FOREWORD

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International criminal law attempts to sanction crimes that have a global nature and impact. After World War II, the international community came together to begin addressing important international issues, including preventing future war and non-war related atrocities and crimes. From the International Military Tribunals established in the wake of World War II to the world’s first permanent International Criminal Court (ICC), a number of international bodies, treaties, and statutes have been formed in an effort to effectively administer criminal justice on an international level. Yet the administration and application of international criminal justice has faced significant hurdles and there are numerous opinions on the proper application, scope, and import of international criminal law.

This important issue of the Penn State Journal of Law & International Affairs (JLIA) examines the evolution and future of the role of international criminal justice in international relations, as well as the structural challenges facing the ICC and other global

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institutions in the coming decades. Contributors to this edition include academics and practitioners intimately involved in the field of international criminal justice.

In the first article, entitled *No Witness, No Case: An Assessment of the Conduct and Quality of ICC Investigations*, Dermot Groome, Senior Trial Attorney in the Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Distinguished Fellow of International Criminal Law at the Dickinson School of Law, Pennsylvania State University, reviews the performance of ICC prosecutors. Mr. Groome discusses five problem areas that have been identified with respect to investigations conducted by ICC prosecutors. These issues include (1) the failure of prosecutors to fully discharge their obligation to conduct investigations fairly under Article 54 of the Rome Statute establishing the ICC, (2) the brevity of investigations, (3) the poor quality of evidence presented in court, (4) the improper delegation of investigative functions to intermediaries, and (5) the failure to fully analyze and disclose exculpatory material. The article details these problems and the impact that they have had on numerous investigations and on the ICC’s reputation as a whole.

In the next article, *The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?*, Shahram Dana, former Associate Legal Officer also in the Office of the Prosecutor at the ICTY and currently a professor of law at The John Marshall Law School, argues that in an effort to achieve an “awesome array of goals” – including, *inter alia*, retribution, deterrence, punishment, rehabilitation, reconciliation, incapacitation, and restoration – international criminal law has overreached and contributed to the politicization of the international judicial process. After examining in particular the application of reconciliation and deterrence in international sentencing proceedings, Professor Dana concludes that the attempt to implement these goals has actually perverted international criminal sentencing outcomes such that they do not reflect the culpability of the individual. In light of this, Professor Dana concludes that international prosecutors and judges should focus on more modest goals in order to preserve the ICC’s core responsibility of punishing those responsible for international atrocities.
In the third article, Yaël Ronen, the Senior Lecturer at Sha’arei Mishpat College, Hod Hasharon, Israel, addresses the impact that the ICTY has had on domestic courts in Bosnia and Herzegovina. Professor Ronen’s article, *The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of Bosnia and Herzegovina*, identifies and explains the impact that the ICTY has had on rates of prosecution, trends in sentencing, and the adoption and application of criminal law norms.

In the fourth article, *The Arab Spring’s Four Seasons: International Protections and the Sovereignty Problem*, authors Jillian Blake and Aqsa Mahmoud identify the various international legal protections used during the revolutions in Tunisia, Bahrain, Egypt, Syria, and Libya after the Arab Spring in 2010. The authors argue that international law did not provide a uniform degree of protection to civilians and combatants in each case. Some post-Arab Spring states are relatively peaceful and have had more international assistance, while others, most pointedly Syria, are still facing internal conflicts. The authors argue for a uniform standard of protections for all populations affected by armed conflict, war crimes, or crimes against humanity. In particular, the authors provide recommendations for limiting what they argue are outdated sovereignty norms and eliminating unjustified subjective distinctions in the international legal system, using lessons from the Arab Spring.

The final article, by Patrick Keenan, Professor of Law at the University of Illinois College of Law, entitled *International Institutions and the Resource Curse*, moves beyond international criminal law and addresses the role of international institutions more generally by examining how international institutions could mitigate the “resource curse.” Academics have almost always identified reforming domestic institutions as the only way for developing states to overcome the corruption, inequality, and lack of development that often accompanies the discovery of rich natural resources. Professor Keenan advocates for the intervention of international institutions when domestic institutions have failed or when reform is unlikely. International institutions can play an important role in providing information as well as preventing access to international markets as an incentive to force public officials to work for the domestic good. In this way, the international community can have a direct impact on
developing states that could otherwise potentially succumb to the “resource curse,” and thus also prevent widespread corruption and human rights violations.

Through the numerous articles submitted by leading experts in the field of international criminal law, this volume addresses the real and substantial challenges facing the international community as it moves forward to effectively administer international criminal justice. Despite the numerous challenges facing the international community, the importance of preventing international atrocities and crimes cannot be overstated, and the voices and opinions of all the stakeholders must continue to be considered.
NO WITNESS, NO CASE: 
AN ASSESSMENT OF THE CONDUCT 
AND QUALITY OF ICC INVESTIGATIONS

Dermot Groome*

INTRODUCTION

The Prosecution’s conduct of investigations has come under increasing scrutiny and criticism from judges on the International Criminal Court. Criticisms are directed at some of the investigative methods used as well as the quality of some of the evidence presented at proceedings.

To date, the Office of the Prosecutor (“OTP”, “the Prosecutor”, “the Prosecution”) has completed investigations into seven situations resulting in requests for 30 arrest warrants or summonses.¹ The charges against 15 accused have been the subject of confirmation proceedings pursuant to Article 61 of the Rome Statute. Judges have confirmed the charges against ten individuals

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and have declined against four on the grounds of insufficient evidence.² In one case, the confirmation hearing was adjourned for additional investigation after the Chamber found the evidence presented was insufficient to sustain the charges.³ The inability to sustain any of the charges at the standard required for confirmation in itself indicates infirmities in the investigation.⁴ Of the ten confirmed cases, one accused has been acquitted after trial and the Prosecution withdrew charges against another citing the loss of several witnesses.⁵ Recently, the Prosecution notified the Kenyatta Chamber that it was removing a key witness from its case after

² Accused against whom charges have been confirmed: Democratic Republic of Congo (DRC): Lubanga (1/29/2007); Katanga and Chui (9/30/2008); Sudan: Abakaer Nourain and Jerbo Jamus (3/7/2011); Central African Republic (CAR): Bemba (6/15/2009); Kenya: Ruto, Sang, Kenyatta, and Muthaura (1/23/2012). On March 18, 2013 the Prosecution withdrew the charges against Muthaura. Ngudjolo Chui was acquitted after trial. Chambers declined to confirm the charges against the following accused: DRC: Mbarushimana (2/16/2011); Sudan: Abu Garda (2/8/2010); Kenya: Kosgey, Hussein Ali (1/23/2012).


⁴ The legal standard of sufficiency for the issuance of an arrest warrant is “reasonable grounds” that a crime under the Rome Statute has been committed. The standard for confirmation of the charges is “substantial grounds to believe,” something more than reasonable grounds but less than “proof beyond a reasonable doubt.” In Lubanga, the Pre-Trial Chamber explicated this standard as requiring the Prosecutor to “offer concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations” against an accused. The Chamber must “[a]fter an exacting scrutiny of all the evidence,…determine whether it is thoroughly satisfied that the Prosecution’s allegations are sufficiently strong to commit [the accused] for trial.” Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, para. 39 (Jan. 29, 2007), http://www.icc-cpi.int/iccdocs/doc/doc266175.PDF.

learning he had fabricated his evidence. It also asked for a delay in the start of the trial to consider whether it could sustain its burden at trial.6

On my first day as a prosecutor in the Manhattan District Attorney’s Office, my bureau chief, Warren J. Murray Jr., began our training by introducing us to a few of his well-known prosecutorial maxims or “rules.” Rule number one, his first and most important was: “No witness—no case.” He was making the somewhat obvious but often forgotten point that the most essential aspect of a prosecutor’s work is to identify and secure evidence (most often in the form of eyewitness testimony).7 Credible and reliable evidence is the foundation of a criminal case; it underlies each and every aspect of the case that follows an arrest. Without it, there is no viable case. The goal of a criminal investigation is to identify and collect evidence. Investigations must be thorough, conducted methodically using recognized procedures and methods, and must explore all investigative avenues, including those that suggest innocence as well as guilt. A successful investigation requires trained and experienced staff, a clear investigation plan, and access to where such evidence may be located.

Article 42 of the Rome Statute charges the Office of the Prosecutor with the responsibility of receiving and examining information of crimes and initiating investigations when appropriate.8 Articles 53 to 56 set out general principles regarding the conduct of investigations. Investigations can be initiated upon the request of a State Party or by a referral from the U.N. Security Council exercising its Chapter VII authority. OTP can also initiate preliminary investigations on its own initiative pursuant to its authority under Article 15.

7 In this essay, I will use the word “evidence” to include all types of proof accepted in court proceedings, including physical evidence, witness testimony, documentary evidence, video, audio, and metadata.
8 Rome Statute, supra note 1, at art. 42(1).
Article 54 sets out the basic structure of an investigation and the principles upon which it should proceed. Most notable is subsection 1(a) which charges OTP with the duty to investigate “all facts” to determine criminal responsibility and to “investigate incriminating and exonerating circumstances equally.” The ICC Rules of Procedure and Evidence (“Rules”) and the Prosecutor’s Regulations expound on the conduct of investigations.⁹

Most prosecutors learn the vital importance of a good investigation early in their career, hopefully with a minor crime. A prosecution will not succeed if the investigation underlying it is seriously flawed. OTP’s failure to adhere to “rule number one” has drawn criticism from the Court and resulted in the faltering of some of its prosecutions, and the failing of others.

THE PROBLEMS IDENTIFIED BY THE ICC JUDGES

To date, judges at the ICC have leveled criticism and expressed concern with respect to several aspects of the OTP’s investigative practices:

- The failure to adequately discharge the Prosecution’s obligation under Article 54 to investigate exculpatory information equally.
- The timing and length of investigations.
- The quality of the evidence collected during the investigation and presented in court.
- The inappropriate delegation of investigative functions; i.e., the use of intermediaries.
- The failure to properly analyze evidence and disclose potentially exculpatory material.

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In the remainder of this essay I will address and analyze each of these criticisms in turn.

A. The Failure to Adequately Discharge the Prosecution’s Obligation Under Article 54 to Investigate Exculpatory Information Equally

Defense counsel have regularly asserted that OTP fails to conduct its investigations in accordance with Rule 54. The Pre-Trial Chamber tasked with considering the charges in the Kenya situation was troubled by evidence indicating the Prosecution had not met its obligation to conduct a fair investigation. The Chamber, in declining to confirm the charges against Callixte Mbarushimana in the Democratic Republic of Congo (DRC) situation, expressed its concern regarding interview techniques used by investigators which “seem[ed] utterly inappropriate when viewed in light of the objective, set out in Article 54(1)(a), to establish the truth by ‘investigating incriminating and exonerating circumstances equally.’” The Chamber was concerned with how the transcripts of investigative interviews repeatedly demonstrated that the investigators conducting the interviews relied heavily on leading questions, belying their theory of events, and showing “resentment, impatience or disappointment” when witnesses did not provide the answer they had hoped to hear.

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11 Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, para. 51 (Dec. 16, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf [hereinafter Mbarushimana Confirmation Decision]. The Chamber went further to state “[T]he Chamber cannot refrain from deprecating such techniques and from highlighting that as a consequence, the probative value of evidence obtained by these means may be significantly weakened.”

12 The Chamber noted that the conduct of the investigators was “hardly reconcilable with a professional and impartial technique of witness questioning.” Id.
The Chamber noted the objectionable practice in the interviews of three witnesses.  

A witness interview is a process of carefully recording a witness’s factual observations, ordinarily through employing open-ended and non-leading questions. The process described by the Chamber indicates that investigators may have been suggesting the Prosecution’s case theory to witnesses rather than asking neutral questions and objectively recording their evidence. This objective process should have continued by verifying the veracity of the information provided and allowing the case theory to emerge from the totality of reliable evidence. Experienced professional investigators know that the type of interview described by the Chamber should rarely, if ever, be conducted. If a witness is truly adverse or is being deceptive, the investigator may decide to conduct a second interview to follow-up on the initial non-leading interview by confronting the witness with some of the inconsistencies in the first interview or with some of the trusted evidence that contradicts his or her account. If the methods described by the Chamber are pervasive, and not simply the work of a few inexperienced investigators, OTP must urgently reconsider how it conducts witness interviews.

B. The Timing and Length of Investigations

Judges have also been concerned with the continuation of investigations long after the commencement of proceedings. Some defense teams have accused the Prosecution of changing their case theory in response to newly acquired witnesses and evidence late into the case. While the Prosecution must always seek the most reliable

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13 Id. (discussing “utterly inappropriate” techniques of the Prosecution’s investigators).
14 For a detailed explanation of the purpose and method of conducting a witness interview, see DERMOT GROOME, HANDBOOK OF HUMAN RIGHTS INVESTIGATION 173-205 (2011).
15 This two-step approach can also be incorporated in the same interview by separating the interview into two parts.
16 See, e.g., Prosecutor v. Francis Muthaura and Uhuru Kenyatta, Case No. ICC-01/09-02/11, Corrigendum to Observations on the Conduct, Extent and Impact of the Prosecution’s Investigation and Disclosure on the Defence’s Ability
evidence and should not ignore important investigative leads, this goal must not undermine the right of the accused to know the charges against him or her and to prepare a defense.

The short interval of time spent investigating cases before seeking arrest warrants is perhaps one of the causes of this phenomenon. The Prosecution’s case theory will inevitably develop in response to new evidence and commencing a case on a limited understanding of events is likely to result in an evolving theory that departs from the original hypothesis.

Conducting an international criminal investigation is a time consuming endeavor. The crimes are both serious and complex and require detailed and careful investigation. The investigation of the actual crime itself (i.e., the victim, the direct perpetrators, and the primary crime scene if available) must be conducted as carefully as, and to the same high standards as, those applied by professional national police services. Often central to an international criminal investigation is the question of whether senior officials participated in the crime. These cases require investigators to perform the additional task of investigating and determining which officials within the chain of command structure bear responsibility. This task adds levels of complexity rarely found in domestic crimes. It is a task that requires careful study of the legal relationships between senior officials, the direct perpetrators, and all those who lie in a chain of causality between the two. As such, investigators must conduct a time-consuming process of accessing and analyzing archival material which may shed light on the governmental structures used in the commission of the crime.

International prosecutors also have the burden of establishing the contextual or chapeau elements of international crimes. For example, establishing that a crime against humanity was perpetrated requires that the subject crime was part of a widespread or systematic attack against a civilian population. As such, investigations into

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crimes against humanity require probing into not only the subject crime, but also into the other crimes forming the relevant context.

In addition to these conceptual differences, there are significant operational challenges faced by international investigators. Witnesses are most often located in places far from The Hague. If they are still living in their homes, they are likely to be in a place that is insecure and polarized about the work of the investigators. Very often victims and witnesses will have fled their permanent residences, sometimes seeking refuge in countries far away. Locating these witnesses and obtaining permission to interview them from the government where they currently reside adds an unavoidable delay to the process.

Before investigators can work effectively they must inform themselves about the historical precursors to the conflict as well as the culture and practices of the people they will interview. Investigators may also be unable to speak the language of the victims and witnesses and may need to identify and train competent interpreters.

Before an investigation arrives at its final conclusions, it has undergone a cyclical process in which evidence is gathered, verified and analyzed, and tentative theories formed, which are in turn tested through additional investigation. New evidence is gathered with an increased focus, guided by a growing base of verified facts. Nascent factual and legal theories may be contradicted, confirmed, or refined by successive trips to the field to interview additional witnesses and collect more evidence. Over time, the focus of the investigation sharpens in a process that is driven by the evidence itself. Eventually the credible and reliable evidence excludes all hypotheses but one. At this point, additional legal analysis is required to determine whether each element of the possible crimes (including contextual elements) can be established beyond reasonable doubt. In most cases, it will be necessary to conduct further investigation to locate specific evidence necessary to corroborate an important witness or to more firmly establish a particularly important point. I have supervised numerous investigations of international crimes over the course of my career as an international prosecutor—each took a minimum of one year.
In light of these challenges, it is surprising that OTP requested arrest warrants in the Côte d’Ivoire situation only 22 days after commencing the investigation, and only after 74 days in the Libya situation.\(^{17}\) While recognizing the importance of interrupting ongoing crimes by taking high-level perpetrators into custody, it is difficult to imagine even the most rudimentary international investigation being completed within these time frames.

In the Côte d’Ivoire situation, the Pre-Trial Chamber spent more time evaluating the evidence than the OTP spent collecting it. The Prosecution received authorization to commence an investigation on October 3, 2011 and applied for an arrest warrant on October 25, 2011. A warrant was issued on November 23, 2011 after the Pre-Trial Chamber found reasonable grounds to believe that Laurent Gbagbo had committed international crimes. Gbagbo surrendered to the Court two days later.

The infirmities of this apparently hurried investigation was the subject of scrutiny by the Pre-Trial Chamber considering whether to confirm the charges. After a considerable delay, caused in part by a defense application asserting that Gbagbo was unfit to stand trial, the

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In fairness to the Prosecution, there are indications that it was receiving information and conducting preliminary inquiries in the Côte d’Ivoire situation as early as April 2009. See Fatou Bensouda, Deputy Prosecutor of the Int’l Criminal Court, Statement on an Overview of Situations and Cases Before the ICC (Apr. 14, 2009), \texttt{http://www.icc-cpi.int/NR/rdonlyres/CF9DFD80-5E15-4AA8-BA0D-7E728F0D86DF/280265/140409Capetown.pdf}; See also Luis Moreno-Ocampo, ICC Prosecutor’s Speech to the Eighth Session of the Assembly of States Parties (Nov. 18, 2009), \texttt{http://www.icc-cpi.int/iccdocs/asp_docs/ASP8/Statements/ICC-ASP-ASP8-statements-OTP-ENG.pdf}. 
confirmation hearing was held in February 2013. The legal standard for confirming charges against an accused is somewhat elevated from the “reasonable grounds” standard for an arrest warrant, but still well below the standard of “proof beyond reasonable doubt” at trial. Article 61(7) of the Rome Statute requires the Pre-Trial Chamber to determine “whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged.”

This standard serves a gate-keeping function, ensuring that only those charges which merit a full trial are allowed to proceed to one. Article 61(7) gives a pre-trial chamber three options: a) to confirm the charges; b) to decline to confirm the charges; or c) to adjourn the hearing and request the Prosecution to provide additional evidence or amend the charges.

The Chamber, having assessed the evidence, came to the view that the Prosecution’s case was insufficient to meet the substantial grounds test. It reasoned that although the evidence was insufficient it did not “appear to be so lacking in relevance and probative value that it leaves the Chamber with no choice but to decline to confirm the charges under Article 67(7)(b).” The Chamber decided that the proper course of action was to adjourn the case and request that the Prosecution conduct more detailed investigations.

18 Gbagbo Adjournment Decision, supra note 3. See supra note 4, for the definition of “substantial grounds” articulated in Lubanga. The Appeals Chamber has stated that, in the application of this standard, a “Pre-Trial Chamber may evaluate ambiguities, inconsistencies and contradictions in the evidence or doubts as to the credibility of witnesses.” Prosecutor v. Callixte Mbarushimana, Case No. ICC-01-04-01/10 OA 4, Judgment on the Appeal of the Prosecutor Against the Decision of Pre-Trial Chamber I of 16 Dec. 2011 entitled “Decision on the Confirmation of Charges” (Mar. 3, 2012).

19 Rome Statute, supra note 1, at art. 61(7).

20 The Chamber in applying the gate-keeping threshold of Article 61(7) considered that the Prosecution must have presented its strongest case resulting from a largely completed investigation. Thus, the appropriate course of action was to adjourn the case for additional investigations. Gbagbo Adjournment Decision, supra note 3, at para. 25.
give her a limited amount of additional time to do so.”

The Chamber enumerated the avenues of investigation the Prosecution should pursue. The Chamber gave the Prosecution five months to continue its investigation and present a new Document Containing the Charges (DCC).

It is clear that OTP’s practice of initiating criminal proceedings prior to substantially completing its investigation has resulted in extensive investigations continuing after an arrest warrant was requested, and, in some cases, after the confirmation of the charges. In Mbarushimana, the Chamber criticized the Prosecution’s broad language in the DCC, which, when specifying the location of crimes used the language “include but are not limited to . . . .” The Chamber expressed its concern that this was an attempt by the Prosecution to keep open the possibility of broadening the case should additional evidence become available later as a result of continued investigations. The Chamber assessed the phrase as meaningless.

The Defense in Kenyatta recently took issue with the large number of new witnesses that were identified by the Prosecution after the confirmation hearing, asserting that they resulted in

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21 Gbagbo Adjournment Decision, supra note 3, at para. 37. The Chamber went on to find that giving the Prosecution this opportunity did not unduly infringe on Gbagbo’s right to be tried without due delay.

22 Regulation 35 of the Prosecutor’s Regulations requires a series of planning documents before investigative activities commence. These planning documents, taken together, would form a comprehensive investigation plan.

23 Gbagbo Adjournment Decision, supra note 3, at para. 23. It is important to note that one member of the Pre-Trial Chamber I wrote an articulate and persuasive dissent from the majority’s decision. Judge Silvia Fernández de Gurmendi took the view that the majority’s decision was based on an erroneous understanding of the applicable evidentiary standard for the confirmation of charges. She went further to take issue with the Chamber’s application of the evidentiary standard to the contextual elements of crimes against humanity. Finally, Judge Gurmendi found that the majority’s request to the Prosecution to deal with specific “questions” and “issues” was both irrelevant and inappropriate.

24 Mbarushimana Confirmation Decision, supra note 11, at paras. 82-83.

25 Id. at paras. 79-83.
“radically altered” allegations. The Chamber in large part rejected this assertion and reaffirmed that the Prosecution was not required to rely on the same evidence at trial that it had adduced during the confirmation process. Nevertheless, the Chamber expressed its concern regarding the “substantial volume of new evidence that was gathered by the Prosecution [after confirmation].” The Chamber, citing the *Mbarushimana* Appeal Decision, reminded the Prosecution that the investigation should be largely completed by the time of the confirmation hearing. Judge Van den Wyngaert, in her concurring opinion, was particularly troubled by the large number of witnesses who were identified as such only after the confirmation hearing. She stated that “there are serious questions as to whether the Prosecution conducted a full and thorough investigation of the case against the accused prior to confirmation.” The *Kenyatta* Chamber introduced the legal requirement that all investigations that could have reasonably been completed before confirmation must be. The Chamber went further stating that the defense will have remedies available with respect to failures to do this. It remains to be seen whether the unspecified remedies referred to by the *Kenyatta*

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26 *Kenyatta* Corrigendum, *supra* note 16, at para. 11 (“The nature of the Prosecution’s ongoing and protracted investigation and the manner in which the Prosecution has sought to disclose its evidence have required the Defense to expend considerable investigative resources in order to attempt to deal with an ever-shifting case…”).

27 *Kenyatta* Article 64 Decision, *supra* note 10, at paras. 110-11.

28 *Id.* at para. 112.

29 *Id.* at para. 119 (“The Prosecution should not seek to have the charges against a suspect confirmed before having conducted a full and thorough investigation in order to have a sufficient overview of the evidence available and the theory of the case.”).

30 *Id.* at Anx 2, para. 1 (Van den Wyngaert, J., concurring).

31 *See* *Kenyatta* Article 64 Decision, *supra* note 10, at para. 121. However, the Majority is of the view that the Prosecution should not continue investigating post-confirmation for the purpose of collecting evidence which it could reasonably have been expected to have collected prior to confirmation. If a Trial Chamber finds that this has occurred, it would need to determine the appropriate remedy based on the circumstances of the case.

Although the Chamber does not limit the application of this principle to inculpatory evidence, that is likely what it intended. It would be inconsistent with general principles of justice and fairness for the Prosecution’s obligations under Article 54 to cease upon the confirmation of charges.
Chamber will have the teeth to compel a change in the OTP’s investigative practices, but the Prosecutor is certainly on notice that in the future Chambers are likely to be less forgiving when investigations prove to be inadequate or tardy.

While the concerns addressed by the Kenyatta Chamber focused on the procedural unfairness caused by an investigation that continues after confirmation, a failure to adequately investigate a case before commencing a criminal process risks a case that is flawed and that may ultimately have to be withdrawn.

This precise situation arose for Kenyatta’s co-defendant, Francis Muthaura, for whom charges were also confirmed in January 2012. On March 11, 2013, OTP filed a notice withdrawing all charges against Muthaura. In the filing, OTP informed the Chamber that having considered all of the available evidence, “there is no reasonable prospect of conviction in the case.” When explaining the underlying reasons for the withdrawal, the Prosecution pointed to the fact that several witnesses had died, were killed or had become uncooperative. It informed the Chamber that one witness recanted his testimony after receiving bribes from representatives of the accused. It is difficult to assess the extent to which these problems were foreseeable and could have been overcome by identifying additional witnesses and evidence during the investigation.

One clearly troubling aspect of the Prosecution’s submission is its explanation that one reason the case collapsed was that the Kenyan government “failed to assist it in uncovering evidence that would have been crucial.” This suggests that the Prosecution may

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32 Muthaura Notice, supra note 5. The Statute and Rules are silent on whether the Prosecution can withdraw charges without leave during the interval between the confirmation of charges and the start of trial. On March 18, 2013, the Trial Chamber decided that the leave of the Chamber was required and granted the Prosecution permission to withdraw the charges.
33 Id. at para. 9.
34 Id. at para. 11.
35 To date, there has been no public record of Article 70 proceedings (Offenses Against the Administration of Justice) having been instituted against the person who allegedly bribed the witness.
36 Muthaura Notice, supra note 5, at para. 11.
have known at the time of confirmation that it had insufficient evidence for conviction, but proceeded in the hope that such evidence would come into its possession before the start of trial.\footnote{Id. The Prosecution had acknowledged in a public statement that there were ongoing efforts to undermine its work in Kenya. \emph{See} Fatou Bensouda, ICC Prosecutor, Statement on ICC Witnesses Undergo Rigorous Tests (Nov. 17, 2010), \url{http://www.icc-cpi.int/NR/rdonlyres/85B705E7-5E3A-43C0-A473-7B52CA120951/282930/Kenya.pdf}. In a related case, Judge Hans-Peter Kaul pointed out the significant risks that are occasioned by such an incremental investigation:}

Many national jurisdictions charge the prosecutor with the responsibility of assessing the probability of conviction on the evidence in its possession prior to committing significant public resources to a prosecution.\footnote{\emph{See}, e.g., \textit{Prosecution Policy of the Commonwealth: Guidelines for Making Decisions in the Prosecution Process} § 2.5, (Austl.) \url{http://www.cdpp.gov.au/Publications/ProsecutionPolicy/ProsecutionPolicy.pdf} (last visited Dec. 10, 2013). When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not sufficient to justify the prosecution. . . . [I]t is then necessary to give consideration to the prospects of conviction. A prosecution should not proceed if there is no reasonable prospect of a conviction being secured. \emph{See also} Nat'l. Dist. Att'y Ass'n, \textit{National Prosecution Standards} 53 (3d ed.), \url{http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf} (last visited Jan. 28, 2014). While commencing a prosecution is permitted by most ethical standards upon a determination that probable cause exists to}
the waste of public resources on prosecutions that are unlikely to result in convictions, but also protects those accused from facing the jeopardy of a trial based on flimsy evidence. Given the significant resources implicated by an international criminal case and the jeopardy it places upon an accused, a decision to proceed in the hopes of acquiring “crucial” evidence demonstrates poor prosecutorial judgment.

In both the Libya and Côte d’Ivoire situations there were legitimate international interests in conducting expedient investigations and securing the arrest of men believed to be still perpetrating crimes. Using the ICC as a means of interrupting ongoing crimes brings with it the risk that hastily investigated and constructed cases will ultimately fail.

International criminal investigations in conflict areas are unique in that evidence that was unavailable at the start of the investigation may become available as time passes and the conflict subsides. Changes in security, disposition towards the court, and reaction to court proceedings can all prompt new witnesses to come forward. Over the course of a case there may be better access to witnesses, crime scenes, and archives. Although the Prosecution must always seek the most reliable and probative evidence, this goal must be balanced against the accused’s right to know the case against him and to prepare a defense.

believe that a crime has been committed and that the defendant has committed it, th[is] standard prescribes a higher standard for filing a criminal charge. To suggest that the charging standard should be the prosecutor’s reasonable belief that the charges can be substantiated by admissible evidence at trial is recognition of the powerful effects of the initiation of criminal charges. Pursuant to the prosecution’s duty to seek justice, the protection of the rights of all (even the prospective defendant) is required.  

39 During the trial of Slobodan Milošević, it was a frequent occurrence for previously unknown witnesses to come forward and identify themselves in the ICTY’s field offices in response to something they saw in the broadcast of the trial. See Alex Whiting, In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered, 50 HARV. INT’L L.J. 323 (2009).
ICTY judges have developed criteria to help strike the appropriate balance between these competing concerns whenever the Prosecution seeks to add evidence after it has filed its witness and exhibit lists. These criteria include:

- The relevance and importance of the new evidence;
- Whether there is good cause for the late addition of the evidence;
- Whether the Prosecution exercised due diligence in identifying the new evidence; and
- Whether allowing the use of the new evidence will result in prejudice to the accused.

Trial Chambers consider and balance these factors to determine whether the interests of justice are best served by the either allowing or disallowing the new evidence.40

Judges are correct in imposing a standard requiring that the investigation ordinarily be substantially complete before the confirmation of the charges. If substantial investigations continue, the Prosecution should have the obligation of explaining why the evidence was previously unknown or unavailable, and the burden of establishing that the interests of justice are best served by permitting the use of the new evidence.

C. The Quality of the Evidence Collected During the Investigation and Presented in Court

Commencing a prosecution before completing a comprehensive investigation directly impacts the quantum and quality of the evidence available to a chamber. One of the criticisms of the Gbagbo Chamber was the Prosecution’s heavy reliance on anonymous hearsay. Criticisms noted the lower probative value of such evidence as well as the implications for the right of an accused to know who is providing evidence against him or her.\footnote{Rome Statute, supra note 1, at art. 67 (addressing Rights of the Accused).} The Chamber also took issue with the Prosecution’s reliance on documentary and summary evidence, such as press articles and reports from non-governmental organizations, and noted that unless the Prosecution was to conduct additional investigations there was little prospect of the evidence being accepted at trial.\footnote{The Gbagbo Chamber stated: “In light of the above considerations, the Chamber notes with serious concern that in this case the Prosecution relied heavily on NGO reports and press articles with regard to key elements of the case, including the contextual elements of crimes against humanity.” Gbagbo Adjournment Decision, supra note 3, at para. 35.} The Chamber expressed its “serious concern” about the quality of the evidence presented during the confirmation hearing.\footnote{Id. at para. 35. In addition to the four separate incidents charged by the Prosecution, it also relied on 41 other incidents to establish the contextual or chapeau elements of crimes against humanity. The Chamber found that for the majority of these 45 incidents, the only evidence adduced during the confirmation hearing was anonymous hearsay from NGO reports, U.N. reports, and press articles.}

The Mbarushimana Chamber also indicated that the anonymous hearsay evidence contained in Human Rights Watch reports would, as a general rule, be “given a low probative value.”\footnote{Mbarushimana Confirmation Decision, supra note 11, at para. 78. This is in keeping with law in many national courts, which are reluctant to find probable or reasonable cause based on anonymous information alone. See, e.g., Illinois v. Gates, 462 U.S. 213 (1983).} The Garda Chamber followed a similar approach with respect to
anonymous evidence and summary statements that the Prosecution tendered in support of its case.  

Anonymous hearsay can be of great assistance in the early stages of an investigation by providing important leads to identify witnesses and evidence as well as providing background to orient investigators to the context and nature of the crimes. Many of the investigations at the International Criminal Tribunal for the former Yugoslavia (ICTY) were commenced after a review of reports from the media and non-governmental human rights organizations. The ICTY also had the benefit of the Bassiouni Commission, an ad hoc commission established by the U.N. Security Council to conduct preliminary non-judicial investigations into some of the allegations of crimes that occurred during the breakup of Yugoslavia.

By contrast, anonymous hearsay should rarely, if ever, be adduced as proof to sustain the Prosecutor’s burden at any stage of a criminal proceeding. It inherently lacks sufficient reliability and is very often factually inaccurate. Many international crimes occur during conflicts in which propaganda is a frequently used tool by all sides. In the context of the former Yugoslavia, a great many fantastic and false stories were spread anonymously in an effort to cause


The anonymity of the information also makes it impossible for a chamber to assess the credibility and reliability of the person providing the information. OTP’s heavy reliance on anonymous hearsay deprived pre-trial chambers of the ability to check the information against other known sources. A chamber that must evaluate evidence that is predominantly anonymous is unable to cross-check the evidence because it is difficult to assess whether seemingly corroborative evidence is truly corroborative, or simply another formulation of the same information from the same anonymous source.

A competent investigation requires more than aggregating several sources of such hearsay and presenting it to the court. Investigators must find the source of the hearsay and conduct their own independent interview and assessment of the witness.

Equally important is the necessity of investigating the credibility and reliability of known witnesses. Ultimately, a chamber will consider the evidence they provide in light of its assessment of that witness’s credibility and reliability. Many of the problems that occurred over the course of the Lubanga trial were the result of the Prosecution’s failure to verify the information provided by witnesses. An important part of any comprehensive witness

48 One of the more egregious reports intended to enflame passions that was proven to be false was a claim that Serb babies were being fed to the lions in the Sarajevo zoo. The original broadcast by Rada Djokić can be seen on Youtube at http://www.youtube.com/watch?v=LzUqQxNh8qw. Borislav Herak, one of the early infamous perpetrators of crimes in the Sarajevo area, claimed that he was motivated in part by the reports of Serb babies being fed to the lions at the zoo. Politics of Rape: Brutal, degrading act a powerful weapon in violence that rends former Yugoslavia, THE DALLAS MORNING NEWS, May 5, 1993, available at 1993 WLNR 4848763.

49 Credibility is whether a witness is being honest and telling the “truth.” Reliability is whether the facts described by a witness are accurate. This is an important distinction in the case of a witness who is honestly mistaken. For example, a witness may be honestly mistaken in their identification of a perpetrator. In such a case, the witness is credible but unreliable.

interview is to gather information that can assist a chamber in evaluating the witness’ credibility and reliability.\(^{51}\)

In addition to the poor quality of some evidence, ICC judges have expressed concern over the paucity or complete lack of evidence on important aspects of the Prosecution’s case. For example, the *Gbagbo* Chamber found that the Prosecution’s evidence left an “incomplete picture” with respect to the structural links between Gbagbo and the “Pro-Gbagbo Forces” which committed the crimes.\(^{52}\) There was insufficient evidence to support the Prosecution’s inferences with respect to the asserted liability that flowed from the direct perpetrators, to Gbagbo’s inner circle, and to Gbagbo himself.\(^{53}\)

In the *Lubanga* Judgment, the Chamber was critical of the Prosecution’s failure to adequately investigate the age of alleged child soldiers—something of central importance to the case.\(^{54}\) Similar criticisms were echoed in *Ngudjolo*, another case from the DRC. Despite the fact that the *Ngudjolo* Chamber recognized that the Prosecution faced significant challenges in conducting investigations in the DRC, it chided the Prosecution for its failure to adequately investigate the background of key witnesses.\(^{55}\)

Evidence presented by the Prosecution in *Mbarushimana* was also found to be lacking. The Chamber declined to confirm the

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\(^{51}\) *HANDBOOK OF HUMAN RIGHTS INVESTIGATION*, supra note 14, at 190-96.

\(^{52}\) *Gbagbo* Adjournment Decision, supra note 3, at para. 36. The Chamber also noted the lack of evidence regarding the activities of the opposing forces, something it considered relevant to its inquiry.

\(^{53}\) *Id.* at para. 36.

\(^{54}\) *Lubanga* Judgment, supra note 50, at para. 175 (“Whilst acknowledging the difficult circumstances in the field at the time of the investigation, this failure to investigate the children’s histories has significantly undermined some of the evidence called by the Prosecution.”).

\(^{55}\) *Prosecutor v. Mathieu Ngudjolo*, Case No. ICC-01/04-02/12, Judgment Pursuant to Article 74 of the Statute, para. 121 (Dec. 18 2012) [hereinafter *Ngudjolo* Judgment].
charges relating to alleged attacks in three villages, finding the
evidence related to them to be sparse, inconsistent and insufficient to
sustain the charges. In some cases, the only evidence offered in
support of an alleged attack was U.N. reports containing vague
summaries of the events. In Garda, the Chamber characterized the
Prosecution’s evidence regarding some allegations as “scant and
unreliable.” The Chamber remarked that in some cases the evidence
adduced not only failed to support the Prosecution’s allegations, but
instead supported the accused’s contention that he did not participate
in the alleged attacks. The Chamber rejected the Prosecution’s
arguments and declined to confirm the charges against Garda.

The Prosecution must give greater focus to the quantum and
quality of evidence it is producing before the court. Consideration
should be given to each element of the crimes charged ensuring that
the Prosecution can confidentially meet its burden at each stage of
the criminal process.

D. The Inappropriate Delegation of Investigative Functions

While the reliance on NGO reports has been criticized as an
improper delegation of a prosecutorial function, the use of
intermediaries has caused considerable debate over the
appropriateness of employing external intermediaries to perform key
investigative functions. This issue came dramatically to the fore when
the first witness in the Lubanga case returned after the lunch break
and recanted his earlier testimony that he had been abducted on the
way home from school and conscripted into the Union of Congolese
Patriots (UPC). His recantation cast immediate suspicion on those
involved in bringing him forward as a witness.

56 Mbarushimana Confirmation Decision, supra note 11, at para. 120.
57 Id. at para. 120.
58 Garda Confirmation Decision, supra note 45, at para. 179.
59 Id. at para. 228.
60 Id. at para. 236.
61 Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06,
cpi.int/iccdocs/doc/doc881407.pdf [hereinafter Lubanga Intermediary Decision].
In *Lubanga*, the Prosecution employed people to assist it in identifying and interviewing witnesses. An OTP investigator identified as P-583 gave evidence at trial that the use of intermediaries was deemed to be the only way to gain access to knowledgeable witnesses given the security situation that existed at the time and the fact that OTP does not have its own police force.\(^62\) The Prosecution relied on seven different intermediaries to secure the evidence of approximately half of the witnesses it called at trial.\(^63\)

The integrity of the intermediaries and the role they played in the investigation was a central issue at trial. The Defense brought a motion at trial seeking a permanent stay of the proceedings based on alleged misconduct of these intermediaries. The Chamber denied the motion finding that it would be able to reach final conclusions regarding the intermediaries and their impact on the integrity of the case during the trial.\(^64\)

In its final judgment, the Chamber focused on the conduct of four of the seven intermediaries and set out its detailed analysis of each of them. Intermediary 143 (I-143) was a paid intermediary who introduced the Prosecution to 21 witnesses and another intermediary (P-031). Five of these witnesses were called at trial. The Defense argued that the witnesses were suborned by I-143.\(^65\) The Chamber found that inconsistent statements by witnesses P-007, P-008, P-010 and P-011 as well as evidence that contradicted their evidence, rendered the witnesses unreliable. The Chamber further concluded that its findings reflected negatively on the integrity of I-143 and established that “it is likely that as the common point of contact he

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\(^63\) The Prosecution informed the Chamber that it had relied on a total of 23 individuals and organizations in its investigation. See *Lubanga* Intermediary Decision, *supra* note 61, para. 3.


\(^65\) *Lubanga* Intermediary Decision, *supra* note 61, at para. 16.
[I-143] persuaded, encouraged or assisted some or all of them [the witnesses] to give false testimony.”

Intermediary 316 (I-316) was under contract with OTP, even though the Prosecution was aware of his close ties with the Congolese intelligence service. The Chamber noted with particular concern that OTP employed an intermediary who was employed by the very same government that had originally referred the case to the ICC. I-316 not only introduced OTP staff to witnesses but also helped arrange interviews. The Chamber considered that it was inappropriate for someone who lacked both independence and impartiality to essentially become a member of the prosecution team. The Chamber was sufficiently concerned with the integrity of I-316 and his impact on the case that it instructed the Prosecution to produce him as a witness. The Chamber found him incredible, citing among other things his claim that his assistant (“Individual 183”) and his family had been murdered, when in fact the Prosecution conceded that his assistant was still alive. The Chamber concluded that I-316 had “persuaded witnesses to lie” and dismissed the entirety of the testimony of one witness (P-015) and some of the testimony of another (P-038).

P-321 was another paid intermediary who acted on behalf of OTP for more than a year and introduced investigators to eight witnesses, four of whom testified in the Lubanga trial. The Chamber found that all four of these witnesses gave materially false evidence and that there was a “significant possibility” that P-321’s improper influence over the witnesses was the cause.

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66 Lubanga Judgment, supra note 50, at para. 291.
67 In addition, the Chamber noted that at least one other member of the Congolese intelligence assisted I-316 in his work. Id. at para. 368.
68 Id.
69 Id.
70 Id.
71 Lubanga Judgment, supra note 50, at paras. 369-74.
72 Id. at para. 374.
73 Id. at para. 450.
P-031 was recruited as an intermediary with the assistance of I-143 and worked for OTP between 2005 and 2008. The Chamber found that while the evidence before it was insufficient to conclude that P-031 had persuaded witnesses to give false testimony, it found the evidence sufficient to require caution with respect to the evidence of witnesses who had contact with him.

The Chamber concluded that “the Prosecution should not have delegated its investigative responsibilities to the intermediaries . . . notwithstanding the extensive security difficulties it faced.” The Chamber criticized the Prosecution’s reliance on these intermediaries and that it had permitted them to work with important witnesses essentially unsupervised. The Chamber further noted the significant time it expended to scrutinize this practice and the evidence it yielded. The Chamber used the judgment to inform the Prosecution that at least two of the intermediaries may have committed Crimes Against the Administration of Justice under Article 70 of the Rome Statute and reminded the Prosecution of its obligation to initiate an investigation into the matter.

Notwithstanding these concerns, the Chamber ultimately concluded that children were recruited and conscripted into the UPC/FPLC and deployed in hostile actions based on other credible testimonial and documentary evidence.

