹⁶² *Katanga*, Decision on Sentence pursuant to Article 76, para. 144.

¹⁶³ *Ibid.*

brutalized, and that pillaging was also committed with cruelty. It found no mitigating circumstances.¹⁶⁴ These judgments suggest that the trial chambers have been cautious in accepting witness testimony,¹⁶⁵ and have in fact only relied on aggravating circumstances to determine sentences in one out of the three convictions so far.

In terms of sentencing review, in September 2015, in *Lubanga*, the appeals chamber undertook its first examination, assessing factors such as cooperation with the court and conduct while in detention. It ruled that there were no grounds to reduce his sentence.¹⁶⁶ Meanwhile, in November that year the sentence in the only other case to have undergone review, that of *Katanga*, was reduced by three years and eight months from the original 12 years.¹⁶⁷ The court reduced Katanga's sentence due to his cooperation with the court, his conduct within detention, and demonstrations of remorse. Interestingly, the court also considered the political factor that his early release "would give rise to some social instability in the DRC," but in the end "found no evidence to suggest that it would be of a significant level."¹⁶⁸ This political consideration is not found in the list of relevant factors in the statute.¹⁶⁹ With only two reviews to date it is too early to assess the extent to which this mechanism will provide an effective protection against excessive punishments.

¹⁶⁴ *Bemba*, Decision on Sentence Pursuant to Article 76, para. 93.

¹⁶⁵ For example, the court did not accept witness testimony that Bemba saw bodies outside the CAR presidential palace during a visit with his troops in November 2002. The testimony came from a witness ("P123") which the defense had alleged was not credible. See *Bemba*, Judgment Pursuant to Article 74, para. 426.

¹⁶⁶ ICC, "ICC Judges Decline to Reduce Mr Thomas Lubanga Dyilo's Sentence," press release, doc. no. ICC-CPI-20150922-PR1153, September 22, 2015, www.icc-cpi.int/Pages/item.aspx?name=pr1153.

¹⁶⁷ ICC, "Germain Katanga's Sentence Reduced and to be Completed on 18 January 2016," press release, doc. no. ICC-CPI-20151113-PR1174, November 13, 2015, www.icc-cpi.int/Pages/item.aspx?name=pr1174.

¹⁶⁸ *Ibid.*

¹⁶⁹ See Rome Statute, article 110.

Overall, the sentencing rules and practice do not provide cause for concern in relation to the legality of punishment. While there is ambiguity and arguably excessive leeway for judges this does not appear to have been detrimental to those found guilty by the court.

Defense parity indicator 1: Institutional support

In this section, first the position of the defense and prosecution within the ICC's institutional structure is examined, as well as the implications of their structural dynamic for adequacy of defense representation before and during trial. Second, a comparison is made of the support the court provides to prosecutors and defense counsel to investigate on-site through immunities and privileges, and the support provided in relation to external actors is examined.

Structural parity

The court consists of four primary institutions or “organs.”¹⁷⁰ the Presidency, the Judicial Divisions (pre-trial, trial, and appeals chambers), the Office of the Prosecutor (OTP), and the Registry.¹⁷¹ The Presidency is responsible for the judicial administration of the court, except for that of the OTP, which operates autonomously.

The Registry's functions include the non-judicial administration of the court,¹⁷² dealt with through the Common Administrative Services Division, and providing judicial support through the Division of Court services, including the management of court records, maintaining a list of

¹⁷⁰ The term “organ” is not defined in the statute, but refers to the primary divisions of the court, which operate independently of each other (although they have interlocking functions), and have the highest level of decision-making authority. All lower divisions of the court are represented by one of the organs in negotiations concerning budgets and rule changes, etc.

¹⁷¹ Rome Statute, articles 34, 38, 39, 42, and 43.

¹⁷² This includes that of the OTP. However, the Registry is restricted in relation to administration of the OTP by the phrase “without prejudice to the functions and powers of the Prosecutor.” See Rome Statute, article 43.1.

qualified defense counsel, and managing the court’s external affairs.¹⁷³ Defense and victim issues are dealt with by the Counsel Support Section (CSS), which incorporates the Office of Public Counsel for the Defence (OPCD) and the Office of Public Counsel for Victims (OPCV), discussed below with defense and victims structural issues. See Figure 5.1 below for a structural chart of the ICC, including the subdivisions of the OTP and Registry. Note that the Registry Division of Victims and Counsel, shown in Figure 5.1, has been dissolved. The CSS, created in 2009, is directly under the authority of the Office of the Registrar.¹⁷⁴

The OTP is an independent organ of the court, with “full authority” over the management and administration of its activities in the hands of the chief prosecutor, who is selected by the ASP for a nine-year term.¹⁷⁵ The OTP receives referrals of situations from ICC state parties and the Security Council and conducts preliminary examinations. If it feels there is sufficient evidence to warrant a full criminal investigation, the OTP applies to a pre-trial chamber for this authority.¹⁷⁶

The OTP consists of three main departments. First, the Jurisdiction, Complementarity and Cooperation Division (JCCD) conducts preliminary investigations, provides the OTP with legal advice, and coordinates the external relationships of the office. This involves examining “the

¹⁷³ ICC, About: Registry, www.icc-cpi.int/about/registry.

¹⁷⁴ Women’s Initiatives for Gender Justice, “Gender 2010 Report Card on the International Criminal Court,” The Hague, November 2010, 38, www.iccwomen.org/news/docs/GRC10-WEB-11-10-v4_Final-version-Dec.pdf.

¹⁷⁵ Rome Statute, article 42.4. An absolute majority of votes of members of the ASP is required in a secret ballot.

¹⁷⁶ *Ibid.*, article 57. A pre-trial chamber may also authorize the OTP to initiate an investigation *proprio motu*—on its own initiative, without state or Security Council authorization. See Rome Statute, articles 13.c, 15.1, and 53.1 on the OTP’s *proprio motu* power, and article 57.3.d on the role of the pre-trial chambers in exercising this power.

broader regional and international political context,”¹⁷⁷ a political function distinct from the practice of prosecutor’s offices in most liberal legal systems.¹⁷⁸ Second, the OTP’s Investigation Division conducts on-site criminal investigations and analysis of evidence. Third, the Prosecution Division conducts the courtroom prosecutions themselves, and prepares the prosecutorial strategy pursued at each trial.¹⁷⁹

¹⁷⁷ Bosco, *Rough Justice*, 95. There was no comparable department in the ICTY’s OTP. It was perceived as necessary at the ICC by the first chief prosecutor, Luis Moreno-Ocampo, due to the need to decide on territorial situations to investigate and coordinate with states in light of the complementarity of its jurisdiction. See *ibid.*, 94.

¹⁷⁸ The OTP is constrained in its ability to decide on investigations by a pre-trial chamber and the Security Council. The chamber supervises the investigatory and prosecutorial activities of the OTP before trial, including “to guarantee the rights of suspects, victims and witnesses during the investigatory phase, and to ensure the integrity of the proceedings.” See ICC, “Understanding the International Criminal Court,” undated, para. 20, www.icc-cpi.int/resource-library/Documents/UICCEng.pdf. In referring a situation to the OTP the Security Council may also limit the scope of an investigation, for example by excluding individuals from states not party to the Rome Statute. In referring the situation in Darfur, Sudan, in 2005, the Security Council “[d]ecides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.” See UN Security Council resolution 1593, March 31, 2005, para. 6, [www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1593\(2005\)](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1593(2005)).

¹⁷⁹ ICC, About: Office of the Prosecutor, www.icc-cpi.int/about/otp.

Organizational Structure of the Court

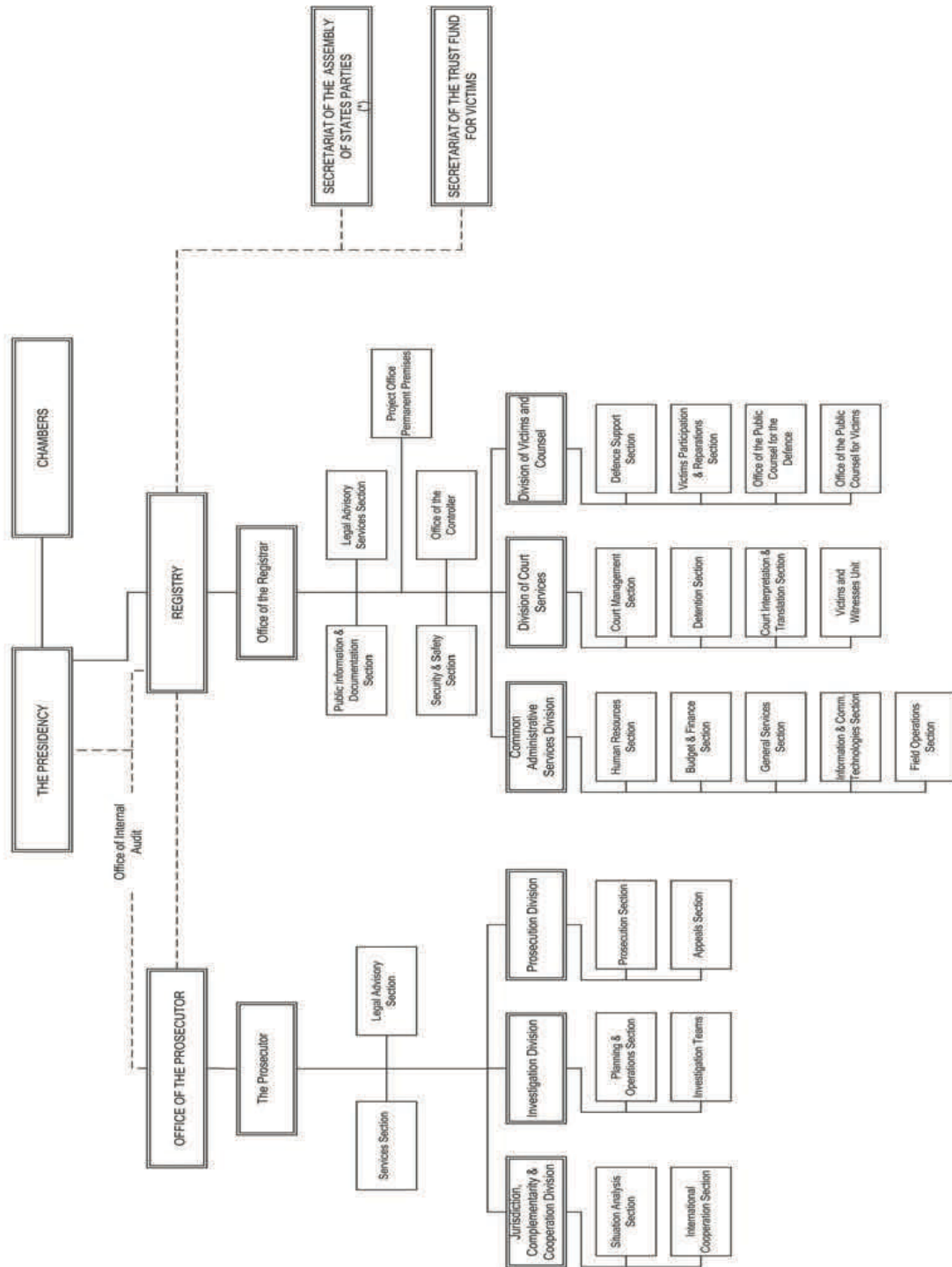


Figure 5.1 Organizational structure of the ICC

Source: “Courting History: The Landmark International Criminal Court’s First Years,” 2008, 3, www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf.

