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The Problem of Purpose in International Criminal Law

Patrick J. Keenan

University of Illinois College of Law

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THE PROBLEM OF PURPOSE IN INTERNATIONAL CRIMINAL LAW

Patrick J. Keenan*

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INTRODUCTION

As the International Criminal Court enters its second decade of operation, and the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda slowly wind down their operations, it is an opportune time to examine the purposes of international criminal law.¹ What good is international criminal law? What can it accomplish? What is its purpose?

* Professor of Law, University of Illinois College of Law. For helpful comments and conversations, I am grateful to Andy Leipold, Eric Johnson, and Verity Winship.

1. The International Criminal Court was established by the Rome Statute, adopted in 1998, and came into existence in 2002 after the Rome Statute was ratified by the requisite number of countries. See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (1998). The ICTY and ICTR are in the process of putting themselves out of business. Indeed, many of their functions have been combined and turned over to the United Nations Mechanism for International Criminal Tribunals. See S.C. Res. 1966, U.N. Doc S/RES/1966 (Dec. 22, 2010) (creating the Mechanism for International Criminal Tribunals and establishing its responsibilities and jurisdiction). The ICTY was created by the U.N. Security Council in May 1993, well before the end of hostilities in the former Yugoslavia. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). Although the ICTY closed its final investigation in 2004, it has taken many years to locate and arrest the remaining defendants. The ICTY has announced that it expects to complete its work by 2017. See Completion Strategy, Interna-

There exists no consensus among scholars and advocates about the purposes of international criminal law, and this lack of clarity affects how the tribunals operate and can undermine their effectiveness. International criminal tribunals have quickly become part of the landscape of conflict resolution and transitions from a period of oppression to peace and stability. Those involved in negotiating the end of the conflict in the Balkans have argued that the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) was essential to the resolution of that conflict.² Even before the genocide in Rwanda was over, some observers were calling for an international criminal tribunal.³ And since the creation of the International Criminal Court (ICC), it has become almost routine for advocates to call for an ICC investigation of one side or another in almost every widespread conflict.⁴

Despite the growing popularity of international criminal tribunals,⁵ they are limited in many ways. International criminal tribunals exist as a

tional Criminal Tribunal for the Former Yugoslavia, at <http://www.icty.org/sid/10016>. The ICTR, which was created by United Nations Security Council Resolution 955 in November 1994, announced in February 2015 that it expected to complete its business during the calendar year 2015. See S.C. Res. 955, U.N. Doc S/RES/955 (Nov. 8, 1994); Press Release, International Criminal Tribunal for Rwanda, ICTR Expected to Close Down in 2015 (Feb. 2, 2015).

2. See, e.g., *Human Rights Group Calls for Tribunal on Bosnian War Crimes*, TIMES (London), Aug. 13, 1992 (reporting that advocacy groups were calling for the creation of an international criminal tribunal to address atrocities committed in the Balkan wars).

3. See Julia Preston, *U.N. to Probe Genocide in Rwanda*, WASH. POST, July 1, 1994, at A15 (reporting that the U.N. planned to initiate an investigation of the genocide to use as evidence in prosecutions before an international criminal tribunal, which had not yet been formed). By the end of July 1994, just as the genocide was ending, the Prime Minister of Rwanda announced plans to initiate prosecutions of people involved in the genocide and to support a plan to create an international criminal tribunal. *Rwanda Plans Prosecutions*, N.Y. TIMES, July 26, 1994, at A6.

4. From the time it came into being through the end of 2013, the ICC received upwards of 10,000 requests to open a case. *Preliminary Examinations*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/Pages/communications%20and%20referrals.aspx (last visited Aug. 1, 2016). Just in the past five years, the ICC has conducted preliminary examinations—indicating that the underlying complaint was at least plausible—of situations in Afghanistan, the Central African Republic, Colombia, Cote D'Ivoire, Georgia, Guinea, Honduras, Iraq, Korea, Mali, Nigeria, Palestine, and Ukraine. See REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2014 (Dec. 2014); REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2013 (Nov. 2013); REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2012 (Nov. 2012); REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2011 (Dec. 2011).

5. There is no consensus as to why international criminal tribunals have become such a prominent part of transitional justice. Pricilla B. Hayner, in her essential book *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* (2d ed. 2011), presents criminal trials as just one of many components in a comprehensive system of transitional justice. See *id.* at 8–10 (arguing that the responses to past abuses may include trials, lustration programs, reparations, attempts to establish a comprehensive history of the abuses, and truth commissions). Indeed, Hayner does not position international criminal tribunals as essential in every case. Other scholars have advanced different explanations for the relative boom in international criminal tribunals. Some argue that international criminal tribunals give states a way to avoid two bad choices: reacting to widespread violence with an armed response or respond with words of condemnation but no actual action. See Fausto

sometimes awkward amalgam of the coercive aspects of a criminal court and the consensual aspects of most other international legal regimes.⁶ They punish criminals, but have no police force or ability to force states to arrest suspects or deliver them to the court. They address what are often intensely local harms, but do so in an international forum, with judges and lawyers from around the world. Even supporters of the ICC admit that it is expensive, moves at what seems like a glacial pace,⁷ and has so far focused almost exclusively on African defendants.⁸ Critics of the ICC argue that it has not accomplished any of the things that its proponents promised and that it runs the risk of exacerbating volatile situations.⁹ Part of the problem is that there is no clear understanding of what international criminal tribunals are created to accomplish. Are they a venue for victims to recount their stories as part of their healing process? Are they political tools, created to solve ongoing conflicts? Are they weak courts created out of guilt by the international community after it failed to prevent atrocities? With so many possible purposes, and without clarity about what the purposes of international criminal tribunals should be, international criminal tribunals will likely continue to disappoint its critics and risk failing victims and others.

I address the problem of purposes in this Article, with two principal objectives. The first is to sort through the competing theories to identify the core purposes of international criminal law. The second is to show how those purposes are or can be put into effect in actual cases. These questions are important because the purposes for which the law is deployed significantly influence *how* it is deployed. Prosecutors bring different kinds of cases and argue different theories based at least in part on what they

Pocar, *The Proliferation of International Criminal Courts and Tribunals*, 2 J. INT'L CRIM. JUST. 304, 307 (2004). Thomas Buergenthal has argued that the increased legalization of problem solving in international affairs is a salutary development because it can have "a socializing effect on states" that leads to greater acceptance of legal obligations and the rule of law. Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is it Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 275 (2001).

6. See Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 42 STAN. J. INT'L L. 39, 40 (2007) [hereinafter Sloane, *Expressive Capacity*] (arguing that international criminal law "combine[s] the paradigms of two very different legal fields: (1) classical international law—a profoundly consensual body of law . . . ; and (2) national criminal law—a profoundly coercive body of law").

7. See, e.g., *The International Criminal Court Loses Credibility and Cooperation in Africa*, THE ECONOMIST, Feb. 19, 2011, at 66 (noting that even "fans of the International Criminal Court . . . admit that its proceedings are interminable and expensive").

8. For a thorough treatment of the ICC's focus on Africa, see generally Alexis Arieff, et al., INTERNATIONAL CRIMINAL COURT CASES IN AFRICA: STATUS AND POLICY ISSUES, Congressional Research Service Report RL34665 (July 22, 2011). See also Ovo Imoedemhe, *Unpacking the Tension Between the African Union and the International Criminal Court: The Way Forward*, 23 AFRICAN J. INT'L & COMP. L. 74, 102–03 (2015) (arguing that perceptions that the ICC has unfairly focused on Africa are inaccurate).

9. For a pointed review of these criticisms, see generally Eric Posner, Commentary, *The Absurd International Criminal Court*, WALL ST. J., June 10, 2012.

hope to achieve. For example, in the domestic context, prosecutors might choose to prioritize domestic violence cases to address that social problem, long neglected by law enforcement, at the expense of other kinds of cases.¹⁰

The purposes of an international criminal tribunal can also influence its relationship with the local population. The crimes that produce international prosecutions often involve hundreds or thousands of victims and similar numbers of perpetrators.¹¹ If the tribunal aims to tell the story of the past as completely as possible, it might provide incentives for perpetrators to participate that would not be present if the goal were to punish wrongdoers as harshly as possible or to fully vindicate the interests of victims.¹² Alternatively, if prosecutors aim to vindicate the interests of as many victims as possible, they might focus on broad-based crimes such as mass rapes, rather than focusing on crimes relating to how combatants obtained or maintained power during the time of conflict.¹³

This Article proceeds in three parts. First, I survey the recent history of international criminal law and institutions with the goal of showing how the current state of the law came to be. International criminal law traces its roots to international humanitarian law, and these roots continue to influence the law as it is practiced today. Prosecutors today have substantial freedom to bring the cases they deem appropriate and to structure those cases as they wish.¹⁴ But they do this within constraints that have direct connections to the history of international criminal law. Even with substantial freedom, modern prosecutors must fit cases into one of three

10. See generally COMMITTEE ON LAW AND JUSTICE, WHAT'S CHANGING IN PROSECUTION 8–10 (Philip Heymann & Carol Petrie eds., 2001) (describing process by which prosecutors prioritize particular types to cases to achieve social policies). For a discussion of the issue in the international context, see, e.g., Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 299–301 (2012). DeGuzman argues that ICC prosecutors should select cases in order to achieve the goal of enhancing the ICC's legitimacy with various constituencies. See *id.*

11. See, e.g., Ewa Tabeau & Jakub Bijak, *War-Related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results*, 21 EUROPEAN J. POPULATION, 206 & 210 (2005) (reviewing a range of estimates of casualties to conclude that approximately 102,000 people were killed and more than 2,000,000 were displaced); Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, 6 J. GENOCIDE RES. 85, 93 (2004) (estimating approximately 175,000–210,000 active participants in the genocide).

12. To be sure, addressing the interests of victims is a complex and difficult task, particularly because there is currently little reliable research on the relationship between prosecution and victim well-being. See generally Jamie O'Connell, *Gambling With the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. L.J. 295 (2005) (surveying the existing literature on the ways that victims of human rights violations are affected by legal action against perpetrators).

13. See generally Mark Findlay, *Activating a Victim Constituency in International Criminal Just.*, 3 INT'L J. TRANSITIONAL JUST. 183 (2009) (describing the various interests of different types of victims of international crimes and arguing in favor modifications to international trials to better account for victims' interests).

14. See *infra* discussion in Part III.

categories: genocide, war crimes, and crimes against humanity.¹⁵ They possess and have used their freedom to create new crimes,¹⁶ but do so within well-established historical rules.¹⁷

In Part II, I work through what I mean by purpose. It is a concept that is frequently used in the literature on international criminal law, and criminal law more generally, but it is not often precisely defined. I argue that, broadly speaking, scholars and advocates use the idea of purpose to denote three distinct concepts. Many of those involved in the creation and administration of international criminal tribunals use purposes to mean the motivations and political considerations that support the creation of a tribunal.¹⁸ For these scholars and advocates, a tribunal's purposes are the geopolitical goals that were espoused by those involved in creating the tribunal. These might include a wish to end an armed conflict, to mollify a recalcitrant party during complex peace negotiations, or even the unstated goal of assuaging the guilt felt by those who knew of a humanitarian crisis and did nothing to prevent or shorten it.¹⁹ Other scholars, many of whom

15. See, e.g., Rome Statute of the International Criminal Court, art. 5, July 17, 1998, 37 I.L.M. 999 (1998) [hereinafter Rome Statute] (listing genocide, crimes against humanity, war crimes, and crime of aggression as crimes within the ICC's jurisdiction); Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (amended July 7, 2009), arts. 3–5 (listing war crimes, genocide, and crimes against humanity as crimes within the ICTY's jurisdiction), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf; Statute of the International Criminal Tribunal for Rwanda (amended Jan. 31, 2010), arts. 3 & 4 (listing genocide and war crimes as crimes within the ICTR's jurisdiction), http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf.

16. See generally Micaela Frulli, *Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a "New" Crime Against Humanity*, 6 J. INT'L CRIM. JUST. 1033 (2008) (describing legal theory used by prosecutors to convince the Special Court for Sierra Leone to recognize a novel and distinct crime against humanity, including the need to harmonize the new crime into the existing categories of crimes against humanity).

17. Principal among these constraints is the so-called "legality principle," or *nullen crimen sine lege*. Under this principle, prosecution is permissible only if, at the time of the events, the activity for which the defendant is being prosecuted was defined as a crime and persons who engaged in it were subject to individual prosecution at the time of the events. See, e.g., Rome Statute art. 22 (incorporating the legality principle into the statute of the ICC).

18. See, e.g., Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT'L ORG. 655, 681–86 (2003) (analyzing the political and other factors underlying the creation of the modern international criminal tribunals).

19. The creation of the ICTY, coming as it did before the hostilities were over, was particularly fraught with political tradeoffs. For a full exploration of these issues, see WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 28–30 (2006) [hereinafter SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS*] (describing the negotiating positions of the parties involved in the creation of the ICTR, including Rwanda's opposition to the final structure). With respect to U.S. inaction and regret with respect to the genocide in Rwanda, see, e.g., SAMANTHA POWER, *A PROBLEM FROM HELL* 373–74 (arguing that the "Clinton administration did not actively consider U.S. military intervention [in the Rwandan genocide], it blocked the deployment of U.N. peacekeepers, and it refrained from undertaking softer forms of intervention"), and James Bennet, *Clinton Declares U.S., With World, Failed Rwandans*, N.Y. TIMES, Mar. 26, 1998, at A1 (reporting President Clinton's regret at the

work in the law and philosophy tradition, use purposes to mean the legitimate justifications for the imposition of punishment.²⁰ For these scholars, the purposes of punishment are those moral bases that justify punishing wrongdoers; these issues are distinct from the reasons supporting the creation of a tribunal. Finally, some scholars and advocates use purposes to signify the objectives of the tribunal.²¹ On this approach, the purpose of prosecution is to pursue particular social and legal goals. To preview my conclusion, I argue that the concept that best fits the institutional capacity of international criminal tribunals is the objectives approach.

In Part III, I argue that there are three policy objectives that international criminal tribunals should attempt to achieve, and I show how these objectives are or can be achieved in practice. To again preview my conclusions, I argue that the appropriate purposes for international criminal tribunals are to address widespread harms that affect many individuals as a way to ensure a full accounting of the atrocities, target those crimes that cause the greatest lingering social harm to victims, pursue other interests of victims in specific ways, including using the criminal process as a way to document the events that gave rise to the tribunal. I argue that international criminal tribunals should focus on widespread harms and those defendants whose conduct affected as many people as possible as opposed to attempting to identify those most responsible for generating the conflict in the first place. In practical terms, this means that prosecutors would focus on systematic crimes—those with many perpetrators and victims—rather than building cases against a very small number of politically powerful individuals. Targeting those crimes that caused the greatest stigma to victims is a way to use the authority of the tribunal to condemn, as wrongful, conduct that occurred during the conflict. For example, in practice this could mean prosecuting a range of cases about sexual violence as a way to condemn, as wrongful, behavior that might have been widespread during the conflict.

With respect to pursuing the interests of victims, I argue that this purpose can be put into effect in important but limited ways. Prosecutors can select cases that carry the greatest social stigma as a way to validate the experience of victims—to stamp conduct as wrongful and illegal even if that conduct was widespread during the conflict. Similarly, international criminal trials can be used to create a first draft of the history of the conflict. Such a history will be imperfect and incomplete, but valuable nonetheless.

I reach these conclusions for pragmatic reasons. I argue that these purposes are appropriate because they best fit the institutional capacity of

United States' failure to act during the genocide and his increased support for international tribunals to prosecute those accused of atrocities).

20. See, e.g., MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 84 (1997) [hereinafter MOORE, *PLACING BLAME*] (describing the reasons provided to justify criminal punishment).

21. See generally Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHICAGO-KENT L. REV. 329 (2008).

international criminal tribunals. Any discussion of the appropriate purposes of international criminal law must be mindful of the institutions through which the law is deployed and doctrinal consequences of prioritizing some purposes over others. International criminal tribunals are closely linked to the victim and perpetrator communities, and their actions—who is apprehended, prosecuted, and punished—have an engaged and informed audience. Prosecutors at international criminal tribunals have many cases to choose from, many more than they can actually prosecute. Prosecutors at international criminal tribunals are not well-positioned to create the kind of political change that might prevent future conflicts. For example, in the case of the former Yugoslavia, even as the ICTY has received widespread attention, its actions do not appear to have changed perceptions as to what caused the conflict.

Similarly, the operations of the international tribunals do not appear to have had the didactic effect that some scholars have imagined. Some argue that the tribunals have the potential to demonstrate how best to conduct criminal investigations, or to hold accountable those accused of terrible crimes. They do not appear to have had these effects. Instead, people view the tribunals as operating fairly, if inefficiently, if the tribunals prosecute their opponents. To be clear, these observations are consistent with the available evidence but have not been demonstrated in any careful empirical studies. But they are consistent with the institutional capacity of international criminal tribunals. Prosecutors are well positioned to select cases that emphasize the wrongfulness of particular conduct, such as sexual violence. The selection of cases and defendants can signal to the attentive audience of victims and others that the conduct is illegal and wrongful.

Prosecutors are not in a good position to convince victims or others that their understanding of the larger conflict is wrong. Thus, when prosecutors target political leaders as a way to make a point about the politics of the conflict, it is unlikely to succeed. But when they select cases as a way to signal the wrongfulness of particular conduct, this message is much more likely to be effective. Prosecutors should not act as sovereign agents—in the way of domestic prosecutors, deciding whether to ignore or attack wrongful conduct on the basis of a prediction of the geo-political effects of their actions.²² That is a role for those who create the tribunal, not those who operate it. And prosecutors should not be overly influenced by the relative moral blameworthiness of perpetrators, as is sometimes the case with domestic prosecutors. All of the crimes that fall within the purview of international criminal tribunals are reprehensible. International criminal law only includes large-scale, violent, and exceptionally harmful conduct. When it comes to whether the underlying conduct should be condemned, there are almost no close cases. To be sure, there are close cases

22. For a discussion of the politics of case selection at the ICC, see Cale Davis, *Political Considerations in Prosecutorial Discretion at the International Criminal Court*, 15 INT'L CRIM. L. REV. 170 (2015). In contrast to my argument, Davis argues that, under specified conditions, prosecutors should consider the “political effects of the ICC’s involvement in a situation or case.” *Id.* at 172.

on the facts: did this defendant do the acts with which he is charged, is a particular witness credible, and the like—and on the law—whether a particular legal theory fits the facts, for example. Instead, prosecutors should use international criminal tribunals to accomplish a set of limited but clear objectives.