The Chamber is correct in its criticism of OTP’s use of intermediaries. Their functional role in the investigation went far beyond helping investigators contact potential witnesses. They became paid agents of OTP, to whom the Prosecution delegated important investigative functions. Using intermediaries to make initial

74 Id. at para. 453.
75 Id. at para. 477.
76 Lubanga Judgment, supra note 50, at para. 482.
77 Id.
78 Id. at para. 483. At the time this article was written, there was no public record that such an investigation had been undertaken.
79 The FPLC is the French acronym for the Patriotic Force for the Liberation of the Congo, the military wing of the Union of Congolese Patriots (UPC).
80 Id. at paras. 911-16.
contact with witnesses is an acceptable way of working in a hostile environment. In some situations making direct contact with witnesses may jeopardize their safety and give the impression that investigators are unprofessional and insensitive to their security. However, the intermediary should only be used to convey a request to speak with a potential witness and not in the selection of witnesses themselves. They should not be involved in any interviews or exchange of substantive evidential information between the investigators and witnesses. If intermediaries are to be used, the investigator must carefully consider whom to use. Knowingly employing an intelligence operative to act as an intermediary, particularly in the setting of the Lubanga case, was fraught with danger from the outset. The Prosecution has the responsibility to control all aspects of the investigation and vigorously protect its integrity.

Even if the use of intermediaries to identify and interview potential child soldiers was necessary in Lubanga, the Prosecution does not appear to have taken the steps necessary to verify the information gathered in this way. Investigators with the Lubanga Defense obtained and tendered school and other records, which established that some of the Prosecution witnesses claiming to have been child soldiers were too old for this to be true. Given that the age of a victim/witness at the time he or she was inducted into combat was a central issue in the trial, the Prosecution had an important responsibility to independently verify the age of these witnesses before advancing their evidence in court. Had the Prosecution done so, the true age of the victims would have been apparent and many of the problems during the proceedings would have been avoided.

E. The Failure to Properly Analyze Evidence and Disclose Potentially Exculpatory Material

The handling of evidence gathered during the investigation has also been an issue to the extent that it has had implications for OTP’s proper discharge of its disclosure obligations. During its investigation into the situation in Kenya, the Prosecution sought and

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81 In Lubanga, it is reasonably possible that paid intermediaries whose job it was to locate witnesses would have considered that payment would cease unless they continued to “find witnesses.”
received documents from a provider under the condition that they would not be disclosed. After the Lubanga confirmation hearing, the Prosecution recognized that some of this material required disclosure under Article 67(2).\footnote{Article 67(2) provides in relevant part: [T]he Prosecutor shall, as soon as practicable, disclose to the defense evidence in the Prosecutor’s possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.} Proceedings came to an abrupt halt when the Prosecution initially failed to receive permission to disclose the material. The Trial Chamber found that during the course of its investigations,

\[\text{[T]he Prosecution has incorrectly used Article 54(3)(e) [confidentiality agreements] when entering into agreements with information-providers, with the consequence that a significant body of exculpatory evidence which would otherwise have been disclosed to the accused is to be withheld from him, thereby improperly inhibiting the opportunities for the accused to prepare his defense. . . .}\]

The Chamber further found that the Prosecution’s actions had also effectively prevented the Chamber from being able to review the material and determine whether the non-disclosure of the material would constitute a breach of the accused’s right to a fair trial.\footnote{Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Urgent 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, para. 92 (June 13, 2008), https://www1.umn.edu/humanrts/instree/ICC/Stay the Proceedings.html.} The Prosecution’s error of accepting exculpatory material on the condition that it would not be disclosed nearly resulted in a termination of the ICC’s first trial. The trial was only able to continue...
after the conditions of the original agreement with the provider were re-negotiated.  

In Kenyatta, there is also evidence to suggest that, at least in one instance, the Prosecution was unaware of all of the evidence generated during the investigation, including clearly exculpatory material. In that case, the credibility of Witness 4, a witness originally deemed of great significance, was undermined when the Prosecution disclosed an affidavit containing a contradictory account of his evidence. Due to an oversight, the affidavit was not disclosed to the defense prior to the confirmation hearing. The Defense alleged that the Prosecution acted in bad faith and characterized the disclosure breach as a “clear and systematic failure involving senior Prosecution lawyers with respect to the procedures applied during its investigations.”

While the Chamber rejected the defense assertion of bad faith, it did express its “serious concern” with respect to the failure to disclose the affidavit and the “deficiencies in the Prosecution’s internal structure.” In her concurring opinion, Judge Van den Wyngaert accused the Prosecution of being negligent with respect to its responsibility to verify the trustworthiness of its evidence.

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86 Kenyatta Article 64 Decision, supra note 10, at paras. 24-31.

87 Id. at paras. 24-26.

88 Prosecutor v. Kenyatta, Case No. ICC-01/09-02/11, Public Redacted Version of the "Defense Reply to the Confidential Redacted Version of the 25 February 2013 Consolidated Prosecution Response to the Defense applications under Article 64 of the Statute to Refer the Confirmation Decision back to the Pre-Trial Chamber", para. 29 (Mar. 8, 2013), http://www.icc-cpi.int/iccdocs/doc/doc1565107.pdf. The Defense asserts that in good investigative practice would have required that the statement in question be reviewed: i) upon receipt, ii) prior to the re-interview, iii) prior to making oral submissions at the confirmation hearing.

89 Kenyatta Article 64 Decision, supra note 10, at para. 94-95.

90 Id. at Anx 2 paras. 3-4 (Van den Wyngaert, J., concurring).

[T]here can be no excuse for the Prosecution’s negligent attitude towards verifying the trustworthiness of its evidence. […]

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International criminal investigations often involve many investigators and analysts working on different aspects of the investigation. Systems must be put in place to ensure that the evidence gathered is organized and referenced in a way that allows the investigative team to easily access all relevant information related to individual witnesses. Equally, prosecutors and investigators must be extremely careful when entering into confidentiality agreements under Rule 54(e). It is difficult to make a decision about the risks involved when entering a confidentiality agreement during the course of the investigation. The legal obligation to disclose potentially exculpatory evidence is a broad one. Entering into confidentiality agreements carry a high risk of the problems experienced in *Lubanga*. Ideally, OTP should include a clause in all agreements that should potentially exculpatory material be found, the Prosecution is authorized to submit it for an *ex parte* review by a chamber and a commitment from the provider to abide by a chamber's decision on whether such material should be disclosed to the defense.

CONCLUSION

The competency and integrity of investigations conducted by the Office of the Prosecutor of the ICC have been called into question in several of its cases. The criticisms are valid and should be carefully considered by the Prosecution. The cornerstone of every criminal prosecution is the quality and integrity of the investigation underlying it. OTP must ensure that it has competent, professionally trained staff who conduct its investigations according to generally accepted principles and in keeping with all of the requirements of the Rome Statute and its Rules of Procedure and Evidence. A failure to improve the quality of ICC investigations and to take measures to ensure investigations are concluded earlier in the process risks not

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[T]here are grave problems in the Prosecution’s system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff. Clearly, thorough and comprehensive due diligence with regard to the reliability of the available evidence is an ongoing obligation of the Prosecution under article 54(1)(a), which is as important as the collection of that evidence itself.
only continued criticism in individual cases but risks undermining the credibility of the Office of the Prosecutor and the ICC itself.

The maxim of that seasoned Manhattan prosecutor, “No witness—no case” reminds prosecutors of the fundamental importance of conducting an effective investigation and gathering credible and reliable evidence in a process that is fair. This important lesson is as true for those who prosecute crimes against humanity as it is for those who prosecute misdemeanors.
THE LIMITS OF JUDICIAL IDEALISM: SHOULD THE INTERNATIONAL CRIMINAL COURT ENGAGE WITH CONSEQUENTIALIST ASPIRATIONS?

Shahram Dana*

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“Men are unable to forgive what they cannot punish.”

- Hannah Arendt, The Human Condition (1958)

INTRODUCTION

Ten years after its statute came into force, the International Criminal Court (“ICC”) completed its first trial, issued its first verdict,¹ and sentenced its first perpetrator.² The prospect of a permanent mechanism to bring to justice perpetrators of gross human rights violations has captured the imagination of ordinary people, victims, human rights advocates, and even celebrities. Angelina Jolie, actress

and Goodwill Ambassador for the United Nations High Commissioner for Refugees, was in the court gallery to hear first-hand the judgment against Thomas Lubanga Dyilo. He was found guilty of war crimes for conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities. As a result, countless children died and those who survived will suffer continued psychological, emotional, and physical trauma for many years to come. For these grave crimes, Lubanga was sentenced to fourteen years of imprisonment.

It was a significant day capping many “firsts” in the nascent life of the world’s first permanent international criminal justice mechanism: the first guilty verdict of the ICC, the first international trial to focus exclusively on child soldiering, and the first international trial to allow victims to participate directly in the trial proceedings. Nevertheless, important milestones and the successful prosecution of Lubanga are not likely

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5 Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76, supra note 2, at para. 99.

6 See generally MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2012), for a reinvigorating and provocative examination of child soldiering.

to end the debate any time soon over the merits of the ICC and the role of international criminal justice mechanisms. Hours after the court sentenced Lubanga to fourteen years, negative reactions populated the media and the internet. For ICC Presiding Judge Adrian Fulford to stare down at Lubanga and forcefully declare that his crimes are “undoubtedly very serious crimes that affect the international community as a whole[,]” but then impose a punishment that is less than half of the maximum term penalty available under the ICC Statute must have been perplexing, even for supporters of the Court. Human rights observers criticized the punishment as “a rather low sentence in relation to the crimes that he

8 Criticisms have targeted both the ICC model as a viable justice mechanism post-atrocity and the way Luis Moreno-Ocampo, the ICC Prosecutor, conducted the investigations and trial. See Joshua Rozenberg, Delay in Lubanga judgment demonstrates ICC weaknesses, THE GUARDIAN, Mar. 14 2012, http://www.guardian.co.uk/law/2012/mar/14/delay-lubanga-weaknesses-icc-model.


10 Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76, supra note 2, at para. 37.

11 Rome Statute of the International Criminal Court art. 77, July 17, 1998, 2187 U.N.T.S. 38544. The maximum imprisonment for a specific number of years is 30 years. Life sentence is permitted only “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” Id. at art. 77(1)(b). See also Jenia Iontcheva Turner, Policing International Prosecutors, 45 N.Y.U. J. INT’L L. & POL. 175, 224 (2012) (arguing that Lubanga’s low sentence can be attributed to a remedy for prosecutorial misconduct).
committed."\textsuperscript{12} The Congolese government likewise agreed that Lubanga should have received a higher sentence, even though some punishment is still a “positive signal” for peace in the region.\textsuperscript{13} Although Lubanga was sentenced to fourteen years of imprisonment, he will receive six years credit for time served during the trial. Thus, Lubanga will be out of prison in less than eight years.\textsuperscript{14} Moreover, if the ICC follows the practice of the \textit{ad hoc} international criminal tribunals of releasing perpetrators after they have served two-thirds of their sentence, Lubanga will be released in a little more than five years.

More significantly, despite all the ceremony and controversy\textsuperscript{15} surrounding the \textit{Lubanga} trial, the sentencing judgment presented the ICC judges with a significant opportunity to clarify the function and purpose of international criminal law ("ICL"). Its first sentencing judgment offered a seminal opportunity for the Court to elucidate the role of the world’s first permanent criminal court with global reach. Such clarity regarding the foundations of international justice is essential to the operation of the court from start to finish, from providing a vision to guide the work of the ICC and its Prosecutor to facilitating consistency in punishment. It would also facilitate better understanding of the Court’s decisions among communities and individuals impacted by the crimes.


\textsuperscript{13} \textit{DR Congo warlord Thomas Lubanga sentenced to 14 years}, supra note 12.

\textsuperscript{14} Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76, \textit{supra} note 2, at paras. 107-8. Lubanga is currently being detained at the Detention Centre in The Hague. \textit{Situations: The Prosecutor v. Thomas Lubanga Dyilo}, ICC-CPI, \url{http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations%20icc%200104/related%20cases/icc%200104%2000106/Pages/democratic%20republic%20of%20the%20congo.aspx} (last visited Oct. 12, 2013).

Unfortunately, the ICC’s first sentencing judgment is disappointingly perfunctory regarding the fundamental pillars of the system, leaving open a deeply divisive question that could jeopardize the legitimacy and success of this endeavour. Moving towards clarity on this question is the main goal of this article. It permeates every critical decision of the ICC: the Prosecutor’s selection of cases and defendants; decisions about the scope of the indictment and witnesses called; the manner in which the trial proceedings are conducted; judicial oversight of the Prosecutor’s decisions and conduct; and the determination of a just punishment. Thus, the questions and critiques addressed here will have continued significance to both practice and theory in ICL. The experience of the ad hoc tribunals indicates that both the defendant and the prosecutor frequently challenge the trial chamber’s sentence on appeal, and the Lubanga case is no exception. Thus, the reflections offered in this article about the primary role and function of international criminal justice has immediate and long-term implications for Court’s work.

Drawing on the experience of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), this article argues that idealism about what international criminal justice mechanisms can achieve has lead to ideologically-driven judicial decision-making in international criminal law. ICL idealism manifests itself in the belief that international criminal prosecutions can achieve a wide range of aspirations and goals, both international and local. According to the

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17 See William Schabas, Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals, 162-64 (2012) (discussing the tension between the Prosecutor and judges at the ICTY regarding the scope of indictments based on competing visions of the role of the Tribunal).


19 As used herein, ideology refers to a normative view that shapes an actor’s goals, expectations and actions.

Secretary General of the United Nations, international criminal tribunals pursue a number of aims including “bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law and contributing to restoration of peace.” Idealism about the institutional capacity of international tribunals also found expression in the reports of Judge Antonio Cassese, the first President of the ICTY and ICTR. Among the institutions’ “Future Priorities,” Judge Cassese confidently stated that the Tribunals were establishing an unassailable “historical record . . . thereby preventing historical revisionism,” which he lauded as “a most important function of the Tribunal.” In the case of the ICTY in particular, Cassese added that in their judicial proceedings international judges endeavored “to establish as judicial fact the full details of the madness that transpired in the former Yugoslavia.”

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22 ICTY President’s Fifth Annual Report, supra note 20, at para. 296.
23 ICTY President’s Fifth Annual Report, supra note 20, para. 296. Cf. Patricia Wald, The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on the Day-to-Day Dilemmas of an International Court, 5 WASH. U. J. LAW & POL’Y 87, 116-17 (2001) (noting that “the findings of judges may not produce the best approximations of history”). However, the factual accuracy of the historical record established by international tribunals has been challenged. See NANCY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).
24 ICTY President’s Fifth Annual Report, supra note 20, at para. 296 (emphasis added).
Furthermore, canvassing the discourse surrounding international criminal courts, the following ambitions are often associated with ICL: retribution, deterrence, reconciliation, rehabilitation, incapacitation, restoration, historical recording building, preventing revisionism, expressive functions, crystallizing international norms, general affirmative prevention, establishing peace, preventing war, vindicating international law prohibitions, setting standards for fair trials, and ending impunity.\(^\text{25}\) Ironically, such ambition, although usually well intended, has actually contributed to the politicization of the international judicial process.\(^\text{26}\)


My argument is that idealism about what international prosecutions can achieve has distorted the condemnation of high-ranking perpetrators and just distribution of punishment among the actors responsible for mass atrocities. This idealism sometimes manifests in the socio-political context, such as the conviction that international prosecutions will ipso facto lead to reconciliation. Other times this idealism reflects traditional criminal law consequentialism. I develop this thesis by examining the application of the goals of reconciliation and deterrence when sentencing of perpetrators of atrocity crimes. My conclusion is that, while both reconciliation and deterrence are laudable aspirations, these ideologies have perversely impacted sentencing such that the punishment too often does not reflect the culpability of the individual.

These ideologies have been interchangeably described as the purpose, aim, or objectives of international prosecutions, justifications for international criminal punishment, or sentencing rationales in international criminal law. Through unpacking the sentencing jurisprudence, this paper breaks new ground by advancing a theory on the relationship between ICL and consequentialist aspirations. Thus, the article’s findings are also instructive to international judges and others in the field for understanding how aspirations such as reconciliation and deterrence have influenced the severity of punishment at international criminal tribunals. The scope of this paper does not permit a full treatment of retributive approaches to ICL. It focuses primarily on a normative analysis of


consequentialism, supported by an empirical and jurisprudential examination of its influence on sentencing.

The perverse effects of this consequentialism frequently surface in the sentencing jurisprudence, giving critics an easy target to denounce international law as a political tool of powerful countries. In particular, ICL’s opponents target the apparently erratic sentences, the incoherent justifications, and the schizophrenic self-image of international criminal courts as evidence that international justice remains elusive in the current international paradigm, which is still largely the product of power.29 In a trial process that frequently appears opaque to outsiders because of complex facts, extraordinary crimes, and unfamiliar procedural rules, the sentence is one feature that is readily accessible to the affected communities. Unfortunately, as illustrated by local reactions and criticized by observers, the sentencing practice appears unprincipled, political and unjust.30 Sentences imposed by international criminal courts are slowly becoming the system’s Achilles’ heel.31 This raises concerns even

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31 See generally Shahram Dana, Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing, 99 J. CRIM.
among supporters of international criminal tribunals. Yet, there has been insufficient scholarly attention on ICL sentencing in academic literature. This paper thus responds in part to this paucity.

Specifically, this article explores the impact of consequentialist ideologies on international criminal justice, and in particular on sentencing of perpetrators. Part I elucidates the sentencing objectives advanced by the ad hoc international criminal tribunals. Here the goal is twofold: first, to gain initial clarity on what international judges purport to be the purpose of sentencing in international prosecutions, and second, to track trends and shifting methodologies by which judges construct this purposive narrative. Two objectives appeared most frequently in the early jurisprudence: retribution and deterrence. Reconciliation subsequently gained

LAW & CRIMINOLOGY 857 (2009) [hereinafter Dana, Beyond Retroactivity]; Mirko Bagaric & John Morss, supra note 27.

Many thoughtful scholars have called for greater attention to be given to the developing a coherent theory for sentencing atrocity perpetrators. See, e.g., Robert Sloane, Sentencing for the “Crime of Crimes”: The Evolving ‘Common Law’ of Sentencing of the International Criminal Tribunal for Rwanda, 5 J. INT’L CRIM. JUST. 713, 733-34 (2007) (noting that sentencing has not yet become an integral part of international criminal justice, but continues to be treated as an afterthought); Drumbl, Collective Violence, supra note 29, at 610 (lamenting under-theorization on this subject and calling for the need for evaluative research on international sentencing).

They could also be understood as utilitarian rationales. Other decisions influenced by one’s ideological vision of international prosecution include selection of situations, cases, defendants, and charges; presentation of evidence at trial; and punishment of perpetrators.


Trib. for the Former Yugoslavia Sept. 15, 2008),
http://www.icty.org/x/cases/delic/tjug/en/080915.pdf; Prosecutor v. Milošević,
Case No. IT-98-29/1-T, Trial Judgment, para. 987 (Int’l Crim. Trib. for the Former
Yugoslavia Dec. 12, 2007),
for the Former Yugoslavia June 12, 2007),
Zelenović, Case No IT-96-23/2-S, Sentencing Judgment, para. 31 (Int’l Crim. Trib.
for the Former Yugoslavia Apr. 4, 2007),
Krajišnik, Case No. IT-00-39-T, Trial Judgment, para. 1134 (Int’l Crim. Trib. for
the Former Yugoslavia Sept. 27, 2006),
Orić, Case No. IT-03-68-T, Trial Judgment, para. 718 (Int’l Crim. Trib. for the
Former Yugoslavia June 30, 2006), http://www.icty.org/x/cases/oric/tjug/en/ori-
jud060630c.pdf; Prosecutor v. Limaj, Case No. IT-03-66-T, Trial Judgment, para.
723 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005),
Strugar, Case No. IT-01-42-T, Trial Judgment, para. 438 (Int’l Crim. Trib. for the
Former Yugoslavia Jan. 31, 2005),
Blagojević & Jokić, Case No. IT-02-60-T, Trial Judgment, para. 817 (Int’l Crim.
Trib. for the Former Yugoslavia Jan. 27, 2006),
http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf;
Prosecutor v. Deronjić, Sentencing Judgment, supra note 52, paras. 142-50;
Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, paras. 900-02 (Int’l
Crim. Trib. for the Former Yugoslavia July 31, 2003),
Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment, para. 838 (Int’l
Crim. Trib. for the Former Yugoslavia Feb. 22, 2001),
Delalić, Case No. IT-96-21-A, Appellate Judgment, para. 806 (Int’l Crim. Trib. for
the Former Yugoslavia Feb. 20, 2001),
Aleksovski, Case No. IT-95-14/1-A, Appellate Judgment, para. 185 (Int’l Crim.
Trib. for the Former Yugoslavia Mar. 24, 2000),
Blaškić, Case No. IT-95-14-T, Trial Judgment, paras. 761-62 (Int’l Crim. Trib.
for the Former Yugoslavia Mar. 3, 2000),
Kupreškić, Case No. IT-95-16-T, Trial Judgment, para. 848 (Int’l Crim. Trib. for
the Former Yugoslavia Jan. 14, 2000),
Erdemović, Case No. IT-96-22-T, Sentencing Judgment, paras. 58, 64 (Int’l
Crim.
considerable traction, especially after the sentencing of Biljana Plavšić, correlating with the coming of age of plea-bargaining at international tribunals. What started out as an ill-fated justification for plea-bargaining genocide morphed to a general aim of international prosecutions.

Part II examines more closely the influence of deterrence and reconciliation ideologies. The analysis demonstrates how these consequentialist ideologies lead to injustice and perverse results in sentencing. I argue that reconciliation should be abandoned as a rationale for sentencing purposes, and deterrence should be limited in its influence on the final sentence. Punishment influenced by these two ideologies often distorts the individual perpetrator's culpability. This is not to say that international criminal justice cannot contribute to these aspirations, but rather that such aspirations should not be as influential in sentencing judgments as they have been thus far. As Hannah Arendt concluded regarding criminal trials for mass atrocities, after observing the prosecution of a former Nazi SS Lieutenant Colonel: “The purpose of a trial is to render justice and nothing else; even the noblest of ulterior purposes . . . only detract

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37 See NANCY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH (2007) [hereinafter COMBS, GUILTY PLEAS], for further discussion on plea-bargaining at international tribunals.

from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.”

I. SENTENCING OBJECTIVES ADVANCED BY INTERNATIONAL CRIMINAL TRIBUNALS

What justifies international criminal justice mechanisms like the ICC and its recent predecessors like the United Nations International Criminal Tribunals for Rwanda and the former Yugoslavia? This is a question that the ICTY and ICTR never really settled. Over time, they advanced an impressive array of “functions” of international criminal courts. Some of these functions are similar to justifications for punishment found in domestic systems, such as retribution, deterrence, and rehabilitation. Others are proffered as

39 HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253 (1964).


“special” or “unique” to international criminal law, such as reconciliation and preventing revisionism.42

The vision of international criminal justice that is prioritized will crucially shape the character of the ICC. Identifying a primary justification for international criminal law, of course, does not mean that ICL cannot make a meaningful contribution to other goals. However, it is imperative that the ICC coalesces around a primary justification for its work and set modest expectations. An idealism that avoids prioritizing goals and eagerly pursues them all can only delay the inevitable choice, as the experience of ad hoc international criminal tribunals reveals, because some of these objectives are in conflict. Eventually international judges are forced to prioritize. This article hopes to inform that decision-making process by evaluating the consequences of that choice through an examination of the sentencing jurisprudence and practice of international tribunals.

A. Developing a Framework: Paucity of Positive Law

Almost exactly fifty years to the day, a three judge trial chamber of the ICTY issued the first sentence by an international criminal tribunal for atrocity crimes since the International Military Tribunal for the Far East punished military and political leaders of the Empire of Japan following World War II. When the three judges, who were from France, Costa Rica, and Egypt, gathered in The Hague, in a building that formerly housed an insurance company, to deliberate on a just punishment for a war criminal, they found that “[n]either the Statute nor the Report of the Secretary-General nor the Rules elaborate on the objectives sought by imposing such a sentence.”43 In identifying justifications for punishment and aims of

sentencing in international criminal law, international judges have
drawn largely from four sources: (1) the preamble of the Security
Counsel Resolution establishing the ICTY and ICTR; (2) penal
theories from national law; (3) the Nuremberg legacy, and (4) human
rights norms.

The preamble provisions of Security Council Resolutions
establishing the ICTY and ICTR are primarily intended to set forth
the legal basis for Security Council action under Chapter VII
pursuant to the U.N. Charter. It is doubtful that they were intende
d as instructions for judges at the time of sentencing. Nevertheless, the
methodology of the International Tribunals has been to turn to these
provisions in their respective constitutive Resolutions to formulate
objectives of international sentencing. This methodology assumes
that the conditions required to trigger the Security Council’s powers
under Chapter VII of the U.N. Charter would suffice for developing
the justification and purpose of punishment of perpetrators of
atrocity crimes. It also assumes that the reasons supporting
international prosecutions are one and the same as the rationales to
guide its sentencing practice. In connection with establishing the
ICTY, Security Council Resolution 808 states:

\textit{Determined to put an end to such crimes and to take
effective measures to bring to justice the persons who are responsible for them,}

ICTY does not offer a consistent philosophical approach to international
sentencing.

\textsuperscript{44} While there is a natural overlap between the justification for
international prosecutions and the object and purpose of international sentencing,
they cannot be assumed to be identical. Unfortunately, this distinction and its
relevance to international sentencing cannot be pursued in the short context of this
Punishment and Responsibility} 1 (2d ed. 2008). \textit{See} also Margaret M.
deGuzman, \textit{Choosing to Prosecute, supra} note 16, at 288-89 (making a distinction
between justifications for the establishment of the International Criminal Court and
rationales to guide case selection).

\textsuperscript{45} \textit{E.g.} Prosecutor v. Kamuhanda, Judgment and Sentence, \textit{supra} note 38,
at paras. 753-54.

\textsuperscript{46} Prosecutor v. Kamuhanda, Judgment and Sentence, \textit{supra} note 38, at
paras. 753-54.
Convinced that in the particular circumstances of the former Yugoslavia, the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.⁴⁷

Likewise, Security Council Resolution 955, establishing the ICTR, states:

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.⁴⁸

Both Resolutions speak to the Security Council’s determination “to put an end to” international crimes, such as genocide, crimes against humanity, and war crimes, and “to bring to justice” the perpetrators. Furthermore, the Resolutions proclaim the Security Council’s conviction that international prosecutions “would enable this aim to be achieved.” Presumably, “this aim” refers to what was mentioned in the previous paragraph: “to put an end to such crimes” and “to bring to justice the persons” responsible. Thus, in the opinion of the Security Council, international prosecutions would “put an end to” international crimes and “bring to justice” the perpetrators. Moreover, the Security Council is also convinced that prosecution “would contribute to the restoration and maintenance of peace.” While some ICTY judges have relied on this particular phrase to claim that the court’s purpose is to promote national

⁴⁷ S.C. Res. 808, 48th Year, S/RES/808 (Feb. 22, 1993). See also S.C. Res. 827, supra note 34.
⁴⁸ S.C. Res. 955, supra note 34, at paras. 1-2.
reconciliation, it is doubtful that this was the intent. This language is boilerplate and appears in every resolution that invokes Security Council’s enforcement powers under Chapter VII. It is necessary to set for the legal basis of the Council’s use of Chapter VII. Interestingly, while Resolutions 808 and 827 are silent regarding reconciliation, Resolution 955 establishing the ICTR explicitly mentions “national reconciliation” as part of the ICTR’s mandate. Although Tribunal judges routinely turn to their respective resolutions to formulate sentencing rationales, their judgments do not address important differences in the texts of these resolutions.

B. Extraordinary Crimes, Ordinary Objectives: Retribution and Deterrence

Although the sentencing jurisprudence of the ad hoc tribunals has never adequately distinguished between a justification for punishment versus the aims of punishment, the initial cases identified two primary purposes: retribution and deterrence. A number of years later, the Blaškić Trial Chamber added rehabilitation and protection of society to the primary purposes of ICL sentencing, but

50 S.C. Res. 955, supra note 34, at paras. 1-2.
51 There is some concern that the judges may not have even noticed these differences. For example, Judge Inés Monica Weinberg de Roca opines about the “identical formulation” of resolutions establishing the ad hoc Tribunals. See Inés Monica Weinberg de Roca & Christopher M. Russi, Sentencing and Incarceration in the Ad Hoc Tribunals, 44 STAN. J. INT’L L. 1, 2 (2008).
it did so without explanation or analysis.\textsuperscript{53} These “four parameters” – retribution, deterrence, rehabilitation, and protection of society – mirror the rationalizations for sentencing found at the national level.\textsuperscript{54} However, scholars contest the applicability and relevance of these rationales to international criminal justice.\textsuperscript{55} As the sentencing jurisprudence developed, retribution and deterrence emerged as the primary rationales in ICL punishment.\textsuperscript{56} Some observers criticize


\textsuperscript{54} Id.


ICL’s focus on retribution and deterrence, hallmarks of a national system’s response to ordinary crimes, as an unimaginative and unoriginal response to atrocity crimes. Modesty, however, may be a safeguard for a nascent international justice system. Ambitious social engineering in the wake of mass atrocities is wisely left to other social processes and institutions. Legalism has its limits, and those limits should be respected. Its formality, rigidity, and obligation to protect the rights of parties make it a limited agent of social change. These meta-juridical goals require a matrix of social and spiritual institutions working together to rebuild the fabric of society post-atrocity. When other institutions and agents of society share this responsibility, international criminal justice can play a modest but important role.

Of course, this is not intended to suggest that deterrence or retribution are easy goals, but they are more familiar to a criminal justice mechanism. According to the Tribunal, the goal of general deterrence implies that “[t]he sentence imposed must also be sufficient in order to dissuade others from committing the same crime.” Individual deterrence, on the other hand, “refers to the


57 See, e.g., Drumbl, Collective Violence, supra note 29, at 610.
specific effect of the sentence upon the accused” sitting in judgment before the court.\textsuperscript{59} The “sentence should be adequate to discourage an accused from recidivism.”\textsuperscript{60} In other words, the punishment should discourage an accused from re-offending after the sentence has been served and the accused has been released.\textsuperscript{61}

The general jurisprudence of the Appeals Chamber affirms that the objective of deterrence, both general and specific, may influence the sentence.\textsuperscript{62} However, it has also cautioned: “this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.”\textsuperscript{63} ICTY trial chambers recognize both specific and general deterrence have “an important function in principle” and serve “an important goal of sentencing.”\textsuperscript{64} Some trial chambers have applied the term “individual” deterrence when referring to specific deterrence.\textsuperscript{65} Other trial chambers rejected the applicability of specific deterrence in international criminal justice. For example, although the Trial Chamber in the Dragan Nikolić case recognized that specific deterrence “has an important function in principle and serves as an important goal of sentencing,”\textsuperscript{66} it

\textsuperscript{65} \textit{Id.} at paras. 134-35.
\textsuperscript{66} \textit{Id.} at para. 134.
nevertheless found that specific deterrence had no relevance in the case before it. The court did not elaborate on why it found that specific deterrence has no relevance to the punishment of Dragon Nikolić. The judges perhaps concluded that the aim of specifically deterring Nikolić from committing crimes against humanity is moot, assuming the circumstances that provided an opportunity for these crimes to be committed, namely war, will not be present when the accused is released.

Outside the tribunals, opinions are split on whether international prosecutions have any deterrent value. Professor Payam Akhavan argues that mass atrocities are the product of “elite-induced” violence aimed at the acquisition or preservation of power. Leaders are making calculated choices and trade-offs and engaging in an immoral cost-benefit analysis. Akhavan makes a compelling case that political power gained through fomenting ethnic hatred resulting in mass violence can be discouraged. Threat of punishment and international stigmatization “can increase the costs of a policy that is criminal under international law.” According to Akhavan, this can in turn impact the calculations of leaders contemplating engagement in criminal policies such as ethnic cleansing, genocide, or crimes against humanity as a viable policy for sustaining power. Most supporters of deterrence in ICL acknowledge that some individuals may not easily be dissuaded from committing crimes when surrounded by routine cruelty. However, they maintain that punishment can be an effective deterrent in preventing such deviant contexts prior to their occurrence, or recurrence, in post-conflict situations.

67 Id. at para. 135.
69 Id.
70 Id.
71 Generally see the following: Akhavan, Beyond Impunity, supra note 68; Rolf Einar Fife, Penalties, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, 211-36 (Roy S. Lee ed.,1999); Dominic McGoldrick, The Permanent International Criminal Court: An End to the Culture of Impunity?, CRIM. L. REV., Aug. 1999, at 627; M. Cherif Bassiouni, Searching for Peace and Achieving Justice:
Others are much more skeptical about the deterrent capacity of international prosecutions.\textsuperscript{72} Professor Jan Klabbers, for example, takes the position that ICL will not play a significant deterrent role because human rights violators cannot be deterred.\textsuperscript{73} He argues that the cost-benefit analysis underlying the deterrence argument advanced by Akhavan and others cannot be applied to human rights violators because they act mainly for political reasons. Because they willfully engage in mass murder for political motives, Klabbers considers them undeterrable. But there is no reason to assume that political motivations are beyond deterrence. As Professor Isaac Ehrlich observes, “willful engagement in even the most reprehensible violations of legal and moral codes does not preclude an ability to make self-serving choices.”\textsuperscript{74} In sum, while the scholarship is divided on the deterrent capacity of international criminal law, tribunal judges nevertheless consider deterrence as a central purpose of international prosecution and claim that it is an influential factor in their sentencing decisions.

\section*{C. The Lip Service to Rehabilitation}

One sentencing purpose proffered by international criminal tribunals that appears to have no impact on sentencing allocations is rehabilitation. International human rights treaties encourage rehabilitation considerations in national penology.\textsuperscript{75} While the focus of these treaties appears to be on the administration of prisons and

\textit{the Need for Accountability, 59 L. \\& CONTEMP. PROBS. 9 (1996), for support of deterrence in ICL.}

\textsuperscript{72} Jan Klabbers, \textit{Just Revenge? The Deterrence Argument in International Criminal Law}, 7 FIN. Y.B. INT’L. L. 249 (2001) (disagreeing that human rights violators can be deterred); Drumbl, \textit{Collective Violence, supra} note 29, at 610 (claiming that there is little or no evidence that punishment deters perpetrators of mass atrocities).

\textsuperscript{73} Klabbers, \textit{Just Revenge?}, supra note 72, at 253.


the manner of enforcement of a sentence, the ICTY has purported to consider such provisions when determining the length of the sentence itself.

In the early sentencing jurisprudence of the ICTY, several trial chambers stated that rehabilitation is one of the “four parameters” that guide international sentencing. However, it is fair to say that rehabilitation was never highly significant in the determination of a sentence and did not act as a meaningful “parameter” to limit the sentence. This was made apparent in the Trial Chamber’s judgment of General Blaškić. Despite acknowledging “rehabilitation” as one of the parameters guiding its determination of Blaškić’s sentence, and despite its own factual finding strongly indicating the possibility of rehabilitation in the case of General Blaškić, the Trial Chamber nevertheless decided to not give these factors any weight, and certainly its forty-five-year sentence leaves little trace of rehabilitation considerations, especially since Blaškić was forty years old when he was sentenced. Such a sentence suggests that the Tribunal was eager to send a strong signal of deterrence, and that this ideology predominated its sentencing considerations, even to the extent, some would argue, of trial chambers distributing exemplary sentences or exemplary justice and placing that foremost in their considerations. Taking caution that this practice did not go too far, the Appeals Chamber stated in one of its judgments that “this factor [deterrence] must not be accorded undue

80 Prosecutor v. Blaškić, Judgment, supra note 78, at para. 762.
prominence in the overall assessment of the sentences.”

It has likewise explicitly pronounced that “rehabilitation should not be given undue weight, confirming what was already implicit in the sentencing practice of earlier cases.”

D. The Rise of Judicial Idealism: Enter Reconciliation & Social Engineering

The U.N. Security Council resolution establishing the ICTY does not mention “reconciliation” as such. Neither does the ICTY Statute or its Rules of Procedure and Evidence (RPE). Likewise, the preamble and statute of the ICC avoid incorporation of reconciliation as a goal of international prosecutions. Furthermore, reconciliation ideology is virtually absent in the early practice of the ad hoc Tribunals.

Even in the first few cases involving guilty pleas and plea bargains, international judges did not justify sentencing discounts in terms of promoting reconciliation. The practice of justifying plea deals in terms of reconciliation became popular only much later. This is not to be confused with judicial unawareness of the potential contribution that international prosecutions and just punishments could make towards reconciliation in a post-conflict society.


83 See Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, para. 806 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf (stating that “although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight”).


86 In the first annual report to the Security Council, the ICTY President Antonio Cassese noted that international criminal justice mechanisms can promote reconciliation and restore “true peace.” See President of the Int’l Crim. Trib. for the Former Yugoslavia (ICTY), 1st Ann. Rep. of the Int’l Crim. Trib. for the Former
initial judges of the ad hoc Tribunals were mindful of this potential, but did not consider it as a differential principle for the purpose of allocating punishment. This is most likely because reconciliation is largely unmeasured, slow building and aspirational. Successful reconciliation requires the mobilization of diverse elements of social and legal order. Justice through criminal prosecution of violators of community norms is merely one step towards that goal.

Although reconciliation is an important goal, the first generation of international criminal law judges understood it could not be captured by legalism or transformed into an operational rule or principle. The very nature of mass atrocities problematizes achieving grand ambitions like reconciliation because the widespread participation in atrocity crimes creates deep complicity that is not easily overcome through the narrow lens of judicially constructed narratives via international criminal justice mechanisms. Moreover, international judges were initially hesitant to act as arbiters of history or to develop judicial narratives of the background to the conflict that would serve as a platform for reconciliation.

87 Prosecutor v. Erdemović, Sentencing Judgment, supra note 43, at paras. 57-66 (discussing factors influencing sentence allocation but not treating reconciliation as a sentencing factor). See also Wald, The International Criminal Tribunal for the Former Yugoslavia Comes of Age, supra note 23 (discussing reconciliation through judicial adjudication).


89 See Note of Secretary-General: Rep. of ICTY, supra note 86, at para. 16.

90 See Wald, The International Criminal Tribunal for the Former Yugoslavia Comes of Age, supra note 23, at 117 (concluding that ‘‘adjudication’’ by ICTY of who started, prolonged, or ended the war and why in the context of criminal proceedings without the states themselves having input is basically unfair, or at least does not contribute to future reconciliation’’). See also Prosecutor v. Erdemović, Sentencing Judgment, supra note 43; Prosecutor v. Kambanda, Judgment and Sentence, supra note 41; Prosecutor v. Sikirića, Sentencing Judgment, supra note 84.

91 See, e.g., Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Judgment, para. 88 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998),
Reconciliation subsequently gained traction in the Tribunals’ jurisprudence when an increasing number of convictions were secured by plea bargains. However, with plea bargains, the historical narrative of “what happened” was no longer constructed in open and public courts by documentation and witnesses to the atrocities, as was done at Nuremberg, but behind closed doors in negotiations between perpetrators and international lawyers. In sentencing judgments following a guilty plea or plea bargain, reconciliation became a useful ideology to legitimize plea deals and justify sentencing discounts. While actors within the system view sentencing reductions as a normal outcome of plea bargains, local populations, especially where plea bargaining is foreign to the domestic legal culture, view the sentencing reduction as political favoritism to a particular ethnic group, unwillingness of elites to hold other elites accountable, failure to acknowledge the suffering and

http://www.icty.org/x/cases/mujeic/tjug/en/981116_judg.pdf. (stating that the “Trial Chamber does not consider it necessary to enter into a lengthy discussion of the political and historical background to these events, nor a general analysis of the conflict”).

92 Notwithstanding the fact that the “role of criminal tribunals as arbiters of historical truth has been contested since the first serious efforts of international justice, at Nuremberg and Tokyo.” See SCHABAS, UNIMAGINABLE ATROCITIES, supra note 17, at 157.

93 For concerns that plea-bargaining distorts the historical record, see COMBS, GUILTY PLEAS, supra note 37, at 67, 207.


95 Tribunal lawyers from civil law countries were initially concerned about the practice of plea-bargaining. See Nancy A. Combs, Copying a Plea to Genocide: The Plea Bargaining of International Crimes, 151 U. PA. L. REV. 1, 139-41, 53 (2002) (reporting that judges and lawyers from civil law countries were uncomfortable with plea bargaining at international tribunals).
injustice inflicted on victim communities, or secretive deal-making.\textsuperscript{96} Thus, the entrenchment of reconciliation ideology in ICL jurisprudence is largely a reactionary effort to legitimize the practice of plea bargaining in the face of mounting criticism.

Crucially, for this push back to be successful, the goal of reconciliation needed to be firmly anchored in the Tribunal’s mandate. The problem facing the judges, however, was that Security Council Resolution 827, establishing the ICTY, did not position reconciliation as a teleological imperative.\textsuperscript{97} In fact, the resolution does not even mention the word “reconciliation,” thus calling into question whether reconciliation ideology should be considered as part of the Tribunal’s mandate.\textsuperscript{98} Nevertheless, some ICTY judges took it upon themselves to inject the goal of reconciliation into the court’s mandate through a flawed interpretation of Resolution 827 that, even if well intended, was beyond the Tribunal’s mandate and institutional capacity. They attempted to situate the Tribunal’s role in promoting reconciliation within Resolution 827’s reference to “contribute to the restoration and maintenance of peace.”\textsuperscript{99} Unfortunately, this methodology suffers from over dependence on the unlikely assumption that, by such preambular declarations, the Security Council intended to articulate a philosophy to guide international sentencing.\textsuperscript{100} Even if we accept the assumptions necessary for this interpretation, this language fails to justify the emphasis given to the notion of reconciliation in ICL sentencing practice, resulting frequently in perversely lenient sentences. Arguably, restoration and maintenance of peace, in this context (i.e. criminal justice forum), require the realization of justice by accountability for crimes and fair punishment for wrongdoing. Thus, even assuming that reconciliation is part of the Tribunal’s mandate, a difficult question follows: what

\textsuperscript{97} See S.C. Res. 827, supra note 34.
\textsuperscript{98} See Clark, The Limits of Retributive Justice, supra note 42, at 465 (challenging the merits of reconciliation and historical record building as goals of international criminal justice mechanisms).
\textsuperscript{99} S.C. Res. 827, supra note 34, at 1.
\textsuperscript{100} The assumption also requires us to ignore the more obvious and immediate purpose of such declarations in the preamble, namely to trigger the Security Council’s coercive powers under Chapter VII.
impact, if any, should the aim of reconciliation have in the
determination of a sentence for international crimes?