In terms of the defense, according to Elise Groulx, the founder and former president of the International Criminal Defence Attorneys Association, the organization proposed that the statute include within the structure of the ICC an office with co-equal status to that of the OTP—that is, a defense office would be a primary organ of the court. However, this proposal was not taken up by the PrepCom or Rome Conference.¹⁸⁰ This reflects both a lack of understanding and underappreciation of the function of the defense by the Rome delegates, and the bias towards prosecution in the establishment of the court, with the most attention paid to the prosecution function, secondarily victims—they were given their own office, established within the Registry, by the statute¹⁸¹—and thirdly the accused.

Therefore, similarly to the ICTY, there is no official organ for the defense established by the Rome Statute—nor has one been created since by the ASP. Instead, defense issues at the court were initially dealt with solely through the Registry. It created the Counsel Support Section in 2009, seven years after the court started operation. The CSS provides support to defendants in relation to such issues as field investigations and acquiring legal assistance,¹⁸² manages legal aid and the list of counsel eligible to practice before the ICC, and acts as an advocate for the defense in the pre-trial stage of investigations before suspects have been handed over to the court.¹⁸³ The

¹⁸⁰ Elise Groulx, “‘Equality of Arms:’ Challenges Confronting the Legal Profession in the Emerging International Criminal Justice System,” *Oxford University Comparative Law Forum* 3 (2006), Section II, ouclf.iuscomp.org/articles/groulx.shtml. Groulx is also a former honorary president of the International Criminal Bar (BPI-ICB), and head of the advisory board of the Business and Human Rights project of the American Bar Association Center for Human Rights.

¹⁸¹ Rome Statute, Article 43.6.

¹⁸² ICC, About: Defence, www.icc-cpi.int/about/defence.

¹⁸³ ICC, Regulations of the Court, article 76.1. For example, Pre-Trial Chamber I requested the Registry to appoint counsel to “represent and protect the general interests of the defence” while inviting amicus briefs on the possibility of investigating the situation in Darfur. See *Situation in Darfur, Sudan*, Decision

CSS also advises the court on defense issues and may cooperate with state bar associations to encourage legal training in relation to the ICC's procedures.¹⁸⁴ The CSS was created after the statute: there is no mention of the defense in the Rome article describing the functions of the Registry—which nonetheless required the Registry to establish a Victims and Witnesses Unit.¹⁸⁵

The lack of structural parity between the prosecution and defense weakens the flexibility of defense teams in pursuing a trial as they are dependent upon remuneration by the Registry. After the end of oral submissions in the *Lubanga* trial the Registry informed the defense team that all remuneration would stop except to lead counsel. The court later reinstated remuneration on the grounds that the Registry's action would have violated the defense's right to full equality.¹⁸⁶ The defense's autonomy in conducting research is also diminished because of its need for permission from the Registry to investigate in the field.¹⁸⁷

A defense office was created in 2004 by the Preparatory Commission, as the Office of Public Counsel for the Defence.¹⁸⁸ The OPCD operates as an independent body of the court, although it falls within the Registry for administrative purposes.¹⁸⁹ However, it is not an organ of the court—its highest level of institutional body. Nevertheless, the OPCD does provide defendants with official institutional representation within the court's structure.¹⁹⁰ Its other functions include

Inviting Observations in Application of Rule 103 of the Rules of Procedure and Evidence, case no. ICC-02/05-10, July 24, 2006, 6, www.icc-cpi.int/CourtRecords/CR2007_01530.PDF. Note that "6" refers to the page number—there are no paragraph numbers in this case document.

¹⁸⁴ RPE, rules 20.1.b-f.

¹⁸⁵ Rome Statute, article 43.6.

¹⁸⁶ *Katanga et al.*, Oral Decision, case no. ICC-01/04-01/07T, June 18, 2012.

¹⁸⁷ Interview with close legal court observer.

¹⁸⁸ Regulations of the Court, regulation 77.1.

¹⁸⁹ *Ibid.*, regulation 77.2.

¹⁹⁰ IBA, "Fairness at the International Criminal Court," August 2011, 29, www.ibanet.org/ICC_ICL_Programme/Reports.aspx#2011.

providing support and assistance to defendants, such as legal advice, and support to defense counsel.¹⁹¹

According to the ICC, the office “constitutes a major innovation in the judicial architecture of international criminal courts,” with a mandate to “represent and protect the rights of the Defence in order to reinforce the equality of arms and to enable a fair trial within the meaning of the Rome Statute.”¹⁹² More modestly, according to the International Bar Association (IBA) the OPCD’s role is similar to that of the OTP’s legal advisory section: it conducts legal research on behalf of defendants, responding to courtroom events to provide timely assistance with legal issues as they arise.¹⁹³ The IBA has been critical of the “limited resources” provided to the OPCD to carry out this mandate, including suffering from inadequate staffing, which would mean that even two consecutive trials would “severely task” those resources.¹⁹⁴ Xavier-Jean Keïta, the head of the OPCD, acknowledges that the office has coordinated with academic institutions and defense offices in other tribunals for legal research assistance in order to overcome problems of limited resources. Keïta claims that the OPCD does, however, provide the

¹⁹¹ Ibid., 29.

¹⁹² ICC, The Office of Public Counsel for the Defence, www.icc-cpi.int, 2015. This text was located on the ICC website in November 2015. It is not available on the revamped website as of June 2016 (the website was completely changed in early 2016 to coincide with the transfer of the court to new premises).

¹⁹³ International Bar Association, “First Challenges: An Examination of Recent Landmark Developments at the International Criminal Court,” doc. no. ICC-01/04-01/07-2153-AnxC, June 2009, 31, www.icc-cpi.int/RelatedRecords/CR2010_03707.PDF. According to ICC judge Adrian Fulford, the mandate of the OPCD was intended to involve direct participation of its staff in trials, similar to a public defender’s office in the United States. See Adrian Fulford, “Reflections of a Trial Judge,” *Criminal Law Forum* 22, nos. 1-2 (2011): 215-23. This is contradicted by Xavier-Jean Keïta, the OPCD’s principal counsel, who argues that its current role, as an advocate outside the courtroom, providing advice and support to independent defense teams, is that originally anticipated. See Xavier-Jean Keïta, “Office of the Public Counsel for the Defence,” in ICC, “Behind The Scenes: The Registry of the International Criminal Court,” 2010, 69, qspace.library.queensu.ca/bitstream/1974/7024/1/Behind%20the%20scenes.pdf.

¹⁹⁴ IBA, “First Challenges,” 31.

defense at the ICC with institutional memory relating to trial process and case law, for example, that has been lacking at the ICTY.¹⁹⁵

While official representation for the accused at the court initially occurred solely through the Registry it is a neutral administrative body. This continues to create a major obstacle for defense interests in gaining an adequate voice in budgeting issues and decision-making changes by the organs of the court.¹⁹⁶

Human Rights Watch argues that the establishment of the OPCD for judicial functions, and that of the CSS within the Registry for administrative functions, represents a “separation of administrative and substantive functions [that] is advantageous for the interests of the defense and reflects an important ‘lesson learned’ from the experience at other tribunals, like the Special Court for Sierra Leone.”¹⁹⁷ However, at the ICTY, defendants are represented formally by their own body, the Association of Defence Counsel,¹⁹⁸ while at the ICC defendants are represented in decision-making forums not by the OPCD but by the Registry. This provides them with unequal bargaining power in negotiations on internal rule changes due to the official neutrality of the Registry, not enabling it to act as an advocate for defense positions while it ostensibly represents their interests in negotiations on policy and other issues.

However, there is direct representation in the context of changes to the RPE and Elements of Crimes. Negotiations take place within the Advisory Committee on Legal Texts, which consists

¹⁹⁵ Keita, “Office of the Public Counsel for the Defence,” in ICC, “Behind The Scenes,” 70.

¹⁹⁶ The Registry is not able to take a position encouraging defense priorities. Charles Chernor Jalloh and Amy DiBella, “Equality of Arms in International Criminal Law: Continuing Challenges,” in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 263.

¹⁹⁷ Human Rights Watch, “Courting History: The Landmark International Criminal Court’s First Years,” 2008, 93-4, www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf.

¹⁹⁸ See the Structural Parity section of Chapter 4 for details on the effect of the ADC-ICTY on the prosecution–defense dynamic at the tribunal.

of three judges, one OTP representative, one Registry representative, and one counsel chosen from the list maintained by the Registry.¹⁹⁹

Important structural effects of the lack of authority of the OPCD include on cooperation, budgeting, and rules and regulations. The OPCD has no right to directly debate within the Committee of Budget and Finance (CBF), which makes budgetary recommendations to the ASP—only the Registry does.²⁰⁰ The OPCD has been advocating for structural parity within the ICC for years, but to no avail. While there is some agreement on the need for greater structural parity, there is an unwillingness at the court to request the ASP to provide this.²⁰¹

The final issue discussed is the structural and procedural implications of trial rights for victims. They can apply for assistance from the ICC’s Trust Fund for Victims,²⁰² and for reparations after an individual has been convicted by the court,²⁰³ and they have a dedicated office within the Registry, the Office of Public Counsel for Victims.²⁰⁴ Before and during trial victims can also participate in proceedings by making presentations to: a pre-trial chamber

¹⁹⁹ See Regulations of the Court, regulation 4.

²⁰⁰ Disparity in financial resources for conducting investigations have a significant impact on the ability of defense teams to acquire evidence. According to a knowledgeable observer close to the court, some 90 percent of defendants use legal aid, which in 2014 was \$3 million, in contrast to the OTP budget of \$39 million. Defendants are provided with \$73,000 for the whole of their case, which, according to the same source, does not permit the hiring of even one dedicated investigator. Anonymous interview. It should also be noted, however, that the number of staff for investigations and prosecution is far lower at the OTP than that for domestic atrocities. For example, the OTP has stated—although this could be argued to be cherry-picking—that a typical investigation it conducts involves 30 personnel, vs. more than 2,600 individuals for the investigation and prosecution over the Oklahoma City Bombing. See ICC ASP, “The Report of the Court on the Basic Size of the Office of the Prosecutor,” doc. no. ICC-ASP/14/21, September 17, 2015, para. 44, www.legal-tools.org/en/doc/b27d2a.

²⁰¹ The nature of the OPCD as an autonomous office that is not an organ of the court has other negative effects on its ability to adequately support defendants and their counsel. It is more difficult to retain staff as they do not receive the same benefits as official court employees. Also defense counsel do not receive an ICC email and Internet access, which they need for direct access to ICC documents—only the OPCD itself has this. Anonymous interview with close court observers.

²⁰² Rome Statute, article 79.

²⁰³ *Ibid.*, article 75.

²⁰⁴ *Ibid.*, article 43.6.

during an OTP request to be permitted to open an investigation;²⁰⁵ the court while the OTP is seeking a ruling on an issue of jurisdiction or admissibility,²⁰⁶ and “at stages of the proceedings determined to be appropriate by the Court” where victims’ personal interests may be affected.²⁰⁷ Trial rights for victims at the ICC have been praised as constituting “a unique innovation” in global legal governance,²⁰⁸ which implements recommendations made by the UN in relation to the provision of assistance to victims.²⁰⁹

Despite judicial instruction within the rules to give primacy to the rights of defendants, the lack of clarity in the victim participation rules in the statute and RPE, and in the hybrid procedural model utilized by the court, provide excessive leeway to judges to determine victims’ involvement, which risks infringing the rights of defendants.²¹⁰ Their participation also arguably violates the presumption of innocence of the accused by assuming that the events and facts the prosecution is presenting at trial occurred—before this has been established by trial.²¹¹ This effectively means that victims do not simply play a passive role in proceedings, as is common in liberal criminal justice proceedings,²¹² but may constitute, according to the head of the OPCD, a

²⁰⁵ Ibid., article 15.3.