Before moving on, a short caveat is in order. Discussions about the purposes of international criminal law sometimes involve arguments about whether international criminal law is law or something else.²³ In my attempts to clarify the appropriate definition of the purposes of international criminal law, I take as a given that international criminal law is law and that it can affect the behavior of states and other actors.²⁴ For the most part, the mechanisms by which the law exerts its influence are distinct from the questions I address. In addition, I do not make an empirical case regarding the extent to which international criminal law actually achieves the policy goals some have ascribed to it.²⁵ Instead, I identify the

23. To be sure, there is robust debate around this issue. For example, Jack Goldsmith and Eric Posner argue that international law has no independent pull on the real behavior of states. JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). They argue instead that states pursue their own self-interest and that states conform their behavior to international law only to the extent that the law serves their existing interests. *Id.* For a contrary argument, see generally MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* (2008). O'Connell's book, written in part as a response to Goldsmith and Posner, addresses the questions around whether international law (and by extension, international criminal law) constitutes law or merely a set of norms and institutions through which states pursue their own interests. *Id.* She argues for a variety of reasons that international law has an independent influence on the behavior of states and other international actors. *Id.*

24. For a positive theory of how international law affects the behavior of states, see generally RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013). Goodman and Jinks specify the social, political, and other mechanisms by which international law influences state behavior. *Id.*

25. There have been a few attempts to use empirical or quasi-empirical approaches to determine whether and how international criminal law, or discrete aspects of it, affects the behavior of potential wrongdoers. See, e.g., Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities*, 84 WASH. U. L. REV. 777, 799–806 (2006) [hereinafter Ku & Nzelibe, *Deter or Exacerbate?*] (concluding, based on analysis of the fates of coup participants in certain countries in Africa, that international criminal tribunals are not likely to deter humanitarian abuses); Lilian A. Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 INT'L J. HUM. RTS. 349, 359–61 (2005) [hereinafter Barria & Roper, *How Effective Are International Tribunals*] (arguing, based on data showing the inability of international criminal tribunals to successfully apprehend suspects, that the tribunals are unlikely to have any significant deterrent effect). In contrast, see Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 9 (2001) (arguing, based on review of cases from the ICTR and the ICTY, that the “empirical evidence suggests” that the tribunals “have significantly contributed to peace building in postwar societies” among other benefits). To date, none of this work has provided a fully satisfying answer to this puzzle. Part of the reason is that different researchers ask slightly (or significantly) different questions, making it difficult to harmonize their findings. This is particularly true in the context of international criminal law violations because of the relatively small number of incidents, taking place in vastly different contexts and at different times. In addition, it is also difficult because the potential wrongdoers inevitably make decisions in a complex, highly

goals of the law and then show how different doctrinal formulations, legal theories, or priorities would or have affected the outcome of cases.

I. INTERNATIONAL CRIMINAL LAW AND INSTITUTIONS

International law developed as a way to manage problems: ensuring the safe passage of emissaries of a sovereign in the territory of enemies, conducting business among people of different cultures, resolving disputes over contested property, and the like.²⁶ The problem of organized violence among people of different cultures has existed since the earliest recorded history, and for almost as long there have been rules to manage the use of violence or address its consequences.²⁷ Contemporary international criminal law is a modern descendent of these early legal systems. Doctrinally, international criminal law is today an amalgam of several distinct areas of law, including humanitarian law (that is, the laws of war), human rights law, and criminal law concepts from domestic legal systems.²⁸ Although the component parts are still occasionally apparent in particular applications of the law, contemporary international criminal law has evolved into a distinct doctrinal specialty in the way that common law doctrines evolve, with abundant borrowing, statement, and restatement of rules and concepts. The history of international criminal law shows both that it developed as a way to address a particular set of problems and that it shares many characteristics with international law more generally.

dynamic environment, making it extremely difficult to identify the factors that affect their decisions, much less estimate with any accuracy the contribution of any single factor to their decisions. For just one example of this complexity, see generally Dara Kay Cohen, *Female Combatants and the Perpetration of Violence: Wartime Rape in the Sierra Leone Civil War*, 65 *WORLD POL.* 383 (2013) (describing, based on interviews and survey data, the various factors that contributed to female combatants' decisions to participate in violence during the civil war in Sierra Leone).

26. See Baron S.A. Korff, *An Introduction to the History of International Law*, 18 *AM. J. INT'L L.* 246, 248 (1924) [hereinafter Korff, *History of International Law*] (arguing that ancient systems of international law arose to address issues relating to "international obligations" and "channels of communication" among nascent states and rulers, giving rise to "established and mutually recognized certain ways of international behavior . . . relating in particular to war and its conduct"). To be sure, the history of international law is a vast topic, one subject to continued scholarly debate and rediscovery. For a useful overview of this history and scholarly debates about how the history of international law should be interpreted, see generally Bardo Fassbender & Anne Peters, *Introduction: Towards a Global History of International Law*, *THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 1, 19–24 (Bardo Fassbender & Anne Peters eds. 2012) (describing scholarly developments in the historiography of international law).

27. See DAVID BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY* 208 (2006) (hereinafter BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY*) (arguing that "there is enough evidence to suggest that there were certain rules of conduct in warfare that were consistently observed by ancient States").

28. See Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 *TEXAS INT'L L.J.* 237, 244–49 (1998) (analyzing the history of international criminal law and showing how disparate doctrinal areas of the law helped to create modern international criminal law).

In tracing this history, I focus on three themes, developed in the parts that follow. The first is that international criminal law has become increasingly specific and well-defined. The earliest regulations of violence were largely based on adherence to principles of fairness, restraint, and the like. Modern international criminal law has evolved to contain specific definitions of a wide range of crimes. It is specific and largely codified, even as the particulars of crimes continue to be subjects of contestation in specific cases.²⁹ The second theme that emerges from a survey of the history is the importance of individual responsibility as opposed to state or collective responsibility. Individuals are charged and punished as individuals, not as representatives of their states. The final theme that emerges is that the harms visited upon victims play an increasingly large role in the way that crimes are charged and defined. A full account of the causes of the changes in international law—or even international criminal law—is beyond the scope of this Article, but it is useful nonetheless to investigate at least some of the most important strands of this history. That international criminal law would end up in its current form was not inevitable. The law has developed as it has in reflection of widespread atrocities, the emergence of the rights and recognition of individuals under the law,³⁰ a widespread redefinition of the social roles of women and girls and the harms visited upon them during wartime,³¹ and a number of other factors.

A. *Early Regulation of Conflict and the Conduct of War*

For international criminal law, perhaps even more than other disciplines of international law, the very early history is important.³² Even

29. See Int'l Crim. Ct. [ICC], *Elements of Crimes*, ICC-PIDS-LT-03-002/11_Eng (2011) (listing detailed elements for each of ninety-six crimes), https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimes_Eng.pdf.

30. See, e.g., Mark Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT'L L.J. 61, 74 (1984) (arguing, based on history of international law, that it "is wrong, both in terms of describing reality and in terms of preferential expression, for the theory of international law to hold that individuals are outside the ambit of international law rules").

31. See TUBA INAL, *LOOTING AND RAPE IN WARTIME* 133–54 (2013) (describing the process by which the prohibition of rape was incorporated into the statute of the International Criminal Court); see also CHISECHE SALOME MIBENGE, *SEX AND INTERNATIONAL TRIBUNALS* 49–57 (2013) (describing the development of human rights instruments designed to address gendered violence during times of armed conflict).

32. This is not to suggest that international criminal law was the first or the most prominent of the early moves toward forms of international law. It was not. Instead, the important points are that the antecedents of international law developed very early, and that these antecedents contributed to contemporary international law. Regarding the early development of international law, see Korff, *History of International Law*, *supra* note 26, at 246–47 (arguing that "as soon as there developed a cultural center of a certain level of civilization, a state of some prominence, there grew up simultaneously relations with the outside world that soon took the shape of a whole system of institutions"). Importantly, even in antiquity these institutions were not limited to Western civilizations and were not exclusively modern developments. See *id.* at 247 (noting, based on survey of historical evidence, that "every civilization possessed whole systems" of institutions and that "they had everywhere many traits in common and [did] not belong exclusively . . . to Europe").

before the advent of modern states or the development of anything like formal international law, there were well-recognized attempts to manage the use and consequences of violence among people of different cultures.³³ There were two sets of legal (or law-like) regulations: those pertaining to the commencement of hostilities, and those pertaining to the uses of violence once war had begun.³⁴ The rules regarding the legitimate justifications for war operated as brakes on leaders who might otherwise rush to war, thereby preserving their “superior moral position in the ensuing conflict.”³⁵ These rules began as norms of behavior with origins in religion, custom, and reason, and gradually evolved into rules with law-like characteristics.³⁶ For example, the ancient Israelites distinguished between obligatory and optional wars.³⁷ This started as a religious understanding—a belief about ecclesiastical commands—but, over time, evolved into a legal doctrine, complete with specific rules that provided independent reasons for action.³⁸ Optional wars were commenced to take territory or weaken potential enemies.³⁹ Mandatory wars were those undertaken to protect the existence of the state or safeguard its land.⁴⁰ Similarly, the Romans developed a concept of just war: war that could be commenced because of a legitimate reason.⁴¹

The second broad category of rules pertained to the conduct of hostilities. One version of these rules permitted the use of different levels of violence depending on the enemy.⁴² For example, when the Israelites engaged in an obligatory war, there were no restraints on the use of violence.⁴³ Combatants prosecuting such wars, because they were viewed as a response to an existential threat, could use any level of violence they believed necessary. In contrast, when engaging in optional wars, combatants were subject to restraints on the level of violence and targets of violence.⁴⁴ For example, in an optional war, the treatment of enemy civilians was more humane (at least by local standards obtaining at the time), and the

33. See, e.g., BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY*, *supra* note 27, at 242 (arguing, based on historical evidence, that there were a set of “deeply observed restraints on the conduct of hostilities” even in ancient times). In this part, I draw heavily on Bederman’s book, which has become the definitive history of international law in ancient times.

34. *Id.* at 208–09 (detailing the “justifications for commencing hostilities”); *Id.* at 242 (arguing that there was a set of “deeply observed restraints on the conduct of hostilities” after war had begun).

35. *Id.* at 209.

36. *Id.* (there was a “subtle transformation of religion and ritual into discourse on legal reason”).

37. *Id.*

38. *Id.* at 209–10.

39. *Id.* at 210.

40. *Id.*

41. *Id.* at 222–24.

42. *Id.* at 242.

43. *Id.* at 243–44.

44. *Id.* at 244.

enemy was given a chance to avoid the worst violence by surrendering.⁴⁵ In other societies, there were similar rules regarding the kinds and levels of violence that could be used in warfare. The result was that “certain places, persons and times . . . [were] sheltered from the effects of warfare,” and sheltered places and persons were deemed outside the set of legitimate objects of violence.⁴⁶ The rules, like those regulating the resort to war in the first place, were formalized and specific, and operated as reasons for action independent of political or ecclesiastical considerations that were also in play.

The history of the role of international law in ancient times is subject to the same caveats that should accompany all attempts to link ancient history to contemporary legal institutions or doctrine. It is simply not possible to follow a single thread that leads directly from the practices of the ancient Israelites or Romans to present-day international criminal tribunals. I do not claim that the rules of today are the same as those of ancient times or those modern rules are the result of uninterrupted progress. Instead, what the ancient history helps to accomplish is to show that the “idea held in antiquity that international relations were to be based on the rule of law”⁴⁷ similarly holds today. The specific rules for each situation are less important for my purposes than is their very existence. The development of these rules shows the importance that ancient rulers gave to the use of violence and the need to regulate its use with articulable rules.⁴⁸ The existence of rules also shows that even in antiquity, there was a shared notion that violence could and should be limited, and that its use needed to be justified.⁴⁹ Thus, today’s prohibitions are not modern quirks or anomalies; they trace their roots to ancient practice.

Another important early attempt at regulation of violence is the Peace of Westphalia. The origins of modern international law are typically traced to the Peace of Westphalia, the treaty that ended the Thirty Years War in 1648. Scholars have debated the import and legacy of Westphalia for centuries. Some argue that Westphalia was but one step—albeit an important step—toward greater legalization in international relations.⁵⁰ These scholars point to the decades before the war, marked by a significant increase in trade among nations, the expansion of European powers to the developing

45. *Id.*

46. *Id.* at 249.

47. *Id.* at 267.

48. For a strong version of this claim, see Korff, *History of International Law*, *supra* note 26, at 258–59. Korff argues that the development of rules governing the conduct of war, along with rules on “commercial relations” were pervasive in ancient times and a “necessary and unavoidable consequence of any civilization.” *Id.* at 258.

49. BEDERMAN, *INTERNATIONAL LAW IN ANTIQUITY*, *supra* note 27, at 248 (arguing that early versions of international law instantiated the idea that war was “not, at least notionally, a license for the suspension of the norms of human decency”).

50. See, e.g., Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 *INT’L ORG.* 251, 260–64 (2001) (arguing the importance of Westphalia has been overblown in international relations scholarship).

world, and an expansion of maritime activity in general as the true drivers of the growth of international law that came after Westphalia. Other scholars point to the emergence of the nation-state as signal change, which helped solidify the idea of international law as law governing relations between states.⁵¹ Regardless of which view is correct, Westphalia does serve as a useful signpost for the emergence of states and formal institutions devoted to helping states to resolve disputes and order their relations more peacefully and profitably.

These interpretations are important to the development of international criminal law, to be sure, but another component of Westphalia is perhaps even more important but less well understood. The Peace of Westphalia attempted to guarantee peace by requiring the signatories to defend the peace against anyone who challenged it.⁵² This was not the first time that an assurance of peace had been included in a treaty.⁵³ But what made this particularly significant were both the importance of the treaty itself and the steps taken to implement the guarantee. The signatories recognized that peace was such a precious commodity that they pledged to uphold it by granting privileges to former enemies or lesser sovereigns.⁵⁴ The changes that Westphalia worked continued, as violence became more regulated and the maintenance of peace became a legal as well as a political issue.

B. *The Codification of Humanitarian Law*

These early attempts to regulate the use of violence in armed conflict took the form of drawing distinctions between appropriate and inappropriate targets of violence during war, or defining legitimate or illegitimate justifications for going to war in the first place. In the period beginning around the time of the U.S. Civil War, efforts to regulate violence in armed conflict became more specific and targeted.⁵⁵ Beginning most prominently with the Lieber Code and continuing with a series of conferences in the Hague, an increasingly specific set of prohibitions applicable

51. For a brief history of the importance of Westphalia, see Hendrik Spruyt, *The Origins, Development, and Possible Decline of the Modern State*, 5 ANN. REV. POL. SCI. 127, 131–35 (2002) (tracing the events that led to the Peace of Westphalia and the changes to the international order after these events).

52. See Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 AM. J. INT'L L. 20, 24 (1948) (noting that the peace agreements declared “that the peace concluded shall remain in force” and that all parties should defend the peace).

53. See *id.* (arguing a promise of future peace “was by no means a new departure” but, because of the prominence of the treaties and their context, this guarantee “came to assume in the following decades an overriding significance”).

54. See *id.* (citing JAMES HEADLAM-MORELEY, *STUDIES IN DIPLOMATIC HISTORY* 108 (1930) (describing some of the concessions made to lesser powers to guarantee the peace)).

55. For a description of this trend with respect to international law more generally, see Amos S. Hershey, *History of International Law Since the Peace of Westphalia*, 6 AM. J. INT'L L. 30, 51 (1912). Hershey situates the Lieber Code into a broader movement toward codification, linking the Lieber Code to the Hague Conventions and other documents that placed increasingly specific limitations on types of weapons, legitimate targets, and the like.

during armed conflict had developed. The Lieber Code was written by the German scholar Francis Lieber for the Army of the United States in 1863.⁵⁶ The purpose of the Lieber Code was to provide a “benchmark for the conduct” of the Union Army with respect to the “enemy army and population.”⁵⁷ Its provisions were specific: they addressed particular acts or types of violence and particular segments of the population.⁵⁸ And the Code was deliberately practical. The goal was to provide “a practical guide” to “describe briefly for commanders in the field the rights and obligations of belligerents.”⁵⁹ The Lieber Code was notable for its attempt to give effect to two sometimes contradictory ideas. The first was the idea, fundamental to international law, that a sovereign was entitled to prosecute wars and to do so in the most effective way possible.⁶⁰ The second was the idea that the effect of war on civilians should be as small as possible. Consider one example: Article 19 of the Lieber Code notes that commanders should “inform the enemy of their intention to bombard a place, so that the noncombatants . . . may be removed before the bombardment commences.”⁶¹ But the same article also notes that “it is no infraction of the common law of war to omit thus to inform the enemy,” because “[s]urprise may be a necessity.”⁶² Balancing these two goals was difficult and controversial, but the Lieber Code was a significant milestone on the path to do just that.⁶³

In the years after the Lieber Code, there were a series of conferences devoted to the development of rules to govern armed conflict. The various conventions that grew out of these conferences were progressively more specific about permissible and prohibited conduct. Of course, this movement was not perfectly linear. And even after all the conventions of the late 19th and early 20th centuries, the problem of applying the prohibitions, however specific, as criminal laws against individual actors had still remained.

56. RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 1, 1–2 (1983) [hereinafter HARTIGAN, *LIEBER’S CODE*] (the Lieber code was written by Lieber and issued as a general order for the Union Army by the Secretary of War).

57. *Id.*

58. *See, e.g.*, Francis Lieber, *Instructions for the Government of Armies of the United States in the Field* (War Dept. 1863) [hereinafter Lieber Code] arts. 31–47 (describing the appropriate treatment of people and property affected by armed conflict in a variety of situations and contexts), http://avalon.law.yale.edu/19th_century/lieber.asp. Other provisions prohibit the practice of poisoning wells or food (art. 71), outlaw pillage (art. 44), and require medical care for captured wounded enemy soldiers (art. 79). *Id.*

59. HARTIGAN, *LIEBER’S CODE*, *supra* note 56, at 5.

60. *See, e.g.*, Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT’L L.J. 49, 65–66 (1994) (describing the Lieber Code’s deference to the sovereign prerogative to wage war).