The complexities and difficulties of advancing reconciliation ideology as part of the core mandate of the Tribunal were not fully appreciated when it gained traction as a justification for the increasing practice of plea-bargaining. Nevertheless, the notion of reconciliation now appears frequently, but largely perfunctory, in sentencing judgments.\footnote{Prosecutor v. Babic, Case No. IT-03-72-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia June 29, 2004), http://icty.org/x/cases/babic/tjug/en/bab-sj040629e.pdf; Prosecutor v. Banovic, Case No. IT-02-65/1-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 28, 2003), http://icty.org/x/cases/banovic/tjug/en/ban-sj031028e.pdf; Prosecutor v. Mrda, Case No. IT-02-59-S (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2004), http://icty.org/x/cases/mrda/tjug/en/sj-040331.pdf.} Despite its absence from the court's constitutive documents, the extant practice among ICTY judges is to cursorily identify “promoting reconciliation” as part of the Tribunal's mandate. Thus, romanticism about international tribunals “promoting reconciliation” persists even though it remains elusively conceptually and pragmatically.\footnote{See Clark, The Limits of Retributive Justice, supra note 42, at 465 (challenging the merits of reconciliation and historical record building as goals of international criminal justice mechanisms).} While the Tribunals have clarified how concepts such as “retribution” and “deterrence” are to be understood in the context of international criminal justice, the notion of “reconciliation” has remained undefined. Tribunal judges have struggled to coherently develop and integrate this concept in their decision-making and sentencing judgments.\footnote{See Kamatali, The Challenge of Linking International Criminal Justice, supra note 40, at 121-24, for arguments on how the ICTR’s approach to jurisprudential issues regarding genocide can undermine Rwandan reconciliation.} The lack of clarity on what “reconciliation” means for international criminal justice, however, has not inhibited trial chambers from relying on it when allocating a sentence. Unfortunately, they have misapplied the notion of reconciliation in their sentencing judgments. As discussed in detail below, the ICTY’s method of realizing reconciliation appears to contradict the aim of combating impunity, which is explicitly part of the Tribunal’s mandate.
E. Didactic Function of International Prosecutions: Affirmative Prevention

Some of the objectives of punishment for atrocity crimes as articulated by the ad hoc tribunals mirror those found at the national level, such as deterrence, retribution, rehabilitation, and protection of society. In addition, other considerations influence sentencing allocations in the international context such as national reconciliation, preserving history, and maintaining peace. Another important consideration in the international context is reinforcing the values of the international community. The work of international courts contributes to internalizing norms, values, and interests protected by international law in the consciousness and culture of national and international actors. An important step in the evolution of the global legal order is the crystallization of universal norms as more than mere soft law provisions, but rather as binding law backed by punishment for violations, especially norms embedded in human rights treaties, international humanitarian law conventions, and the Genocide Convention.

Referred to by some commentators as the didactic function, in the context of international criminal justice this
translates into building awareness of the distinction between legal and criminal conduct during war or armed conflict, whether international or non-international in character. At first blush, this aim may appear rather simplistic. After all, the line between legal and criminal conduct is rather obvious when considering murder, rape, torture, and other such crimes that occur in the context of armed conflict. However, crimes committed in these situations are often precipitated by direct and implicit indoctrination that dehumanizes the victim. Coupled with the awareness that war crimes historically go unpunished, these forces converge to disease belligerents with a “culture of inverse morality” where killing, raping, and terrorizing civilians becomes an accepted part of the warfare itself.

An individual’s inner sense of morality and repulsion towards such brutality is overridden by peer pressure from immediate comrades and superiors, and reinforced by inflammatory rhetoric of national leaders. The perversity can reach a point where, far from being considered wrongful, violence against “the other” is considered a righteous deed. Thus, an educational or didactic function as an objective of sentencing is particularly significant in the context of international law.\(^{109}\) Moreover, it approaches the notion of deterrence from a positive perspective of crime prevention. In addition to building awareness of international law, international sentencing may also help reinforce specific values that the international community seeks to advance such as tolerance or the immorality and wrongfulness of persecution of peoples on the basis of race, religion, ethnicity or nationality. At this same time, it is interesting to contemplate the moral dilemma and paradoxes of sustaining morality in war. The evils that inhere in war problematize achieving a didactic function through legalism, as does our extant framework. We outlaw aggressive war, but once that rule is violated, we say killing of a combatant by a combatant is lawful and killing of civilians is

\(^{108}\) See Akhavan, Beyond Impunity, supra note 68, at 7, 10, 12.

unlawful. It is a position that is morally problematic, a legal fiction that struggles to survive the realities of war.

Some international judges, notably Judge Wolfgang Schomburg, have advanced the didactic function of international sentencing for atrocity crimes.\textsuperscript{110} In sentencing a perpetrator to twenty-three years of imprisonment for persecution as a crime against humanity, Judge Schomburg opined that punishment by an international criminal court “is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.”\textsuperscript{111} He further added: “this fundamental rule fosters the internalisation of these laws and rules in the minds of legislators and the general public.”\textsuperscript{112} According to this ideology, “influenc[ing] the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public” and “reassur[ing] them that the legal system is implemented and enforced” is one of the main purposes of international punishment.\textsuperscript{113} Criminologists and criminal law scholars have likewise embraced the “general affirmative prevention” function of international criminal prosecutions.\textsuperscript{114}

While international criminal prosecutions can contribute to this educational or didactic aim, it is unclear how this rationale can serve a differential principle to guide sentencing allocations. Even international judges who embrace didactic aims accept this limitation


\textsuperscript{111} Prosecutor v. Nikolić, Trial Sentencing Judgment, \textit{supra} note 58, at para. 139.

\textsuperscript{112} Prosecutor v. Nikolić, Trial Sentencing Judgment, \textit{supra} note 58, at para. 139. Other trial chambers have also followed this approach. See, \textit{e.g.}, Prosecutor v. Deronjić, Sentencing Judgment, \textit{supra} note 52, at para. 149.

\textsuperscript{113} Prosecutor v. Nikolić, Trial Sentencing Judgment, \textit{supra} note 58, at para. 139.

\textsuperscript{114} Akhavan, \textit{Beyond Impunity}, \textit{supra} note 68, at 7; Damaska, \textit{What is the Point}, \textit{supra} note 40, at 334-35, 339, 345; Nemitz, \textit{The Law of Sentencing in International Criminal Law}, \textit{supra} note 25.
of the didactic function.\textsuperscript{115} Expressivism thus becomes a potential consequence of international punishment for atrocity crimes, but not a factor for allocating sentence severity. The ICTY’s leading proponent of the expressive potential of ICL, Judge Schomburg, prioritized retributivism over expressivism for the purposes of sentencing.\textsuperscript{116} Expressivism operates under the umbrella of retributivism. In fact, absent a firm grounding in retributive justification, the expressive function loses its meaning and moral force. The “culture of inverse morality”\textsuperscript{117} accompanying atrocity crimes does not take root for lack of awareness of the wrongfulness of the conduct. Rather, the absence of accountability and punishment in the face of pressures and orders from fellow soldiers and superiors sufficiently weakens the individual’s moral resistance and motivation.

F. Judicial Schizophrenia? Between Punitive and Restorative Approaches

As reconciliation ideology gained traction in the jurisprudence, it challenged the tribunal’s rhetoric that retribution and deterrence are the primary goals of sentencing for atrocity crimes.\textsuperscript{118} The jurisprudence, however, is unsettled as to which ideology is the primary rationale in international punishment and which ones are secondary. Consequently, inconsistency, indeterminacy, and confusion persist from case to case when attributing priority and thus

\textsuperscript{115} Prosecutor v. Nikolić, Trial Sentencing Judgment, supra note 58, at para. 123 (ruling that “the individual guilt of an accused limits the range of the sentence”).

\textsuperscript{116} Id.

\textsuperscript{117} Akhavan, Beyond Impunity, supra note 68, at 10.

the influence of these rationales in sentencing allocations. \footnote{Andrew Ashworth & Andrew von Hirsch, Principled Sentencing: Readings on Theory and Policy 167 (Andrew Ashworth et al. eds., 3d ed. 2009) (arguing that identifying a priority among sentencing rationales is essential to achieving consistency and justice).} This results not only in the appearance of unfair sentences but also in arbitrary advancement of sentencing rationales. Thoughtful scholars, like Professor Mark Drumbl, Jan Nemitz, and Professor Mirjan Damaska, have observed that under-theorization and lack of clarity among international judges regarding the purpose of international criminal prosecutions has undermined the court’s integrity and credibility. \footnote{See Damaska, What is the Point, supra note 40, at 330 (arguing that “current views on the objectives international criminal courts are in disarray”); Drumbl, Collective Violence, supra note 29, at 593; Nemitz, The Law of Sentencing in International Criminal Law, supra note 25.} Nemitz criticizes international judges for engaging in “ex post facto justification” designed to legitimize a pre-determined end. \footnote{Nemitz, The Law of Sentencing in International Criminal Law, supra note 25.} His “ex post facto” criticism merits further consideration, especially regarding the advancement of reconciliation as both a grounds for justifying the practice of plea-bargaining and as a mitigating factor. \footnote{See infra note 133.}

appear to vacillate between retribution and deterrence ideologies. They do, however, vacillate between retribution and deterrence together on the one hand, and reconciliation on the other. Thus, I build on Drumbl’s theory and push the discussion forward by

focusing on vacillation between reconciliation on the one hand and the two joint factors of retribution and deterrence on the other hand.

In other words, the tension is between restorative and punitive approaches. A number of factors have led me to prefer this explanation. First, almost every sentencing judgment of the ad hoc tribunals identifies both retribution and deterrence as the main rationales of international sentencing.\(^{125}\) Thus, to argue that international judges vacillate between retribution and deterrence requires us to focus on one or two outlier judgments and ignore the bulk of the jurisprudence. The argument is advanced by creating three markers on a vacillation continuum: (1) judgments that treat retribution and general deterrence equally, (2) others that cite retribution as the “primary objective”, and (3) a third group that considers “deterrence as probably the most important.”\(^{126}\)

The problem is that these markers do not carry the same weight or significance. When one plots all the cases on a continuum, the overwhelming majority of cases fall into group one. Only a few cases fall in groups two or three. Drumbl’s research confirms this.\(^{127}\) For example, only one case (the Čelebići Trial Judgment) can be found to hold the space of the third marker, making it in my opinion more of an exception rather than a true vacillation. Additionally, the Čelebići Trial Chamber doesn’t even fully commit itself: it states “deterrence probably is the most important factor.”\(^{128}\) Moreover, on appeal the Appeal Chamber distances itself from this notion by explicitly ruling that deterrence should not be given undue prominence in the determination of a sentence and suggesting that retribution and

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127 Drumbl, Collective Violence, supra note 29, at 560 et seq.
deterrence are equal considerations.\textsuperscript{129} Thus, any value that the trial judgment potentially offered for the retribution-deterrence vacillation argument has been overruled by the Appeals Chamber.

The majority of judgments do not explicitly prioritize between retribution and deterrence. Instead, they appear to treat them as “equally important.”\textsuperscript{130} The following has become a standard formulation found in these judgments (or language very similar): “the main purposes of sentencing for these crimes are deterrence and retribution.”\textsuperscript{131} Of course, whether these rationales in fact influence sentencing allocations is another question entirely. However, I would advance Drumbl’s thesis by focusing on vacillation between reconciliation on the one hand and the two joint factors, retribution and deterrence, on the other hand. This vacillation is more problematic for ICL because it exerts a more substantial, yet unpredictable, influence on the sentence.

Furthermore, it highlights the serious and real tension between traditional criminal law functions (retribution and deterrence) and broader aspirations such as reconciliation and building a historical record. The vacillation argument takes new life when we unpack the impact of reconciliation ideology on the determination of a sentence. In fact, making more transparent the role of reconciliation in atrocity sentencing may help identify factors


\textsuperscript{131} Prosecutor v. Delalić, Appeals Judgment, supra note 118, at para. 806.
that contribute to seemingly incoherent sentences in international criminal law. Granted, establishing this link is immensely more challenging as reconciliation ideology is more influential in sentencing judgments following plea bargains, thus introducing a whole set of additional factors that complicate the sentencing matrix. Nevertheless, as elaborated more fully below, the introduction of reconciliation ideology into the determination of a sentence has considerably increased indeterminacy and confusion in international penology.

Before moving on to Part II, which focuses on deterrence and reconciliation, I acknowledge that there are many other factors that have been proffered as aspirations of international prosecutions. As noted above, these include restoring peace, preserving a historical record of the atrocities to prevent revisionism, ending impunity, protecting the rights of the accused with exemplary standards for fair trials, halting active armed

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134 Jonathan A. Bush, Nuremberg: The Modern Law of War and Its Limitations, 93 COLUM. L. REV. 2070 (1993) (reviewing TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992)). However, the ICTY seems to recognize that this function should not dominate the proceedings and is not first and foremost among the objectives of international criminal prosecution. Moreover, it likewise acknowledges that the criminal justice process is not ideally suited for this function. Prosecutor v. Deronjić, Sentencing Judgment, supra note 52, at para. 135 (noting that the “Tribunal is not the final arbiter of historical facts. That is for historians.”).

135 See Robinson, The Identity Crisis of International Criminal Law, supra note 20, at 926; Pejic, Creating a Permanent International Criminal Court, supra note 109, at 294.
conflict,136 providing reparations to victims,137 denouncing racist ideologies, disarming urges for revenge,138 establishing a narrative that culpability is individual and not collective,139 and vindicating international law.140 Many have been explicitly accepted by international judges as part of the mandate of international criminal tribunals.141 This overburdening of ICL has complicated the task of international judges. It is beyond the scope of this article to address all of these aspirations, given that many of the above objectives are better understood as aims of trial proceedings rather than principles for the purpose of sentencing allocations. Therefore, the following sections address deterrence and reconciliation because they appear frequently in the sentencing judgments.

II. PROBLEMATIC ENTANGLEMENT WITH DETERRENCE AND RECONCILIATION

A common criticism of ICL sentencing is that the proffered rationales for punishment are ill suited to atrocity crimes and that

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137 See Farer, Restraining the Barbarians, supra note 109, at 91; Pejic, Creating a Permanent International Criminal Court, supra note 109, at 292.

138 See Farer, Restraining the Barbarians, supra note 109, at 91.

139 See S.C. Res. 955, supra note 34, at para. 1; Pejic, Creating a Permanent International Criminal Court, supra note 109, at 292; Teitel, The Law and Politics of Contemporary Transitional Justice, supra note 25, at 857.

140 See S.C. Res. 827, supra note 34, at pmbl.; S.C. Res. 955, supra note 34, at pmbl. See also Farer, Restraining the Barbarians, supra note 109, at 91; Pejic, Creating a Permanent International Criminal Court, supra note 109, at 292.

141 See Prosecutor v. Obrenovic, Case No. IT-02-60/2-S, Sentencing Judgment, para. 111 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003), http://icty.org/x/cases/obrenovic/tjug/en/obr-sj031210c.pdf (finding that “restoring peace,” “establishing a historical record,” “countering denials,” and providing victims with “some form of closure” are part of the mandate of international criminal tribunals); Prosecutor v. Nikolić, Trial Sentencing Judgment, supra note 58, at para. 233 (Tribunal has the task to contribute to the “restoration and maintenance of peace” and to ensure that serious violations of international humanitarian law are “halted and effectively redressed”).
they do not in fact guide sentencing allocations at international criminal courts. Per the statutes of their respective courts, international criminal law judges, who come from diverse countries, cultures, and legal systems, enjoy wide discretion in sentencing. This is also true for the International Criminal Court. \(^{142}\) Compared to its predecessors, the ICC statute is more detailed, more rigid, and more procedural in nearly every aspect of the court’s functioning, \(^{143}\) except sentencing. \(^{144}\) The wide discretion in sentencing matters afforded to judges at the \textit{ad hoc} Tribunals failed to produce a unified articulated vision on punishment in the context of international criminal justice. The ICC might well draw important lessons in this regard. ICTY and ICTR judges have been accused of first sticking their arrow in the wall and then subsequently painting a bulls-eye target around it. In other words, international judges have a predetermined penalty in mind and simply mine among the rationales available to them under their wide discretion until they find one most convenient to their intended end. Although this may occur in some cases, it does not fully explain the sentencing practice. In the following sections, however, I will seek to offer a more comprehensive explanation.

A. Deterrence

The effectiveness of deterrence through punishment has been well debated at the national level. Many are skeptical of this function of punishment in the domestic context and have repeated their skepticism in the context of international criminal justice. \(^{145}\) Professor Tom Farer has noted that “[b]elief about the potential efficacy of penal sanctions as vehicles for enforcing international law is a fairly

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\(^{145}\) \textit{See, e.g.}, Jan Klabbers, \textit{Just Revenge? The Deterrence Argument in International Criminal Law}, 12 FIN. Y.B. INT’L L., 249-67 (2001) (disagreeing that human rights violators can be deterred); Drumbl, \textit{Collective Violence, supra note 29, at 609-10 (2005) (claiming that there is little or no evidence that punishment deters perpetrators of mass atrocities).}
straightforward extrapolation from the collective appreciation of law enforcement at the national level.”  He cautions, however, that “confidence in this extrapolation is not universally shared.” Any fair observer would have to concede that it is too early to judge whether international criminal justice can have an effective deterrent quality. If we consider Farer’s reminder that “one widely accepted dictum of domestic law enforcement is that a high probability of punishment generally deters more effectively than a very severe sanction rarely applied,” then the establishment of a permanent international criminal court can contribute to increasing the probability that instigators and prime movers of mass atrocities will be punished. International criminal law has long lacked the necessary enforcement mechanisms to give relative certainty to punishment for violations of human rights and international humanitarian law. Moreover, with the current international criminal justice system remaining dreadfully dependent on voluntary cooperation of states, questions still remain whether the international system, in its present state, can sustain a credible threat of certain punishment so as to deter potential violators. Full treatment of these questions is beyond the scope of this article, but we may begin the discussion by focusing on a narrower question: to what extent does the objective of deterrence actually influence sentencing considerations of international judges? The aim here is not simply to consider the rhetoric employed by international judges in their discussion of the sentence, but to go beyond the rhetoric and examine the practice itself.

All trial chambers without exception state that deterrence is one of the primary objectives in international sentencing. Several of

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146 Farer, Restraining the Barbarians, supra note 109, at 92.
147 Id.
148 Drumbl, Collective Violence, supra note 29, at 608 (noting that international criminal law “is still relatively young” and “in a nascent stage”).
150 For rulings by the ICTY Appeals Chamber see, for example, Prosecutor v. Delalić, Appeals Judgment, supra note 118, at para. 806 (“[T]he Appeals Chamber (and Trial Chambers of both the Tribunal and the ICTR) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution.”) (internal citations omitted)). For ICTY trial
the early sentencing judgments even considered deterrence to be “the most important factor” in determining a sentence for international crimes. Sending a strong message that the international community will not tolerate the perpetration of international crimes by political leaders and senior military officials has been considered as part of the Tribunals’ mandates from the very start. Particular importance was attached to effectively deterring the so-called “masterminds” and “architects” of genocidal policies and crimes against humanity.

However, deterrence is sometimes proffered as more than an objective of international sentencing. According to some ICTY judges, it is also the justification for punishment in international justice. As a justification, it operates as the prime determinant of the appropriate length of punishment. Thus, it is a factor that influences the trial chambers’ determination of the length of the sentence. Whether the goal of deterrence meaningfully influences ICTY sentences can be challenged; nevertheless the sentencing judgments ostensibly claim sentencing allocations to be deterrence orientated. For example, in the Dragan Nikolić case, the Trial Chamber held that deterrence was among the “[f]undamental principles taken into consideration when imposing a sentence.” Thus, the objective of deterrence was a factor that influenced the length of Dragan Nikolić’s
sentence. This was not the first time that an “objectives orientation” towards sentencing was adopted by an ICTY trial chamber to fix a sentence.\textsuperscript{153} Both the Blaškić case and the Todorović case express the view that the goal of deterrence may legitimately influence the sentence. In fact, the sentencing jurisprudence of international tribunals generally recognizes the “importance of deterrence as a consideration in sentencing for international crimes.”\textsuperscript{154} The Todorović Trial Chamber understood this to mean that the goal of deterrence is relevant to determining whether an individual’s punishment should be in the high or low end of the penalty range.\textsuperscript{155} Punishment “imposed by the International Tribunal must, in general, have sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so.”\textsuperscript{156} The Blaškić Trial Chamber likewise adopts an objectives-orientated approach, namely general deterrence, to sentencing. But do these trial chambers in fact follow it? In other words, do the results (i.e. the sentence impose) resonate with deterrence philosophy? What, if any, impact did deterrence have on the sentence of Todorović and Blaškić?

Todorović’s crimes included murder, sexual assaults, beatings, ordering and participating in the unlawful detention and cruel and inhuman treatment of non-Serb civilians, ordering subordinates to torture a person, ordering and participating in deportation and forcible transfers, ordering and issuing directives violating the rights of non-Serb civilians to equal treatment under the law, and infringing on their basic rights.\textsuperscript{157} He was convicted of persecution as a crime against humanity. He also participated in the forcible take over of the non-Serb towns and villages in the municipality of Bosanski Samac.\textsuperscript{158} Todorović was the Chief of Police in Bosanski Šamac and also a

\textsuperscript{153} See Dana, Revisiting the Blaškić, supra note 81, at 326.
\textsuperscript{154} Prosecutor v. Todorović, Sentencing Judgment, supra note 58, at para. 30 (citing Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, para. 185 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000)).
\textsuperscript{155} Prosecutor v. Todorović, Sentencing Judgment, supra note 58, at para. 30.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at para. 9
\textsuperscript{158} Id. at paras. 12, 35.
member of the Serb Crisis Staff. The Todorović Trial Chamber considered “his abuse of such a superior position” and the “particular cruelty” and “duration” of the beatings as an aggravating factor. As mitigating factors, the Trial Chamber held that Todorović’s guilty plea, expression of remorse, and substantial cooperation with the Prosecution merited reduction in the penalty. For his crimes, the Prosecution recommended a sentence of five to twelve years; the Trial Chamber sentenced him to ten years imprisonment.

In comparison with penalties at the national level, Todorović’s punishment is notably lenient: ten years for a murder, multiple lengthy and brutal beatings, and sexual assaults. Thus, while recalling the Appeals Chamber’s rulings that deterrence is a legitimate consideration when fixing a penalty, the actual sentencing imposed by the Todorović Trial Chamber—ten years—suggests that deterrence had little impact on the penalty. The Todorović Trial Chamber appears to concede as much: “while the Chamber recognises the importance of deterrence as a general consideration in sentencing, it will not treat deterrence as a distinct factor in determining sentence in this case.”

Apart from the general and indeterminate nature of this ruling, it raises a more serious concern. In essence, the Todorović Trial Chamber takes the position that it is free to ignore deterrence as a consideration when fixing its penalty, despite the pronouncements of the Appeals Chamber. Moreover, it gives no explanation for why it chooses to not factor deterrence rationale into its sentence in this case. The Trial Chamber may have a good reason for not giving much weight to deterrence, but this reason is not made transparent. The lack of transparency, in turn, can lead to criticism that the Tribunal’s sentencing practice is unjust and arbitrary. Such criticism calls into question the legitimacy of international sentencing and undermines its expressive value. In subsequent sections, this article

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159 Id. at para. 60.
160 Id. at paras. 59-62.
161 Id. at paras. 67-95.
advances a theory that arguably explains the Trial Chamber’s approach here.\footnote{Arguably, the circumstances of Todorović’s case necessitated powerful pragmatic considerations, leading to a plea agreement between the accused and the Prosecutor. However, the low sentence is not fully explained by them. After all, the Trial Chamber could have given a higher sentence (that of 12 years) and still satisfied the terms of the plea agreement.}

What about the \textit{Blaškić} Trial Chamber?\footnote{The Trial Chamber was composed of Judge Claude Jorda (Presiding), Judge Almiro Rodrigues, and Judge Mohamed Shahabuddeen.} If the \textit{Todorović} case serves as an example of a trial chamber paying lip service to the objective of deterrence but not following that ideology in its actual sentencing, what example does the \textit{Blaškić} case provide? General Blaškić was the first high-ranking figure to appear before the ICTY.\footnote{\textsc{Gary Jonathan Bass, Stay the Hand of Vengeance} 4 (2000).} At the start of his trial, the Tribunal had a meager eight alleged war criminals in its custody. War criminals to prosecute were hard to come by and the dockets where empty despite the fact that the Office of the Prosecutor (OTP) had publically issued indictments for seventy-five individuals.\footnote{\textit{Id.}} Among those in custody, Blaškić was not only the highest-ranking defendant, but also the only one of any significance.\footnote{\textit{Id.}} The Trial Chamber found the accused guilty of persecution as a crime against humanity for ordering attacks on towns and villages, murder, destruction of property and institutions dedicated to religion or education, inhuman treatment, and forcible transfer of civilians.\footnote{Prosecutor v. Blaškić, Trial Judgment, supra note 151, at para. 267. The trial lasted more than two years. The Prosecution opened the trial on 24 June 1997 and completed its case-in-chief on July 29, 1998. Presentation of evidence by the Defense commenced on September 7, 1998. Following a period of recess after the Defense rested, the Trial Chamber heard closing arguments from July 26 to 30, 1999.} He was also convicted of war crimes, but the underlying acts overlapped almost entirely with the crimes against humanity charges.\footnote{See \textit{Annotated Leading Cases of International Criminal Tribunals, Volume IV: The International Criminal Tribunal for the Former Yugoslavia 1999-2000}, 659-66. (André Klip & Göran Sluite eds., 2002), for further analysis of General Blaškić’s criminal responsibility.} In other words, due to the different
jurisdictional elements of crimes against humanity and war crimes, the alleged criminal acts were charged as both.\textsuperscript{171} I have elsewhere criticized the Blaškić Trial Chamber’s analysis of modes of liability,\textsuperscript{172} which was subsequently overturned on appeal in large part.\textsuperscript{173}

For the judges in the Blaškić case, the key to determining a “fair” and “just” sentence was not the gravity of the offense but the “objectives sought” by international prosecutions and punishment.\textsuperscript{174} In their estimation, the main objective of international prosecutions is deterrence.\textsuperscript{175} The commitment of the judges to deterrence is asserted several times and unequivocally increased General Blaškić’s sentence: “The Tribunal’s mission is to put to an end serious violations of international humanitarian law.”\textsuperscript{176} In order to achieve this objective, deterrence became “the most important factor in the assessment of appropriate sentences for violations of international humanitarian law.”\textsuperscript{177} Thus, the international judges here are clearly adopting a consequentialist approach towards General Blaškić’s punishment. The result was forty-five years of imprisonment; the


\textsuperscript{172} See Dana, \textit{Revisiting the Blaškić}, supra note 81. See also Prosecutor v. Blaškić, Trial Judgment, supra note 151, at paras. 267-70.


\textsuperscript{174} \textit{Id.} at para. 761.

\textsuperscript{175} \textit{Id.} at para. 762.

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} Prosecutor v. Blaškić, Trial Judgment, supra note 151, at para. 761 (quoting Prosecutor v. Delalić “Čelebići”, Case No. IT-96-21-T, Trial Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)). Moreover, the Blaškić Trial Chamber considered both specific deterrence and general deterrence as relevant factors in allocating a punishment: “Apart from the fact that the accused should be sufficiently deterred by appropriate sentence from ever contemplating taking part in such crimes again, persons in similar situations in the future should similarly be deterred from resorting to such crimes.” \textit{Id.} (quoting the Čelebići Trial Judgment at para. 1234).
most senior figure in the court’s custody received the highest punishment ever imposed by the ICTY at that time.\textsuperscript{178}

The influence of deterrence in increasing Blaškić’s punishment is demonstrated not only by court’s consequentialist philosophy and severe sentence, but it is also illustrated by its treatment of aggravating and mitigating factors and its marginalization of factors relevant to individualizing the sentence.\textsuperscript{179} In the Trial Chamber’s own words, in light of the deterrence “mission of the Tribunal, it is appropriate to attribute a lesser significance to the specific personal circumstances.”\textsuperscript{180} From the perspective of the Trial Chamber’s ideology, this makes perfect sense. It is a logical extension of its ideology because such factors are less relevant to the goal of deterrence. The Blaškić Trial Chamber’s treatment of “personal factors” and “the rehabilitation parameter” only serve to underscore its deterrence ideology. The court’s own


\textsuperscript{179} In one way or another, the Blaškić Trial Chamber found reason to reject the following mitigating factors: voluntary surrender (Prosecutor v. Blaškić, Trial Judgment, supra note 151, at para. 776); remorse (Id. at para. 775); lack of direct participation in the crime (Id. at para. 768); duress (Id. at para. 769); material context of armed conflict, i.e. disorder ensuing from a state of armed conflict (Id. at para. 770); and co-operation with the Prosecutor (Id. at para. 774).

\textsuperscript{180} Prosecutor v. Blaškić, Trial Judgment, supra note 151, at para. 765.
findings strongly indicate that Blaškić is well suited for rehabilitation: he had no prior criminal record,\textsuperscript{181} assisted victims;\textsuperscript{182} was a dutiful and professional soldier,\textsuperscript{183} and demonstrated “exemplary behaviour” throughout the entire trial.\textsuperscript{184} The Trial Chamber even went so far as concluding that it was “evident” that Blaškić’s “character is reformable.”\textsuperscript{185} In sum, the Trial Chamber stated that rehabilitation is a factor “to be taken into account in fixing the length of the sentence”\textsuperscript{186} and further found, after detailed accounting, that the defendant before them was reformable.\textsuperscript{187} Then, in what can only be described as a 180, judges abruptly decide to do just the opposite of the principles and finding they just laid out, declaring that these factors will not be taken into account and are “non-existent” for the purposes of fixing Blaškić’s sentencing.\textsuperscript{188}

What is objectionable, even bizarre, about the judgment authored by Judge Claudia Jorda (France) is not its rejection of rehabilitation. In fact, I agree that rehabilitation is not a relevant factor in fixing punishment for war criminals, although their punishment may have that outcome. But if you are not going to take rehabilitation into account when allocating sentences, then why make a big show of it in the first place? Why declare that rehabilitation is a relevant to sentencing allocation? Why engage in a lengthy discussion that the defendant is reformable? Given this detailed analysis, we would have expected the judges to provide a similarly detailed explanation of why it is rejecting its own analysis. Instead, in a single sentence, the Trial Chamber summarily concludes that factors indicative of Blaškić’s reformability are “non-existent when determining the sentence.”\textsuperscript{189} It is as though by the time the Trial Chamber

\begin{footnotesize}
\begin{enumerate}
\item Id. at para. 780.
\item Id. at para. 781.
\item Id. at paras. 765, 780.
\item Id. at paras. 765, 780.
\item Prosecutor v. Blaškić, Trial Judgment, supra note 151, at para. 781.
\item Id. at para. 761.
\item Id. at para. 781.
\item Id. at para. 782.
\item Id. at para. 782 (emphasis added). The Trial Chamber gave two reasons to justify its positions here: the “serious” nature of the case and the fact that “many accused share these personal factors” Id. at para. 782.
\end{enumerate}
\end{footnotesize}
reaches the end of its analysis, it has forgotten the principles it set up at the start.

Thus, although the Trial Chamber sets out “four parameters”, it appears only seriously interested in deterrence. Nevertheless, despite the criticisms that may be levied against the Blaškić Trial Judgment, it must be noted in its favor that, unlike the Todorović Trial Chamber, it remains faithful to its espoused ideology. It takes the position that sentences must reflect the object of Tribunal’s mandate. It identifies deterrence as the main objective, and it imposes a sentence commensurate with that objective.

In sum, both the Todorović and Blaškić trial chambers overtly state that deterrence is one of the primary goals of international sentencing and as such may influence the sentence. However, the resulting penalty in the Todorović case suggests that the goal of deterrence did not have much of an impact on the sentence whereas it appears to have a substantial influence on the Blaškić Trial Chamber’s sentence. The apparent inconsistency here is only exacerbated by the Todorović Trial Chamber’s admission that it opted not to consider deterrence ideology in fixing the penalty, adding a degree of arbitrariness to the inconsistency. Why was Blaškić not so fortunate to benefit from a suspension of the penalty enhancing effects of deterrence ideology? I will argue that the both trial chambers “got it right” intuitively, even if they could have done better to articulate their approaches. Below I will offer a theory that both explains the sentencing decisions of international judges and also guides the application of deterrence in international criminal justice. Before doing so, allow me to briefly identify two challenges in general to realizing deterrence in international criminal prosecutions.

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190 They are retribution, protection of society, rehabilitation and deterrence. Prosecutor v. Blaškić, Trial Judgment, supra note 151, at para. 761.

191 For example, it has departed in both ideology and practice from the general sentencing jurisprudence of the ICTY and ICTR that treat “gravity” of the crime as the primary factor in determining a sentence. Dana, Revisiting the Blaškić, supra note 81, at 330-32.
1. **Challenges to realizing deterrence**

   a. **Practical challenges to realizing deterrence.** As noted above, effectively deterring future “masterminds” and “architects” of atrocity crimes constitutes a primary mandate of international tribunals. In the early days of the ICTY, the main challenge to realizing this mandate was that those in custody were not the masterminds. They were low-level soldiers like Dražan Erdemović192 and Duško Tadić. High-ranking political and military leaders like Slobodan Milošević, Radovan Karadžić, Rakto Mladić, and Biljana Plavšić who bear the greatest responsibility for the Yugoslavia atrocities, were at that time beyond the reach of the ICTY.193 Nor was there any prospect that these men would ever see trial and punishment at the ICTY. The most senior ranking accused in the custody of the ICTY in the early days was Tihomir Blaškić, who had just been made a colonel at the time of the war. Although Blaškić was by no means a “mastermind” of the policies that lead to the atrocities, nor even among the high-ranking decisions makers within the Bosnia Croat or Croatian power structure, he was nevertheless the highest-ranking person before the ICTY. If the ICTY wanted to send a message of deterrence through severe punishment of senior political and military officials, who lead the masses of people into a bloodbath, then the Tribunal would need to impose a severe sentence on Blaškić. It did so without hesitation.

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b. Theoretical challenges to realizing deterrence. — To further examine the role and relevance of deterrence to international sentencing at the individual level, it may be helpful to place perpetrators of atrocities crimes in two broad categories of offenders: low-level perpetrators and high-level perpetrators. Regarding the former, contextual considerations, such as a culture of inverse morality as noted by other authors,\(^1\) challenges the appropriateness and effectiveness of deterrence. Although here, the didactic function of ICL or “affirmative general prevention” can play a role in preventing such a culture from taking root.\(^2\) Deterrence, however, may be better suited to sentencing in relation to the latter group of high-level perpetrators. If we assume the model of the “rational calculating” criminal, then from a utilitarian perspective, punishment can have a deterrent effect by tipping the scales on the cost-benefit analysis\(^3\) so that “crime does not pay.” Naturally, more contextual and factual research needs to be performed in order to firm up this proposition.\(^4\) But there is a sufficient basis, grounded in facts and the realities of the rise of such atrocities, to say that many of the high-level leaders, who are responsible for instigating the circumstance that lead to such dire calamities and cataclysms, deliberately and calculatedly promulgated doctrine of racial hatred or extreme nationalism and cynically propagated such divisive currencies to ascend to political power. Punishment of such persons can demonstrate that there is a cost, in terms of a severe penalty, for those that seek to gain political power through tactics that endanger the stability of society. The punishment must outweigh any political gains.

2. Perpetrator hierarchy and deterrence

Even if one disagrees with this approach, it may explain what the Tribunals are doing. As demonstrated above, some ICTY trial

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\(^1\)See Akhavan, _Beyond Impunity_, supra note 68, at 7.


\(^3\)See generally, Akhavan, _Beyond Impunity_, supra note 68, at 8.

\(^4\)Jan Klabbers, _Just Revenge? The Deterrence Argument in International Criminal Law_, 12 FINNISH Y.B. INT’L L. 249, 2001 (disagreeing that human rights violators can be deterred).
chambers took a consequentialist approach towards punishment of human right violators, focusing on deterrence. While the rhetoric on deterrence is bold and broad, the practice reveals a more subtle and sophisticated nuance. There is some evidence that international judges weigh the relevance of deterrence in determining the penalty for a particular perpetrator based on that person’s position of authority. This is illustrated through the examples of the punishment of Blaškić and Todorović. Both trial chambers declare the objective of deterrence to be a factor in their sentencing approach. The Blaškić Trial Chamber in particular appears wholly fixated on deterrence, but a closer reading reveals that its myopic consequentialism is induced by the presence of a high-ranking perpetrator. It even declares that “the Tribunal was set up to punish according to the accused’s level of responsibility.” Thus, the judges in the Blaškić case approached the deterrence factor with regard to the Blaškić’s role and position in the overall hierarchy that was responsible for the atrocities.

Moreover, regarding the influence of general deterrence on punishment, with a few exceptions, ICL sentencing practice indicates that the objective of general deterrence will increase the sentence of a high-ranking perpetrator, but generally has little affect on the sentence of rank and file soldiers, unless they demonstrated notorious cruelty or exceptional brutality. This explains to some extent why Todorović received a very low sentence. Boiler plate rhetoric aside, international judges do not actually seem to be very convinced that deterrence is relevant or effective in the case of rank and file, low level perpetrators. A more cynical view attributes Todorović’s low punishment to the embarrassing situation the ICTY found itself in when the United Nations sanctioned peacekeeping force, S-FOR, refused to comply with the Court’s order to turn over documents relevant to his arrest and transfer to The Hague. This perspective, however, does not entirely account for how low the Trial Chamber went with Todorović’s sentence because the judges could have given

199 S-FOR stands for “Stabilization Force” which was led by NATO but established by United Nations Security Council pursuant to Resolution 1088 on December 12, 1996.
200 Combs, Capping a Plea, supra note 95, at 118-22; See discussion infra Section II(B)(2).
a higher sentence and still remained within the scope and terms of the plea agreement.

Moreover, the point can be established by other examples less tainted by cynicism. Consider for example the ICTR’s punishment of Mikaeli Muhimana, the conseiller of the Gishyita secteur.\textsuperscript{201} The Trial Chamber found that he “occupied a position of influence in the community” and that instead of using his position to protect the defenseless, he actively participated in the attacks against Tutsi civilians seeking refuge in churches and hospitals. Muhimana raped and killed women who he believed to be Tutsi in the most gruesome and brutal manner.\textsuperscript{202} In sentencing him to imprisonment for the remainder of his life, the Trial Chamber found a host of aggravating factors such as his position of influence,\textsuperscript{203} the fact that the victims were seeking refuge,\textsuperscript{204} the young age (fifteen years old) of one of the rape victims,\textsuperscript{205} presence of others during the rapes,\textsuperscript{206} intentionally increasing the suffering of the victim,\textsuperscript{207} public humiliation,\textsuperscript{208} savagery,\textsuperscript{209} and the fact that the victim was pregnant.\textsuperscript{210} Some of these aggravating factors could arguably be characterized as factors pertaining to the gravity of the offense. In fact, in its recent

\textsuperscript{201} Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Summary of Judgment, paras. 3, 4 (Apr. 28, 2005), http://www.unictr.org/Portals/0/Case\%5CEnglish\%5CMuhimana\%5CJudgement\%5C280405summary.pdf.

\textsuperscript{202} Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, paras. 606-15 (Apr. 28, 2005), http://www.unictr.org/Portals/0/Case/English/Muhimana/decisions/muhimana280505.pdf. (In one incident, Muhimana “used a machete to cut the pregnant woman Pascasie Mukaremera from her breasts down to her genitals and remove her baby, who cried for some time before dying. After disembowelling the woman, the assailants accompanying Muhimana then cut off her arms and stuck sharpened sticks into them.”).

\textsuperscript{203} Prosecutor v. Muhimana, Judgment and Sentence, supra note 202, at para. 604.

\textsuperscript{204} Id. at para. 605.

\textsuperscript{205} Id. at para. 607.

\textsuperscript{206} Id. at para. 609.

\textsuperscript{207} Id. at para. 610.

\textsuperscript{208} Prosecutor v. Muhimana, Judgment and Sentence, supra note 202, at para. 611.

\textsuperscript{209} Id. at para. 612.

\textsuperscript{210} Id. at para. 612.
sentencing judgment, the ICC treated similar factors as relevant only to its assessment of “gravity” and rejected them as aggravating factors, which was how the ICC Prosecutor characterized them. In the context of the ICTR’s sentencing provisions, which give international judges “unfettered discretion” in fashioning a penalty, the distinctive functions of “gravity of the offense” and “aggravating circumstances” are somewhat marginalized, so long as the trial chamber is careful to not consider the same factor twice. However, the lack of doctrinal and theoretical clarity on the intersection between and distinctiveness of “gravity” and “aggravating circumstance” will prove more problematic for the ICC because, inter alia, the Rules of Procedure and Evidence (RPE) require the existence of at least one aggravating circumstance before the court can impose life imprisonment.