²⁰⁶ Ibid., article 19.3.

²⁰⁷ Ibid., article 68.3.

²⁰⁸ Lorraine Smith-van Lin, “Victims’ Participation at the International Criminal Court: Benefit or Burden?” in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 181-204.

²⁰⁹ United Nations Office for Drug Control and Crime Prevention, “Handbook on Justice for Victims,” New York, 1999, www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf.

²¹⁰ Salvatore Zappalà, “The Rights of Victims v. the Rights of the Accused,” *Journal of International Criminal Justice* 8, no. 1 (2010): 137-64.

²¹¹ Ibid., 145-6.

²¹² Note in certain legal systems, such as the United States at the federal level, victims may play a more active role during the sentencing hearing. Federal Rules of Criminal Procedure, Title VII: Post-Conviction Procedures, Rule 32: Sentencing and Judgment. See Cornell, Legal Information Institute, www.law.cornell.edu/rules/frcrmp/rule_32.

“second prosecutor,”²¹³ by arguably crossing the line between being participants at the court and being parties to the adversarial conflict between the prosecution and defense.²¹⁴

Victim rights theoretically constitute a major step for the protection of human rights at international trials, and ones that arguably should be balanced against those of defendants. However, it should be kept in mind that “the rights of the accused are not ‘just’ human rights guarantees; they are part and parcel of the epistemological mechanism for fact finding in criminal proceedings.”²¹⁵ Effectively establishing the truth and thereby determining the guilt or innocence of defendants requires the protection of their fundamental trial rights. An international trial may therefore not be the most appropriate forum for victim participation.²¹⁶

Investigatory support and cooperation

The Rome Statute, and the Agreement on the Privileges and Immunities of the International Criminal Court, the latter of which came into force in July 2004,²¹⁷ divided those perceived to be

²¹³ Xavier-Jean Keita, Melinda Taylor, and Mark Chadwick, “The Office of Public Counsel for the Defence & Challenges for the Defence Before the International Criminal Court,” presentation at “Ensuring Fair International Trials: Prospects and Challenges,” TMC Asser Institute, The Hague, Netherlands, November 30, 2011, www.iccnw.org/documents/OPCD_Asser_presentation.pdf.

²¹⁴ Lucia Catani, “Victims at the International Criminal Court: Some Lessons Learned from the Lubanga Case,” *Journal of International Criminal Justice* 10, no. 4 (2012): 912. In the *Lubanga* case, the court authorized 129 victims to participate, including via making opening and closing statements. See, for example, *Lubanga*, Opening Statements (transcript), case no. ICC-01/04-01/06-T-107, January 26, 2009, 36-70, www.legal-tools.org/en/browse/record/bc5f5e; and *Lubanga*, Closing Statements (transcript), case no. ICC-01/04-01/06-T-356, August 25, 2011, 56-90, www.legal-tools.org/en/browse/record/01302c.

²¹⁵ Zappalà, “The Rights of Victims v. the Rights of the Accused:” 145.

²¹⁶ Christine Van den Wyngaert, “Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge,” *Case Western Reserve Journal of International Law* 44, no. 1 (2011): 475-96.

²¹⁷ ICC, Agreement on the Privileges and Immunities of the International Criminal Court. All immunities and privileges are subject to waiver by other actors within the court (see Rome Statute, article 48.5). The agreement was finalized in September 2002, and came into force after ratification by ten states. See United Nations Treaty Collection, Agreement on the Privileges and Immunities of the International

in need of international legal protection in the conduct of court business into four groups. The first consists of judges, prosecutors, deputy prosecutors, and the registrar.²¹⁸ They were provided with the privileges and immunities provided to heads of diplomatic missions under the Vienna Convention on Diplomatic Relations²¹⁹—although limited to while conducting official court business within the territory of a state party.²²⁰

According to Phakiso Mochochoko, head of the OTP’s Jurisdiction, Complementarity and Cooperation Division, and former chair of the Working Group on Privileges and Immunities, which created the agreement, “[t]he legal status of this class is thus the same as that of judges of the International Court of Justice as approved by General Assembly Resolution 90 of December 11, 1946.”²²¹ Mochochoko, and the ASP, which agreed to this categorization, privilege the first category as essential for the court’s functioning, including the chief prosecutor and deputies—but not defense staff.

The categories seem to indicate a descending order of perceived importance by the ASP to the essential functioning of the ICC. The other three groups, including defense counsel, are mentioned in the statute,²²² but their rights in this regard are solely found within the agreement. The second group consists of “officials of the court”—deputy registrars and staff members of the

Criminal Court, treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-13.en.pdf.

²¹⁸ Rome Statute, article 48.2, and ICC, Agreement on the Privileges and Immunities, article 15.

²¹⁹ Vienna Convention on Diplomatic Relations, April 18, 1961, legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf.

²²⁰ This therefore constitutes functional immunity (similar to consular staff) rather than the personal immunities associated with embassy staff. See United States Department of State, Office of Foreign Missions, “Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities,” June 2015, www.state.gov/documents/organization/150546.pdf.

²²¹ Phakiso Mochochoko, “The Agreement on Privileges and Immunities of the International Criminal Court,” *Fordham International Law Journal* 25, no. 3 (2001): 651.

²²² Rome Statute, articles 48.3-4.

Registry and OTP. Their immunities and privileges, while not as extensive as those of category one, still provide them with functional immunity.²²³

Defense counsel and investigators constitute the third category (in the statute lumped in together with the fourth category as a miscellaneous group of all others).²²⁴ During the drafting of the statute, some delegations argued, unsuccessfully, that equality of arms requires defense counsel to be provided with the same immunities and privileges in conducting official business as afforded to the prosecution.²²⁵ Nevertheless, their immunities and privileges are very similar to those in category two, except for certain financial advantages accruing to court officials, but not counsel. The fourth category is a catch-all consisting of witnesses, victims, experts, and other individuals whose presence at the court might be necessary—their immunities and privileges are very similar to those of category three.²²⁶

According to Mochochoko, “[t]he Agreement represents a major innovative departure from previous ones in that it recognizes the important role of, amongst others, experts, witnesses, victims, and other persons required to be present at the seat of the Court.”²²⁷ While this is true, and while the details of defense counsel privileges are greater than those found in the ICTY RPE, the agreement creates a further institutional disparity between prosecution and defense. The chief officers of the OTP are treated as “high officials” of the court, while counsel are individuals necessary for “the good administration of justice.”²²⁸ The chief prosecutor is an officer of justice

²²³ ICC, Agreement on the Privileges and Immunities, article 16.

²²⁴ *Ibid.*, article 18. The article mentions “Counsel and persons assisting defense counsel.” According to Mochochoko the question of how broadly this refers to individuals aiding the defense, such as secretaries and drivers, “has been left open.” See Mochochoko, “The Agreement on Privileges and Immunities:” 655.

²²⁵ Mochochoko, “The Agreement on Privileges and Immunities:” 654.

²²⁶ ICC, Agreement on the Privileges and Immunities, articles 19-22.

²²⁷ Mochochoko, “The Agreement on Privileges and Immunities:” 641.

²²⁸ *Ibid.*, 652 and 656.

at the court and so this distinction in rights may seem appropriate from that perspective. However, the prosecutor is also the head of the OTP, which has the function of co-equal party in an adversarial trial system, whose competitor is defense counsel.²²⁹

The ICC, as a product of treaty negotiations among states reluctant to surrender authority to the court, is provided with less investigatory power in relation to states than was the ICTY by the Security Council, defining their obligations more narrowly in terms of releasing evidence to the court, for example.²³⁰ States may deny a request for evidence on national security grounds, and the statute emphasizes “cooperative means” of resolving disputes rather than providing powers to the court to enforce compliance.²³¹

A situation may be referred to the ICC—enabling a preliminary examination by the OTP, and a full investigation with pre-trial chamber consent—in one of three ways: by a state party, by the Security Council, or by the chief prosecutor’s own initiative, known as *proprio motu* power.²³² An empirical analysis of situations before the court found that state cooperation with investigations “typically tracks the ways in which cases get to the ICC in the first place,” with state party referrals engendering more cooperation with the OTP.²³³

²²⁹ The practical issue of implementation should also be kept in mind. For example, by 2006, two years after the ASP agreed these immunities protections, only “a few dozen” members had passed domestic implementing legislation. See Bosco, *Rough Justice*, 136.

²³⁰ Geert-Jan Alexander Knoops and Robert R. Amsterdam, “The Duality of State Cooperation Within International and National Criminal Cases,” *Fordham International Law Journal* 30, no. 2 (2006): 275-7.

²³¹ Rome Statute, articles 72 and 93.4, quote at article 72.5.

²³² *Ibid.*, article 13.

²³³ Courtney Hillebrecht and Scott Straus, “Who Pursues the Perpetrators? State Cooperation with the ICC,” *Human Rights Quarterly* 39, no. 1 (2017, forthcoming), 3, courtneyhillebrecht.files.wordpress.com/2016/02/final_icc_cooperation_hillebrecht_straus.pdf. Note that page numbers refer to the initial online pdf and not the final article page numbering.

Of the ten situations currently under investigation by the OTP,²³⁴ five have been referred to the court by state parties.²³⁵ The situations for all three of those individuals convicted by the court were referred by state parties, and of the four ongoing cases (involving eight individuals), three relate to situations referred by state parties.²³⁶ This ratio looks set to change going forward, as, of the three cases awaiting the start of trial as of July 2016, one relates to a state referral situation, one to a Security Council referral, and one commenced with a *proprio motu* investigation.²³⁷

The term “self-referral,” sometimes used in relation to states referring the situation in their territory to the court, would be more accurately described as “opposition-referrals” as their purpose is to remove political and military rivals.²³⁸ This has led to a dynamic where situations referred by state parties tend to have cooperation with the court heavily skewed towards the OTP, while those involving Security Council referrals and *proprio motu* investigations largely skewed against the OTP, making arrests and the gathering of evidence far more difficult in an

²³⁴ These relate to situations where a pre-trial chamber has authorized the OTP to undertake a full criminal investigation after a preliminary examination by the OTP. Preliminary examinations are currently underway in relation to: Afghanistan; Burundi; Columbia; Guinea; Iraq/United Kingdom; Nigeria; Palestine; Registered Vessels of Comoros, Greece, and Cambodia; and Ukraine. See ICC, Preliminary Examinations, www.icc-cpi.int/pages/preliminary-examinations.aspx.

²³⁵ Uganda (opened 2004), DRC (2004), CAR I (2004), Mali (2012), and CAR II (2014) were referred by the state parties of the territory involved; Darfur, Sudan (2005), and Libya (2011) were referred by the Security Council; and Kenya (2010), Côte d’Ivoire (2011), and Georgia (2016) were opened *proprio motu* by the chief prosecutor. See ICC, Situations Under Investigation, www.icc-cpi.int/pages/situations.aspx.

²³⁶ The ongoing cases for situations referred by state parties are: Dominic Ongwen (Uganda); Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (CAR I, crimes against the administration of justice); and Bosco Ntaganda (DRC). The case of Laurent Gbagbo and Blé Goudé relates to Côte d’Ivoire (*proprio motu*). See ICC, Trial: Ongoing, www.icc-cpi.int/Pages/trial.aspx. Note that, as discussed earlier, the former situation was completed in October 2016, after the end of the research period analyzed.

²³⁷ These are the cases of, respectively, Dominic Ongwen (Uganda situation), Abdallah Banda (Darfur, Sudan), and Ahmad Al Faqi Al Mahdi (Mali). See ICC, Trial Stage: In Preparation, www.icc-cpi.int/Pages/trial.aspx.