61. Lieber Code, *supra* note 58, art. 19.

62. *Id.*

63. *See, e.g.*, Jochnick & Normand, *supra* note 60, at 63–65 (describing theory of *raison d’état*, which held that the law should not be privileged over national interest, which during times of war should be victory).

The two Hague Peace Conferences, in 1899 and 1907, produced between them sixteen conventions and four declarations pertaining to the conduct of hostilities and the treatment of those involved in or affected by armed conflict.⁶⁴ The 1907 Convention on the Laws and Customs of War on Land, often referred to as Hague IV, remains one of the principal treaties placing limits on the means and methods of warfare. Hague IV held that the right of “belligerents to adopt means of injuring the enemy is not unlimited.”⁶⁵ The Convention attempted to give effect to three principles. The first is that the means and methods of warfare should not “cause unnecessary suffering.”⁶⁶ This is an early instantiation of the principle of proportionality: the use of violence should be no more than necessary. The second is that the “necessities of war” could justify extraordinary violence, including acts that might have been forbidden were they not necessary.⁶⁷ The law thus codified a role for the judgment of commanders in the assessment of potentially wrongful acts. Finally, Hague IV required commanders to distinguish between legitimate and illegitimate targets.⁶⁸ Taken together, the provisions of Hague IV and its companion treaties produced standards of conduct that made the corpus of humanitarian law more specific and purported to make it relevant in a wider range of conflicts.⁶⁹ After these treaties, the law was somewhat less hortatory and more concrete, somewhat less ad hoc and more comprehensive.

These steps, significant as they were, did not address all forms of abusive conduct and certainly did not end abusive conduct toward civilians in war. The standards-based approach was beneficial in that it was flexible enough to address potential changes in weapons or tactics, but this came at the cost of doing little to ban specific weapons, even those known to result in severe harm to civilians.⁷⁰ One goal of the Hague conferences was to develop and codify standards of conduct that would limit the behavior of states during war.⁷¹ Despite this, the treaties were criticized for placing few practical limitations on the ability of states to use violence as they wished, so long as they could plausibly claim that their actions were militarily necessary.⁷² In the end, a signal contribution of the Hague conferences

64. For a review of the two conferences and their results, see *id.* at 68–77.

65. Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 22, in *THE LAW OF WAR: A DOCUMENTARY HISTORY*, Vol. 1, at 308 (Leon Friedman ed., 1972).

66. *Id.* art. 23, ¶ e.

67. *Id.* art. 23, ¶ g.

68. See, e.g., *id.* art. 25 (prohibiting the bombardment of undefended towns and buildings).

69. Jochnick & Normand, *supra* note 60, at 68–69.

70. *Id.* at 72.

71. See 1 JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907* 2 (1909) (describing as aims of the conferences to give “important topics of international” the “symmetry and precision of a code”).

72. Jochnick & Normand, *supra* note 60, at 74.

may have been to develop a set of principles around which coalesced specific criminal charges, setting the stage for individual criminal liability.

C. Nuremberg and Individual Criminal Responsibility

The post-World War II international military tribunals are the most prominent international criminal courts in history and their precedents continue to affect international criminal tribunals today. According to the terms of the 1943 Moscow Declaration, Nazi officers and soldiers who had committed atrocities were to be “judged and punished according to the laws of [the] countries” in which the crimes had taken place.⁷³ The Allies decided to prosecute those who committed the most wide-ranging crimes under a process to be determined “by joint decision of the government of the Allies.” The Allies created the International Military Tribunal at Nuremberg to try Nazi suspects and the International Military Tribunal for the Far East to try Japanese suspects. Together, these two tribunals tried a small number of high-level defendants. Thousands of other defendants were tried in the domestic courts of the countries in which their crimes were committed.⁷⁴

In the Nuremberg Tribunal, prosecutors charged the architects of the Nazi regime with a range of crimes, including conspiring to wage an illegal war, the crimes against the peace, crimes against humanity, and war crimes.⁷⁵ It was the first large-scale attempt to hold individuals criminally accountable for the acts of states. The Nuremberg Charter was built in part on the Hague Conventions, particularly their specific descriptions of wrongful conduct, to construct a statute that would permit the prosecution of Nazi officials while preserving at least some due process guarantees for defendants.⁷⁶ The Nuremberg verdict reads like a history of the war, with detailed sections on the development of the Nazi plan to take over Germany, the process by which Germany waged war on its neighbors and throughout Europe, and the role of individual defendants and criminal

73. The Tripartite Conference at Moscow, Oct. 19–30, 1943, *reprinted in* International Conciliation, No. 395, at 599–605 (1943) [hereinafter Moscow Declaration].

74. STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 210 (3rd ed. 2009) [hereinafter RATNER ET AL., ACCOUNTABILITY FOR ATROCITIES].

75. The Nuremberg Charter granted the Tribunal jurisdiction over “crimes against peace,” meaning the initiation or waging of an illegal war, “war crimes,” which meant the violations of the laws of war, and “crimes against humanity,” which covered acts against the civilian population (including what would come to be called genocide). Nuremberg Charter Art. VI., *in* THE LAW OF WAR: A DOCUMENTARY HISTORY, Vol. 1, at 883 (Leon Friedman ed., 1972). The Charter also granted jurisdiction over “[l]eaders, organizers, instigators and accomplices participating in . . . a common plan or conspiracy to commit” any of the charged crimes. *Id.*

76. For a detailed account of the process by which the Nuremberg Tribunal was created, see TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 33–40 (1992) [hereinafter TAYLOR, NUREMBERG TRIALS]. See also Michael P. Scharf, *Have We Really Learned the Lessons of Nuremberg?*, 149 MIL. L. REV. 65, 66–70 (1995) (describing the procedural limitations and errors of the Nuremberg Tribunals and comparing them to the due process protections in modern international criminal tribunals).

groups.⁷⁷ In addition, there is a description, complete with dates and numbers of victims, of Nazi atrocities against civilian persons and property. The effect of this detail was to describe the full scope of the Nazi regime and its actions and then to locate each individual defendant within the larger plan so as to ascribe to each defendant the appropriate individual responsibility.

The Tokyo Tribunal was similar to the Nuremberg Tribunal,⁷⁸ but General Douglas MacArthur, the Supreme Allied Commander in the Far East, retained significant control over the proceedings. Indeed, the International Military Tribunal for the Far East Charter (IMTFE Charter) granted him the right to intervene in cases and overrule decisions, although he never used this power.⁷⁹ The verdict in the Tokyo Tribunal was as detailed as the Nuremberg verdict, with sections on the ideology of those who led Japan to war, the actions of Japanese leaders and soldiers during the war, and atrocities against civilians.⁸⁰

The legacy of the Nuremberg and Tokyo Tribunals continues to affect the structure and doctrine of modern international criminal law. There are several features that have emerged as central to modern international criminal law from among the many ways that the legal responses to World War II that continue to affect contemporary legal institutions. The post-World War II prosecutions were notable for their efforts to specify as precisely as possible the conduct for which the defendants were to be held criminally liable. Despite attempts to make international humanitarian law more specific and less ad hoc, at the time it was largely principle-based. The law contained substantial flexibility, granting commanders wide discretion as to how to use violence in pursuit of state aims. The Nuremberg and Tokyo indictments were attempts to apply those general principles to bear in a way that would comport with the rules of criminal proceeding by describing specific conduct that violated the principles.

Closely related to this was the effort to ascribe individual criminal liability for what were large-scale, state-sponsored crimes.⁸¹ The Nuremberg

77. See Nuremberg Judgement, Sept. 30, 1946, in *THE LAW OF WAR: A DOCUMENTARY HISTORY*, Vol. 2, at 922–1025 (Leon Friedman ed., 1972).

78. For a comparison of the two tribunals, see generally Zachary D. Kaufman, *The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs, and Operations*, 43 *JOHN MARSHALL L. REV.* 753 (2010).

79. See Charter of the International Military Tribunal for the Far East, art. 17, in *THE LAW OF WAR: A DOCUMENTARY HISTORY*, Vol. 1, at 894 (Leon Friedman ed., 1972) (providing that the only appeal from the judgment of the tribunals was to “Supreme Commander of the Allied Powers” who had the authority to “reduce or otherwise alter” a defendant’s sentence so long as he did not increase its severity); see also *Hirohita v. MacArthur*, 338 U.S. 197, 215 (1948) (Douglas, J., concurring) (“[T]he Tokyo Tribunal acted as an instrument of military power of the Executive Branch of government. It responded to the will of the Supreme Commander as expressed in the military order by which he constituted it.”).

80. See *The Tokyo War Crimes Trial*, Nov. 1948, in *THE LAW OF WAR: A DOCUMENTARY HISTORY*, Vol. 2, at 1029–1159 (Leon Friedman ed., 1972).

81. See Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 *AM. J. INT’L L.* 551, 562–63 (2006) (situating the Nuremberg and Tokyo Tribu-

Charter did not allow prosecutors to indict individuals who were themselves accused of pulling the trigger or launching mortars.⁸² Instead, both post-war tribunals targeted those leaders and organizers who were mainly responsible for setting and implementing state policy.

Another notable feature of the post-war tribunals is that each was created with the deliberate intention of playing a role in the post-war process of reconstruction and normalization. The Tribunals attempted to punish those responsible for the war and the worst atrocities committed by the Axis powers, to be sure, but their focus was also forward-looking. Prosecutors and scholars argued that without the trials, another war would be more likely and reconstruction in Europe would be more difficult.⁸³

The post-war tribunals were noteworthy also because they represented an attempt by a group of states to address international wrongs. To be sure, the Tribunals were created by the Allied powers to prosecute defendants from the Axis powers: victors prosecuting the vanquished. But those who created the tribunals also justified them as the fulfillment of an obligation to address the wrongs of the war and to help set the stage for reconstruction.

Finally, the post-war tribunals were significant because they were explicitly legal mechanisms by which to accomplish reconciliation and reconstruction. There were other means available—and used—but the Tribunals had an intentionally juridical character. They were as much like courts as possible, and included due process protections for defendants, attempts to ensure that the judges were independent, and similar features.

As important as they were, the post-war tribunals were subject to criticism for both their structure and doctrine. To many, including perhaps most prominently Justice Rahadbinod Pal, who served on the Tokyo Tribunal, the tribunals looked like victor's justice.⁸⁴ Only those who lost the war were prosecuted, and they were prosecuted by those who had won the war. Individuals from the Allied powers were not prosecuted even for instances of egregious violence against civilians, including the bombing of Dresden or the use of atomic bombs.⁸⁵ Furthermore, defendants were not allowed to justify their own conduct by pointing to similar conduct by Al-

nals into the history of prosecutions for crimes during armed conflict, with particular emphasis on the choice of defendants and their role in the underlying crimes).

82. The Tribunal's jurisdiction was limited to "the major war criminals of the European Axis countries." Charter of the International Military Tribunal, Art. VI.

83. See, e.g., Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488, 490–92 (1955) (describing arguments among U.S. policymakers in favor of tribunals).

84. In Justice Pal's dissenting opinion, he discussed these issues at some length. See Dissenting Opinion of Justice R.B. Pal, in *THE LAW OF WAR: A DOCUMENTARY HISTORY*, Vol. 2, at 1159, 1163–67 (Leon Friedman ed., 1972).

85. For example, former Secretary of Defense Robert McNamara quoted former General Curtis LeMay as saying that, "If we'd lost the war, we'd all have been prosecuted as war criminals." See Errol Morris, *The Fog of War: Transcript*, at http://www.errolmorris.com/film/fow_transcript.html. In McNamara's telling, Lemay was referring to Allied firebombing during World War II and the loss of civilian loss of life.

lied forces.⁸⁶ The tribunals were also criticized for their sometimes cramped holdings on the legality defense. The legality principle, also known as *nullum crimen sine lege*, permits prosecution only if the allegedly criminal activity was defined as a crime and those who engaged in the substantive conduct were subject to individual criminal prosecution at the time the conduct occurred.⁸⁷ The Nuremberg and Tokyo Tribunals rejected every challenge based on this principle, even when defendants were charged with novel crimes.⁸⁸ Perhaps most prominently, Justice Pal, in his dissent from the judgment in the Tokyo Tribunal, critiqued the majority's conclusion that crimes being prosecuted for the first time nonetheless satisfied the requirement that they were clearly defined before the defendants acted, and that people who committed those acts were subject to criminal prosecution.⁸⁹

In addition to international criminal law developments occurring at the post-war Tribunals, there were parallel developments in the areas of human rights law and humanitarian law. Perhaps most prominently, the four 1949 Geneva Conventions codified a wide range of requirements with respect to the conduct of war and the treatment of those affected by conflict, including civilians, prisoners of war, and former combatants.⁹⁰ One of the hallmarks of the Geneva Conventions was their integration of human rights principles into the laws of war.⁹¹ The integration of human rights law into humanitarian law did not happen completely or immediately, of course, in part because the main bodies working on human rights largely excluded the laws of war from their work.⁹²

The combination of the doctrinal advances in the Nuremberg Tribunal and the work done on treaties in the years after World War II changed international criminal law profoundly. Much more conduct was the subject of legal regulation. Areas that were once the exclusive province of norms or were considered political considerations were now subject to specific legal provisions. It is important to note here and throughout any discussion of international criminal law that these provisions have been enforced

86. See RATNER ET AL., ACCOUNTABILITY FOR ATROCITIES, *supra* note 74, at 212 (noting that the “tribunal charters did not permit the defendants to invoke Allied practices in their defense”).

87. See *id.* at 23–24 (describing contours of the legality principle).

88. *Id.* at 212.

89. Dissenting Opinion of Justice R.B. Pal, *supra* note 84, at 1159, 1168–69.

90. See generally Raymond T. Yingling & Robert W. Ginnane, *The Geneva Conventions of 1949*, 46 AM. J. INT'L L. 393 (1952) (describing the content of each of the four Geneva Conventions).

91. For a more detailed discussion of this relationship, see Robert Kolb, *The Relationship Between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*, 38 INT'L REV. RED CROSS 409 (1998). Kolb notes that it was only after World War II that human rights law became integrated into public international law. *Id.* at 410.

92. *Id.* at 411 (arguing that “the United Nations, the guarantor of international human rights, wanted nothing to do with the law of war”).

imperfectly and intermittently.⁹³ Another important result of the post-war developments is that the category of protected persons is much larger than before. This is the category of persons whose victimization can lead to a prosecution. Civilians, including persons mistreated by their own governments, are now protected by international criminal law and crimes against them can be the subject of an international prosecution. Another of the hallmarks of modern international criminal law is its specificity. Modern tribunals, especially the ICC, have attempted to identify as precisely as possible the conduct for which a defendant is to be held criminally liable. The evolution toward specificity is one of the features that distinguishes contemporary international criminal law from international humanitarian law even as the roots of the move can be traced to a series of attempts by states to promulgate rules governing the conduct of wars.

D. Contemporary International Criminal Tribunals

In the decades since the Nuremberg and Tokyo tribunals at the end of World War II, the United Nations and various states have created six major international criminal tribunals to address particular situations, plus the ICC. Apart from the ICC, all of these tribunals were created in response to an event or a period of violence and armed conflict, and all were created with specific policy objectives in mind. The principal modern tribunals are the ICTY, the ICTR, and the Special Court for Sierra Leone (SCSL).⁹⁴ ICTY was created in 1993 to address the violence in the former Yugoslavia even before the war ended. The ICTR was created in 1994,

93. See, e.g., Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 416–17 (2001) (noting that “even the fiercest apologists for international criminal law acknowledge that its enforcement has been erratic”).

94. See, e.g., GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNALS 14–24 (2014) [hereinafter KNOOPS, LAW OF THE INTERNATIONAL CRIMINAL TRIBUNALS] (describing origins and functioning of special criminal tribunals for East Timor, Kosovo, and Bangladesh, among others). Particularly noteworthy are the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Tribunal for Lebanon. The ECCC is a hybrid tribunal, comprising both domestic and international judges and applying a mixture of domestic and international law. It was created to address the widespread crimes of the Khmer Rouge regime in Cambodia in the 1970s. So far it has prosecuted a handful of very senior defendants and brought to light an extensive record of the atrocities in that country. See generally JOHN D. CIORCIARI & ANNE HEINDEL, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (2014). Ciorciari and Heindel detail the ECCC’s many accomplishments while also highlighting what they characterize as its “structural handicaps,” which have produced “inefficiency and credibility problems.” *Id.* at 263. The Special Tribunal for Lebanon was created to investigate the murder in 2005 of former Prime Minister Rafiq Hariri and has prosecuted five principal defendants. See Special Tribunal for Lebanon, Sixth Annual Report (2014–2015), <http://www.stl-tsl.org/en/documents/stl-documents/presidents-reports-and-memoranda/3845-sixth-annual-report-2014-2015>.

after the genocide in Rwanda had ended, to address the atrocities committed during the genocide and its immediate aftermath.⁹⁵

Yugoslavia began to break up in 1991 following the collapse of the Soviet Union and the death of longtime leader Josip Tito. As Croatia and Slovenia declared their independence from the Serb-dominated remnant of Yugoslavia, organized violence began to break out along the borders of the contested states. Even before the war broke out in earnest, there were calls for the creation of an international criminal tribunal to address the violence.⁹⁶ As violence spread across the region, the calls for an international criminal tribunal increased. Even before the end of the war, the United Nations had decided to create an ad hoc tribunal to prosecute those responsible for the widespread violence against civilians.⁹⁷

On April 6, 1994, the plane carrying the presidents of Rwanda and Burundi was shot down near the airport in Rwanda's capital, Kigali. Within hours, members of the Rwandan Hutu power movement began implementing plans to massacre the Tutsi populations. Over the course of the next 100 days, between 500,000 and 800,000 Tutsis (and some moderate Hutus) were killed in Rwanda. Tensions between Tutsis and Hutus had been high before the plane was shot down and the United Nations had placed a contingent of U.N. peacekeepers in Rwanda. Their presence made little difference during the early days of the genocide, and the United Nations eventually withdrew most of the peacekeepers. The genocide only ended when the Rwandan Patriotic Front, a Tutsi-led militia that had been in exile in Uganda until the genocide began, defeated those responsible for the genocide.⁹⁸ Even before the genocide was over, there were efforts in the United Nations to create an international criminal tribunal to prosecute those responsible for the violence. To do so, the United Nations convened a Commission of Experts to consider the facts on the ground in Rwanda and make a recommendation as to how to proceed, which it did in September 1994. After substantial negotiations about the structure and remit of the tribunal, the U.N. Security Council created the ICTR in November 1994.⁹⁹

The SCSL was created as part of the process of ending the conflict that had affected a large swath of West Africa for nearly a decade.¹⁰⁰ The parties to the conflict signed a peace accord in 1999 that included a truth

95. For a description of the establishment of the ICTR, see L.J. VAN DEN HERIK, *THE CONTRIBUTION OF THE RWANDA TRIBUNAL TO THE DEVELOPMENT OF INTERNATIONAL LAW* 31–32 (2005).

96. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS*, *supra* note 19, at 13–14 (describing the earliest calls for a Nuremberg-like tribunal to address violence in the former Yugoslavia).

97. *Id.* at 18.

98. *Id.* at 25.

99. For a description of the negotiations and wrangling that accompanied the creation of the tribunal, see *id.* at 28–30 (describing the negotiating positions of the parties involved in the creation of the ICTR, including Rwanda's opposition to the final structure).

100. See Alison Smith, *The Expectations and Role of International and National Civil Society and the SCSL*, in *THE SPECIAL COURT FOR SIERRA LEONE AND ITS LEGACY* 46,

and reconciliation commission.¹⁰¹ Soon after, conflict broke out again. Simultaneously, some in the United Nations and other international organizations objected to the establishment of a truth and reconciliation commission and promises of amnesty for some wrongdoers without the creation of any sort of body to prosecute those responsible for the violence.¹⁰² It was against this backdrop that the SCSL was created in 2002. The SCSL had the power to apply both Sierra Leonean law and international law, and included both local and international prosecutors.¹⁰³

All of the modern international tribunals have independent prosecutor's offices staffed with professionals, most of whom were from countries other than the country in which the events under investigation took place.¹⁰⁴ In contrast to the Nuremberg prosecutions, modern international criminal tribunals are not opportunities for victors to prosecute the vanquished. All of the modern tribunals have statutes that provide clear jurisdictional rules, and specific and finite lists of crimes.¹⁰⁵ All of them permit the prosecution of genocide, crimes against humanity, and war crimes, albeit with occasional variations as to the specific definitions of the crimes. Although each is independent and not subject to external review, these tribunals regularly borrow legal theories from each other and their jurisprudence reflects that they are cognizant of the way that the other tribunals have ruled on important issues.¹⁰⁶

54–58 (Charles Chernor Jalloh ed., 2014) (describing the legal and political processes surrounding the creation of the SCSL).

101. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, U.N. SCOR, Annex, at 15, U.N. Doc. S/1999/777 (1999).

102. See William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y 145, 148–50 (2004) (describing reservations regarding the Truth and Reconciliation Commission and the prospect of amnesty for wrongdoers).

103. See Beth K. Dougherty, *Right-Sizing International Criminal Justice: The Hybrid Experiment at the Special Court of Sierra Leone*, 80 INT'L AFF. 311, 316–18 (2004) (describing the legal sources and capacity of the SCSL).

104. The selection of the prosecutor and the staffing of his or her office has proven complicated. See, e.g., KINGSLEY CHIEDU MOGHALU, *GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS* 55–56 (2008) (describing the selection of the first prosecutor for the ICTY); Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT'L CRIM. JUST. 427, 432 (2004) (describing complications in the functioning of the Office of the Prosecutor for the ICTY); Bernard A. Muna, *The Early Challenges of Conducting Investigations and Prosecutions Before International Criminal Tribunals*, in FINAL REPORT OF COLLOQUIUM OF PROSECUTORS OF INTERNATIONAL CRIMINAL TRIBUNALS (Nov. 2004), <http://ictr-archive09.library.cornell.edu/ENGLISH/colloquium04/index.html> (describing the early operations of the office of the prosecutor and other court personnel in the ICTR).

105. See KNOOPS, *LAW OF THE INTERNATIONAL CRIMINAL TRIBUNALS*, *supra* note 94, at 2–9 (describing temporal and subject matter jurisdiction and competence of the ICTR and the ICTY); see also *id.* at 14–19 (describing jurisdiction and functions of international criminal tribunals for Sierra Leone, Cambodia, East Timor, Kosovo, Lebanon, and Bangladesh).

106. See, e.g., Aldo Zammit Borda, *How Do International Judges Approach Competing Precedent? An Analysis of the Practice of International Criminal Courts and Tribunals in Relation to Substantive Law*, 15 INT'L CRIM. L. REV. 124, 143–44 (2015) (finding, based on review of decisions from international criminal tribunals, that judges typically attempt to

The ICC is, of course, the most prominent modern tribunal. It became operational in 2002, with the first cases growing out of the ICC's investigation of the situation in the Democratic Republic of Congo.¹⁰⁷ Of the ICC's nine current situations (and the attendant cases), all are from Africa.¹⁰⁸ Because it is still in its infancy, the ICC's doctrinal impact has been minimal, with the prominent exception of the attention the ICC has paid to the issue of child soldiers.¹⁰⁹

II. MOTIVATIONS, JUSTIFICATIONS, AND OBJECTIVES

Those who work in the field of international criminal law and in the tribunals through which the law is administered must sometimes feel like they answer to King Eurystheus, who famously gave Hercules a series of twelve tasks as punishment for having killed his wife and children.¹¹⁰ The tasks assigned to international prosecutors are not designed to punish them, but they are as varied and as difficult as those assigned to Hercules. Almost without failure, when an international crisis breaks out, there are calls for a response based in international criminal law, whether administered through the ICC or another tribunal. International criminal law is no longer seen just as a way to punish, after the fact, those who violate the laws of war or commit gross atrocities against civilians. Instead, international criminal law is heralded as a treatment for all manner of problems. For example, advocates have called for international prosecutions of those involved in the violence and conflict in Colombia and Syria, to name just two.¹¹¹ The problem is that it is impossible for international criminal law

avoid contradicting or criticizing decisions from other tribunals, even when those decisions do not constitute binding precedent). For a recent theory of how and why international courts interpret and reinterpret the work of other courts, see Paul B. Stephan, *Courts on Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17 (2014). Stephan describes the phenomenon and argues that courts understand their mandates as contractual obligations. See also Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 193 (2003) (describing the practice of judges in one jurisdiction citing the decisions of judges from other countries or international tribunals as persuasive authority).

107. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 23, 34 (2011) (describing the ICC Statute coming into force and the ICC commencing operation).

108. *Situations and Cases*, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

109. See generally Mark A. Drumbl, *The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering*, in YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 87 (T.D. Gill et al. eds., 2012) (describing ICC case against Thomas Lubanga and situating it into contemporary jurisprudence on the use of children in wartime).

110. See EDITH HAMILTON, MYTHOLOGY 231 (1942).

111. See, e.g., SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 19, at 4–6 (describing “the many calls for the establishment of other” international criminal tribunals after the creation of the ICTR and the ICTY); Nada Bakri, *U.N. Human Rights Official Calls for Intervention in Syria*, N.Y. TIMES, Dec. 3, 2011, at A4 (describing argument by U.N. High Commissioner for Human Rights for the U.N. Security Council to refer Syria to the ICC); Simon Romero, *Court Looks at Supporters of Rebels in Colombia*, N.Y. TIMES,

to fulfill all of these goals, much less to do so simultaneously and while a conflict is ongoing. The surplus of roles assigned to international criminal law can be traced to many sources, but I focus on one principal reason: confusion about what the purposes are and can be. In this Article, I show that the international criminal tribunals are not designed or operated as well as they could be to achieve the stated goals of their proponents, even if these goals might not, standing alone, justify the imposition of punishment. In this Section, I identify what scholars and advocates mean when they discuss the purposes of international criminal law. I then argue that there are three main purposes that are both appropriate as goals of international criminal tribunals and within the institutional capacities of the tribunals.

When scholars and advocates discuss the “purposes” of international criminal law and the institutions through which it works, they often use similar words to mean very different things. *Purposes* is used to signify three main clusters of ideas: motivations, justifications, and objectives. By *motivations*, I mean the political and other considerations that lead to the creation of the international criminal tribunal in the first place or to the exercise of its jurisdiction. During and after a period of violence or repression there are often calls for a legal response in the form of prosecutions before a court with the authority to punish those responsible for the violence. This set of ideas is often most salient during the time that an international criminal tribunal is created. *Justifications* refers to the search for the legitimate moral bases for the use of the law. This is often framed as a legal-philosophical question: what constitutes a sufficient justification to prosecute and punish under the law? The issue of justification attempts to clear away the clutter of supposed benefits that might flow from the exercise of the legal authority to punish, to identify the reason or reasons that justify punishment in the first place. By *objectives*, I seek to identify the social goals that any given international criminal institution can hope to accomplish through its operations. The focus here is not on the creation of the tribunal or its philosophical foundations, but on the ways that prosecutors select, theorize, and pursue cases, and is framed in largely doctrinal terms. It is an inquiry into the fit between the use of the law and the social goals for which it is deployed.

These categories track the distinction that some scholars have made between the aims of the proceedings and the aims of punishment.¹¹² For example, Mirjan Damaska notes that some of the confusion around the aims of international criminal law can be traced to the failure to distin-

Aug. 16, 2008, at A10 (describing preliminary investigation into alleged crimes in Colombia in response to requests from advocates).

112. I take this distinction from Mirjan Damaska. See Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 CHICAGO-KENT L. REV. 329, 331 n.2 (2008) (noting that some of the purported goals of international criminal tribunals are properly understood as “aims of the proceedings,” not “aims of punishment”). See also *id.* at 339 n.15 (noting that even in sentencing judgments, tribunal judges conflate the aims of punishment and the aims of the proceedings).

guish between the aims of the proceedings and the aims of punishment.¹¹³ Damaska does not fully develop the idea, but the distinction can help identify whether a tribunal has the institutional capacity to accomplish the goals assigned to it. For example, the aims of punishment might be thought of as focused on the individual: to give the wrongdoer what he deserves, to remove him from society so that he does not offend again, and similar goals. In contrast, the aims of the proceeding might serve a didactic purpose such as reestablishing the rule of law or demonstrating the legitimacy of the post-conflict legal system. Indeed, it is this didactic purpose that Damaska highlights as the most appropriate for modern international criminal tribunals.¹¹⁴ There has been other scholarly discussion of the purposes of international criminal law, though none of the scholarship has squarely addressed the issues that I address. Miriam Aukerman thoroughly analyzes the extent to which the common domestic purposes might be applied to situations of transitional justice.¹¹⁵ Aukerman's focus is on how to arrive at the optimal mix of prosecution, amnesty, or other post-conflict measures to help a society heal from a period of conflict or systematized injustice like apartheid. Aukerman's work is an important contribution to the literature on transitional justice generally, but it does not address how international criminal tribunals should be structured, or how international criminal law should be applied, to best meet the stated goals of those who propose them. More recently, Jonathan H. Choi analyzed how the traditional purposes of criminal law might affect sentencing policy at the international level.¹¹⁶ The three categories that I identify refine Damaska's distinction even further by distinguishing between the aims of the proceedings—what I refer to as the “objectives” approach—and the motivations that inspired the creation of the tribunal in the first place. What these categories share is that the underlying aims operate independently of the punishment imposed on any individual defendant. Instead, these aims are satisfied or not by whether and how a tribunal is created or by how the tribunal handles certain types of cases.

A. *Motivations*

International criminal tribunals are created in response to crises: a genocide in Rwanda, a war largely of ethnic cleansing in Yugoslavia, the atrocities of World War II, widespread violence in West Africa that devastated the civilian population. Since World War II, it has been possible to create an international criminal tribunal only through a formal, legalized process. For many, the purposes of a tribunal are the geopolitical goals

113. *Id.*

114. *See id.* at 347 (arguing that “the central mission of international criminal courts should be the socio-pedagogical one of strengthening the public sense of accountability for human rights violations”).

115. Miriam Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUMAN RTS. J. 39, 53–91 (2002).

116. Jonathan Choi, *Early Release in International Criminal Law*, 123 YALE L.J. 1784, 1808–13 (2014).

touted by those who created the tribunal. Consider the examples of the three most prominent recent tribunals. For my purposes, the impetus that sparked the creation of the tribunal is the motivation. In the cases of the ICTY and the ICTR, the legal process by which the tribunal was created was the same. The U.N. Security Council, in consultation with others, determined that the conflict constituted a threat to international peace and security and used its authority under Chapter VII of the U.N. Charter to create the tribunal.¹¹⁷ The establishment of the SCSL was different. It was created by agreement between the United Nations and the government of Sierra Leone as the conflict in Sierra Leone was winding down.¹¹⁸ When it created the ICTR and ICTY, the Security Council acted under Chapter VII of the U.N. Charter, which permits the Security Council to take a range of actions in response to threats to peace or acts of aggression.¹¹⁹ With respect to the SCSL, the United Nations relied on many of the same arguments but created the tribunal using a different process. After first considering the creation of a tribunal pursuant to its powers under Chapter VII, the United Nations negotiated with the government of Sierra Leone to create a hybrid tribunal.¹²⁰ Despite this difference, the arguments advanced in support of the creation of the tribunal were similar in each case.

The Security Council resolutions creating the ICTR and the ICTY contain what I have characterized as the motivations-as-purposes arguments, and they are strikingly similar. After decrying the violence and loss of life, the Security Council advanced three principal reasons for the tribunal: to put an end to the conflict and the attacks on civilians, to hold accountable those responsible for violence, and to help restore peace.¹²¹ These goals would be accomplished, or not, by the creation of a tribunal. The actual operation of the tribunal was largely beside the point.

The motivations underlying the creation of a tribunal are important, to be sure, because they expose the political considerations that inevitably affect the creation of a tribunal.¹²² And it can be difficult to identify with any precision the actual motivations underlying the creation of a tribunal.

117. See S.C. Res. 827 (May 25, 1993) (creating the ICTY); S.C. Res. 955 (1994) (creating the ICTR).

118. See S.C. Res. 1315 (Aug. 14, 2000).

119. See Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 79 (1994) (describing the Security Council's use of Chapter VII power to create the ICTY); Payam Akhavan, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 502-03 (1996) (describing the history of the creation of the ICTR under the Security Council's Chapter VII powers).

120. See SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS*, *supra* note 19, at 34-40 (detailing the history of the creation of the SCSL by the United Nations and the government of Sierra Leone).

121. S.C. Res. 827 (May 25, 1993) (creating the ICTY); S.C. Res. 955 (1994) (creating the ICTR).

122. See, e.g., Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT'L CRIM. JUST. 541, 542 (2004) (describing the creation of the ICTY and the ICTR as "acts of

For example, at the time of its creation the ICTY was criticized as a public relations tool, with little real power to address the violence that had ravaged the former Yugoslavia.¹²³ This process provides a forum through which states and international organizations might work through those political considerations, an entirely salutary function. But these considerations provide little guidance as to how the tribunals should operate. They provide almost no guidance about who should be prosecuted, what the prosecutor's priorities should be, and how to resolve the myriad conflicts that arise in every international tribunal.

The issue of motivations was also salient with the creation of the post-World War II tribunals, and the operation of the Tokyo Tribunal, in particular, illustrates the danger of operating a tribunal whose aims are satisfied upon creation. Even before the end of the World War II, the Allied powers began to develop a plan to prosecute some of the people and organizations responsible for the war and the Holocaust.¹²⁴ The Nuremberg and Tokyo Tribunals were important for what they accomplished, to be sure, but their very existence was perhaps of even greater importance. After the war, some argued that some Axis leaders should be summarily executed for the crimes of their troops during the war.¹²⁵ Instead, the victorious powers sought to create juridical bodies with complex procedural mechanisms that looked and acted like courts.¹²⁶ But because the existence of the tribunal was the goal, the Tokyo Tribunal in particular lacked the procedural safeguards that could have saved it from arguments that it was nothing more than victor's justice. All international criminal tribunals run the risk of sloppiness, created as they are to address widespread atrocities,¹²⁷ but the Tokyo Tribunal in particular was created with scant attention to due process and the other mechanisms that make courts operate in a way that is actually legitimate, rather than merely possessing the surface characteristics of legitimacy.¹²⁸ For example, the ultimate appeal in the

political contrition" created to atone for the "egregious failures to swiftly confront the situations" that led to the atrocities).

123. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS*, *supra* note 19, at 21.

124. *See, e.g.*, Moscow Declaration, *supra* note 73 (stating that "the three Allied powers will pursue" the guilty "to the uttermost ends of the earth . . . in order that justice may be done").

125. *See* TAYLOR, *NUREMBERG TRIALS*, *supra* note 76, at 30–32 (1992) (describing discussions between Churchill and Stalin and their staffs regarding the possibility of summary executions of certain German war criminals).

126. *See id.* at 28–30 (describing early decision to create a juridical body to address war crimes and other atrocities).

127. *See, e.g.*, KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 178 (2011) (analyzing the criminal procedure aspects of the Nuremberg trials and concluding that the processes were adequate though imperfect); Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 *COLUM. J. TRANSNAT'L L.* 635, 641–649 (2007) (detailing the many due process deficits in the Nuremberg Tribunal and their effect on the fairness of the proceedings).

128. *See* 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*, 37

Tokyo Tribunal was to the Supreme Military Commander of Allied forces rather than to a judicial body.

There are two additional characteristics that make motivations an unsuitable way to understand and implement the purposes of international criminal law. The first is that the motivations for the creation of an international criminal tribunal are largely satisfied when the tribunal is created. It is the fact of creation, and not the work of the tribunal, that accomplishes the work necessary to satisfy the motivations of those proposing the tribunal. There is a second characteristic that makes motivation an inapposite way to understand purpose. Much of the “purpose” language used before and at the time of the creation of a tribunal is deployed to satisfy legal or political requirements, not to express the practical expectations of what the tribunal will accomplish. Arguments about threats to peace and security and the potential of an international criminal tribunal to defuse those threats should be understood as legal findings necessary to complete the process of creating the tribunal. They should not be understood to be expressions of the tribunal’s practical goals or even predictions about what the tribunal will accomplish.