Both the Prosecution and the Trial Chamber position Muhimana as a “conseiller” and “businessman.” The Trial Chamber found that the defendant’s status in the society where he lived constituted an aggravating factor. Generally speaking, persons in positions of public authority who abuse their positions and the powers entrusted to them to commit or advance mass atrocities merit greater punishment because such perpetrators are more dangerous in that they cast a wider net of harm and destruction. The enhanced punishment is also justified because they have breached a sacred trust by employing their position and the machineries at their disposal to victimize those to whom they had a duty to serve and protect. These factors have a direct impact on the criminality. The jurisprudence of the ICTY and ICTR recognizes these principles by holding “superior position,” or in some cases, “abuse of authority” as an aggravating factor. The ICTR Trial Chamber viewed Muhimana as a high-level

211 Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76, supra note 2, at paras. 92-9.
213 Prosecutor v. Muhimana, Judgment and Sentence, supra note 202, at paras. 596, 604.
214 Id. at paras. 595-96.
and influential person and, like the ICTY’s Blaškić Trial Chamber, imposed a severe punishment.\(^{215}\)

In Muhimana case, however, the Defense should have challenged the Prosecutor’s submission that his status should be an aggravating factor. In this case, it is unclear how his “status” aggravated his criminality. The Prosecution does not argue that Muhimana held any political position or that his “status” lead to an abuse of authority. The Prosecution only submits that “his close associations with senior civil servants and prominent business people, and his popularity . . . further enhanced his ‘status’.”\(^{216}\) The Trial Chamber accepted this argument and aggravating his penalty because of his “status.”\(^{217}\) However, while his associations and popularity may have enhanced his “status,” the Trial Chamber does not explain how it enhances his culpability in relation to his crimes. The Muhimana Trial Chamber found no mitigating circumstances,\(^{218}\) and the Defense surprisingly made no submissions on this point.\(^{219}\)

In sum, international judges at the ad hoc Tribunals boldly proclaim the deterrent function of international criminal prosecutions.\(^{220}\) They demonstrate confidence in the deterrent capacity of international courts, and state that the goal of deterrence influences their determination of penalties.\(^{221}\) This obtuse rhetoric

\(^{215}\) Id. at para. 618.

\(^{216}\) Id. at para. 596.

\(^{217}\) Id. at para. 604.

\(^{218}\) Prosecutor v. Muhimana, Judgment and Sentence, supra note 202, at para. 616.

\(^{219}\) Id. at para. 602.


obfuscates the actual sentencing practice, which demonstrates greater nuance. The general sentencing jurisprudence reveals that the goal of deterrence has little impact on increasing the penalty of low-level war criminals. Deterrence plays a more significant role in enhancing the penalty for a high-level perpetrator or those that had significant power or influence. This unspoken distinction mirrors the position of some observers that rank and file common persons cannot be easily deterred when surrounded by the chaos of systematic criminality during war.222 Instead, the goal of deterrence should focus ICL’s


222 However, this is by no means universal. In the both the Yugoslav and Rwandan atrocities, there are a number of examples of great human moral courage resisting the systematic criminality. See Bernard Muna, The ICTR Must Achieve Justice for Rwandans, 13 AM. U. INT’L L. REV. 1481 (1998).
punitive sting for leaders who used their power and influence to execute criminal policies.

B. Reconciliation

One unresolved question regarding the primary role of international criminal justice mechanisms is to what extent the ICC should allow reconciliation ideology to influence its decision-making. Prioritizing reconciliation (a restorative focus) over retribution (punitive focuses) may alter decisions by the ICC. 

Prosecutor at the front end, for example in case and situation selection, as well as decisions by judges at the back end, for example when sentencing. The experience of the ICTY shows that the absence of a coherent theoretical underpinning for the application of reconciliation ideology has lead to some troubling results. To illustrate this we may consider the following cases: Erdemović, Jelišić, Sikirica, Plavšić, Bralo, and Nikolić.

Since 2001, the practice of plea-bargaining increased exponentially in international prosecutions. At the same time,


225 Prosecutor v. Sikirica, Sentencing Judgment, supra note 84.


229 See COMBS, GUILTY PLEAS, supra note 37.
reconciliation ideology gained traction among international judges.\textsuperscript{230} To appreciate this phenomenon, it is necessary to start with the early practice at the Tribunal in relation to both plea-bargaining and reconciliation. As a preliminary matter, it should be noted that guilty pleas at international tribunals come in two varieties: “unilateral” guilty pleas and bargained-for guilty pleas. The latter consists of situations where the defense engages in negotiations with the Prosecutor for the defendant’s admission to the certain charges in exchange for the Prosecutor’s agreement to dismiss other charges and/or allegations from the indictment (charge reduction), and/or to recommend a lenient sentence, or to refrain from seeking a particular (high) penalty (sentence reduction). It excludes situations where the accused accepts his or her criminal responsibility and enters a guilty plea without negotiating for charge or sentence reduction. In these guilty pleas, no bargaining or negotiating is needed to secure the defendant’s admission. In other words, not all guilty pleas are the result of plea-bargaining.\textsuperscript{231}

1. Early practice: reconciliation ideology has no influence on sentencing.

In the first ten years of the ICTY’s operations, only two cases were disposed of by plea bargaining: the Todorović case and the Sikirica case.\textsuperscript{232} Each contained some element out of the ordinary. A third


\textsuperscript{231} An illustrative example is the case of Dražan Erdemović and his immediate plea of guilt at his initial appearance. See Erdemović, Dražen, HAGUE J. PORTAL, \url{http://www.haguejusticeportal.net/index.php?id=6096} (last visited Oct. 13, 2013). See also Prosecutor v. Erdemović, Sentencing Judgment, supra note 43.

\textsuperscript{232} Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment, para. 11 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 14, 1999),
case—against Goran Jelišić, a camp commander—involves the accused pleading guilty to all counts but one—genocide—and the Office of the Prosecutor (OTP) continued to trial on the remaining count. Thus, his plea does not appear to have been bargained for. All three cases underscore an OTP policy against plea-bargaining, especially when the accused has been charged with genocide. Reconciliation ideology is virtually non-existent as a sentencing factor in these early cases.

233 In the Jelišic case, a camp commander pled guilty to thirty-one individual counts of crimes against humanity and war crimes. The only charge that Jelišić refused to accept responsibility for was a single charge of genocide. 234 Given that the OTP had substantial evidence to prove genocide, it refused to drop the charge from the indictment. Much to the disappointment of the judges, the Prosecution insisted on proceeding to trial against Jelišić for the single count of genocide, even though Jelišić was already facing a very severe prison sentence resulting from his guilty plea to very serious crimes, including multiple murders committed in the most chilling and wicked manner. The tension between the ICTY judges and the Prosecutor was plainly evident during the course of the trial. The judges were frustrated at what they considered wasteful expenditure of time and resources on a trial of a relatively minor figure that had already pled guilty to crimes against humanity and war crimes grave enough to merit a forty-year sentence. The OTP was equally determined to try Jelišić for genocide so that the record would reflect what it believed was the true scope of his culpability. The policy behind the OTP’s uncompromising stance was the idea that the

http://www.icty.org/s/cases/jelisic/tjug/en/jel-tj991214e.pdf (pleading guilty on October 29, 1998); Prosecutor v. Todorović, Sentencing Judgment, supra note 58, at para. 5 (pleading guilty on December 13, 2000); Prosecutor v. Sikirica, Sentencing Judgment, supra note 84, at paras. 12-15 (pleading guilty on September 19, 2001; September 19, 2001; and September 4, 2001, respectively). As explained above, the Erdemović case is not included among these cases because Erdemović pled guilty at his initial appearance.

233 See also Prosecutor v. Erdemović, Sentencing Judgment, supra note 43.

crime of genocide carries too much significance to be dropped simply because the accused has accepted responsibility for other crimes. The Jelišić case demonstrates the OTP’s unwillingness to provide the accused with any concession by way of charge or penalty reduction for his guilty plea. As noted above, however, it would be incorrect to characterize Jelišić’s guilty plea accepted responsibility for all the charges against him except the crime of genocide.\footnote{Id.} No bargaining or negotiating was needed to secure his admission to the other crimes.

Stevan Todorović and Biljana Plavšić, on the other hand, represent cases of carefully crafted plea bargains. Todorović muscled a highly favorable plea deal out of the Prosecutor. His Defense team successfully obtained an order from the ICTY directing the NATO led S-FOR to cooperate with the defendant by producing documents and making senior officials available as witnesses for his hearing challenging the lawfulness of his arrest, detention, and transfer to The Hague by S-FOR. Todorović was living comfortably in his hometown in the Federal Republic of Yugoslavia (FRY) and woke up one morning to find himself hooded and handcuffed in a helicopter on his way to S-FOR’s Tuzla Air Force Base.\footnote{Press Release, Int’l Crim. Trib. for the Former Yugoslavia, Decision on Todorovic’s Motion For Judicial Assistance, XT/ P.I.S./ 636-e (Oct. 20, 2000), http://www.icty.org/sid/7811.} One version of the events attributes his capture to four bounty hunters.\footnote{See, Combs, Copping a Plea, supra note 95, at 118.} According to Todorović, his kidnapping was a clandestine operation orchestrated by S-FOR in which he was hooded, beaten, kidnapped, and taken to the boarder of Bosnia Herzegovina to be subsequently transferred by S-FOR to the ICTY.\footnote{Combs, Copping a Plea, supra note 95, at 118-19. See also Susan Lamb, Illegal Arrest and the Jurisdiction of the ICTY, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 27-35 (Richard May et al. eds., 2001) (discussing the events surrounding Todorovic’s arrest and transfer to the ICTY).}

Claiming that his arrest was illegal and violated fundamental human rights, Todorović sought to compel S-FOR to hand over
documents and witnesses to support his allegations. The trial judges ordered the North Atlantic Council, thirty-three individual States, and S-FOR itself to disclose specific documents. In a bold move, they also ordered the Commanding General of S-FOR, Eric Shinseki of the United States, to appear as a witness in his individual capacity at the hearing. All parties promptly refused to comply with the order, citing possible security risks to an on-going military and peacekeeping operation. The standoff was an embarrassment to the United Nations and the ICTY—a U.N. created peacekeeping force flatly refused to comply with an order of a U.N. judicial body. Would power submit to the law? NATO’s non-compliance with the ICTY order seemed to contradict the principle that all must obey the law. The ICTY—in fact the entire enterprise of international criminal justice—was predicated on the notion of accountability and that no one was above the law. It was a direct challenge to the authority of the court from an unexpected source, something ICTY defendants had been doing since the first time the court asserted jurisdiction.

With his motion threatening the legitimacy of the ICTY if NATO were to continue to disobey the order, Todorović gained leverage in his negotiations with the Prosecutor. NATO, the U.S., and other states appealed the decision and the Appeals Chamber stayed the Trial Chamber’s order pending the outcome of the appeal. Meanwhile, ICTY lawyers scrambled behind the scenes. While the appeal was pending, the OTP and the defendant filed a joint and confidential ex parte motion, submitting to the court a negotiated plea agreement. Todorović agreed to plea guilty to the crime of persecution on political, racial, and religious grounds as a crime
Tellingly, the plea agreement specifically required him to withdraw: (1) all pending motions regarding his arrest; (2) all factual allegations that his arrest was unlawful; and (3) all claims that NATO or SFOR participated in any unlawful activity in connection with his arrest. To secure the deal, the OTP withdrew the remaining twenty-six counts and recommended a prison sentence of five to twelve years.

The Sikirica case involved three defendants: Duško Sikirica, Damir Došen and Dragan Kolundžija. All three were charged with crimes against humanity and violations of the laws and customs of war. However, Sikirica was also charged with genocide. The defendants all entered a plea of not guilty and the case proceeded to trial. After the close of the Prosecution’s case-in-chief, Sikirica filed a Rule 98bis motion to dismiss the genocide count, which was granted. Then, to everyone’s surprise, during the presentation of the defense rebuttal, one of Sikirica’s co-defendants changed his plea and pled guilty to crimes against humanity. With the code of silence broken, the remaining defendants also sought the Prosecutor for a plea bargain. The plea agreement between Sikirica and the OTP made clear that the Prosecutor would not have accepted his plea while the charges of genocide were still pending against him. This reluctance towards plea-bargaining is in line with the OTP’s policy in the Jelisić

245 Prosecutor v. Todorović, Decision on the Prosecution Motion to Withdraw Counts of the indictment and Defence Motion to Withdraw Pending Motions, supra note 244, at para. 2. Prosecutor v. Todorović, Sentencing Judgment, supra note 58, at para. 4.
246 Sikirica was the most senior ranking of the three.
cases. The ICTY Prosecutor manifested complete aversion toward any type of bargaining or deal making that would require her to withdraw a genocide charge.

While the Prosecution refused to bargain in the Jelisić case, it did not have to in the Erdemović case—he comprehensively and immediately accepted responsibility to the entire indictment against him. The Erdemović case challenges the ICTY’s current ideological narrative constructed around reconciliation. Extant sentencing judgments declare reconciliation as an ideology—something more than mere *ex post facto* rationalization of an expanding plea bargaining practice and lenient sentences, but as a principled justification for mitigating penalty. However, the judges do not advance such a view of reconciliation in the Erdemović sentencing judgment, even though the facts of the case offered an opportunity to establish this platform. Erdemović did not attempt to negotiate a deal behind the scenes. He plead guilty to all crimes charged at his first hearing, expressed genuine remorse, and fully cooperated with the Prosecution in bringing to light what happened. Although in subsequent cases, notably the Plavšić case, these factors are considered relevant to determining the accused’s contribution to reconciliation and thus a reduction in punishment, the Erdemović Trial Chamber did not consider contribution to reconciliation *per se* as a sentencing factor. In fact, “reconciliation” is mentioned merely twice in passing in the entire judgment. It is not discussed in relation to Erdemović’s acceptance of guilt, nor do the international judges appear to be particularly interested in the possibility that his unreserved admission of responsibility for his share in the atrocities will foster reconciliation.

Compare this to the twenty-seven times the ICTY judges discuss reconciliation in the Plavšić case and their unbridled enthusiasm about how her narrowly crafted and limited admission will have a significant impact on reconciliation in the former Yugoslavia. It comes as no surprise that the notion of reconciliation overwhelms the analysis of the sentencing judgment in the Plavšić

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Reconciliation gained notoriety in cases where the accused bargained for a less comprehensive factual record and a reduction in charges or punishment. But this deal making in the face of grossly unspeakable crimes required a counterweight. Enter reconciliation. It is an apology for plea-bargaining atrocity crimes, an attempt to recast plea deals as an ally of truth and history rather than cutting the legs of public and accurate record building. These matters are addressed in greater detail in the next section.

To summarize the background materials, the ICTY’s early jurisprudence and practice seems to indicate that reconciliation was not a central issue in sentencing and that the Prosecution was unwilling to bargain away the charge of genocide. The Plavšić case reversed the trajectory on both matters. It was the first time the Prosecutor willingly dropped the charges of genocide against an accused in return for her guilty plea. Moreover, it marked the coming of age of “reconciliation” as it proved an influential force in mitigating Biljana Plavšić’s sentence.

2. The coming of age of reconciliation ideology

The Plavšić case marks a turning point in the ICTY’s legacy. The rise of reconciliation ideology as a justification for the practice of plea-bargaining and as a mitigating factor in sentencing can trace their origins to this case. Prior to the Plavšić Sentencing Judgment, only


\[251\] See Damaska, *What is the Point*, supra note 40, at 341 (concluding that the only viable justification for plea bargaining is efficiency), for a critique of various justifications for plea-bargaining.
three cases in the ICTY’s ten-year history had been disposed of by plea-bargaining. In sharp contrast, following the Plavšić judgment, the first twelve months alone witnessed at least seven cases disposed of by way of plea-bargaining. These plea bargains occasioned “unseemly” lenient sentencing recommendations by the OTP. Likewise, the practice of dismissing the charge of genocide can trace its origins to the Plavšić case. Plavšić was initially indicted for


crime of genocide and complicity in genocide. Departing from its practice in the past, the Chief Prosecutor Carla Del Ponte subsequently made a deal with Plavšić to withdraw the counts and allegations specifically pertaining to genocide and complicity in genocide and also all remaining crimes, with the exception of persecution as a crime against humanity. In return, Plavšić would plead guilty to one count for the crime of persecution.

She was the first defendant for whom the Prosecution willingly withdrew the genocide charges from the indictment in exchange for a plea. Ironically, this first time willingness came in a case were the defendant was most likely among the more culpable for the allegedly genocidal policies from among those charged with the crime. Given the magnitude of the case, the high ranking and profile of the accused, the gravity of her crimes (as originally alleged), and the fact that the Chief Prosecutor herself appeared at an accused’s sentencing hearing, which she rarely did, the people of Yugoslavia and the international community rightfully expected an accounting for Del Ponte’s decision to drop genocide from the indictment. However, she offered no explanation in the public forum of an international courtroom. Nor did the judges press her for one. If there was a good reason for the compromise, it did not appear in the Court’s official records or sentencing judgment.

254 Prosecutor v. Plavšić, Case No. IT-00-40-I, Indictment, para. 19 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2000), http://www.icty.org/x/cases/plavsic/ind/en/pla-ii000407e.pdf. The counts were: Count 1 (Genocide) and Count 2 (Complicity in Genocide).

255 Prosecutor v. Plavšić, Case No. IT-00-39&40-PT, Plea Agreement (Int’l Crim Trib. for the Former Yugoslavia Sept. 30, 2002), http://www.icty.org/x/cases/plavsic/custom4/en/020930plea_en.pdf. This was filed ex parte confidential and under seal. This document is available and on file with the author.

256 In her published memoirs, Del Ponte describes Plavšić as a “close associate” of the notorious Radovan Karadžić and Momčilo Krajišnik. Del Ponte further claims that Plavšić “participated at the highest political levels in the campaign to dismember Bosnia and Herzegovina and ethnically cleanse large swaths of its territory.” See CARLA DEL PONTE, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY’S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 160 (2008).
If the judges genuinely believe that the goal of reconciliation is central to the Tribunal’s mandate, that International Tribunals have the capacity to contribute to reconciliation, and that substantial sentencing reductions actually promote reconciliation, then they must account for why genocide was removed from the scope of Plavšić liability and why a prison sentence of eleven years supports rather than undermines the goal of reconciliation. The absence of transparency regarding the circumstances resulting in a factual record narrower than the original indictment undermines reconciliation and truth finding. Rather than address difficult questions about responsibility and punishment that are crucial to the goal of reconciliation, international sentencing judgments idealize reconciliation as vague aspirations of ICL while remaining impervious to factors that undermine it. The judgments mistake acceptance of responsibility and apology (often short lived) for reconciliation. Del Ponte has even admitted that Plavšić’s admissions and apologies offered nothing towards reconciliation. The Plavšić Trial Chamber’s discussion and analysis of reconciliation raises three concerns in relation to sentencing.

a. Is reconciliation itself mitigating? – Certain post-crime actions by the accused, such as expression of remorse, truth-telling, cooperation with the Prosecutor, and genuine and sincere acceptance of responsibility have been accepted as appropriate reasons to mitigate the punishment of a convicted person precisely because these factors, inter alia, potentially contribute to the aim of reconciliation. However, the Plavšić Trial Chamber appears to go beyond this and treat reconciliation itself as an independent mitigating factor.

The problem with treating reconciliation as an independent ground for sentence mitigation lies in the limitations of criminal justice legalism. Reconciliation is better understood as a slow rebuilding process, not an event. While judicial institutions are quite capable of determining whether a war criminal “voluntarily surrendered,” they are not particularly apt at predicting future events. Whether the accused has “contributed to reconciliation” is usually difficult to measure with legal certainty. It cannot be put sufficiently

\[257\] See CARLA DEL PONTE, MADAME PROSECUTOR, supra note 256, at 161.
beyond the realms of speculation so as to satisfy the Tribunal’s legal standards or the requirements of law.\textsuperscript{258} Some factors relevant to assessing a defendant’s contribution to reconciliation are admittedly less speculative such as an accused who goes door to door apologizing to specific families that he has victimized, or volunteers for demining operations, or helps victims identify locations whether murdered family members have been hidden or buried. But the contribution to reconciliation of factors, such as a general apology, on which the \textit{Plavšić} Trial Chamber relied, is highly speculative. Moreover, they can be undone in a way that concert action (such as the above list) beyond mere words cannot be. Thus, as is the case with other consequentialist aims, the court treads in dangerous territory when judges allow reconciliation to influence its sentencing allocations.

For example, \textit{Plavšić} gave an interview to Banja Luka ATV on March 11\textsuperscript{th}, 2005, that undermines her purported contribution to reconciliation based on her apology and public statement that the judge used to justify mitigating her penalty to eleven years imprisonment.\textsuperscript{259} Barely two years after her public remorse and apology in the courtroom of the ICTY, she denied all responsibility for her role in the atrocities to the viewing public back in the former Yugoslavia. With thousands, if not tens of thousand, of persons whose lives she victimized, she emphatically claimed: (1) she only pled guilty because witnesses that would establish her innocence were afraid to come forward; (2) smug international judges sitting in The Hague far away from the realities of the conflict could not comprehend that a high ranking person in her position, removed from the battlefield, may not know what is going on at the ground level; (3) Western powers accept that the real culprits of the conflict


\textsuperscript{259} Interview by Banja Luka ATV with Biljana Plavšić (Mar. 11, 2005), \texttt{http://www.atvbl.com/home.php?id=biljanaintervji}. An unofficial translation into English by the ICTY Outreach Office in Sarajevo is available on file with the author.
where the Bosnians that wanted independence in the first place. To the victims, her statements most likely came across as: (1) I am not responsible; (2) the Bosnian Serb leadership is not responsible; and (3) the victims got what they deserved. Perhaps Del Ponte and the international judges had no reason to suspect that Plavšić would so fantastically and publically unravel the foundations of her mitigated penalty. Nevertheless, the experience illustrated why the ICC should not entangle with consequentialist aspirations. At least, judges should not allow the goal of reconciliation to influence sentencing allocations.

b. Failure to link lack of cooperation to sentencing discounts based on purported contribution to reconciliation. – The sentencing law of international criminal courts and tribunals recognize cooperation with the Prosecutor or Court as a mitigation factor. Under the ICTY rules in particular, it is the only mitigation factor explicitly provided. Plavšić firmly refused to cooperate with the ICTY OTP, despite several interventions by Del Ponte and her team to get Plavšić to reverse course. When Del Ponte tried to include in the plea agreement a condition that Plavšić agree to be a witness in the cases of persons who bore the greatest responsibility for the atrocities such as Radovan Karadžić, Momčilo Krajišnik, and Ratko Mladić, Plavšić flatly refused and the Chief Prosecutor backed down. Del Ponte would later write in her memoirs that Plavšić had deceived her into thinking that she would cooperate.

If part of the justification for the Prosecution to engage in plea-bargaining lies in the theory of “breaking the circle of silence” among the leadership, then her guilty plea wholly deprived international justice of any such benefit. In fact, she appears to go out of her way to insulate them and protect them from the atrocities she

260 See id.


262 See Carla Del Ponte, Madame Prosecutor, supra note 256, at 161-62.

263 See id. at 161.

264 See id.
acknowledges took place. She expressly stated that the responsibility for the crimes to which she bore witness are hers and hers “alone” and do not “extend to other leaders who have the right to defend themselves.” Her failure to cooperate should have been factored in to the weight given to her “contribution to reconciliation.” I am not suggesting that the court do what the Blaškić Trial Chamber did when it treated non-cooperation as an aggravating factor. The international sentencing jurisprudence correctly rejects such an approach. Nevertheless, failure to cooperation with international justice is relevant to assessing the accused’s “contribution to reconciliation.” Plavšić’s conduct and statements carefully avoid implicating her co-perpetrators Karadžić and Krajišnik in the atrocities and cast doubt on her commitment to reconciliation. Loyalty to her fellow nationalist over accounting for crimes perpetrated against other ethnic groups does little to defuse ethnic tensions. The judges noted expert testimony that “full disclosure in confessions is vital for the reconciliatory process.” Again, we see another example of the international judges failing to meaningfully analyze the accused’s conduct and factors relevant to punishment in relation to what they earlier identified as the purpose of sentencing, in this case, reconciliation. Plavšić’s failure to disclose the role of other high-ranking Serbs in atrocity crimes to the full extent of her knowledge undermines the goal of reconciliation. The judges should have weighed the potential adverse impact this has on their purported goal, especially because they used reconciliation ideology to justify a lower sentence.

266 Prosecutor v. Blaškić, Judgment, supra note 151, at para. 774. See Dana, Revisiting the Blaškić, supra note 81, at 327.
267 See Dana, Revisiting the Blaškić, supra note 81, at 328.
268 Prosecutor v. Plavšić, Sentencing Judgment, supra note 36, at para. 77 (emphasis by Trial Chamber).
Local reactions support my argument. Sefko Alomerović, President of the Helsinki Board in Sandzak at the time of Plavšić’s sentencing, also drew attention to her failure to “bring into question the state policy that led towards the extinction of the Bosnian people, in which she played an important role.”

Although the Trial Chamber expressly disagreed with the Prosecutor’s evaluation of the weight to be accorded to this factor in mitigation, in light of the foregoing, the Prosecutor’s assessment seems to better capture the extent of her contribution to reconciliation. The OTP recommended a prison term of fifteen to twenty-fix years. The Trial Chamber sentenced her to eleven years. This was not the first time a trial chamber imposed a sentence lower than the Prosecutor’s recommendation, but it was the first time the Prosecutor did not appeal a low sentence outside its recommended range.

c. Superior position results in paradoxical boost for mitigation. — Generally, sentencing discounts for guilty pleas are justified on the grounds of their functional utility, namely that plea bargains can result in efficiency benefits by saving costs and Tribunal resources related to investigation, counsel fees, trial costs, etc. The Plavšić Trial Chamber, however, attempts to offer more than a functional justification for plea bargains that result in large sentencing reductions by arguing that they substantially contribute to the Tribunal’s presumed mandate. In the Plavšić case, the judges characterized Plavšić’s negotiated and carefully contrived guilty plea as a genuine expression of remorse that contributed to reconciliation, rather than a self-interested maneuvered that resulting in limiting her criminal liability and punishment.

Apparently, the Trial Chamber was guided in this direction by the Prosecutor who amplified the mitigating value of Plavšić’s contribution to “reconciliation” and “expressions of remorse” based

272 Id. at para. 128.
273 Id. at para. 132.
274 Id. at para. 70.
on her superior position as a high-ranking and high-profiled member of the Bosnian Serb war leadership. \(^{275}\)

The Trial Chamber noted: “"[t]he Prosecution states that this expression of remorse is noteworthy since it is offered from a person who formerly held a leadership position, and that it 'merits judicial consideration.'”\(^ {276}\) Thus, the Plavšić Trial Chamber endorsed the notion that expressions of remorse have added value for the purposes of reconciliation when offered by high-ranking defendants, and thus are deserving of greater reduction in sentence.\(^ {277}\) This position, however, is at odds with basic principles of justice and the ICTY’s own jurisprudence, which has long held that the superior position of the accused is a factor that aggravates, rather than mitigates, the accused’s punishment.

Unfortunately, the Plavšić precedent favoring high-ranking perpetrators when it comes to mitigation of penalty based on contribution to reconciliation is having a pernicious influence on the subsequent cases. In some cases, it appears that both the Prosecutor and the judges award less sentencing reduction for low-level defendants who contribute to reconciliation.\(^ {278}\) Citing the Plavšić ruling, some defense counsels even appear convinced that their client’s potential contribution to reconciliation is only worth arguing if the client is a person of high rank.\(^ {279}\)

3. The perverse effects of reconciliation

As noted above, reconciliation was not a significant factor in sentencing in the early practice of the ICTY. However, since the Plavšić Sentencing Judgment, it has received frequent consideration by trial chambers when addressing sentencing. In the Plavšić case, it

\(^{275}\) Id. at para. 70.

\(^{276}\) Prosecutor v. Plavšić, Sentencing Judgment, supra note 36, at para. 70 (emphasis added).

\(^{277}\) Id. at para. 70.

\(^{278}\) See, e.g., Prosecutor v. Bralo, Sentencing Judgment, supra note 94. This case is discussed in detail below.

exerted a significant influence in mitigating her punishment. Many commentators consider Plavšić’s eleven-year sentence to be very lenient in both absolute terms and in symbolic terms. As it has done with other factors such as deterrence and rehabilitation, the Appeals Chamber should likewise encourage a cautious approach towards awarding significant reduction of the penalty on the basis of “contribution towards reconciliation.” Caution here is justified on both moral and practical basis. The Plavšić case illustrates why.

During Plavšić’s sentencing hearing, I observed, first hand, defense counsel argue to the judges that her remorse and acceptance of responsibility was a more significant contribution to reconciliation than had the same come from a lower ranking perpetrator. Defense counsel boldly declared: “what greater contribution do you have to your mandate than my client’s—a person at the very top of the Bosnian Serb leadership—admission of responsibility.” Never mind that her limited acceptance of responsibility was known to the judges or that her remorse proved to be ostensible. Nonetheless, all this coming from the Defense was largely expected. The real surprise was that Chief Prosecutor Carla de Ponte, in a rare court appearance at a sentencing hearing, made the same argument but even more emphatically. She argued that as a high-ranking figure and former leader, her remorse and contribution to reconciliation is particular noteworthy and merits special consideration. Thus, in advancing a framework for how reconciliation should influence sentencing allocations, the Chief Prosecutor advocates for greater sentencing reductions for those in high-ranking positions, thereby turning upside

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283 Id.
down the relationship between superior position and punishment. The judges agreed, finding that Plavić’s position at the very top of the Bosnian Serb Presidency gave “significant weight” to her contribution to reconciliation. Because the Trial Chamber accepted the goal of reconciliation as a relevant factor for fixing a sentence, it was able to justify substantial reduction of prison time.

Accordingly, greater contributions to reconciliation merit greater reduction in punishment. Unfortunately, ICTY judges and the Chief Prosecutor appear to weigh the value of an accused’s contribution to reconciliation based largely on his or her rank. Under their approach, high-ranking offenders, who accept responsibility for their wrongdoings, deserve more sentencing reduction than low-level individuals merely because of their status. The perverse effect of this consequentialist approach towards punishment is that the leaders who are most culpable for the atrocities receive greater sentencing discounts, as demonstrated by how the ICTY subsequently dealt with the punishment of low-level perpetrators. Adding to a sense of injustice is the fact that their purported “contribution to reconciliation” is in relation to sufferings and atrocities that the leaders themselves created.

Therefore, the logical conclusion of the reconciliation ideology adopted by the Plavić Trial Chamber is that less culpable and lower ranking perpetrators will not receive the same degree of mitigation, resulting in higher penalties. If so, this would be elitism at its worst and consequentialism at its most perverse. In order to test this hypothesis, I examined the ICTY sentencing judgments to identify cases similar to Plavić. Two cases—the prosecutions of Miroslav Bralo and Drago Nikolić—shared several factors in common with the Plavić case. Both involved plea-bargained guilty pleas, convictions for crimes against humanity, underlying crimes that included killings and murder, and in both cases, the trial judges found reconciliation to be a mitigation factor in sentencing.

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284 Superior position is an aggravating factor in the ICTY jurisprudence.
In the Bralo case, a Croatian defendant—a relatively minor figure in the conflict—was initially only charged with war crimes. Because of his complete self-effacing cooperation with the Prosecutor, Miroslav Bralo exposed himself to further criminal liability for persecution as a crime against humanity. The Prosecution mercilessly moved to amend the indictment to expanded Bralo’s individual criminal responsibility to include the crime of persecution. Bralo did not oppose the motion. In fact, he did not challenge or dispute any charge or allegation in the extended indictment and pled guilty to all charges. The trial judges considered his unexpurgated acceptance of criminal responsibility as an unequivocal sign of sincere remorse and willingness to be held accountable.

As noted above, the process leading to an accused’s admission to his or her participation in atrocity crimes and ethnic violence impacts the goal of reconciliation. Plavšić and Bralo stand in sharp contrast. The former machinated to limit and diffuse the scope and gravity of her crimes, successfully minimizing her criminal responsibility. Her plea deal included charge reduction with the removal of genocide from the record, thereby alternating the narrative of the conflict and degree of victimization. Bralo, on the other hand, showed unabridged acknowledgement of his moral blameworthiness and took full responsibility for his wrongful conduct. While Plavšić bargained down her responsibility, Bralo accepted responsibility beyond the initial charges against him.

Working from the ICTY premise that reconciliation is an appropriate goal of sentencing for international crimes, Bralo’s contribution to reconciliation arguably merits greater mitigation. The Trial Chamber found that Bralo apologized to victims in person and through personalized letters, identified previously unknown

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288 Id. at paras. 5-6.
289 Id. at para. 60.
290 Id. at para. 72.
locations of mass graves allowing survivors to carry out funerals for their departed in accordance with their religion and customs, in some cases exhuming the body from the mass grave himself, and participated in de-mining operations.\textsuperscript{291} This may be understood as direct reconciliatory acts. It is more tangible to individual victims than Plavšić’s prescribed general apology. Although the Tribunal held that Bralo contributed to reconciliation,\textsuperscript{292} it did not afford Bralo’s acts as much weight in mitigation as was awarded to Plavšić. Has the ICTY’s reconciliation ideology turned the significance of superior position or authority as an aggravating factor upside down? Plavšić’s punishment was imprisonment for eleven years. Bralo received a prison sentence of twenty years,\textsuperscript{293} nearly twice as much as Plavšić, despite the fact that she was in the very highest echelons of the Bosnian Serb leadership prosecuting the war, second only to Radovan Karadžić.\textsuperscript{294} At the time of her sentencing, she was the highest-ranking figure on any side of the conflict to be punished by the ICTY.\textsuperscript{295} Bralo was a relatively low ranking figure, a Croatian foot soldier in a notorious military unit with little or no command authority.\textsuperscript{296} Dragon Nikolić,
also a relatively low level perpetrator, was sentenced to 23 twenty-three years of imprisonment.\footnote{Prosecutor v. Dragan Nikolić, Appeals Sentencing Judgment, supra note 60, at paras. 2, 4.}

Plavšić’s low sentence compared to higher penalties for Bralo and Nikolić is inconsistent with the Tribunal’s sentencing practice and legal rulings that superior position or authority is an aggravating factor. By this measure, Plavšić should have received a more severe punishment, all other material factors being equal—and they generally are. Similarly, the difference in the distribution of punishment does not square with Tribunal sentencing law in that cooperation with the Prosecution is a significant mitigating factor, if not the most significant. The trial judges found that Bralo and Nikolić substantially cooperated with the Prosecutor, a mitigating factor that was absent in Plavšić’s case. Compounding the disparity, one could reasonably conclude that cooperation with the Court or the Prosecutor itself constitutes “contribution towards reconciliation.” Likewise, it would have been reasonable for the trial chambers to treat intentional non-cooperation as diminishing the value of an accused’s asserted contribution to reconciliation. In sum, analyzing the court’s treatment of the two sentencing factors—one aggravating factor (superior position/authority) and one mitigating circumstance (cooperation with the Prosecution)—reveals perverse results where judges attempt to reflect the goal of reconciliation in sentencing allocations. Plavšić, who used her superior position to perpetrate grave crimes and offered no cooperation with the OTP, received a very lenient penalty, while other defendants, who were low-level perpetrators and cooperated with the Prosecution, received significantly harsher sentences. Reconciliation ideology was so influential that it resulted in misapplication of two well entrench sentencing principles in international criminal law.

Judging by the fact that low-level offenders were punished twice has harshly as high-ranking perpetrators, the ICTY disproportionately awards more penalty reduction for reconciliation to the latter. Interestingly, the Bralo Trial Chamber stated that if there were no mitigating factors, it would have imposed a prison sentence
of twenty-five years. Thus, Bralo received a sentencing reduction of 5 five years that accounts for all the mitigation factors found in his case. His contribution to reconciliation amounts to something much less than a 5 five-year discount, significantly lower than the discount given to Plavšić’s.

Unfortunately, the perverse effects of consequentialism permeate the entire ICTY institution beyond the international judges. Consequentialism in the decision-making of the ICTY Prosecutor influenced its presentation of the case during oral arguments, its application of sentencing factors, and finally its sentencing recommendation. It argued that Plavšić’s contribution to reconciliation based on her “expression of remorse is noteworthy since it is offered from a person who formerly held a leadership position, and that it ‘merits judicial consideration.’” Thus, the Prosecutor links the mitigating value of an accused’s contribution to reconciliation to her superior position. Similarly, in cases where reconciliation is a factor, the OTP exercises its discretion to recommend sentences that offer greater penalty reduction to high-ranking perpetrators. The court typically follows the OTP’s recommendations in plea bargains.

For example, the Chief Prosecutor Carla Del Ponte recommended a prison sentence of fifteen to twenty-five years for Plavšić. She represented to the Court that if Plavšić had not pled guilty she would have recommended life imprisonment. Typically, the ICTY grants early release after the defendant has served two-thirds of the sentence. Accordingly, when the OTP recommends a prison term of twenty-five years, it is effectively asking for a sentence

\[\text{\textsuperscript{298}}\text{Prosecutor v. Bralo, Sentencing Judgment, supra note 94, at para. 95.}\]

\[\text{\textsuperscript{299}}\text{Prosecutor v. Plavšić, Sentencing Judgement, supra note 36, at para. 70 (emphasis added).}\]

\[\text{\textsuperscript{300}}\text{Id. para. 59. See also CARLA DEL PONTE, MADAME PROSECUTOR, supra note 256, at 161.}\]

\[\text{\textsuperscript{301}}\text{Ines Monica Weinberg de Roca & Christopher M. Rassi, Sentencing and Incarceration in the Ad Hoc Tribunals, 44 STAN. J. INT’L L. 1, 50-51 (2008) (“At the ICTY, early release is determined by the implied powers of the President, which is particularly instructive when examining the case of the eight ICTY-convicted persons granted early release, after serving approximately two-thirds of their sentence.”).}\]
of a little more than sixteen-and-a-half years. Thus, its low-end recommendation of fifteen years in the Plavšić case is effectively a recommendation for ten years. The Trial Chamber gave Plavšić eleven years, which meant she was out in seven years and a few months.

The OTP’s discretion was exercised more harshly when recommending a sentencing for Bralo. Although it initially asked for a prison sentence of twenty-five years, at the sentencing hearing the OTP stated that it was in fact seeking a “mandatory minimum” of twenty-five years. Thus, accounting for the two-thirds approach outline above, the OTP recommendation was effectively a prison sentence of thirty-seven-and-a-half years. The OTP’s policy towards reconciliation and mitigating factors indicate that it assigned less value to Bralo’s contribution to reconciliation because he is a low profile perpetrator, in other words, because of his status. Its policy manifested an aggressive recommendation for a harsher penalty for the low level perpetrator because he is a low level person, despite his cooperation with the Prosecution. The ICTY’s reconciliation ideology is driving this recommendation.

A final point of interest here concerns Plavšić’s release from prison. She reserved her prison time at a women’s prison called “Hinseberg” located in Frövi, Örebro County, Sweden. The inmates call it “the castle” because it is a mansion overlooking a lake. The prisoners can engage in artistic activities, enjoy saunas, bake for leisure, and even ride horses. In 2009, after serving two-thirds of her sentence, she applied to the ICTY for early release. Although her application for early release was made after her repudiation of

303 Id. at para. 62.
305 Id.
responsibility on public television, something she repeated again for a local newspaper, ICTY President Judge Patrick Robinson granted her motion for release finding that she was “rehabilitated.” No mention was made of her renunciation of responsibility, her slide backwards towards justifying her criminal behavior, or her complete nullification of her apology, which was central to mitigating her sentence.

CONCLUSION

With the creation of the ICC, international criminal justice gained a permanent mechanism with potentially global reach. The potential latent in such an international court has fueled high expectations. Yet, the growing list of objectives and goals has resulted in unrealistic expectations of international prosecutions of atrocity crimes. Consequently, fulfilment of the core functions of international criminal justice has been jeopardized. The pressure to chase aggrandized ambitions comes not only from politicians, or special interest groups, or media frenzies. Actors within the system, particularly international judges, have to some extent bought into romanticized notions that their legal institutions can achieve an awesome array of societal goals, even when some of those objectives are in direct conflict with each other. This overreach has had a negative impact on the sentencing of perpetrators of genocide, crimes against humanity, and war crimes. Judges at international criminal courts have elaborated a smorgasbord of ideological objectives for international criminal prosecutions, resulting in perverse and confusing justifications for individual sentences.

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308 See Plavšić Pardon Decision, supra note 306, at para. 8.
309 See id.
310 Although, significantly, it is lacking its own law enforcement regime to carry out basic police tasks, or a standing “police force” so to speak.
The ad hoc tribunals have drawn on a wide range of sources when identifying the sentencing rationales for international criminal justice. Although deterrence and retribution appear most frequently in the tribunal’s sentencing judgments, international judges appealed to a much wider range of justifications, legal and political, to legitimize their sentences, in particular sentences that would otherwise appear to be extremely lenient. This toggling at will between punitive and restorative approaches to punishment has opened the work of international criminal tribunals to criticism of bias, politicization, and victor’s justice. International idealism defeats itself. There are many learning lessons here for the ICC and pitfalls to avoid.

This article’s findings caution against international criminal justice mechanism becoming too entangled with idealistic aspirations, such as reconciliation or producing a historical record, at the cost of their primary function to punish perpetrators of atrocity crimes. By analyzing the tribunals’ jurisprudence, this article demonstrates how international judges often veer off course away from their primary role in light of the realistic capacity of international criminal courts when attempting to achieve other well-meaning goals that are beyond the institutional capacity of international criminal courts. This results in problematic rulings, distortion of responsibility or accountability, and ultimately failure to achieve the desired aspirations because of institutional and structural limitations.

Arguably, international judges cannot commit to serious punitive measures and simultaneously prioritize pragmatic considerations, as weak institutions must—such as, incentivizing voluntary surrender or encouraging cooperation. Perhaps they are unwilling to impose meaningful penalties out of misplaced idealism that their leniency will bring other high-ranking perpetrators, those who bear the greatest responsibility, to the table. This strategy failed. None of the remaining most wanted perpetrators followed Plavšić’s suit in either surrendering to the court or admitting responsibility. Krajišnik maintained his innocence and opted for a trial. 311 Karadžić


An analysis of the sentencing jurisprudence suggests that international judges pick and choose, without principled justification, an ideology to follow in a particular case that serves the desired result they have in mind for that case. In subsequent cases, that ideology may be abandoned or marginalized, without explanation, if it proves to be an obstacle to their desired sentence. This is particularly true in the case of the ICTY where the sentencing jurisprudence lacks commitment to prioritizing a principle to guide sentencing allocations. In other words, ICL sentencing lacks commitment to a general principle that will influence its determination of a sentence.