²³⁸ Hillebrecht and Straus, “Who Pursues the Perpetrators?” 3.

institutional environment dependent upon external enforcement.²³⁹ The empirical analysis of cooperation with the OTP discussed above demonstrated a very close correlation between the targets of investigation and level of cooperation with the court—with government opposition figures as targets generating greater cooperation.²⁴⁰

The primary advantage to an ICC referral by a state party is the political elimination and delegitimization of a rival—especially with a conviction, providing a significant incentive to cooperate with the OTP to obstruct defense investigations: “For state incumbents, a successful prosecution serves as a political windfall, one in which the state appears to be cooperating with international justice institutions, thereby earning reputation benefits, and removes and delegitimizes an immediate and likely persistent threat.”²⁴¹

The OTP is clearly aware of this dynamic, and has been more likely to open cases where it feels that state support for its investigation in a particular situation will be more forthcoming.²⁴² While it makes practical sense for the OTP to pursue cases where prosecutions are more likely to be successful due to access to evidence, it does mean that the nature of the ICC—dependent upon outside support for investigations—leads to the OTP choosing cases pragmatically in ways that likely privilege their access to evidence over that of defense counsel in trials before the court.²⁴³

²³⁹ Courtney Hillebrecht, *Domestic Politics and International Human Rights Tribunals: The Problem of Compliance* (Cambridge: Cambridge University Press, 2014).

²⁴⁰ Hillebrecht and Straus, “Who Pursues the Perpetrators?” 18, Table 2.

²⁴¹ *Ibid.*, 9.

²⁴² Bosco, *Rough Justice*, 19.

²⁴³ According to Hillebrecht and Scott, “facing extensive criticism, Court officials have a strong incentive to secure finished cases rather than open confrontations with states, thereby risking existing cases or engendering more paralysis. The Court’s desire to restore and buttress its legitimacy and mount successful cases intersects with state incumbents’ incentives to gain the benefits of cooperation while

There are, however, risks for states with cooperating with an OTP investigation as it might unearth evidence of government involvement in crimes. Referring state parties have therefore tended to encourage the investigation and prosecution of rivals before broader investigations on their territory, by engaging in differential cooperation in relation to access to information on opposition versus government actions.²⁴⁴

The *Bemba* case illustrates this dynamic. In 2002 Bemba's Congolese rebel force, the *Mouvement de libération du Congo* (MLC), agreed to fight in the CAR on the side of then-president Ange-Félix Patassé in a civil war against the former head of the CAR military, François Bozizé. When Bozizé won the war and became president he referred the conflict to the ICC.²⁴⁵ This encouraged the removal of Bemba as a potential rival for power, and sent a signal to international donors that Bozizé's government would protect human rights and abide by the rule of law. The government subsequently handed the files of its own criminal investigation on Bemba to the OTP.²⁴⁶

The CAR referral also interacted with that of the DRC. In the latter country, the fragile government of Joseph Kabila also stood to gain from delegitimizing military and political opponents. Bemba, a "millionaire businessman from a prominent [DRC] family,"²⁴⁷ returned home and became vice president of the DRC between 2003 and 2006. He lost the 2006 presidential election to the incumbent Kabila. Pressure from the government led Bemba to flee

minimizing the risk of prosecution. The result is an intricate set of interactions that complicates the cooperation process." See Hillebrecht and Straus, "Who Pursues the Perpetrators?" 14.

²⁴⁴ *Ibid.*, 11.

²⁴⁵ Human Rights Watch, "State of Anarchy: Rebellion and Abuses against Civilians," volume 19, no. 14(A), September 2007, www.hrw.org/reports/2007/car0907/car0907webwcover.pdf.

²⁴⁶ Courtney Hillebrecht and Scott Straus, "Last Week, the International Criminal Court Convicted a War Criminal. And that Revealed One of the ICC's Weaknesses," *The Washington Post*, March 28, 2016.

²⁴⁷ Marlise Simons, "Congolese Politician, Jean-Pierre Bemba, Is Convicted of War Crimes," *The New York Times*, March 21, 2016.

the country in 2007, and he was arrested in Belgium and handed over to the ICC the following year.²⁴⁸

Another reason for state parties to cooperate with the OTP is the pressure that can be brought to bear by IGOs and states keen to promote a human rights agenda.²⁴⁹ In March 2004, after months of consultations between the OTP and the government of the DRC, the latter announced that it was referring the conflict in the east of the country to the court. The referral had required “mild pressure” from the OTP—eager to begin investigations²⁵⁰—and more significant pressure from the European Union as a major donor to the DRC.²⁵¹

Such political influences on prosecutorial decision-making are inevitable for a court largely dependent upon external actors—state parties and the Security Council—to refer situations that enable the OTP to begin investigations.²⁵² The OTP undertook diplomatic negotiations with the Ugandan government to encourage it to make the first referral. This included a meeting between Luis Moreno-Ocampo, the chief prosecutor of the ICC at the time, and President Yoweri Museveni of Uganda in London in January 2004, and culminated in a joint press conference where they announced the referral of the situation involving the Lord’s Resistance Army (LRA),

²⁴⁸ Joe Bavier, “Bemba Arrested for War Crimes,” *The Independent*, May 25, 2008, www.independent.co.uk/news/world/europe/bemba-arrested-for-war-crimes-834383.html.

²⁴⁹ David Richards, David Gelleny, and David Sacko, “Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries,” *International Studies Quarterly* 45, no. 2 (2001): 219-39.

²⁵⁰ Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions: The Principle of Complementarity* (Leiden: Martinus Nijhoff, 2008), 246.

²⁵¹ Bosco, *Rough Justice*, 98-9.

²⁵² Of course, as discussed earlier, the chief prosecutor also possesses the power to begin an investigation *proprio motu*. Most recently, Prosecutor Bensouda was authorized by Pre-Trial Chamber I to open an investigation into the situation in South Ossetia, Georgia from July to October 2008. See ICC, “ICC Pre-Trial Chamber I Authorises the Prosecutor to Open an Investigation into the Situation in Georgia,” press release, doc. no. ICC-CPI-20160127-PR1183, January 27, 2016, www.icc-cpi.int/Pages/item.aspx?name=pr1183.

a major Ugandan rebel group.²⁵³ The chief prosecutor of the ICC later felt it necessary to clarify that it would not only be investigating LRA actions but also those of the government. He did not, however, make a similar statement of prosecutorial investigatory parity in relation to the Security's Council's referral of Darfur the following year.²⁵⁴

In the case of both the DRC and Uganda the OTP stressed to the governments that it wished to complement and not undermine the ongoing peace processes, and in Uganda in particular the OTP coordinated its investigatory approach with the government.²⁵⁵ Uganda hoped to use the referral to increase support among ASP member states for its attempt to defeat the LRA.²⁵⁶ The government later suffered domestic criticism over the referral and the inability to seize indicted suspects or end the conflict, leading it to scale back its cooperation with the ICC.²⁵⁷ Similarly, political pressure from the UN encouraged the DRC government to arrest and hand Thomas Lubanga to the ICC after his forces were accused of attacking UN peacekeepers in February 2005.²⁵⁸

There is also the prominent counter-example of Kenya to the influence of the chief prosecutor. In 2010 the prosecutor opened a *proprio motu* investigation into crimes committed during post-election violence in 2007-8, including over 1,000 people killed, over 900 rapes, and 350,000 people displaced.²⁵⁹ Defendants Uhuru Kenyatta and William Ruto became the

²⁵³ Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *The American Journal of International Law* 99, no. 2 (2005): 403-21.

²⁵⁴ William A. Schabas, "Prosecutorial Discretion and Gravity," in *The Emerging Practice of the International Criminal Court*, ed. Carsten Stahn and Göran Sluiter (Leiden: Martinus Nijhoff, 2009), 238.

²⁵⁵ *Ibid.*, 239.

²⁵⁶ Bosco, *Rough Justice*, 129.

²⁵⁷ Hillebrecht and Straus, "Who Pursues the Perpetrators?" 20.

²⁵⁸ Bosco, *Rough Justice*, 124.

²⁵⁹ ICC, "Kenya: Situation in the Republic of Kenya," case no. ICC-01/09, www.icc-cpi.int/kenya.

president and vice president of Kenya, respectively, in 2013, leading to alleged obstruction with the OTP's investigation, including, according to the court, "witness interference" and "political meddling."²⁶⁰ The OTP reluctantly decided to close the cases against them.²⁶¹ In 2009 the African Union also passed a resolution criticizing the actions of the Security Council and the ICC in regard to the referral of Sudan and the subsequent OTP investigation and indictments, and called on AU member states not to cooperate with the ICC's arrest warrants.²⁶²

However, these cases do not suggest a form of overall "balance," and thereby parity, between prosecution and defense at the court, constituting an element of legal fairness. Where accused are in power they are highly unlikely to face prosecution at the ICC, whereas those in opposition to a state referring party are likely to be significantly disadvantaged at trial due to differential access to evidence by the state.²⁶³ Mechanisms for compelling external actor cooperation with defense

²⁶⁰ Marlise Simons and Jeffrey Gettleman, "International Criminal Court Drops Case Against Kenya's William Ruto," *The New York Times*, April 5, 2016.

²⁶¹ The ICC vacated the charges in *Ruto et al.* and withdrew the charges in *Kenyatta*. See ICC, "Kenya: The Prosecutor v. William Samoei Ruto and Joshua Arap Sang," case no. ICC-01/09-01/11, www.icc-cpi.int/kenya/rutosang; and ICC, "Kenya: The Prosecutor v. Uhuru Muigai Kenyatta," case no. ICC-01/09-02/11, www.icc-cpi.int/kenya/kenyatta.

²⁶² African Union, "Report of the African Union on Darfur (AUPD)," Peace and Security Council 207th Meeting at the Level of the Heads of State and Government, doc. no. PSC/AHG/2(CCVII), October 29, 2009, Abuja, Nigeria. See also Gwen Barnes, "The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir," *Fordham International Law Journal* 34, no. 6 (2011): 1,584-1,619.

²⁶³ More broadly, Jalloh and DiBella argue that the lack of a comparable institutional voice, and the diplomatic position, access, and influence of the OPCD relative to defense counsel create significant sources of disparity in attaining assistance with investigations, including the gathering of documentary evidence and access to witnesses. See Jalloh and DiBella, "Equality of Arms in International Criminal Law," 264. For example, the ICC signed cooperation agreements with the UN in 2004 and the EU in 2006, which specify cooperation with the OTP. See, respectively, Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, doc. no. ICC-ASP/3/Res.1, October 4, 2004, www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf; and Agreement Between the International Criminal Court and the European Union on Cooperation and Assistance, doc. no. ICC-PRES/01-01-06, April 10, 2006, www.icc-cpi.int/NR/rdonlyres/6EB80CC1-D717-4284-9B5C-03CA028E155B/140157/ICCPRES010106_English.pdf. Also, as discussed in Chapter 4 in relation to the

teams in gaining access to potential evidence are inadequate to address this problem.²⁶⁴ In 2008, in *Lubanga*, due to lack of defense access to evidence the ICC suspended proceedings.²⁶⁵ While this is very unusual, it could be a useful strategy to encourage state cooperation, as it did in this case.

Defense parity indicator 2: Evidentiary procedures

This section analyzes the effect of documentary and witness evidence on the courtroom dynamic between prosecution and defense at the ICC. The first section explores the procedural right of disclosure of prosecution evidence to the defense before trial, and the problems created by the reliance of the prosecution on external sources of information. The second section discusses witness procedures in the rules, focusing on rules affecting cross-examination and those permitting the introduction into the record of written witness statements.