B. *Justifications*

Another approach focuses on the important legal-philosophical questions that are sometimes framed as a discussion of the “purposes” of the law: the legitimate justifications for prosecution and punishment under the law.¹²⁹ This discussion can be an important theoretical antecedent to the development of law in general and international criminal law in particular because it helps to clarify why some conduct is blameworthy and how best to justify the exercise of state authority to proscribe and punish the conduct. Although there is a relative paucity of writing about this issue in the narrow area of international criminal law,¹³⁰ there has been substantial and very useful work in the area of criminal law more generally. Michael Moore, the most prominent advocate of the retributivist school of criminal

COLUM. J. TRANSNAT’L L. 851, 864–70 (describing the process by which the rules of evidence were created for the Tokyo Tribunal and critiques of the fairness of the proceedings).

129. See generally MOORE, *PLACING BLAME*, *supra* note 20. Moore works through the “prima facie reasons given to justify the institution of punishment.” *Id.* at 84. He then argues that retributivism is the sole legitimate justification for punishment. *Id.* at 153–188.

130. There has been some work in this area. For a thorough theoretical account of the arguments for and against desert-based theories of international criminal law, see generally Andrew K. Woods, *Moral Judgments and International Crimes: The Disutility of Desert*, 52 VA J. INT’L L. 633 (2012). The author argues that the theory actually put forth most prominently in support of international criminal law is the “utility of desert” argument, by which he means that an international criminal law response is not “retributive to its core” but is “justified by the view that desert serves the many policy goals” of the response. *Id.* at 638. For an attempt to test empirically whether retribution is effective, see Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina*, 7 J. INT’L CRIM. JUST. 463, 464 (2009) [hereinafter Clark, *Empirical Study in Bosnia and Herzegovina*] (concluding that there are significant limitations “of a purely retributive approach to violations of international humanitarian law”).

law, argues that “only the achievement of retributive justice” is the appropriate function of criminal law.¹³¹ On Moore’s account, “[p]unishing those who deserve it is good and is the distinctive good that gives the essence, and defines the borders, of criminal law.”¹³² To simplify (perhaps overly much), the problem the law therefore must solve is to identify who is blameworthy and specify the appropriate quantum of punishment.¹³³

In contrast, proponents of deterrence, another leading justification for criminal sanctions, argue that the law’s role in society is to reduce incidence of crime. On this approach, punishment is warranted for those who violate the law because of the effect that this punishment will have on others who will observe the punishment and decide not to similarly offend.¹³⁴ Again, I have presented a grossly simplified version of what are complex arguments, but it captures the essence of the issue.¹³⁵ On this approach, the problem the law must solve is to identify those people whose punishment would most affect other people.

This debate about what constitute the legitimate justifications for punishment is separate from a debate about whether particular institutions, legal rules, or instances of prosecutorial discretion are likely to achieve the goals that those creating the institutions or applying the law wish to achieve. Part of the reason that the purpose-as-justification approach is unsuitable is that each theory seeks to identify the sole or principal justification for punishment. In international criminal law, such a pursuit of theoretical purity is doomed to failure. International tribunals have limited capacity and far more potential suspects than they can ever prosecute. For example, it would be impossible to design a system that could simultaneously satisfy the political requirements that every tribunal must satisfy and fulfill the “*duty to punish*” deserving offenders that thoroughgoing retributivists would advocate.¹³⁶ A second reason that the justification-as-purpose approach does not work in international criminal law is that every tribunal is created with a host of justifications. Modern international criminal tribunals are institutions born of politics and the inevitable compromises and theoretical messiness that affect every political institution. This is not to say that the justification-as-purpose approach is indifferent to the other consequences of punishment. In the realm of law and philosophy, I am interested in what Michael Moore has described as the “benefi-

131. MOORE, *PLACING BLAME*, *supra* note 20, at 78–79.

132. *Id.* at 79.

133. *See id.* at 91 (“Retributivism . . . is truly a theory of justice such that . . . we have an obligation to set up institutions so that retribution is achieved.”).

134. *See, e.g.*, Ku & Nzilibe, *Deter or Exacerbate?*, *supra* note 25, at 799–806 (arguing that international criminal tribunals are not likely to deter humanitarian abuses); Barria & Roper, *How Effective are International Tribunals*, *supra* note 25, at 359–61 (arguing that tribunals are unlikely to have any significant deterrent effect).

135. For a fuller discussion of the strands of deterrence theory and their flaws, see generally Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At its Worst When Doing its Best*, 91 *Geo. L.J.* 949 (2003).

136. MOORE, *PLACING BLAME*, *supra* note 20, at 91.

cial consequences” of criminal law or the “happy surplus that punishment produces.”¹³⁷ Such salutary byproducts might include the deterrence of other potential wrongdoers, rehabilitating offenders, or assuaging the injuries done to victims. These consequences are distinct from “what makes punishment just.”¹³⁸

C. Objectives

The approach I favor is what I call the objectives approach. Prosecutors should identify the policy objectives that a tribunal might achieve within the constraints of a criminal tribunal. What can the operation of a tribunal reasonably accomplish, and how can it best accomplish these objectives? In contrast to the purpose-as-motivation approach, this shifts the focus from the beneficial consequences that might flow from the creation of the tribunal to a consideration of the consequences that might result from the operation of the tribunal.

International courts are complex institutions and are inevitably the result of political tradeoffs and compromises.¹³⁹ Nonetheless, those who create international courts or who are responsible for prosecuting international crimes do so in service of particular goals. For example, when the United Nations created the ICTR in the wake of the 1994 genocide, the Security Council maintained that the creation of the ICTR would bring to justice those responsible for the genocide and “contribute to the process of national reconciliation and to the restoration and maintenance of peace.”¹⁴⁰ It is this kind of policy objective—whether described as a purpose, goal, mandate, or otherwise—that I consider in this Article.¹⁴¹

137. *Id.* at 153.

138. *Id.*

139. See generally LUC REYDAMS ET AL., THE POLITICS OF ESTABLISHING INTERNATIONAL CRIMINAL TRIBUNALS, IN INTERNATIONAL PROSECUTORS 7–80 (Luc Reydams et al. eds., 2012) (describing the political histories of the modern international criminal tribunals); Frédéric Mégret, *The Politics of International Criminal Justice*, 13 EUR. J. INT’L L. 1261 (2002) (reviewing seven recent histories of the legal, political, and practical aspects of creating the modern international criminal tribunals).

140. S.C. Res. 955 (Nov. 8, 1994).

141. To be sure, there has been substantial debate in the field of domestic criminal law in the United States about what the social goals of the criminal process are and ought to be. For a review of the history of the purposes of the criminal law on these terms, see Albert W. Altschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U. CHI. L. REV. 1 (2003). Altschuler cites the familiar “purposes of criminal punishment—retribution, deterrence, incapacitation, and rehabilitation,” and argues that reforms in sentencing and other areas that shifted the law’s focus toward rehabilitation or deterrence have been mistaken and have shown that retribution “merits recognition as the central purpose of criminal punishment.” *Id.* at 15. Altschuler engages with the philosophers, but his focus is on doctrine and policy, not on the justifications for punishment.

III. PUTTING PURPOSES INTO EFFECT

In this part, I argue that there are three policy objectives that international criminal tribunals can accomplish and illustrate how this can work in practice. The first objective is addressing widespread harms: to bring before the tribunal those crimes that caused the greatest harm and ensure a full accounting of the harms that occurred. In practice, this would mean a reduced focus on political leaders and a greater focus on those who perpetrate widespread atrocities, even if they are lower in the political or military hierarchy, or are not responsible for creating the conflict in the first place. The second objective is to use the power of prosecution to condemn those acts that caused the greatest stigma to victims. International criminal tribunals, because they command the attention of the target population, have the potential to express the wrongfulness of the conduct that took place. International criminal tribunals are unlikely to convince many people in the target population to change their opinions about political leaders or other prominent figures, but they can condemn wrongful conduct. In practice, this likely means prosecuting more sexual offenses, because of the strong stigma that victims experience. The final objective is to attend to some of the needs of victims by using cases to obtain as much information as possible about the underlying crimes and to use the leverage that criminal cases provide to extract information about atrocities beyond the crimes for which the defendant is being prosecuted.

Before addressing the objectives, it is important to understand how prosecutors can put purposes into effect. The purposes of international criminal law influence how it is used. It is also true that the structure of international criminal justice is sufficiently flexible to permit it to be used in diverse ways. Even with the constraints of the statutes that create international criminal tribunals, every international prosecutor has the authority to bring or decline to bring cases as he or she sees fit. The issue of prosecutorial discretion is a contentious one in international criminal law. Prosecutors at the modern international criminal tribunals have enjoyed substantial discretion to determine which cases to bring and how to shape each case.¹⁴² Because every tribunal comes into being with great promise and with a surplus of possible goals, two prosecutors could be entirely faithful to one or more of the purposes that animate the tribunal and use their case-selection authority in different ways. The exercise of prosecutorial discretion takes place in the presence of two additional and vitally important considerations. First, prosecutors have scarce resources. Despite the exorbitant cost of all of the international tribunals, and evi-

142. See Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (amended July 7, 2009), art. 15, § 2 (providing that the prosecutor shall “act independently”) & art. 17 (providing that the prosecutor shall determine “whether there is sufficient basis to proceed” after she or he assesses the facts of the case); art. 16, § 2 (providing that the prosecutor shall “act independently”); art. 18 (providing that the prosecutor shall “decide whether there is sufficient basis to proceed” based on the evidence); Statute of the Special Court for Sierra Leone, art. 15, § 1 (Jan. 16, 2002) <http://www.rscsl.org/Documents/scsl-statute.pdf> (providing for prosecutorial independence).

dence that inefficiency is at least in part responsible for the high costs, international prosecutors do not have the resources to bring every case they might wish. For every defendant brought before an international tribunal, there are hundreds (or in the case of Rwanda, tens of thousands) of culpable defendants who are not prosecuted.¹⁴³ Second, no prosecutorial decision is made for any single reason.¹⁴⁴ Prosecutors base their decisions on the availability and reliability of the evidence, their time and expertise, and other factors.¹⁴⁵ It is important to recognize these considerations because they mean that the choices prosecutors make have practical consequences for victims and defendants alike.

There are several aspects of prosecutorial discretion that are particularly important in an international tribunal, all of which would be affected by the prosecutor's understanding of the purposes of the tribunal. One way for prosecutors to exercise their discretion is to identify the defendants they wish to prosecute. David Crane, the first prosecutor at the SCSL, adopted a common strategy, even if his was perhaps an extreme version of that strategy. He interpreted the language permitting him to prosecute "those most responsible" for the violence in Sierra Leone to mean those whose decisions produced the campaigns of violence that had plagued the country.¹⁴⁶ This also included the successful prosecution of Charles Taylor, president of Liberia during much of the time that war gripped West Af-

143. There were an estimated 175,000–200,000 active participants in the genocide in Rwanda. Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide? An Estimate*, 6 J. GENOCIDE RES. 85, 93 (2004); MARK A. DRUMBL, ATROCITY PUNISHMENT, AND INTERNATIONAL LAW 72 (2007) (reporting that at one time there were approximately 89,000 people detained in Rwanda on charges related to the genocide).

144. For an analysis of prosecutorial decision making, see Kai Ambos & Ignaz Stegmiller, *Prosecuting International Crimes at the International Criminal Court: Is There a Coherent and Comprehensive Prosecution Strategy*, 58 CRIME, LAW & SOCIAL CHANGE 391 (2012) [hereinafter Ambos & Stegmiller, *Prosecution Strategy*]. Ambos and Stegmiller reviewed the various memoranda and strategy papers put forth by ICC prosecutors on case selection and prosecution strategy and concluded: "Four fundamental principles lie at the core of the strategy: (i) positive complementarity, (ii) focused investigations and prosecutions, (iii) addressing the interests of the victims, and (iv) maximizing the impact of the Office's work." *Id.* at 393. Similarly, Luc Cote, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 J. INT'L CRIM. JUST. 162 (2005) [hereinafter Cote, *Prosecutorial Discretion*], analyzed the criteria cited by prosecutors in various applications to international criminal tribunals and identified several criteria, including the "nature and seriousness of the crime," the "position of the alleged perpetrator," the "significance of the legal issues involved in the case," the "sufficiency of the evidence." *Id.* at 168. In addition, Cote also cited statements by former prosecutors at the ICTR and the ICTY to explain how they chose the first case they would bring before the tribunal and concludes that an important consideration was "the urgent to prove . . . that these first attempts at international justice after Nuremberg could work, rather than the relative importance of holding these specific men accountable." *Id.* at 169.

145. See generally U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL 9-27.000, <http://www.justice.gov/usam/usam-9-27000-principles-federal-prosecution> (describing multiplicity of factors that prosecutors are permitted to consider when making charging decisions).

146. See David M. Crane, *The Take Down: Case Studies Regarding "Lawfare" in International Criminal Justice: The West African Experience*, 43 CASE W. J. INT'L L. 201 (2010).

rica. Crane's interpretation of his mandate meant that decision makers, including political leaders and people from outside Sierra Leone, were a higher priority than other potential defendants.

Even with these background factors in mind, international prosecutors exercise substantial discretion, and their understanding of their mandate—their purpose—guides their decisions. To understand what it means to put purposes into effect, it is helpful to return to the different categories of purposes that I outlined earlier and add an additional consideration into the mix. The focus of my argument is the prosecutor at an international criminal tribunal. Prosecutors have the greatest ability to influence how international criminal law is used and how it develops.¹⁴⁷ Those who create a tribunal are not in the best position to do this. The creation of a tribunal is certainly an important act with potentially wide-ranging consequences. But these consequences are mainly in the domain of international relations. The existence of a tribunal might affect a combatant party's willingness to negotiate or its incentives to prosecute the war in a particular way. The creation of a tribunal might signal greater international attention to a conflict and its impact on civilians or neighboring states. But it does not really affect the content or direction of international criminal law as doctrine. Similarly, arguments about the moral justifications for punishment are much less important in practical terms when the crimes at issue are genocide or crimes against humanity. What is left then are the practical objectives of an international criminal tribunal: those tasks that prosecutors can accomplish if they use the law in particular ways. This fits the institutional capacity of prosecutors, particularly at international criminal tribunals.

A. *Select Crimes to Address the Widespread Harms*

The crimes that give rise to international criminal tribunals are widespread and affect large swaths of the population.¹⁴⁸ Indeed, the modern law of crimes against humanity, genocide, and war crimes all require the proof of the wider conflict.¹⁴⁹ The widespread nature of the conflicts also

147. See Cote, *Prosecutorial Discretion*, *supra* note 144, at 162. Cote notes that the selection of cases at the Nuremberg tribunal was done by a committee representing the states that had created the tribunal. In contrast, case selection at the modern tribunals, including the ICTY, ICTR, and SCSL, is done by the prosecutors themselves, independent of states. *Id.* at 166.

148. There is a burgeoning literature on the geography of conflict and its effects on civilians. See Marijke Verpoorten, *Detecting Hidden Violence: The Spatial Distribution of Excess Mortality in Rwanda*, 31 POL. GEOGRAPHY 44, 44–46 (2012) (reviewing recent literature on studies that analyze the armed conflict through the use of “spatial statistics”). In the cases of both Rwanda and the former Yugoslavia, the armed conflicts affected the entire country and neighboring states. See William B. Wood, *Geographic Aspects of Genocide: A Comparison of Bosnia and Rwanda*, 26 TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS 57, 62–70 (2001) (documenting the wide geographic distribution of violence in Rwanda and Bosnia).

149. For an analysis of the statutes of the modern tribunals on this point, see, e.g., KNOOPS, LAW OF THE INTERNATIONAL CRIMINAL TRIBUNALS, *supra* note 94, at 37–38 (summarizing proof requirements of crimes against humanity at the modern international criminal

means that prosecutors have many more potential defendants than they can prosecute. Thus one of the most important practical considerations that is affected by the purposes of an international criminal tribunal is the selection of cases. Every international criminal tribunal has in its founding document at least some guidance on this issue. For example, the statute of the SCSL states that the tribunal shall “have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law” during the relevant time period.¹⁵⁰ The statute of the ICTY gives prosecutors “the power to prosecute persons responsible for serious violations of international humanitarian law.”¹⁵¹ The ICTR statute has similar language.¹⁵² In practice, this means that prosecutors have substantial discretion to make decisions based on their understanding of their mandate and authority.

In the selection of cases, prosecutors at modern tribunals have chosen to focus on the most politically prominent perpetrators and on episodes of violence rather than the systematic violence that characterized the conflict. For example, in a statement signed by the then-prosecutors of the ICC, the ICTY, the ICTR and the SCSL, the prosecutors noted that their goals were to “end impunity for the most serious crimes” and to “contribute to peace and the prevention of future violence.”¹⁵³ Importantly, the prosecutors argued that they had attempted to accomplish these goals by prosecuting “heads of state or government” and “other major perpetrators.”¹⁵⁴ Similarly, prosecutors have chosen to target discrete episodes of violence rather than systematic exploitation.¹⁵⁵

There are significant practical effects flowing from a different understanding of the purpose of the tribunal. If, for example, prosecutors had interpreted the purpose to be to target those individuals who engaged in the most violence themselves, the roster of defendants might have looked

tribunals, including that the violence be widespread and systematic); *id.* at 54 (summarizing proof requirements of war crimes). See also BETH VAN SCHAAK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* 427–29 (3d ed. 2015).

150. Statute of the Special Court for Sierra Leone, art. 1, ¶ 1, (Jan. 16, 2002).

151. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 1, ¶ 1 (amended July 7, 2009).

152. Statute of the International Criminal Tribunal for Rwanda, art. 1, ¶ 1 (amended Jan. 31, 2010) (“The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law.”).

153. *Joint Statement of the Prosecutors of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone*, in *FINAL REPORT, COLLOQUIUM OF PROSECUTORS OF INTERNATIONAL CRIMINAL TRIBUNALS* (Nov. 2004), <http://ictr-archive09.library.cornell.edu/ENGLISH/colloquium04/index.html>.