Another observation that may be made, aside from failure to identify a primary sentencing philosophy, is that quite often the proffered rationales are inconsistent with the actual sentencing results. Under-theorization and the absence of scholarly examination of the sentencing jurisprudence of international criminal courts has left us with an \textit{ad hoc} approach to sentencing for genocide, crimes against humanity, and war crimes. In the absence of a guiding theory, the wide discretion given to international judges in sentencing has failed to produce a rational and consistent international sentencing practice. To the contrary, certain ideologies resulted in injustice in sentencing. This is particularly so when reconciliation ideology influenced the sentence, and therefore it should be abandoned or given very limited weight. A possible unfortunate legacy of the ICTY’s sentencing jurisprudence is that high-ranking perpetrators in leadership positions receive more reduction in prison sentence than foot soldiers where both are found to have “contributed toward
reconciliation.”314 Those most responsible for atrocities, in particular, have benefited the most when reconciliation was advanced as a rationale for mitigating punishment. They have received significantly reduced sentences, often lower than their subordinates, thus trivializing their culpability for the atrocities. Moreover, in general, most utilitarian aspirations associated with international criminal prosecutions should be abandoned as sentencing rationales because they distort the individual perpetrator’s culpability.

This paper’s analysis demonstrates that when international judges give undue weight to utilitarian aspirations in their sentencing judgments, they distort and diminish the culpability and just distribution of punishment among the various actors’ responsibility for atrocity crimes in a situation. Moreover, the goals they seek to achieve with their sentencing reductions, like reconciliation, are beyond the immediate capacity of criminal courts. International prosecutions should assume a more modest posture regarding its capabilities, lest it damages its core responsibility of punishing perpetrators of atrocities crimes. This is not to say that international criminal justice cannot contribute to these aspirations, but rather that it should not be given weight as a factor in sentencing.

THE IMPACT OF THE ICTY ON ATROCITY-RELATED PROSECUTIONS IN THE COURTS OF BOSNIA AND HERZEGOVINA

Yaël Ronen*

INTRODUCTION

The establishment of international criminal tribunals since the 1990s has been part of a general move by the international community toward a clear condemnation of atrocities and an expression of a collective determination to end impunity. Yet the international tribunals cannot achieve these goals by themselves.¹ Domestic courts are an essential component in the enforcement of international criminal law because they help to ensure that accountability does not remain the lot of an exclusive few while thousands of perpetrators walk free. Without large-scale domestic action, the international community’s message of ending impunity, as expressed in the establishment of international tribunals, would be severely undermined. This holds true for the era of the International

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Criminal Court no less than for the experience of its ad hoc antecedents.

The international and the domestic arenas are not isolated from each other. They interact both intentionally and implicitly, including through judicial bodies. The latter interaction naturally varies from one instance to another depending on the particular circumstances. Yet because the shift in emphasis from international to domestic enforcement of international criminal law is a recurring one, the question arises whether there are characteristic patterns in the institutional interaction that allow for lessons to be learned as to best practices, or, on the other hand, as to potential pitfalls in future processes. This article concerns the experience in effecting this shift from international to domestic enforcement of international criminal law with respect to Bosnia and Herzegovina (BiH), namely the interaction between the International Criminal Tribunal for Yugoslavia (ICTY) and the courts of BiH.

In the case of BiH, the distinction between international and domestic institutions is not self-evident. While the ICTY’s international character is beyond dispute, as is the domestic character of the ordinary courts of BiH, the classification of the federal-level BiH court dealing with international crimes is less straightforward. It was set up while BiH was under international administration, and it employs international, as well as national, judges and prosecutors. However, the source of authority of the court is domestic law; it applies domestic law, and, ultimately, will employ only national personnel. Thus, while at present it is best characterised as a hybrid, its terms of reference envisage an entirely domestic mechanism. For the purposes of the present article, institutions within BiH, irrespective of their provenance and composition, are therefore regarded as domestic, although the hybrid character of the federal-level BiH court will be analyzed in context.

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2 Cf. Cesare P. R. Romano, The Proliferation of International Judicial Bodies: The Pieces of the Puzzle, 31 J. OF INT’L L. & POL. 709, 713-14 (1999) (defining an international tribunal as one which must have been established by an international legal instrument and resorts to international law).
Sections I to III of this article are introductory and therefore brief. Section I provides a historical and institutional background to the situation in BiH; Section II recalls the international response to the mass atrocities in BiH, namely the establishment of the ICTY; and Section III reviews the domestic judicial response of BiH to the mass atrocities. Section IV constitutes the heart of the article and considers the impact of the ICTY on the domestic response to war-related crimes through qualitative, quantitative, and normative parameters. The article concludes with a tentative characterization and assessment of the ICTY’s impact on the domestic response.

This article does not purport to provide a comprehensive study of the international involvement in BiH, the significance of which cannot be overstated in the context of addressing war-related crimes. Important international processes and actors other than the ICTY, such as the Office of the High Representative (OHR) and the European Union (E.U.), have undoubtedly affected the policy and practice in BiH, arguably to an even greater extent than the ICTY. While this article is nonetheless limited to the potential trickle-down effect of the ICTY in its direct interaction with the domestic legal system, there is no doubt that political stances toward the international involvement have had an impact on the reception in BiH of the ICTY and, accordingly, on its ability to impact domestic institutions—particularly the judiciary. Arguably, whatever success the ICTY has had in influencing BiH institutions was the result of the tight control that the international community has exercised over the country, and, correspondingly, limited to the state of BiH, where it enjoyed such control.

I. BACKGROUND

BiH’s descent into ethnic war in 1992 was the culmination of over seven decades of pent-up ethnic animosity among Serbs, Croats, and Bosnians, nurtured by forced political union under Yugoslav statehood in its various forms. In fact, the establishment of the Republic of BiH under Tito’s Yugoslavia was itself a tool of ethnic management, aimed at maintaining a balance between the two
dominant ethnicities in Yugoslavia, the Serbs and the Croats, both of which lay claims to the territory of the Republic.³

Tito's death in 1980, combined with the end of Cold War rivalry and the decline of communist ideology in the rest of Europe in the 1980s, led to the severe weakening of the Socialist Federal Republic of Yugoslavia (SFRY)'s crucial unifying factors. The breakup of Yugoslavia in 1991-92 came as no surprise. In BiH the process was fashioned by interethnic disputes and heavy involvement of Serbia and Croatia, both acting in pursuit of their territorial aspirations. When BiH declared independence on March 3, 1992, large-scale violence had already erupted within it with the support of the kin states.⁴

At the outset, the BiH conflict was predominantly between Bosnian Muslims and Bosnian Croats backed by Croatia on one side, and Bosnian Serbs backed by Serbia on the other side. By the end of May 1992, two thirds of BiH territory, including the soon-to-be-named Republika Srpska, was in Bosnian-Serb hands. The second stage of the war began in May 1993 with the collapse of cooperation between Bosnian Croats and Bosnian Muslims. This conflict lasted until the spring of 1994, when the combined territory held by the Croat and Bosnian-Muslim government forces was united into the Federation of Bosnia and Herzegovina, and the number of warring parties in BiH was again reduced to two. The last stage of the conflict, from early 1994 on, was marked by NATO's military intervention. It culminated in May 1995, when, in reaction to Serb refusal to comply with a NATO ultimatum to withdraw heavy weaponry from around sieged enclaves, NATO forces launched air strikes on Serb targets in BiH and in Serbia. Further air strikes led to

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U.S.-sponsored peace talks in Dayton, Ohio, in November 1995, which produced the Dayton Peace Accords in December 1995.\(^5\)

Estimates as to the number of victims of the war vary enormously, ranging from 25,000 to 329,000.\(^6\) Former ICTY Prosecutor Carla del Ponte endorsed a finding of 103,000 lives lost.\(^7\) Reliable data suggests that about two-thirds of the victims were Muslim, over a quarter Serb, and the remaining eight percent Croat.\(^8\) Approximately one million BiH citizens became refugees during the war, and another one million were internally displaced. Over a third of pre-war residential dwellings were destroyed and the technical and social infrastructure was significantly damaged.\(^9\) As a consequence, the ethnic composition of entire regions was affected. In the territory of the present-day Federation of BiH, which is predominantly Muslim-Croat, the share of non-Serbs had increased by over forty percent, while in the Serb-populated area that now forms the Republika Srpska, the share of non-Serbs had fallen by over eighty percent.\(^10\)

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The Dayton Peace Accords outline the new constitutional design of BiH. The State of Bosnia and Herzegovina (BiH, or “the state”) comprises two administrative divisions (“entities”): the Bosnian-Serb Republika Srpska (RS), the Bosnian/Croat Federation of Bosnia and Herzegovina (FBIH), and the internationally-supervised Brčko district. The RS is a unitary entity dominated by Bosnian Serbs, while FBIH is itself also a federal entity, with power shared between Bosnian Muslims and Croats.\(^\text{11}\) The Dayton Accords established the Office of the High Representative (OHR) to facilitate the implementation of the Accords. BiH has hosted a number of peacekeeping forces. Since 2004, the E.U. has been responsible for peacekeeping operations, while NATO maintains a headquarters in Sarajevo to assist the country with defense reform.\(^\text{12}\)

The BiH Constitution attached to the Dayton Agreement\(^\text{13}\) delineates the division of competences between the entities and the state. The state is vested with comparatively few powers and competences,\(^\text{14}\) and residual competences lie with the entities.\(^\text{15}\) The entities exercise a wide measure of independence, and the relationship between their governing bodies and those of the state, including judicial bodies, is hardly hierarchical. Indeed, in some respects, BiH and FBIH are as foreign to RS as BiH is to Croatia or Serbia. Moreover, the judicial institutions of the state of BiH are eminently affected by the international administration of the country.
since 1995, whereas the impact of the international administration on the courts of FBiH and RS has been much more limited.

BiH has been experiencing an uneasy peace since the conclusion of the Dayton Accords. It receives extensive international assistance, but the economy remains weak. No less importantly, political paralysis plagues the country’s institutions; more than one senior official has suggested the country was “dysfunctional,” with its constituent entities disagreeing on fundamental structural questions. This dynamic has prevented necessary constitutional reform. Dissatisfaction with the constitutional structure of the country is particularly forceful in RS, where the possibility is occasionally raised of taking steps toward secession. As will be demonstrated, this lack of unity has had an impact on the interaction between institutions and on the sense of a commitment to act jointly toward the achievement of common goals.

II. THE INTERNATIONAL RESPONSE TO THE MASS ATROCITIES: THE ICTY

On May 25, 1993, the Security Council unanimously adopted Resolution 827 under Chapter VII of the U.N. Charter, establishing the ICTY and adopting the Tribunal’s Statute. The Tribunal’s subject-matter jurisdiction extended to war crimes, crimes against humanity, and genocide. Resolution 827 made particular reference

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16 Progress Hostage to Political Blockages in Kosovo, Bosnia and Herzegovina, NATO Parliamentarians Hear in Balkans, NATO PARLIAMENTARY ASSEMBLY (June 28, 2010), www.nato-pa.int/default.asp?SHORTCUT=2168.
to BiH as the site of reported widespread and flagrant violations of international humanitarian law.  

The establishment of the ICTY was accompanied by statements on the need for justice, deterrence, promotion of the rule of law, reconciliation, and maintenance of peace. But it was also motivated by less-articulated political goals, such as appeasement of international public opinion and avoidance of military intervention. It is not clear that the judicial role of the Tribunal was taken seriously by Security Council Members at the time.

Domestic prosecutions did not feature prominently on the agenda of the drafters of the ICTY Statute, but it was clear from the outset that the bulk of cases related to the mass atrocities in the former Yugoslavia were to be handled eventually by national courts. Only at a relatively late stage was it recognized that only if the ICTY succeeds in sustaining its action locally would it really meet the expectations of the Security Council's resolutions.

At the same time, in light of the ongoing armed conflict and the deep-rooted animosity among the various ethnic and religious groups which initially made domestic courts unlikely to be willing or

able to conduct fair trials.\textsuperscript{25} ICTY Statute Article 9(2) provides the Tribunal with primacy over domestic courts, of which it has made only infrequent use.\textsuperscript{26} The majority of indictments before the ICTY have been for crimes committed on the territory of BiH, and the majority of indictees have been Serbs and Bosnian-Serbs.\textsuperscript{27}

In 2003 the Security Council adopted the ICTY-devised “completion strategy,” aimed at ensuring that the Tribunal conclude its mission in a timely way and in coordination with domestic legal systems in the region.\textsuperscript{28} The completion strategy required that the ICTY focus its efforts on “the most senior leaders suspected of being most responsible for crimes within the Tribunal’s jurisdiction”\textsuperscript{29} and transfer “intermediate and lower ranked accused” to competent domestic jurisdictions,\textsuperscript{30} while ensuring that basic human rights standards and procedural safeguards are met. In fact, ICTY President Pocar has noted that the Completion Strategy was a strategy not so much to “complete” the work of the ICTY as it was designed to allow continuation by domestic actors of those activities that have

\textsuperscript{25} Cassese, supra note 22, at 339; Paul R. Williams and Michael P. Schare, Peace with Justice? War Crimes and Accountability in the Former Yugoslavia 96-98 (2002).


\textsuperscript{27} Over two thirds of the indictees are of Serb ethnicity. Over three quarters of the indictments filed until 2000 were of Ethnic Serbs. Yaël Ronen, with the assistance of Sharon Avital & Oren Tamir, Prosecutions and Sentencing in the Western Balkans, DOMAC/4, graph 6.2.2 (2010), http://www.domac.is/media/domac/DOMAC-4-2010.pdf.


\textsuperscript{29} S.C. Res. 1503, supra note 28, at preambular para. 7.

\textsuperscript{30} Id. at preambular para. 8.
been initially put in motion by the ICTY. Altogether, thirteen cases have been referred from the ICTY to domestic jurisdictions. Of those, eleven were referred to BiH. The ICTY also sent back to domestic jurisdictions cases that had been investigated by the OTP but in which no indictment was filed in the ICTY by the deadline set at the end of 2004.

III. THE DOMESTIC RESPONSE TO THE MASS ATROCITIES

The post-conflict treatment of international crimes in BiH is unique among the countries of the former Yugoslavia. First, the volume of potential cases relating to BiH is immense, because the overwhelming majority of crimes were committed on its territory and against its population. Second, international crimes are addressed today principally at the level of the federal state, which is characterized by a weak central government in comparison with the strong entity structures (the FBiH and RS). Not unique, but significant for the analysis of domestic practice, is the fact that the legal system in BiH is relatively new, containing both institutions and norms that were only put in place in 2003.

In the immediate aftermath of the armed conflict, the appointment process for judges in the two entities continued to be controlled by the ruling political parties. There were frequent accusations of partiality, corruption, and judicial incompetence. Judges were often forced to supplement their meagre salaries with “outside” work. This not only deprived judges of time that should have been devoted to judicial duties, but it also risked compromising the judges’ independent decision-making abilities. In addition, the system lacked basic infrastructure. The weakness of the judiciary was compounded by complexities in the legal framework and inappropriate procedural laws to effectively prosecute and defend alleged war criminals, a lack of qualified defense attorneys, and an

32 Mark S. Ellis, Bringing Justice to an Embattled Region - Creating and Implementing the “Rules of the Road” for Bosnia-Herzegovina, 17 BERKELEY J. INT’L L. 1, 5-6 (1999).
inability to monitor trials or summon witnesses. Other obstacles were poor case preparation by prosecutors, ineffective witness protection mechanisms, and lack of cooperation between the entities.

The international community did not intervene in the re-establishment of law enforcement institutions. The Constitution of BiH, annexed to the Dayton Accords, only re-established the Constitutional Court. Until 1997, administration of justice was under the exclusive responsibility of the entities (with the exception of a BiH-level Constitutional Court). In 1997, a new Ministry of Civil Affairs and Communications was established at the BiH level, which was given responsibility for dealing with “international and inter-entity criminal law enforcement,” including international legal assistance.

Most law enforcement, including the domestic prosecution of war-related crimes, was left to the entities. Only in the early 2000s did the OHR initiate a comprehensive reform of the legal system in BiH. This included restructuring and downsizing of courts and prosecutors’ offices and replacing all judges and prosecutors in an effort to secure the independence of the judiciary and establish an appropriate balance of judges of different ethnicities. In 2003, a Ministry of Justice was created at the BiH level, which by then


34 Interview with NGO researchers in The Hague, BiH, and ICTY (Jan. 2009). Interviewees were selected based on their seniority and familiarity with the relevant justice systems. They included senior officials in various the ICTY units, international and domestic judges and prosecutors, E.U. and OSCE officials, and local NGOs. Since many of the interviewees did not want the information they provided to be attributed to them, they are referred to in generic terms.


included the State (federal) Court and State (federal) Prosecutor’s Office.  

Until 2005, trials for war-related crimes were held only in the courts of the entities. In FBiH, jurisdiction over war-related crimes lies with ten cantonal courts, where 174 individuals, mostly of Serb ethnicity, have been indicted from 1992 to September 2009. Of these, 146 have received final verdicts. In RS, jurisdiction lies with 5 district courts, and forty-five individuals have been indicted and eventually received a verdict by 2009, the overwhelming majority of whom were of Serb ethnicity. All but five of the indictments in RS were submitted in or after 2003. Appeals on these courts’ judgments are heard by the Supreme Court of the respective entity. Since 2005, war-related crimes have also been tried at the War Crimes Section (WCS) within the State Court of BiH (State Court). The WCS employs both domestic and international judges and exercises primary jurisdiction over war-related crimes, namely genocide, crimes against humanity, and war crimes, through both trial and appeals chambers. It retains cases or transfers them to entity courts depending on their complexity and sensitivity. By September 2009, 139 individuals had been indicted for war-related crimes before the WCS at the State Court, most of them of Serb ethnicity. By the end of the same period, seventy-two of the defendants had received a final verdict.

37 BIH PUB. ADMIN. REFORM COORDINATOR’S OFF., FUNCTIONAL REVIEW OF THE BIH JUSTICE SECTOR (2005), parco.gov.ba/?id=408.
38 BALKAN INVESTIGATIVE REPORTING NETWORK (BIRN), PURSUIT FOR JUSTICE: GUIDE TO THE WAR CRIMES CHAMBER OF THE BIH COURT 7 (vol. II) (hereinafter BIRN, PURSUIT OF JUSTICE).
39 For a discussion of this policy, see infra text accompanying notes 87-95.
40 CRIM. PROC. C. BOSN. & HERZ., art. 315.
41 For a discussion of this policy, see infra text accompanying notes 140-46; NATIONAL STRATEGY FOR WORK ON WAR CRIMES CASES (2008), www.mpr.gov.ba/userfiles/file/Projekti/Drzavna%20strategija%20za%20rad%20na%20predmetima%20RZ.pdf [hereinafter NATIONAL STRATEGY]. See also NATIONAL WAR CRIMES STRATEGY (2008), www.adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf, for an English translation of NATIONAL STRATEGY.
42 RONEN WITH AVITAL & TAMIR, supra note 27, at graphs 2.2A.1.1, 2.2A.4.1.
IV. THE IMPACT OF THE ICTY ON DOMESTIC COURTS

A. Introduction

When the ICTY was established in 1993, no thought was given to cooperation with, or even assistance to, domestic jurisdictions in the former Yugoslavia. The ICTY had specific tasks to perform—arrests and trials. It was busy strengthening its judicial capacity, developing procedures, and ensuring that the international community provided the necessary cooperation in gathering evidence and arresting indictees. Fostering the ability of domestic authorities to address international crimes was not considered one of the Tribunal’s goals, and no resources were allocated toward it. Moreover, war was still raging in the region during the first years of the Tribunal’s existence, making geographical and legal remoteness inevitable. But remoteness was also a policy choice, which continued to maintain hold after the termination of the armed conflict. The Court regarded impartiality as requiring it to maintain and display its distance (geographically, linguistically, politically, and legally) almost to the extent of indifference to political reality on the ground. In addition, cooperation with the domestic jurisdictions was considered a potential threat to the integrity of the international process because the rule of law remained suspect in all these states.

44 Louise Arbour, The Crucial Years, 2 J. INT’L CRIM. JUST. 396, 397 (2004); DEL PONTE & SUDETIC, supra note 7, at 1.
47 Interview with official from ICTY Outreach Office in Sarajevo (January 2009). Del Ponte points out that ICTY prosecutors intentionally remained uninformed about the conflict, ostensibly so as not to compromise their impartiality. DEL PONTE & SUDETIC, supra note 7, at 125.
From the outset, the ICTY suffered from a negative reputation among the various domestic constituencies in the Western Balkans, including BiH. Entity institutions in particular often regard the ICTY as a hostile political body.\(^{48}\) The antagonism toward the ICTY has been attributed to ignorance among domestic constituencies as to the Tribunal’s operation as well as to the dissatisfaction with its perceived bias over whom it chooses to indicted. The popularity of the Tribunal throughout the region is inversely proportionate to the number of indictees hailing from the majority ethnic community in question,\(^{49}\) while the minority within each state has a more positive view of the Tribunal. The only exception is in FBiH, where the Muslim majority has a better opinion of the Tribunal than the Croatian minority.\(^{50}\) Nonetheless, the Muslim community is frustrated with the small number of indictments, the slowness of the trials, and the perceived leniency of sentences.\(^{51}\) To counter this phenomenon, ICTY President Gabrielle Kirk McDonald, with the cooperation of prosecutor Louise Arbour, established in 1998 the Outreach Programme within the Tribunal to encourage engagement with domestic authorities\(^ {52}\) and to communicate directly with the people of the former Yugoslavia. The main focus of the Outreach Programme is to provide information to key regional stakeholders and the wider public about the work of the Tribunal to, \(\textit{inter alia}\), facilitate the transfer of expertise to national judiciaries.\(^ {53}\) Despite these efforts, opinions regarding the ICTY have not changed dramatically.\(^ {54}\) It has been suggested that the Outreach

\(^{48}\) Interview with NGO researcher in Sarajevo (January 2009); Mirko Klarin, \textit{The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia}, 7 J. INT’L CRIM. JUST. 89, 96 (2009).

\(^{49}\) Hodžić, supra note 45, at 4.

\(^{50}\) Klarin, supra note 48, at 91-92.

\(^{51}\) Id. at 90.

\(^{52}\) Interview with official from ICTY Outreach Office in Sarajevo (January 2009); Arbour, supra note 44, at 401.


Programme, as well as the legal officers of the ICTY, do not sufficiently acknowledge the influence of the domestic Serb and Croat political, academic, and cultural elites, who propagate the view that the ICTY is a politically-motivated Western project intent on undermining Serb and Croat independence. This opposition to the international project of state-building in BiH is reflected in animosity not only toward the ICTY itself, but also toward institutions of the state, including judicial bodies. For example, the unwillingness of entity courts to take the cue from the State Court of BiH is driven in part by its perception as an internationally imposed puppet institution.

The completion strategy of the ICTY has nonetheless brought about a sea change in the relationship between the ICTY and domestic jurisdiction. The ICTY developed a strong interest in enhancing the capacity of domestic legal systems to uphold relevant criminal standards. It engaged more proactively with the establishment of the War Crimes Chamber (WCS) within the State Court of BiH, with a view to facilitate the domestic exercise of criminal justice powers following transfer of cases under Rule 11bis and domestically-initiated cases. The completion strategy also played a part in the adoption of new criminal codes and criminal procedure codes. Regardless, even as late as 2008, there were doubts in the ICTY, and the international community more generally, about whether domestic institutions were capable of administering justice for war-related crimes effectively and in accordance with international standards. This may explain the reluctance on the part

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55 Klarin, supra note 48, at 96.
56 DEL PONTE & SUDETIC, supra note 7, at 49-50.
57 Clark, supra note 54, at 483. For conflicting views on the Outreach Program, see Megret, supra note 24, at 1037-40.
58 Rule 11bis allows the ICTY to refer cases to domestic courts in the region of the former Yugoslavia.
59 Interviews with official from ICTY Prosecutor’s Office and with official from the Office of the High Representative in Sarajevo (January 2009); Interview with official from the ICTY Outreach Office in Sarajevo (January 2009).
of the ICTY to relinquish specific cases or to actively promote domestic courts (an endeavour which is also constrained by the ICTY’s limited capacity). Interaction with domestic institutions has therefore been informed by the acknowledgement of the necessity of the completion strategy, combined with skepticism as to the viability of domestic processes and resource limits on both sides. The following sections examine the normative, quantitative, and qualitative impact of the ICTY in domestic courts in BiH.

B. The Qualitative Impact of the ICTY—Capacity of Courts

1. Establishment of the WCS

The most fundamental development in capacity enhancement in BiH with respect to domestic proceedings relating to international crimes was the establishment of the WCS. The proposal to transfer cases from the ICTY to the states of the former Yugoslavia was first tabled by ICTY President Jorda in May 2000. However, for a long time, such relocation was perceived as premature. It was envisaged for a later stage, when the judicial systems of the relevant states were reconstructed on democratic foundations, so that they could accomplish their goal with total independence and impartiality and with due regard for the principles of international humanitarian law and the protection of human rights. This would have entailed international involvement and support in training.

By late 2002, when President Jorda presented the Security Council with a further report outlining the completion strategy, the transfer of cases involving mid- and low-level accused to national courts had become an essential component of the strategy. The most important condition that national courts were required to satisfy was the ability to handle transferred cases “effectively and consistently with internationally recognized standards of human

The judicial system of BiH was nonetheless still considered inadequate. The report therefore called for the creation of a special war crimes chamber in BiH, a concept which was endorsed by the Security Council.

The initial reaction to the establishment of the WCS by BiH officials was lukewarm. BiH officially “welcome[d] the ICTY initiative to process some of the cases by the domestic judiciary structures under the auspices of the ICTY,” but added that “the prosecution and trial of the indicted war criminals in the region should continue to be a United Nations responsibility.” This position reflected a common refrain in domestic BiH politics, according to which the ICTY alone was an adequate solution, although certain elements of domestic society did push for greater activity by domestic courts in the late 1990s. Domestic approval of the WCS was nonetheless fuelled by the misinformed yet prevalent conception that, as a result of the various Security Council Resolutions endorsing the completion strategy, BiH was obliged to accept defendants that would be transferred from the ICTY in the future, even though the entities were not yet in a position to provide the accused with a fair trial. In addition, frustration with the ICTY increased, and the state government regarded a special war crimes chamber as an opportunity to prove to both national and international audiences that the state institutions in BiH were capable of performing even the most demanding criminal prosecutions and

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67 Burke-White, supra note 35, at 316.
that BiH had effectively recovered from the conflict. Simultaneously, the special war crimes chamber would enable state-level officials to wrest power away from entity-level institutions under a stamp of approval by the ICTY. The result was a new and powerful domestic interest block in BiH pushing for general enhancement of domestic judicial institutions and for a state-level war crimes court in particular.  

FBiH representatives, too, were generally supportive of a special court to deal with war-related crimes as a means of raising confidence in domestic institutions and awareness of the overall issues involved.  

In contrast, the RS was resistant to endowing the State Court with jurisdiction over war-related crimes, as there was strong concern that the State Court would be biased against Serbs. Perhaps a more cynical reason for whatever support was voiced by either entity’s officials was their interest in preventing ethnically-charged cases from landing on their own doorsteps. The strength of domestic interests in favor of a state-level war crimes chamber eventually made possible the adoption of the necessary legislation in the BiH legislature in November and December 2004.

The procedures and policy of the State Court avoid many of the shortcomings of the ICTY. These include strictly-imposed deadlines for trial length; geographical proximity; the absence of a language barrier; a willingness and intention to investigate and prosecute crimes committed against Serbs with the same dedication as all other crimes; and a comprehensive outreach effort, inter alia adopting the models of communication used by the ICTY.

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70 Burke-White, supra note 35, at 332.
71 Michael Bohlander, Last Exit Bosnia – Transferring War Crimes Prosecution from the International Tribunal to Domestic Courts, 14 CRIM. L. F. 59, 69 (2003).
73 Burke-White, supra note 35, at 330.
2. Transfer of know how

A common means of transferring know how and expertise among institutions is joint work, either within the transferring institution or within the receiving one. In the relationship between the ICTY and institutions within BiH, the former form of interaction was almost completely absent. As part of the ICTY’s initial attitude of detachment from the region, it was regarded inappropriate to recruit professionals from the former Yugoslavia, particularly as judges, on the ground that this would make it difficult to maintain sufficient distance and neutrality. Security concerns were also a powerful disincentive for hiring nationals of the region.

This general policy was revised, not as a result of a conscious decision to develop domestic capacity, but due to the need to speed up the processes pending before the ICTY. First, the OTP considered it crucial to acquire knowledge of the conflict and its background, and to be able to perform in relevant languages. Further steps were triggered by the notion that most of the work would have to be done in the region and by the fact that the few people from the region who went to work at the ICTY proved to be good professionals. However, this change in policy did not make a substantial contribution to the actual transfer of knowledge and skills to BiH, at least not in the short term, because people from the region who started working at the ICTY were unlikely to return to the region—at least not immediately.

In contrast, the employment of former ICTY personnel at the domestic level, mainly at the state level, as was the extensive

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74 Interviews with officials from the ICTY Chambers at The Hague (January 2009).
75 Interviews with officials from the ICTY Chambers, Victims and Witnesses Section, Prosecutor’s Office, and others, at The Hague (January 2009).
77 This is also true of locals working in victims and witness support. Interview with official from the ICTY Victims and Witnesses Section at The Hague (January 2009).
78 Interviews with judges from the BiH Court in Sarajevo (January 2009).
advice offered by other administrative ICTY officers in connection with the setting up the Court of BiH, have been important elements of the transfer of knowledge from the ICTY to BiH. This overall policy appears to have been motivated at least partly by the need to ensure that the domestic processes satisfy the ICTY’s requirements, in order to enable the transfer of cases under Rule 11bis, rather than out of direct concern for the development and future of domestic institutions.80

The international presence within the State Court of BiH encompasses all units from the judiciary itself to administrative support. The need for this international participation was acknowledged even by the RS.81 One of the positive contributions of this participation has been in deflecting the suspicion and mistrust of the domestic public toward the domestic judiciary, which had been seen as unprofessional, corrupt, and biased against members of the “other” side. Foreign professionals may also be more familiar with international crimes and jurisprudence and with applying international standards of due process.

At the same time, it was recognized from the start that the State Court had to be run and seen to function as a BiH institution, with domestic actors taking responsibility for early its success. The appointment of domestic practitioners to lead positions82 gave the institution a BiH face and identity. One aspect of this is the exclusion of international judges from presiding over panels. However, this policy has been controversial. Some suggest that a rotation in panel presidency could have had a positive impact on the effectiveness and celerity of the Court, in particular if international judges were to introduce efficient case management techniques.83 Originally, each panel was comprised of two international judges and a presiding domestic judge. At the time of writing, the WCS trial section first-

79 Declaration by the PIC Steering Board, PEACE IMPLEMENTATION COUNCIL (June 12, 2003), http://www.ohr.int/pic/default.asp?content_id=30074.
80 Interviews with officials from the BiH Court Registry in Sarajevo (January 2009).
81 Bohlander, supra note 71, at 68.
82 Law on the Ct. of Bosn. & Herz., art 65.
83 Interview with a judge from the BiH Court in Sarajevo (January 2009).
instance panels comprise four judges each, one international and three domestic. As a rule, the domestic judge is the president of the panel. The appellate division of the WCS consists of one panel composed of two international judges and a presiding domestic judge. The participation of international judges was intended to be phased out by 2009, but in December 2009 the OHR extended that mandate of the international judicial and prosecutorial staff for three years, despite strong objection by RS.

A more fruitful aspect of the informal transfer of knowledge is the working relationships established between judges and their legal officers. The younger legal professionals are also usually more receptive to mentoring and are often better able to adapt to the new legal framework.

Many other elements nonetheless undermine the process of transferring knowledge and skills between international and domestic court officials. One is the selection process of international judges and prosecutors for the WCS, which has been heavily criticized for resulting in the appointment of insufficiently qualified professionals. The situation has allegedly improved with the transfer of the selection process to the domestic High Judicial and Prosecutorial Council. A related problem is the short duration of international

85 HUMAN RIGHTS WATCH 2006, supra note 33, at 7.
87 Id.
88 Interviews with judges from the BiH Court in Sarajevo (January 2009). To this, some locals would add “their unfamiliarity with the domestic system, with the historical context, with the constitutional structure of BiH, and with its political context.” Interview with a judge from the BiH Court in Sarajevo (January 2009).
89 DAVID TOLBERT & ALEKSANDAR KONTIC, FINAL REPORT OF THE INTERNATIONAL CRIMINAL LAW SERVICES (ICLS) EXPERTS ON THE SUSTAINABLE TRANSITION OF THE REGISTRY AND INTERNATIONAL DONOR SUPPORT TO THE COURT OF BOSNIA AND HERZEGOVINA AND THE PROSECUTOR’S OFFICE OF
judges’ tenure, and the resultant lack of familiarity with the complex nature of cases and the cultural and political background within which they took place.  

Several domestic judges consider the influence of their international counterparts as generally positive. Experienced domestic judges have not always been willing to be “chaperoned” by international colleagues.  

Because there has been no institutional policy regarding the transfer of expertise, interaction between international and domestic judges, in the form of regular debates over both substantive and procedural issues, drafting of guidelines by the international judges, and special training sessions, has always been the product of the commitment of particular judges.  

In the prosecution, the mix of international and domestic professionals in case teams was also viewed as a good method for domestic legal professionals to increase their knowledge about the applicability of international instruments on human rights and to ensure compliance with international standards. The contribution of international staff to the capacity of domestic legal professionals is especially important in light of the breadth and complexity of war crimes cases. Recent reform of the BiH criminal procedure code that has made the criminal justice system in BiH more adversarial and thus less familiar to domestically-trained professionals, has made capacity building even more critical. However, a reported lack of trust and goodwill toward international prosecutors on the part of the first BiH Chief Prosecutor, combined with a post-communist
in institutional culture of reluctance to share information, severe time constraints, and heavy workload, obviously affected peer relationships and the possibility of knowledge- and information-sharing. At the time of writing, there is only one international serving prosecutor.

3. Transfer of information

Transfer of cases from the ICTY to domestic courts entailed an enormous transfer of information and evidence to the domestic courts. This required the ICTY to provide mechanisms to liaise with domestic authorities to obtain further relevant information. Accordingly, for instance, ICTY RPE Rule 75(H) was added in 2007 to allow domestic courts, prosecutors, and defence counsel to obtain confidential ICTY material.

This process contributed to interaction between the ICTY and the domestic courts, particularly the WCS. The two tribunals developed a greater sense of horizontal collaboration and partnership in a common task. The ICTY OTP

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96 Interview with an official from the Office of the Prosecutor of the BiH Court in Sarajevo (January 2009).
99 Interviews with officials from the ICTY Chambers at The Hague (January 2009). This meant signing a Memorandum of Understanding between the Office of the Prosecutor of the ICTY and the Special Department for War Crimes of the Prosecutor’s Office of BiH. *BIH PROSECUTOR’S OFFICE BRIEFING BOOK* (2009).
100 This collaboration also meant that the local courts would be able to voice their needs in a useful way. A judge from the State Court of BiH, for instance, suggested that the Registry create a web page with instructions on how to file a request for assistance, something which was taken on board at the Hague. Interview with official from the ICTY Court management at The Hague (January 2009).
perceived this collaboration as “healthier” since the authorities in the region are the ones that need to finalize the cases.  

Until 2004 the admissibility in courts in BiH of evidence collected in ICTY proceedings was unclear to domestic prosecutors. In 2004, BiH adopted a Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Admissibility of Evidence Collected by the ICTY in Proceedings before the Courts. This law permits the use of evidence collected in accordance with the Statute and the ICTY RPE in proceedings before the courts in BiH. Borrowing from ICTY RPE 94(b), the WCS has developed criteria for using ICTY evidence and proven facts. Thus the courts may accept as proven those facts that are established by legally binding decisions in proceedings by the ICTY and may accept documentary evidence from proceedings of the ICTY relating to matters at issue in the current proceedings. However, BiH courts may not base a conviction solely, or to a decisive extent, on the prior statements of witnesses who did not give oral evidence at trial.

A perusal of judgments reveals extensive use by the WCS of evidence from the ICTY regarding, for example, the existence of the requisite elements of a widespread and systematic attack against a civilian population, the intent by the Serb forces at Srebrenica to

101 Interviews with officials from the ICTY Prosecutor’s Office at The Hague (January 2009).
102 OSCE 2005, supra note 9, at 31.
105 Id. at art. 3(2).
106 Prosecutor v. Vuković & Another, Case No. KRŽ-07/405, First Instance Verdict, 9-10 (Ct. Bosn. & Herz. Feb. 4, 2008) (basing decision on the ICTY’s Prosecutor v. Kunarac, Kovac & Vukovic, Case No. IT-96-23& IT-96-
destroy the protected group;\textsuperscript{107} the determination that genocide occurred in the enclave of Srebrenica during the time specified within the indictment;\textsuperscript{108} the existence of armed conflict in BiH after April 6, 1992,\textsuperscript{109} and the fact that genocide occurred in BiH.\textsuperscript{110} The use of the 2004 Law is not without its own challenges. For example, the material arrives in English, and its abundance sometimes challenges domestic prosecutors’ ability to locate relevant evidence.\textsuperscript{111}

Where the entities are concerned, language barriers and hostility to the ICTY are obstacles to cooperation. The ICTY’s proactive engagement has almost completely overlooked the courts of the entities (as have other international bodies). The absence of a conscious effort to empower domestic institutions does not mean that the ICTY had no effect at all on the latter, although in view of the circumstances, such effect was not necessarily positive. For example, a 2000 Survey in BiH revealed that domestic professionals felt that the international community saw them as “intellectual inferiors who did not understand the relevant law.”\textsuperscript{112} Noting that


\textsuperscript{109}Mandić, supra note 102, at 57 (basing decision on Prosecutor v. Galić, Case No. IT-98-29-A, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006)).

\textsuperscript{110}Trbić, First Instance Verdict, supra note 108, at 223-29 (basing decision on Krstić, supra note 107 and Blagojević & Jokić, supra note 107).

\textsuperscript{111}\textsc{Diane Orentlicher, That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia} 121 (2010).

\textsuperscript{112}\textsc{Human Rights Ctr., Int’l Human Rights Law Clinic (Univ. of Cal., Berkeley and Sarajevo), Justice, Accountability and Social Reconstruction} 36, 41 (2000),
ICTY officials failed to keep them informed of the status of the investigations even in response to direct inquiries, these professionals viewed the ICTY as unresponsive and detrimental to the ability of BiH courts to conduct national war crimes trials.\textsuperscript{113} With respect to the transfer of ICTY evidence, difficulties are exacerbated by the fact that entity officials do not know which material is available.\textsuperscript{114} In contrast to the interaction between the ICTY OTP and the BiH prosecutor, which takes place on a daily basis,\textsuperscript{115} requests for assistance from entity courts number no more than 5-6 a year, mostly for evidence.

4. Summary

The ICTY was influential in bringing the WCS into existence and has been involved in its routine operation. This involvement was facilitated by, and indeed had a part in inducing, the hybrid character of the WCS. In contrast, the ICTY has displayed disinterest in entity courts, leading the latter to reciprocate and even to express resentment toward the Tribunal and a reluctance to take guidance from it.

\textsuperscript{113} \textit{Id.}


\textsuperscript{115} Interview with official from the ICTY Transition Team at The Hague (January 2009).
C. Quantitative Impact of the ICTY

1. Prosecution rates

The prevailing view is that had it not been for the ICTY, there would not have been domestic prosecutions even at the limited volume in which they exist. Yet a quantitative attempt to assess the impact of the ICTY on prosecution rates and sentencing in the BiH jurisdictions has proven difficult because the number of cases is too small for statistically significant findings. In other words, there are no statistically significant findings on trends in the volume of cases in domestic jurisdictions, let alone trends that can be attributed to the relationship of these jurisdictions with the ICTY. An examination of prosecution rates from 1992 to 2009 nonetheless reveals a few tentative patterns. The rate of indictment in the WCS has remained more or less constant since it began to operate in 2005. However, in FBiH and perhaps in RS, a number of waves are discernible that may be linked to changes in the direct or indirect working relationship with the ICTY.

2. Impact of the Rules of the Road (RoR) procedure

In FBiH, there was a drop in indictments from 1997 to 2000, picking up again in 2001. In RS there were a handful of indictments until 1997, and none again until 2003. At least in FBiH, this gap may be related to the Rules of the Road (RoR) procedure introduced in 1996 (the paucity of indictments in RS prior to 1997 makes it impossible to identify a similar drop or gap).

The RoR marked the ICTY’s first involvement in domestic administration of justice in BiH. It was based on an agreement among BiH, Croatia, and Serbia, and responded to unchecked issuances of indictments for war-related crimes by entity prosecutors.

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116 Interview with official from BiH Prosecutor’s Office in Sarajevo (January 2009).
117 RONEN WITH AVITAL & TAMIR, supra note 27, at graph 2.2A.1.1.
118 Id. at graph 2.2B.1.1.
119 Id. at graph 2.2C.1.1.
The policy of entities prosecuting war crimes without oversight became particularly problematic as elections in BiH neared and people traveling to their respective voting places were easy prey for unmerited arrests, abuse, and restrictions on movement. The RoR procedure introduced a requirement of ICTY clearance for prosecutions by the entity authorities. If either of the BiH’s entities’ authorities wished to make an arrest where there was no prior indictment by the ICTY, they had to send evidence to the RoR Unit established at the ICTY’s Office of the Prosecutor (OTP) in order for the Unit to advise whether or not the available evidence was sufficient by international standards to justify either an arrest or indictment. The ICTY OTP was not enthusiastic about undertaking the review of files and questioned whether it was within the Tribunal’s mandate to do so. The OTP was also concerned that it lacked the resources to undertake this type of activity and preferred to focus efforts on potential indictments within its own jurisdiction. Yet, after considerable pressure from states supportive of the Tribunal, the OTP reluctantly agreed to review the cases submitted to its office. The RoR procedure undoubtedly reduced the incidence of arbitrary arrests in BiH and contributed to the active participation of displaced people and candidates in the early elections.

