Duke Law Journal

VOLUME 59 JANUARY 2010 NUMBER 4

INTERNATIONAL IDEALISM MEETS DOMESTIC-CRIMINAL-PROCEDURE REALISM

STEPHANOS BIBAS†

WILLIAM W. BURKE-WHITE††

ABSTRACT

Though international criminal justice has flourished over the last two decades, scholars have neglected institutional design and procedure questions. International-criminal-procedure scholarship has developed in isolation from its domestic counterpart but could learn much realism from it. Given its current focus on atrocities like genocide, international criminal law's main purpose should be not only to inflict retribution but also to restore wounded communities by bringing the truth to light. The international justice system needs more ideological balance, stable career paths, and civil-service expertise. It should also draw on the American experience of federalism to cultivate cooperation with national authorities and select fewer cases for international prosecution. Revised plea bargaining and sentencing

Copyright © 2010 by Stephanos Bibas & William W. Burke-White.

† Professor, University of Pennsylvania Law School.

†† Assistant Professor, University of Pennsylvania Law School; The Secretary's Policy Planning Staff, United States Department of State. The views expressed in this Article are those of the authors and do not necessarily reflect those of the U.S. Department of State or the U.S. government. Thanks to David Abrams, Jason Johnston, Maximo Langer, Howard Lesnick, Paul Robinson, Natalie Reid, Richard Ross, Christopher Serkin, Ilya Somin, Jenia Iontcheva Turner, David Zaring, and participants at a faculty workshop at the University of Pennsylvania Law School for their comments and feedback on an earlier draft.

rules could learn from American experience and pitfalls, husbanding scarce resources and minimizing haggling, yet still buying needed cooperation. Finally, in blending adversarial and inquisitorial systems, international criminal justice has jettisoned too many safeguards of either one. It should reform discovery, speedy-trial rules, witness preparation, cross-examination, and victims' rights in light of domestic experience. Just as international criminal law can benefit from domestic realism, domestic law could incorporate more international idealism and accountability, creating healthy political pressures to discipline and publicize enforcement decisions.

TABLE OF CONTENTS

Introduction 639
I. Comparing Domestic and International Criminal Procedure 644
A. The Functions of International and Domestic Criminal Justice 645
B. The Purposes of Criminal Law 650
C. An Overview of the Two Systems 654
1. International Criminal Justice 654
2. Domestic Criminal Procedure 658
II. The Mentality of International Justice Practitioners 660
A. Ideologies and Worldview 660
B. Career Opportunities and Loyalties 663
III. The Politics of International Justice 667
A. Appointments and Elections 667
B. State Cooperation 671
C. Funding 676
D. Defense Resources 678
IV. Improving International Case Management 680
A. Gatekeeping and Case Selection 680
B. Plea Bargaining and Caseloads 685
C. Sentencing 689
V. Pretrial and Trial Procedures 693
A. Melding Adversarial and Inquisitorial Process 694
B. Discovery 696
C. Trial Procedures 699
D. Victims' Rights 701
Conclusion 703

INTRODUCTION

After the world had spent years and millions bringing him to court for genocide and war crimes, Slobodan Milošević cheated justice. The butcher of the Balkans died unexpectedly in his holding cell in 2006, as his four-year trial was drawing to a close but before verdict and sentence. Proceedings were slow and costly; as of Milošević's death, hundreds of people had been charged but only dozens had been convicted, clogging the International Criminal Tribunal for the Former Yugoslavia (ICTY).[1] By pursuing exhaustive justice against his henchmen, the ICTY had denied Bosnian Muslims, Croats, and Serbs the most basic justice of seeing Milošević convicted and punished swiftly and publicly.

Milošević's case, although extreme, is not unique.[2] It epitomizes deeper problems with international criminal justice. Fired by idealism and the laudable legacy of the post–World War II Nuremberg Tribunal, the United Nations (UN) and Western nations began setting up international criminal tribunals in the early 1990s. In 1993 and 1994, the UN Security Council created the ICTY and its sister court, the International Criminal Tribunal for Rwanda (ICTR).[3] The UN, in cooperation with national governments, created other hybrid tribunals that blend international and domestic legal approaches in partnerships with nations such as Sierra Leone, Lebanon, Cambodia, East Timor, and Bosnia.[4] In 2002, the Rome Statute created the first permanent international criminal court, the International Criminal Court (ICC).[5] In 2009, the ICC dared to issue an arrest warrant for a sitting head of state, Omar Bashir of Sudan, for his role in the Darfur

---

1. *See* Vesna Peric Zimonjic & David Randall, *'Justice Cheated' as Milosevic Is Found Dead in His Prison Cell*, INDEPENDENT (London), Mar. 12, 2006, at 2; Editorial, *The Death of Milosevic*, N.Y. TIMES, Mar. 14, 2006, at A26.

2. In late 2008, the International Criminal Tribunal for Rwanda convicted Colonel Bagosora for genocide, crimes against humanity, and war crimes fourteen years after the fact, after a six-year trial involving 242 witnesses. *See* Lydia Polgreen, *Senior Rwandan Officer and Two Accomplices Are Found Guilty of 1994 Genocide*, N.Y. TIMES, Dec. 19, 2008, at A11.

3. S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the ICTY); S.C. Res. 955, ¶ 1, U.N. Doc. S/Res/955 (Nov. 8, 1994) (establishing the ICTR).

4. For a discussion of these hybrid tribunals, see William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 30–61 (2003).

5. Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

genocide.[6] But the idealistic plans of all these tribunals are foundering on practical shoals, overwhelmed by hundreds of cases and protracted proceedings. Their substantive aspirations have not been built upon solid, realistic procedural foundations.

More generally, international criminal law has reinvented the wheel. Though scholarship in this growing field has flourished since the early 1990s,[7] it has not engaged with its counterparts in American or European criminal procedure.[8] Thus, international- and domestic-

---

6. *See* Prosecutor v. Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ¶ 21 (Mar. 4, 2009), *available at* http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf. Notably, the arrest warrant for Bashir includes war crimes and crimes against humanity, but not genocide charges due to the difficulty of winning a genocide conviction.

7. In the United States, international criminal law scholarship has focused on the forms of responsibility, the morality of justice, and the establishment of international tribunals, rather than on the structures and procedures on which this Article focuses. *See generally* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998) (discussing the moral choices of post-conflict justice); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000) (discussing the moral underpinnings of transitional justice); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999) (considering how the ICTR affected the Rwandan judiciary); Burke-White, *supra* note 4 (examining the impact of hybrid courts); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005) (examining forms of criminal responsibility); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004) (considering justice in times of transition); Michael P. Scharf, *The ICC's Jurisdiction over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67 (2001) (analyzing the United States' position on jurisdiction under the ICC and its potential ramifications); Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007) (focusing on network effects among tribunals); Laura A. Dickinson, Note, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003) (examining hybrid tribunals). In Europe, the discipline has focused on substantive crimes and doctrinal interpretation. *See generally* GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS (2005) (considering the definitions of international crimes); William Schabas, *National Courts Finally Begin to Prosecute Genocide, the 'Crime of Crimes,'* 1 J. INT'L CRIM. JUST. 39 (2003) (discussing national court interpretations of genocide).

8. *See generally* LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM (2002) (exploring some ICC rules of procedure); 2 INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS (M. Cherif Bassiouni ed., 2d ed. 1999) (explaining procedural issues, but without a comparative analysis of domestic practice); Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835 (2005) (addressing comparative criminal procedure in international tribunals); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429 (2003) (considering the development of international judicial institutions, but without reference to criminal procedure); Michael P. Scharf, *Trading Justice for Efficiency: Plea-Bargaining and International Tribunals*, 2 J. INT'L CRIM. JUST. 1070 (2004) (considering plea bargaining before international courts, but with only limited domestic comparative analysis); Sonja B. Starr, *Rethinking "Effective Remedies": Remedial Deterrence in International Courts*, 83 N.Y.U. L. REV. 693 (2008) (considering how certain procedures influence the

criminal-procedure scholarship have developed independently and failed to learn from each other.

Though the international and domestic settings differ substantially, international and domestic enforcement and procedure share much in common. The scholarly gap between the two fields is especially glaring on issues of institutional design and structural constraints. Substantive domestic criminal law has occasionally influenced substantive international law and vice versa, when national courts have enforced international law.[9] But international criminal procedure has largely overlooked the structural, institutional, and political lessons it could glean from domestic-criminal-procedure scholarship.[10]

Bringing the lessons of domestic criminal law to international criminal law promises to illuminate and advance international scholarship. International scholars have thrived on dreams of subjugating politics to law and holding the worst of the worst accountable.[11] Although these dreams have spurred the development of international criminal courts, they have hindered systemic and political analysis of how these systems actually work. In contrast, domestic American procedural scholarship has dissected the systemic factors, rational actors, incentives, and institutional design choices that shape domestic criminal enforcement.[12] We hope to inject a

---

deterrent effect of international tribunals); Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1 (2005) (examining the domestication of international criminal law and possibilities for state cooperation, but not directly engaging with procedural issues).

9. *See* William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 106–07 (2008) (considering the domestic application of the ICC Rome Statute by Congolese courts).

10. For the few articles that have addressed procedural issues, see Langer, *supra* note 8, at 847–53; Scharf, *supra* note 8, at 1074–80; Turner, *supra* note 8, at 30–51.

11. *See, e.g.*, GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 1–36, 147–205 (2000) (discussing the idealist motivations for international criminal justice); Stephen Krasner, *Pitfalls of International Idealism*, 8 UCLA J. INT'L L. & FOR. AFF. 61 *passim* (2003) (describing international criminal justice as part of a movement toward "international idealism," according to which "normative structures can constrain state behavior, and that if we could get these normative structures built into the international system, the world would be a better place").

12. The master of this institutional understanding of criminal procedure is William Stuntz. *See, e.g.*, William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791–818 (2006) (arguing that constitutional overregulation of criminal procedure leads to pathological political phenomena, such as overpunishment and discriminatory prosecution); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L.

needed note of realism into idealistic international aspirations as the ICC comes of age.

Our aim is to show how the lessons of domestic, especially American, criminal procedure can make international criminal justice more effective. Part I provides an overview of the two systems, to set the stage for comparisons and contrasts. Part II examines the mindset and Part III considers the politics of international criminal justice. Part IV draws lessons for international case management, and Part V offers similar lessons for pretrial and trial procedures.

We begin in Part I with a bird's-eye view of the functions and goals of the two systems. International criminal justice could in theory pursue transnational crimes or crimes that national governments will not prosecute, but in practice targets the most severe atrocities such as genocide. American federal criminal enforcement targets some crimes that states will not prosecute and used to focus on interstate crimes, but the federal system increasingly is handling many of the most serious crimes. Pragmatic considerations, such as resources and interest, drive federal jurisdiction rather than abstract, theoretical categories of interstate commerce. In both systems, these functions of justice determine the purposes of punishment. Domestic criminal law

---

REV. 2548, 2550–58 (2004) (arguing that law has less effect on plea bargains than do voters' and prosecutors' preferences, budget constraints, and other forces); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 523–29, 533–39 (2001) (arguing that politics and prosecutorial discretion lead to increasingly broad criminal law and harsher criminal punishment); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 6–22, 65–74 (1997) (identifying problems with the current allocation of power between courts and legislatures in the criminal justice system and recommending a constitutional solution focused on criminal substance, not criminal procedure). Others have contributed significant scholarship in this vein. *See, e.g.*, GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 40–61 (2003) (discussing plea bargaining's rise and its effect on criminal enforcement); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 876–84, 895–97 (2009) (discussing the enormous discretion of federal prosecutors and recommending separation of investigators and advocates from adjudicators); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2481–82, 2483–85, 2469–519 (2004) (arguing that plea bargains are made in the shadow of factors beyond the expected outcome at trials, such as attorney competence, sentencing rules, and psychological biases); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2121–23 (1998) (highlighting how America's heavy reliance on plea bargaining has begun to resemble a nonadversarial, administrative justice system); Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 755–94 (2003) (describing how the interaction between federal prosecutors and federal enforcement agents affects enforcement discretion); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 48–58 (2002) (discussing prosecutorial screening as an alternative to plea bargaining).

seeks primarily to deter, incapacitate, and inflict retribution. International criminal law has largely sought to ensure retribution as well as international peace and security. But so long as it focuses on the gravest atrocities, international law must also emphasize restorative justice to heal the wounds of genocide and war. These functional choices must inform how we understand and improve each system's procedural structures. Next, we quickly sketch the key institutional features that make international criminal law political and often ineffective and the ones that make domestic law more efficient but also more insulated and amoral.

Parts II through V then apply the lessons of recent domestic-criminal-procedure scholarship to improve international criminal tribunals' effectiveness. We look primarily to American criminal procedure because its federal structure resembles the international layers of authority and because it has well-developed case management techniques. Part II explores the mentality of international justice. International lawyers often view criminal justice as taming power through law, so courts need to seek lawyers with more diverse and less biased ideologies. International-civil-service reforms and secondments of domestic lawyers and judges could address excessive staff turnover.

Part III delves into the problematic politics of international justice and what it could learn from less-political domestic justice. International mechanisms of appointment and reappointment can leave prosecutors and judges insufficiently insulated from political pressures. Because international prosecutors lack their own police forces, they must rely on state cooperation to secure evidence, interview witnesses, and make arrests. And international courts' budgets are set through overtly political processes, which can press courts to please key funders. Moreover, defense lawyers face financial incentives to underlitigate cases. Domestic experiences illuminate how one could insulate courts' budgets and perhaps give defense lawyers parity of resources. Other problems in international justice are unavoidable; at best, we can recognize and minimize them.

Part IV focuses on the need for international case management. International prosecutors have a nearly limitless universe of potential cases but time and resources for only a few. The ICTY pursued too many low-level cases only to clog the system and delay justice for Milošević and other leaders, a failure that the ICC seeks to remedy. Domestic courts have much experience with gatekeeping and sorting. Triage mechanisms can select only those individuals most responsible,

whose convictions would best serve restorative justice, and refer lesser cases to national courts and motivate them to pursue them. Another way to manage caseloads is through plea bargaining, which, given international criminal justice's purposes, must be transparent and limited. Cooperation agreements can purchase testimony to bring ringleaders to justice but require stronger safeguards. And more consistent sentencing policies can prevent arbitrary disparities between international and national sentences for the same conduct.

Part V considers procedural safeguards more broadly. Current international procedures are an uneasy hybrid of inquisitorial and adversarial systems without the essential checks of either one. Surprisingly, there are few limits on witness coaching, and rules on speedy trials and victims' rights are too weak. The rules of discovery and cross-examination are inadequate to prevent tampering with witnesses and fabricating evidence. Domestic criminal procedure offers helpful guidance for how to redesign these rules.

The Conclusion draws together the lessons that domestic criminal procedure can offer international criminal law. It then considers the converse question—namely, how can domestic criminal procedure learn from international law's idealism and politics? Specifically, one of international law's strengths and domestic law's weaknesses is accountability and oversight. Official reporting to intergovernmental bodies, the demands of cooperation with nations, and nongovernmental organization (NGO) monitoring all constrain international prosecutors and provide transparency. Similar mechanisms could better check domestic prosecutorial discretion and make it more legitimate. There might even be ways to infuse more of international lawyers' idealistic mindset, leavening the often cynical mindset of many domestic prosecutors, defense counsel, and judges.

I. COMPARING DOMESTIC AND INTERNATIONAL CRIMINAL PROCEDURE

To draw lessons for international criminal justice from domestic criminal procedure, one must understand their many similarities and differences. We first consider the functions and then the penological purposes of international and domestic criminal justice. Finally, we provide an overview of how each system is structured and works, noting particularly how both systems seek to achieve common ends.

A. *The Functions of International and Domestic Criminal Justice*

As a newly created system, international criminal law could have performed any number of distinct functions. It could have prosecuted crimes that span national jurisdictions, ensured accountability when national governments failed to act, or prosecuted the most significant crimes regardless of where they occurred. We call these the transnational, backstop, and atrocity functions, respectively. The choice of function determines the goals and purposes of punishment and should also influence key procedural rules. This Section briefly explores those functional choices and analogizes them to the functions of both state and federal criminal justice systems in the United States.

Perhaps international criminal law should naturally have fought supranational crimes that span jurisdictions, such as human smuggling, drug trafficking, intellectual and maritime piracy, and international terrorism. After all, national governments usually cooperate internationally when they share common functional needs.[13] Investigating and prosecuting transnational crimes requires multiple governments to coordinate efforts. Thus, international criminal law originated with universal jurisdiction over piracy, the quintessential transnational crime.[14] If this transnational emphasis had continued, international tribunals and procedures would have spanned a very different set of substantive crimes. Some crimes would have been less severe, and some of the wrongdoers would have been much less culpable than others. What these crimes would all have shared is a need for states to cooperate in stamping them out.

Secondly, international criminal law could have served as a backstop, holding wrongdoers accountable when national governments were unable or unwilling to act themselves. This supplementary function would have been a logical response to state

---

13. *See generally* ERNST B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES 1950–57 (1958) (describing various aspects of the integration of European countries in the 1950s).

14. As Justice Story wrote: "A pirate is deemed, and properly deemed, *hostis humani generis*" (an enemy of all mankind). Harmony v. United States (The Brig Malek Adhel), 43 U.S. (2 How.) 210, 232 (1844); *see also* Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 791–98 (1988). As Eugene Kontorovich has argued, piracy jurisdiction did not rest on the view that piracy was an atrocity or an especially heinous crime. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 186 (2004).

weakness or failure[15] or to governmental culpability. This function might have led to international jurisdiction over all crimes national governments were unable or unwilling to prosecute, ranging from genocide to theft. The international system would have intervened, regardless of the nature of the crime, whenever domestic courts failed to act. International criminal procedures would have predicated international action on domestic inaction. They would have been broad, flexible, and efficient enough to handle many, varied crimes, especially those in failed or failing states.[16]

A third possible function of international criminal law is to prosecute the most serious or grave atrocities, whether or not they have transjurisdictional elements. This atrocity function seems improbable precisely because national governments often want to prosecute atrocities themselves and would rarely cede jurisdiction over these gravest crimes to international tribunals.[17]

Yet international criminal justice has largely focused on atrocities, perhaps as a legacy of the Nuremberg Tribunal, which responded to the Holocaust. Nuremberg's express purpose, according to the London Charter that established it, was "the just and prompt trial and punishment of the major war criminals of the European Axis."[18] It received jurisdiction over only the gravest crimes: war crimes, crimes against the peace, and crimes against humanity.[19] The U.S. and United Kingdom (U.K.) decided to export their liberal and legalist notions of justice, in stark contrast to the Nazi and Soviet approaches to justice.[20] This legalist element was reflected in Nuremberg's procedure, including full rights to counsel, extensive

---

15. *See* Stephen D. Krasner & Carlos Pascual, *Addressing State Failure*, FOREIGN AFF., July/Aug. 2005, at 153.

16. Hybrid tribunals established as joint ventures between domestic and international authorities in weak states reflect this supplementary function. *See, e.g.*, Statute of the Special Court for Sierra Leone arts. 4–5, Jan. 16, 2002, 2178 U.N.T.S. 145 (recognizing jurisdiction over international crimes, as well as over arson and abduction of girls in violation of Sierra Leonean law); Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH. J. INT'L L. 1075, 1095–96 (2004) (discussing the use of international judges in courts in Hong Kong, East Timor, Kosovo, and Sierra Leone).

17. *See* Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AM. J. INT'L L. 361, 375 (1999) (discussing sovereignty costs in criminal prosecution).

18. Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 1, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 280.

19. *Id.* art. 6.