154. *Id.*

155. I addressed this issue in some detail in earlier work. See Patrick J. Keenan, *Conflict Minerals and the Law of Pillage*, 14 *CHICAGO J. INT’L L.* 524, 541–42 (2014) [hereinafter Keenan, *Conflict Minerals*]. In that article, I focused on the crime of pillage and argued that in the modern tribunals, prosecutors have brought charges exclusively based on an episodic theory of pillage; that is, based on discrete episodes of theft. I argued that this ignored those acts that took place over time and affected a broader number of victims.

very different. Instead of indicting political leaders or other decision makers, prosecutors would have targeted the most prolific killers, even if they were low in the hierarchy of the organizations that perpetrated the violence. Alternatively, prosecutors might have concluded that the purpose of the tribunal was to vindicate the experiences of victims to the greatest extent possible. With that understanding, prosecutors might have chosen defendants who contributed the most to the deplorable conditions of life that was experienced by civilians. In this situation, defendants who participated in the mass abductions of children, or the systematic looting of mineral wealth or personal goods, might have been more likely targets. Whatever the final conclusion about the appropriate purposes of the tribunal, prosecutors have enough discretion (and enough potential defendants) that their decisions as to whom to prosecute would affect whether the tribunal would fulfill its purpose.

Consider another way that prosecutors might put into effect the purpose of a tribunal, and how it affects the outcome. Prosecutors have the power to choose whether to focus on direct perpetrators or those who are criminally liable only through their relationship to others. Thus, prosecutors have wide discretion to determine how to shape cases, and these decisions should also be influenced by the purpose of the tribunal. Once a prosecutor has identified a particular defendant for prosecution, the prosecutor still must determine how to frame the case against the defendant. Two examples help to illustrate the point. The first is from the ICTY, and it shows how prosecutors have used expanded liability doctrines to help present a more comprehensive picture of the underlying atrocities. The second is from the SCSL, and shows how the choice of legal theory can make it more difficult to achieve this objective.

The crimes that are the subject of international criminal tribunals are those that attract the attention of the international community and they are, almost by definition, large-scale and prolonged episodes of organized violence. In almost every case, violence of this sort is carried out by organized groups of individuals, whether affiliated with a state or acting independently. This presents the problem of “the attribution and calibration of individual responsibility for mass atrocities.”¹⁵⁶ One of the jurisprudential hallmarks of the ICTY has been the expansion of criminal liability to individuals who are further and further from the physical perpetrator of the crime through the expansion of doctrines of command responsibility, joint criminal enterprise, and the like.¹⁵⁷ For example, prosecutors in the ICTY

156. Alison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 79 (2005).

157. *See id.* at 102–110 (describing the legal theories developed in the ICTY to prosecute individuals who are not themselves the physical perpetrators of the crimes for which they are charged).

charged Anto Furundzija with war crimes involving sexual violence.¹⁵⁸ The prosecution alleged that Furundzija was one of many men involved in a series of violent sexual assaults against a number of young women.¹⁵⁹ Prosecutors could have charged each defendant based on the physical acts that he committed. Instead, they charged Furundzija and others based on a theory of command responsibility, a legal doctrine that allows prosecutors to hold commanders legally liable for the crimes of their subordinates if certain conditions are met.¹⁶⁰

The legal theory chosen by the prosecutors affected the evidence they presented. Recall that prosecutors were likely guided by the aim of developing a full accounting of the violence and exploitation that occurred during the relevant time period. By approaching the case the way they did, ICTY prosecutors showed that the infliction of sexual violence against young women was organized and involved individuals at all levels of the command hierarchy.¹⁶¹ Prosecutors painted a picture of a system of exploitation and violence and traced the various aspects of this system.¹⁶² Apart from the importance of this for individual defendants, this strategy created a different and more comprehensive record of the effect of violence on civilians during the conflict. The other approach—based on the individual physical conduct of each defendant—might have permitted observers to conclude that there had been such a system, but that inference would have been far from inevitable or uncontested. Perhaps more importantly, that conclusion would not have borne the imprimatur of the tribunal. Of course, it is true that the prosecutor's decision would be based on any number of factors. Thus, if the prosecution saw as its duty to fulfill a goal of establishing a complete record of the period of conflict, it might prefer a doctrine like joint criminal enterprise. If, on the other hand, the prosecution saw as its duty to identify and prosecute the individuals responsible for perpetrating the most destructive (or most numerous) acts of violence, it might opt to eschew doctrines of collective responsibility and focus on individuals. The reality of prosecutorial discretion and the availability of multiple legal doctrines by which a prosecutor might pursue the same underlying conduct means that either option, and likely many others, would be acceptable.

158. See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 39–41 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (describing prosecutor's allegations about Furundzija's conduct).

159. *Id.*

160. *Id.* ¶ 42 (arguing that Furundzija was liable on the theory that he ordered or aided in the commission of the crime because he was "intentionally present at the location" of the crimes, he engaged in "acts of encouragement" of the physical perpetrators, and he did not fulfill his duty to prevent the crimes).

161. See *Prosecutor v. Furundzija*, Case No. IT-95-17/IA, Judgment in the Appeals Chamber, ¶ 201 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (noting the "systemic rape and detention of women" as one of the motivating factors for the creation of the ICTY).

162. *Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 76–89 (describing circumstances of sexual violence and rape against victims).

Another example helps to illuminate other aspects of the practical importance of the purposes of a tribunal in determining which legal theory to use, this involving the law of pillage and taken from the SCSL. During the long period of conflict in Sierra Leone, commanders gave their troops permission to take what they wanted from the local population, and gave these campaigns names like “Operation No Living Thing,” “Operation Spare No Soul,” and “Operation Pay Yourself.”¹⁶³ In “Operation Pay Yourself,” troops were encouraged to steal from civilians because their commanders could no longer pay their salaries. Troops were also encouraged to kidnap local women to be their “wives” because women were viewed as chattel.¹⁶⁴ In “Operation Spare No Soul,” troops were encouraged to “kill, maim or amputate any civilian with whom they came into contact, burn villages and rape girls and women freely.”¹⁶⁵ For their roles in ordering these operations, a handful of leaders of two of the factions in the war were convicted of pillage.

Consider two ways the prosecution of this underlying conduct could have been different. First, prosecutors could have, but did not, charge the physical perpetrators of the crimes. Thousands of women and girls were raped and mutilated. Thousands of civilians had their hands or other body parts forcibly amputated, usually by machete. Thousands of people had their property stolen or their homes burned to the ground.¹⁶⁶ The physical perpetrators of these acts were not prosecuted. The reason they were not prosecuted is that the prosecutor understood the purpose of the tribunal as a mandate to punish those individual decision makers who set in motion or instigated the violence.¹⁶⁷ If prosecutors had understood the purpose of the tribunal as a mandate to punish those who perpetrated the most or most egregious acts of violence, they might have approached the case differently. Instead of focusing on decision makers, they might have spent their scarce prosecutorial resources on the prosecution of as many perpetrators as possible. To be clear, I do not suggest that the approach taken by prosecutors was inappropriate, just that it was directly affected by their understanding of the purpose of the tribunal, and that it was not the only appropriate approach.

Second, what if prosecutors had had a different understanding of the law of pillage? Under the modern law of pillage, prosecutors have availa-

163. Prosecutor v. Taylor, Case No. SCSL-03-01-A, Judgment, ¶ 281 (Special Court for Sierra Leone Sep. 26, 2013); Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶ 238 (Special Court for Sierra Leone June 20, 2007).

164. *Taylor*, Case No. SCSL-03-01-A, ¶ 281.

165. *Id.* ¶ 238.

166. See generally “We’ll Kill You if You Cry”: *Sexual Violence in the Sierra Leone Conflict*, HUMAN RIGHTS WATCH (Jan. 2003), <https://www.hrw.org/report/2003/01/16/well-kill-you-if-you-cry/sexual-violence-sierra-leone-conflict> (describing campaigns of abuse against civilians during the conflict in Sierra Leone, including rape and amputations).

167. David M. Crane, *Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts*, 37 CASE W. RES. J. INT’L L. 1, 5–7 (2007) (describing development of prosecutorial strategy and understanding of mandate).

ble to them two theories to prosecute the crime of pillage.¹⁶⁸ One approach is to focus on discrete episodes of theft. On this theory, prosecutors identify specific dates (or short periods of time) during which one or the other fighting force stole from civilians during an armed conflict or widespread attack.¹⁶⁹ The other available approach is the systematic theory of pillage.¹⁷⁰ On this theory, prosecutors would focus on violence associated with the widespread theft of natural resources. In Sierra Leone, as elsewhere, prosecutors used an episodic definition of pillage. In the SCSL, prosecutors held commanders legally liable for the acts their subordinates committed as they stole from civilians.¹⁷¹ As violent and destructive as they were, these discrete episodes of pillage were not the only times that the defendants in the SCSL stole from civilians. In fact, there was widespread and systematic theft of exploitable resources throughout the conflict.¹⁷² There is substantial evidence that the fighting forces engaged in the systematic appropriation of timber, diamonds, and other minerals from civilians in Sierra Leone, and that the proceeds from these stolen goods were used to fund the wars.¹⁷³ Indeed, prosecutors had extensive evidence that Charles Taylor, convicted of pillage because of the actions of his subordinates in discrete episodes of pillage, also directed systematic theft, although he was never prosecuted for those acts.¹⁷⁴

These different approaches to prosecuting the same crime illustrate the importance of linking the purpose of the tribunal to practical, doctrinal considerations. For example, by choosing the episodic theory of pillage, prosecutors made relevant different evidence than would have been relevant had they prosecuted the defendants under a systematic theory. The episodic theory made relevant evidence of harms visited upon a limited number of villagers over a very short period of time. In contrast, a systematic theory would have provided a richer and more complete record of the harms of the conflict. One of the signal features of many, though certainly

168. This Section draws on my earlier article. See Keenan, *Conflict Minerals*, *supra* note 155.

169. At its most basic, the crime of pillage is the unlawful appropriation of property during armed conflict. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 185 (Int'l Comm. of the Red Cross ed., 2005). In the ICC, the elements are as follows: "(1) the perpetrator appropriated certain property; (2) the perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use; [and] (3) the appropriation was without the consent of the owner." *Elements of Crimes*, *supra* note 29, art. 8 (2)(b) (xvi) (describing the War Crime of Pillaging).

170. See Keenan, *Conflict Minerals*, *supra* note 155, at 541–42 (describing the systematic theory of the crime of pillage).

171. See *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Judgment, ¶ 1395 (Special Court for Sierra Leone June 20, 2007).

172. See *id.* ¶ 1398; see also James Rupert, "Diamond Hunters Fuel Africa's Brutal Wars," *WASH. POST*, at A1 (Oct. 16, 1999) (reporting on the effects of "Operation Pay Yourself" on the civilian population).

173. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment in the Trial Chamber, ¶ 5843 (Special Court for Sierra Leone May 18, 2013).

174. See *id.* ¶ 6994.

not all, modern conflicts is that the fighting forces often fund their operations by exploiting natural resources.¹⁷⁵ They fight for territory at least in part so that they can extract and sell the minerals or timber on the contested land to fund the conflict. If one of the purposes of an international criminal tribunal is to prosecute those responsible for a system of exploitation and those who have harmed the most victims, a legal theory that does not expose the system of exploitation that gave rise to the atrocities is inadequate.

The statutes of all modern international criminal tribunals have a provision within the category of crimes against humanity labeled “other inhumane acts.” This provision amounts to a catch-all and permits prosecutors to hold defendants accountable for acts similar to those enumerated in the statute but not contemplated by the drafters of the statute. One of the emerging trends in international criminal law is a movement toward identifying crimes by the harms they cause. It often seems that prosecutors are attempting to find a separate crime to fit every harm. To see how this category has been used to allow prosecutors to find a crime for every harm, consider an example, again from Sierra Leone and again involving the crime of forced marriage. Throughout the conflict in Sierra Leone, fighters abused women almost at will. There was a high incidence of rape and other sexual violence, sexual slavery, kidnapping, and forced labor.¹⁷⁶ All of these crimes fit neatly, at least in theory, into existing categories of crimes against humanity. The statute of the SCSL permitted the tribunal to try defendants for rape, sexual slavery, forced prostitution, forced pregnancy, sexual violence, and torture.

But in the case against Brima and others from the AFRC leadership, prosecutors brought an additional charge, that of “forced marriage.”¹⁷⁷ They sought to fit it into the category of “other inhumane acts” and to seek convictions even when they were prosecuting the defendants for the same underlying series of events involving the same victims. Importantly, the problem was not that there was insufficient proof of the other crimes; indeed, there was ample proof of them. Prosecutors could show all of the elements of rape, torture, slavery, and the like. Instead, the problem was that the existing crimes did not describe precisely the unique harms done to women who were subjected to forced marriage. Prosecutors created the crime to fit a harm that they (and the victims) believed was not covered by the other crimes.¹⁷⁸ Prosecutors justified this by arguing that one of the

175. See generally MICHAEL T. KLARE, *RESOURCE WARS: THE NEW LANDSCAPE OF GLOBAL CONFLICT* (2001) (showing the links between natural resources and conflict in modern conflicts).

176. See generally “*We’ll Kill You if You Cry*”: *Sexual Violence in the Sierra Leone Conflict*, *supra* note 166.

177. Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶ 6 (Special Court for Sierra Leone June 20, 2007) (noting that the prosecutor amended the indictment to add a charge of “forced marriage” in the category of other inhumane acts as a crime against humanity).

178. Micaela Frulli, *Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a “New” Crime Against Humanity*, 6 J. INT’L CRIM.

purposes of the tribunal was to affirm the experiences of the victims; to, so far as possible, find a way under the statute to address as many of the most egregious harms as possible. Note that in the context of Sierra Leone, this purpose did not align perfectly with another purpose: to prosecute those most responsible for the conflict, which prosecutors interpreted to mean leaders and those responsible for the decisions that fueled the conflict.

Consider another example, this from Rwanda. The ICTR was the first international criminal tribunal to convict a defendant of the crime of genocide when the underlying conduct was rape, not murder.¹⁷⁹ As with the cases in Sierra Leone, it was not the case that prosecutors had to use this unique charge to hold accountable defendants who would otherwise have escaped justice. The ICTR statute provided ample avenues to convict defendants guilty of rape for crimes against humanity or war crimes.¹⁸⁰ Instead, the decision to pursue the charge of genocidal rape was an attempt to attach a criminal label to unique underlying harms.

In both cases, the tribunal faced a difficult legal problem: how to adjudicate charges that seemed to address behavior entirely incorporated into other charges. The tribunals purported to enforce a version of what is sometimes called the “same elements” rule. Under this rule, a single defendant may be convicted of two offenses based on the same underlying transaction only if each charge includes an element not present in the other charge.¹⁸¹ To distinguish the new crimes, the tribunals relied on expert testimony about the unique harms present with the new offenses. For example, with respect to the crime of forced marriage, expert witnesses testified that forcing a young woman to act as the “wife” of her captor caused emotional damage different from the harm caused by the crime of rape or kidnapping (or both).¹⁸² Similarly, the crime of genocidal rape included an element that distinguished it from simple rape—the intent to destroy the targeted group.

JUST. 1033, 1036–37 (2008) (showing that the prosecutor charged and the tribunal accepted the crime of forced marriage because the other avenues of prosecuting sexual violence did not fully capture the specific harms attendant to forced marriage).

179. See Diane Marie Amann, *International Decisions, Prosecutor v. Akayesu*, 93 AM. J. INT'L L. 195 (1999) (noting that a case from the ICTR “marks the first time an international criminal tribunal has tried and convicted an individual for genocide and international crimes of sexual violence”).

180. See Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (amended July 7, 2009), arts. 3(g) & 4(d) (permitting prosecutors to bring charges of rape as a crime against humanity or a war crime).

181. There are good reasons to question the tribunals’ fidelity to this rule. Under a strict reading of the rule, the second offense may not merely have an additional element; that is, the second offense may not have the same elements as the first offense plus one. Each offense must have a unique element. In each case, it appears that the tribunal found one element that was not present in the other charge; that is, that the second offense had the same elements as the first offense plus one. The tribunals do not appear to have found an element that was unique to each offense.

182. See *Prosecutor v. Brima*, SCSL-04-16-T, Trial Judgment, ¶¶ 1076–1083 (Special Court for Sierra Leone June 20, 2007) (summarizing testimony of expert witness regarding the harms associated with forced marriage).

Consider what the cases would have looked like without the additional charges. In the Rwanda case, it is unlikely that the additional charges would have brought before the tribunal any defendants who would not have otherwise been charged. What is more, the victims of genocidal rape would not have had their day in court even if prosecutors had not lodged the additional charges. The same is true for the Sierra Leone case: the additional charges brought no additional defendants and did not permit any additional victims the opportunity to have their day in court. The primary consequence of the additional charges was to highlight a specific type of harm not previously the centerpiece of a prosecution and ensure that that type of harm was recognized as sufficiently important to justify a criminal prosecution.

B. *Stigmatize Harmful Conduct*

If one of the purposes of an international criminal tribunal is to account for the interests of victims, prosecutors should select for prosecution those cases that carry the greatest social stigma. In all the modern tribunals, prosecutors have taken as one of their purposes “to end impunity for the most serious crimes that plague humankind.”¹⁸³ In practice, this has meant attempting to end impunity for the most notorious or prominent criminals, not necessarily for the crimes that affect the most people. I argue that prosecutors should use international criminal tribunals to target the crimes that cause the most stigma for their victims, even if the defendants are not the most politically powerful or prominent. This argument rests on three propositions, each of which I explore in detail in this part. First, prosecution of a crime in an international criminal tribunal stamps that conduct as wrongful. The imprimatur of a prosecution operates as a signal to those in the society that the underlying conduct was not only illegal but also wrong. Second, many victims lose social standing on account of their victimization. They are viewed as damaged in a very real way—unfit for marriage, for example—merely by the fact that they were the victim of a particular crime.¹⁸⁴ And finally, this stigma is harmful to individual victims and also detrimental to efforts to reconcile the damaged society. If these three propositions are true, and if one of the goals of an international criminal tribunal is to account for the interests of victims, then prosecutors should prioritize those cases that address the most stigmatizing conduct.