Cases reviewed by the OTP were returned to domestic authorities with a marking A through H, indicating their suitability for further investigation or trial. The most common category designations by the ICTY OTP were A (the evidence was sufficient by international standards to provide reasonable grounds for the belief that the accused may have committed the specified serious violations of international humanitarian law); B (evidence was

123 Ellis, supra note 32, at 7-8.
insufficient); and C (the ICTY was unable to determine the seriousness from available evidence).\textsuperscript{125}

Lack of clarity regarding the legal status of the RoR and the failure to disseminate the rules to relevant entity officials led to confusion among domestic authorities. As such, a significant number of cases were heard by entity courts in disregard of the RoR procedure. In some cases, such discrepancies were resolved by a retrospective designation as category A by the ICTY OTP or by prisoner exchanges and early releases from prison.\textsuperscript{126}

The OTP ceased the RoR review on October 1, 2004 in anticipation of the closure of the ICTY.\textsuperscript{127} OTP staff reviewed 1,419 files involving 4,985 suspects between 1996 to 2004. Approval under Category A was granted for the prosecution of 848 persons.\textsuperscript{128} Of those, fifty-four (eleven percent) had reached trial stage in domestic courts by January 2005.\textsuperscript{129}

Some commentators argue that the effect of the RoR was to stifle domestic courts. The ICTY was notoriously slow in reviewing cases, in large part due to staff limitations and competing priorities. The files that the ICTY received were in the local language and were organized in a way that was entirely alien to international OTP.

\textsuperscript{125} The significance of the various categories has not been made public. According to various sources, Category D meant that the ICTY would have precedence over that individual as a witness. INT’L CRISIS GROUP, WAR CRIMINALS IN BOSNIA’S REPUBLIKA SRPSKA: WHO ARE THE PEOPLE IN YOUR NEIGHBOURHOOD?, 8 (2000), www.crisisgroup.org/~/media/Files/europe/Bosnia%2039.ashx). Category G indicated that the ICTY OTP determined that the evidence for the specified serious violation of international humanitarian law was insufficient, yet it was sufficient for a different violation of international humanitarian law. OSCE 2005, supra note 9, at 5.

\textsuperscript{126} OSCE 2005, supra note 9, at 47-48 (citing specific cases).

\textsuperscript{127} Since 2005, the BiH prosecutor has reviewed war-related cases. This review, which is sometimes mistakenly mentioned as the continuation of the RoR, concerns not the quality and sufficiency of the evidence but the allocation of cases to state or entity instances.


\textsuperscript{129} Burke-White, supra note 35, at 314.
officers. More than 2,300 of almost 6,000 cases sent to the ICTY were never reviewed and were lost in administrative limbo. The slow processing of other cases and the unsystematic return of decisions on reviewed cases to the domestic authorities stalled momentum in the domestic jurisdiction.

ICTY statistics indicate that less than a quarter of the individuals whose files were reviewed by the OTP were categorized under classification A, i.e. “evidence sufficient to proceed to arrest and indictment.” These figures may indicate that, in the majority of cases, the authorities in BiH were prepared to proceed with the detention of individuals when the evidence was deficient and basic international standards were not met. This supports the contention that the RoR were necessary and met their political objectives. It is also possible, however, that under-investigated files were deliberately submitted in some cases in order to exonerate certain individuals. It could be argued that the RoR was conducive to the interests of the legal authorities in BiH in the sense that they relieved them further of the responsibility of conducting effective prosecutions, which they tended to regard as falling within the ICTY’s prerogative.

The small number of cases adjudicated in FBiH from 1997 until 2001 and the complete absence of cases in RS from 1998 until 2003 may also indicate insufficient resolve among prosecutors, police, and courts to see the cases through. But a more nuanced view of

130 Interview with an official from the ICTY Chambers and anonymous interviewee at The Hague (January 2009).
132 Interview with official from BiH Prosecutor’s Office in Sarajevo (January 2009); OSCE 2005, supra note 9, at 48.
133 Interview with official from the ICTY Outreach Office in Sarajevo (January 2009).

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the data is needed to account for the paucity of cases. For example, war-related crimes have often been prosecuted as ordinary crimes, particularly in RS.\textsuperscript{136} On the one hand, impunity is less rampant than may appear at first sight, but this approach also reflects a refusal by the local authorities to come to terms with the gravity of past events.\textsuperscript{137}

3. \textit{Progress of the completion strategy}

In FBiH and RS, there were surges in indictments in 2001 and in 2003, respectively. This may have been a reaction to the completion strategy of the ICTY and in anticipation of the establishment of the WCS. Receipt of cases under the completion strategy was a mark of prestige for domestic jurisdictions.\textsuperscript{138} Therefore, as the completion strategy gained momentum, states in the region became keen to show that they could administer justice in accordance with international standards so as to ensure that cases are transferred to them.\textsuperscript{139} The BiH government pushed strongly to have cases referred to it, in part because it recognized the legitimating effect of the referral. The ICTY’s “carrot” of a case transfer allowed it to push domestic institutions to meet the benchmarks it had set for the effectiveness of a domestic judiciary. This effort focused at the state level, with the establishment of the WCS, but left a mark also in the entities. In RS in particular, there was support for special courts at the entity level rather than the establishment of a state level court to follow up on the work of the ICTY.\textsuperscript{140} RS authorities argued that a

http://www.crisisgroup.org/~/media/Files/europe/Bosnia%20Report/report103/BG0103.pdf.\textsuperscript{136} RONEN WITH AVITAL & TAMIR, supra note 27, at graph 2.2B.4.4.\textsuperscript{137} Gordana Katana, \textit{Republika Srpska courts shy away from war crimes}, BIRN (undated), www.birn.ba/en/50/10/2316/?tpl=30.\textsuperscript{138} Correspondence with Mirko Klarin (Sept. 13, 2010).\textsuperscript{139} Interview with official from the ICTY Outreach Office in Sarajevo (January 2009).\textsuperscript{140} RS President Dragan Čavić emphasized that the institutions dealing with cooperation with the Hague Tribunal are making tremendous efforts to prove they are fully functional and to regain trust. Dragan Jerinic, “We are making tremendous efforts to prove our cooperation with the Hague,” \textit{Nezavisne Novine} 4-5, cited in OHR BiH Weekend Round-up (Oct. 30-31, 2004), www.ohr.int/ohr-dept/presse/bh-media-rep/round-ups/print/?content_id=33421.
separate court beyond the current system would signal loss of confidence in domestic courts.\textsuperscript{141} There was also a strong preference in RS for jurisdiction to lie in the locality in which the crime took place, and not where the victims resided at the time of trial.

4. Case channelling

A third tentatively-identifiable pattern in the practice of the entity courts is the increase in indictments in 2006 in both FBiH and RS. This increase chronologically followed the undertaking by the WCS since 2005 to channel war-related cases to the entity courts following a review of their sensitivity and complexity. The criteria for determination were unclear at the outset.\textsuperscript{142} However, a National War Crimes Strategy was formulated in 2008. The Strategy provides a rationale for the channelling process that is similar to the completion strategy: to prosecute the most complex and top-priority cases at state level, with deadlines set at 2015 and 2023. The ICTY assisted in the drafting of the complexity criteria for the 2008 National War Crimes Strategy, and, incorporating standards that are a result of the practice of the international criminal courts,\textsuperscript{143} the criteria used by the WCS borrow directly from Rule 11bis of the ICTY RPE.\textsuperscript{144} The State Court tries “very sensitive cases,” which are considered the most complex, taking into account the type and seriousness of the alleged crime; the rank or political prominence of the defendant; and a number of other factors, such as whether the case involves “insider” or “suspect” witnesses, whether there is a risk of witness intimidation, and whether political conditions are such that a fair trial may be impossible.\textsuperscript{145} In another lesson learned from the ICTY, the WCS opted for transparency of the selection criteria (in general terms), to preclude accusations of ethnic bias. Some observers argue

\begin{itemize}
  \item \textsuperscript{141} Bohlander, \textit{supra} note 71, at 68-69.
  \item \textsuperscript{142} \textsc{Orentlicher}, \textit{supra} note 111, at 128.
  \item \textsuperscript{143} \textsc{National Strategy}, \textit{supra} note 41.
  \item \textsuperscript{144} BiH prosecutor, comment made at the Roundtable on the Impact of International Criminal Courts on Domestic Proceedings, Belgrade (Nov. 19-20, 2009).
  \item \textsuperscript{145} \textsc{Human Rights Watch} 2008, \textit{supra} note 114, at 10-11; \textsc{National Strategy}, \textit{supra} note 41, at Annex A; \textsc{National Strategy}, \textit{supra} note 41, based on Orientation Criteria from 2004, \textit{reviewed in} BIRN, \textsc{Pursuit of Justice}, \textit{supra} note 38, at 9.
\end{itemize}
that this review process has been instrumental in prompting entity prosecutors to undertake prosecutions in a more serious and concerted manner.\textsuperscript{146}

5. \textit{Sentencing patterns}

It is difficult to assess whether the sentencing patterns in the BiH jurisdictions are related to those of the ICTY. The paucity of cases is an obstacle to any quantitative analysis. Furthermore, the range of sentences available to each of the courts is different. There are no minimum sentences in the ICTY and the maximum sentence is life imprisonment. In BiH, sentences may range from ten to forty-five years of imprisonment, while under the Criminal Code of Socialist Federal Republic of Yugoslavia (SFRY CC), applied in the entities, the sentencing range for the more severe war-related crimes is five to twenty years of imprisonment and one to ten years of imprisonment for certain other crimes against the laws of war.\textsuperscript{147}

An examination of sentencing against the categories of crime reveals that the average sentence for genocide-related acts in the ICTY is twenty-four years imprisonment, compared with a sixteen years average for crimes against humanity and a ten years average imprisonment for war crimes.\textsuperscript{148} The notion of gradation in domestic jurisdiction can only be examined with respect to the WCS because only in that court have there been convictions for all three categories of crimes (genocide, crimes against humanity, and war crimes), and, to a limited extent in FBiH, where there have been convictions for genocide and war crimes. There is no scope for gradation in RS because there are only convictions for war crimes. In BiH, there is a very apparent difference in sentencing between an average of over forty years of imprisonment for genocide-related crimes and an

\textsuperscript{146} \textit{HUMAN RIGHTS WATCH 2008, supra note 114, at 11-12.}

\textsuperscript{147} \textit{E.g., SFRY art. 142(1) (regarding war crimes against civilians); SFRY art. 38 (regarding sentencing), \textit{discussed in} Prosecutor v. Gojko Janković, Case No. ICTY-IT-96-23/2PT, Decision on Referral of Case Under Rule 11bis, para. 33-36 (Int'l Crim. Trib. for the Former Yugoslavia July 22, 2005).}

\textsuperscript{148} \textit{RONEN WITH AVITAL & TAMIR, supra note 27, at graph 6.4.4. Arguably, sentences reflect the gravity of the acts rather than the formal offense for which a person was convicted, which is often a matter of prosecution-defense negotiations.}
average of 14.4 and 12.7 years of imprisonment for crimes against humanity and war crimes, respectively. In FBiH, no gradation is discernible, with the average sentence for genocide being 14.7 years of imprisonment and twelve years for war crimes. The lack of gradation in sentencing may be, however, a consequence of the fact that the range of penalties available differs among the various jurisdictions. The relative gravity of ICTY sentences may also be related to the different levels of perpetrators brought before the ICTY and the domestic courts.

Another factor distinguishing the sentencing patterns in the domestic jurisdictions from those of the ICTY is that in the absence of a *stare decisis* doctrine in BiH jurisdictions, a sentencing standard is not apparent. However, in a lesson learned from the ICTY, the WCS has adopted a sentencing template (based on BiH law) and has been developing a reasoned jurisprudence on sentencing.

6. **Summary**

There are many challenges in attempting to identify a quantitative link between the national and international tribunals. The small number of cases makes any assessment tentative at best, and the looseness of the findings makes it difficult to establish any substantive or temporal correlation. Similarly, the loose linkage with respect to sentencing can be interpreted in conflicting directions. It

149 *Id.* at graph 2.2A.4.4.
150 *Id.* at graph 2.2B.4.4.
152 Interview with official from ICTY Outreach Office in Sarajevo (January 2009).
may reflect a true detachment of the domestic from the international tribunals, or it may reflect the different perpetration levels considered at the ICTY and in national tribunals. However, as other sections in this article demonstrate, the domestic institutions are not oblivious to the international one. In some contexts, such as prosecutorial policy, the impact of the international judiciary may be less significant than that of political institutions. Insofar as concerns sentencing, however, the influence of the ICTY may be more significant. Whether the ICTY standard is followed or not may depend on different legal circumstances or on political objection.

D. Normative Impact of the ICTY—Criminal Norms

1. Impact of the ICTY on legislation

During the period between 1991-1995, when most of the war-related crimes adjudicated by BiH courts occurred, the criminal code in force in BiH was the SFRY CC. In 2002, the OHR commissioned a report on issues relating to war-crime prosecutions that might take place in BiH as part of a general overhaul of the judicial system and in order to meet the challenges of prosecuting both domestically-initiated cases and cases referred to BiH by the ICTY under Rule 11bis of its Statute. The report recommended that existing domestic legislation should serve, as far as possible, as a basis for new or amended legislation, and that where existing legislation required revision, amendments should also take into account developments in the law as applied in the ICTY.

In 2003 BiH adopted a new Criminal Code (BiH CC), which differs significantly from its SFRY predecessor. The BiH CC establishes the offense of crimes against humanity, provides comprehensively for command responsibility, and applies a different range of penalties for international crimes from that which applies to

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156 Interviews with an official from the BiH Prosecutor’s Office and from the ICTY Transition Team in Sarajevo (Jan. 2009).
157 Bohlander, supra note 71, at 78.
ordinary crimes under domestic law. The WCS regularly applies the BiH CC also to pre-2003 cases on the ground that the latter codifies customary international law.

The influence of the ICTY on BiH law is noticeable in the provisions on modes of individual responsibility which refer to military commanders and civilian superiors. Like the ICTY Statute (and contrary to the ICC Statute), the BiH CC does not expressly provide for any joint criminal enterprise mode of responsibility. But the 2003 BiH CC is informed not only by the ICTY’s jurisprudence; the definition of crimes against humanity (BiH CC Article 172) follows closely that of the ICC Statute Article 7 rather than the ICTY Statute Article 5, foregoing a nexus of the act to an armed conflict and drawing on the ICC Statute’s definitions of various terms (although it should be recalled that the drafting of the ICC Statute was itself influenced by ICTY jurisprudence). The provisions on war crimes borrow from the SFRY CC.

Unlike the BiH CC, the 2003 criminal codes of FBiH and RS do not include crimes under international law at all. Consequently, where the WCS decides not to exercise its primacy, it is not clear which law should apply in entity courts. BiH institutions, as well as the Constitutional Court, hold that cases channelled by the WCS to entity courts carry with them the BiH CC and the entity courts must apply the principles and safeguards incorporated in the BiH Criminal Procedure Code, as well as the case law of the WCS. Entity courts


E.g. Stupar, supra note 107, at 138-41; Alfredo Strippoli, National Courts and Genocide: The Kravica Case at the Court of Bosnia and Herzegovina, 7 J. INT’L CRIM. JUST. 577, 581 (2009).

CRIM. C. BOSN. & HERZ. art. 180.

Id. at arts. 173-75, 177-79, 181-83.

dispute this and, for the most part, apply the SFRY CC\textsuperscript{163} on the ground that BiH CC sentences are heavier and therefore more detrimental to the defendant.\textsuperscript{164} In the absence of a formal dispute-settling mechanism that is binding upon the entities, the matter remains unresolved.\textsuperscript{165}

The new criminal procedure codes of 2003 also differ significantly from their SFRY predecessor. In particular, and in clear connection with the ICTY Rules and Procedure of Evidence (RPE), they replaced an inquisitorial with a composite inquisitorial-adversarial system, introduced plea bargains,\textsuperscript{166} and replaced retrials before the court of first instance by final determinations of cases by the appeal instance.\textsuperscript{167} The BiH Criminal Procedure Code (CPC) was also very much guided by international standards and in particular by the European Court of Human Rights (ECHR).\textsuperscript{168} The adherence to the ECHR\textsuperscript{169} is perhaps the least surprising in the drafting of BiH legislation because the ECHR forms part of the Constitution of BiH and enjoys priority over all other law in BiH.\textsuperscript{170}

\begin{footnotesize}
\begin{enumerate}
\item Courts in FBiH have in a limited number of cases applied the interim 1998 FBiH Criminal Code. OSCE 2008, supra note 158, at 10.
\item It is difficult to argue with the stance of the entity courts: as defendants themselves acknowledge, they are better served by a law which permits a sentence of 5-20 years’ imprisonment than by one which permits a sentence of 10-45 years’ imprisonment. The historical development of the former law, which is regularly invoked by the State Court when explaining why its own sentencing range is less severe than that of the entities’, is of academic, rather than practical, significance.
\item Interview with an official from the BiH Prosecutor’s Office in Sarajevo (January 2009).
\item OSCE 2005, supra note 9, at 12.
\item Office of the High Representative, Decision Enacting the Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 35/03, preambular para. 8 (Jan. 24, 2003), www.ohr.int/decisions/judicialrdec/default.asp?content_id=29094.
\item BiH CONSTITUTION, art. II(2).
\end{enumerate}
\end{footnotesize}
2. Impact of the ICTY on jurisprudence

The 2002 OHR-commissioned report recommended that the jurisprudence of the ICTY have persuasive authority in the judicial interpretation of legislation—addressing both procedural and substantive matters—at both the state and entity levels. However, it was acknowledged that, in view of the differences between the international and domestic legal systems, it would be infeasible for domestic courts to fully follow the jurisprudence of the ICTY. The report therefore recommended the adoption of a regulation stating that the courts should take into account the jurisprudence of the Tribunal.\footnote{Bohlander, supra note 71, at 78.}

The BiH prosecution shared the view that reliance on ICTY jurisprudence is an important element in providing for uniformity in interpretation of principles and rules.\footnote{Ibro Bulić, State Prosecutor, Application of International Sources of Law in BiH, Presentation at the International Conference on the Implementation of International Humanitarian Law in National Systems, Budapest, 3 (Oct. 29-30, 2007), www.tuzilastvobih.gov.ba/files/docs/Primjena_medunarodnih_izvora_prava_u_Bih.pdf.} Although the ICTY is not the only international institution influencing the WCS in this fashion, it has had the most pronounced impact.\footnote{BiH prosecutor, comment made in the Roundtable on the Impact of International Criminal Courts on Domestic Proceedings, Belgrade (Nov. 19-20, 2009).} The library of the WCS includes a complete collection of the ICTY’s jurisprudence and all of the judges in the WCS have been instructed on the Tribunal’s jurisprudence.\footnote{Burke-White, supra note 35, at 343.}

The WCS has followed the spirit of the OHR-commissioned report,\footnote{Noted with respect to CRIM. C. BOSN. & HERZ., art.171 (genocide); Stupar, First Instance Verdict, supra note 107, at 53; CRIM. C. BOSN. & HERZ., art. 180, which duplicated ICTY Statute Art. 7; and Trbić, First Instance Verdict, supra note 108, at paras. 171-73, 205.} relying on the jurisprudence of the ICTY to: (1) establish that certain provisions in the BiH CC reflect customary international
law, thereby confirming its own jurisdiction *ratione materiae*; \(^{176}\) (2) to characterize the conflict in the former Yugoslavia as international; \(^{177}\) and (3) to assist in the analysis of a great number of concepts and elements of crimes. \(^{178}\) In some cases, rulings by the WCS do not


mention the ICTY expressly but mirror its judgments so closely that
given that they concern identical events, it is probable that ICTY case
law influenced the decisions of the WCS. ICTY influence is also
visible with respect to procedural norms, such as when ruling on the
admissibility of illegally-obtained evidence.179 The ICTY has also had
some impact on the factors that inform sentences in the WCS. For
example, in Todorović, the WCS cited the ICTY judgments in Zelenović
and Erdemović to determine that a plea bargain constitutes a mitigating
factor in sentencing and the Erdemović judgment to determine that the
provision by the defendant of direct evidence for facts otherwise
requiring proof is a mitigating factor in sentencing.180 At the same
time, WCS judgments are also replete with references to international
law in general and to international tribunals other than the ICTY,
especially the ICTR but also the ICJ, the Special Court of Sierra
Leone, and even domestically-established courts, such as the U.S.

179 Prosecutor v. Zijad Kurtović, Case No X-KR-06/299, First Instance
Verdict, at 23 (Ct. Bosn. & Herz. Apr. 30, 2008) (relying on Kordić & Čerkez,
Judgment, supra note 177; Brdanin, Judgment, supra note 178); Mandić, First
Instance Verdict, supra note 103, at 117-18 (relying on Kordić & Čerkez, Judgment,
supra note 177).

180 Todorović, First Instance Verdict, supra note 103, at 28-29.
military tribunal at Nuremberg. With respect to procedural norms, the European Court of Human Rights has also been influential.

An area in which international jurisprudence and ICTY jurisprudence in particular have played a significant role in the jurisprudence of the WCS is command responsibility, which was not regulated under the SFRY law which governed BiH until 2003. The WCS has ruled that command responsibility has nonetheless been regulated in some form by domestic law, and was criminalized under customary international law at the relevant time. According to the WCS, the new BiH CC’s Article 180(2), which codifies command responsibility, derives from and is identical to ICTY Statute Article 7 and must be interpreted in light of its international origins and its international judicial interpretation and definitions. Although not bound by the decisions of the ICTY, the WCS was “persuaded that the ICTY’s characterization of command responsibility, and its elements properly reflects the state of customary international law as it existed at the times relevant to the [i]ndictment.” Accordingly it found it “helpful to review the evidentiary factors” which “the ICTY, and other international courts have found relevant to determining whether the prosecution has successfully met its burden of establishing liability under the principle of command responsibility, as guidance in reviewing the evidence in the instant case.” The WCS relied on ICTY judgments to establish the elements of “effective

\[\text{\textsuperscript{181} Trbić, First Instance Verdict, supra note 108, at paras. 177-202, (citing Ndindabahizi, supra note 178; U.S. v. Wilhelm von Leeb et. al. (the High Command Case), 12 LRTWC 1, 59 (1948)).}\]
\[\text{\textsuperscript{182} Mandič, First Instance Verdict, supra note 103, at 116-18 (relying on ECtHR’s Khan v. UK and PG and HJ v. UK); Prosecutor v. Dragan Damjanović, Case No. X-KRZ-05/51, Second Instance Verdict, 14 (Ct. Bosn. & Herz. Jun. 13, 2007).}\]
\[\text{\textsuperscript{183} Stupar, First Instance Verdict, supra note 107, at 138-39, 141.}\]
\[\text{\textsuperscript{184} Mandič, First Instance Verdict, supra note 103, at 151 (citing Halilović, Judgment, supra note 178; Prosecutor v. Aleksovski, Case No. IT-95-14/t-A, Appeal Judgment (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), and others).}\]
\[\text{\textsuperscript{185} Stupar, First Instance Verdict, supra note 107, at 135.}\]
\[\text{\textsuperscript{186} Id. at 141.}\]
\[\text{\textsuperscript{187} Id.}\]
control”188 and other elements of the doctrine.189 The jurisprudence of the WCS also reflects the differences in views within the ICTY with respect to certain elements of command responsibility, such as whether responsibility as a commander for acts of genocide requires a commander to share the special genocidal intent.190

The WCS also followed ICTY jurisprudence in accepting the existence of the joint criminal enterprise doctrine,191 which, as noted above, is not expressly established under either the ICTY Statute or the BiH CC. It now co-exists uneasily with co-perpetration that is expressly provided for in the BiH CC.192


189 E.g., Mandić, First Instance Verdict, supra note 103, at 151-52 (citing Mucić, Appeal Judgment, supra note 188; Halilović, Judgment, supra note 178; Blaskić, Judgment, supra note 177; Kordić & Ćerkez, Judgment, supra note 177); Mandić, Second Instance Verdict, supra note 103, at para. 109; Stupar, First Instance Verdict, supra note 107, at 140-41.

190 BiH prosecutor, comment at DOMAC Seminar (Nov. 19, 2009); Strippoli, supra note 159, at 590-91. The WCS, too, avoided answering the question definitively, noting that, in the circumstances, it had been proven beyond reasonable doubt that the defendant in fact had the specific genocidal intent. Stupar, First Instance Verdict, supra note 107, at 162-63.

191 Trbić, First Instance Verdict, supra note 108, at para. 205 (noting that Article 180 of the Criminal Code of Bosnia and Herzegovina duplicated ICTY Statute Article 7, which has been interpreted as encompassing JCE); Strippoli, supra note 159, at 586.

192 Strippoli, supra note 159, at 587 (citing Prosecutor v. Vuković & Another, Case No. KRŽ-07/405, Second Instance Verdict, at 6, n.1 (Cr. Bosn. & Herz. Sept. 2, 2008) and noting that no importance is given to the use of the word perpetrating instead of committing). Interestingly, in Vuković, the Trial Chamber relied on ICTY jurisprudence to establish joint criminal enterprise as a mode of criminal responsibility in the context of Bosn. & Herz., Criminal Code, Art. 29 (2003), which applies to all offenses, rather than in the context of Bosn. & Herz., Criminal Code, Art. 180 (2003), which concerns modes of liability for crimes under international law. Vuković, First Instance Verdict, supra note 106, at 20; Rašević & Todović, First Instance Verdict, supra note 154, at 111; Prosecutor v. Rašević & Todović, Case No. X-KR/06/275, Second Instance Verdict, at 26 (Cr. Bosn. & Herz. Nov. 6, 2008). A further confirmation that JCE forms part of customary
The impact of the ICTY jurisprudence in entity courts is much less pronounced than in the WCS. While entity courts do not consider themselves bound by ICTY jurisprudence, the ICTY is an authority that they respect and to which they look.\textsuperscript{193} However, the fact that ICTY jurisprudence was not, at first, translated to Bosnian/Serb/Croat prevents it from being directly accessible to entity courts.\textsuperscript{194} Parties and judges in the entity courts do not usually cite international or foreign jurisprudence\textsuperscript{195} and the decisions of these courts are often at odds with international jurisprudence on issues as important as the validity of the superior responsibility doctrine\textsuperscript{196} or whether a grave breach of the Geneva Conventions requires inhumane treatment to have resulted in “great suffering or serious bodily injury” in order to be a crime under SFRY CC Article 142.\textsuperscript{197}

3. Summary

The ICTY has had a limited impact on BiH legislation. This may be explained by the development of applicable standards and models in the period between the adoption of the ICTY statute and the enactment of the BiH CC. In contrast, ICTY jurisprudence has influenced the work of the WCS. In the entities, the ICTY has had little impact on both law and jurisprudence.

Even where ICTY law has been incorporated formally into the law of BiH and its entities, its implementation has often experienced difficulties. Thus, it has been argued that certain aspects

\textsuperscript{193} Judge Rudislav Dimitrijević, Supreme Court of RS, Remarks at the Seminar on the Impact of International Courts of Domestic Proceedings, Belgrade (Nov. 19-20, 2009).
\textsuperscript{194} Interview with an official from the BiH Prosecutor’s Office in Sarajevo (January 2009).
\textsuperscript{195} OSCE 2005, supra note 9, at 21-22.
\textsuperscript{197} OSCE 2005, supra note 9, at 21 (describing Ćupina, Verdict by Mostar Cantonal Ct., supra note 196).
of the criminal procedure reform expedited the holding of trials and enhanced the effectiveness of BiH’s legal system, particularly at the State Court level. However, the new rules also created confusion and frustration among domestic professionals, leading to widespread resistance to their application. Much of this adverse reaction was generated by the fact that several of the reforms were entirely foreign to the domestic legal traditions, and the perception that local legal traditions were not properly understood and regarded with contempt by international institutions. Although the Criminal Procedure Code was drafted by a team of BiH lawyers, the code in its entirety was perceived as being internationally imposed, not least because it was ultimately enacted by the OHR.

CONCLUSION

BiH is a good experimentation and observation ground for modalities of interaction between international and domestic courts.

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198 Interviews with a judge from the BiH Court and an official in the Court of BiH Prosecutor’s Office in Sarajevo (January 2009). See also Christopher DeNicola, Criminal Procedure Reform in Bosnia and Herzegovina: Between Organic Minimalism and Extrinsic Maximalism, DEPAUL RULE OF L. J. (2010), http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=christopher_denicola.

199 DeNicola, supra note 198, at 67. This confusion was certainly not helped by the Council of Europe hiring local practitioners, trained in the continental system, to draft the commentaries to these new procedural rules.

200 Interviews with NGO representatives in Sarajevo (January 2009). An OSCE report based on the monitoring of over one hundred trials indicated that over 25% of judges, prosecutors, and defence attorneys were ‘not accomplishing a shift’ to the new procedure. OSCE 2004, supra note 167, at 27-34.


202 Interview with a Legal Adviser in Bosn. & Herz. (January 2009). Our interviewees seem to disagree with DeNicola regarding the fact that local drafters were directed by international or foreign players into drafting mixed procedure. Rather, they suggest that many of the relevant changes were established out of personal and professional conviction. Cf. DeNicola, supra note 198.
Within the same country there are courts of different levels, which illustrate different models of interaction. Because these courts appear to operate within the same domestic culture, one might assume that any differences in domestic action are indeed attributable to different modalities of interaction with the ICTY.

At the turn of the millennium, the ICTY was severely criticized for failing to have an impact on critical justice issues, including its non-provision of assistance to the reform of the justice systems in the region, and lack of involvement in preparing the local prosecutors and courts to carry out investigations and trials regarding war crimes. A decade later, it might be fairer to say that the ICTY’s engagement with domestic institutions arrived too late, but overall was, and remains, of some value.

An analysis of the impact of the ICTY on the judicial institutions in BiH, namely the WCS and entity courts, reveals a significant difference in the extent and tone of interaction. The WCS has been much more closely associated with the ICTY than the entity courts, which have been reluctant to accept external influence and to interact with international actors.

Thus, at the BiH state level, dramatic reforms have taken place since the end of the war, especially since the completion strategy was put in place. These reforms include the establishment of the WCS within the State Court and the adoption of criminal and criminal procedure codes. International elements played a key role in promoting and shaping these reforms. The role of the ICTY has varied from one aspect to another.

First and foremost is the establishment of the WCS which is directly, although not exclusively, related to the progression of the completion strategy. The latter not only has precipitated the transfer of cases and evidence, but also know-how and expertise.

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203 Tolbert, *supra* note 46, at 12.
Consequently, BiH has been able to assume the responsibility of sharing with the ICTY the burden of trying war related offences, largely in accordance with international standards. However, international influence has been, at least at the outset, a by-product of the ICTY’s and other international institutions’ concerns and goals rather than the consequence of a conscious effort at modelling the domestic system. Thus, for example, the interest in establishing the WCS and in the transfer of cases to BiH, as well as the empowering of domestic institutions, are the consequence of the ICTY’s completion strategy and shaped by its needs.

Quantitatively, the impact of the ICTY is in some aspects very immediate but of little long-term significance, and of more lasting value in others. An example of the former is the transfer of cases from the ICTY to the WCS under Rule 11bis, as well as the transfer of files in which no indictment had yet been issued. At this level, one could say that the prosecution patterns of the WCS are directly related to the ICTY’s work. However, one must acknowledge that because this will only occur once in the lifespan of the WCS, it does not by itself hold the promise of the WCS following ICTY prosecuting policy. A more interesting influence is illustrated by the fact the primacy of the WCS over entity courts, and by the criteria it adopted to determine which cases should be channelled to which domestic jurisdiction, which is expressly in pursuance of the ICTY’s policy. The WCS also emulates the ICTY in the subtle adoption of gradated sentencing depending on the characterization of crimes.

On the normative level, the state of BiH and the WCS has followed the ICTY in a variety of manners. First, they adopted, through legislation and jurisprudence, various international legal doctrines. The WCS also interprets domestic instruments in light of ICTY jurisprudence and follows the ICTY in procedural issues.

In contrast to the close links between the WCS and the ICTY, the impact of the ICTY on entity institutions has been much less marked. The impact of the ICTY on their capacity is not only limited, but also mostly unintended. Very little funding is directed toward the entities and there is little focus on nurturing their institutions. If anything, this disregard has led to antagonism in the entities that has negatively impacted institutional capacity. The
entities’ resistance is directed not only against the ICTY but also against the State Court, which, despite its domestic legitimacy, has failed to impose its standards on entity courts. The role of the WCS in channelling cases, as it is being discharged, has also been cited as detrimental to the empowerment of entity institutions.

Generally speaking, entity institutions are characterized by their resistance to prosecution. On the normative level, it is notable that parties and judges in entity courts do not usually cite international or foreign jurisprudence, and the decisions of these courts are often at odds with international jurisprudence. For example, important substantive legal doctrines developed by the ICTY such as command responsibility have been disregarded, if not outright rejected. ICTY jurisprudence on procedural issues has not fared much better, as demonstrated by the fundamental controversy on the applicability of post-conflict law in entity courts.

The schism between entity institutions and the ICTY is partly attributable to practical constraints. The ICTY is much less accessible to entity institutions than it is to the WCS. First there is the language barrier, which only in recent years the ICTY has been laboring to overcome. In addition, there is a gap in international funding which leaves the training initiative almost exclusively reserved to the WCS. It has been suggested that better results could have been obtained if the international activity directed at empowering domestic authorities had begun earlier or if more attention had been paid both to the potential influence of the ICTY’s practice on domestic authorities and to the domestic constraints which international efforts should accommodate. For example, ICTY case law and investigative material could have been accessible at an earlier stage, and training initiatives could have been more accurately designed for the relevant audience’s needs.

It may be argued that the issue is not technical incapacity or misdirection of international resources, but, instead, a more profound issue. Particularly in RS, where there has not effectively been a post-conflict change of government, domestic institutions are not keen to undertake prosecutions and the trickle-down effect of the international tribunal has been therefore very limited. The reluctance to engage in post-conflict criminal justice is politically-grounded.
External engagement incentivises some actors and alienates others, particularly the Serb community.\textsuperscript{205}

The WCS’s susceptibility to ICTY influence is strongly and directly related to its hybrid nature, owing to the circumstances of its establishment, namely through institutional and normative dictates of the High Representative. In other words, the WCS is a \textit{partner} in the international mechanism largely because it is the \textit{product} of international intervention in BiH. We should therefore not be blinded by the apparent success of the WCS. It was made possible by the strong international influence, which effectively circumvented the political obstacles standing in the way of accountability mechanisms.\textsuperscript{206} It would be more accurate to describe the international effect over domestic institutions as dependant on the capacity to impose, rather than as a spontaneous ripple effect. While the limitations of extrapolating from the BiH case study should not be underestimated, an important lesson to be drawn by those designing international tribunals as catalysts for domestic action is the importance of engaging with potential political obstacles to preempt their obstruction of even the best-planned legal framework.


\textsuperscript{206} See also Talbot & Kontic, supra note 204, at 160.
THE ARAB SPRING’S FOUR SEASONS: INTERNATIONAL PROTECTIONS AND THE SOVEREIGNTY PROBLEM

Jillian Blake & Aqsa Mahmud *

INTRODUCTION

In December 2010, public demonstrations erupted throughout the Middle East against autocratic regimes, igniting a regional political transformation known as the Arab Spring. While some of these demonstrations were peaceful, others escalated into domestic uprisings and civil and international wars. Depending on events, modern international criminal and humanitarian law provided certain protections to vulnerable populations. However, international law did not provide a uniform degree of protection to civilians and combatants who faced similar circumstances. Post-Arab Spring, some countries have been relatively stable while others continue to face internal conflicts; most notably, the violent civil war in Syria continues to this day.

This article argues for a uniform standard of protections for all populations affected by armed conflict, war crimes, and crimes against humanity. Part I presents four legal typologies under current international humanitarian and criminal law using rules codified in

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the Rome Statute and the Geneva Conventions. It evaluates each of five major Arab Spring uprisings (Tunisia, Bahrain, Egypt, Syria, and Libya) and describes the legal protections that applied in each country’s revolution or rebellion. Part II analyzes the differences in protection, focusing on the distinction between international and non-international armed conflicts under current law, which affords a significantly lower degree of protection during civil conflicts. Given the substantial number of non-international armed conflicts in the modern era, we argue for a uniform standard of protections for all armed conflicts. Part III shows that current sovereignty trends are moving away from the concept of an absolute sovereign in favor of a responsible sovereign who adheres to international standards. This trend is incompatible with current international law, which provides a minimal level of protection during civil war, and could therefore shield sovereigns from liability for mass atrocity crimes. Finally, Part IV of this article offers solutions to appropriately minimize outdated sovereignty norms and eliminate unjustified distinctions in the international legal system using lessons from the Arab Spring. These solutions include eliminating the distinction between non-international and international armed conflict in international humanitarian law and promoting International Criminal Court (ICC) membership in Arab states.

I. THE FOUR SEASONS: REGIME OF PROTECTIONS UNDER INTERNATIONAL CRIMINAL AND HUMANITARIAN LAW

International humanitarian law (“IHL”) and international criminal law (“ICL”) afford certain protections in the event of an armed conflict, genocide, or crimes against humanity. IHL applies in the event of an armed conflict, characterized as either international or

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2 International humanitarian law is also commonly referred to as law of armed conflict (LOAC) or law of war.
non-international in nature. Depending on its classification, specific protections apply to civilians affected by and combatants taking part in the conflict. ICL imposes criminal liability on individuals who commit certain offenses, including genocide, war crimes, and crimes against humanity. Crimes against humanity include murder, extermination, enslavement, imprisonment, torture, or rape against a civilian population. Notably, crimes against humanity are distinct from war crimes because they do not need to be committed as part of an armed conflict.

This section outlines an analytical framework to determine current international protections for various conflict scenarios and evaluates each of five Arab Spring countries within the framework. We present four levels of protections based on the occurrence of crimes against humanity, existence of an armed conflict, and whether the conflict is international or non-international in nature. We selected these criteria due to their importance in guiding current application of international law and relevance to the Arab Spring. The four legal seasons of the Arab Spring are: (A) outside the scope of international protections (Tunisia); (B) international criminal non-war crime protections (Bahrain and Egypt); (C) non-international armed conflict protections (Syria); and (D) international armed conflict protections (Libya). This framework will be useful in analyzing the international legal protections that apply to various revolution or rebellion situations, especially in relation to each other.
A. Tunisia: Outside the Scope of International Criminal and Humanitarian Legal Protections

1. Background

On December 17, 2010, a young Tunisian street vendor set himself on fire in protest against harsh treatment by authorities, starting the first Arab Spring revolution. Following his demonstration, riots broke out in the city of Sidi Bouzid and continued throughout the new year, as protestors rallied across the country over socioeconomic and political issues. On January 12, 2011, rioting spread to the capital of Tunis, and a national curfew was
imposed. Reports emerged of police firing on protestors and some protestors being abused in detention, with the abuse rising to a level “that may [have] amount[ed] to torture.” On January 14, 2011, President Zine el-Abedine ben Ali fled to Saudi Arabia, and an interim government took control until future elections. In October 2011, Tunisia held elections that put the new National Constituent Assembly into power.

2. Classification

The Tunisian revolution (also referred to as the “Jasmine Revolution”) qualifies as “Season A”—outside the scope of ICL and IHL—because no armed conflict took place and the government’s actions fail to meet the standard for international criminal liability. Although at times violent, clashes between demonstrators and security forces did not reach the degree of intensity found in armed conflict. Furthermore, protestors in Tunisia were for the most part unarmed and lacked centralized organization required for an armed conflict.

The government’s attacks against civilians are unlikely to meet the requirements for crimes against humanity. Crimes against humanity are defined as certain enumerated offenses committed as

8 Id. at 1-2.
11 Although Tunisia continues to face transitional challenges, the scope of our analysis focuses on the events leading up to the first transition of power during the Arab Spring revolutions. See ARIEFF, supra note 6, at 2.
12 ARIEFF, supra note 7, at 2; Tunisia: 11 die in new clashes after weeks of unrest, supra, note 5.
13 See infra Part II.C.1, Season C for an in depth discussion of factors determinative of an armed conflict legal classification.
part of a widespread attack against civilians.\textsuperscript{14} According to the International Criminal Court’s (ICC) Rome Statute, Article 7, crimes against humanity include:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearance of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.\textsuperscript{15}

\textsuperscript{14} \textit{See infra} Part II.B.

\textsuperscript{15}
For acts to be considered “crimes against humanity,” they must be committed as “part of a widespread or systematic attack, directed against any civilian population, with knowledge of the attack.”\textsuperscript{16} The population must be predominantly civilian to be characterized as such for crimes against humanity liability.\textsuperscript{17} According to the International Criminal Tribunal for the Former Yugoslavia (ICTY), the existence of a “widespread or systematic attack” can be determined by a variety of factors, including the “the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes.”\textsuperscript{18} In \textit{Prosecutor v. Jelisic}, the ICTY noted that

\begin{quote}
[the] existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of an attack.
\end{quote}

According to the United Nations, 300 people died in the Tunisia uprising, and 700 were injured between December 17, 2010

\begin{footnotes}
\textsuperscript{16} Id.
\end{footnotes}
and January 14, 2011. While the government unlawfully killed many people during the uprising, the crimes did not reach the level of “massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims,” articulated by the International Criminal Tribunal for Rwanda (ICTR) in *Prosecutor v. Akayesu*.

However, there is no clear standard for how many victims meet the “widespread” requirement, and the analysis is largely subjective. Therefore, there may be reasonable disagreement on this point.

Furthermore, there was no indication of a “systematic” attack, such as a plan or policy, by the government. The actions of the Tunisian government during the revolution were not part of a “continuous” policy, but rather a short-term, uncoordinated response to a domestic uprising. Because of these requirements for crimes against humanity liability, the actions of the Tunisian government during the Arab Spring do not meet the international definition of crimes against humanity.

3. Protections

Of the countries to be discussed in this paper, Tunisia suffered the fewest casualties and related crimes during the Arab Spring. Because the case of Tunisia was outside the scope of ICL and IHL, domestic law and applicable international human rights law governed the revolution. Any international protections under customary international law would still apply as well as any human rights agreement to which Tunisia is a party; however, this paper focuses on international criminal and humanitarian protections as

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23 For example, Tunisia is a signatory to the International Covenant on Civil and Political Rights (ICCPR).
codified under the Rome Statute and the Geneva Conventions as interpreted by international courts and other authoritative bodies.