20. BASS, *supra* note 11, at 147–206.

opportunities for cross-examination by the defense, and frequent decisions by the tribunal protecting defense rights.[21] Though perhaps inadequate from today's perspective, the Nuremberg procedure was designed to provide a free and fair trial, despite the costs and logistical challenges.[22]

Later courts continued this primary function of holding wrongdoers accountable for atrocities. The ICTY was established "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law."[23] Similarly, the preamble of the Rome Statute (establishing the ICC) provides: "[T]he most serious crimes of concern to the international community as a whole must not go unpunished . . . ."[24]

True, certain provisions of the Rome Statute suggest the backstop function noted above—holding wrongdoers accountable when national governments cannot or will not act. Article 17 of the Rome Statute bars cases from the ICC while national governments undertake their own genuine investigations and prosecutions.[25] But the ICC is already jurisdictionally limited to adjudicating the most severe crimes.[26] In other words, the ICC is a backstop to national governments only within the narrow category of atrocities.

The focus on atrocities has largely driven the development of both international jurisdiction and procedure. The tribunals for Rwanda and Yugoslavia and the ICC have each only been given very narrow subject-matter jurisdictions, largely over war crimes, crimes against humanity, and genocide.[27] Each of these tribunals has also

---

21. *See* Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, *supra* note 18, art. 16(d) (conferring the right to defense counsel); *id.* art. 16(e) (conferring the right to cross-examination); 9 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 665 (1947) (ruling in favor of defense rights to evidence).

22. *See* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98–102 (1947) (opening statement of Justice Robert Jackson, Nuremberg Tribunal, Nov. 21, 1945, acknowledging that the court's procedures and the prosecution's research were adequate but not "finished craftsmanship," because of the need for swift justice within months of victory).

23. S.C. Res. 827, *supra* note 3, ¶ 2.

24. Rome Statute of the International Criminal Court, *supra* note 5, pmbl.

25. *Id.* art. 17.

26. *Id.* arts. 6–8.

27. *See* S.C. Res. 955, *supra* note 3, arts. 2–5 (defining the crimes within the ICTR's jurisdiction); S.C. Res. 827, *supra* note 3, arts. 2–5 (defining the crimes within the ICTY's jurisdiction); Rome Statute of the International Criminal Court, *supra* note 5, art. 5 (giving the ICC jurisdiction over war crimes, crimes against humanity, and genocide).

developed procedures that focus on scrupulous procedural regularity and eliciting truth at the expense of speed and efficiency.[28] For example, in its early years the ICTY relied almost exclusively on live rather than affidavit testimony, to ensure full cross-examination of witnesses.[29] Even today, the ICC refuses to admit evidence provided by third parties, such as the UN, when the prosecutor cannot fully share that evidence with the defense.[30]

Although elaborate procedures worked for twenty-two defendants at Nuremberg and for the earliest Rwandans and Yugoslavians,[31] that model has grown problematic as the range of cases has mushroomed. These tribunals remain limited to atrocities, yet today there are probably thousands of war crimes, crimes against humanity, and genocides each year.[32] Moreover, as more than one hundred nations have signed on to the ICC, the geographic reach and number of potential cases has exploded. Thus, the procedural model that sufficed for a few dozen Nazis is no longer viable.

This atrocity function of international criminal justice stands in stark contrast to the functions of American criminal justice. Domestic systems must prosecute exponentially more defendants and cases

---

28. For a discussion of the ICTY's evidentiary standards, see Patricia M. Wald, *To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings*, 42 HARV. INT'L L.J. 535, 537 (2001). Over time, tribunals have developed their rules in an effort to process cases more quickly and handle evidence more efficiently, but the results of these developments have been mixed. *See* Langer, *supra* note 8, at 885–905. For example, the ICTY revised its rules of procedure to expedite trials through pretrial hearings and affidavit testimony. *See* ICTY R. P. & EVID. 65*bis*(A) (providing for pretrial conferences); *id.* 71(A) (allowing greater use of affidavit testimony by deleting the 1995 rules requirement that such testimony only be used in "exceptional circumstances").

29. *See* ICTY R. P. & EVID. 71(a) (1995) (amended 1998) (allowing for affidavit testimony only in "exceptional circumstances").

30. *See, e.g.*, Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor Against the Decision of the Trial Chamber I Entitled "Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused Together with Certain Other Issues Raised at the Status Conference on 10 June 2008," ¶ 97 (Oct. 21, 2008), http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf (overturning the trial chamber's order to release Lubanga Dyilo but maintaining the inadmissibility of nondisclosable evidence).

31. *See* Richard Goldstone, *Assessing the Work of the United Nations War Crimes Tribunals*, 33 STAN. J. INT'L L. 1, 4–8 (1997) (discussing the early work of the ICTY).

32. By February 1, 2006, the ICC Office of the Prosecutor had received 1,732 communications with regard to alleged international crimes possibly within the court's jurisdiction. *See* OFFICE OF THE PROSECUTOR, ICC, UPDATE ON COMMUNICATIONS RECEIVED BY THE OFFICE OF THE PROSECUTOR OF THE ICC (2006), *available at* http://www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277421/OTP_Update_on_Communications_10_February_2006.pdf.

across a far wider range of crimes. Unlike international criminal tribunals, which can leave lesser crimes to national courts, domestic courts must address the full range of crimes. To handle these caseloads, American criminal procedures have emphasized efficiency and case management, sometimes at the expense of perfect accuracy and scrupulous procedures.[33] Thus, American law and practice can guide international law as its range and caseloads expand.

Moreover, America's federal system of dual sovereignty, like its international counterpart, must allocate cases across multiple levels. To oversimplify, the Commerce Clause was once understood as limiting federal jurisdiction to cases that spanned state borders, reaching interstate but not intrastate crimes.[34] (A few other constitutional provisions allowed the federal government to punish violations of certain exclusively federal concerns, such as federal tax evasion and counterfeiting.) That interstate function of federal criminal law resembled international criminal law's original focus on transnational crimes such as piracy. More recently, federal civil rights prosecutions under the Fourteenth Amendment[35] have circumvented and substituted for racist and corrupt state government.[36] In other words, federal law served as a backstop.

This backstop function, however, has always been only a small slice of American federal jurisdiction. As the interstate/intrastate divide crumbled after the New Deal, federal criminal jurisdiction has become a hybrid of two functions: targeting the most serious crimes

---

33. The best example of this efficiency mindset at the expense of procedural regularity is the hypertrophy of American plea bargaining. *See generally* FISHER, *supra* note 12, at 40–47 (discussing how heavy caseloads encouraged prosecutors to plea bargain); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 24–32 (2d ed. 1978) (discussing how the perceived need to dispose of cases quickly pushes prosecutors, district attorneys, and judges to plea bargain even in the absence of heavy caseloads).

34. *See* Champion v. Ames (*The Lottery Case*), 188 U.S. 321, 363 (1903) (finding federal criminal jurisdiction under the Commerce Clause over transporting lottery tickets across state lines). For a historical discussion, see generally Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1 (1996).

35. *See, e.g.*, United States v. Guest, 383 U.S. 745, 760 (1966) (enforcing a statute criminalizing conspiracies to violate rights guaranteed by the Fourteenth Amendment).

36. *See, e.g.*, Koon v. United States, 518 U.S. 81, 91 (1996) (reviewing federal convictions and sentences arising out of the federal prosecution of Los Angeles police officers for beating motorist Rodney King); *see also* Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1140 (1995) (noting that the Civil Rights Acts "conferred federal jurisdiction over state crimes where the affected citizens were denied their rights or where state courts would not enforce them").

and those than span borders.[37] Through a range of jurisdictional hooks, today the federal government targets many of the gravest crimes and leaves lesser crimes to state prosecutors.[38] The accommodation between federal and state levels has been pragmatic, driven by resource allocation and interest rather than theoretical categories of interstate versus intrastate matters. To handle the broad range of cases and allocate it across state and federal systems, domestic criminal procedure has had to learn to manage cases and engage in gatekeeping effectively.[39]

Though their functions differ somewhat, structurally and procedurally, the international and domestic systems share much in common. Ultimately, both seek to hold wrongdoers accountable effectively and efficiently through legal processes. Both seek to allocate cases between two tiers along somewhat similar functional divides. Thus, it is particularly surprising that the two systems barely engage each other and that scholars within each system rarely look to their counterparts.

B. The Purposes of Criminal Law

Domestic and international criminal justice also serve somewhat different purposes. Domestic criminal law serves four main, broad

---

37. Federal criminal jurisdiction under the Commerce Clause is extremely broad though not infinitely elastic. *See* United States v. Lopez, 514 U.S. 549, 551–63 (1995).

38. Although states conduct most capital murder prosecutions, federal prosecutors have taken over substantial shares of bank robberies, large drug-trafficking, organized crime, and white-collar crime. *See* JODI M. BROWN & PATRICK A. LANGAN, FELONY SENTENCES IN THE UNITED STATES, 1996, at 3, 7 (Bureau of Justice Statistics, Bulletin No. NCJ 175045, 1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fsus96.pdf (noting that most bank robberies are prosecuted federally, and that federal drug sentences are substantially longer on average than state sentences); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, at tbl.5.17.2004, tbl.5.44.2004 (2009), http://www.albany.edu/sourcebook/tost_5.html (indicating that in 2004, federal prosecutors handled roughly 13 percent of drug trafficking prosecutions—201,760 felony convictions in state courts compared to 25,539 in federal courts—and 19 percent of fraud prosecutions—48,560 felony convictions in state courts compared to 9,261 in federal courts); *see also* Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1456 (2004) (reporting the results of an empirical study indicating that federal prosecutors are more likely to take cases involving large quantities of drugs and leave those involving smaller quantities to the states).

39. *See* Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, 2 CRIM. JUST. 81, 91–96 (2000) (describing the accommodation of federal and state law enforcement as one of "negotiated boundaries," in which substantive laws overlap but resource constraints, policy priorities, local culture, and sources of information influence which cases are dealt with federally and which are left to states).

purposes: retribution, deterrence, incapacitation, and rehabilitation.[40] In recent decades, rehabilitation has fallen out of favor because of doubts about its efficacy.[41] Some scholars now promote expressive condemnation, the need to denounce the wrong and reinforce society's norms.[42] Notwithstanding vigorous disagreement, many scholars and most laymen emphasize retribution as the primary purpose of domestic criminal punishment and incapacitation as a secondary goal.[43] This approach stresses moral justice, but leaves room for practical concerns as well.

If international law sought to serve as a backstop, a supplement for deficient domestic criminal justice, its purposes would mirror those of domestic criminal justice. Transnational crimes, such as software piracy and smuggling, are often less morally freighted than domestic crimes, so they might call for less emphasis on retribution and more on deterrence. But, as we have explained, international criminal law has largely neglected the transnational and backstop functions.

Though domestic criminal law redresses a breathtakingly broad array of crimes, from the gravest to the most trivial, international law targets a few high-level, highly public, politically salient mass

---

40. Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 1 (2003).

41. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 7, 57 (1981); Alschuler, *supra* note 40, at 9; Robert Martinson, *What Works? Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22, 25 ("With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism.").

42. *E.g.*, Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594–601 (1996) (supporting expressive condemnation).

43. *E.g.*, MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW 83 n.1 (1997) (collecting scholarship embodying retributivism's resurgence); Alschuler, *supra* note 40, at 15; Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284, 295–97 (2002) (finding, in two empirical studies, that laymen's punishment judgments were driven by just deserts and not by deterrence considerations); John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 676 (2000) (finding, in two empirical studies, that laymen's punishment judgments were driven primarily by the seriousness of the offense rather than the likelihood of recidivism, suggesting a dominant objective of retribution, not incapacitation); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 477–78, 492–94 (1997); *cf.* Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19, 24 (2003) (identifying retribution as the dominant purpose and incapacitation as the secondary purpose of the U.S. Sentencing Guidelines).

atrocities, which often arise out of political instability.[44] Thus, international criminal law is expected to serve not only the four purposes of domestic criminal law[45] but also a fifth one: restorative justice.[46] Because international criminal cases are high profile and occur during or after conflicts, international criminal law is often called upon to reconcile broken communities.[47] With the advent of the ICC, the demands on international tribunals have increased. Both states and nongovernmental organizations have called on the ICC to fulfill all of the functions of domestic law, in addition to promoting international peace and security through restorative justice.[48]

International criminal justice should focus its aims. Resources are limited, so the international system cannot create meaningful amounts of incapacitation or deterrence.[49] Because it is so hard to dispense much retail justice in the wake of a war or genocide, international criminal law should focus on providing public restoration, reconciliation, and retribution for the worst of the worst. In other words, international criminal justice, which can use a few cases to send messages, is better than domestic criminal justice at the more symbolic functions of punishing, vindicating victims, teaching, healing, and reconciling. International tribunals are ideally situated to restore and reconcile because their cases are high profile and their

---

44. *See, e.g.*, WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 58–140 (2007) (discussing the temporal, territorial, and subject-matter limitations of the ICC compared with other courts).

45. *See* Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 928–35 (2000) (discussing the purposes and expectations of the ICTY).

46. While not entirely absent from American law, "[t]o date, restorative justice in the United States has operated at the fringes of the criminal justice system with small programs, often run by churches and private agencies, handling a relatively small number of juvenile cases and cases involving minor offenses." Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 413.

47. For discussions of international restorative justice, see DESMOND TUTU, NO FUTURE WITHOUT FORGIVENESS *passim* (2000); Elizabeth Kiss, *Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice*, *in* TRUTH V. JUSTICE 68, 79–83 (Robert I. Rotberg & Dennis Thompson eds., 2000).

48. For a list of statements by national officials detailing their expectations for the ICC, see Burke-White, *supra* note 9, at 59–61.

49. While some have advocated international criminal justice as a deterrent, it is difficult to document deterrence in the international context. *See* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 31 (2001) ("No one should entertain the illusion that the relative success of the ICTY, the ICTR, and the ICC process, or the engagement of national and foreign courts, has somehow exorcised the specter of genocide and other massive crimes from our midst.").

stage is global, rising above national politics and local ethnic tensions. As Mark Osiel argues, atrocity trials should serve primarily as pedagogical spectacles, telling stories and shaping national identity and collective memory.[50] Of course, trials cannot create comprehensive historical records; historians, truth commissions, and commissions of inquiry are far better at that.[51] But trials can nevertheless publicly acknowledge atrocities and begin to restore their wounds. They cannot prosecute every perpetrator nor make one a scapegoat for many others. But even a handful of prosecutions, with due process for defendants as well as sensitivity to victims, can make these points. Nuremberg and South Africa are two well-known, albeit very different, examples of how public tribunals can document atrocities and clear the public record.[52] International trials can also present evidence in ways that publicly document atrocities, by for example showing the "Scorpions" video in the Milošević trial, which recorded the gruesome executions of six youths in Srebrenica.[53]

Public retribution against political and military leaders is another important purpose, because atrocities excite the public's outrage and demand for justice. Prosecutions denounce and condemn crimes, underscoring their wrongness.[54] Incapacitation should be central only during ongoing conflicts when national courts are truly unable to act, and even then only for the highest-level offenders.

---

50. MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 2–3, 39 (1997).

51. For an extended caution about the inability of international trials to document atrocities comprehensively or to restore victims, see Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 332–43 (2008).

52. *See, e.g.*, NORBERT EHRENFREUND, THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIALS CHANGED THE COURSE OF HISTORY 139–48 (2007) (describing the effects of Nuremberg's documentation of Nazi crimes); PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 24–32, 152–65 (2002) (describing the reconciliatory effects of the South African Truth Commission); *see also* 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 22, at 98–102 (opening statement of Justice Robert Jackson acknowledging that, although the individual Nazi defendants needed no further incapacitation because "their personal capacity for evil is forever past," their evil deeds required retribution and deterrence, because "any tenderness to them is a victory and an encouragement to all the evils which are attached to their names. Civilization can afford no compromise with the social forces which would gain renewed strength if we deal ambiguously or indecisively with the men in whom those forces now precariously survive").

53. Frank Petit, *ICTY: The Domino Effect of a Video*, INT'L JUST. TRIB., June 13, 2005, http://www.rnw.nl/int-justice/article/icty-domino-effect-video.

54. *See* Damaška, *supra* note 51, at 343–47 (advocating making "the didactic function" the primary goal of international criminal justice).

The differences in purposes between the two systems do not undermine the lessons of our comparative exercise. On the contrary, the comparison provides insights into how international criminal law can better achieve other goals, such as retribution, which the domestic system serves reasonably well. It also highlights what international criminal justice can learn by contrasting its strengths and weaknesses with those of domestic criminal procedure. Larger, speedier domestic systems are much better at deterring and incapacitating. International criminal justice should acknowledge that its capacity is necessarily much more limited. It cannot hope to match domestic deterrence and incapacitation, but should instead emphasize punishing as well as healing the wounds of atrocities.

C. An Overview of the Two Systems

1. *International Criminal Justice*. Scholars often describe the courts that enforce international law as uncoordinated and perhaps even ineffective.[55] Over the last decade, however, new courts have emerged rapidly and now enforce international law far more systematically. Though it remains dysfunctional, international criminal justice today is a nascent system guided by core principles.

In recent years, many more international, domestic, and hybrid courts have begun to enforce international criminal law. At the international level are courts established by international treaties or by the UN Security Council: the ICC, the ICTY, the ICTR, and the UN Special Tribunal for Lebanon (STL).[56] The ICC has jurisdiction over international crimes committed on the territory of or by nationals of the 110 States Parties to the Rome Statute as well as crimes referred by the Security Council.[57] In contrast, the ICTY,

---

55. *E.g.*, H.L.A. HART, THE CONCEPT OF LAW 214 (2d ed. 1994) (suggesting that international law is not properly law); Martinez, *supra* note 8, at 443 (noting that based on common definitions of a system, "there is not now an international judicial system nor could one exist in the absence of a central scheme of hierarchical relationships").

56. *See* Rome Statute of the International Criminal Court, *supra* note 5; S.C. Res. 827, *supra* note 3; S.C. Res. 955, *supra* note 3; Statute of the U.N. Special Tribunal for Lebanon, S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007). While the STL was created by the UN Security Council acting under Chapter VII, elements of its structure and operation are more similar to hybrid tribunals such as those discussed below.

57. For a list of the 110 States Parties, see The States Parties to the Rome Statute, http://www2.icc-cpi.int/Menus/ASP/states+parties/ (last visited Nov. 8, 2009). The ICC investigation of the situation in Sudan was referred by the UN Security Council through Resolution 1593 (2005) pursuant to Article 13(b) of the Rome Statute. Press Release, U.N. Sec. Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International

ICTR, and STL have limited jurisdiction, restricted to crimes in the former Yugoslavia, Rwanda, and Lebanon, respectively. Collectively, these international tribunals reach very broadly, covering more than half the world's countries and about a third of its population.[58] All four courts are limited to the most serious crimes, namely war crimes, crimes against humanity, genocide, and (for the STL) the assassination of Rafik Hariri.[59]

In addition, many national courts routinely prosecute and adjudicate international crimes.[60] Finally, hybrid tribunals sit halfway between the domestic and international levels and rest on cooperation between national and international institutions.[61] Hybrid courts were or are operating in Bosnia and Herzegovina, East Timor, Cambodia, and Sierra Leone.[62] These courts draw authority from both

---

Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005), *available at* http://www.un.org/News/Press/docs/2005/sc8351.doc.htm.

58. Roughly 1.9 billion people live in countries that are States Parties to the ICC. *See* CIA, THE WORLD FACTBOOK *passim* (2009).

59. Rome Statute of the International Criminal Court, *supra* note 5, art. 5; S.C. Res. 827, *supra* note 3, arts. 1–5; S.C. Res. 955, *supra* note 3, arts. 2–6; Statute of the U.N. Special Tribunal for Lebanon, *supra* note 56, art. 1.