States and the UN demonstrated little concern with due process and the rights of accused through much of the negotiations to create the ICC. There were very few references to the protection of defendant rights in the early drafts of the statute, including the 1994 International Law Commission proposal, and the “Zutphen draft” agreed in February 1998.²⁶⁶ This only began to change in the months leading up to the Rome Conference, and resulted in a statute whose

ICTY, defense counsel may especially encounter resistance while investigating from states with a civil law system as in such systems this is not a task undertaken by defense teams. See Bert Swart, “General Problems,” in *The Rome Statute of the International Criminal Court: A Commentary, Vol. 2*, ed. Antonio Cassese, Paola Gaeta, and John Jones (Oxford: Oxford University Press, 2002), 1,600.

²⁶⁴ Jalloh and DiBella, “Equality of Arms in International Criminal Law,” 282.

²⁶⁵ *Lubanga*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together with Certain Other Issues Raised at the Status Conference on 10 June 2008, case no. ICC- ICC-01/04-01/06-1401, June 13, 2008, www.legal-tools.org/en/browse/record/e6a054.

²⁶⁶ Kenneth S. Gallant, “Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard, and What Might be Done about One of Them,” *Criminal Law Forum* 14 (2003): 319.

procedures constitute a “veritable conglomeration of different legal processes,” due to the range of legal systems represented at the conference.²⁶⁷ Bassiouni argues that the predominance of common-law adversarial procedures in the statute reflects the desire of states to protect the rights of accused, though he criticizes the “excessive formalism” in delineating rules as “counter-productive to the accused.”²⁶⁸ The dissertation takes issue with this position for two reasons. First, while the rights are laid out in far greater detail than those found in the ICTY statute, this is not a high bar, and they are not delineated in an “excessive manner” relative to those found in liberal democratic legal systems. Second, the formalism of detailed rules provides core features of a high level of the legality of criminal procedures: detailed and clear written rules.

Documentary evidence and disclosure

According to Schabas, the Rome Statute contains due process protections for the accused that “go somewhat beyond the minimum requirements found in the International Covenant on Civil and Political Rights.”²⁶⁹ The covenant’s requirements consist of the following rights: to be informed of the charges; to an expeditious trial; to adequate resources and access to counsel (paid for by the court if necessary); to present witnesses and cross-examine those of the prosecution; and to not incriminate oneself.²⁷⁰

Monroe Leigh, former US State Department legal advisor and former president of the American Society of International Law, has argued that the Rome Statute rights are more

²⁶⁷ Bassiouni, “Negotiating the Treaty of Rome:” 464.

²⁶⁸ Ibid.: 464-5.

²⁶⁹ Schabas, *An Introduction to the International Criminal Court*, 224.

²⁷⁰ ICCPR, article 14.3.

extensive than those found in the US Bill of Rights.²⁷¹ However, as Schabas recognizes, the rights delineated in the ICCPR—and the Bill of Rights, though Schabas does not refer to this—by themselves constitute weak due process protections by contemporary liberal legal standards. He clarifies that there are additional rights in the Rome Statute—including rights during the investigation stage. Nevertheless, the central protection of disclosure as an obligation on the prosecution to release evidence is only loosely mentioned in the statute.²⁷²

The Rome Statute makes reference to the obligation of disclosure only in relation to exculpatory material—and with significant restrictions, discussed below.²⁷³ The RPE includes a section with nine rules titled “Disclosure,” providing significantly more detail and clarity than found in the ICTY RPE (which does not include a dedicated disclosure section).²⁷⁴ This includes the prosecutorial obligation to disclose witness information (their names and any prior statements) and copies of physical material—objects, written documents, and photographs,

²⁷¹ Monroe Leigh, “The United States and the Statute of Rome,” *The American Journal of International Law* 95, no. 1 (2001): 130-1.

²⁷² Apart from vague references to an obligation to hand over material, the references to disclosure in the Rome Statute are largely those placing limitations on the obligation to hand over evidence when state parties handing over information wish it to be kept confidential. See discussion in documentary evidence section below. Schabas appears to recognize the relevance of disclosure to trial fairness, though not its centrality. See Schabas, *Introduction to the International Criminal Court*, 300-1.

²⁷³ Rome Statute, article 67.2. Apart from this the statute makes only two vague references in relation to the functions of chambers. Rome Statute, article 64.3.c states that: “Subject to any other relevant provisions of this Statute, provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial.” Article 61.3 makes a similar statement of function in relation to pre-trial chambers. All other references in the statute are aimed at *restricting* disclosure of confidential information. The statute also obliges ICC prosecutors to investigate exonerating as well as incriminating evidence (article 54.1.a), unlike at the ICTY. In the ICTY RPE, the prosecution must hand over exculpatory material they know to be in their possession (rule 68), but have no obligation to search for such material during investigations. According to Mark Ellis, this is aimed at balancing the advantage in investigative resources acknowledged to be held by the OTP. See Mark Ellis, *In the Dock: Defence Rights at the ICC*, documentary film directed by Liliana De Marco Coenen and Victor Fokke (International Bar Association, 2011), www.ibanet.org/Article/Detail.aspx?ArticleUid=4b9cd7f3-9185-4ebc-b40b-d54b8cc8d01e.

²⁷⁴ RPE, rules 76-84.

etc.²⁷⁵ Also included are restrictions on disclosure, including those relating to confidential evidence.²⁷⁶

While the ICTY's disclosure procedures initially largely mirrored those of the US criminal justice system,²⁷⁷ according to Antonio Cassese *et al.* ICC procedures have somewhat tilted the international hybrid adversarial-inquisitorial trial model back towards the latter.²⁷⁸ This includes an obligation on the defense to disclose evidence to the prosecution, and aspects of the defense strategy.²⁷⁹ As discussed in Chapter 1, in an adversarial approach, the disclosure obligation tends to be placed solely on the prosecution, in acknowledgment of the defense's disadvantage in gathering evidence in such a trial system.

In the ICC's *Ruto et al.* trial, in the Kenya situation, the defense team asked for a postponement of a date for disclosure to the prosecution on the grounds that it had too few resources to meet the disclosure deadline.²⁸⁰ The application was denied by the court, arguing that the defense was merely disorganized and that certain resources were not mandated by the

²⁷⁵ *Ibid.*, rules 76 and 77, respectively. No specific time-line is delineated, only "sufficiently in advance to enable the adequate preparation of the defense" in relation to witness information (rule 76.1) and nothing in relation to tangible material.

²⁷⁶ *Ibid.*, rules 81 and 82.

²⁷⁷ See Hanna Kuczyńska, *The Accusation Model Before the International Criminal Court: Study of Convergence of Criminal Justice Systems* (New York: Springer, 2015), 234. However, ICTY jurisprudence led to disclosure procedures increasingly drifting from those of the United States.

²⁷⁸ Cassese *et al.*, *International Criminal Law: Cases & Commentary*, 571.

²⁷⁹ RPE, rules 78-9. The strategy issue to be disclosed is whether the accused intends to rely on an alibi defense, or on grounds for excluding criminal responsibility, such as mental illness, intoxication, or duress. See Rome Statute, article 31 for the grounds for excluding criminal responsibility discussed in the RPE defense disclosure requirements.

²⁸⁰ *Ruto et al.*, Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence, case no. ICC-01/09-01/11-255, August 11, 2011, para. 3, www.legal-tools.org/en/browse/record/63d42d.

court to supply, so their lack was the defense's problem to resolve on their own.²⁸¹ Yet the court later granted an extension on the deadline for the confirmation of charges in the case at the Registrar's request,²⁸² suggesting time pressures are of greater concern to the court when only the defense is disadvantaged.²⁸³

Most references to disclosure in the statute refer to limitations on the right of disclosure, by providing protections for external parties which have given information to the OTP so that it will not be released to the defense, even if it contains potentially exculpatory material.²⁸⁴ This is a reflection of the acknowledgment by the Rome Conference of the need for the ICC, unlike domestic courts, to rely on external cooperation, and of the desire by states to maintain control in any cooperation they choose to give.

Without its own police, with limited investigatory resources, and lacking the legal authority to secure evidence from government agencies, the OTP is reliant upon states to provide evidence, including intelligence information that states would be unlikely to hand over without assurances that it would remain confidential. The restrictions on disclosure were also created to protect the identity of some victims and witnesses, generating a conflict between the necessity for their protection and the due process rights of the accused.

²⁸¹ *Ruto et al.*, Decision on Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence, case no. ICC-01/09-01/11-260, August 12, 2011, paras. 11, 13, www.legal-tools.org/en/browse/record/1d5a28.

²⁸² *Ruto et al.*, Decision on the Issuance of the Decision Pursuant to Article 61(7) of the Rome Statute, case no. ICC-01/09-01/11-357, October 26, 2011, www.legal-tools.org/en/browse/record/7605f5.

²⁸³ Yvonne McDermott, "Rights in Reverse: A Critical Analysis of Fair Trial Rights under International Criminal Law," in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Naimh Hayes (Farnham, UK: Ashgate, 2013), 175-7.

²⁸⁴ Rome Statute, articles 54.3.e, 72, 87.3, 93.4, 93.8.c, and 99.5. See also RPE, rule 82.

The head of the ICC's Office of Public Counsel for the Defence argues that redactions from confidential documents that these rules have permitted have hampered the ability of defense teams to investigate, as well as having delayed proceedings.²⁸⁵ *Lubanga* provides a sobering example of the problems that can be caused for the ability to present an adequate defense by the confidentiality limitation. The United Nations in Congo had released a great deal of evidentiary material to the OTP to aid the prosecution in that case, but only on the agreement that it be used solely to generate further evidence which could be presented in court. The UN evidence itself could not be presented in court or shared at the ICC outside the OTP—not even with the judges.²⁸⁶ Some material was disclosed to the defense after heavy redaction, which counsel argued left them unable to effectively defend their client.²⁸⁷ The International Bar Association was also critical of the belated disclosure of redacted, possibly exculpatory evidence, which led to delays in the proceedings.²⁸⁸ Larry Johnson, a legal scholar and former UN assistant secretary-general for legal affairs, argues that these problems with “the implementation of the cooperation regime with the United Nations...almost derailed the whole trial.” They exposed “the tensions between the two obligations—disclosure and confidentiality.”²⁸⁹

²⁸⁵ Keïta, Taylor, and Chadwick, “The Office of Public Counsel for the Defence & Challenges for the Defence Before the International Criminal Court.”

²⁸⁶ Human Rights Watch, “The Status of the ICC Trial of Thomas Lubanga,” November 12, 2008, www.hrw.org/news/2008/11/12/status-icc-trial-thomas-lubanga. See Rome Statute, article 54.3.e.

²⁸⁷ Stephanie Hanson, “Africa and the International Criminal Court,” Council on Foreign Relations background paper, July 24, 2008, www.cfr.org/courts-and-tribunals/africa-international-criminal-court/p12048.

²⁸⁸ International Bar Association, “First Challenges,” 31.

²⁸⁹ Larry D. Johnson, “The *Lubanga* Case and Cooperation between the UN and the ICC: Disclosure Obligation v. Confidentiality Obligation,” *Journal of International Criminal Justice* 10, no. 4 (2012): 887, 888.