183. *Joint Statement of the Prosecutors of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone*, in COLLOQUIUM OF PROSECUTORS OF INTERNATIONAL CRIMINAL TRIBUNALS (Nov. 2004), <http://ict-r-archiv09.library.cornell.edu/ENGLISH/colloquium04/index.html>.

184. See, e.g., Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone's Rape Victims*, 18 HARV. HUM. RTS. J. 85, 87 (2005) (describing stigma associated with having been the victim of rape or other sexual violence during wartime).

There is evidence that people in conflict-affected societies take their lead from the justice system and perceive as wrongful the conduct that is prosecuted in a tribunal. There are several possible explanations for this. First, and most obvious, because international criminal tribunals typically focus on the most egregious conduct, the prosecution of a case merely confirms existing perceptions about the wrongfulness of the underlying conduct. Even in conflict-affected societies where violence is widespread, norms condemning murder, rape, and other serious offenses remain in place. A second explanation for the power of courts to stamp conduct as wrongful comes from the authority of the tribunal. If it is viewed as legitimate and exercising power against those who committed the worst acts, then observers perceive all of the prosecuted cases as involving wrongful conduct.¹⁸⁵ This fact can have serious negative consequences for defendants, to be sure, but it remains true.

The second proposition that supports my argument that prosecutors should focus their scarce resources on those crimes that carry the greatest social stigma would represent a sharp break from the roots of international criminal law and a recalibration of what it means for conduct to be harmful under international law. Historically, international law existed to regulate relations among states. The law existed to give order to interactions among states, allow states to resolve disputes peacefully, and provide a predictable set of rules for things like commercial transactions, navigation on the sea, or the work of diplomats. International humanitarian law had a similar purpose, albeit in a very different context. The law's purpose was to reduce the incidence of conflict among states and reduce the effect of conflict on states not involved in the dispute and on civilians.¹⁸⁶ In this context, harmful acts—that is, those that generated a legal response—were those that affected states and the interests of states. For example, in the Nuremberg prosecutions, that lynchpin of the case was not the charge of crimes against humanity for Nazi atrocities against civilians. Instead, it was the charge that Germany had waged an aggressive war. The principal underlying harm was what Germany had done to other states (and to the international community), not what Germany had done to civilians in the countries it invaded. To be clear, I do not argue that the charges addressing Nazi crimes against civilians were unimportant or in any way legally inappropriate. Indeed, they helped set the stage for the current state of international criminal law. But, without the aggression charge, the others would have been difficult or untenable. My argument that prosecutors who wish to promote the interests of victims should do so by focusing on the conduct with the greatest social stigma is a departure from the traditional approach.

185. See generally Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404–05 (1958) (describing the condemnatory effect of criminal sanctions).

186. See generally FRITS KALSHOVEN & LIESBETH ZEGVELD, *CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 1–3 (4th ed. 2011).

The third proposition—that addressing social stigma helps fulfill the purpose of attending to the interests of victims—is a more complex question. Scholars have long argued that the content of legislation can have the effect of signaling to the public that a particular behavior is favored or disfavored.¹⁸⁷ More recently, scholars have begun to consider whether the prosecution of particular crimes or the passing of a particular sentence has a similar signaling effect.¹⁸⁸ Richard McAdams has developed a useful framework for understanding when the prosecution of a crime expresses condemnation of the underlying acts.¹⁸⁹ McAdams identifies three conditions under which the prosecution of a particular crime might plausibly signal a particular attitude. The first is that “the enforcement action carries some clear audience message.”¹⁹⁰ This means that those receiving the message can easily infer its meaning. The second condition is that there be sufficient “publicity”; that is, that “many people receive the message.”¹⁹¹ Finally, McAdams argues that for a signal to affect the recipient’s beliefs, there must be something about the signal that makes it particularly salient. He argues that there must be a “mechanism[] that amplif[ies] the informational content of the legal signal.”¹⁹²

With respect to the effect on victims of the prosecution or non-prosecution of particular crimes in an international criminal tribunal, these conditions apply particularly well. Victims have strong incentives to pay close attention to the proceedings, and the available evidence suggests that they do so.¹⁹³ In addition, all modern international criminal proceedings have some form of victims’ advocates who expressly provide information to victims about the proceedings.¹⁹⁴ And there are advocacy groups that engage

187. See, e.g., Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 PENN. L. REV. 1363, 1448–50 (2000) (reviewing literature on expressive theories of regulation).

188. RICHARD McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 136 (2015) [hereinafter McADAMS, *EXPRESSIVE POWERS*] (summarizing the dynamic as follows: “law provides information; information changes beliefs; new beliefs change behavior”).

189. *Id.* at 176–79.

190. *Id.* at 179.

191. *Id.*

192. *Id.* at 180.

193. See BINAIFER NOWROJEE, “YOUR JUSTICE IS TOO SLOW”: WILL THE ICTR FAIL RWANDA’S RAPE VICTIMS? 4 (2004) [hereinafter NOWROJEE, “YOUR JUSTICE IS TOO SLOW”]. Nowrojee interviewed numerous women raped during the genocide in Rwanda in 1996 and again in 2003, and based on these interviews she concluded: “There is not a rape survivor to whom I spoke who had not heard of the ICTR and who did not have thoughts about the institution. They are watching.” *Id.* See also Donna E. Arzt, *Views on the Ground: The Local Perception of International Criminal Tribunals in the Former Yugoslavia and Sierra Leone*, 603 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 232–33 (2006) (summarizing evidence regarding public awareness of the ICTY and the SCSL and concluding that both were very well known and closely observed locally).

194. For summaries of the victim outreach and support programs, see, e.g., Patricia M. Wald, *Dealing With Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 221–22 (2002) [hereinafter Wald, *Dealing with Witnesses*]; Erik Mose, *Main Achievements of the ICTR*, 3 J. INT’L CRIM. JUST. 920, 937 (2005) [hereinaf-

victims to keep them informed. So the audience is paying close attention. The prosecution or non-prosecution of particular crimes is sufficiently important to victims that they receive the signal. That is, the action carries a message that the audience of survivors understands.¹⁹⁵ Finally, the authority and power of the tribunal amplifies its message sufficiently to make it stand out from the rest of the information that victims receive. Before moving on, it is important to emphasize that the most I claim is that the prosecution or non-prosecution of particular offenses in an international criminal tribunal could have the effects I describe. As I have discussed, several aspects of international criminal tribunals make a particularly strong candidate for this kind of effect, but it is impossible to prove definitively.¹⁹⁶

Prosecutors wishing to address crimes bearing the greatest social stigma would have to solve the practical problem of determining how best to identify which acts were the most stigmatizing. To be sure, there is no way to make a definitive calculation as to which crimes produce the most social stigma. But there is an emerging body of evidence that victims of certain acts face more social costs than victims of other acts. They find it more difficult to reintegrate into society, fit themselves into desired social roles by marrying and having children, and find work in the post-conflict society.¹⁹⁷

To see how this would affect actual cases, consider two recent examples. During the genocide in Rwanda, there was widespread killing as Hutus killed Tutsis by the thousands. After 100 days, between 500,000 and 800,000 Tutsis and moderate Hutus had been slaughtered. Parallel with the killings was a campaign of mass rapes that received relatively little attention. After the genocide, researchers determined that approximately 500,000 women and girls were raped or otherwise subjected to sexual violence, including rape with objects. Many of the victims were raped by a large number of men and many were raped in public. Many of these vic-

ter Mose, *Achievements of the ICTR*]; Rebecca Horn et al., *Testifying in an International War Crimes Tribunal: The Experience of Witnesses in the Special Court for Sierra Leone*, 3 INT'L J. TRANSITIONAL JUST. 135, 137–38 (2009) [hereinafter Horn et al., *Witnesses in the SCSL*].

195. Sloane makes a similar point. Sloane argues that international criminal tribunals have the capacity to communicate effectively with their target audience. Sloane, *Expressive Capacity*, *supra* note 6, at 84–85.

196. *See id.* at 70 (arguing that the expressive function of international criminal law “is not or need not be . . . a self-sufficient “justification” for punishment; it is a function an essential characteristic of punishment as a social institution). Similarly, I argue that even if the expressive function is a worthwhile objective of prosecutors as they select and shape cases, even if it not a sufficient justification for the creation of a tribunal in the first place.

197. *See, e.g.*, SUSAN MCKAY & DYAN MAZURANA, *WHERE ARE THE GIRLS? GIRLS IN FIGHTING FORCES IN NORTHERN UGANDA, SIERRA LEONE AND MOZAMBIQUE: THEIR LIVES DURING AND AFTER THE WAR* 37 (2004) (reporting, based on empirical study, that the post-conflict reintegration of boys who had committed atrocities was often easier than the reintegration of girls who had been raped or subjected to forced marriage); Donatilla Mukamana & Petra Brysiewicz, *The Lived Experience of Genocide Rape Survivors in Rwanda*, 40 J. NURSING SCHOLARSHIP 379, 381–82 (2008) (reporting, based on small empirical study, that survivors of rape experienced shame, social isolation, and dishonor).

tims were also killed, but those who survived faced a shameful stigma.¹⁹⁸ The legacy of rape is complicated and affects all survivors differently. But across the range of victims, there is convincing evidence that survivors were ostracized, viewed as unfit for marriage, and found it difficult to raise their children (some conceived of rape).¹⁹⁹

When prosecutors were developing cases for the ICTR, they did not include rape among the charges.²⁰⁰ Indeed, the charge of rape as genocide only appeared after a witness “spontaneously” testified that she had been raped.²⁰¹ After this, prosecutors hastily amended the indictments in a number of cases and incorporated rape charges against the defendants. In fact, prosecutors had faced withering criticism for failing to include rape and other crimes against women among the charges to be pursued.²⁰² The initial investigations that produced the most extensive documentation of the campaign of rapes were conducted not by prosecutors, but by human rights advocates. It was only after advocates have assembled extensive evidence of rapes that prosecutors changed their strategy.

The second example—this one more promising—is from Sierra Leone. During the decade of conflict in West Africa, some of the fighting forces developed a practice of kidnaping girls and young women and forcing them to serve as the “wives” of combatants. They were subjected to sexual violence and coercive sex, forced to keep a home and feed the com-

198. See Lisa Sharlach, *Rape as Genocide: Bangladesh, the Former Yugoslavia, and Rwanda*, 22 *NEW POLITICAL SCIENCE* 91, 99 (2000) (reporting that “the terrible social stigma that accompanies rape” affects survivors well after the genocide). Indeed, there is evidence that rape was used as means of inflicting this stigma. *Id.* at 98–99 (summarizing evidence of the incidence of rape in Rwanda and concluding that those responsible for the genocide “used rape of women, primarily Tutsi, as a political weapon”). Complicating this is the fact that many women contracted HIV as a result of being raped, subjecting them to the additional stigma that comes with that status. See Paul B. Spiegel et al., *Prevalence of HIV Infection in Conflict-Affected and Displaced People in Seven Sub-Saharan African Countries: A Systematic Review*, 369 *LANCET* 2187, 2190–91 (2007) (reviewing literature and finding that many “articles reported that the 1994 genocide caused a substantial increase in HIV infection in the rural population because of massive displacement, population mixing, and wide-scale rape”).

199. See Binaifer Nowrojee, *Making the Invisible War Crime Visible: Post-Conflict Justice for Sierra Leone’s Rape Victims*, 18 *HARV. HUM. RTS. J.* 85, 104 (2005) [hereinafter Nowrojee, *Sierra Leone’s Rape Victims*] (describing the “particular stigma and shame that attaches to rape”); CHISECHE SALOME MIBENGE, *SEX AND INTERNATIONAL TRIBUNALS: THE ERASURE OF GENDER FROM THE WAR NARRATIVE* 42 (2013) (describing the personal and social stigma attached to rape).

200. NOWROJEE, “YOUR JUSTICE IS TOO SLOW,” *supra* note 193, at 8–9 (describing ICTY prosecutors’ failures to develop a strategy to prosecute crimes of sexual violence and their failure to bring such charges).

201. See Kelly Dawn Askin, *Gender Crimes Jurisprudence in the ICTR*, 3 *J. INT’L CRIM. JUST.* 1007, 1009–10 (2005) (describing witness who testified that she had been raped and had heard of other rapes, and prosecutor’s subsequent amendment of the indictment to include rape charge).

202. See, e.g., NOWROJEE, “YOUR JUSTICE IS TOO SLOW,” *supra* note 193, at 9–11 (describing ICTR prosecutor’s failure to investigate and charge rape cases and critiques of that strategy).

batants, and expected to bear and raise their children. As discussed in detail above, prosecutors worked closely with victims to understand the multiple and separate harms they experienced, and to understand the stigma associated with having been victims of those crimes.

Despite their announced intention to pursue the interests of victims, ICTR prosecutors initially failed to investigate or appreciate the social significance of rape among survivors. Those who had been victimized in this way bore a stigma that victims of other crimes did not bear. This was, of course, compounded by other physical and emotional scars that the rape victims bore. By initially ignoring rape, ICTR prosecutors signaled that those who had suffered it had not suffered as profound a harm as others. They also signaled that the underlying conduct—sexual violence—was not as serious as the other conduct for which they sought criminal sanctions. In contrast, prosecutors at the SCSL built a relationship with local people, including victims, which helped to develop a richer understanding of the varied harms caused by the conflict.²⁰³

A second practical problem facing prosecutors is that they would be required to present evidence from witnesses who may have little desire to testify publicly. Proof is a problem in every criminal case, and this is certainly true for international criminal cases. Prosecutors must identify witnesses who may still live in fear of the perpetrators. But prosecuting the cases carrying the most social stigma presents even greater complications. Witnesses testify publicly and might fear that detailed descriptions of their victimization would exacerbate their social stigma.²⁰⁴ Prosecutors have attempted to overcome this problem by permitting witnesses to testify pseudonymously or from a remote location.²⁰⁵ Nonetheless, it is important to acknowledge that it might be costly to shift focus from targeting national leaders to those whose crimes caused the most social harms.

C. *Pursue the Interests of Victims by Uncovering as Much as Possible about the Atrocities*

One of the most common refrains from those who create international criminal tribunals and the prosecutors who work in them is that the tribunals exist to serve victims.²⁰⁶ Every prosecutor declares his or her dedica-

203. See Nowrojee, *Sierra Leone's Rape Victims*, *supra* note 199, at 96–102 (describing the evolution of prosecutorial strategy for investigating and prosecuting charges of sexual violence in the SCSL).

204. See e.g., Valerie Oosterveld, *Lessons from the Special Court for Sierra Leone on the Prosecution of Gender-Based Crimes*, 17 J. GENDER, SOC. POL. & L. 407, 423 (2009) (describing reluctance of some witnesses to testify regarding sexual violence).

205. See, e.g., 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*, 5 WASH. U. J. L. & POL'Y 87, 108–09 (2001) (describing measures taken by ICTY to ensure the safety of witnesses and overcome reluctance to testify).

206. The idea of serving victims did not, of course, originate with the modern tribunals. Victims participated as witnesses in the Nuremberg Tribunal and gave evidence of their suffering. See Luke Moffett, *The Role of Victims in the International Criminal Tribunals of the Second World War*, 12 INT'L CRIM. L. REV. 245, 253–54 (2012). Victims played a much

tion to the task of doing as much as possible for victims. David Crane, the first prosecutor at the SCSL, argued that “the true purpose of the tribunal [is] the victims, their families, towns, and districts.”²⁰⁷ Luis Ocampo, the first prosecutor at the ICC, has argued that a prosecutor must “become a lawyer for the people.”²⁰⁸ The authors of a comprehensive analysis of the memoranda on case selection and strategy published by the ICC’s prosecutors found that one of the main principles that guides prosecutors is “addressing the interests of victims.”²⁰⁹

Modern tribunals have adopted a version of an information and access approach: provide detailed information to victims about the proceedings and ensure that they have multiple opportunities to present their views in the proceeding. This approach improves victims’ access to the proceedings, to be sure, but its focus is limited to assisting victims in their participation in existing (or planned) proceedings. It makes it easier for victims to acquire information about the proceedings, but it does little to help victims to acquire information about the crimes that gave rise to the proceedings. Information about the trial and access to it are surely important, but if a concern for victims means nothing more than that, this method is limited.²¹⁰ All modern international criminal tribunals are structured to support victims through the trial and appellate process. In the ICTY and ICTR, there are units within the court that provide support for victims.²¹¹ Such units counsel victims on the importance and meaning of their testimony, provide information about trials, and generally attempt to help victims participate as meaningfully and as painlessly as possible. Given the stakes of the proceedings and the experiences of many victims, it is impossible to make the experience of victim witnesses entirely painless or conve-

smaller role at the Tokyo Tribunal. *Id.* at 263–67. That victim participation is not unpre-
cedented is not to suggest that the role played by victims in the past was satisfying to them. For
a critique of the absence of victim participation in the post-World War II tribunals, see Su-
sanne Karstedt, *From Absence to Presence, From Silence to Voice: Victims in International
and Transitional Justice Since the Nuremberg Trials*, 17 INT’L REV. VICTIMOLOGY 9, 12–16
(2010) (describing the experiences of victims of World War II in and after the tribunals).

207. David M. Crane, *Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts*, 37 CASE W. RES. J. INT’L L. 1, 5 (2007).

208. *Final Report*, COLLOQUIUM OF PROSECUTORS OF INTERNATIONAL CRIMINAL TRIBUNALS ON THE CHALLENGES OF INTERNATIONAL JUSTICE, 4 (Nov. 2004), <http://ictr-archive09.library.cornell.edu/ENGLISH/colloquium04/index.html>.

209. Ambos & Stegmiller, *Prosecution Strategy*, *supra* note 144, at 393.

210. For a review of the measures in place to attend to the needs of victims, see generally Mina Rauschenbach & Damien Scalia, *Victims and International Criminal Justice: A Vexed Question?*, 90 INT’L REV. OF THE RED CROSS 441 (2008) (summarizing and criticizing the increase in measures to advance the interests of victims in international criminal law).