B. Egypt and Bahrain: International Criminal Legal Protections

1. Background

   a. Egypt – The revolution in Egypt began on January 25, 2011 with a series of mass demonstrations in Cairo and other cities, demanding an end to President Hosni Mubarak’s almost 30-year rule. The government blamed the uprising on the officially banned Muslim Brotherhood opposition faction. According to independent observers, however, the discontent with Mubarak was extensive and caused by popular discontent with government corruption and economic grievances.

   By February, the unrest had resulted in 900 deaths, Mubarak was forced to resign, and the Supreme Council of the Armed Forces (SCAF) took control of the country. SCAF claimed to work on behalf of the protestors, restoring justice and establishing a new political order. In March 2011, a new constitution was approved with 77 percent support which included provisions on presidential term limits, judicial oversight for elections, and changes in presidential candidate qualifications. In late 2011 and early 2012, the Muslim Brotherhood and other Islamist parties were elected to a majority of the seats in the new Parliament. In June 2012, Mubarak

26 Id.
was tried by an Egyptian court and found guilty and convicted as an accomplice in the murder of unarmed protestors during the uprising.30 However, a few months later, an Egyptian court granted an appeal from Mubarak and ordered a retrial.31 Egypt continues to face transitional challenges post-Arab Spring—the country’s first democratically elected president, Mohamed Morsi, was ousted by the military in July 2013.32

b. Bahrain – The Arab Spring uprising in Bahrain was inspired, in part, by the success of the protests in Tunisia and Egypt.33 In mid-February 2011, demonstrations erupted in the capital Manama against the monarch King Hamad bin Isa Al Khalifa.34 According to international affairs expert Jane Kinninmont, “[a]t the heart of the uprising [the “Pearl Revolution”] were long-standing grievances over the distribution of power and wealth—including calls for a fully elected parliament, an elected government, and an end to the gerrymandering of elections and corruption.”35 The government immediately responded with a brutal crackdown, firing on civilians and detaining opposition leaders.36 One month after the Pearl

36 Cynthia Johnston & Frederik Richter, Four killed in Bahrain clashes as Mideastweathes, REUTERS, Feb. 17, 2011,
Revolution began, King Hamad bin Isa Al Khalifa authorized Saudi troops to enter the country to help put down the revolt. By March, security forces had suppressed the demonstrations, making it the only Arab Spring country to effectively put down its uprising through use of force.

The suppression came at a high cost to human rights. According to an independent commission, the Bahrain Independent Commission of Inquiry, security forces used excessive force in the campaign, including torture. Almost 3,000 people were imprisoned, and sixty-four percent of detainees (1,866 individuals) reported being tortured. The commission found that thirty-five people died during the protests and five detainees were tortured to death. According to Human Rights Watch, Bahrain’s police continue to torture and beat detainees.

2. Classification

The Egyptian and Bahrain revolutions qualify as “Season B”—outside the scope of IHL, but within the scope of ICL. Egypt and Bahrain are distinguishable from “Season A” and Tunisia because crimes committed during the uprisings were more widespread and systematic. The repression in Egypt produced three times as many casualties as in Tunisia. According to a “high-level [Egyptian government] inquiry,” police killed almost 900 people during the uprising and “used snipers on rooftops overlooking


40 Id.

41 Id.

Cairo’s Tahrir Square to shoot into the huge crowds.” As many as 1,000 people were “disappeared” during the Egyptian revolt, and Egyptian armed forces reportedly tortured and killed individuals “across the country.” While the Tunisian government repressed and killed civilians during the Jasmine Revolution, the crimes committed by the Egyptian government were significantly more widespread, thereby meeting the chapeau elements for crimes against humanity.

In Bahrain, torture was widespread and systematic during, and in the wake of, the Pearl Revolution, meeting the requirement for crimes against humanity liability. There were a large number of victims, and torture was part of a continuous government policy. The report of the Bahrain Independent Commission of Inquiry found government agencies “followed a systematic practice of physical and psychological mistreatment, which in many cases amounted to torture, with respect to a large number of detainees in their custody.”

IHL and war crimes protections, to be discussed in the following “Season C” and “Season D” sections, do not apply because the revolutions in Egypt and Bahrain did not rise to the level of armed conflicts. No international armed conflict (IAC) existed because the government forces did not engage the armed forces of another state directly or by proxy. Neither situation qualified as a non-international armed conflict (NIAC) because the opposition forces lacked the required organization or the situations were limited in their intensity and protractedness. In Bahrain, the opposition was


mainly composed of the youth protest movement with dispersed leadership hosting varying goals. The opposition never gained significant control over Bahraini territory, unlike the opposition groups in other Arab Spring revolutions. In Egypt, the Muslim Brotherhood represented a highly organized opposition group; however, it did not engage in extended fighting with the Egyptian government and took power only after Mubarak resigned and through the electoral process. In both situations, the violence was limited in its duration: in Bahrain, the fighting lasted for two months, and, in Egypt, it lasted for 18 days. The number of casualties in both situations were significantly less than those in Syria and Libya to be discussed in the next sections and which qualify as armed conflicts.

Uprisings in Bahrain and Egypt also lacked other factors indicative of an armed conflict. For example, the fighting did not spread throughout the country for a long period of time, the Security Council did not issue resolutions on the conflicts, and opposition forces had limited access to military-grade weapons.

3. Protections

ICT criminalizes and protects against defined acts rather than providing a series of blanket protections triggered by exogenous circumstances, such as an armed conflict. However, enforcement of ICT protections remains a concern. For example, because most Arab states are not party to the Rome Statute, they are outside the Court’s jurisdiction except in the case of Security Council referral. Furthermore, even if the state is party to the Statute, the government

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48 *Id.*

49 The only Arab states that are party to the Rome Statute are Jordan, Comoro Islands, Djibouti, and Tunisia (which recently joined in 2011).
is unlikely to refer its own leadership to the ICC for charges related to the successful suppression of a revolt. In the case of Egypt, former President Mubarak is currently being tried with other former high-level officials in domestic courts for killing unarmed protestors. However, Egypt is not party to the Rome Statute, and the ICC has no jurisdiction over Mubarak’s violation of international criminal law without referral by the Security Council. In Bahrain, the government was able to put down its opposition movement, thereby effectively insulating itself from prosecution. Arguably, crimes against humanity were committed in both instances yet neither situation was prosecuted under ICL.

C. Syria: Non-International Armed Conflict Legal Protections

1. Background

The Arab Spring came to Syria on March 15, 2011, with protests in the city of Deraa against the Ba’ath Party and demands for the resignation of President Bashar al-Assad. Grievances against the regime included rampant corruption, lack of political freedoms, high unemployment, high inflation, limited upward mobility, and repressive security forces. In reaction, the government deployed its military to put down the uprising, and the government reportedly fired on civilians, used disproportional force, and expelled foreign

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journalists and news organizations from the country. With a strong crack down on protestors, the conflict became increasingly militarized between the Syrian government and opposition forces.

As the fighting continued and escalated, international legal bodies described Syria to be on the “brink” of non-international armed conflict. By May 2012, the President of the International Committee of the Red Cross (ICRC) declared that fighting in at least two places was at the level of armed conflict of a non-international character. The next month, the U.N. Under-Secretary-General for Peacekeeping Operations Hervé Ladsous stated that the Syrian situation could be called a civil war. By June 2013, an estimated 100,000 people had been killed in the war and one-third of the causalities were civilians. In an August 2012 report, the U.N. Human Rights Council commission of inquiry on Syria found reasonable grounds to believe that Government forces . . . had committed the crimes against humanity of murder and of torture, war crimes and gross violations of international human rights law and international humanitarian law, including unlawful killing, torture, arbitrary arrest and detention, sexual violence, indiscriminate attack, pillaging and destruction of property . . . anti-Government armed

57 Id.
groups did not reach the gravity, frequency and scale of those committed by Government forces . . .

U.S. President Barack Obama and European allies have called for a U.N. resolution condemning the Assad regime and imposing sanctions. However, as of January 2014, Russia and China have vetoed three such resolutions, claiming that sanctions would pave the way for military intervention. Because of Russian and Chinese opposition, the Security Council is unlikely to issue an authorization for economic sanctions or use of force for third-party intervention. According to U.S. government analysts, “[t]he popular-uprising-turned-armed-rebellion against the Assad regime . . . seems poised to continue, with the government and a bewildering array of militias locked in a bloody struggle of attrition.”

International concern over Syria increased when reports surfaced in May 2013 that chemical weapons had been used in Syria. U.S. Secretary of Defense Chuck Hagel confirmed that the intelligence community “assesses with some degree of varying confidence that the Syrian regime has used chemical weapons on a small scale in Syria . . . .” Turkey also voiced its belief that “the [Assad] regime has used chemical weapons.” Medical teams provided blood samples and eyewitness accounts about victims to the chemical attacks. U.N. investigator Carla Del Ponte also

62 Id.
64 SHARP & BLANCHARD, supra note 51, at 1.
66 Interview by Christiane Amanpour with Zaher Sahloul, President of the Syrian American Medical Society (SAMS), in Turkey (April 29, 2013, 5:11 PM
commented on “strong concrete suspicions but not yet incontrovertible proof” that opposition forces may have used the chemical agent sarin.67 In response, United States and the United Kingdom officials claimed to have found no evidence to support the opposition’s use of chemical weapons.68

By summer 2013, the evidence of chemical weapons use prompted the United States government and its allies to consider military intervention absent Security Council authorization.59 Before any action was taken, Russia proposed with Syrian consent, that Syria join the Chemical Weapons Convention (CWC) and commit to the elimination of its chemical weapons stockpile.70 Syria joined the CWC in October 2013,71 de-escalating the confrontation and option for intervention proposed by the United States.72

2. Classification

The Syrian revolution and subsequent civil war qualify as “Season C” –IHL protections apply for a non-international armed conflict (NIAC). Syria is distinguishable from “Season A” (Tunisia) and “Season B” (Egypt and Bahrain) in terms of the intensity of the violence and organization of the oppositional groups, which rose to the level of an armed conflict.73


70 Id. at 250.


72 Blake & Mahmud, supra note 69, at 250.

73 See Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, para. 90 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005),
For IHL protections to apply, the situation must first qualify as an armed conflict. There is no “widely accepted definition of armed conflict in any treaty.” However, all armed conflict “has certain minimal, defining characteristics that distinguish it from situations of non-armed conflict or peace.” In Prosecutor v. Tadic, the ICTY found that armed conflict “exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.” NIAC excludes “conflicts in which two or more States are engaged against each other . . . [and] conflicts extending to the territory of two or more States.”

International courts have defined characteristics of NIAC including the “intensity of the conflict and the organisation of the parties to the conflict.” In Prosecutor v. Hardiñaj, the ICTY elaborated on the first criterion of organization. The Trial Chamber summarized “several indicative factors, none of which are, in themselves, essential to establish whether the ‘organization’ criterion is fulfilled.” These . . . include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the


74 THE HAGUE CONFERENCE, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 1 (2010).
75 Id. at 2.
78 Tadic Judgment, supra note 17, at para. 562. See also THE HAGUE CONFERENCE, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 15 (2010).
group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.\footnote{Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, para. 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), \url{http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf} [hereinafter Haradinaj Judgment].}

The ICTY Judgment identified factors for evaluating the second criterion of intensity, including

\[\ldots\] the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and caliber of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones.\footnote{Id. at para. 49.}

In addition, U.N. Security Council resolutions on the situation may indicate the existence of an intense conflict.\footnote{Haradinaj Judgment, supra note 79, at para. 49; Limaj Judgment, supra note 73, at para. 90.} However, none of the listed factors “are, in themselves, essential to establish that the criterion \[of intensity\] is satisfied.”\footnote{Haradinaj Judgment, supra note 79, at para. 49.}

The situation in Syria meets the definition of NIAC because, first, it is confined within the territory of one state\footnote{While the vast majority of fighting has been confined within the Syrian State, some fighting has spilled over into Turkey and Lebanon. See Jose Tracey Shelton, \textit{Syria Conflict Continues to Spill Over into Turkey}, GLOBAL POST, Oct. 12, 2012, \url{http://www.globalpost.com/dispatch/news/regions/middle-east/syria/121012/syria-turkey-border-clashes-tensions-assad-fsa}; Josh Wood,} and Syria is the
only state party to the conflict. 84 Additionally, organized groups engaged in intense fighting characterize the conflict. According to military analyst Joseph Holliday at the Institute for the Study of War, “the armed Syrian opposition [the Free Syrian Army] is identifiable, organized and capable, even if not unified.”85 The Free Syrian Army (FSA) is an overwhelmingly Sunni umbrella group “nominally headquartered in Turkey” with ties to three major Syrian militias: the Khalid bin Walid Brigade, the Harmoush Battalion, and the Omari Battalion.86 Additionally, “insurgents have been able to maintain control of key terrain near Damascus and central Homs.”87 Both the Syrian government and FSA forces also face opposition from al-Qaeda-linked armed insurgent groups that have complicated and intensified the civil war.88

The fighting has been ongoing for more than three years, outlasting any other Arab Spring uprising in terms of sustained,
intense fighting. Both sides are reportedly using military-grade weapons\textsuperscript{89} and reports by the media and government sources cite the use of chemical agents. The government has “relied on artillery attacks and air power” as well as tank ground attacks.\textsuperscript{90} It has used multi-barrel rocket launchers, which opposition forces have also accessed—likely by stealing them from government weapons caches.\textsuperscript{91} Opposition forces are also launching pipe bombs made from parts taken from unexploded government bombs.\textsuperscript{92} Recently, the government has been using cluster bombs, which are inherently more indiscriminate than conventional bombs.\textsuperscript{93} Additionally, chemical weapons likely have been used in the conflict by government forces and possibly by rebel forces.

The number of deaths, refugees, and material destruction from the conflict has been devastatingly high. In July 2013, the civil war had claimed the lives of over 100,000 people\textsuperscript{94} and the U.N. had registered 1.8 million refugees from Syria.\textsuperscript{95} In September 2012, the opposition group Syria Network for Human Rights “estimated more than 2.9 million homes, schools, mosques, churches and hospitals

\begin{thebibliography}{9}
\bibitem{91} Id.
\bibitem{92} Id.
\end{thebibliography}
had been damaged or destroyed since the uprising began in March 2011."\(^{96}\) Although the Security Council has not authorized military action or sanctions, it has issued resolutions condemning the actions of the Syrian government on the Turkish border.\(^{97}\) Furthermore, the U.N. Human Rights Council has condemned Syria for war atrocities.\(^{98}\)

The Syrian government has received military support from Iran, Hezbollah, and Russia.\(^{99}\) The opposition received military support from Saudi Arabia\(^{100}\) and non-military assistance from the United States,\(^{101}\) France, and the United Kingdom\(^{102}\) prior to the recent reports of chemical weapons use. In response to chemical weapons allegations, the United States stated a change in policy from providing only humanitarian aid to providing military support as well.\(^{103}\) In July 2013, the U.S. was moving weapons to Jordan with


plans to arm “small groups of vetted Syrian rebels...”

This change in policy, however, would not internationalize the civil war, changing it from NIAC to an international armed conflict (IAC).

Internationalization may occur when a foreign state provides support to an insurgent group against the local government.

Both the ICJ and the ICTY have articulated tests for determining state control, respectively called the effective control test and the overall control test. In Nicaragua v. U.S., the ICJ held that, for “conduct to give rise to legal responsibility... it would in principle have to be proved that the state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.”

In Tadić, the ICTY espoused its overall control test that requires that the state: “i) provided financial and training assistance, military equipment and operational support as well as; ii) participates in the organization, co-ordination or planning of military operations.”

In the case of Syria, U.S. and allied military support to the opposition would not internationalize the conflict under either test. Both tests require a degree of control by the foreign state over the planning of military operations. Sending military supplies, by itself, fails to satisfy either test.

In Syria, crimes against humanity and widespread torture have also triggered ICL liability. According to the Public International Law and Policy Group, “[j]n Syria, mass atrocity crimes are being committed on a scale not seen since Kosovo, Rwanda, and

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Government and opposition forces have both committed international crimes, including unlawful killing and torture, with the United Nations reporting that the government’s abuses are more widespread and serious. Human Rights Watch reports it has identified at least 27 torture centers run by Syrian government intelligence agencies as of 2012.

Violations of the Geneva Conventions during the civil war would also trigger war crimes liability. War crimes are the most serious violations of IHL, triggering ICL liability and possible prosecution by the ICC. The Rome Statute mirrors the Geneva Conventions IAC-NIAC distinction in its criminalization of war crimes. The Statute sets out four categories of war crimes which include serious violations of: the four Geneva Conventions; the laws and customs of international armed conflict; Common Article 3; and law and customs of non-international armed conflict.

3. Protections

As a NIAC, the Syrian conflict triggers Article 3, common to all Geneva Conventions. If Syria were a member of the 1977 Protocol Additional (II) to the Geneva Conventions of August 12, 1949—which it is not—additional protections would apply. In

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111 Tadic Interlocutory Appeal, supra note 76, at para. 128.


114 Common Article 3 is the only provision applicable to non-international armed conflict unless another arrangement is agreed to by the parties.
addition to NIAC protections, the parties’ conduct also triggers individual criminal liability under ICL\(^\text{115}\) including war crimes liability.

Common Article 3 (“CA3”) is a blanket provision that promises humane treatment by prohibiting the most egregious of conduct. In certain situations, Protocol II may also apply and go beyond CA3 to address distinct groups of people and prohibit certain military conduct. CA3 is the only provision in the Geneva Conventions to address armed conflict that is non-international in nature.\(^\text{116}\) Under CA3,

(1) Persons taking no active part in the hostilities, including members of any armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

NIAC may trigger additional protections depending on the state’s status as a party to other treaty regimes. Examples of other treaty regimes include the 1980 Convention on Certain Conventional Weapons and its Protocols; the 1997 Ottawa Convention banning anti-personnel land mines; the 1993 Chemical Weapons Convention; and the Convention for the Protection of Cultural Property and its 1999 Second Protocol.

\(^{115}\) See discussion infra in Season Two analysis, Part II.B.

\(^{116}\) Commentary to the Geneva Conventions (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field at 48 (“... Article 3... is only applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention.”) [hereinafter Commentary to Geneva Convention I].
(b) taking of hostages;

c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

Protocol II provides additional protections to CA3 but has a narrower scope of applicability. While Syria is party to the Geneva Conventions, it is not party to Protocol II. Protocol II is triggered in the following situations:

The conflict is between the armed forces of a Party and “dissident armed forces”;

The dissident armed forces are “under responsible command”; and

These dissident armed forces “exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations” and adhere to the Protocol.118

117 “Where the conditions of application of the Protocol are met, the Protocol and common Article 3 will apply simultaneously, as the Protocol’s field of application is included in the broader one of common Article 3. On the other hand, in a conflict where the level of strife if low, and which does not contain the characteristic features required by the Protocol, only common Article 3 will apply.” Commentary to Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) 4457 [hereinafter Commentary to Additional Protocol II].

Protocol II expands the list of fundamental guarantees for persons not taking part or who have ceased to take part in hostilities. These include:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.  

Where it applies, Protocol II provides the civilian population a “general protection against the dangers arising from military operations.”  

It promulgates the following rule: “The civilian population, as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of


119 Additional Protocol II, supra note 118, at art. 4(2).
120 Id. at art. 13.
which is to spread terror among the civilian population are prohibited."121

D. Libya: International and Non-International Armed Conflict Legal Protections

1. Background

The dictator Muammar Gaddafi ruled Libya since he seized power in a military coup in 1969. During Gaddafi’s rule, U.S.-Libyan relations deteriorated, and the Libyan government allegedly committed a number of state-sponsored acts of terrorism against U.S. nationals including the 1988 Lockerbie bombings.122 The regime also pursued weapons of mass destruction, but changed its position in 2003, leading to a lifting of international sanctions.123 Still, there was little domestic political change in Libya during this period, and tensions intensified between the Gaddafi government, the Libyan Islamist Fighting Group (LIFG), and the Muslim Brotherhood.124

The Arab Spring revolutions in Tunisia and Egypt provided a catalyst for a domestic revolution in Libya in February 2011.125 Protests broke out in eastern region of Cyrenaica and spread to Benghazi and the capital of Tripoli.126 On February 17, the opposition movement, called the National Conference for the Libyan

121 Id. at art. 13.2
123 BLANCHARD, supra note 122, at 16.
124 Id.
125 Id.
Opposition (an umbrella group made up of several anti-Gaddafi groups), declared a “Day of Rage” protest. By the next day, sources reported that the opposition movement had taken over areas of Benghazi and Cyrenaica. The Gaddafi regime reacted violently to the calls for reform, vowing to track down and kill protestors “house by house.” Human rights groups reported that the government killed hundreds of civilians including women and children in the initial crackdown against protestors. According to media reports, Gaddafi also indiscriminately bombed areas with helicopters and warplanes. At the end of February, the United Nations passed a resolution to freeze the assets of Gaddafi and his affiliates and send the matter to the ICC for investigation. In March, the Security Council passed another resolution that authorized a no-fly zone over Libya, demanded an end to attacks against civilians, and authorized member States to take all necessary measures to protect civilians in danger in Libya.

Following U.N. authorization, the United States, the United Kingdom, and France led a NATO coalition against Libyan
government forces, known as Operation Unified Defender.\textsuperscript{134} By August, the opposition was able to attack Gaddafi strongholds, and the Libyan National Transitional Council had killed Gaddafi and established control over Libyan territory.\textsuperscript{135} By November 2011, NATO forces had withdrawn from Libya.\textsuperscript{136}

2. Classification

The conflict in Libya qualifies as “Season D”—IHL protections apply for IAC and NIAC, and ICL protections also apply. An IAC generally refers to an armed conflict between states or, as previously discussed,\textsuperscript{137} an internal armed conflict that is internationalized by foreign state intervention, as was the case in Libya.

Under Common Article 2 of the Geneva Conventions, an IAC exists in the case of “declared war or of any other armed conflict . . . between two or more of the High Contracting Parties, even if the state of war is not recognized by them.”\textsuperscript{138} A state does not have to formally declare war, nor do all parties to the conflict have to recognize the armed conflict for the situation to qualify as an international armed conflict and trigger IHL protections.\textsuperscript{139}

The conflict between the Libyan government and domestic rebel forces met the organization and intensity requirements of a NIAC. Beginning in February 2011, the situation could be classified as a NIAC due to the organization and intensity of the fighting


\textsuperscript{135} Id.


\textsuperscript{137} See infra Part III.C(2) (discussing internationalization of a non-international armed conflict).

\textsuperscript{138} Geneva Conventions Relative to the Treatment of Prisoners of War art. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 2 is common to all Geneva Conventions.

\textsuperscript{139} Commentary to Geneva Convention I, supra note 116, at 32.
between the Libyan government and opposition forces. The rebels were organized under the National Conference for the Libyan Opposition and, within the first days of the conflict, gained control of significant areas of Libyan territory. Both sides employed military-grade weapons, including “automatic weapons, rocket-propelled grenades, and heavy machine guns.” The government has also used tanks and surface-to-air missiles.

As the conflict continued and the government’s abuses came to light, the Security Council authorized U.N. members to take all means necessary to protect civilians. By the end of March, NATO forces had taken international military action in Libya, which internationalized the civil conflict by direct intervention. IAC protections were triggered once fighting between NATO and the Libyan government commenced, while NIAC protections applied to the conflict between the government and domestic opposition forces. In August, the opposition forces took control of Tripoli and held the Gaddafi stronghold of Sirte by October 2011. This marked the initial de-escalation of the revolution and eventual end of both armed conflicts.

The conflict in Libya can be described as a “mixed” IAC-NIAC conflict. Between February and November 2011, Libya was engaged in both non-international and international armed conflicts. The revolution against Gaddafi began in February 2011 as a non-international armed conflict; in March 2011, with NATO’s

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140 See infra Season Three discussion on organization and intensity criteria, Part II.C.1.
141 CHRISTOPHER BLANCHARD & JIM ZANOTTI, supra note 121, at 1.
intervention, the conflict became a mixed IAC-NIAC. In November, when NATO forces withdrew and the National Transitional Council consolidated power, the situation returned to a conflict of a non-international nature. By February 2012, there was no longer an armed conflict of either type in Libya.

3. Protections

The conflict between the Gaddafi regime and NATO forces triggered IAC protections under the Geneva Conventions and Additional Protocol I. IAC triggers the highest degree of protections for civilians and combatants under IHL. Separately, the conflict between the Libyan government and rebel forces triggered NIAC protections.\(^{146}\)

IAC law affords protection to the wounded and sick, prisoners of war (POWs), and the civilian population. During IAC, the Geneva Conventions and Additional Protocol I regulate the conduct of warfare.

First, the Geneva Conventions provide protections for the sick and wounded of the armed forces during both land and naval conflicts.\(^{147}\) Such personnel are regarded as “‘hors de combat,’ [and] from that moment sacred and inviolable.”\(^{148}\) Under the Conventions, they shall be treated humanely and cared for by the Parties to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited;

\(^{146}\) See infra Part II.C.3.


\(^{148}\) Commentary to Geneva Convention I, supra note 116, at 132.
in particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments; they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.  

Second, the Geneva Conventions require state parties to protect POWs. POW status is specifically reserved for combatants taking part in international armed conflict. POWs must be “humanely treated” and “[a]ny unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the present Convention.”

The Third Geneva Convention forbids “physical mutilation or . . . medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest.” The Convention also maintains a standard of humane treatment for combatants during the time of captivity. POWs are protected from physical and mental torture for purposes of information and have the right to complain about the conditions of their captivity.

Finally, the Conventions protect civilians and civilian objects under the rule of distinction. As a rule, “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objects and accordingly shall direct their operations only against military objectives.” Civilians are protected from being the “object of

149 Geneva Conventions I, supra note 147, at art. 12; Geneva Conventions II, supra note 147, at art. 12.
151 Id.
152 See id. at arts. 13, 17-18, 26, 29, 78.
153 Id., at art. 17.
154 Id., at art. 78.
attack . . . [and] [a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population . . . .”\textsuperscript{156}

As a general rule, “the right of Parties to the conflict to choose methods or means of warfare is not unlimited.”\textsuperscript{157} Under article 35 of API,

(2) [i]t is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. (3) It is [also] prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.\textsuperscript{158}

Military strategy must also take into account the principle of proportionality. As applied,

the attack must be directed against a military objective with means which are not disproportionate in relation to the objective, but are suited to destroying only that objective, and the effects of the attacks must be limited in the way required by the Protocol; ‘moreover,’ even after those conditions are fulfilled, the incidental civilian losses and the damages must not be excessive.\textsuperscript{159}

If faced with several options “for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.”\textsuperscript{160}

\textsuperscript{156} Id. at art. 51(2).
\textsuperscript{157} Id. at art. 35(1).
\textsuperscript{158} Id. at art. 35.
\textsuperscript{159} Id. at art. 51(5); Commentary to Additional Protocol I, 624-25.
\textsuperscript{160} Additional Protocol I, supra note 155, at art. 57(c)(3).
III. JUSTIFIED AND UNJUSTIFIED DIFFERENCES IN PROTECTIONS UNDER CURRENT INTERNATIONAL LAW

International law did not apply to the Arab Spring in a uniform manner. Although IHL protections only applied in Libya and Syria, ICL offered a baseline of protection for civilians facing egregious government attacks in Egypt and Bahrain. For the armed conflicts in Libya and Syria, IHL provided a lower degree of protection for civilians and combatants in Syria’s civil war than in Libya’s international conflict. This distinction is unjustified because it assigns a different weight to human integrity based on the sovereign status of the parties to the conflict. In addition, it does not reflect the reality that NIAC poses an equivalent, if not greater, threat to affected populations and the international community. A lesser protection regime also provides the opportunity for abuse during NIAC. Furthermore, the dual system of a mixed conflict creates practical problems of legal compliance and enforcement.

A. ICL v. IHL: A Justified Distinction

Distinctions between international criminal (“Season B”) and humanitarian (“Season C” and “Season D”) legal protections under the current regime are justified. ICL (non-war crime) liability applies irrespective of an armed conflict. It prohibits large-scale violations against the civilian population, including crimes against humanity and genocide. In contrast, IHL protections are triggered by the existence of an armed conflict. It provides a set of protections specific to armed conflict that address combatants, prisoners of war, and civilians through the principles of distinction and proportionality.

ICL protections are better suited to situations that do not rise to the level of an armed conflict. During an armed conflict, IHL recognizes legally permissible killings while providing protections to persons not taking part in hostilities. For example, CA3 prohibits the killing of individuals not taking part in the conflict, and IAC goes further, requiring that attacks be carried out in a manner “expected to cause the least danger to civilian objects.” 161 In situations of non-

161 Id. at art. 57.
armed conflict, IHL would not apply; however, ICL protections trigger criminal liability for widespread or systematic attack against the population. ICL liability depends on the impact on the affected population without any reference to military calculations.

The distinction between international criminal and humanitarian legal protections is justified. ICL protections are important intermediary protections between basic international human rights protections and international protections exclusive to the time of war.

B. IAC v. NIAC: An Unjustified Distinction

The distinction between IAC (“Season C”) and NIAC (“Season D”) in IHL is unjustified. Protections are assigned based on the sovereign status of the parties, ignoring the factual reality that NIAC threatens vulnerable populations as well. Thus, the IAC-NIAC distinction is unjustified because it fails to provide a uniform legal standard of protections against potential atrocities. This is illustrated by the comparison of Libya and Syria, which did not merit the same protections under current international law.

While IHL affords a lesser degree of protections in Syria, the civil war poses a greater threat to the population and international security than the Libyan conflict. Libya and Syria both experienced prolonged periods of violence. In Libya, the IAC lasted for eight months; and, by October 2011, the combined casualties for the IAC and NIAC were estimated at 25,000. 162 By July 2013, the Syrian conflict had been ongoing for more than two years with a death count exceeding 100,000 including more than 36,000 civilians. 163 The Syrian civil conflict has greatly destabilized the region, creating almost two million refugees, 164 drawing in mercenaries and foreign

164 McDonnell, supra note 95.
fighters, and heightening sectarian violence. Despite the seriousness of the civil conflict, IHL affords a lesser degree of protection in Syria than the Libyan armed conflict.

Under the Geneva Conventions, CA3 is the only provision that applies in Syria. CA3 does not govern the conduct of warfare or distinguish the wounded combatant from the general population. In the absence of a POW status, Common Article 3 protects the captured combatant from inhumane treatment and unfair prosecution; however, the individual remains vulnerable to national laws against treason and other crimes. In effect, CA3 is a compromised text, weighing the concern for human integrity against the state’s interest in sovereign authority to govern its internal affairs. It “merely provides for the application of the principles of the Convention and not for the application of specific provisions . . . .” Under CA3, the Syrian government is held to general principles and allowed greater flexibility relative to IAC in its conduct against perceived threats.

In contrast, the Libyan armed conflict triggered an extensive number of provisions that, unlike CA3, are more specific, practical, and less vague. As a rule, IAC requires the parties to distinguish

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167 See Commentary to the Geneva Conventions I, supra note 116.

168 See id. at 48. “It [art. 3] at least ensures the application of the rules of Humanity which are recognized as essential by civilized nations and provides a legal basis for charitable interventions by the International Committee of the Red Cross or any other impartial humanitarian organization—interventions which in the past were all too often refused on the ground that they represented unfriendly interference in the internal affairs of a State.”

169 Id.

170 Id. at 150 (comparing Article 15 with Common Article 3, which provides general principles of protection without specific provisions as to the parties responsibilities and conduct in achieving the protections).
between civilians and military objects and “direct their operations only against military objectives.”¹⁷¹ Civilians are protected from being the “object of attack . . . [and] [a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population . . . .”¹⁷² Furthermore, IAC limits the means of warfare and requires military action to adhere to the principle of proportionality.¹⁷³ IAC protections also give legal status to the wounded and sick and “lay down the actual steps to be taken for their benefit from the moment they fall on the battlefield.”¹⁷⁵ POW status also applies to captured combatants and confers a series of protections that maintain a standard for humane treatment during the time of custody.¹⁷⁶

In Nicaragua, the ICJ referred to CA3, which applies in Syria, as “rules which, in the court’s opinion, reflect . . . ‘elementary considerations of humanity.’”¹⁷⁷ Protocol II (which applies to certain non-international armed conflicts) embodies, to an extent, the principle of distinction,¹⁷⁸ but, as the Commentary points out, “[u]nlike Protocol I [related to international armed conflict], which contains detailed rules, only the fundamental principles on protection for the civilian population are formulated in Protocol II . . . .”¹⁷⁹ Even these fundamental protections may not apply in Syria because Syria is not party to Protocol II. Although courts and states can interpret and apply rules of IAC to NIAC as customary law,¹⁸⁰ the codified regime at the core of IHL protections still differentiates the situation and the applicable protections. There is significant disagreement over the

¹⁷¹ Additional Protocol I, supra note 155, at arts. 48-52.
¹⁷² Id. at art. 51(2).
¹⁷³ Id. at art. 35.
¹⁷⁴ Id. at art. 51(5); Commentary to Additional Protocol I at 624-25.
¹⁷⁵ Commentary to Geneva Convention I, supra note 116, at 150 (discussing art. 15).
¹⁷⁶ See Geneva Convention III, supra note 150, at arts. 13, 17, 18, 26, 29, 78.
¹⁷⁷ Nicaragua, supra note 106. The ICJ views Common Article 3 as reflecting the “elementary considerations of humanity” referred to in its prior 1949 opinion of Corfu Channel, Merits, 1949 I.C.J. 22 (April 9).
¹⁷⁸ See infra note 194.
¹⁷⁹ Commentary to Additional Protocol II, supra note 117, at 4762.
¹⁸⁰ See INT’L INST. OF HUMANITARIAN LAW, supra note 77.
substance of customary international law, creating ambiguity in possibly applying and enforcing IAC protections in NIAC. The IAC-NIAC distinction is mirrored in ICL war crimes liability established by the Rome Statute.

The IAC-NIAC distinction is also subject to abuse. During NIAC, the government or opposition forces may take advantage of the less restrictive protections regime, especially if the state is not a party to subsequent agreements that regulate the conduct of war. In Syria, for example, President Assad used cluster bombs against the oppositional forces with significant impact on the civilian population. The legal argument against the use of cluster bombs is stronger under IAC either because they violate articulated rules of distinction or because many states have banned their use, but this protection is less clear in NIAC. Because Syria is not party to the Convention on Cluster Munitions, the government might legitimately argue their use is permissible under the current legal regime. A similar analysis applies to the use of chemical weapons. At the start of the current conflict, Syria was not a party to the Chemical Weapons Convention (CWC), which prohibits the use of chemical weapons, and it did not join the CWC until October 2013. Although IHL regulates the use of weapons during IAC, it does not include a similar provision for NIAC unless agreed to in arrangements beyond the Geneva Conventions.

In addition to the potential for abuse by government forces, current international law leaves “little incentive for insurgent forces to comply with laws of war . . . [and] granting the privileges to insurgents might promote greater reciprocity on their part.” NIAC offers few protections for and restrictions on the opposition group. This increases the likelihood that the opposition will also commit atrocities and ignore basic humanitarian concerns. In the case of

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181 See Additional Protocol II, supra note 118, at art. 13.
182 See id.
183 Blake & Mahmud, supra note 69, at 250.
184 Additional Protocol I, supra note 155, at art. 35.
Syria, the opposition has allegedly committed human rights abuses for which it should be held accountable. Elimination of the IAC-NIAC distinction would promote greater compliance on both sides, offering greater protections and incentive for adhering to international law.

The continuation of a dual system of protections also poses theoretical and practical problems. Situations that trigger both sets of protections, the so-called “mixed conflict,” create confusion and complicate the application of IHL. For example, Libya hosted both an NIAC and IAC, creating a dual system of law within a single conflict. To determine the applicable protections regime, each engagement would require a separate evaluation and classification as part of the international or non-international armed conflict. Mixed conflicts may further complicate the analyses in situations when opposition forces of each armed conflict physically mix during an altercation. Furthermore, the current system creates virtuous and vicious cycles of protections. For example, when the international community decides in favor of intervention (as was the case in Libya), the internationalization of that conflict leads to a greater set of protections. On the other hand, in Syria, the international community’s failure to act has led to lesser protections because the conflict remains non-international. These cycles are also problematic because they give bodies such as the Security Council or NATO considerable power in determining the legal protections that apply to a conflict, instead of creating standing and determinate legal regimes. Yet, the most apparent flaw of the dual system is its assignment of two protections regimes in the same conflict, in which one set of protections arbitrarily gives a different weight to human integrity depending on the sovereign status of the oppositional force. Ultimately, the IAC-NIAC distinction assigns a different weight to human integrity depending on the sovereign status of the parties to the conflict. In Tadić, the ICTY argued that the different weight given to human integrity under current IHL was unjust. The court asked:

Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign states are engaged in
war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign state? If international law, while of course duly safeguarding the legitimate interests of states, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.\footnote{186 Tadic Interlocutory Appeal, \textit{supra} note 76, at para. 97.}

A dual system of law in a mixed conflict is avoidable if the NIAC is “internationalized,” thereby applying one protections regime to both conflicts. However, one must apply a burdensome and uncertain test on whether or not the conflict has met the criteria to be “internationalized”—a standard which international courts continue to debate. For example, Syria already exhibits some factors of foreign involvement that suggest a future internationalized conflict. However, the transition from NIAC to IAC is a gray area and difficult to determine. Eliminating the distinction between IAC and NIAC would also resolve the internationalization dilemma by rendering it a moot point and making universal application of IHL less complicated and contentious.

Finally, the international character of modern civil conflicts justifies a collapsed single protection regime. This would reflect the reality of domestic conflict and its contribution to international destabilization. For example, although Syria is involved in a traditional civil war, numerous foreign states have been affected. Regional security concerns have prompted the direct involvement of Israel, Turkey, and Lebanon. In addition, the refugee situation has impacted Jordan, Lebanon, Turkey, Iraq, and Egypt. The Syrian conflict is not an isolated situation. Foreign alliances currently play a role in providing military and non-military assistance to both parties to the conflict.
IV. The Sovereignty Problem

In the latter part of the twentieth century, international legal trends have transformed the concept of state sovereignty. Current analysis of the Arab Spring demonstrates that sovereignty norms in ICL and IHL must be interpreted in light of these changes. The next section describes the foundations and transformation of state sovereignty and argues that the current problems in applying IHL and ICL to the Arab Spring are attributed to an undue preference for traditional and outdated conceptions of sovereignty. The Geneva Conventions were ratified in the 1940s and the Rome Statute in the 1990s. They preceded the changing conceptions of sovereignty in the latter part of the twentieth century and the emergence of the Responsibility to Protect movement in the beginning of the twenty-first century, respectively. IHL and ICL should be understood in light of changing contexts and the international understanding of sovereignty. Given the continued occurrence of armed conflict in the modern era and the international community’s changing understanding of sovereignty, we must re-evaluate the current treatment and application of IHL and ICL protections. International protections should be a uniform standard of protections that apply to all populations affected by conflict, genocide, and crimes against humanity.

A. IAC-NIAC Distinction Incompatible with Sovereignty Trends

The problems identified in this Article stem from the same conceptual source: sovereignty. The IAC-NIAC distinction reflects the traditional sensitivity of a state’s right to govern its domestic affairs without intrusion. The drafting history shows that states vehemently opposed a single protection regime for armed conflict (IAC and NIAC), fearing that internal insurgencies would take advantage of international protections from domestic action and gain legal status. Historically, as the Commentary points out,
“[a]pplications by a foreign Red Cross or by the International Committee of the Red Cross have more than once been treated as unfriendly attempts to interfere in the internal affairs of the country concerned.”

Similarly, ICL protections are also limited because of sovereignty concerns. The Rome Statute is a consent-based document, consistent with the Westphalian model in that states are only bound to the international law to which they agree. Many countries, including the United States, Israel, and most Arab states are not party to the Rome Statute. This creates practical enforcement issues. Similarly, Security Council action and ICC referral are based on the consent of the five permanent members (P5). As noted by international legal scholar Andrew Guzman,

\[\text{[a]ny issue that is of truly global importance will affect each of the P5 members in a different way and a resolution can only be adopted if each of them believes it to serve their interests... The need to focus on areas where the P5 can agree limits the Council to a relatively small subset of the world's problems.}\]

B. Foundations of Sovereignty

Traditional sovereignty or “the conception that a state must have control of its external policies and be free of external authority structures is an essentially European invention, dating from the sixteenth and seventeenth centuries” with the signing of the Treaty revolt, or that it may confer belligerent status, and consequently increased authority, upon the adverse Party.”

188 Commentary to the Geneva Conventions, supra note 116, at art. 3, para. 39.

189 For a recent argument that consent should be minimized in international law, see Andrew T. Guzman, Against Consent, 52 VA. J. INT'L L. 747 (2012).

190 Id. at 780.

of Westphalia. At the time, Hugo Grotius, the “father of international law” conceived of “an authentic law of nations which was based on the ‘mutual consent’ of sovereigns acting in the context of a ‘great society of States.’” The paradox of this system, however, was that “sovereignty created the territorial state and the international system.” This system would be held together by states that were each independent and did not have to answer to a higher authority.

Stephen Krasner identifies several sovereignty typologies including Westphalian sovereignty and international legal sovereignty. According to Krasner, Westphalian sovereignty is the idea that a “state has the right to determine its own authority structures, which implies that states should avoid intervening in each other’s internal affairs.” International legal sovereignty is the idea that “juridically independent territorial entities merit recognition and with it such rights and privileges as membership in international organizations.”

http://isites.harvard.edu/fs/docs/icb.topic162929.files/B_Political_Integration/KcohaneIroniesOfSovereignty.pdf.

192 While the peace of Westphalia was a significant watershed moment in the international system and for the codification of traditional sovereignty norms “[it] was not a clear break with the past: political entities with exclusive control over a well-defined territory existed well before the Peace…” Stephen D. Krasner, Westphalia and All That, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE (Judith Goldstein & Robert O. Keohane eds., 1993), http://www.polisci.wvu.edu/faculty/hauser/PS362/KrasnerIdeasForeignPolicyWestphalia.pdf.


The United Nations Charter, the foundational document of modern international law, enshrines both concepts of sovereignty and also sets their limits. Article 2(4) of the Charter upholds the notion of Westphalian sovereignty, asserting that states “shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.” Chapter VII of the Charter then limits that sovereignty by giving power to the Security Council to take military and non-military action against a member to “restore international peace and security.”