The OTP did not disclose to the *Lubanga* defense team over 200 confidential documents which the court also recognized contained “potentially exculpatory information.”²⁹⁰ The court further acknowledged the damage that nondisclosure can cause to the defense and ruled that it would only permit the admission of evidence that can be disclosed.²⁹¹ It called the disclosure of exculpatory material “a fundamental aspect of the accused’s right to a fair trial,” censured the prosecution for misapplying confidentiality agreements to withhold information from the defense and the trial chamber, and consequently suspended the trial, on the basis that these factors “ruptured” the trial process “to such a degree that it is now impossible to piece together the constituent elements of a fair trial.”²⁹² The court criticized the prosecution in particular for “routinely” misapplying the confidentiality restriction to disclosure, and criticized prosecutors for a “broad and incorrect interpretation of the statute’s confidentiality requirements.”²⁹³

Accountability for lapses in relation to such important procedural matters may well aid compliance in the future. Nevertheless, a code of ethics for the OTP has only been in force since

²⁹⁰ *Lubanga*, Judgment on the Appeal of the Prosecutor Against the Decision of the Trial Chamber I Entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused Together with Certain Other Issues Raised at the Status Conference on 10 June 2008,” case no. ICC-01/04-01/06-1486, October 21, 2008, para. 21, www.legal-tools.org/en/browse/record/e6a054.

²⁹¹ *Lubanga*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials, para. 92. This was upheld by the appeals chamber: *Lubanga*, Judgment on the Appeal of the Prosecutor Against the Decision of the Trial Chamber I, paras. 96-7.

²⁹² *Lubanga*, Decision on the Consequences of Non-Disclosure of Exculpatory Materials, paras. 92-3.

²⁹³ *Lubanga*, Judgment on the Appeal of the Prosecutor Against the Decision of the Trial Chamber I, para. 22. The statute and agreements with outside bodies, such as the UN, do not permit the court to be shown confidential but possibly exculpatory material *in camera*—that is, privately within judges’ chambers and not appearing in the official record. This could have enabled the judges to determine whether the undisclosed information sheds sufficient doubt on the guilt of the accused to dismiss charges—a practice used in some domestic legal systems to balance confidentiality and disclosure. See Stephanos Bibas and William W. Burke-White, “International Idealism Meets Domestic-Criminal-Procedure Realism,” *Duke Law Journal* 59, no. 4 (2010): 699.

September 2013—more than ten years after the opening of the court.²⁹⁴ It remains to be seen whether it will make a difference to the OPT's compliance with its disclosure obligations.²⁹⁵

In addition to arguable prosecutorial misconduct, a significant cause of the disclosure problems in *Lubanga* was the court's structural weakness of a "disjointed defense system."²⁹⁶ The Registry appointed an ad hoc defense counsel for Lubanga during the investigatory phase, before his transfer to the court. Pre-Trial Chamber I decided to replace this counsel with representation through the OPCD, but refused to permit the OPCD to fulfill all the counsel's functions, including gaining access to prosecution evidence.²⁹⁷ *Lubanga* provides an example of how lack of structural parity for the defense generates other parity weaknesses by limiting the court's ability to respond to procedural problems. Considering the likely reliance of the OTP in future on information from states and IGOs, the tension between the obligations of disclosure to the defense and confidentiality towards sources "will become an issue for the court again."²⁹⁸

While there is insufficient space here to pursue other issues in depth, it should be noted that, similarly to the ICTY, another significant problem with disclosure to the defense has been the

²⁹⁴ OTP, "Code of Conduct for the Office of the Prosecutor," doc. no. OTP2013/024322, September 5, 2013 (date of entry into force), www.icc-cpi.int/iccdocs/oj/otp-COC-Eng.PDF.

²⁹⁵ As early as 2000, the International Criminal Defence Attorney's Association had proposed that the ICC prosecution be held accountable by a code of conduct in the same way as defense counsel, but this was rejected by the court. See Jalloh and DiBella, "Equality of Arms in International Criminal Law:" 285.

²⁹⁶ Rachel Katzman, "The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial," *Northwestern Journal of International Human Rights* 8, no. 1 (2009): 100.

²⁹⁷ *Situation in the Democratic Republic of Congo*, Decision on the Request by the OPCD for Access to Previous Filings, case no. ICC-01/04-389, September 11, 2007, paras. 6-7; and *Situation in the Democratic Republic of Congo*, Decision on Request for leave to appeal the "Decision on the Requests of the OPCD on the Production of Relevant Supporting Documentation Pursuant to Regulation 86(2)(e) of the Regulations of the Court and on the Disclosure of Exculpatory Materials by the Prosecutor," case no. ICC-01/04-438, January 23, 2008, www.legal-tools.org/en/browse/record/ca6330.

²⁹⁸ Susana SáCouto and Katherine Cleary, "The Relationship Between the International Criminal Court and the United Nations," American University Washington College of Law, War Crimes Research Office, Legal Analysis and Education Project, August 2009, 45, www.wcl.american.edu/warcrimes/icc/icc_reports.cfm.

sheer volume of material handed over, due to the nature of the crimes and the international context. In *Lubanga*, for example, the prosecution notified the court that it possessed 27,500 documents, comprising 92,500 pages of material, of which it intended to hand over 20,000 documents (74,000 pages).²⁹⁹

Witnesses and defense cross-examination

According to legal scholar Christoph Safferling, the defense right to cross-examine prosecution witnesses “presupposes the oral presentation of the...evidence,” yet there is “no explicit norm stating that the trial be oral” at the ICC.³⁰⁰ Nevertheless, the statute expresses a preference for in-person, oral testimony.³⁰¹ This represents, according to former ADC-ICTY president Colleen Rohan, a “welcome return to the principle that witnesses should testify in person,” which has been undermined in the practice of the ICTY.³⁰²

²⁹⁹ Kuczyńska, *The Accusation Model Before the International Criminal Court*, 235.

³⁰⁰ Christoph Safferling, *International Criminal Procedure* (Oxford: Oxford University Press, 2012), 401, 402.

³⁰¹ Rome Statute, article 69.2.

³⁰² Colleen M. Rohan, “Protecting the Rights of the Accused in International Criminal Proceedings: Lip Service or Affirmative Action?” in *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, ed. William A. Schabas, Yvonne McDermott, and Niamh Hayes (Farnham, UK: Ashgate, 2013), 303. See Witnesses and Defense Cross-Examination section in Chapter 4 for details on the decline in this standard at the ICTY. An improvement over the ICTY is that the defense has the right to be the last party to examine a witness, including therefore the right to examine their own witness after prosecution cross-examination (RPE, rule 140.2.d). The ICTY early on decided that “as a general rule the testimony of a witness ends with his re-examination, absent any new matter during re-examination... Thus, without something new, a party has the last word with his own witness.” See ICTY, *Delalić et al.*, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo, case no. IT-96-21, May 1, 1997, para. 30, www.icty.org/x/cases/mucic/tdec/en/70501DE2.htm. According to legal scholar Masha Fedorova, this is a “notable departure” from the ad hoc tribunals which aids in safeguarding the principle of *dubio pro reo*—“when in doubt, for the accused,” which aids in protecting the primary democratic criminal justice principles of the presumption of innocence for the accused, and the conviction standard of proof beyond a reasonable doubt (RPE, rule 141.2). See Masha Fedorova, *The Principle of Equality of Arms in International Criminal Proceedings* (Cambridge: Intersentia, 2012), 399. It is complemented by the defense right to always speak last in closing statements before the court.

Rohan argues that, to date, the ICC has largely sustained this preference, permitting the use of written witness statements in a far narrower range of circumstances than at the ICTY.³⁰³ The rights to an oral trial and to directly challenge one's accusers tend to be less commonly applied in civil law inquisitorial trial systems,³⁰⁴ and so the inclusion of protections within the Rome Statute and RPE is indicative of the importance the Rome delegates and ASP placed on maintaining the extra defense protections that an adversarial model requires.³⁰⁵

Safferling's assessment agrees with Rohan's position, arguing that the ICC has so far taken a "relatively cautious approach" of restricting the introduction of written testimony. He speculates that this may be due to the ICC not yet experiencing the high level of political pressure to speed up proceedings as experienced by the ad hoc tribunals, due to the "backlog" of cases the latter accumulated. He cautions against the ICC capitulating to similar pressure in the future in order to maintain fair trial standards.³⁰⁶

³⁰³ The ICC circumstances include the presence of the witness in court to enable cross-examination, and providing background information that does not appear to be in dispute between the parties. See *Lubanga*, Decision on the Prosecution's Application for the Admission of the Prior Recorded Statements of Two Witnesses, case no. ICC-01/04-01/06-1603, January 15, 2009, para. 24, www.icc-cpi.int/pages/record.aspx?uri=618279.

³⁰⁴ Alexander Zahar and Göran Sluiter, *International Criminal Law* (Oxford: Oxford University Press, 2007), 314.

³⁰⁵ The RPE provide prosecution and defense with the right to cross-examine each others' witnesses in order to, for example, challenge the reliability of their testimony and the credibility of the witness. See RPE, rule 140.2.b. The ICC case law has established guidelines for cross-examination: see *Lubanga*, Decision on Various Issues Related to Witness' Testimony During Trial, case no. ICC-01/04-01/06-1140, January 29, 2008, para. 32, www.legal-tools.org/en/browse/record/8367f1; and *Katanga et al.*, Corrigendum: Directions for the Conduct of Proceedings and Testimony in Accordance with Rule 140, case no. ICC-01/04-01/07, December 1, 2009, paras. 69-76, www.legal-tools.org/en/browse/record/2bf038. These include protecting witnesses by prohibiting "assault[ing] the dignity or exploit[ing] the vulnerability of witnesses." See *Katanga et al.*, Corrigendum, para. 75.

³⁰⁶ Safferling, *International Criminal Procedure*, 403.

However, there are signs that there is already a move in this direction by the court. In 2013 the ASP amended³⁰⁷ an ICC procedural rule to enable a greater use of written witness statements,³⁰⁸ with a very similar content to rule changes at the ICTY in 2000 and 2006.³⁰⁹ The changes permit the introduction of a written transcript in lieu of oral testimony in situations where the witness is not present in court, but where the defense has had the opportunity to question the witness during the recording of their testimony; where the witness is present in court (though the testimony is not live), and there is the opportunity to cross-examine; where the witness has died since providing a written transcript; or where there has been witness intimidation.

The International Bar Association supported the adoption of the changes, especially those aspects that maintain the right of cross-examination, while urging “a cautionary approach to [their] implementation...in recognition of fundamental fair trial guarantees.”³¹⁰ The IBA “urges the Trial Chambers to exercise caution,” and argues that the changes permitting written

³⁰⁷ All proposed changes to the RPE must be agreed to (with a two thirds majority) by the Assembly of State Parties, (in theory) making procedural change much more difficult than for the ICTY, where the judges have this role and also removing the conflict of interest between judges as modifiers of rules and implementers of those same rules. See Gallant, “Politics, Theory and Institutions:” 325.

³⁰⁸ Rome Statute, rule 68, as amended by resolution ICC-ASP/12/Res.7.

³⁰⁹ The ICTY RPE rules are *92bis* and *92quater*. Rule *92bis* allows the introduction of a written statement as long as the testimony’s purpose is only to establish historical background and the context of the situation(s) examined in the case. Rule *92quater* allows written testimony which goes directly to the acts and conduct of the accused (i.e. it is not just background information) even if the witnesses is unable to appear before the court. The issue is discussed in detail in Chapter 4.

³¹⁰ International Bar Association, “IBA ICC Programme Legal Opinion: Rule 68 Amendment Proposal,” January 2014, 1, www.ibanet.org.

testimony without the right of cross-examination “should be evidentiary mechanisms of last resort.”³¹¹ This development has led to increasing use of written testimony since 2014.

The changes occurred due to ASP desire to facilitate faster and cheaper trials. Such pressure has resulted from the slow pace of trials so far. Only in March 2012—nearly ten years after the court’s establishment—did the ICC complete its first trial.³¹² As of June 2016 the court has completed four trials, with three convictions and one acquittal.³¹³ Similarly to the ad hoc tribunals, this has been criticized in relation to the ICC by academic and media commentators.³¹⁴ The ASP, and in particular the wealthier member states that provide the majority of the court’s funding,³¹⁵ have become increasingly concerned since 2004 about the costs associated with the

³¹¹ Ibid., 5. The IBA also cautioned that the rules “should not be used as a ‘back-door’ substitution for victim and/or witness protection mechanisms,” as such protections already exist at the court (e.g. RPE rule 88.5). Ibid.