60. Some domestic criminal justice systems, such as those in the Democratic Republic of Congo or Chile, prosecute recent or past crimes based on territorial or nationality jurisdiction. *See, e.g.*, U.N. MISSION IN DEMOCRATIC REPUBLIC OF CONGO (MONUC), MONTHLY HUMAN RIGHTS ASSESSMENT: JULY 2007 (2007), *available at* http://www.unhcr.org/refworld/category,COI,MONUC,,46ee75401a,0.html. Others, such as those of Israel, Belgium, France, Germany, and Spain, prosecute extraterritorial crimes based on universal jurisdiction. *See, e.g.*, Att'y Gen. v. Eichmann, 36 I.L.R. 18 (Jer. D.C. 1961), *aff'd* 36 I.L.R. 277 (S. Ct. 1962) (Isr.); Hijazi v. Sharon, Cour d'Appel [CA] [intermediate court of appeals] Brussels, June 26, 2002 (Belg.); Cour de Cassation [Cass. crim.] [highest court of ordinary jurisdiction], Jan. 6, 1998, Bull. crim., No. 2, *translated in* 1 YB. INT'L HUMANITARIAN L. 598 (1998), *nullifying and dismissing* Tribunal de Grande Instance de Privas (examining magistrate), Jan. 9, 1996 *and* Cour d'Appel de Nimmes, Mar. 20, 1996 (Fr.); Bayerisches Oberstes Landesgericht [BayObLGZ] [court of appeals for selected matters in Bavaria], 23 May 1997 - 3 St 20/96 (F.R.G.) *reprinted in part in* NEUE JURISTISCHE WOCHENSCHRIFT 392 (1998) (Ger.); R v. Bow St. Metro. Stipendiary Magistrate, *ex parte* Pinochet Ugarte (No. 3), [2000] 1 A.C. 147 (H.L.) (appeal taken from Q.B.) (U.K. House of Lords proceeding on the extradition of Pinochet to face universal jurisdiction charges in Spain).

61. *See* Burke-White, *supra* note 4, at 75–97.

62. Law on Amendments to the Law on Court of Bosnia & Herzegovina, OFFICIAL GAZETTE BIH, 24/02 (Aug. 29, 2002) (Bos.); Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, 2004, NS/RKM/1004/006 (Cambodia); Statute of the Special Court for Sierra Leone, *supra* note 16; G.A. Res 57/228, ¶¶ 1–4, U.N. Doc. A/Res/57/228B (May 22, 2003); Burke-White, *supra* note 4, at 41–54 (describing hybrid courts operating in East Timor); William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State*

national legislation and a UN mandate.[63] They use both national and foreign officials and apply a combination of domestic and international law. They fill an impunity gap, serving as backstops when international tribunals lack jurisdiction or are overwhelmed by atrocities but national courts cannot or will not fill the need.

Each of these courts is independent, yet they have far more in common than commentators recognize. First, international, domestic, and hybrid criminal courts apply a common body of international law defining three international crimes: war crimes, genocide, and crimes against humanity.[64] Second, international criminal courts have developed detailed procedural rules,[65] some of which have migrated into the practice of hybrid tribunals as well.[66] Third, culpability is emerging as a gatekeeping criterion for selecting cases.[67]

Court of Bosnia & Herzegovina, 46 COLUM. J. TRANSNAT'L L. 279, 285–89 (2008) (discussing the creation and operation of the State Court of Bosnia and Herzegovina).

63. *See* Dickinson, *supra* note 7, at 295 (discussing the features of hybrid courts).

64. While definitions of war crimes and crimes against humanity have developed over time, the Rome Statute fixes core definitions of these crimes. *See generally* GIDEON BOAS, JAMES L. BISCHOFF & NATALIE REID, INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY: VOLUME 2: ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW (2008) (specifying the elements of core crimes).

65. The ICTY developed rules of procedure and evidence for modern international criminal tribunals. *See* ICTY R. P. & EVID.; Joseph L. Falvey, Jr., *United Nations Justice or Military Justice: Which Is the Oxymoron? An Analysis of the Rules and Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, 19 FORDHAM J. INT'L L.J. 475, 485–528 (1995) (discussing the development of the ICTY Rules of Procedure and Evidence). While the rules have been amended, they remain fairly stable. *Compare* ICTY R. P. & EVID. (1995) (amended 1996), *with* ICTY R. P. & EVID. (2009). The ICC Rules of Procedure and Evidence contain important innovations and reflect the state of the art. *See generally* ICC R. P. & EVID.; Fabricio Guariglia, *The Rules of Procedure and Evidence for the International Criminal Court: A New Development in International Adjudication of Individual Criminal Responsibility*, *in* 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1111 (Antonio Cassese et al. eds., 2002).

66. ICTY officials gave guidance to the new State Court of Bosnia and Herzegovina, resulting in procedures that reflect international practice more than traditional Bosnian procedure and transformed Bosnia into a quasi-common-law system. *See* INDEP. JUDICIAL COMM'N, HIGH JUDICIAL AND PROSECUTORIAL COUNCIL OF BOSNIA AND HERZEGOVINA, FINAL REPORT OF THE INDEPENDENT JUDICIAL COMMISSION JULY 2001–31 MARCH 2004, at 161–62 (2004) ("Some elements of the inquisitorial process were abandoned in favour of a more adversarial process.").

67. Compare, for example, Slobodan Milošević, a president who ordered and orchestrated genocide, with Predrag Banović, a prison camp guard who beat detainees. *See* Prosecutor v. Banović, Case No. IT-02-65, Consolidated Indictment, ¶¶ 31, 32, 34 (July 5, 2002) (charging Banović, along with other guards at the Keraterm and Omarska prison camps, with crimes against humanity). In its early days, the ICTY prosecuted any perpetrator over whom it could secure custody, regardless of culpability. *See* Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia

Fourth, courts increasingly rely on the principle of subsidiarity to allocate cases. Subsidiarity suggests hearing cases at the lowest level of authority that can deal with them effectively—in the territorial state when possible.[68] Subsidiarity efficiently conserves international resources and situates cases close to the events, evidence, and victims, which aids restorative justice and reconciliation. The ICC implements the principle of subsidiarity through the rule of complementarity, which means that it hears cases only when national courts cannot or will not act.[69] The ICTY and ICTR accomplish the same goal by referring cases back to national authorities when domestic courts become able and willing to prosecute.[70] In other words, international courts serve as backstops.[71] Even some national courts rely on the principle of subsidiarity in deciding whether to exercise universal jurisdiction.[72] Collectively, these developments have grown into a system for enforcing international criminal law.

---

and the International Criminal Tribunal for Rwanda, *Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, ¶ 92, UN Doc. A/54/634 (1999) (describing the ICTY's difficulty in obtaining custody over leadership figures and prosecuting any low-level indictees in custody). Political pressures to reduce the ICTY's caseload led to the use of culpability as a case selection device. *See* Judge Claude Jorda, President, ICTY, Address to the United Nations Security Council (July 23, 2002), *available at* http://www.icty.org/sid/8080 (suggesting that the tribunal only prosecute "the highest-ranking political, military, paramilitary and civilian leaders"). The ICC also relies on culpability. *See* Office of the Prosecutor, ICC, Criteria for Selection of Situations and Cases 5 (June 2006) (unpublished draft policy paper, on file with authors) (looking to the scale, nature, and impact of crimes).

68. *See* Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 31 I.L.M. 253, *amended by* Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, Nov. 10, 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56 *and* Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Related Acts, Mar. 10, 2001, 2001 O.J. (C 80) 1 (implementing subsidiarity).

69. Rome Statute of the International Criminal Court, *supra* note 5, art. 17.

70. ICTY R. P. & EVID. 11*bis* (providing for the referral of cases back to national authorities); ICTR R. P. & EVID. 11*bis* (same); Prosecutor v. Stanković, Case No. IT-96-23/2-PT, Decision on Rule *11bis* Referral, ¶ 42 (Sept. 1, 2005) (setting guidelines for referring cases).

71. *See* Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic*, 47 HARV. INT'L L.J. 327, 339 (2006) (discussing the backstop function of international law).

72. The influential *Princeton Principles on Universal Jurisdiction* consider the "connection between the requesting state and the alleged perpetrator, the crime, or the victim" and "the place of commission of the crime." PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001), *available at* http://www1.umn.edu/humanrts/instree/princeton.html. Some national courts implement subsidiary jurisdiction by prosecuting only when the territorial state does not. Landesgericht Salzburg 38 Vr 1335/94, Hv 42/94 (May 31, 1995), *enforcing* /Re/ Dusko C., Oberster Gerichtshof, No. 15 Os 99/94 (July 13, 1994).

2. *Domestic Criminal Procedure*. In contrast, domestic criminal procedure in the United States is more efficient but has its own pathologies. The coherence and professionalism that make it efficient at handling large volumes of cases also make it opaque, insular, and more amoral. As a result, domestic criminal procedure is better at incapacitating cheaply but less successful at teaching lessons, restoring communities and victims, and earning public confidence.

In its infancy, American criminal justice centered around public morality plays (namely jury trials), much as the young system of international criminal justice now does. Today, however, the domestic system runs on a well-oiled plea-bargaining assembly line. Professional (usually local) police investigate and arrest, often interrogating and conducting searches in the process. After that, professional prosecutors handle cases from charging through conviction and sentencing. Prosecutors negotiate with defense lawyers and make key decisions about whether and what crimes to charge, what plea bargains to strike, and what sentences to specify in their plea bargains.[73]

Many features of this assembly-line criminal justice are worthy of note. First, the system is designed to handle large volumes of cases. Like international trials, jury trials are time-consuming and expensive, and resources are limited, so plea bargains emerged as a cheaper, more efficient way to maximize convictions at minimum cost.[74] Today, guilty pleas resolve 95 percent of adjudicated cases, and most of these result from plea bargains. Both sides' lawyers are professionals, repeat players who know the going rates for particular crimes. They strike bargains that lower individual sentences in exchange for increasing the total volume of cases processed. They often strike cooperation deals, lowering defendant A's sentence in exchange for his undercover help or testimony against defendant B. This approach maximizes incapacitation and perhaps deterrence. The downside is that the assembly line trades off some of the softer, moral values that citizens expect from criminal justice. These include giving citizens their day in court, letting the public sit in judgment as jurors,

73. STEPHANOS BIBAS, ASSEMBLY-LINE CRIMINAL JUSTICE chs. 1–2 (forthcoming 2011).

74. The best historical account of plea bargaining emphasizes that it emerged as a tool to lighten prosecutors' and judges' workloads and avoid time-consuming and unpredictable jury trials. *See* FISHER, *supra* note 12, at 12–44, 111–24.

vindicating victims, denouncing wrongs, and restoring wounded relationships among victims, wrongdoers, and communities.[75]

Second, professionals often see it as their job to husband and allocate their scarce time and money. Because there are far more crimes and eligible cases than prosecutors can handle, police and prosecutors gatekeep. They apply formal or informal criteria, targeting the most urgent kinds of cases and getting rid of smaller cases involving first-time or sympathetic defendants. They routinely screen out cases based on weak evidence, minimal culpability, or lack of seriousness.[76] They may, for example, routinely dismiss thefts of less than $100 or possession of less than an ounce of marijuana unless the defendant is a recidivist.[77] Prosecutors often divert minor cases for drug treatment and dismiss them upon successful completion of a program. They sometimes decline to prosecute lesser cases when defendants make restitution or civil remedies are available.[78] Federal agents and prosecutors may decline cases that are less serious or more effectively handled at the state level. Conversely, federal officials are especially likely to pursue cases in which state criminal justice is ineffective or suspect, such as cases of public corruption or civil rights violations by local officials.[79] These effective screening and allocation measures are analogous to the international principles of subsidiarity and complementarity.

Third, the system is hidden from public view and insulated from public control. Police do not announce whom they will stop and what crimes they will target, lest they encourage more crimes within their blind spots. Prosecutors do not explain their decisions to charge, decline, or plea bargain, lest they undercut deterrence or create grounds for appeal. Discovery, grand jury proceedings, plea bargains, and hearings are hidden or obscure.[80] Grand juries are rubber stamps and petit juries are rare; instead, prosecutors and defense lawyers run

---

75. *See* BIBAS, *supra* note 73, chs. 1, 3; Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of* Alford *and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1400–04, 1406–07 (2003) [hereinafter Bibas, *Harmonizing*]; Stephanos Bibas, Essay, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 947–48 (2006) [hereinafter Bibas, *Transparency*].

76. *See* Bibas, *supra* note 12, at 2470.

77. *Cf.* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' WRITTEN GUIDELINES FOR THE DECLINATION OF ALLEGED VIOLATIONS OF FEDERAL CRIMINAL LAWS: A REPORT TO THE UNITED STATES CONGRESS 11 tbl.3, 22 tbl.11 (1979).

78. *See* Bibas, *Transparency*, *supra* note 75, at 933 & n.91.

79. *See infra* note 191 and accompanying text.

80. Bibas, *Transparency*, *supra* note 75, at 923–24.

the show. Judges rubber-stamp plea deals struck in secret; public court hearings are empty ceremonies with preordained results.[81] Because domestic criminal justice is far from transparent, it is not accountable. District attorneys, for example, are elected. But their elections are not informed referenda on prosecutorial policies, most of which are secret or hidden from view. Electoral races are distorted by huge incumbency advantages and driven by occasional scandals and unrepresentative, high-profile celebrity trials.[82] Lack of transparency thus hobbles accountability.

Domestic criminal justice, then, has succeeded perhaps too well in processing cases efficiently, at the expense of some of criminal justice's other aims. International criminal justice can learn both from its successes and its shortcomings.

II. THE MENTALITY OF INTERNATIONAL JUSTICE PRACTITIONERS

One of the more troubling aspects of international criminal law is the mentality that many practitioners share. This Part begins by exploring their precommitments and contrasting them with the greater range of views in domestic systems. After that, we consider the career paths of international criminal justice practitioners, again contrasting them with domestic career trajectories.

A. Ideologies and Worldview

Culture and people define organizations as much as laws do. That is true of international prosecutors, defense lawyers, and judges, who strive to subordinate power and politics to the rule of law. In his opening statement at Nuremberg, Justice Jackson described his mandate as defending civilization itself, taming despotic power through the law.[83] The emphasis has been on victorious outcomes and only secondarily on just processes. When civilization itself is at stake, conviction takes precedence over adjudication. Many later officials, including the ICC's presiding judge and chief prosecutor, still echo

81. *Id.* at 929–30.

82. *Id.* at 935; *see also* Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 983–91 (2009); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 591–602 (2009).

83. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 22, at 102–04.

Jackson's emphasis on taming raw power rather than observing legal niceties.[84]

This ideology of international justice is even more apparent among some rank-and-file staff. Junior staffers are often recent law school graduates who have chosen a career in international criminal law out of a devotion to this mission. In the words of one such ICTY judicial clerk, "I came to work here because I wanted to stop the violence; I wanted law to be a meaningful tool to constrain the likes of Milošević."[85] A staffer in the Chambers at the ICC emphasized the court's solicitude toward victims: "I chose the ICC because we are the voice—the only voice—of the victims."[86] Even defense counsel, who might be expected to carry a different set of biases, often have deeper, systemic goals of strengthening international law.[87] Some defense counsel admit that they took their jobs because they wanted to help develop international criminal justice.[88] Others had more explicit agendas: "My primary motivation was the fact that the conflicts that led to the war [in Rwanda] and crimes in the respective countries were a result of foreign interference, neocolonialism, lack of democracy, poverty and economic exploitation . . . ."[89]

This is not to say that international tribunals or their staffs are inherently biased. In fact the ICTY has acquitted a number of defendants.[90] Rather, tribunal officials routinely stress the importance of due process and the rule of law.[91] Nonetheless, international

84. Judge Philippe Kirsch, President, ICC, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), *available at* http://www.icc-cpi.int/NR/rdonlyres/6A3D5C50-CB29-4C1B-AFDD-CFE40CA53539/146377/PK_20030616_En1.pdf ("We are part of humanity's response to the countless victims and their plight . . . ."); Luis Moreno-Ocampo, Statement at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003), *available at* http://www.iccnow.org/documents/MorenoOcampo16June03.pdf (describing the mission to punish atrocities and protect victims).

85. Interview with anonymous Staff Official, Office of the Prosecutor, ICTY, in The Hague, Neth. (Oct. 23, 2008).

86. Interview with anonymous Staff Official, ICC, in The Hague, Neth. (Oct. 24, 2008).

87. *But see* Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 549 (2008) (suggesting that "most lawyers are not driven by political or ideological motivations in their representation of international criminal defendants").

88. *Id.* at 548.

89. *Id*. at 549 n.77.

90. *See* ICTY Acquittals, http://www.icty.org/sid/9984 (last visited Nov. 30, 2009).

91. *E.g.*, Kirsch, *supra* note 84 (describing the ICC's "commitment to independence, transparency, and the Rule of Law").

criminal law's civilizing mission is pervasive and powerful. In mindset, if not openly, tribunal staff may be inclined to presume guilt, to view convictions as more important than process, and to base charging decisions more on potential impact than on evidence. As one ICTY judicial assistant stated in a blunt and perhaps extreme admission: "Of course we have a presumption of innocence here, but . . . we all know they are guilty. Our job is to convict them according to the law."[92] This mission to convict threatens fair, dispassionate adjudication.

Domestic criminal justice offers two useful ways to limit this troubling missionary ideology: differentiated worldviews and venue changes. The missionary mindset spans all three international branches: prosecutors, defense counsel, and judges' chambers. This imbalance subverts judges' and defense counsel's ability to check and balance prosecutors. In contrast, though domestic prosecutors seek convictions to incapacitate and inflict retribution,[93] other actors have different roles. Domestic defense attorneys often want to help the less fortunate, to rehabilitate perpetrators, or to uphold the integrity of the system through strong criminal defense.[94] And judges generally strive to be neutral, to guarantee fair proceedings and due process. The variety of perspectives creates equilibrium, checking prosecutorial zeal even within an adversarial system.

To guarantee the system's integrity, international criminal justice needs a broader range of viewpoints. Instead of relying exclusively on international legal idealists, international courts should also tap domestic judiciaries. Domestic judges and law clerks are used to remaining neutral and even-handed in less public and sensational cases; domestic defense lawyers understand the need to defend zealously instead of presuming guilt. As we discuss below, one way to diversify the ideologies of international tribunal staff would be to have national systems temporarily detail their personnel to international courts for short- or medium-term rotations.[95] In addition, signing bonuses or similar incentives could help recruit

92. Interview with anonymous Staff Official, *supra* note 85.

93. *See, e.g.*, JOHN KROGER, CONVICTIONS: A PROSECUTOR'S BATTLE AGAINST MAFIA KILLERS, DRUG KINGPINS, AND ENRON THIEVES 11–22 (2008).

94. *See, e.g.*, KEVIN DAVIS, DEFENDING THE DAMNED: INSIDE A DARK CORNER OF THE CRIMINAL JUSTICE SYSTEM 47–59 (2008); MICKEY SHERMAN, HOW CAN YOU DEFEND THESE PEOPLE? 31–59 (2008).

95. *See infra* Part II.B.

judges, lawyers, and clerks with relevant domestic experience for permanent jobs.

Some international prosecutions also suffer bias because the same court has repeatedly heard cases based on identical or similar facts. For example, the ICTY repeatedly hears evidence about the existence of wars in the Balkans and particular massacres such as Srebrenica. Joint trials are often efficient and desirable when common facts relate to multiple defendants. Occasionally, however, joint trials are infeasible, when, for example, one defendant is arrested much later than his alleged accomplices. A court may thus be biased or perceived as biased when it has already adjudicated facts central to the later defendant's criminal responsibility. If, for instance, previous defendants testified that the current defendant had ordered them to kill civilians, the current defendant may find it hard to relitigate his command responsibility or role in a joint criminal enterprise.[96] Domestic procedure deals with this and other problems by allowing changes of venue.[97] As most international courts consist of multiple trial chambers,[98] defendants could enjoy the advantages of a new venue by being assigned to a different trial chamber.[99] When the danger of bias is especially grave, a senior official's later trial could occur before an entirely different international court.[100]

B. Career Opportunities and Loyalties

To attract and keep good personnel, international courts need to offer them good career prospects. Although staffers can easily move laterally from one court to another, they find it very hard to move upwards. This acute lack of vertical opportunities undermines morale

---

96. For a discussion of these forms of indirect criminal responsibility, see generally Danner & Martinez, *supra* note 7.