211. For a description of the operation of the ICTY’s unit, see Wald, *Dealing With Witnesses*, *supra* note 194, at 221–22. The ICTR’s support for victims has been more halting, but there were structures in place to attempt to support victims. See Mose, *Achievements of the ICTR*, *supra* note 194, at 937. See also Horn et al., *Witnesses in the SCSL*, *supra* note 194, at 137–38 (describing mechanisms in place to assist witnesses in the SCSL).

nient. Nonetheless, victim support units attempt to remove as many of the unnecessary difficulties as possible.

The ICC has gone further, with an office designed to represent victims in the proceedings. The ICC statute provides victims with the right to present their views to the court before the end of the proceedings.²¹² Victims typically do this through a legal representative and may do so throughout the proceedings.²¹³ Victims may present their views before the Pre-Trial Chamber rules on the prosecutor's request to initiate an investigation, during the pre-trial stage, at trial, and during the appeal.²¹⁴ In addition, the ICC statute provides for the possibility of reparations for victims.²¹⁵ If a defendant is convicted, the ICC has the power to order him to pay reparations to his victims.²¹⁶ Victims are permitted to participate in this process, either by requesting reparations or simply requesting the right to participate and present their views.

Despite the widespread concern for victims and the nascent structures in place to attend to the needs of victims, it is not at all clear what the doctrinal effects of a victim-centered approach are or might be. What does it mean for a prosecutor to be a lawyer for the victims? One place to begin the inquiry is to ask what victims want from international criminal proceedings. There have been relatively few empirical investigations done regarding the desires of victims, but those that exist suggest what motivates victims and what hopes they have for the tribunal.²¹⁷ First, many victims report that they are motivated to testify by a desire to tell the story of the

212. See Rome Statute of the International Criminal Court, art. 68(3), July 17, 1998, 37 I.L.M. 999 (1998) (providing that the court shall permit the "views and concerns" of victims to be "presented and considered at stages of the proceedings determined to be appropriate by the Court").

213. See *id.* art. 68(3) (providing that the views of victims may be presented through their legal representatives).

214. See *Participation of Victims in Proceedings*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/victims/participation/Pages/participation%20of%20victims%20in%20proceedings.aspx.

215. Rome Statute art. 75(1) (providing that the court may order "appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation").

216. *Id.* art. 75(2) (providing that the reparations order be made "directly against a convicted person").

217. Two important caveats are in order with respect to these studies. First, and perhaps obviously, the victim population is heterogeneous, and their views on what they want from international criminal tribunals are similarly varied. It is also inevitable that victims experienced the conflict differently and processed it differently afterwards. The issues I highlight are consistent with the available evidence, but I do not argue that they represent the views of all victims. Second, all of the studies on which I base my arguments are drawn from interviews or surveys of victim witnesses; that is, the respondents are those victims who chose to testify before a war crimes tribunal. My interest is in the victim population more generally, not simply in those who testify. Because there is a dearth of evidence about victims generally, and because victim witnesses represent an important part of the victim population, evidence from these studies is useful even though it does not perfectly align with my focus. There has been some theoretical work arguing that the victim population should be considered more broadly. See, e.g., Mark Findlay, *Activating a Victim Constituency in International Criminal Justice*, 3 INT'L J. TRANSITIONAL JUST. 183, 198–99 (2009) (arguing that international criminal

wrongs committed against them.²¹⁸ They are motivated to participate in international criminal proceedings because of what the proceedings offer them for their suffering.²¹⁹ A second finding is that victims are particularly eager to determine what happened to their loved ones, even if acquiring this information comes at the cost of having to talk about what are often very humiliating experiences of victimization.²²⁰ Taken together, these motivations suggest that an international criminal tribunal with a purpose of providing for the interests of victims need not concern itself with general deterrence—that is, the deterrence of future crimes by unspecified wrongdoers—as it selects, shapes, or prosecutes cases.²²¹ From the perspective of victims at least, the proceedings offer an opportunity to tell their story and acquire information about what happened to them; deterring others is not a principal motivation. A third motivation cited by many victim witnesses is a desire for affirmation of the wrongfulness of their suffering.²²² Here, it is important to recall the context in which the crimes that give rise to international criminal tribunals arise. Victims are targeted because of their race, religion, tribe, or other group identity.²²³ Thus,

law should recognize “communitarian victimization” in which the victim population is defined very broadly).

218. See Shanee Stepakoff et al., *Why Testify? Witnesses’ Motivations for Giving Evidence in a War Crimes Tribunal in Sierra Leone*, 8 INT’L J. TRANSITIONAL JUST. 426 (2014) [hereinafter Stepakoff et al., *Witnesses in the SCSL*]. The authors conducted structured interviews with witnesses who testified before the SCSL. *Id.* at 438. Based on these interviews, the authors concluded that a witness’s desire to respond to the wrongs done to him or her was the most common motivation for testifying. *Id.* at 441–44.

219. This finding is consistent with research done on other victim witness populations. See, e.g., PHIL CLARK & NICOLA PALMER, TESTIFYING TO GENOCIDE: VICTIM AND WITNESS PROTECTION IN RWANDA 8 (2012) [hereinafter CLARK & PALMER: WITNESSES IN RWANDA] (reporting, based on interviews with witnesses, that the desire to truthfully report what happened to the witness was a principal motivation for testifying in a genocide-related trial); GABRIELA MISCHKOWSKI, THE TROUBLE WITH RAPE TRIALS—VIEWS OF WITNESSES, PROSECUTORS AND JUDGES ON PROSECUTING SEXUALIZED VIOLENCE DURING THE WAR IN THE FORMER YUGOSLAVIA 13 (2009) [hereinafter MISCHKOWSKI, WITNESSES IN THE ICTY] (reporting, based on interviews with victim witnesses, that many were motivated by a desire to talk about the truth of what happened to them).

220. CLARK & PALMER: WITNESSES IN RWANDA, *supra* note 219, at 8 (reporting that those who testified did so in part “to obtain more information about what happened during the genocide, including locating the bodies of murdered loved ones and identifying perpetrators”).

221. To be clear, in all of the studies I have cited, the respondents reported that they wished to see the perpetrators punished and prevented from committing similar crimes.

222. See MISCHKOWSKI, WITNESSES IN THE ICTY, *supra* note 219, at 13 (reporting that some victims testified so that young people “do not take those who committed war crimes as their role models”); CLARK & PALMER: WITNESSES IN RWANDA, *supra* note 219, at 8 (reporting that victim witnesses were motivated by a “need for public acknowledgement of suffering”); Stepakoff et al., *Witnesses in the SCSL*, *supra* note 218, at 442 (reporting that many victim witnesses were motivated by a desire to “establish the truth about what happened in the war”).

223. See NANCY AMOURY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS 230 (2010) [hereinafter COMBS, FACT-FINDING WITHOUT FACTS] (noting that international “crimes typically

when victims report that they are motivated by the desire to establish the truth of what happened and to affirm the wrongfulness of the acts that gave rise to their suffering, they are expressing a desire for condemnation of both the individual acts against them and the acts against their group.²²⁴ To be sure, the desires of victims must be considered in the context of what can be accomplished in a very limited number of criminal trials. International criminal tribunals will never perfectly realize the desires of victims, but there are practical steps that prosecutors can take that would better serve this purpose.

Prosecutors should use the criminal proceedings to help victims develop as much information as possible about the underlying crimes.²²⁵ The idea of using international criminal proceedings as a way to develop a record of the crimes of a prior regime or period of violence is not new,²²⁶ but there has been little consideration of the doctrinal implications of what it means to embrace this goal as a purpose of the tribunal.²²⁷ Trials are a deeply imperfect mechanism for creating a comprehensive history of any event, particularly events as complex as those that give rise to the creation of international criminal tribunals. One problem is that the capacity of international tribunals is inevitably limited, which means that even some important events will not be the subject of a prosecution (at least at the international level).²²⁸ Another problem is that trials are subject to strict rules regarding the presentation of evidence.²²⁹ It must be relevant to the crimes charged, reliable, and available at the time of the trial. Evidence that is important to the larger history of the event but not relevant with respect to a particular defendant might be excluded.²³⁰ So too with evidence that is not sufficiently reliable for a criminal proceeding but might

target victims on the basis of their group identities . . . as a means of pursuing broader, ideological goals”).

224. This point becomes clearer with a review of the response of victims to acquittals in the international criminal tribunals. Many victims “view acquittals . . . as repudiating their status as victims in the larger narrative of the conflict.” *Id.*

225. For a comprehensive treatment of using trials as history (and the use of history in trials), see generally RICHARD ASHBY WILSON, *WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS* (2011) [hereinafter WILSON, *WRITING HISTORY*]. Wilson notes and analyzes in detail the many problems with using trials to create the history of an event. Nonetheless, he concludes that “the actual record of trials at the ICC, ICTR, and ICTY mitigates an overwhelmingly negative assessment of the relationship between law and history.” *Id.* at 219.

226. See, e.g., Clark, *Empirical Study in Bosnia and Herzegovina*, *supra* note 130, at 474–75 (describing the purported trade-offs between establishing the complete truth and the processes available in the ICTY).

227. This purpose also has implications for the selection of cases, a subject I address separately.

228. See WILSON, *WRITING HISTORY*, *supra* note 225, at 9–10 (noting that because international criminal tribunals must fit evidence into existing legal categories, any history established by the tribunal will be incomplete and not impartial).

229. See *id.* at 11–12 (noting that the procedural rules can operate to exclude some important evidence).

230. See, e.g., *ICTR Rules of Evidence and Procedure*, Rule 89(C), INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (providing that the trial chamber “may admit any rele-

be considered reliable by historians when considered in light of other available evidence.²³¹ Finally, despite complaints about the slow pace of international tribunals, one of the benefits of trials is that they typically occur relatively close in time to the crime. Historians, forensic anthropologists, and other scholars may spend years studying an event and their conclusions may turn on evidence developed years after the trials have concluded. The history of a war as developed by the courts in the years just after the conflict might be starkly different from the history developed in the fullness of time.

Despite the many limitations of using trials as a way to write history, it remains true that many participants in the international criminal justice system continue to argue that attending to the interests of victims should include an attempt to develop a history of the conflict. Thus the question remains: how might prosecutors use the law to create a victim-centered history of the conflict? The first way is one that parallels the arguments I have already made regarding the prosecution of widespread crimes that affect many victims. To the extent that prosecutors bring charges involving broad-based crimes, the evidence will tell a much more complex and complete story of the underlying conflict. Criminal trials must focus on individual defendants and will always rely on the testimony of individual victim witnesses, but when their testimony is used to establish broadly felt harms, the trial record will create a more complex history.

A second and much more controversial strategy is to use plea bargains somewhat differently than they are used now. In the ICTR and the ICTY defendants have pleaded guilty to charges against them.²³² Plea bargaining is the practice in which defendants typically agree to plead guilty to some of the charges against them. This spares the prosecution and the court the expense of a trial, insulates the prosecution against an appeal, and allows victims to avoid what might be the traumatic experience of testifying in court. In most cases, defendants who plead guilty are given some assurance by the prosecution that it will seek a less severe sentence than would otherwise have been available had the defendant been convicted after

vant evidence which it deems to have probative value”), <http://unictr.unmict.org/sites/unictr.org/files/legal-library/150513-rpe-en-fr.pdf>.

231. That unreliable evidence should be excluded is certainly true in theory. Combs reviewed the transcripts from the ICTR, SCSL, and the tribunal created to address atrocities in East Timor. COMBS, FACT-FINDING WITHOUT FACTS, *supra* note 223, at 4. Based on this review, Combs concluded that “international criminal trials are less reliable adjudicatory mechanisms than they appear,” largely because of “fact-finding impediments.” *Id.* at 7. She found that, in general, testimony is “frequently vague, lacking in detail, and contradicted” by other evidence. *Id.*

232. See, e.g., Alan Tieger & Milbert Shin, *Plea Agreements in the ICTY: Purpose, Effects and Propriety*, 3 J. INT’L CRIM. JUST. 666, 667–68 (2005) [hereinafter Tieger & Shin, *ICTY Plea Agreements*] (describing how plea bargaining began at the ICTY); Janine Natalya Clark, *Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 EUR. J. INT’L L. 415, 416–23 (2009) [hereinafter Clark, *ICTY Plea Bargaining*] (describing history of guilty pleas in the ICTY).

trial.²³³ Plea bargains are, by an overwhelming margin, the most common way that criminal cases are disposed of in the United States.²³⁴

Two cases, one from the ICTY and one from the ICTR, illustrate both the potential and problems of guilty pleas as a way to develop the history of a conflict. In the ICTY, Drazen Erdemovic pleaded guilty to one count of a crime against humanity.²³⁵ In doing so, Erdemovic provided the prosecution with evidence of “facts of which they had not previously been aware,” enabling prosecutors to discover a massacre site that it had not yet discovered.²³⁶ Even critics of the use of plea bargaining acknowledge that Erdemovic’s guilty plea and its accompanying statement of facts were important to uncovering the full story of the crimes in the former Yugoslavia.²³⁷ Nonetheless, the use of charge bargaining—when prosecutors agree to drop certain charges in exchange for the defendant’s guilty plea—has impoverished the record of the underlying conflict.²³⁸ What is significant about Erdemovic’s case is that his guilty plea, even though it came with the promise of a lighter sentence and the dismissal of one charge against him, did not impoverish the record. His statement of facts was complete and the only benefit he received was a reduced sentence.

Contrast this to the ICTR. The first attempt to use a plea bargain in the ICTR was the case of Jean Kambanda, who was the former prime minister of Rwanda. He cooperated with prosecutors and provided detailed information about the genocide and the roles of other participants, particularly senior military and civilian leaders. “For these efforts, Kambanda got nothing.”²³⁹ His sentence was not reduced at all; he received the maximum sentence allowed under the ICTR statute despite having acknowledged his guilt and having attempted to help the prosecution put together cases against other leaders of the genocide.²⁴⁰ From Kambanda’s perspective, the decision to cooperate with the prosecution was one that

233. For a thorough discussion of the dynamics of plea bargaining in the domestic context, see generally Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

234. See, e.g., MARK MOTIVANS, FEDERAL JUSTICE STATISTICS, 2011–2012, at 19 (2015) (reporting that of the more than 96,000 defendants convicted of crimes in the federal courts in the United States in 2012, 89% were convicted following a guilty plea).

235. Prosecutor v. Erdemovic, First Sentencing Judgment, ¶¶ 3, 10 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

236. Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 PENN. L. REV. 1, 110 (2002) [hereinafter Combs, *Plea Bargaining*].

237. See Clark, *ICTY Plea Bargaining*, supra note 232, at 424 (acknowledging, based on Erdemovic’s plea, that “guilty pleas can play a significant role in establishing the facts”).

238. See Michael P. Scharf, *Trading Justice for Efficiency: Plea Bargaining and International Tribunals*, 2 J. INT’L CRIM. JUST. 1070, 1074 (2004) [hereinafter Scharf, *Trading Justice for Efficiency*] (describing the first instance of charge bargaining in the ICTY); Clark, *ICTY Plea Bargaining*, supra note 232, at 427–428 (describing cases in which defendants were able to have charges dismissed through plea bargaining).

239. Combs, *Plea Bargaining*, supra note 236, at 3.

240. *Id.* at 4.

he clearly came to regret.²⁴¹ But from the perspective of victims eager to know the history of the genocide, Kambanda's treatment was also counterproductive. He was an invaluable source of information about how the genocide was planned and carried out. With leniency as an incentive, the other leaders of the genocide could have provided similar information. Many survivors of the genocide in Rwanda do not even know where their loved ones' bodies are buried—many were thrown into pit latrines or dumped into mass graves—much less know how the genocide was carried out.²⁴² Because of the highly organized nature of Rwandan society, it is likely that the senior leaders of the genocide could have provided answers to at least some of the lingering questions.

If one of the goals of international criminal tribunals is to create a victim-centered history of the atrocities, then plea bargaining should be used in a limited way.²⁴³ Plea bargains that impoverish the record should not be permitted.²⁴⁴ In practice, this need not spell the end of charge bargains. Instead, it suggests that the defendant's complete statement of facts must include information about the dropped charges. Plea bargains are negotiated agreements, and prosecutors have the power to insist that defendants provide information about both the charges to which they will plead guilty and those that will be dismissed. A second important requirement is that cases in which plea bargains are struck must include a complete sentencing hearing.²⁴⁵ These hearings can provide a forum for victims to recount their stories without cross-examination and with the knowledge that the defendant has already been convicted.²⁴⁶ In this way, the limited use of guilty pleas need not impoverish the historical record and can, in some cases, enhance it.

CONCLUSION

International criminal tribunals have become an important part of the tool kit of states attempting to rebuild after a period of conflict. Despite

241. After he was sentenced to life in prison despite having pled guilty, Kambanda appealed his sentence and attempted to withdraw his plea. See *Prosecutor v. Kambanda*, Judgment, Case No. ICTR 97-23-A, Judgment, ¶¶ 49–55, 114–26 (Int'l Crim. Tribunal for Rwanda Oct. 19, 2000) (describing defendant's attempt to withdraw his guilty plea and arguments that his sentence was excessive because it did not properly credit his guilty plea).

242. See ALISON DESFORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 187 (1999) (reporting that perpetrators disposed of their victims by “stuffing bodies down latrines, tossing them in pits, throwing them into rivers or lakes, or digging mass graves in which to bury them”).

243. There is little likelihood that plea bargaining will go away completely. See, e.g., Scharf, *Trading Justice for Efficiency*, *supra* note 238, at 1074 (describing resilience of plea bargaining at international criminal tribunals).

244. See Regina E. Rauxloh, *Negotiated History: The Historical Record in International Criminal Law and Plea Bargaining*, 10 INT'L CRIM. L. REV. 739, 766 (2010) (arguing that “[c]harge bargaining can distort the historical record”).

245. See Tieger & Shin, *ICTY Plea Agreements*, *supra* note 232, at 675 (describing sentencing hearings that follow guilty pleas in the ICTY).

246. *Id.*

their many advances and increased acceptance, there remains much confusion about what such tribunals are designed to accomplish. As long as the many stakeholders in a post-conflict society expect different things from international criminal law, the tribunals will continue to be less effective than they could otherwise be. By narrowing their objectives and clearly articulating what they hope to accomplish, international prosecutors can better manage the expectations of victims, combatants, and the international community, and enhance both the credibility and effectiveness of international criminal tribunals.