³¹² This was of Thomas Lubanga Dyilo, who was transferred to The Hague in March 2006. He was sentenced to 14 years imprisonment for war crimes.

³¹³ The convictions are discussed above, under the legality of sentencing. Mathieu Ngudjolo Chui was acquitted in December 2012 of war crimes and crimes against humanity, and the verdict was upheld on appeal in February 2015. See *Ngudjolo*, Judgment Pursuant to Article 74 of the Statute, case no. ICC-01/04-02/12, December 18, 2012, www.legal-tools.org/en/browse/record/2c2cde; and *Ngudjolo*, Judgment on the Prosecutor’s Appeal against the Decision of Trial Chamber II Entitled “Judgment Pursuant to Article 74 of the Statute,” case no. ICC-01/04-02/12 A, February 27, 2015, www.legal-tools.org/en/browse/record/1dce8f. As of June 2016 there are no appeals ongoing. See ICC, Appeals Stage, www.icc-cpi.int/Pages/appeal.aspx.

³¹⁴ See, for example, Antonio Cassese, “Is the ICC Still Having Teething Problems?” *Journal of International Criminal Justice* 4, no. 3 (2006): 440-1; Jean Galbraith, “The Pace of International Criminal Justice,” *Michigan Journal of International Law* 31 (2009): 138-42; Marlise Simons, “For International Criminal Court, Frustration and Missteps in its First Trial,” *The New York Times*, November 21, 2010; and Susana SáCouto and Katherine Cleary, “Expediting Proceedings at the International Criminal Court,” American University Washington College of Law, War Crimes Research Office, Legal Analysis and Education Project, June 2011, 35-45, www.wcl.american.edu/warcrimes/icc/documents/1106report.pdf.

³¹⁵ Most funding is currently derived from the governments of Japan, Germany, the United Kingdom, and France. The scale of contributions is assessed using the formula for the UN regular budget, relying on relative wealth and population. See Rome Statute, article 117. In the 2015 budget, appropriations for the court totaled €130.67 million. See ASP, Resolution on the Programme Budget for 2015, the Working Capital Fund for 2015, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court, Financing Appropriations for 2015 and the Contingency Fund, doc. no. ICC-

ICC.³¹⁶ That year the ASP's Committee on Budget and Finance explicitly expressed concern that the costs not spiral as they had at the ad hoc tribunals.³¹⁷ By 2015 the ICC had spent a total of \$1 billion, with two convictions to show for it.³¹⁸

Conclusion

At the beginning of the chapter it was noted that there has been insufficiently critical reflection on the promise of the ICC for the fairness of prosecution within global legal governance. The examination of the court's rules and limited practice to date provide a cautionary assessment. The ICC arguably constitutes an advance for the fairness of global legal governance for defendants over the ad hoc tribunals, but with significant caveats. The legality of the court constitutes an advancement in terms of non-retroactive enforcement of law, and especially in terms of the clarity and specificity of legal prohibitions. There are, however, still concerns as to the implications of the sentencing rules, which provide significant flexibility to the judges. While the three convictions so far reveal no particular concerns, they provide a limited basis for an assessment of legality.

Structurally there is more of an official inside voice for the accused at the ICC, but there is not the effective equivalent of the ADC-ICTY with an external voice in decision-making forums.

ASP/13/Res.1, December 17, 2014, asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ASP13/ICC-ASP-13-Res1-ENG.pdf.

³¹⁶ Bosco, *Rough Justice*, 104-5.

³¹⁷ ICC Assembly of State Parties, "Report of the Committee on Budget and Finance," doc. no. ICC-ASP/3/18, August 13, 2004, para. 57, asp.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-3-18-CBF_report_English.pdf.

³¹⁸ Caroline Schmitt, "13 Years, 1 Billion Dollars, 2 Convictions: Is the International Criminal Court worth it?" Deutsche Welle, January 27, 2016, www.dw.com/en/13-years-1-billion-dollars-2-convictions-is-the-international-criminal-court-worth-it/a-19006069.

The accused and their counsel are still far from attaining structural equality as it relates to the pre-trial and trial stages of proceedings.

Investigatory access to information is arguably worse for the defense at the ICC than at the ICTY, due to: complementarity, whereby domestic court jurisdiction supersedes that of the ICC (the opposite to the situation at the ICTY); control of top-level decision-making by a large and unwieldy body with many competing political interests—the ASP; and the bias inherent in state referrals of situations. The ICC also has similar evidentiary problems to the ICTY due to the dependence of the court on external support and information. While it has not yet suffered from the same level of inducement to speed up proceedings, there are signs of nascent pressure and their impact on trials. This requires monitoring to ensure that rule changes do not weaken defense parity to the same extent as they have been argued to at the ICTY.³¹⁹

Two remaining major problems for prosecution within global legal governance are its prosecution bias, and the structure of the system. The first issue results from the traditional international human rights focus on victims being incorporated uncritically into the evolving structures and procedures of international prosecution. The inadequate understanding of the role and function of the accused and defense counsel by states, NGOs, judges, and external commentators³²⁰ is a major obstacle to the improvement of fair trial standards.

³¹⁹ The discussion here did not allow space for the analysis of another issue, which while not directly related to legality or defense parity as explored in the research is potentially of profound importance for trial fairness at the ICC. Regulations of the Court, regulation 55 permits the prosecutor to change the charges against a defendant during the proceedings—even after the end of the prosecution’s presentation of evidence. For an exploration of this issue see Susana SáCouto and Katherine Cleary, “Regulation 55 and the Rights of the Accused at the International Criminal Court,” American University Washington College of Law, War Crimes Research Office, Legal Analysis and Education Project, October 2013, www.wcl.american.edu/warcrimes/icc/documents/Report17.pdf.

³²⁰ For example, David Bosco, in a recent and otherwise well researched book on the politics of the ICC throughout made little mention of defense counsel and their need for and ability to gain access to

On the second issue, *Lubanga* highlights the arguably inherent conflict between the utility to the OTP of information provided by outside sources for pursuing a prosecution, and the requirement of disclosure. This remains unresolved and is perhaps an inevitable consequence of an international court reliant on external cooperation. Problems with effectiveness and efficiency have led to questioning of whether the ICC suffers from a “credibility gap,” especially in comparison to liberal democratic state criminal justice systems.³²¹ This may lead to pressure to increase effectiveness at the expense of trial fairness.

A key obstacle to the legitimacy of the ICC is that while it is modeled on courts within liberal criminal justice systems, it is not embedded within the sort of broader criminal justice structures—such as a police force for investigations and arrests—that would enable it to be both more effective and provide more equitable treatment to defendants. This leads to weaker legitimacy in terms of both fair trials and efficacy. Significantly responsible for this is that the court and its procedural rules were the outcome of a bargaining process among states, reflecting compromises among state interests and understandings of criminal justice, and the institutional power dynamic between the like-minded group and powerful states. As suggested in Chapter 4, perhaps a fundamental weakness of prosecution within global legal governance as currently constituted, is that it does not provide the best method for maintaining fair trial standards while also effectively prosecuting those who may have committed mass atrocity crimes.

information, despite spending considerable effort on this issue in relation to the prosecution. See Bosco, *Rough Justice*.

³²¹ Makua W. Mutua, “Closing the ‘Impunity Gap’ and the Role of State Support of the ICC,” in *Contemporary Issues Facing the International Criminal Court*, ed. Richard H. Steinberg (Leiden: Martinus Nijhoff, 2016), 104.

6 Conclusion: Politics and the legitimacy of global legal governance

The narrative of the evolution of international human rights is generally told within IR as one of increasing protections through the development of international human rights and humanitarian law, the role of NGOs and civil society groups in promoting and protecting rights, the development of post-conflict justice mechanisms such as truth and reconciliation commissions, and the movement to end impunity for mass atrocities through international criminal justice.¹

In focusing on the rights of victims as heralding the achievement of greater justice through international prosecution, political scientists have tended to underappreciate the centrality of the rights of the accused to the legitimacy of global legal governance institutions. Consequently, the effect of political influences on legal processes that affect defendants is underexplored within IR.

The dissertation has demonstrated that defendant rights are particularly difficult to protect in a judicial environment characterized by: 1) the institutional power of states through the shaping of the rules by which courts are structured and operate; 2) the reliance of courts, in the pre-trial stage in particular, on external actors, especially states and IGOs; 3) a concern for victim rights that has arguably generated a blind spot among states and IGOs with regards to the rights of defendants; and 4) conflict between the political and legal goals of states in relation to international prosecution. The influence of the political goals and preferences of state and IGO

¹ E.g. Ruti G. Teitel, *Humanity's Law* (New York: Oxford University Press, 2011); Kathryn Sikkink, *The Justice Cascade* (London: W.W. Norton & Company, 2011); Wayne Sandholtz and Kendall Stiles, *International Norms and Cycles of Change* (New York: Oxford University Press, 2009); Ian Clark, *Legitimacy in International Society* (Oxford: Oxford University Press, 2005); and Barry Buzan, *From International to World Society? English School Theory and the Social Structure of Globalisation* (Cambridge: Cambridge University Press, 2004).

actors on courts shapes the legal dynamic between the prosecution and defense, to the detriment of defendants' rights to a fair trial.

While defendants at mass-atrocity trials are frequently referred to in international media as war criminals, without maintaining strong standards of legal justice there is effectively no presumption of innocence, and the process is at risk of sinking into a political show trial with the purpose of vengeance, not justice. Nevertheless, many political and NGO actors advocate successful international prosecution while paying inadequate attention to the legal rights of defendants. In doing so they harm the human rights objectives of deterrence, recognition of victim suffering, and transitional justice through prosecution.

As demonstrated in the research, weaknesses in legal legitimacy constitute miscarriages of justice. Justice has not been served when the structural and procedural flaws in defendant rights explored have failed to provide the accused with adequate opportunities to defend him- or herself. Occasionally the research has been able to demonstrate prejudicial outcomes, such as the wrongful conviction of Croatian general Tihomir Blaškić on most counts, as determined by the ICTY appeals chamber. A broader assessment of wrongful conviction through a systematic examination of appeals at the ICTY and ICC is outside of the scope of the dissertation and may serve as the basis for further research. The appeals examined in the research suggest that there are various examples of miscarriages of justice resulting from the interference of political factors in the legal process.

The first two sections of the conclusion provide a summary of the legal fairness findings of the research. They lay out the manner in which fairness has been shaped by the institutional power of states, and courts' political reliance on external actors. This includes how decision-making in creating legal rules is shaped by states' political goals, including a bias towards

prosecution, concern to contain costs, and an underappreciation of the necessity for an active role for defendants in criminal justice. In the final section, the chapter discusses the implications of the project for the future of global legal governance, focusing on the effect of the inconsistency between courts on the coherence of the international criminal justice system—indeed, whether a disparate group of courts can constitute a system at all, and what this means for the rights of defendants. It also examines the study’s implications for IR research.

Legality and institutional power: Amelioration despite interference

The level of adherence to the requirements of the legality of crimes and punishment has improved enormously since the IMT at Nuremberg, while various problems remain. The improvement is largely due to the expansion of international human rights and humanitarian treaty law since 1945, but also the increasing level of detail on crimes incorporated within court statutes, and the evolution of customary law. Particularly significant has been the inclusion of sexual offenses within all three mass atrocity crimes prosecuted at the tribunals analyzed—war crimes, crimes against humanity, and genocide. Sexual offenses were introduced to international criminal justice through the practice of the ICTY, and they were subsequently delineated in detail in the ICC statute.