97. *E.g.*, FED. R. CRIM. P. 21(a); *see also* Laurie L. Levenson, *Change of Venue and the Role of the Criminal Jury*, 66 S. CAL. L. REV. 1533, 1537 (1993) (discussing the merits of changes of venue when jury pools are distinct).

98. For a discussion of the structure of the trial chambers at the ICTY, see About the ICTY: Chambers, http://www.icty.org/sections/AbouttheICTY/Chambers (last visited Nov. 8, 2009).

99. Presently, trials are assigned to a trial chamber based on docket vacancies. *See* Theodore Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 364 (2005).

100. For example, after years of ICTY trials of crimes by Serbian forces, the judges of the ICTR could have sat by designation for later trials of senior officials, avoiding bias from previously adjudicated evidence. S.C. Res. 827, *supra* note 3, arts. 12, 13*ter*–13*quater* (describing the qualifications of *ad litem* judges and the process for their appointment).

and contributes to high turnover. International tribunals thus lack continuity, squander human capital, and waste resources training staff who remain for only a year or two.

International criminal tribunals should have no shortage of talent. They attract many of the best and brightest internationally minded young lawyers from around the world. Moreover, they offer relatively generous and often tax-free salaries.[101]

One group of lawyers drawn to international criminal courts is dubbed a cadre of "post-conflict justice junkies."[102] Justice junkies thrive on working in war zones, either to get an adrenaline rush or to do some good. They often hop horizontally from court to court, conflict to conflict, until they leave the system for personal reasons or to settle down. Although they may hope to move upward at a new court,[103] they care more about the freedom to move to the latest hot spot than upward mobility. One former ICC staffer captures the mindset of these justice junkies: "I came six months ago, but [am] getting restless now. Time to start thinking about [the] next opportunity."[104] They remain at a court for only a year or two and start looking for their next move almost as soon as they arrive.[105]

Another part of the talent pool consists of career seekers. Unlike justice junkies, career seekers want more stable job prospects in justice or, perhaps, international justice. They may choose a particular court for its prestige or the nature of its work, not because it is near an active conflict. They want not horizontal but vertical mobility and growing responsibilities within a particular court. Yet the structure of international courts often fails these career seekers, who are given few opportunities to advance. Once they see how limited their career trajectory is, career seekers quickly abandon the international judicial system for better prospects back home. A former ICTY staffer explains: "[I left the Tribunal because] there was nowhere for me to

101. Salaries at the ICTY are based on UN job classifications and range from $60,000 to $80,000 for junior professionals. *See* UN Human Res. Mgmt., United Nations Salaries, Allowances, Benefits and Job Classification, http://www.un.org/Depts/OHRM/salaries_allowances/salary.htm (last visited Nov. 8, 2009).

102. Elena A. Baylis, *Tribunal Hopping with the Post-Conflict Justice Junkies*, 10 OR. REV. INT'L L. 361, 363 (2008).

103. Baylis suggests that the frequent movement of these "justice junkies" may in part be driven by the potential for upward mobility at the time of a move to a new court with greater staff vacancies. *Id.* at 374.

104. Interview with anonymous Staff Official, *supra* note 85.

105. *See* Baylis, *supra* note 102, at 373 (referring to the "short duration[s of] postings").

go. There are very few senior legal officer positions and becoming a judge is impossible—they are elected by the Security Council."[106] Another ICTY staff member put it bluntly: "I came with high hopes but they were shattered. I would be stuck as a P-2 forever with an iron-ceiling above me. So I packed my bags and left."[107]

Both justice junkies and career seekers have few incentives to stay for any length of time, so both groups tend to move on after just a year or two. Early departures and high turnover rates have become a major problem. The ICTY has recognized that its high staff turnover hinders its ability to complete its mission and that existing incentives to stay are inadequate.[108] Though the ICC is a permanent court in no danger of closing, it has similar staff retention problems. In its first three years, the prosecutor's office had lost twenty-two of its 146 staffers, fourteen of whom left before their contracts had ended.[109] Anecdotal evidence suggests that the prosecutorial turnover rate has increased since 2006 and that judicial chambers and defense counsel face similar retention problems.[110]

Some staff attrition is unavoidable, but high turnover rates drain human capital. Although longer employment contracts and financial incentives to renew could keep justice junkies in place slightly longer, they are likely to tribunal-hop regardless. There is more hope for remedying the plight of career seekers.[111] The UN Common System, which international tribunals use,[112] limits professional advancement

---

106. Interview with former Staff Member, ICTY, in N.Y., N.Y. (Jan. 15, 2009).

107. Telephone Interview with former Staff Member, ICTY (Jan. 18, 2009).

108. Letter from Patrick Robinson, President, ICTY, to President, UN Sec. Council, para. 30 (Nov. 21, 2008), *available at* http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/Completion_Strategy_24nov2008_en.pdf.

109. Office of the Prosecutor, ICC, *Report on the Activities Performed During the First Three Years (June 2003 – June 2006)*, para. 74 (Sept. 12, 2006), *available at* http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf; *see also* Dr. Edmond H. Wellenstein, Dir.-Gen., Task Force ICC, Statement at the 2d Public Hearing of the Office of the Prosecutor (Sept. 25, 2006), *available at* http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Public+Hearings/Second+Public+Hearing/Session+1/Dr+Edmond+H++Wellenstein+Director+General+Task+Force+ICC.htm (demanding that the Prosecutor address staff turnover).

110. Interview with anonymous Staff Official, *supra* note 86.

111. *See* Office of the Prosecutor, *supra* note 109, para. 74 ("[T]he Office seeks to attract the most qualified individuals in the field of international justice.").

112. *See* Assembly of State Parties to the Rome Statute of the International Criminal Court, Res. ICC-ASP/2/Res.2 *passim* (Sept. 12, 2003), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP2-Res-02-ENG.pdf (requiring that the ICC establish terms of employment consistent with the UN Common System for ICC employees). For a discussion of

and bases promotions more on seniority than on merit.[113] Staff who left institutions that use this system cite lack of opportunities for professional growth and promotion as the two most common reasons for leaving.[114] The wide staffing pyramids of international tribunals, with many lower-ranked positions and few senior ones, exacerbate the problem of career advancement.[115] Moreover, the most senior positions, such as tribunal judges, are permanently out of reach, filled through political elections.

Domestic career paths offer a promising alternative. Domestic prosecutors and public defenders can move up to supervisory positions and more desirable units based on talent and hard work as well as seniority.[116] In some countries, such as Germany, the judiciary is a meritocratic civil service.[117] Career seekers could begin in the domestic system, be seconded (detailed) to international courts for a time, and later move up the ladder by returning to their domestic systems. Justice Jackson, who took a leave from the Supreme Court to serve as the U.S. Chief Prosecutor at Nuremberg, is perhaps the best example of how secondment can bring valuable skills and expertise. Though secondment of domestic officials to international tribunals occurs occasionally, it should become the norm, not the exception. The ICC could expand its existing cooperation agreements

---

the United Nations Common System, see UN Human Res. Mgmt., UN Common System, http://www.un.org/Depts/OHRM/salaries_allowances/common.htm (last visited Nov. 30, 2009).

113. *See* Glentis T. Thomas, 2d Sec'y, Delegation of Ant. & Barb., Statement on Behalf of the Group of Seventy-Seven and China on Agenda Item 125: United Nations Common System, in the 5th Committee During the Main Part of the 63d Session of the General Assembly ¶ 5 (Oct. 27, 2008), *available at* http://www.g77.org/statement/getstatement.php?id=081027a ("It is important to underline that lack of opportunities for career development was cited in most cases in headquarters locations as the main cause of voluntary turnover . . . ."); *see also* Alexander Downer, MP, Minister for Foreign Affairs, Reinvigorating the United Nations: Reform, Rights and Reconfiguration, Address Before the 52d Session of the General Assembly (Oct. 3, 1997), *available at* http://www.foreignminister.gov.au/speeches/1997/unga3october97.html (noting the disproportionate role played by seniority).

114. HUMAN RES. POLICY DIV., INT'L CIVIL SERV. COMM'N, RESULTS OF THE GLOBAL STAFF SURVEY ON RECRUITMENT AND RETENTION (2008), http://icsc.un.org/resources/hrpd/gssr/docs/ICSCStaffsurvey.pdf.

115. *See* Rome Statute of the International Criminal Court, *supra* note 5, arts. 36, 42 (describing the qualification and election of judges and the Prosecutor).

116. Of course, politics also plays a large role in American states' and counties' elections for district attorneys and judges. We do not wish to replicate every quirk of the American system, particularly its politicization, but simply to suggest the need for incentives to work hard and perform well to get ahead.

117. *See* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 853 (1985) (noting that the German civil service system prevents politics from influencing the appointment and promotion of judges at most levels).

with its States Parties to facilitate secondment and to improve candidates' postsecondment prospects back home. National civil services could amend their personnel and benefits policies to promote international secondments as valuable credentials for career advancement.

Routine secondment of career seekers could also alleviate the problematic worldview that many international tribunal staff now share.[118] Having been socialized within national judicial systems, secondees are more likely to have diverse ideologies befitting their roles, instead of categorically leaning toward conviction.

More generally, the UN Common System and the international civil service urgently need reform. Though a detailed exploration of these points is beyond the scope of this Article, civil-service systems should allow for rapid advancement based on merit, create incentives to retain good staff, and facilitate careers that bridge international and domestic service.

III. THE POLITICS OF INTERNATIONAL JUSTICE

Though international criminal justice seeks to tame politics through law, it remains deeply political. Politics infects the election and appointment of key officials, state cooperation in investigations and arrests, and court funding. It skews outcomes, weakens independence, and undercuts the appearance of impartiality. Domestic judiciaries offer examples of how to insulate justice from politics and how to acknowledge and defuse the politics that remains.

This Part explores the politics of international criminal justice and draws lessons from domestic judiciaries. First, we consider the politics and elections of judges, prosecutors, and other senior officials. Next, we turn to a unique aspect of international criminal justice—the need for state cooperation to conduct investigations or undertake arrests. Third, we examine the politics of funding international tribunals. Finally, we consider the politics of defense resources and the need to ensure equality of arms.

A. Appointments and Elections

International prosecutors and judges are elected or appointed by processes that often turn into political beauty pageants. To give but one example, when judicial vacancies arise on the ICTY, the UN

118. *See supra* Part II.A.

Secretary General solicits each state to nominate up to two candidates. The Security Council then narrows the slate to a maximum of forty-two candidates. The General Assembly elects judges for four-year terms with the possibility of reappointment.[119] International tribunals' statutes impose additional requirements that further politicize selection. For example, ICC judges must be diverse in geography and sex and represent the world's main legal systems.[120]

The cumbersome electoral system injects dysfunctional international politics into law. Many states nominate candidates based on patronage, not merit.[121] For judges from developing states, an international judicial appointment with its relatively high salary is a plum political appointment. One notable case of presumed political cronyism involved a Nigerian judge at the ICTY who routinely slept through trials but was nonetheless nominated by his government for reelection.[122] Political horse-trading can also lead to the selection of less qualified candidates. Thomas Franck analogized the UN General Assembly not to a principled court "but a bazaar, with its emphasis on price and trade."[123] In this context, bloc politics, bargaining, and horse-trading matter more than merit.

Take, for example, the 2003 election of the ICC's first group of judges. The election of eighteen judges took thirty-three rounds of voting over three days. The eighty-five voting states had to select

---

119. S.C. Res. 827, *supra* note 3, art. 13*bis*. The UN Security Council elects the ICTY Prosecutor, subject to veto by permanent members. *Id*. art. 16(4). ICC judicial appointments are likewise politicized. Each state party nominates one candidate. Candidates with criminal procedure experience compose one list; those with international law expertise form a second. The States Parties then elect judges from these lists by a two-thirds vote. Rome Statute of the International Criminal Court, *supra* note 5, art. 36. The Assembly of States Parties (ASP) creates a list of candidates for head ICC Prosecutor and elects the Prosecutor by secret ballot. The Prosecutor then puts forth a list of three candidates for each deputy prosecutor job, and the States Parties likewise elect them by secret ballot. *Id*. art. 42(4).

120. Rome Statute of the International Criminal Court, *supra* note 5, art. 36(8). The ICTY statute requires that judicial elections take "due account of the adequate representation of the principal legal systems of the world." S.C. Res. 827, *supra* note 3, art. 13*bis*(1)(c).

121. Studies of the election of judges to the European Court of Human Rights offer strong evidence that patronage plays a large part in nominations. *See* JUTTA LIMBACH ET AL., JUDICIAL INDEPENDENCE: LAW AND PRACTICE OF APPOINTMENTS TO THE EUROPEAN COURT OF HUMAN RIGHTS 9 (2003) ("[N]omination often involves a 'tap on the shoulder' from the Minister of Justice or Foreign Affairs, and frequently rewards political loyalty more than merit.").

122. Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387, 398 (2009).

123. Thomas M. Franck, *Of Gnats and Camels: Is There a Double Standard at the United Nations?*, 78 AM. J. INT'L L. 811, 833 (1984).

candidates according to prescribed ratios of criminal-justice experts to international experts, men to women, and various geographic regions.[124] Ballots that did not meet these criteria were excluded, which may have compromised the validity of the election.[125] Geographic and bloc politics resulted in bargaining and horse-trading that may have hampered the selection of the most qualified judges.[126]

Problematic backroom deals aside, the prospect of reelection creates troubling incentives for sitting international judges and prosecutors. When reelection is possible, judges and prosecutors' interests may be more aligned with the states that nominated or supported them than with justice itself.[127] Desire for reappointment can also create conflicts of interest. For example, an ICTY advisory committee decided not to investigate possible international crimes by North Atlantic Treaty Organization (NATO) forces during the war in Kosovo,[128] and ICTY Prosecutor Carla Del Ponte accepted this recommendation.[129] Because her reappointment required the support of the U.S. and the U.K., which had led the NATO bombing campaign, her decision appeared to be less than independent or impartial.[130]

Although some horse-trading is unavoidable given the small electorate of repeat players, reforms can limit its pernicious effects.

---

124. Some commentators suggest that the ASP had to elect a minimum of six women and three judges each from Africa, Latin America, and Western Europe, and two from Asia. Darin R. Bartram & David B. Rivkin, Jr., *The ICC's First False Step*, WALL ST. J., Feb. 17, 2003, at A9.

125. *Id.*

126. Candidates spent weeks before the election in a "beauty contest" at the UN involving substantial cross-issue bargaining. *See* Lauren Etter, *Call for ICC to Learn ICTY Election Lessons*, INST. FOR WAR & PEACE REPORTING, Nov. 26, 2004, http://www.globalpolicy.org/component/content/article/164-icc/28481.html (describing the perception of some judges and observers that the elections were determined by political deal-making); *cf.* Bartram & Rivkin, *supra* note 124 (suggesting the election was tainted). *But see* Leila Nadya Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court*, 21 WIS. INT'L L.J. 557, 581–82 (2003) (suggesting that the elected judges were qualified).

127. *See* Voeten, *supra* note 122, at 389 (suggesting that international judges "depend in large measure on the willingness of national governments to advance their candidacies for high international judicial office").

128. Office of the Prosecutor, ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶ 91 (June 13, 2000), *available at* http://www.icty.org/x/file/Press/nato061300.pdf (recommending that the NATO bombing campaign not be investigated).

129. Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503, 505 (2001).

130. *See id.* (questioning Del Ponte's decision).

Truly secret ballots make it impossible to enforce backroom bargains.[131] Alternatively, a fully independent committee could propose a slate of candidates for an up-or-down vote, thereby at least preventing horse-trading of appointments on the floor of the General Assembly. Raising the prerequisites for nomination, such as education levels and years of judicial service, can ensure that whoever is elected will be qualified.[132] Unavoidable bargaining should at least be more public, so that NGOs and the press can scrutinize deals and domestic voters can hold their governments accountable for the bargains they strike.

Domestic judiciaries have considerable experience with reappointment and reelection. The need to run for reelection skews judicial incentives and outcomes. For example, American state trial judges often face popular reelection and are therefore likely to be more punitive in sentencing, presumably in an effort to be seen as tough on crime.[133] Concerns abound that periodic elections undermine judges' independence and impartiality.[134] As Alexander Hamilton foresaw, "[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence."[135] To solve this problem, international courts should move from short, renewable terms toward a single, longer term of service. The Rome Statute has appropriately moved in this direction, providing that from now on the ICC's judges and

131. Elections for ICTY judges do not use secret ballots. *See* S.C. Res. 827, *supra* note 3, art. 13*bis* (describing the procedure for judicial elections). The ICC improved on this model by requiring the use of a secret ballot. Rome Statute of the International Criminal Court, *supra* note 5, art. 36(6).

132. The ICC has taken an appropriate step in this direction, requiring that judicial nominees be qualified to serve in the highest judicial office in their home states, have experience in criminal law or international law, and have excellent knowledge of one of the court's official languages. Rome Statute of the International Criminal Court, *supra* note 5, art. 36(3). More explicit qualifications and strict enforcement would help.

133. *See* Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind when It Runs for Office?*, 48 AM. J. POL. SCI. 247, 261 (2004) (concluding that as judicial elections approach, judges impose increasingly punitive sentences); *cf.* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 41 (1993) (suggesting that elected judges are more susceptible to political influence).

134. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 694 (1995) (suggesting that the majoritarian difficulty associated with elected judges may not be compatible with constitutional democracy); Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1979–83 (1988) (suggesting that judicial elections pose a threat to the integrity of the courts).

135. THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Prosecutor will serve one nonrenewable nine-year term.[136] Nine years may suffice, or we may find that judges still cultivate relations with patron governments to secure future jobs after their current ones end. If that happens, even longer terms could turn international judicial appointments from stepping stones to the capstone of a judge's career.

B. State Cooperation

International courts need states to cooperate with them. They cannot search for evidence, compel witnesses, or arrest suspects without the help of states, which are all too often uncooperative. Some courts, such as Nuremberg, enjoyed good cooperation because the Allied nations running the tribunal occupied and controlled the remnants of the German state.[137] But the ICTY and ICTR face much more difficulty, even though international law obligates states to help locate persons, take testimony, request evidence, serve documents, and arrest suspects.[138] Most notoriously, for thirteen years the ICTY could not arrest the two masterminds of the Balkan war, Radovan Karadžić or Ratko Mladić. For most of the thirteen years, Bosnian authorities and even NATO troops knew where Karadžić was but lacked the will to arrest him.[139] Not until July 2008 did Serbian authorities arrest him, under the threat of sanctions, promises of financial aid, and a change in domestic government.[140] Worse, Mladić still remains at large, hiding in plain sight in Serbia.[141] These delays

---

136. Rome Statute of the International Criminal Court, *supra* note 5, arts. 36(9)(a), 42(4).

137. *See* Charter of the International Military Tribunal Annexed to the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, *supra* note 18, 82 U.N.T.S. at 294, art. 17 (enumerating the powers of the Tribunal). *See generally* EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION (1993) (providing an overview of international humanitarian law governing occupied territories).

138. S.C. Res. 827, *supra* note 3, art. 29(2); *id.* ¶ 4. Decisions of the Security Council taken under Chapter VII are binding on all UN member states. U.N. Charter art. 25.

139. *See* Carla Del Ponte, *Hiding in Plain Sight*, N.Y. TIMES, June 28, 2003, at A15 ("It is clear that NATO and the authorities in Serbia and Montenegro know even more about [Karadžić and Mladić's] whereabouts . . . . The time has come to summon the will and bring [them] to justice.").

140. *See Finally, Nowhere to Hide*, N.Y. TIMES, July 23, 2008, at A20. Karadžić's arrest was motivated by economic threats from the United States and the European Union. *See* David Rohde & Marc Lacey, *Arrest Helps Tribunals Prosecuting War Crimes*, N.Y. TIMES, July 23, 2008, at A10.

141. Vesna Peric Zimonjic, *The Most Wanted Man in Europe: Caught on Video: Ratko Mladic, a Fugitive from Global Justice After Ordering the Worst Massacre in Modern Europe, Enjoying Life in Serbia*, INDEPENDENT (London), June 12, 2009, at 1 (describing film footage of

and failures to arrest have slowed the work of the ICTY and called its efficacy into question.

The ICC faces even more daunting challenges. Without state assistance, the ICC is truly impotent, unable even to transfer an accused already in custody in a foreign jurisdiction to the court.[142] Its statute binds only States Parties, yet even they often fail to fulfill their obligations. The ICC steps in when national governments cannot or will not prosecute, but these same states likewise often cannot or will not assist the ICC. For example, the leadership of the Lord's Resistance Army, a Ugandan rebel group, remains at large despite ICC arrest warrants issued in 2005.[143] Though everyone knows that the rebels are hiding in eastern Democratic Republic of the Congo (DRC), the Congolese military cannot and will not arrest them.[144] Even more troubling, the UN Mission in the DRC could arrest them but has shown little political will to do so.[145]

Perhaps the most powerful example of the ICC's need for state cooperation is its efforts in Sudan. Initially, Sudan defied ICC arrest warrants for two leaders of the Darfur genocide, including one sitting minister of the Sudanese government, and threatened ICC staff and witnesses.[146] As a result, prosecutors must rely on witness interviews

---

Mladić enjoying living openly in a Belgrade suburb, allegedly as recently as 2008, though Serbian officials insist the footage is much older).

142. When Thomas Lubanga Dyilo was arrested by Congolese authorities in Kinshasa, the ICC lacked the means to physically transfer him to the Hague. Eventually, the French government provided transport. *See* BBC News, Profile: DR Congo Militia Leader Thomas Lubanga, http://news.bbc.co.uk/2/hi/africa/6131516.stm (last visited Nov. 8, 2009).

143. *See* Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Application for Warrants of Arrest Under Article 58 (July 8, 2005).

144. *See* Letter from Jane Kiggundu, Solicitor Gen., Gov't of Uganda, to the Registrar, ICC (Mar. 27, 2008), *available at* http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-286-Anx2-ENG.pdf.

145. *See* Scott Baldauf, *Legacy of Rwanda's Genocide: More Assertive International Justice*, CHRISTIAN SCI. MONITOR, Apr. 7, 2009, at 6 (discussing MONUC's politically motivated decision not to arrest Congolese rebels); MONUC, Democratic Republic of the Congo - MONUC - Mandate, http://www.un.org/Depts/dpko/missions/monuc/mandate.html (last visited Nov. 8, 2009) (explaining that the 2004 revision of the original mandate includes the new responsibility to contribute to the disarmament of Congolese combatants). In early 2009, the UN Mission in the DRC unsuccessfully attempted an arrest but has otherwise been reluctant to act. *See* Jeffrey Gettleman & Eric Schmitt, *U.S. Aided a Failed Plan to Rout Ugandan Rebels*, N.Y. TIMES, Feb. 7, 2009, at A1.

146. *See* Maggie Farley, *Warrants Issued in Darfur Conflict: U.N. Court Seeks the Arrests of a State Official and a Militia Leader, but Sudan Appears Unlikely to Hand Them Over*, L.A. TIMES, May 3, 2007, at A3; Eric Reeves, *Obama, Darfur, and ICC Justice*, CHRISTIAN SCI. MONITOR, Nov. 24, 2008, at 9; *see also* OFFICE OF THE PROSECUTOR, ICC, SECOND REPORT OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT, MR. LUIS MORENO-OCAMPO,

in neighboring countries' refugee camps.[147] When the ICC Prosecutor so indicted Sudanese President Bashir, the African Union (AU) as well as some leading NGOs and academics loudly criticized the court, condemning its legitimacy and vilifying its Prosecutor.[148] If key states took the approach adopted by the AU, the ICC's indictments and the institution itself would be an empty threat. Cooperation, however, is about far more than public rhetoric, and the AU's statements may say more about Sudan's influence in the organization than the actual willingness of states to assist the court. The real questions are whether Western powers will pressure Sudan and its neighbors, whether key African states will deny him entry and safe transit, whether domestic audiences will force him from power as they did Milošević, and whether he can be arrested while abroad. In at least some of those respects, the court's prospects appear more promising[149] but remain dependent on astute diplomacy and ongoing state cooperation.

Though international tribunals need state cooperation and support, at the same time getting too close to any one nation would call into question their independence and impartiality. When the ICC Prosecutor opened his investigation in Uganda in 2004, he sought to establish a close relationship with President Museveni to allow the

---

TO THE SECURITY COUNCIL PURSUANT TO UNSC 1593, at 4 (2005), *available at* http://www.icc-cpi.int/NR/rdonlyres/2CFC1123-B4DF-4FEB-BEF4-52E0CAC8AA79/0/LMO_UNSC_Report B_En.pdf (noting a "climate of insecurity" and the "absence of an effective system of protection" for victims and witnesses in Sudan).

147. *See* Luis Moreno-Ocampo, Chief Prosecutor, ICC, Statement to the U.N. Security Council Pursuant to UNSCR 1593 (Dec. 14, 2006), *available at* http://www.icc-cpi.int/NR/rdonlyres/4B0CCA58-55A5-4428-9886-9DE1DB5BB24F/0/LMQ20061216_en.pdf (noting investigation difficulties due to the lack of Sudanese cooperation).

148. *See* Assembly of the African Union, *Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC)*, Assembly/AU/Dec.245(XIII) (July 1–3, 2009) (condemning the indictment of Bashir); Jeffrey Gettleman, *As Charges Loom, Sudan Chief Mounts Charm Offensive*, N.Y. TIMES, July 24, 2008, at A6 (discussing Sudan's efforts to persuade powerful states on the Security Council to block efforts to arrest Bashir); Neil MacFarquhar, *Accusations Against Leader of Sudan Fuel Debate*, N.Y. TIMES, Sept. 30, 2008, at A15. Though not a State Party, Sudan is legally obligated to cooperate with the ICC by UN Security Council Resolution 1593. S.C. Res. 1593, ¶ 2, U.N. Doc. S/RES/1593 (Mar. 31, 2005); *see also* Eric Posner, *The Limits of Global Legalism*, VOLOKH CONSPIRACY, July 3, 2009, http://volokh.com/posts/1246649185.shtml (noting a treaty obligation to arrest Sudan's president).

149. Bashir has, for example, failed to attend summit meetings in some African states due to fear of arrest. *See Uganda Says Sudan's Bashir to Send Deputy over ICC*, REUTERS, July 16, 2009, http://www.reuters.com/article/latestCrisis/idUSLG94343 (noting that Sudan would send a deputy to a summit in Uganda after Uganda indicated that it might act on the ICC arrest warrant).

smooth functioning of his investigation.[150] Yet, the ICC Prosecutor's now-infamous handshake with Museveni, which signaled that the court would not investigate potential crimes by government forces, led many Ugandans to view the Prosecutor as Museveni's puppet.[151]

Hybrid tribunals face different problems. Because they are rooted in a national judiciary, they depend on the host state's assistance and support.[152] Although they can harness a domestic government's coercive capacity, they have difficulty securing evidence from or arresting suspects in other states.[153] Moreover, hybrids risk being co-opted by domestic authorities. The Extraordinary Chambers in Cambodia, for example, have been widely criticized as a pawn of the Cambodian government.[154] The balance between cooperation and co-option is precarious.

Solutions to the state cooperation dilemma are more often political than legal.[155] Realistically, international tribunals will not have their own police powers in the foreseeable future. There are, however, four broad ways to mitigate the problems of state cooperation. First, international tribunals should seek greater cooperation from and deeper integration with clean-handed, helpful states. The ICC must urge, prod, and cajole the 108 States Parties, especially those that are not likely to be the site of an investigation, to

---

150. OFFICE OF THE PROSECUTOR, ICC, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 2 (2003), *available at* http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf (discussing the need for close state cooperation).

151. For a discussion of the perception of bias generated by this meeting, see Zachary A. Lomo, *Why the International Criminal Court Must Withdraw Indictments Against the Top LRA Leaders: A Legal Perspective*, SUNDAY MONITOR (Kampala), Aug. 20, 2006, *available at* http://www.refugeelawproject.org/press_releases/press_whyICCmustwithdraw.pdf.

152. *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, U.N.-Sierra Leone, art. 17, Jan. 16, 2002, 2178 U.N.T.S. 138, *available at* http://www.specialcourt.org/documents/SpecialCourtAgreementFinal.pdf (providing for cooperation by the government).

153. The STL has difficulty investigating because Syria is uncooperative. *See generally* S.C. Res. 1644, U.N. Doc. S/RES/1644 (Dec. 15, 2005) (condemning Syria for its lack of cooperation with the ICC).

154. *See* Suzannah Linton, *Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers*, 4 J. INT'L CRIM. JUST. 327, 340 (2006).

155. Existing formal legal obligations to cooperate have proved insufficient to motivate unwilling states. For example, Sudan faces an obligation under UN Security Council Resolution 1593 to "cooperate fully with and provide any necessary assistance to the Court." S.C. Res. 1593, *supra* note 148, ¶ 2. Yet Sudan has failed to arrest any of the indictees on its territory.

assist international tribunals.[156] Though astute diplomacy is a good first step,[157] tribunals also need deeper integration into clean-handed states' domestic legal systems. Extradition could become as routine as it is between American states, without the need to jump through cumbersome treaty procedures. Likewise, courts need intelligence-sharing arrangements, so that international authorities have access to domestic wiretaps and other information. Working directly with national enforcement officials would be faster, more efficient, and less political than having to funnel requests through a political bottleneck of a state's foreign ministry.[158] Cooperation agreements could authorize international courts to requisition transport assistance, collect evidence, or execute warrants through a national judiciary, rather than through a state's foreign ministry.[159] By bypassing foreign ministries, international and domestic courts and police could cooperate as smoothly as American state and federal authorities do in arresting, extraditing, and sharing information.

Second, international tribunals should use issue linkages and sanctions to pressure uncooperative states. Although international tribunals themselves have few levers to coerce unwilling national governments, third-party states and international organizations can pressure uncooperative states by linking cooperation to trade benefits, foreign aid, and sanctions. The 2008 arrest of Radovan Karadžić, noted above, was motivated by the threat of European Union sanctions and the promise of significant financial incentives.[160]

---

156. For various statements by national governments in support of the ICC, see Burke-White, *supra* note 9, at 60 nn.23–28.

157. The Jurisdiction, Cooperation and Complementarity Division of the Office of the Prosecutor is responsible for diplomacy. It needs to be more proactive and better solicit the support of national governments. *See* Luis Moreno-Ocampo, Chief Prosecutor, ICC, Remarks at the 27th Meeting of the Committee of Legal Advisers on Public International Law (Mar. 18, 2004), *available at* http://www.iccnow.org/documents/ICCProsecutorCADHI18Mar04.pdf.

158. Rome Statute of the International Criminal Court, *supra* note 5, art. 87 (providing statutory authority for communication with States Parties and specifying the use of "the diplomatic channel"); *see also* ICC R. P. & EVID. 176–77 (delineating responsibilities for communications among organs of the court).

159. Many states would have to pass implementing legislation to allow international tribunals to directly interface with and activate domestic institutions. Americans may see such unlimited cooperation as far-fetched, but some European states, such as France, have amended their constitutions to conform to the Rome Statute and could be convinced to provide deeper cooperation. *See generally* Michael P. Hatchell, Note, *Closing the Gaps in United States Law and Implementing the Rome Statute: A Comparative Approach*, 12 ILSA J. INT'L & COMP. L. 183 (2005) (discussing domestic implementation of the Rome Statute).

160. *See* Rohde & Lacey, *supra* note 140.

Third, international tribunals should consider offering sentence discounts and plea agreements in exchange for cooperation and self-surrender to reduce their dependence on state cooperation. In this vein, American criminal procedure already offers discounts to induce defendants to turn themselves in, plead guilty, not file motions, and cooperate. Sentence discounts for self-surrender could provide incentive for indictees to submit themselves to the tribunal, without the need to get state assistance to make arrests. Cooperative states could also freeze assets automatically upon indictment, increasing the pressure to surrender. Similarly, as Part IV.B discusses, cooperation agreements could induce testimony, reducing the need for in-country interviews or forensic evidence collection. Though far from ideal, these discounts may be necessary to circumvent political roadblocks to justice.

Finally, as a last resort, regime change may be the only available way to deal with a state that systematically harbors international fugitives. An indictment and arrest warrant from an international tribunal may provide a rallying point around which victims and opposition can unite to force an international criminal from power or to pressure a government to turn over a suspect.[161] Slobodan Milošević, for example, was ultimately arrested after a domestic uprising in Serbia toppled his regime.[162] The closest domestic analogue is that officials who shelter criminal cronies risk electoral defeat, impeachment, and even federal civil-rights prosecution.[163]

C. Funding

International tribunals likewise depend on national governments for their funding, either directly or through international organizations, which raises two concerns. First, funding may be inadequate.[164] The ICC's €66.8 million budget allocation for 2006 fell

161. These efforts must be undertaken carefully given the possibility of nationalist backlash. For example, the ICC Prosecutor's request for an indictment of the Sudanese president led to rallies of support in Khartoum. *See* Lydia Polgreen & Jeffrey Gettleman, *Sudan Rallies Behind Leader Reviled Abroad*, N.Y. TIMES, July 28, 2008, at A1.

162. *See* CHRIS STEPHEN, JUDGEMENT DAY: THE TRIAL OF SLOBODAN MILOŠEVIĆ 145, 155–62 (2004).

163. Most famously, President Gerald Ford's pardon of former President Richard Nixon is thought to have doomed whatever hopes he had for reelection. Lionel Van Deerlin, *Gerald Ford: The Right President for His Time*, SAN DIEGO UNION-TRIB., May 9, 2001, at B7.

164. Although the ASP has been relatively generous thus far, that generosity may not continue. *See, e.g.*, ICC, *Report of the Committee on Budget and Finance on the Work of Its Sixth Session*, ICC-ASP/05/01 (May 4, 2006), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/

short of the court's request and required the ICC to scale back certain programs and staffing.[165] The ICTY and ICTR have likewise experienced significant budget pressure as states have sought to curtail their contributions to the UN.[166] Funding constraints can limit a tribunal's staffing, prevent new investigations, or impair responses to unforeseen developments.[167] Hybrid tribunals face even greater operational constraints, as they depend on the support of poorer host states and on voluntary contributions that richer states sometimes promise but do not deliver.[168] In 2008, the Cambodia tribunal began pleading for additional funding so that it could begin its first trial.[169]

Second, financial dependence can compromise independence and impartiality. Funding often turns on the support of rich, powerful states. When the ICTY Prosecutor decided not to investigate crimes by NATO forces in Kosovo and Serbia, she might have feared that such an investigation would jeopardize the U.S.'s and U.K.'s financial support. The ICC Prosecutor's decision not to investigate crimes by British forces in Iraq raised the same question of independence.[170]

---

library/asp/ICC-ASP-5-1_English.pdf. For information on presently available finances, see ICC, *Financial Statements for the Period 1 January to 31 December 2005*, ICC-ASP/05/02 (Aug. 8, 2006), *available at* http://www.icc-cpi.int/iccdocs/asp_docs/library/asp/ICC-ASP-5-2_English.pdf.

165. Jonathan O'Donohue, *The 2005 Budget of the International Criminal Court: Contingency, Insufficient Funding in Key Areas and the Recurring Question of the Independence of the Prosecutor*, 18 LEIDEN J. INT'L L. 591, 593 (2005).

166. ICTY and ICTR funding comes through assessed contributions to the UN, whereby states are required to pay a portion of the UN budget. Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 427 (2006). Because ICTY and ICTR expenses are more than 10 percent of the UN's annual budget, reductions in tribunal budgets can decrease assessed contributions. *See* David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861, 861 (2006).

167. In 2009, for example, the ICC staff was limited to 744 persons with a budget of about €100 million. Assembly of States Parties to the Rome Statute of the International Criminal Court, Res. ICC-ASP/7/Res.4 (Nov. 21, 2008). That budget may preclude new investigations and will be a factor in how ongoing investigations are conducted.

168. *See* Higonnet, *supra* note 166, at 427. Many of the pledges to the State Court of Bosnia & Herzegovina have not been delivered. *See* COURT OF BOSNIA & HERZEGOVINA, PROJECT IMPLEMENTATION PLAN PROGRESS REPORT 35 (Oct. 2004), *available at* http://www.registrarbih.gov.ba/files/docs/WCC_Project_Plan_201004_complete.pdf.

169. *See* Paul Watson, *Special Cambodian Court Short of Funds*, L.A. TIMES, June 24, 2008, at A4.

170. *See* Letter from Luis Moreno-Ocampo, Chief Prosecutor, ICC, to Senders of Communications Regarding Iraq (Feb. 9, 2006), *available at* http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (noting that "the Statute requirements to seek authorization to initiate an investigation in the situation in Iraq have not been satisfied").

Several innovations could better insulate international courts from the political pressures of securing funding and the perceptions of bias. First, international tribunals should develop standby reserve funds to cushion them against real or threatened budget cuts.[171] Second, soliciting donations could provide a further buffer against budgetary threats. Third, courts could forfeit and seize convicts' funds, furthering financial independence. The Rome Statute already allows the ICC to impose financial penalties on those convicted of international crimes.[172] Presently, seized funds and fines are earmarked for a trust fund for the benefit of victims and witnesses.[173] Many warlords have stashed away millions or billions from their plunder, so courts could consider splitting proceeds among victims, witnesses, and court systems. American experiences here suggest proceeding with caution.[174] There is a danger that prosecutors might target the wealthy to enhance their budget, so rules need to insulate case selection against this danger. Finally, international courts could stretch their dollars by streamlining procedures along American lines. For example, Parts IV.B and IV.C suggest, they could make greater use of plea bargaining and cooperation discounts.

D. Defense Resources

The politics of funding has especially grave consequences for defense lawyering. Despite significant reforms,[175] the ICTY legal aid system discourages zealous litigation. Defense counsel receive set lump sums for pretrial, trial, and appeals work based on the

---

171. A variant of this approach has been used by hybrid tribunals, whereby establishment is conditioned on an adequate "donors fund." *See* COURT OF BOSNIA & HERZEGOVINA, *supra* note 168, at 35.

172. Rome Statute of the International Criminal Court, *supra* note 5, art. 77(2).

173. *Id*. art. 79.

174. *See, e.g.*, Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 56–82 (1998) (discussing how the prospect of forfeiture warps law-enforcement incentives to prosecute drug crimes that are likely to result in large forfeitures). For an overview of a recent procedural reform designed to protect innocent owners against overzealous, financially motivated law enforcers, see generally Barry L. Johnson, *The Civil Asset Forfeiture Reform Act of 2000 and the Prospects for Federal Sentencing Reform*, 14 FED. SENT'G RPTR. 98 (2001).