Problems remain in terms of the contextual requirements of these crimes and some underlying offenses, with court interpretations providing a mixed picture. While sometimes clarifying the law, and thereby enhancing legality, courts have also on occasion strayed into creating new law, and thereby have effectively retroactively created prohibitions. Definitions of crimes are also shaped by state political preferences—this was particularly evident in decision-making at the Rome Conference of the ICC.

The legality of punishments has attained a lower level of adherence to that of crimes. Practice has tended to suffer from the enforcement of arguably retroactive penalties, due to insufficient clarity and specificity in sentencing guidelines within courts' statutory documents, enabling excessive judicial discretion. This has led at the ICTY to poor consistency in sentencing; at the ICC more convictions will be necessary to determine if it suffers from the same malady. Such weaknesses are a significant matter for the legitimacy of international courts as sentencing practice goes to the heart of one of the primary purposes of legal retribution—the appropriate punishment of offenders.

Yet adherence to the principle of legality is overall significantly less problematic within international criminal justice than is the level of defense parity. A central reason is that there has been less of a role for political interests shaping legality. Partly because of the Cold War expansion of international law, there has been broader agreement as to the legal requirements surrounding mass atrocities among states, as well as greater acceptance of expert positions on the legality of crimes. In addition, since the early postwar period, the concept of legality has become established as a fundamental legal principle at the domestic and international levels. There has therefore been less flexibility in the no-longer-nascent fields of international humanitarian and human rights law for interference by political and judicial actors through retroactive creation of crimes.

Defense parity and bias towards prosecution: Dependence on external support

Defense parity remains more problematic than does legality. This is partly due to the complex nature of criminal trials: the structures, procedures, and resources available to the accused interact in various ways, profoundly affecting the ability of the accused to experience a satisfactory defense. This remains inadequately appreciated by states, the Security Council, and other political actors involved in creating international courts.

Structural inequality within the institutional design of courts has left the accused and their counsel with a weaker voice in decision-making over such issues as budgets and procedural rule changes. This in turn has limited their ability to gain access to resources, and to be able to resist political pressure to speed up trials in ways detrimental to the ability of the defense to challenge the case before them. Resistance from states and IGOs reluctant to aid suspects, especially where a state may gain from non-cooperation with the accused, weakens the ability of defense teams to adequately investigate and locate exculpatory material.

There is little evidence of learning applied at the ICC to ameliorate the weaknesses in the structural position of the defense at the ICTY. The continued failure of international courts to incorporate the defense equally—along with the prosecution—into their institutional structure is problematic for their legitimacy and the evolution of international criminal justice as a whole. While states and IGOs have clearly seen that it is necessary to establish a separate institutional organ for the prosecution within courts, none created a similar office for defense counsel until the Special Court for Sierra Leone in 2003, in a “novel,” “innovative,” and “unique” step.² Only at the Special Tribunal for Lebanon—which has yet to try any suspects—is there a Defense

² Alison Thompson and Michelle Staggs, “The Defence Office at the Special Court for Sierra Leone: A Critical Perspective,” War Crimes Studies Center, University of California, Berkeley, April 2007, 53.

Office as an organ of the court with equal status to that of the Office of the Prosecutor.³ Without learning lessons on the need for robust adequacy of representation, subsequent international courts will not provide a high level of legal fairness, with all that entails for diminished legitimacy.

The prosecution and defense counsel at all international courts are dependent upon the cooperation of external actors to enable them to conduct pre-trial investigations and gather evidence. States control the territory in which research is conducted and material gathered, and so the effectiveness of investigations is especially dependent upon their cooperation. Other important actors include such IGOs as the UN and NATO, and such NGOs as Human Rights Watch and Amnesty International, which may have access to witnesses and other sources of evidence.

While both prosecution and defense have suffered from poor cooperation, defense teams have tended to be much more severely hampered, as they lack the advantages of institutional status and resources available to the prosecution; and chief prosecutors possess political and diplomatic contacts and influence denied to defense teams, which aid in encouraging and pressuring states to cooperate. In addition, states may perceive advantage to hindering the investigations of defendants who are prior military or political rivals. This especially applies to the ICC, where the mechanism of state referral of situations for investigation has been responsible for a considerable imbalance in investigatory support between the prosecution and defense.

³ STL, About the STL: Defence Office, www.stl-tsl.org/en/about-the-stl/structure-of-the-stl/defence/defence-office.

A major impediment to the legitimacy of international courts remains their creation as standalone institutions, rather than being embedded within an authority structure similar to that of the domestic criminal courts within liberal criminal justice systems that they are modeled on. Lacking territorial authority, international courts are unable to guarantee parity of access to evidence. The state creators of international courts have not provided them with adequate tools for encouraging external cooperation, and judges have tended to insufficiently recognize that an imbalance in access to evidence is a significant cause for concern and an issue that the courts themselves need to address. Especially considering the adversarial nature of international criminal trial procedure, the statutes and RPEs of existing courts do not adequately take into account the requirements of defense counsel to conduct an effective investigation for exculpatory material.

In terms of evidentiary procedures, the ability of defendants to acquire evidence from the prosecution (the obligation of disclosure), and counsel's ability to cross-examine prosecution witnesses suffer from significant, and in some cases growing, weaknesses. Disclosure has suffered from problems caused by the perhaps inevitably large scope of mass atrocity trials, especially those of political and military leaders. Cross-examination has been negatively impacted by the methods adopted to respond to UN and state pressure on courts to speed up trial proceedings, which have involved reducing the proportion of witnesses who testify in person, and therefore reducing opportunities to challenge the prosecution's evidence. Cost and time pressures have impacted the ICTY since before the end of its first decade of operation, and similar pressures are appearing at the ICC.

The research acknowledges that due process protections for the accused have been a factor in the length and cost of trials at international courts, as they have been domestically.⁴ However, the diminished efficiency legitimacy of tribunals, due to the widespread perception of the excessive length of trials,⁵ has to be balanced against the necessity of maintaining adequate legal protections for defendants, as this is fundamental to the legitimacy of prosecution within global legal governance.

IR scholars demonstrate limited understanding of the importance of institutional design to the quality of legal fairness within international criminal courts, reflecting an underappreciation of the role of defendants as active participants in criminal trials. There is consequently little awareness of how defendant rights are affected by the structure of a court and the level of cooperation forthcoming from external actors. With a similarly limited understanding of criminal procedure, IR scholars tend not to recognize how the rules established for a court, and the political influences on changes to those rules, may impact the ability of accused to present an adequate defense. They similarly tend not to appreciate how the distinct legal and political relationship of each court with external actors shapes the ability to protect defendant rights. Yet a recognition of the central place of criminal procedure in generating legal fairness, and how this is weakened by political influences, are essential to an assessment of the legitimacy of global legal governance that incorporates the role of the defendant, who is inadequately recognized as the key *actor* in criminal trials.

⁴ See, e.g., Robert G. Bone, "Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness," *Boston University Law Review* 83 (2003): 485-552.

⁵ See, e.g., *The Economist*, "Justice on Trial," February 28, 2004, www.economist.com/node/2460574; Geoffrey Robertson, "Outstanding Questions," *Assessing the Legacy of the ICTY*, ed. Richard H. Steinberg (Leiden, The Netherlands: Martinus Nijhoff, 2011), 18; and Rupert Skilbeck, "Funding Justice: The Price of War Crimes Trials," *Human Rights Brief* 15, no. 3 (2008): 6-10.

The future of global legal governance and implications for IR research

Arguably there is no international criminal justice system per se, only a disparate group of courts. International courts apply a reasonably coherent set of criminal laws, which has aided in the relative consistency of legality between them, but each court also has jurisdiction over the (somewhat differing) laws as laid down in its own statute and there is no agreement as to the value of precedent, which would facilitate consistency in interpretation. A hierarchy between courts, as tends to operate within domestic legal systems, would help towards achieving coherence by requiring adherence to common standards through acceptance of authoritative decisions from outside each court.

The problem is much greater in relation to defense parity, as each court has established its own distinct set of structures and procedures for protecting the accused. There is no clear learning over time within and between courts which would indicate a move towards greater parity. Therefore there is no significant indication that standards are trending towards an improvement for defendants, and no guarantee that those defendants facing prosecution at different courts will achieve anything approaching equal treatment. Without a coherent justice system characterized by consistent structures and procedural standards, and the universal acceptance of precedent within a judicial hierarchy, there is also little prospect of an amelioration.

At the domestic level, liberal criminal justice systems are embedded within a particular community and evolve according to its concerns. The operation of global legal governance assumes that common values are defended by the international community of states, justifying an

international duty to punish offenders.⁶ This position is undermined by the diverse understandings among states of the standards of justice to be applied by international courts, which is demonstrated throughout the research by the attitudes and actions of states in creating, maintaining, and cooperating with such courts.

IR scholarship has not adequately explored defendant rights as a source of legitimacy within global legal governance. By analyzing these rights, this study complements the extensive and growing body of research on other sources of legitimacy for international law and institutions, including the content of laws; non-legal inputs, such as transparency and accountability; and institutional outputs such as the number of court decisions.⁷

The project raises questions about the theoretical and empirical assumptions of IR research on global governance, and expands scholarship in the theoretical exploration of the legitimacy of international criminal justice institutions by demonstrating the value of applying legal theory to the analysis of legitimacy and incorporating an active role for defendants. While such institutions are extensively analyzed within IR, the study of legal justice is underdeveloped.

The research highlights the dangers of IR scholars and other public commentators claiming that trials are fair without an adequate understanding of what fairness towards defendants consists of, and without effectively exploring these issues in relation to the rules and practice of

⁶ Thomas Marguerite, "International Criminal Law and Human Rights," in *Routledge Handbook of International Criminal Law*, ed. Schabas and Bernaz, 435.

⁷ E.g. Jens Steffek, "The Legitimation of International Governance: A Discourse Approach," *European Journal of International Relations* 9, no. 2 (2003): 249-75; Jan Wouters and Nicolas Hachez, "Transitional Societies and the Rule of Law: A Benchmarks Approach," Working Paper No. 47, Leuven Centre for Global Governance Studies, Catholic University Leuven, March 2010; and Jason Ralph, "Anarchy is What Criminal Lawyers and Other Actors Make of It: International Criminal Justice as an Institution of International and World Society," in *Governance, Order, and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court*, ed. Steven C. Roach (New York: Oxford University Press, 2009), 133-53.

tribunals. The study contributes to a more complete understanding of global legal governance by demonstrating that the legitimacy of legal institutions can only be understood if it is recognized that law is a distinctive social process, and that it is shaped at the international level by the influence of political actors on the principles underlying law's legitimacy.

Appendix: List of interviews

Behar, Elliott, former prosecutor, ICTY, San Francisco, Calif., January 30, 2016.

Goldstone, Richard, former chief prosecutor, ICTY, New York, October 17, 2014.

Guy-Smith, Gregor, defense attorney, ICTY, and former ADC-ICTY president, San Francisco, Calif., August 12, 2015.

Robinson, Peter, defense attorney, ICTY and ICTR, and former ADC-ICTY Executive Board member, San Francisco, Calif., August 27, 2015.

Rohan, Colleen, defense attorney, ICTY, and former ADC-ICTY president, Berkeley, Calif., November 12, 2015.

Various former prosecutors, defense attorneys, and other anonymous legal experts who have either worked at or closely observed the ICTY and ICC, San Francisco, Calif., London, and The Hague, The Netherlands, August 2015–January 2016.

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