175. *See* Secretary-General, *Comprehensive Report on the Progress Made by the International Criminal Tribunal for the Former Yugoslavia in Reforming Its Legal Aid System*, ¶¶ 7–39, *delivered to the General Assembly*, U.N. DOC. A/58/288 (Aug. 12, 2003) (outlining reforms in 2001 that sought to create incentives for defense counsel to work efficiently and control costs). Initially, the ICTY paid defense counsel about one hundred euros per hour, with a 175-hour monthly cap. *Id.* ¶¶ 7–8.

complexity of the case.[176] Because there is no extra compensation for extra hours or dollars spent,[177] this lump sum system discourages spending much time or money on cases. Moreover, although holding back partial payments until the end of a phase may speed up trial, it also encourages defense counsel to underlitigate in their haste to receive their fees.[178]

Defense funding can be even more problematic for hybrid tribunals, in which prosecutors are often much more influential than legal aid offices. For example, in East Timor, the UN directly funded the hybrid tribunal's prosecutor, whereas the impoverished East Timorese government funded the defense.[179] As a result, during the first two years of trials in East Timor, no defense counsel called a single witness.[180] More recently, the hybrid war crimes chamber in Bosnia has paid defense only for hours in the courtroom, offering no resources for investigation or pretrial work.[181] Ultimately, the legitimacy of international criminal law depends on zealous defense. That in turn requires compensation for full and effective—but not dilatory—litigation and common budget constraints for the prosecutor and the defense. Although many American defense lawyers likewise suffer chronic funding problems, some enterprising lawyers have succeeded in increasing defense resources by reframing the debate. Domestic scholarship shows that phrasing the need for defense resources in terms of leveling the playing field, rather than helping defendants, can make proper funding more palatable.[182]

---

176. *See id*. ¶¶ 24–25. For the simplest cases, the lump sum payments assume 1,400 lead counsel hours; for the most difficult leadership cases, the lump sum payments assume 2,800 lead counsel hours. *See id.* Annex I. Defense counsel receive $132,000 for simple trials expected to take four months, or $400,000 for leadership trials expected to take ten months. *See id*. Annex III.

177. The UN notes: "If a trial stage terminates ahead of schedule, the defence will still be entitled to the full lump sum; conversely, if the trial runs a little longer, the defence will not receive additional payments." *Id*. ¶ 25.

178. This structure encourages defense counsel to litigate quickly but not thoroughly. *See generally* Bibas, *supra* note 12, at 2476–78 (discussing how low lump sums or flat fees impair defense lawyering and encourage haste).

179. *See* Burke-White, *supra* note 4, at 70.

180. *See id.*

181. *See* Burke-White, *supra* note 62, at 346 n.255.

182. *See, e.g.*, Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 261–62 (2004).

IV. IMPROVING INTERNATIONAL CASE MANAGEMENT

Because international criminal justice has evolved so recently and haphazardly, it has only begun to heed to systemic issues of case management. The idealistic desire to do justice collides with the reality of limited time and money. The system must learn to perform better triage by screening out some cases and striking cooperation agreements or other plea bargains in many more. Otherwise, the hordes of lower-level cases will continue to delay or deny justice to the likes of Slobodan Milošević. We consider in turn how to improve gatekeeping and case selection, plea bargaining and caseloads, and finally sentencing.

A. Gatekeeping and Case Selection

Though the universe of potential cases is nearly infinite, international criminal tribunals can bring only a very few cases themselves. But they find it hard to motivate domestic prosecutors to pursue other cases, and critics often attack their decisions to take or decline certain cases.[183] Although statutes emphasize the need to prosecute those most responsible, they lack clear criteria for ranking cases.[184] The lack of criteria not only calls into question particular charging decisions but also delays important cases such as Milošević's.

---

183. *See* William A. Schabas, *Prosecutorial Discretion vs. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 736–48 (2008) (discussing criticisms of ICC case selection). In its early years, the ICTY pursued low-level suspects, *id.* at 746, when it desperately needed to bring any accused to fill empty courts. Unfortunately, the more recent reliance on subsidiarity and culpability for gatekeeping has not been fully effective. The ICTY still has pending indictments against twenty-five suspects and the ICC has at times failed to follow its statutory limitation to the most serious offenders. Details of the remaining ICTY cases in trial or awaiting trial are available at http://www.icty.org/action/cases/4. With a few exceptions, such as Radovan Karadžić, most of these suspects probably would not qualify as those most responsible for the atrocities in the Balkans. The first two indictees from the DRC are far from those most responsible for international crimes there. *See* Prosecutor v. Ntaganda, ICC-01/04-02/06, Warrant of Arrest, 3–4 (Aug. 22, 2006); Prosecutor v. Lubanga, ICC-01/04-1/06, Warrant of Arrest, 3–4 (Feb. 10, 2006).

184. The Rome Statute provides that a case must be "of sufficient gravity to justify further action by the Court." Rome Statute of the International Criminal Court, *supra* note 5, art. 17(1)(d). The Prosecutor has sought to clarify in a white paper the criteria for selecting cases, but the paper has not been published and offers insufficient guidelines. *See* Office of the Prosecutor, *supra* note 67. Recent scholarship has sought to develop the gravity criterion. *See* Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, *in* FUTURE DIRECTIONS IN INTERNATIONAL CRIMINAL JUSTICE (Carsten Stahn & Larissa van den Herik eds., forthcoming January 2010), *available at* http://ssrn.com/abstract=1270369.

To solve these problems, the first step is to clarify the functions and purposes of punishment. Part I.A discussed the need to target atrocities and serve as a backstop to domestic judiciaries, and Part I.B emphasized the goals of restoration, reconciliation, and retribution. This Part addresses how to implement these priorities in practice and draw on domestic lessons in doing so.

Domestic prosecutors have plenty of experience with screening and gatekeeping. In particular, federal prosecutors choose to take certain cases federally and leave most others for the states. For example, many federal prosecutors' offices have written declination guidelines. Typically, these guidelines classify cases by crime type, amount of money or drugs involved, criminal history, pattern of crime, strength of proof, and alternatives to federal prosecution.[185] Some district attorneys' offices assign seasoned prosecutors to a specialized screening unit, which reviews and investigates incoming cases and decides whether the case is serious enough and whether the evidence is strong enough to justify the charges.[186] Federal and state law-enforcement agencies often work together on joint task forces, pooling their resources and knowledge and directing cases to appropriate courts.[187]

To apply these lessons internationally, one must first acknowledge resource constraints openly.[188] A system that idealistically promises justice to everyone will disappoint most of them. It must focus on the most intentional and flagrant crimes that caused the gravest harm to the most victims and sowed the most widespread grief and bitterness.[189] Coherent screening policies can pick a handful of strong cases involving the worst crimes, to maximize

---

185. U.S. DEP'T OF JUSTICE, *supra* note 77, at 29.

186. Wright & Miller, *supra* note 12, at 61–64 (discussing the New Orleans District Attorney's office).

187. *See, e.g.*, Sandra Guerra, *The Myth of Dual Sovereignty: Multijurisdictional Drug Law Enforcement and Double Jeopardy*, 73 N.C. L. REV. 1159, 1182–83 (1995) (describing the DEA's creation and funding of federal task forces incorporating state and local police).

188. In 2006, the ICC Prosecutor indicated a goal of opening four to six investigations by 2009. Michel De Smedt, Office of the Prosecutor, ICC, Statement at the Second Public Hearing of the Office of the Prosecutor: Outlining the Prosecutorial Strategy (Sept. 25, 2006), *available at* http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Network+with+Partners/Public+Hearings/Second+Public+Hearing/Session+1/Outlining+the+Prosecutorial+Strategy+_+Mr_+Michel+De+Smedt.htm. Only four investigations are presently underway. ICC, Situations and Cases: All Situations, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/ (last visited Nov. 30, 2009).

189. For a discussion of international criminal justice's primary function of targeting atrocities, see *supra* Part I.A.

public satisfaction and historic resolution. They can screen out all but the most serious international crimes and all but the highest-level persons responsible, such as political or military leaders. These criteria mesh with the backstop function of international law: national leaders can prosecute their own lower-level criminals but may be unable or unwilling to prosecute their own political and military leaders.

The existence, efficacy, and limitations of national courts are important considerations here. Domestic federal prosecutions, for example, target deficiencies in state criminal justice. For example, the *Petite* Policy authorizes federal reprosecution if some flaw tainted an earlier state prosecution.[190] Federal prosecutors may particularly intervene in cases of public corruption, excessive force, and civil-rights violations by police, for which local prosecutors and courts are unlikely to clean house.[191]

The backstop role means that international prosecutors must assess the willingness and ability of domestic prosecutors and courts to proceed. The ICC's Rome Statute forbids international prosecution if there is a "genuine domestic prosecution."[192] As a result, prosecutors must gauge whether a domestic regime is sheltering war criminals, dragging its feet in prosecuting them, or pursuing them with vigor. More active domestic prosecutions can

190. 3 U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-2.031 (2d ed. Supp. 2009) (allowing evidence that corruption, incompetence, intimidation, or undue influence tainted a prior state prosecution to overcome the presumption against federal reprosecution). Of course, double jeopardy is not a constitutional bar to reprosecution by a different sovereign, Bartkus v. Illinois, 359 U.S. 121, 132 (1959), but as a policy matter the Department of Justice steps in only when state proceedings were deficient or inadequate.

191. For example, U.S. Attorney Patrick Fitzgerald succeeded remarkably in indicting two sitting Illinois governors within five years. Fitzgerald was chosen precisely because, as an outsider, he would be freer to clean up state and local corruption. *See* John Kass, *U.S. Attorney's Independence Pays Dividends*, CHI. TRIB., Dec. 21, 2003, at C2 ("I think that having an independent U.S. attorney out of reach of the normal power brokers who run Illinois is a major and important change in our state." (quoting Ill. Sen. Peter Fitzgerald (no relation), who appointed Fitzgerald)). A different example is the Department of Justice's reprosecution of Rodney King's attackers, four white Los Angeles police officers who had the venue of their local trial changed to a mostly white suburb and were acquitted despite damning film capturing their extended beating of King. Koon v. United States, 518 U.S. 81, 85–88 (1996); Robert Reinhold, *U.S. Jury Indicts 4 Police Officers in King Beating*, N.Y. TIMES, Aug. 6, 1992, at A1.

192. *See* Rome Statute of the International Criminal Court, *supra* note 5, art. 17(1)(a); *see also* John T. Holmes, *Complementarity: National Courts Versus the ICC*, *in* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 65, at 667, 667 ("Ironically, however, the provisions of the Rome Statute itself contemplate an institution that may never be employed.").

relieve the international caseload. International prosecutors and courts should spur domestic enforcement, through what one of us has dubbed proactive complementarity.[193] Thus, if the ICC's Prosecutor can prod national courts to prosecute, he is barred from doing so, but has achieved his ultimate goal of exposing and punishing atrocities.[194] In other words, international encouragement and prodding can leverage scarce international resources, producing hundreds or thousands of domestic prosecutions in lieu of dozens of international ones.

When domestic courts are willing and able to prosecute, the ICC has little need to proceed. When domestic prosecutors or courts are unwilling or reluctant, international courts can spur them to act. For example, they can shame national courts into action by focusing media attention on a case. They can begin their own investigations or send letters informing national governments that, if national courts remain passive, they intend to prosecute internationally.[195] Many nations want to be perceived well and fear the embarrassment and intrusion upon sovereignty of having an international court intervene. Those nations may find it less politically costly to prosecute the wrongdoers themselves.

When domestic prosecutors and courts are willing but not fully capable, international courts can help to develop their capacity. Although international courts are not designed to build domestic judiciaries, they sit at the center of transnational networks and can bring publicity, diplomacy, and investigative resources to bear.[196] Other organizations, such as the European Union, can help to build and strengthen domestic judiciaries so that they can hear atrocity cases.[197] A more direct way to assist weak domestic courts would be to

---

193. *See* Burke-White, *supra* note 9, at 53–64 (developing the concept of proactive complementarity).

194. *See* Moreno-Ocampo, *supra* note 84, at 2 ("As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.").

195. The ICC Prosecutor followed this approach by writing to the government of Colombia seeking information on the lack of domestic prosecutions. *See* Burke-White, *supra* note 9, at 89–90.

196. *See id.* at 95–96; Turner, *supra* note 7, at 1007.

197. The European Union has provided significant funding and resources to DRC courts after the initiation of the ICC investigation in 2004. *See* William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-*

use their greater resources to investigate and prepare cases at the international level and then hand off prepared dossiers to domestic prosecutors for prosecution.[198]

Another possible way to shrink the international docket is to apply the referral back mechanism more broadly. Having found itself overburdened, the ICTY has referred many lower-level cases in which it had already issued indictments back to national courts for domestic prosecution.[199] If the domestic judiciaries do not prosecute these cases to the satisfaction of the international prosecutor, however, the ICTY reserves the right to recall the cases to the international level.[200] The ICC does something similar, abstaining from international prosecution when there is a genuine national prosecution.[201] International courts could use this referral back mechanism not only reactively to reduce unforeseen backlogs, but proactively to cooperate with, stimulate, and guide domestic judiciaries. They could plan to farm out certain classes of cases to willing, competent courts in affected or other nations and retain oversight and checks to make sure these prosecutions were genuine.[202] International double jeopardy law resembles domestic policy, which allows reprosecution of state cases tainted by "incompetence, corruption, intimidation, or undue influence . . . [or] court or jury nullification in clear disregard of the evidence or the law."[203] But so long as the domestic prosecution is genuine, the international court will not intervene. International referrals could help guide domestic

---

Level Global Governance in the Democratic Republic of Congo, 18 LEIDEN J. INT'L L. 557, 571 n.76 (2005).

198. This proposal would institutionalize an aspect of the ICTY's referral back mechanism under rule 11*bis* whereby cases were handed back to national prosecutors in Bosnia. *See* ICTY R. P. & EVID. 11*bis.* The ICTY sent back prepared dossiers to national prosecutors to facilitate domestic prosecutions. *See* Burke-White, *supra* note 62, at 340–41. To make this practice work, one would need to amend the Rome Statute's rules regarding confidentiality of information, and defense lawyers might need assistance to ensure equality of arms.

199. *See* Burke-White, *supra* note 62, at 321–28.

200. *See* ICTY R. P. & EVID. 11*bis*(f) (providing for recall of cases).

201. *See* Rome Statute of the International Criminal Court, *supra* note 5, art. 17.

202. As this Article has discussed, *see supra* note 192 and accompanying text, international courts are generally barred from investigating if the territorial court is willing and able to prosecute domestically. Sometimes, however, a formerly unwilling nation becomes willing to prosecute after a new government comes into power, in which case an international court could then refer some cases back for domestic prosecution.

203. 3 U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL, *supra* note 190, § 9-2.031(D). *Compare id.* (setting forth criteria for reprosecution quoted above), *with* Rome Statute of the International Criminal Court, *supra* note 5, art. 20 (barring reprosecution where domestic prosecution was genuine).

prosecutorial strategy and fill the impunity gap of lower-level cases that international tribunals cannot prosecute. The threat of revoking international referrals can help to keep domestic prosecutions on track and leverage limited international resources. Overall, managing cases well, especially by ranking priorities and allocating cases to different courts, can make the international justice system more effective for more cases.

B. Plea Bargaining and Caseloads

Another important conflict between idealism and realism is in the field of plea bargaining. Ideally, international courts would hold full public trials of all grave atrocities, or at least whenever national courts cannot or will not do so. But the number of blood-stained killers far exceeds the number of international trial slots. Often, domestic courts are not an option, as many cases arise out of failed or complicit states. Thus, international and hybrid courts face hard choices: Do they try to offer perfect justice for everyone with elaborate due process and crawl at a snail's pace, as the ICTY did with Milošević? Do they take at best a dozen cases a year and leave thousands of others unpunished? Or do they dirty their hands, haggling over the price of murder and trading off public vindication for lesser punishment and quick plea bargains?

International courts have unthinkingly chosen the first of these options—the impossible quest for perfect, widespread justice. The average ICTR and ICTY trial spans almost a year and a half, costs millions, hears hundreds of witnesses, and fills more than ten thousand transcript pages.[204] These trials have grown far more bloated than their equivalents at Nuremberg. But, as the Milošević example shows, the best is the enemy of the good. Because the ICTY tried too hard to dispense retail justice to everyone, it failed to dispense justice to perhaps the most culpable man of all.

The second choice would be more defensible. By even more rigorously screening out all but a handful of top defendants, international prosecutors could at least set part of the historical record straight, offer some healing, and inflict public retribution on warlords and dictators. One could combine this approach with streamlined pretrial and trial procedures, so international courts

204. NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 28 (2007).

could try one or two dozen defendants a year. On this approach, though, international courts would have little credible leverage to prod reluctant domestic courts into action.

Also, to reach the head of a criminal organization, domestic prosecutors normally must start at the bottom and work up. They start with drug pushers whom eyewitnesses saw peddling heroin, use threats of punishments and promises of leniency to get them to testify against their suppliers, and work up the chain to drug lords. In other words, at least some plea bargaining with smaller fry is essential to shatter the conspiracy of silence that surrounds the big fish, the ones who most deserve punishment. International prosecutors could use the same approach to prosecute otherwise insulated defendants, by beginning cases with soldiers and working up the chain of command to generals and warlords.[205] Though international prosecutors must focus on prosecuting those most responsible, charging and bargaining away lower-level cases may facilitate prosecuting those higher up.[206]

Moreover, as Nancy Combs argues, prosecution of violent crime is the traditional norm in domestic law, and plea bargaining is a more lenient innovation. International atrocities, in contrast, traditionally went unpunished; even today, international courts can try only a tiny handful.[207] One alternative, a truth and reconciliation commission such as South Africa's, gives complete immunity in exchange for airing the truth. Given those alternatives, plea bargaining looks less like lenient innovation than improved accountability. If only a handful of defendants are tried and punished, they may appear to be

---

205. International prosecutors do occasionally bargain for information and cooperation, though neither systematically nor effectively. *See id.* at 108–10 (describing two botched efforts to procure the cooperation of ICTR defendants: in one case, the defendant disappeared and was found dead after references to his cooperation became public, while in the other case, Rwanda blocked a proposed effort to move the cooperating defendant's trial to Norway, where the sentence would likely be lighter); Trial Watch: Michel Bagaragaza, http://www.trial-ch.org/en/trial-watch/profile/db/legal-procedures/michel_bagaragaza_378.html (last visited Nov. 8, 2009) (reporting that after efforts to transfer the trial to Norway and the Netherlands failed, a cooperating defendant was transferred back to Tanzania and entered a confidential plea agreement).

206. If international and domestic systems were integrated enough, international authorities could prod domestic ones to investigate and prosecute lower-level defendants to generate evidence for eventual international prosecutions. The closest parallel to this approach is the cooperation between U.S. state and federal law-enforcement agencies, in which task forces cooperate to develop evidence and prosecute in either venue. *See, e.g.*, JAN CHAIKEN ET AL., NAT'L INST. OF JUSTICE, MULTIJURISDICTIONAL DRUG LAW ENFORCEMENT STRATEGIES: REDUCING SUPPLY AND DEMAND 43–47 (1990) (discussing case studies of cooperative efforts between state and federal law enforcement).

207. COMBS, *supra* note 204, at 129–32.

tokens, scapegoats, martyrs, or fall guys. Broadening the net of conviction and retribution would share blame, substitute for private vengeance, and elicit more complete historical narratives.[208] Done correctly, more frequent plea bargaining can both restore war-torn communities by airing painful truths and inflict a measure of retribution on many more defendants.

For years, international courts piously proclaimed that they would never trade leniency, not even in exchange for much-needed cooperation.[209] But they then lurched in the other direction. Prodded by staggering backlogs, international courts have begun to plea bargain more in the last few years, drawing criticism from European scholars.[210] Unfortunately, they have not always gone about it in the right way. As Ronald Wright and Marc Miller argue, trials are most honest and transparent, followed by open guilty pleas without bargains. But if one must bargain, the best plea bargains are sentence bargains, which offer sentence discounts without distorting the facts or the charges. Charge bargains are much worse, because lowering the charges often distorts the historical record and lies to the public about what actually happened. Fact bargains likewise conceal or blatantly lie about what happened.[211] Charge and fact bargains are even more troubling in the international arena because they undercut restoration and setting the historical record straight. Yet international courts have quickly succumbed to charge bargains, many of which appear to suppress, distort, or misrepresent the historical record. For example, ICTY prosecutors dropped a charge that Milan Simić had discriminatorily persecuted thousands of Bosnian civilians in exchange for his pleading guilty to torturing five victims, even though Simić refused to cooperate against other defendants.[212] It would be far

---

208. *Id.* at 46–47, 53–55.

209. *See id.* at 60 (citing the declaration of a former ICTY president that "*no one* should be immune from prosecution for [certain crimes], no matter how useful their testimony may otherwise be").

210. *See, e.g.*, Michael P. Scharf, *supra* note 8, at 1074–80 (considering the tradeoffs in plea bargaining); Alan Tieger & Milbert Shin, *Plea Agreements in the ICTY: Purpose, Effects and Propriety*, 3 J. INT'L CRIM. JUST. 666, 669–79 (2005) (criticizing aspects of ICTY plea bargaining).

211. Wright & Miller, *supra* note 12, at 111.

212. In 2002, the ICTY began charge bargaining in the Simić case. COMBS, *supra* note 204, at 63–65. Several later ICTY cases contain troubling indications of charge bargaining, though it is often difficult to be sure why a prosecutor dropped particular charges. *Id.* at 67–70. Likewise, ICTY prosecutors have begun to bargain more aggressively over whether particular defendants committed genocide or lesser crimes. *Id.* at 111–12.

better to bring bargaining out into the open, explicitly authorizing sentence bargaining and clamping down on charge and fact bargaining. For example, international tribunals should delete provisions that allow prosecutors to strike bargains agreeing to amend indictments, and at guilty-plea colloquies should insist on proof of guilt independent of the parties' collusive agreement.[213]

Not all cases are appropriate for plea bargaining. The most important international defendants are the ringleaders—the top political and military officials who orchestrated atrocities. It is far more important to try and punish the likes of Adolf Hitler, Hermann Goering, Idi Amin, Pol Pot, Slobodan Milošević, and Radovan Karadžić than their low- and mid-level minions. Plea bargaining with low- and mid-level killers clears dockets and procures testimony so that the system can punish and set the record straight more effectively, especially at the top. Thus, international courts should ban plea bargaining and insist on open trials for the very top leaders, the ones at the center of the historical record and blame.

If guilty pleas are to substitute for trials' truth-telling function in some cases, they must also include full, detailed plea allocutions. Victims who wish to do so must be able to see and hear their tormenters confess unequivocally, without denial, excuse, minimization, or blaming victims. Unequivocal, detailed confessions would thwart future atrocity deniers and propagandists. Sentence discounts should not be automatic for perfunctory, bare-bones admissions of guilt, as happens all too often in domestic American guilty pleas.[214]

Another useful approach is to join guilty pleas to restorative justice. Restorative justice is an umbrella term for structured opportunities for wrongdoers, victims, mediators, and often friends and relatives to talk with and listen to one another. Many victims want not only retribution, but also information, reparation, and, when possible, apologies. They value opportunities to tell their stories,

---

213. *See* ICTY R. P. & EVID. 62*bis*(iv) (allowing an agreement between parties to be a sufficient factual basis for a guilty plea); *id.* 62*ter*(A)(i) (allowing prosecutors to agree to amend indictments as part of plea bargains).

214. *See* Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1534–40 (1997) (reporting the results of an empirical study of one federal district in which acceptance-of-responsibility reduction operated as a nearly automatic plea discount in practice and reviewing national evidence that 88 percent of defendants who plead guilty, but only 20 percent of those who go to trial, receive the discount).

express their feelings, and perhaps forgive and release their resentment, anger, and grief. Involvement empowers victims and takes their needs and views seriously. Restorative justice efforts can tap into a local society's traditions and culture, helping to bring justice home for victims.[215] Many wrongdoers bear the weight of guilt and shame and want to cleanse themselves or perhaps even ask for forgiveness. Granted, other victims and defendants are reluctant to take part, and confessions and apologies can be absent, halting, or insincere. But when the parties are willing, this kind of storytelling gives everyone access to a form of justice and increases satisfaction, as South Africa's Truth and Reconciliation Commission shows. Restorative justice is not a substitute for retribution for atrocities, but it may supplement guilty pleas when the parties are willing.[216]

In sum, increasing the use of plea bargaining, managing cases better, and offering restorative justice can shrink dockets, increase accountability, and make the remaining international trials more effective.

C. Sentencing

Sentencing and plea-bargaining rules must work in tandem. To encourage guilty pleas, there must be incentives to plead guilty, to participate in restorative justice, and to testify and provide information against other defendants. Instead of charge reductions, prosecutors need to be able to offer explicit sentence discounts. True, this proposal commodifies justice and apologies, which in an ideal world would be priceless.[217] But we do not live in an ideal world, and we desperately need truth and justice to halt the cycle of vengeance in war-torn lands. As one of us has argued, even a purchased, insincere apology is valuable: it vindicates the victim, humbles the wrongdoer,

---

215. Restorative justice is a nascent, growing movement in countries including Australia, New Zealand, and Canada, as well as various American states. For a survey of the field, see generally Symposium, *The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1. The proposed peace settlement in Uganda seeks to harness this approach; it would try the senior rebels domestically and have them participate in restorative justice processes as well. *See* Annexure to Agreement on Accountability and Reconciliation, Lord's Resistance Army/Movement-Uganda, Feb. 19, 2008, *available at* http://www.iccnow.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf.

216. For an extended argument for integrating restorative justice into international plea bargaining, see COMBS, *supra* note 204, at 136–87.

217. For a powerful statement of this position in the context of civil lawsuits, see Lee Taft, *Apology Subverted: The Commodification of Apology*, 109 YALE L.J. 1135, 1156–57 (2000).

affirms the violated norm, and may even induce repentance by cracking the wrongdoer's denials and excuses.[218]

Probably the least offensive way to encourage guilty pleas is to offer relatively fixed sentence discounts in exchange for complete, truthful pleas. Sentencing rules could prescribe these discounts automatically in exchange for open guilty pleas, without any need for bargaining. Alternatively, prosecutors could recommend sentence discounts according to a fixed schedule, provided that judges followed a settled practice of usually heeding prosecutors' recommendations. A guilty plea with a full, truthful allocution could earn a one-fifth discount, for example.[219] A guilty plea coupled with full participation in restorative justice might earn a one-third discount.[220] And a guilty plea coupled with restorative justice and full cooperation with the authorities against other defendants might earn a one-half discount.[221] (If courts need more leverage to encourage the fullest cooperation, discounts could range from one-third to one-half depending on the degree of cooperation.) This approach would avoid the dishonesty inherent in charge and fact bargains and would minimize unseemly, unequal haggling dependent on the quality of one's lawyer. Fixed discounts can be difficult to enforce domestically, where prosecutors have a wealth of different charges and sentencing factors that they

218. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 143–44 (2004).

219. *See* Bibas, *supra* note 12, at 2538 & n.331 (collecting commentators advocating fixed plea discounts of between 10 percent and 20 percent, as well as literature suggesting that defendants' high discount rates would require discounts toward the upper end of this range for sentences of ten years or more).

220. *Cf.* CODICE DI PROCEDURA PENALE arts. 442, 444.1 (Italy) (providing for a one-third sentence reduction for a guilty plea to a minor charge provided the reduced sentence does not exceed five years, and a one-third sentence reduction for agreeing to an abbreviated trial of certain serious charges); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 28 (1988) (discussing the Sentencing Commission's empirical data that, before the U.S. Sentencing Guidelines were created, guilty pleas typically received sentence discounts of 30 percent to 40 percent); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1415 (1997) (reporting that under the U.S. Sentencing Guidelines, guilty pleas typically earn acceptance-of-responsibility discounts of about 35 percent).

221. *Cf.* LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, U.S. SENT'G COMM'N, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 33 ex. 12 (1998) (reporting that average sentence reductions for defendants belonging to certain demographic groups who successfully cooperated with federal authorities ranged between 54 percent and 66 percent below the otherwise applicable Sentencing Guidelines minimum).

can manipulate.[222] But the problem should be more manageable internationally, as the range of possible charges is far narrower and the widely publicized facts are harder to hide or distort.

International courts also need to integrate their cooperation rewards with domestic systems. Because the same defendant can face charges or have information relevant to international, hybrid, and domestic trials, one level of court may need to grant leniency in exchange for cooperation at another level. For example, domestic courts could offer soldiers plea discounts in exchange for their testifying against their commanding officers in international trials. In these cases, courts need mechanisms to delay sentencing until other defendants' proceedings end or to reopen sentencing if a need for cooperation arises later. Also, cooperating witnesses may refuse to make incriminating statements unless they receive use or derivative-use immunity against having those statements introduced into evidence against them domestically or internationally. International and national courts may need to harmonize their immunity guarantees to encourage cooperators to disclose the whole truth.[223]

Although there are no international sentencing guidelines, there have been some efforts to move toward common sentencing practices.[224] Should each international tribunal try to equalize its sentences with those imposed by other international tribunals, or rather with domestic sentences in the country where the crime was committed? Sentences vary widely, particularly between Africa (where many international crimes occur) and Western Europe (whose nations often take leadership roles in international courts), so the choice of law matters.[225] In the American federal system, it makes sense to harmonize federal sentences horizontally for crimes prosecuted almost exclusively at the federal level, such as immigration, counterfeiting, and federal income tax evasion.[226] Federal laws, policies, and interests are written to apply uniformly

---

222. *See* Bibas, *supra* note 12, at 2535–37.

223. The ICC could integrate this harmonization into the existing cooperation agreements the court signs with many States Parties.

224. *E.g.*, Daniel B. Pickard, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L.J. 123, 127–28 (1997).

225. *Cf.* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (discussing how criminal justice is milder in Europe than it is in the United States).

226. *See* Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 140 (2005).

across a single legal system. But for crimes that either level can prosecute, such as robberies and gun cases, there is more need to harmonize sentences vertically, so the fortuity of federalizing some cases does not change sentences much.[227]

If international law focused on transnational crimes, such as piracy, the case for horizontal uniformity would be strong. Because international law instead targets atrocities and serves as a backstop, international prosecutions necessarily overlap with domestic ones. Domestic courts often try cases that could be handled internationally. In the ICTY, for example, Bosnian courts receive cases back from international tribunals but ultimately apply their own domestic sentencing rules.[228] Similar issues relating to vertical uniformity arise when domestic courts prosecute atrocities under domestic law. The lines between genocide and mass murder or between systematic rape and serial rape are at least fuzzy, and domestic crimes are lesser included offenses of international ones. Thus, it is more important for international sentences to track domestic ones in the territorial state (at least roughly) than to track the sentences of other international tribunals.

International tribunals appear to be moving away from vertical sentencing harmonization, in part because Western Europeans favor lighter sentences and oppose the death penalty, which remains on the books in many countries where international crimes occur.[229] Though the ICTY Statute called on the Tribunal to take into consideration domestic sentencing rules in the former Yugoslavia, the Rome Statute does not require the ICC to give similar consideration to national sentencing practices in the territorial state.[230] To foster vertical

---

227. *See* Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn't*, 117 YALE L.J. 1374, 1402–06 (2008).

228. *See, e.g.*, Prosecutor v. Stanković, Case No. X-KRŽ-05/70, slip op. at 13–15 (Court of Bosnia & Herzegovina, Section I, War Crimes Chamber, Mar. 28, 2007), *available at* http://www.sudbih.gov.ba/files/docs/presude/2007/Radovan_Stankovic_-_Final_Verdict_-_ENG.pdf (lengthening prison terms and applying domestic legal rules).

229. *See generally* WHITMAN, *supra* note 225 (comparing the harshness of criminal sentences in the United States and European countries). Vertical uniformity was problematic in Cambodia, where disagreement over the availability of the death penalty stalled the establishment of the tribunal. For the resolution by the Constitutional Council, see Constitutional Council, Case No. 038/001/2001, Decision No. 040/002/2001 (Feb. 12, 2001).

230. *Compare* Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)I, Annex*, Art. 24(1), U.N. Doc. S/25704 (May 3, 1993) ("In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."), *and* ICTY R. P. & EVID. 101(b)(iii) (same), *with* Rome Statute of the International Criminal Court, *supra*

sentencing harmonization, the ICC could consider domestic practice in the territorial state as an explicit element at sentencing. The result would likely be longer sentences for most convicts but greater harmonization with domestic practice.

Finally, there remains the issue of whether to codify sentencing rules in structured guidelines or to leave them as open, unstructured ranges. Traditional, unstructured sentencing lets judges sentence murderers to probation, life imprisonment, or anywhere in between. Structured sentencing sets a much narrower range based on factors such as the defendant's criminal history and role in the crime, the severity of the crime, and the number of victims. If they seek vertical uniformity, international tribunals cannot use rules radically different from those in place in the territorial state of the crime. Nevertheless, even when tracking nations that have vague sentencing factors, international courts can at least clarify and weigh the factors openly. Sentencing rules of thumb or true guidelines can improve the predictability and equality of sentences and reduce defendants' optimism about their likely sentences after trial, thereby promoting guilty pleas and cooperation.[231] Thus, sentencing guidelines should make sentencing practices clearer and more predictable, specify plea-bargaining and cooperation discounts, and harmonize international sentences with those imposed in territorial domestic courts.

V. PRETRIAL AND TRIAL PROCEDURES

The new international criminal justice system comprises elements from many nations' systems, both adversarial and inquisitorial. In this Part, we first make a broader point: either adversarial or inquisitorial procedures can be effective, but each system requires certain checks that the other system often lacks. Unfortunately, in synthesizing the two systems, international courts have often lost sight of cautionary domestic experiences with the two types of systems. Then, we go on to apply domestic lessons to several areas of pretrial and trial procedure. Discovery rules should focus less on prosecutorial awareness and wrongdoing and more on whether evidence may cast doubt on guilt. At the same time, discovery of inculpatory evidence needs to be coupled with safeguards to prevent witness tampering. Trial procedures need to ensure speedier trials

note 5, art. 78 (providing guidelines for the "[d]etermination of the sentence" but failing to refer to not including reference to domestic law).

231. Bibas, *supra* note 12, at 2533.

and guarantee either neutral magistrates or adversarial cross-examination to test hearsay. Finally, to heal victims' emotional and psychic wounds, international criminal justice needs stronger and better-enforced victims' rights.

A. Melding Adversarial and Inquisitorial Process

International criminal tribunals have developed a unique procedural system that melds inquisitorial and adversarial processes.[232] Nuremberg, and later the ICTY and ICTR, began as primarily adversarial systems.[233] Although the ICTY's largely adversarial system went far to ensure defendant rights, it also resulted in long trials with hundreds of witnesses and unacceptable delays.[234] To expedite trials, the ICTY undertook a series of reforms that moved further toward inquisitorial justice.[235] The result is a hybrid international criminal procedure.[236]

---

232. *See* Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 IND. L.J. 809, 842 (2000) ("Like the London Charter, the Yugoslavia and Rwanda tribunals' statutes and rules combine aspects of the common law, civil law, and military law."); Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635, 640 (2007) (noting that international tribunals "are forced to compromise internally regarding procedural matters . . . [and] must harmonize the imperatives of . . . the common law and the civil law").

233. Gordon, *supra* note 232, at 644 (noting some inquisitorial elements at Nuremberg, including the use of affidavit testimony); Langer, *supra* note 8, at 857 ("Those judges drafted [the ICTY and ICTR] Rules with a clear adversarial inclination."); 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 COLUM. J. TRANSNAT'L L. 851, 854 (1999).

234. Gabrielle Kirk McDonald, President, ICTY, *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committee in the Territory of the Former Yugoslavia Since 1991*, ¶ 13, *delivered to the Security Council and the General Assembly*, U.N. Doc S/1999/846, A/54/187 (Aug. 25, 1999) ("The Tribunal's Judges are concerned about the length of time many of the trials and other proceedings are taking . . . .").

235. *See* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 369 (2003) ("[T]o expedite proceedings which, being grounded in the adversarial model, were rather lengthy, it was necessary to depart from the common law scheme . . . . whereby the court has no knowledge of the case before commencement of trial."); Langer, *supra* note 8, at 869–874; Jorda, *supra* note 67, at 1.

236. Wallach, *supra* note 233, at 854. Langer calls this "managerial judging." *See generally* Langer, *supra* note 8 (discussing the rise of managerial judging at the ICTY). The new ICC rules of procedure and evidence are based largely on this model. *See* Nancy Amoury Combs, *International Criminal Jurisprudence Comes of Age: The Substance and Procedure of an Emerging Discipline*, 42 HARV. INT'L L.J. 555, 566 (2001) (reviewing SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF

Fundamentally, adversarial and inquisitorial systems specify very different roles for judges, prosecutors, and even defendants. Adversarial judges are detached umpires, with prosecutors and defense counsel serving as zealous investigators and advocates for their clients. In contrast, inquisitorial judges and investigating magistrates are active truth-seekers, collecting and reviewing evidence to determine facts.[237]

Our argument is not that a pure adversarial or inquisitorial system is preferable. Our fear is that the mishmash of the two systems has abandoned some distinctive checks on which each system depends. The lack of appropriate mental models for the role of judges, prosecutors, and defense counsel results in confusion and perhaps even systemic failure. For example, when an American defense attorney dared to object repeatedly to the ICTY Prosecutor's evidence, the judges found his adversarial advocacy inappropriate and rejected his procedural objections. The French presiding judge criticized him for trying to import "the procedures that Mr. Hayman is used to using in Los Angeles."[238] If the system is going to be adversarial, American experience suggests, it needs to allow zealous adversarial testing of the evidence instead of censuring American lawyers for playing their roles. If, however, the system is going to be inquisitorial at root, it needs to retain more inquisitorial safeguards.

Additionally, the mishmash of systems obscures how to allocate resources. Because an adversarial system is based on two relatively equal parties contesting facts and evidence, each side needs roughly equal, adequate resources in order to investigate. American experience teaches that in an adversarial system, parity of funding for the two sides is crucial.[239] But when inquisitorial judges carry the

---

INTERNATIONAL AND NATIONAL COURTS (Gabrielle Kirk McDonald & Olivia Swaak-Goldman eds., 1990)).

237. *See* Langer, *supra* note 8, at 849–53; Vladimir Tochilovsky, *Legal Systems and Cultures in the International Criminal Court: The Experience from the International Criminal Tribunal for the Former Yugoslavia*, *in* INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW 627, 630 (Horst Fischer et al. eds., 2001) (discussing the different legal cultures in international criminal tribunals). Adversarial and inquisitorial systems are two poles along a spectrum. Today, most continental European judges and scholars describe their system as mixed rather than purely inquisitorial, in part because nineteenth- and twentieth-century reforms borrowed some safeguards from adversarial systems. David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1640 (2009).

238. *See* Kitty Felde, *'L.A. Law' at a War Tribunal: Clash of Legal Systems, Styles*, CHRISTIAN SCI. MONITOR, July 3, 1997, at 7.

239. *See*, *e.g.*, Wright, *supra* note 182; *see also* CONN. GEN. STAT. § 51-293(h) (2005) (mandating salary parity for prosecutors and public defenders); State v. Lynch, 796 P.2d 1150,

burden of investigating for both sides, the parties need fewer resources and the judges need more resources.

B. Discovery

The legacy of the adversarial system is that each opposing party investigates and presents evidence favorable to its own side, with no judicial oversight. One of the worst features of the adversary system, especially in America, is that it allows each party to prepare, shape, and even coach its own witnesses to elicit favorable facts and suppress unfavorable ones. Inquisitorial systems, in contrast, have judges and police who question witnesses. Though advocates may suggest certain witnesses or certain subjects for questioning, in an inquisitorial system, they may not speak directly with most witnesses.[240]

In this respect, international criminal procedures combine the worst of both adversarial and inquisitorial worlds. They spell out no evidentiary, ethical, or procedural limitations on witness preparation, allowing partisan adversaries to distort the truth.[241] At the same time, they provide for very broad discovery. Well ahead of trial, prosecutors must turn over prior statements of all witnesses the prosecutor plans to call at trial, and thereafter defense lawyers must make similar disclosures.[242] Full pretrial discovery has many merits, eliminating trial by surprise and facilitating preparation. But in inquisitorial systems, judges and police interview witnesses well

---

1161 (Okla. Crim. App. 1990) (using prosecutors' salaries as a benchmark for setting defense lawyers' salaries).

240. William T. Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 42–44, 58–59 (1996) (reporting that Germany, like most civil law countries, strongly prefers uncoached narrative testimony, and views American-style witness preparation as unethical; instead, prosecutors and defense and victims' lawyers suggest additional witnesses for police to interview, leaving the questioning of those witnesses to police and judges).

241. Witness preparation has been accepted by the ICTY and ICTR since their inception. *See e.g.*, Prosecutor v. Limaj, Case No. IT-03-66-T, Decision on Defence Motion on Prosecution Practice of 'Proofing' Witnesses, at 2 (Dec. 10, 2004) (rejecting a challenge to the Prosecutor's preparation of witnesses). The ICTR dismissed the possibility that witness preparation would distort the truth, noting: "There are clear standards of professional conduct which apply to Prosecuting counsel when proofing witnesses." *Id.* at 3; s*ee also* Prosecutor v. Karemera, Case No. ICTR-98-44-AR73.8, Decision on Interlocutory Appeal Regarding Witness Proofing, ¶ 14 (May 11, 2007) (approving the use of witness preparation at the ICTR); Ruben Karemaker, B. Don Taylor & Thomas W. Pittman, *Witness Proofing in International Criminal Tribunals: A Critical Analysis of Widening Procedural Divergence*, 21 LEIDEN J. INT'L L. 683, 685–86 (2008) (detailing the practice of witness proofing).

242. ICC R. P. & EVID. 76.1; ICTY R. P. & EVID. 66(A)(ii).

before trial, and their transcripts are admissible into evidence.[243] Because neither witness tampering nor intimidation can erase the witness's story, full discovery is much less dangerous. When one prosecutes genocidal warlords in an adversarial system, however, full discovery creates far too much temptation to kill or silence the complaining witnesses and to tailor one's story to the evidence revealed in discovery. Full, open-file discovery in New Jersey has proved deadly to witnesses, tempting defendants' associates to kill them to keep them from testifying.[244] Discovery is desirable, but it must be coupled with inquisitorial measures to preserve and admit witness testimony, and to thwart witness tampering.[245] The ICC has recently taken an important step in this direction, breaking with earlier international tribunals by forbidding witness preparation. Now, only the Victim and Witness Unit—not the Prosecutor—may familiarize witnesses with the proceedings and with past statements.[246]

The fragmentation of authority poses another problem for discovery. Prosecutors must turn over to the defense evidence that could exculpate or mitigate the defendant's crime or impeach the prosecution's evidence. This duty extends only to information that the prosecutor actually knows about and possesses or controls.[247] The fragmentation of investigative and enforcement authority across different states and international organizations, however, means that the prosecutor may not actually know about or control evidence in a

---

243. Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 343 (1995) (noting that, under German law, the admissibility of police transcripts, though not judicial transcripts, depends upon the witness's being unavailable).

244. *See* David Kocieniewski, *Scared Silent: In Witness Killing, Prosecutors Point to a Lawyer*, N.Y. TIMES, Dec. 21, 2007, at A1 (detailing the murder of a key witness in a drug case).

245. While courts are supposed to protect victims and witnesses and withhold discovery as necessary to do so, that protection undercuts the rule of full disclosure and so is limited to exceptional cases. *See* Rome Statute of the International Criminal Court, *supra* note 5, art. 68, ¶ 5 (limiting disclosure in cases of "grave endangerment of the security of a witness or his or her family"); ICC R. P. & EVID. 81.3, 87–88; ICTY R. P. & EVID. 69(a) (authorizing nondisclosure of the witness's or victim's identity "[i]n exceptional circumstances" where that person "may be in danger or at risk"). Thus, prosecutors may well disclose evidence that leads to witness intimidation or tampering.

246. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶¶ 53–55 (Nov. 30, 2007); Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Practices of Witness Familiarisation and Witness Proofing, at 21–22 (Nov. 8, 2006) (barring the Prosecutor from conducting evidentiary review with the witness).

247. ICTY R. P. & EVID. 68; Prosecutor v. Blaskić, Case No. IT-95-14-T, Decision on the Production of Discovery Materials, ¶¶ 47, 50 (Jan. 27, 1997).

state's hands. For example, only days after the ICTY convicted a Bosnian Croat general of atrocities, Croatia turned over thousands of pages of potentially exculpatory evidence, leading the Appeals Chamber to overturn sixteen of his nineteen convictions.[248] (The potential for delay and manipulation of the judicial system is obvious.) Similar problems arise in the United States' fragmented federal system. Courts charge American prosecutors with a constitutional duty to inquire of investigators from the same jurisdiction, holding them liable for what they knew or should have known.[249] Unfortunately, this standard focuses on the prosecutor's knowledge and actions, not on the defendant's innocence. At the very least, international prosecutors should face the same standard, bearing a burden to investigate what they should know instead of hiding behind lack of actual knowledge. Better cooperation between states and law-enforcement agencies could also make more information from various states available to prosecutors. Ideally, the cautionary lesson of America's flawed approach would lead international courts to adopt a tougher standard. At least for powerfully exculpatory evidence, the standard should focus not on the prosecutor's *actus reus* or *mens rea* but on whether the evidence creates a strong doubt about guilt. The focus should be not on punishing prosecutors for violating the rules of an adversarial game but on freeing defendants who are likely innocent.[250]

A related problem that arises in discovery is that nations sometimes share information with international prosecutors on condition that they not disclose the information. These nondisclosure provisions collide with defendants' need to know, investigate, and rebut the evidence against them. If the material is inculpatory, of course, the prosecution cannot use it without getting the supplier's consent and providing it to the defendant in advance of trial.[251] But if the withheld material is exculpatory, a state's refusal to share information could lead to convicting the innocent. In the ICC case of Thomas Lubanga, for example, the Prosecutor had received possibly

248. Gordon, *supra* note 232, at 678–79.

249. Kyles v. Whitley, 514 U.S. 419, 437–38 (1995); Commonwealth v. Burke, 781 A.2d 1136, 1142 (Pa. 2001).

250. For a more extended development of this idea, see Stephanos Bibas, Brady v. Maryland*: From Adversarial Gamesmanship Toward the Search for Innocence?*, *in* CRIMINAL PROCEDURE STORIES 129, 151–54 (Carol S. Steiker ed., 2006).

251. Rome Statute of the International Criminal Court, *supra* note 5, art. 54, ¶ 3(e); ICC R. P. & EVID. 82.1; ICTY R. P. & EVID. 70(B).

exculpatory evidence under a confidentiality agreement and withheld it from the defense.[252] To solve this problem, prosecutors should have to submit confidential exculpatory or impeachment evidence to the court for in camera review; the court could then dismiss charges or overturn convictions if the evidence creates a reasonable doubt about guilt. Domestic prosecutors already do this with information that may or may not qualify as exculpatory.[253] Confidentiality agreements that preclude even in camera review by courts raise even more serious issues. Prosecutors should reject these restrictive agreements, even though that may limit their access to both inculpatory and exculpatory evidence.[254]

C. Trial Procedures

International trial procedures also could learn from domestic guarantees of speedy trials and cross-examination. One important development would be to add teeth to speedy-trial requirements. Defendants, many of whom are detained without bail, can languish in jail for years awaiting justice although they are presumed innocent. Victims and the public likewise have strong interests in seeing justice done quickly so they can begin to heal. The ICTY and Rome Statutes guarantee defendants speedy trials. Yet, in practice, courts uphold years-long delays.[255] Though recent procedural reforms have tried to speed trials,[256] there is still much room to improve. Before trial, judges need to enforce strict schedules and use plea bargaining to clear their dockets for the most important trials. At trial, judges need to exercise their powers to limit the number of witnesses and the length of their

---

252. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I, ¶¶ 21, 57 (Oct. 21, 2008).

253. *See, e.g.*, United States v. Garcia, 562 F.3d 947, 953 (8th Cir. 2009) (per curiam) (remanding the case to the district court to conduct in camera review of possibly exculpatory or impeachment evidence in the presentence investigation reports); United States v. Naranjo, 309 F. App'x 859, 865–66 (5th Cir. 2009) (discussing the district court's in camera review of witness-interview notes for exculpatory and impeachment material).

254. *See Lubanga Dyilo*, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I, ¶ 45 (expressing particular concern about a prosecutor's agreement to accept large amounts of information from the UN subject to an agreement not to disclose that information even to the court).

255. *E.g.*, Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment, ¶¶ 10, 270–71 (Dec. 18, 2003) (holding that a delay of three years and eight months between arrest and conviction was not disproportionate); *see also* Rome Statute of the International Criminal Court, *supra* note 5, art. 67, ¶ 1(c) (requiring cases "[t]o be tried without undue delay"); S.C. Res. 827, *supra* note 3, art. 21, ¶ 4(c).

256. Langer, *supra* note 8, at 886.

testimony.[257] The Nuremberg trials began less than seven months after the Allies' victory in Europe; within a year, they had convicted or acquitted all twenty-two defendants and executed those sentenced to death.[258] True, most states now accord defendants somewhat more procedural rights than they did sixty years ago. Nevertheless, fairness and justice should be measured in months, not years.

Another important issue is the admissibility of written statements. As mentioned, inquisitorial systems charge judges and police with investigating even-handedly and make their transcripts admissible, at least when witnesses are unavailable. Adversarial systems, in contrast, do not trust pretrial investigations conducted by partisan advocates. Instead, all witness evidence must be live testimony at trial, so that the other side can cross-examine it to probe its weaknesses. International criminal justice lacks neutral investigating magistrates, whose pretrial questioning one could trust to be even-handed. Though it lacks this inquisitorial safeguard, it also dispenses with the adversarial requirement of cross-examination in all cases. ICC and ICTY rules allow the parties to submit documentary evidence and written statements, not subject to cross-examination, on peripheral issues other than "the acts and conduct of the accused."[259] It makes sense to admit uncontested hearsay on background matters such as the existence of a war in the Balkans or the demographics of an area's inhabitants. As long as the other side has adequate notice and a right to rebut, these measures can speed trials past uncontested jurisdictional elements and peripheral issues. Unfortunately, in their efforts to speed and streamline trials, these courts have gone too far. They have admitted testimony of witnesses from prior trials against other defendants to prove a current defendant's *mens rea*.[260] Neither inquisitorial, even-handed questioning nor adversarial cross-

257. ICTY R. P. & EVID. 73*bis*(C).

258. ROBERT H. JACKSON, THE NÜRNBERG CASE, at viii, xii–xiii (1947).

259. ICTY R. P. & EVID. 92*bis*; *see also* Rome Statute of the International Criminal Court, *supra* note 5, art. 69, ¶ 2 (allowing the introduction of recorded testimony, documents, and written transcripts so long as they do not prejudice defendants' rights).

260. Prosecutor v. Galić, Case No. IT-98-29-AR73.2, Decision on Interlocutory Appeal Concerning Rule 92*bis*(C), ¶ 11 (June 7, 2002) (allowing un-cross-examined evidence "of the knowledge by the accused that his acts fitted into a pattern of widespread or systematic attacks directed against a civilian population"); Prosecutor v. Sikirica, Case No. IT-95-8, Trial Chamber Decision on Prosecutor's Application to Admit Transcripts Under Rule 92*bis*, ¶¶ 11, 21, 2001 WL 1794081 (May 23, 2001) (allowing admission of evidence that could be used to prove the defendant's guilt of genocide, and suggesting that the remedy was to call new evidence rather than to permit cross-examination).

examination has probed the weaknesses of evidence so central to the prosecution's case. Each side needs to be able to insist on live testimony that it can cross-examine, except when it has previously cross-examined the same witness at a deposition or perhaps when the witness has died.

D. Victims' Rights

A final concern is that international procedure is not sensitive enough to victims' needs and concerns. If the main purpose of international justice is to restore wounded communities and heal victims, then victims need to feel that the system takes them seriously, listens to them, and gives them opportunities to release their anguish, bitterness, and grief. All too often, international law's technicalities and the physical distance of Hague-based trials from victims exacerbate victims' disconnection from proceedings and outcomes. To be fair, international procedures evince some solicitude for victims. The ICTY and ICC have victim-witness offices to counsel and protect victims' privacy and safety,[261] and also facilitate reparations and compensation.[262] But the ICTY's procedures guarantee victims no notice or consultation about bail, guilty pleas, trial, or sentencing. The ICC goes further.[263] It allows victims to hire legal representatives, who may, if the court permits, make opening and closing statements and question witnesses.[264] It requires notifying victims of decisions not to investigate or prosecute or to confirm charges. Those who apply to the court to participate through legal representatives are notified of later proceedings and discovery, and the court may choose to solicit their views on other matters.[265] Early ICC decisions suggest that the court will interpret "victims" broadly and grant them considerable influence.[266]

If domestic practice is any indication, however, the grand rhetoric of victim participation outstrips reality. In practice, despite

---

261. ICTY R. P. & EVID. 34, 65(B)–(C), (I)(ii), 69, 75; ICC R. P. & EVID. 16–19, 85–88.

262. ICTY R. P. & EVID. 106; ICC R. P. & EVID. 94–99.

263. *See* David Donat-Cattin, *Article 68 Protection of the Victims and Witnesses and Their Participation in the Proceedings*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 869, 871 (Otto Triffterer ed., 1999).

264. ICC R. P. & EVID. 89–91.

265. *Id.* 92–93.

266. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06-1119, Decision on Victims' Participation, ¶ 92 (Jan. 18, 2008), *available at* http://www2.icc-cpi.int/iccdocs/doc/doc409168.pdf (defining victims before the court and setting the scope of victim participation).

broad victims' rights laws, many crime victims fail to receive notice.[267] Although they are better than nothing, a legal representative's motions and questions are no substitutes for the victim's own day in court.[268] At the very least, victims should be able to watch proceedings on television. Ideally, they should have some opportunity to speak or at least submit their stories in writing. Of course, victim participation is in tension with keeping trials short and swift, particularly because genocides harm hundreds or thousands of victims. But there are ways to incorporate American victims'-rights experiments into international justice without bogging down the system. Perhaps victims could submit video victim-impact statements at sentencing. Integrating international criminal trials with local restorative justice efforts would let more victims take part by telling their stories to defendants in restorative-justice conferences afterwards, without compromising the speed of trials. Simply giving victims these cathartic, expressive opportunities would take them seriously and help them to heal. Plea and sentencing procedures could push for and reward unequivocal admissions of guilt, remorse, and even apologies.[269] Unequivocal admissions of guilt vindicate victims, open the door to forgiveness, and set the historical record straight, precluding Holocaust denials. Conversely, judges and prosecutors should refuse to accept guilty plea allocutions that deny or minimize defendants' acts or guilt or shift blame onto victims.[270] Judges and prosecutors could even speak in less technical and more moralistic language at pleas and sentencing, clearly documenting and condemning atrocities for all to see.

---

267. JOHN M. BOYLE, COUNCIL OF STATE GOV'TS/E. REG'L CONFERENCE, CRIME ISSUES IN THE NORTHEAST 3 (1999), *available at* http://www.csgeast.org/pdfs/cv.project.report.pdf (providing statistics that show a lack of notice); DEAN G. KILPATRICK, DAVID BEATTY & SUSAN S. HOWLEY, THE RIGHTS OF CRIME VICTIMS—DOES LEGAL PROTECTION MAKE A DIFFERENCE? 4–5 (Nat'l Inst. of Justice, Research in Brief, NCH 173839, 1998), *available at* http://ncjrs.org/pdffiles/173839.pdf.

268. *See* William W. Burke-White, *Regionalization of International Criminal Law Enforcement: A Preliminary Exploration*, 38 TEX. INT'L L.J. 729, 735 (2003) (discussing the cathartic effects of live testimony for rape victims from Bosnia).

269. For more extended explorations of these points, see Bibas & Bierschbach, *supra* note 218, at 140–45.

270. *See* Bibas, *Harmonizing*, *supra* note 75, at 1400–08 (discussing the harmful effects of "[g]uilty-but-not-guilty pleas").

CONCLUSION

This Article has focused on the lessons that domestic criminal procedure can teach international procedure, in particular how domestic realism can temper international idealism. The numerous lessons range from case management to staffing, from budget allocations to procedural safeguards. As international criminal courts come of age and confront ever-growing caseloads, these domestic lessons can obviate reinventing the wheel, enhance efficiency, and make international criminal justice more just.

Although we have focused on the lessons domestic criminal procedure can offer international criminal law, the comparison works the other way around as well. Domestic procedure has grown so cynical and amoral that it could profit from a dose of fresh international idealism. The lessons of international criminal law for domestic procedure merit a separate article, but we introduce three key themes here.

First is the theme of transparency and political accountability. Domestic criminal procedure is opaque. Except for a few high-profile cases, there is little public scrutiny of charging and prosecuting decisions,[271] leaving plenty of room for the agency costs of self-interested lawyers.[272] Plea bargaining behind closed doors resolves the vast majority of cases. In contrast, international tribunals are transparent and accountable. Every decision and transcript is posted for all to see. The prosecutor and presiding judge must report twice a year to the UN or the ASP and depend on state cooperation. NGOs and scholars dissect a tribunal's every move. Although the resulting pressure can be problematic, it also makes the international system accountable. For example, when the ICC Prosecutor charged Lubanga only with conscripting child soldiers, the NGO community cried foul that other crimes—particularly rape and sex crimes—were neglected, forcing the Prosecutor to broaden his strategy.[273] Granted, international criminal justice is easier to monitor: there are fewer

---

271. *See* Bibas, *Transparency*, *supra* note 75, at 923–31 (discussing the exclusion of outsiders from the process).

272. *See id.* at 920–23 (discussing the interests of insiders).

273. *See, e.g.*, Gareth Evans, Int'l Crisis Group, Statement at the Second Public Hearing of the Office of the Prosecutor (Sept. 25, 2006), *available at* http://www.icc-cpi.int/NR/rdonlyres/9BF30137-776A-457D-B2CE-BF1DB8F4D25E/277910/OTP_PH2_HGSTATES.pdf ("Human rights organizations have criticized the limited scope of the charges laid – limited to conscripting children - claiming that evidence exists of systematic rapes, torture, and summary executions.").

cases, they are much more serious, and they are highly salient, exciting public and media attention. Nevertheless, perhaps NGOs and reporting requirements could introduce more domestic transparency, making domestic criminal justice more accountable.

Second is the goal of restoration. As we have discussed, the global context and atrocity focus make restorative justice particularly salient internationally. Victim participation, outreach to affected communities, and the linkage of formal trials and traditional justice mechanisms promise to enhance restoration. In contrast, domestic criminal law has largely neglected this restorative element, focusing instead on retribution and incapacitation. Though contexts differ, domestic criminal law could do more to emphasize restoration. For low-level domestic crimes, judicial processes could use informal social pressure and shame and seek to heal as much as punish. For more serious crimes, particularly hate and bias crimes, domestic law could involve victims more directly and supplement criminal trials with truth commissions or other restorative processes.

Finally, although we have criticized overzealous idealism, its flipside—cynicism—is equally dangerous. Domestic prosecutors, judges, and defense lawyers are far too often cynical, jaded veterans who have lost their vision and motivation.[274] International officials and NGOs, in contrast, are driven by strong idealism. We might even try to leaven domestic cynicism with a dose of international idealism. Perhaps more term limits, rotation in office, and rhetoric about justice can combat the world-weary cynicism that wears down zealous newcomers. A system less like a plea-bargaining assembly line and more like a morality play could better inspire the actors.[275] Greater transparency and accountability might also motivate even cynical veterans to play their roles with gusto.

---

274. *See* Bibas, *supra* note 82, at 1009–10 ("[P]rosecutors may eventually become wedded to convicting defendants and less careful about presuming innocence and questioning evidence of guilt. They may develop a black-and-white view of the world and fail to see shades of gray.").

275. *See* Bibas, *Transparency*, *supra* note 75, at 960 (suggesting that abandoning the "assembly-line system" could enable citizen advocates "to serve as effective voices").