Article 2(1) of the Charter codifies international legal sovereignty, stating that the United Nations is “based on the principle of the sovereign equality of all its Members.” State membership in the United Nations necessarily enhances international legal sovereignty by recognizing each state as an independent and legitimate legal entity, able to enter into treaties and conventions and participate in the General Assembly, Security Council, and other U.N. bodies. Chapter II of the Charter then sets out mechanisms and justifications for limiting international legal sovereignty by expelling members from various U.N. committees or from the U.N. itself.

C. Transformation of Sovereignty: The Fading of the Westphalian Model

In the latter part of the twentieth century, international trends have transformed the concept of sovereignty and have eroded the prominence of Westphalian sovereignty. States have acceded to international regimes that promote universal standards, agreed to the jurisdiction of international judicial bodies, and authorized nongovernmental bodies to monitor and enforce states’ commitments. In exercise of their legal sovereignty, states have consented to external authorities and thereby weakened the Westphalian model. These international trends are illustrated in the fields of human rights, international security, and the creation of international criminal courts.

198 U.N. Charter art. 2(4).
199 Id., at art. 39.
200 Id., at art. 2(1).
201 Id., at arts. 3-6.
1. Human rights

In the twentieth century, human rights protections have gained universal standing with states that have acceded to agreements and joined organizations that promote global norms for human rights. States “enter into such [human rights] accords with the full understanding that in so doing they might limit their own autonomy by altering domestic views about legitimate behavior, authorizing external monitoring of internal practices, or creating third-party adjudication procedures that give individual citizens, not just states, legal standing.”203 Each is evidence to the fact that the state no longer enjoys the exclusive right to define humane treatment under its jurisdiction.

2. International security

International security institutions illustrate states’ consent for an international body to take coercive measures against a sovereign. Under Art. 42 of the United Nations Charter, “[s]hould the Security Council consider that measures provided for in Art. 41 [use of un-armed force] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” Such enforcement actions are exceptions to Art. 2(7) and the limitations on intervention in “matters which are essentially within the domestic jurisdiction of any state . . . .”204 States have also agreed to support the Council’s decisions, even if they are non-permanent members or took no part in the vote. This further violates the Westphalian system, which promotes the state’s external authority and “prohibits governments from agreeing to rules defining a process, over which it does not have a veto, that can confer obligations not specifically provided for in the original agreement.” Beyond supporting the

203 Id. at 106.
204 U.N. Charter art. 2(7).
Council’s decisions, some states have supported military intervention absent Security Council authorization for humanitarian reasons.\textsuperscript{205}  

3. \textit{International criminal courts}  

The enforcement of international criminal law has made significant progress in the twentieth century with the creation of international courts and tribunals.\textsuperscript{206} Following World War II, the London Agreement of August 8, 1945, called for a “trial of war crimes whose offenses have no particular geographic location.”\textsuperscript{207} This established the Trial of German Major War Criminals, known as the Nuremberg Trial, and, in Asia, the Allied Forces established a similar proceeding known as the Tokyo Tribunal. Both tribunals exercised jurisdiction over individuals charged with crimes against peace, war crimes, and crimes against humanity. These adjudications enforced the principle of individual liability for international crimes\textsuperscript{208} and international adjudication, independent of the state where the crimes occurred or the nationality of the actors.  

In the 1990s, the United Nations created tribunals to address the atrocities committed in Yugoslavia and Rwanda.\textsuperscript{209} In both cases,  

\textsuperscript{205} See infra Part IV.D (discussing humanitarian intervention and the emerging norm of responsibility to protect).  
\textsuperscript{206} The 1919 Treaty of Versailles included provisions for an international tribunal and domestic military courts (of the Allied and Associated Powers) to try German officials. The enforcement of such provisions was unsuccessful. However, the Netherlands refused to extradite the Kaiser, and the other provisions of the Treaty were unsuccessfully enforced. See BETH VAN SCHAAK & RON SLYE, A CONCISE HISTORY OF INTERNATIONAL CRIMINAL LAW 23-25 (2007) (referring to arts. 227-28 of the 1919 Treaty of Versailles).  
\textsuperscript{208} Judgment of Nuremberg Tribunal (also cited in the Rome Statute). In its judgment, the Nuremberg Tribunal stated that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can international criminal law be enforced.”  
\textsuperscript{209} The ICTY was established by S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993), and the ICTR was established by S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994). The United Nations also assisted in the establishment of criminal tribunals for atrocities associated with Cambodia, East Timore, and Sierra Leone.
the Security Council cited the situation “to constitute a threat to international peace and security,” a clear reference to its Chapter VII powers and the states’ assent to international action in domestic affairs. The tribunals function under the procedures and substantive rules of their respective Statutes and outside the domestic judicial system. Both Statutes include general provisions for a fair trial; reference to the international standard of due process under the International Covenant on Civil and Political Rights; and an appeals process with interlocutory review and a separate Appeals Chamber.

The Statutes include substantive provisions that assign individual criminal responsibility, and the tribunals exercise personal, territorial, and temporal jurisdiction. The tribunals have concurrent jurisdiction with national courts. However, they take precedence over domestic proceedings, and national adjudication does not bar the tribunal from initiating a subsequent proceeding. Whereas the ICTY and ICTR are limited to their respective conflicts, the ICC is “a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . .”

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212 ICTY Statute, supra note 211, at art. 25(1). See also ICTR Statute, supra note 212, at art. 12 (stating the original intention for the ICTR to share the same Appeals Chamber as created under the ICTY Statute).
213 ICTY Statute, supra note 211, at art. 7; ICTR Statute, supra note 212, at art. 6.
214 ICTY Statute, supra note 211, at arts. 6, 8; ICTR Statute, supra note 212, at arts. 5, 7.
215 ICTR Statute, supra note 212, at art. 8(1); ICTY Statute, supra note 211, at art. 9(1).
216 ICTY Statute, supra note 211, at art. 9(2); ICTR Statute, supra note 212, at art. 8(2) (granting concurrent jurisdiction with “primacy over the national courts of all States.”).
The creation of international criminal courts arguably violates a state’s Westphalian sovereignty by giving power to an entity outside of the state’s control. First, the courts are created by third parties, whether by a coalition of states or an international organization such as the United Nations. The trial is generally outside the state’s judicial system, and its procedures are established through external documents (Charters and Statutes) also adopted by third parties. Second, these tribunals create substantive changes to the state’s penal system. They impose international standards and assign individual liability, prosecuting conduct for which there may not be a domestic equivalent. Third, international courts exercise jurisdiction over the individuals of or conduct that occurred in a particular state that would otherwise fall under the state’s sovereign jurisdiction. The tribunals and courts take precedence over national proceedings, a stark contradiction to the traditional notion that a state has primary authority to govern its own affairs.

D. Responsibility to Protect (R2P)

The emergence of Responsibility to Protect (R2P) represents a culmination of the decline of traditional notions of Westphalian sovereignty in international law. It is a recent doctrine that highlights the importance of humanitarian protections against absolute sovereignty. The IAC-NIAC distinction is incompatible with this notion that humanitarian protections are not secondary to sovereignty concerns.

Responsibility to Protect is an emerging norm that recognizes

(1) the *jus cogens*, or fundamental nature of the prohibition against atrocity crimes; (2) historical state practice regarding humanitarian intervention; and (3)

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218 See London Agreement, *supra* note 208, for the definition of “crimes against humanity.”
219 See ICTR Statute, *supra* note 212, at arts. 1, 5-8 (establishing the competence of the tribunal, personal jurisdiction, individual criminal responsibility, territorial and temporal jurisdiction, and concurrent jurisdiction); S.C. Res. 827, *supra* note 210 (establishing a tribunal “for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 . . .”).
opinio juris, or state belief, that when atrocity crimes are unchecked within a state, the threat to international stability is so great that states can justifiably use force for the limited purpose of stopping these crimes.  \(^{220}\)

At the 2005 United Nations World Summit, “Heads of State and Government unanimously endorsed the Responsibility to Protect, pledging to never again abandon people threatened by the crimes of genocide, war crimes, crimes against humanity and ethnic cleansing.”  \(^{221}\) The Summit, first, affirmed the view that, “[w]hen individual states fail to protect their own populations, they have no sovereign right to nonintervention.”  \(^{222}\) It also “set a new standard for the United Nations and the international community as a whole: Failure to take action to protect populations from genocide and other atrocities is failure to fulfill a clearly acknowledged duty.”  \(^{223}\) Of importance, R2P challenges the sovereign right of nonintervention that is the primary characteristic of the Westphalian model. The IAC-NIAC distinction fails to reflect the current understanding that traditional sovereignty has given way to universal standards and protections.

According to Secretary General Boutros Boutros-Ghali at the end of the twentieth century:

A major intellectual requirement of our time is to rethink the question of sovereignty—not to weaken its essence, which is crucial to international security and cooperation, but to recognize that it may take more than one form and perform more than one function. This perception could help solve problems both within and among states. And underlying the rights of the individual and the rights of peoples is a dimension of universal sovereignty that resides in all

\(^{220}\) PUBL. INT’L. & POL’Y GRP., supra note 108, at 7.

\(^{221}\) Id.


\(^{223}\) Id. at 1162.
humanity and provides all peoples with legitimate involvement in issues affecting the world as a whole. It is a sense that increasingly finds expression in the gradual expansion of international law.\(^{24}\)

V. SOLUTIONS

A. International Humanitarian Law Solutions

Populations affected by armed conflict should benefit from the same regime of heightened protections. This requires the creation of one protection regime for all armed conflict that corrects the existing flaws. Armed conflict should be evaluated under a uniform standard, irrespective of its international nature, to determine whether or not the situation triggers IHL protections. This analysis should consider such factors that infer an adverse effect on the population and need for a protections regime. Second, the same protections regime should apply to all populations in armed conflict.

For the purposes of IHL protections, we propose that “armed conflict” be defined as the following:

(a) conflict between two or more organized armed forces under the responsible command of authorities, with the ability to exercise control over the territory, engaged in fighting of some intensity; or

(b) a conflict between two or more states, or declared war between two or more states.

Subpart (b) embodies the traditional notion of international armed conflict. It reflects the situation of imminent or actual conflict where a hierarchal command (the state) intends to use, or has already used, armed force.

Subpart (a) eliminates the distinction between IAC and NIAC in favor of criteria that indicate a situation of intense violence and need for international protections. This standard incorporates the elements of armed conflict, irrespective of the parties’ status as sovereign states. It requires the existence of two or more organized armed forces under the responsible command of authorities. The criterion of a responsible command “implies some degree of organization of the insurgent armed group or dissident armed forces . . . . It means an organization capable, on the one hand, of planning and carrying out sustained and concerted operations, and on the other, of imposing discipline in the name of a de facto authority.”

The existence of an armed force with an identifiable command distinguishes the armed conflict from internal disturbance and does not affect the state’s ability to handle insurgencies or situations of unorganized violence. Subpart (a) also requires the authorities to have “the ability to control the territory.” This criterion assures the ability of all parties—whether states or opposition forces—to enforce the rules of war.

A significant level of organization and territorial control for the insurgent party is required. This is “likely to exclude internal disturbances, riots, and terrorist activities from the scope of a single body of international humanitarian law.” Subpart (a) also depends on a threshold level of violence. This reflects the key value of IHL as a protection of human life during a period of vulnerability and potential threat.

Under the proposed definition, a situation that meets either Subpart (a) or (b) is an armed conflict and triggers traditional IAC protections. The protection regime should, however, contain the caveat that the triggering of protections does not affect the legal status of the parties. This alleviates the historical concern that application of international protections confers legal status on rebel forces equivalent to that of a state. Under the proposed analysis,

225 Commentary to Additional Protocol II, supra note 117, at 4463.
226 Stewart, supra note 186, at 345-46 (referring to Brazilian government’s suggestion for APII threshold).
227 Id. at 346.
armed conflict would trigger IAC protections, rendering CA3 and Protocol II obsolete.

Indeed, the proposed analysis reflects the international community’s finding that IAC-like protections and principles should apply to NIAC. For example, the Manual on the Law of Non-international Armed Conflict details the rules and protections that apply during NIAC; however, many of these principles are extensions of IAC protections interpreted by courts as customary international law and applied to all armed conflict, including NIAC.\footnote{For example, the principle of military necessity is not found in Common Article 3 or Additional Protocol II. However, the ICTY has found the principle to apply based on customary international law. See INT’L INST. OF HUMANITARIAN LAW, supra note 77.} Courts and other authoritative bodies have recognized that certain aspects of IAC are customary law for NIAC; however, which aspects apply to NIAC remains unsettled. These developments demonstrate a recognition that the IAC-NIAC distinction is unjustified, but at the same time, the distinction remains a significant feature of treaty and customary international law.

B. International Criminal Law Solutions

The undue preference for traditional sovereignty norms must also be minimized in the current enforcement of ICL and at the ICC. While ICC enforcement has thus far taken place in African conflicts, the Arab Spring’s call for major judicial reform might provide a catalyst for the Middle Eastern countries to join ICL institutions. ICL enforcement could be achieved by promoting ICC membership within the Arab League. Furthermore, the creation of a regional or other independent ICC referral mechanism would encourage Arab nations to join and make the process less politicized.

It is fitting that Tunisia, the country that set the Arab Spring in motion, has also been the first Middle Eastern country to ratify the Rome Statute post-Arab Spring.\footnote{Daniel Makosky, Tunisia Ratifies Rome Statute, Joining ICC, JURIST (Jun. 25, 2011), http://jurist.org/paperchase/2011/06/tunisia-ratifies-rome-statute-joining-icc.php.} As countries in the region deal domestically with judicial reform issues in the coming years, ICC
membership could aid in “national judicial reform, spurring spates . . . to enact legislation that reflects a responsibility to ensure accountability for grave crimes at the national level. In turn, civil society monitors [can] ensure that governments follow through on their commitments to combat impunity, and advance good governance and rule of law.”

The Arab League, with international assistance, might also set up an ad hoc war crimes tribunal to prosecute war criminals in Syria, the site of the most serious of the Arab Spring’s war crimes, after the conflict has ended. Such an institution would be similar to the ICTY or ICTR, or hybrid courts, and could provide a realistic alternative to embracing international law within Arab institutions in the absence of widespread acceptance of ICC jurisdiction. U.N. investigators are currently compiling information on international criminal violations in Syria. Given the scale of atrocities already committed, the international community must identify a proper forum for future prosecution.

CONCLUSION

The Arab Spring has been called “the world’s first true human rights revolution: the young protestors of the Arab street


231 A proposed statute for an international tribunal to prosecute Syrian war crimes has been drafted by a group of international experts led by the Public International Law and Policy Group. See http://www.csmonitor.com/World/2013/1003/Revenge-or-retribution-Is-it-possible-to-prosecute-war-crimes-for-Syria.


spoke the language of democracy and human rights, and the international community responded with the same lexicon.” The Arab revolutions and international legal trends demonstrate the global advancement and acceptance of universal human rights values in the past sixty years. The idea that foreign intervention is justified against states committing mass atrocity crimes against its own people has gained widespread support. Still, international law continues to provide inconsistent protections during armed conflicts based on the sovereign status of the parties, and ICL continues to face enforcement problems. While these issues are difficult to resolve, the international community can take certain actions to correct these concerns. These include the elimination of the unjustified distinction between IAC and NIAC and promotion of increased ICC membership. Time and again, the international community has promised “never again” in the wake of the world’s most horrific atrocities. The international community must address the flaws in its current legal regime if it is to stand beside its promise.

INTERNATIONAL INSTITUTIONS AND THE RESOURCE CURSE

Patrick J. Keenan*

INTRODUCTION

Determining why some countries have prospered and others have failed to grow has puzzled scholars and policymakers for decades and remains an important question to the millions of people in the developing world. A particularly vexing part of the problem has to do with countries that are rich in exploitable natural resources like oil, natural gas, or minerals. These countries have tended to grow more slowly than countries without similar resources. This phenomenon, often called the resource curse, has been the focus of sustained attention by scholars from many disciplines who have attempted to identify whether, how, and why the resource curse exists and how it might be reversed or ameliorated. To a poor country, a source of sustained revenue can look like free money: the country simply needs to extract the resource from the ground and sell it, which should cause the country grow more quickly and fare better than countries without similar resources. In too many places, reality has proven far different.\(^1\) But resource wealth does not inevitably

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\(^1\) For a thorough discussion of the literature on the resource curse, see Michael L. Ross, *The Political Economy of the Resource Curse*, 51 World Pol. 297 (1999). Ross reviews the literature and concludes that there “is now strong evidence that states with abundant resource wealth perform less well than their resource-poor counterparts, but there is little agreement on why this occurs.” Id. at 297. Two relatively early books remain important for their discussion of individual countries and the lessons they draw from these case studies. For discussion of the relative importance of mineral endowments and their often-negative effects on macroeconomic performance, see Richard M. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis* (1993).
cause harm. There are certainly success stories of countries that have turned resource wealth into sustained economic development. What explains the difference in outcomes?

Determining the effect of a country’s resource wealth on its economic development is an important strand of development scholarship. As scholars have considered the effect of resource wealth, it has become clear that institutions are a principal factor in determining whether a country develops quickly or slowly (or at all). Some scholars go so far as to argue that “institutions rule” with respect to economic development; that is, that institutions are the most important factor in general and with respect to states rich in natural resources. For my purposes, it is not necessary to argue or to prove that institutions are the principal determinant of economic

Avery examines in detail six highly resource-dependent countries and finds that resource wealth can have a negative effect on growth under particular policy conditions. Terry Lynn Karl, in the book THE PARADOX OF PLENTY: OIL BOOMS AND PETRO-STATES (Stephen D. Krasner et al. eds., 1997), finds similar results in countries dependent on the sale of oil, albeit for somewhat different reasons.

2 See, e.g., Ragnar Torvik, Why Do Some Resource-Abundant Countries Succeed While Others Do Not?, 25 OXFORD REV. ECON. POLY 241, 245-46 (2009) (comparing resource-rich countries which have not been affected by the resource curse to those which have).

3 See, e.g., Daron Acemoglu, Simon Johnson & James A. Robinson, The Colonial Origins of Comparative Development: An Empirical Investigation (Nat’l Bureau of Econ. Research, Working Paper No. 7771, 2000) (arguing “that differences in institutions account for roughly three-quarters of the differences in income per capita” in former colonies). For an accessible and comprehensive analysis of economic development scholarship and history, see Daron Acemoglu & James A. Robinson, Why Nations Fail: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY (2012). Acemoglu and Robinson consider both individual cases and large-n econometric analyses to conclude that countries “differ in their economic success because of their different institutions, the rules influencing how the economy works, and the incentives that motivate people.” Id. at 73.

4 Dani Rodrik et al., Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development (Nat’l Bureau of Econ. Research, Working Paper No. 9305, 2002) (finding that the quality of institutions is the principal determinant of a country’s income, more important than geography—which includes resource endowment—and market integration).

5 A recent study by Jeffrey A. Frankel, The Natural Resource Curse: A Survey (Nat’l Bureau of Econ. Research, Working Paper No. 15836, 2010) confirms earlier conclusions and, based on a review of recent literature, identifies institutions as the most important factor.
growth to the exclusion of other factors.6 Instead, I argue that institutions are important and warrant critical analysis.

In countries with robust and well-functioning institutions, there is ample evidence that it is possible to turn the revenue flowing from the exploitation of natural resources into lasting economic and social development.7 In countries whose institutions function less well, the presence of resource wealth either does not help as much as would be expected or even harms the country’s prospects for development. Although there is still considerable debate about which institutions are most important and why, there is no longer much

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6 There are, of course, other factors that affect economic development. For example, there are many scholars who argue that geography plays a significant role in determining a country’s economic development, perhaps the most important role. For example, Jeffrey D. Sachs, Paul Collier, and their co-authors argue that at “the root of Africa’s poverty lies its extraordinarily disadvantageous geography, which has helped to shape its societies and its interactions with the rest of the world.” David E. Bloom et al., Geography, Demography, and Economic Growth in Africa, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 207, 211 (1998). See also John Luke Gallup et al., Geography and Economic Development, 22 INT’L REG’L SCI. REV. 179, 194 (1998) (showing empirical linkages between geographic factors, such as transport costs and intrinsic productivity and long-term economic growth). As might be expected, there has long been robust debate between the geography-first camp and the institutions rule camp and which factor is most important. Compare Rodrik et al., supra note 4, at 4 (arguing that “the quality of institutions trumps everything else”), with Bloom et al., supra note 6 (arguing that geography predominates and about how to determine which factor is most important). See, e.g., Edward L. Glaeser et al., Do Institutions Cause Growth?, 9 J. ECON. GROWTH 271, 296-98 (2004) (arguing that “the existing research strategy” has not proven the link “between institutions and economic growth”). See generally Simeon Djankov et al., The New Comparative Economics, 31 J. COMP. ECON. 595 (2003) (considering the connections between geography, institutions, and growth in the context of a number of other relevant causal factors). It is not my objective to determine which single factor is the most important in determining economic development. It is enough to show, as the evidence clearly does, that institutions are vitally important and do affect economic development in general and in the context of resource-rich economies.

7 For a discussion of various policy interventions to address the resource curse, see ESCAPING THE RESOURCE CURSE (Macartan Humphreys et al. eds., 2007). The book’s contributing authors consider policies to address the political and economic components of the resource curse and draw on success stories to demonstrate that it is possible to transform resource wealth into sustained economic development.
debate that institutions are central to the problem of development in general and to the effect of resource wealth on development in particular.\(^8\)

To this point, the scholarship on economic development and the exploitation of natural resources has arrived at a rough consensus on two issues. The first is that the resource curse is a demonstrable phenomenon, and the second is that weak institutions are an important causal factor. Having verified that the symptoms are real and identified some of their causes, the next step is to arrive at a viable course of treatment.

The principal contribution of this Article is to show that, in many cases, international institutions—as opposed to domestic institutions—are promising mechanisms by which to address the problem. This argument is both an attempt to push the scholarly conversation forward by moving from a cause to treatment and to offer a corrective to a common problem in the policy literature. Most policymakers have focused almost entirely on the reform of domestic institutions as the way to address the problems associated with the resource curse. Given the trajectory of development scholarship, it is unsurprising that scholars and policymakers have focused primarily on domestic institutions. The scholarship on the causes of the resource curse has identified domestic institutional failures as a principal driver of the resource curse. Scholars argue that the failures of domestic institutions cause the resource curse and that fixing domestic institutions is the best way to address the problem. I argue that it is a mistake to assume that because domestic institutional failures are the principal cause of the problem, their reform should be the principal focus of policymakers. In many instances, the weaknesses of domestic institutions are self-perpetuating, and focusing on them can amount to either a missed opportunity or actually contribute to harm. Instead, I argue that international

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\(^8\) See, e.g., Halvor Mehlum et al., *Institutions and the Resource Curse*, 116 ECON. J. 1 (2006) (finding that institutions are key to determining the economic success of resource rich countries); Ivar Kolstad, *The Resource Curse: Which Institutions Matter?*, 16 APPLIED ECON. LETTERS 439 (2009) (arguing that private sector institutions are more important than public sector institutions with respect to the resource curse).
institutions, even if they are not a principal cause of the problem, can be a viable second-best solution. Indeed, given the state of domestic institutions in many resource-rich developing countries, international institutions may represent the most plausible mechanism by which to address the problem.

The Article proceeds in three parts. In Part I, I review the relevant literature on the resource curse and the role of institutions in economic development. There are two principal schools of thought within the institutions literature. One approach holds that the most important institutions are those that affect the choices faced by people and firms in the private sector. These scholars argue that countries prosper when institutions push entrepreneurs to pursue productive activity instead seeking to garner a greater share of the rents from existing commercial activity. The second approach holds that institutions that affect the behavior of political leaders matter most because they determine how resource revenue is distributed and the extent to which leaders are accountable to citizens. I do not attempt to resolve this debate. Instead, I show that both explanations are plausible, and, more importantly, that my argument works regardless of which approach is the more accurate.

In Part II, I show the various kinds of institutional failures that are associated with poor economic growth; that is, what it is that institutions do or fail to do that contributes to growth or stagnation. These failures come in many forms, of course, but I focus on two clusters of problems. First, in many states, weak domestic institutions permit public officials to play dual roles in resource revenue decisions. In their official roles, they make commercial decisions on behalf of the state, and, in their private capacities, they serve as shareholders or principals in companies that do business with the state on the same projects over which they have official control. Officials are thus policymakers and private actors in the same transaction. This permits officials to personally enrich themselves and their families. Second, the domestic institutions of many resource-rich states are weak enough to permit public officials to distribute resource revenue in ways that benefit themselves or their political allies but do not contribute to the state’s long-term growth or improve the lives of citizens. This revenue distribution problem takes many forms, but, at its core, it is about how public officials choose to
use the revenue that comes from the sale of what are, after all, assets owned by the state.

In Part III, I identify the international institutions that either help or could help to ameliorate the resource curse in resource-rich countries under the right conditions. These institutions do the work of constraining the choices or influencing the behavior of the relevant public and private actors involved in the exploitation of natural resources. In this part I have two principal goals, one doctrinal and one theoretical. The doctrinal goal is to demonstrate that my approach is plausible and could succeed by specifying the legal or institutional mechanisms that could serve as substitutes for functioning domestic institutions. These include tools to place limits on the ability of officials to play dual roles, force the disclosure of relevant information to citizens or others, and reduce the incentives that officials have to use resource revenue in self-serving or inefficient ways. The theoretical goal is to anticipate and respond to potential objections to my approach. The strongest of these objections is that it is an affront to the sovereignty of developing states to use international institutions to accomplish what should be core domestic functions. Nonetheless, because international institutions are already involved in resource extraction transactions, their use as substitutes for failing domestic institutions is appropriate.

I. THE RESOURCE CURSE AND INSTITUTIONS

In this Part, I address two principal issues: what is the resource curse and how does it affect poor countries, and what role do institutions play in economic development, particularly with respect to resource-rich states. First, scholars have long worked to determine the factors that contribute economic development, including attempting to determine how the presence of exploitable natural resources affects a country’s development prospects. Some countries have used the revenues from resources to expand their economies and become solidly developed (or begin on a clear path toward development). Others appear to have foundered despite influxes of wealth from resources.
The second objective of this Part is to identify what institutions actually do in the context of natural resource development. What do institutions provide to a country, or from what do they protect it? Do they educate people so they can participate in governance or economic activity? Do they protect the country from avaricious bankers or politicians? Do they protect the country from elites attempting to dominate the economy? Because almost anything could be an institution when considered at a sufficiently general level—political parties, social clubs, the criminal law—I first specify that I mean those entities and regulations that shape political and economic behavior with respect to natural resources. I argue that institutions provide successful states with a cluster of essential goods and that when these goods are not provided, states struggle to develop in the first place or to sustain gains made under different conditions.

A. The Resource Curse

Countries rich in natural resources grow more slowly than similar countries without the resources. For years, development economists argued that resource endowments were critical to the long-term economic development of countries. Countries that had been blessed with more natural resources were expected to develop more quickly than states not similarly blessed. Then scholars began to note an anomaly: some countries that should have prospered if the conventional wisdom were true were in fact floundering. What was sometimes called “the paradox of plenty” was the finding that more wealth produced less welfare for many people in poor countries. In the policy literature using country studies and analyzing the

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9 There is a vast literature on the resource curse and its causes and consequences. For a comprehensive survey and analysis of its many strands, see Michael L. Ross, The Oil Curse: How Petroleum Wealth Shapes the Development of Nations (2012). Ross’s book presents the empirical evidence that resource wealth is associated with slower development and other social ills and analyzes the various hypotheses for why this is true.

10 See, e.g., Auty, supra note 1, at 1 (noting the conventional view that resource abundance was positively associated with economic development).

11 See Karl, supra note 1 (arguing that the oil and commodity booms of the 1970s and 1980s should have led to development in many poor countries but did not).
connections between resource abundance and wealth over a relatively short time frame, scholars demonstrated that resource wealth did not quickly or inevitably lead to economic development in countries in which it should have had the extant theories been valid. Later, in econometric analyses of many more countries over a longer time period, scholars began to demonstrate the full extent of the problem. Jeffrey D. Sachs and Andrew M. Warner, in a now-famous article, showed that there is a “statistically significant, inverse, and robust association between natural resource intensity and growth.” Sachs and Warner examined the growth rates of 97 resource-dependent countries and found that, even after controlling for other variables, growth was slower, on average, in more heavily resource-dependent states than in states less dependent on resource wealth.

Since the path-breaking work of Sachs and Warner and others, scholars have identified a number of other problems that appear more likely in resource-dependent countries than in countries less dependent on resources: there is a higher likelihood of conflict, there is more official corruption, corrupt rulers stay in power longer, and there is a greater likelihood of a misallocation of

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12 See, e.g., ALAN GELB, OIL WINDFALLS: BLESSING OR CURSE? (1988) (assessing the success or failure of oil exporting countries Algeria, Ecuador, Indonesia, Nigeria, Trinidad and Tobago, and Venezuela during the oil boom of the 1970s).
14 Id. at 2 (comparing “each country’s annual growth rate between 1970 and 1989 in relation to the country’s natural resource-based exports in 1970, measured as a percent of GDP.”).
15 See generally Silje Aslaksen & Ragnar Torvik, A Theory of Civil Conflict and Democracy in Rentier States, 108 SCANDINAVIAN J. ECON. 571, 584 (2006) (presenting empirical results showing that greater “resource wealth increases the expected payoff from both elections and conflict”).
16 Aaron Tornell & Phillip R. Lane, The Voracity Effect, 89 AM. ECON. REV. 22, 23 (1999). Tornell and Lane argue that where political and legal institutions are weak, unconditioned wealth can produce “a more-than-proportional increase in redistribution” of wealth from resource rents. Id. at 42.
17 See Benjamin Smith, Oil Wealth and Regime Survival in the Developing World, 1960-1999, 48 AM. J. POL. SCI. 232, 238 (2004) (finding that “[oil] dependence is a positive predictor of durability, but at the same time is negatively related to democracy, another positive predictor”).
resources. To be sure, these ills are not unique to resource-dependent countries, and there is no evidence that resource abundance is the sole cause of all of these problems. Regardless, the finding that resource-dependent countries fared worse than similarly constituted countries without the blessing of resource wealth is robust. Once scholars had demonstrated that the problem exists, the next issue was to determine why this was so. In the following parts, I address this question. First I review the literature on institutions and their role in economic development. Then I address the relationship between institutions and the resource curse.

B. Institutions and Development

Institutions are the controls by which individuals and societies regulate themselves. They shape the incentives faced by a politician who must choose between enriching himself at the public’s expense and investing in his nation. They guide a bright young graduate who must choose between developing a productive new business and seeking a way to reap more for herself from an existing enterprise. In recent decades, scholars of various disciplines have studied the role of institutions in economic development, and have tested their theories empirically. In this Part, I lay out what I mean by institutions and discuss what institutions do for societies, particularly those institutions most relevant to economic development.

I use a definition of institutions adopted largely from the work of Douglass North. Institutions are the agreed-upon rules that

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18 See, e.g., James A. Robinson & Ragnar Torvik, White Elephants, 89 J. PUB. ECON. 197, 198 (2005) (describing decisions by the government of Zambia to place manufacturing plants in locations that would ensure support from voters even though the locations were not served by reliable transportation networks and alternative locations were available).

19 See generally MATTHEW BISHOP, ESSENTIAL ECONOMICS (2004); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (2005).


21 See, e.g., Rodrik et al., supra note 4.
people use to structure their interactions.\textsuperscript{22} Included in this are formal rules, such as laws or regulations, explicitly created to facilitate exchange.\textsuperscript{23} Also included are non-formal “codes of conduct that underlie and supplement formal rules.”\textsuperscript{24} This definition is sufficiently broad as to accommodate constraints, rules, and incentives for all manners of human interaction. Indeed, Nobel-prize winning political scientist Elinor Ostrom, in her work on institutions, argues that institutions organize interactions “within families, neighborhoods, markets, firms, sports leagues, churches, private associations, and governments at all scales.”\textsuperscript{25}

In addition to comprising the rules or processes by which interactions are governed, my definition of institution necessarily implicates the structures through which those rules are made and enforced. By this I mean that institutions include both the rules of the game and the mechanisms by which those rules are developed, contested, and enforced. In this way, my conception of institutions is consistent with that of Robert Keohane, for whom institutions include the rules of the game and the “formal organizations” in which these rules find expression.\textsuperscript{26} An important implication of my conception of institutions is that it accounts for the way interactions actually occur in international (and domestic) affairs: there is constant negotiation and re-negotiation of the rules of the game, which is affected by and affects the organizations in which the negotiations take place.

A second implication of my conception of institutions is that it accounts for the ways that the rules of the game affect those involved in the game. This problem is necessarily and inevitably contingent on the actors involved, the kinds of rules in place, and the issues at stake. For my purposes, the most convincing account of enforcement comes from Andrew Guzman’s work on international relations.

\textsuperscript{22} NORTH, supra note 19, at 4 (“Institutions include any form of constraint that human beings devise to shape human interaction.”).
\textsuperscript{23} Id.
\textsuperscript{24} Id.
\textsuperscript{25} OSTROM, supra note 19, at 4.
Guzman argues that what matters is to identify, to the extent possible, how international law—the immediate focus of his attention—“changes the behavior of states.” My focus is therefore not on enforcement, that is, specifying the precise mechanism by which a particular rule is imposed on actors. Instead, my focus is on the ways that institutions might influence the behavior of states and other actors.

At this level of generality, institutions could be almost anything, and it is not my objective to develop a positive theory of institutions. Instead, I focus on a subset of institutions that are most relevant to economic development, particularly in resource-abundant countries. The problem is significantly more complicated in developing countries with exploitable natural resources. But, at its core, the phenomenon is the same: how to mediate among competing desires to achieve the best outcome. Institutions play the role of self-control. They channel the incentives faced by disparate actors, each of whom might have different objectives and desires.

In the view of Douglass North, institutions are the principal determinant of economic growth. Dani Rodrik and his co-authors argue that institutional quality does more to explain economic development than the other available hypotheses. One need not go that far, of course, to conclude that institutions are critically important. For my purposes it is enough to conclude, in the words of Daron Acemoglu and James A. Robinson, that dysfunctional institutions “keep poor countries poor and prevent them from embarking on a path to economic growth.”

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28 Id. at 22.
29 NORTH, supra note 19, at 107 (arguing that institutions “are the underlying determinant of the long-run performance of economies”).
30 Rodrik et al., supra note 4, at 5 (arguing, based on econometric analysis, that “institutional quality emerges as the clear winner of the ‘horse race’ among geography, integration, and institutions in determining economic development”).
31 ACEMOGLU & ROBINSON, supra note 3, at 398. But cf. Ha-Joon Chang, Institutions and Economic Development: Theory, Policy and History, 7 J. INST’L ECON. 473, 475-77 (Oct. 2010) (arguing that scholars have paid insufficient attention to
The more difficult task is to identify which institutions are most important and the work those institutions do to help or harm a country. Of greatest interest to scholars concerned with economic development is that subset of institutions that regulate economic and political activity. In states that benefit from the presence of natural resources, there are institutions that mediate citizen and state interactions with respect to commercial activity and the development of state or public resources and that provide points of access for citizens to assert their values and hold their leaders accountable. The failure of such institutions can undermine a state’s opportunity for economic development. Even more important, the failure of such institutions can lead to increased human suffering, exploitation, or degradation. When people have few legitimate opportunities to influence their governments, they suffer.

C. The Work Institutions Do

Not every resource-rich country fails to develop, and scholars have attempted to identify what factors must be present in addition to resource abundance to lead to the problems described above. Increasingly, scholars have identified dysfunctional institutions as a principal cause of the resource curse because of the role institutions play, or fail to play, in society. What is more difficult is to identify causality in determining whether institutional quality causes economic or whether economic development causes institutions to improve.

32 See, e.g., Torvik, supra note 2 (reviewing empirical literature on the existence of the resource curse and theoretical literature on explanations for its presence or absence).

33 There is a robust literature on the causes of the resource curse. The first set of scholarly explanations addresses the effects of resource booms on exchange rates and non-resource sectors of the economy. See, e.g., Paul Collier, *The Bottom Billion: Why the Poorest Countries Are Failing and What Can Be Done About It* 39-40 (2007) (reviewing the macroeconomic arguments for the resource curse); Michael Bruno & Jeffrey Sachs, *Energy and Resource Allocation: A Dynamic Model of the “Dutch Disease,”* 49 Rev. Econ. Stud. 845, 846 (1982) (describing the effects of resource booms on various sectors of the economy). Later studies concluded that, in most cases, there was scant empirical support for these explanations. See Erwin H. Bulte et al., *Resource Intensity, Institutions, and Development,* 33 World Development 1029, 1030 (2005) (reviewing the literature and concluding that there “is little empirical support for the Dutch disease as an explanation for the resource curse”). More recently, scholarly
those features of institutions that do the important work. Scholars of the roles of institutions argue that at their most basic, institutions operate as ways to allocate power, whether political, social, or economic.\textsuperscript{34} That is, institutions provide the rules and the forum by which actors seek, keep, and contest power. For my purposes, what matters is not to develop a full, positive theory of all that institutions do. Instead, my goal is to show the ways that institutions affect economic outcomes in the presence of resource wealth.

What are the institutional failures that most contribute to the negative effect of resource wealth? Institutions come in all types, but two main types of institutions are relevant to the use or misuse of resource wealth.\textsuperscript{35} One set of institutions includes those that principally affect the private sector. Put simply, private-sector institutions are those that would affect the decisions an entrepreneur might make when deciding where to apply her talents and energy: the protection of property rights, the fair resolution of disputes, and the like. The second are those that principally affect the public sector. Public-sector institutions are those that ensure the accountability and responsiveness of political leaders, including the role of these leaders in the distribution of resource revenue.

Scholars who attribute more explanatory power to the role of private institutions posit two states of affairs. In each there is the presence of valuable and exploitable natural resources. Entrepreneurs are faced with a choice between productive activities, those that will grow the pie, and rent-seeking activities, those that allocate to the entrepreneur a bigger share of the pie without increasing its size. One leading study terms these institutions “grabber-friendly” and “producer-friendly” institutions\textsuperscript{36} and argues that the “combination

\textsuperscript{34} See Daron Acemoglu & James A. Robinson, Economic Origins of Dictatorship and Democracy 218 (2006) (arguing that “institutions influence the allocation of future political power” and provide mechanisms by which to “lock in” or context political power).

\textsuperscript{35} Kolstad, supra note 8, at 439-40.

\textsuperscript{36} Mehlum et al., supra note 8, at 2-3.
of grabber friendly institutions and resource abundance leads to low growth,” whereas “[p]roducer friendly institutions” can “help countries take full advantage of their natural resources.”37 On this account, the quality of institutions determines the relative appeal of productive or rent-seeking activities, and entrepreneurs faced with a choice between the two typically behave rationally and choose the more profitable route.38 Better institutions lead to more production and better economic growth because entrepreneurs choose that route; worse institutions cause entrepreneurs to choose a less productive path.

Scholars who give more weight to the role of public sector institutions instead focus on the choices faced by politicians.39 These scholars argue that “bad economic policies” lead to low growth,40 and that the bad policies stem from the decisions made by politicians in resource-rich countries.41 To explain this outcome, these scholars focus on the role that political institutions play in shaping or constraining the behavior of politicians. In this model, politicians face a choice: distribute resource revenue in a way that promotes fair and long-term development, or distribute revenue in a way that increases the politician’s chances of staying in power.42 States with institutions that make it difficult or impossible for the politician to choose the self-serving distribution of revenue fare better than states whose institutions permit such distribution.

There is no consensus yet as to which of these two approaches is the more viable, but there is empirical support favoring the private sector explanation.43 For my purposes, what matters most is not to declare a winner but to recognize the vital role institutions play and to identify those essential functions that might be approximated by outside institutions. Political institutions constrain

37 Id. at 16.
38 Kolstad, supra note 8, at 439.
40 Id. at 448.
41 Id. at 466.
42 Id.
43 Kolstad, supra note 8, at 441 (arguing that “only private sector institutions matter empirically”).

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or embolden politicians, who set policies that can push entrepreneurs in a productive, pro-growth direction or in an unproductive, growth-inhibiting direction. The decisions made by individual entrepreneurs can either exacerbate existing problems, leading to worse policies and less accountability, or they can lead to more growth and more accountability. In the end, once revenue started flowing in many resource-rich countries, the result was a gross mis-deployment of human capital and public resources because the incentives facing individuals and leaders were insufficient to push them into productive work or use of public resources.

II. THE EFFECTS OF WEAK OR DYSFUNCTIONAL INSTITUTIONS

After years of prospecting, oil companies confirmed in 2006 that there were billions of barrels of oil reserves in the ground under Uganda.44 This prompted the mix of hope and fear that is not uncommon when oil or other valuable natural resources are discovered in developing countries. What should be a windfall is now widely seen as a mixed blessing at best and a curse at worst. When oil production began in Ghana in 2010, the president felt compelled to reassure the nation and the international community that he would “ensure that it becomes a blessing not a curse.”45 Indeed, one leading pastor in Ghana told the Financial Times that he had prayed that Ghana would never discover oil because of his fears that oil would harm the country.46 Citizens and leaders in the Democratic Republic of Congo, Equatorial Guinea, and Sao Tome and Principe expressed similar concerns when oil was discovered in their countries. It is no longer surprising when resource wealth makes a country worse off. In

46 William Wallis, Let the Good Times Roll, FIN. TIMES, Feb. 18, 2011, http://www.ft.com/intl/cms/s/2/235d95a2-3972-11e0-97ca-00144fead0.html#axzz2mQWSxpZw (quoting Pastor Mensa Otobil as stating, “For years I prayed we would never find oil. I don’t think it will help us to develop the work ethic we need to structure a viable, productive society. I think people would most likely become very corrupt because there are no barriers.”).
this Part, I analyze the types of harms done by resource wealth in countries with weak institutions. It is important to specify the harms because only by identifying the particular harms is it possible to target solutions to these harms. Think of these harms as types of cancer: without knowing the particular type of cancer, it would be difficult for doctors to select the appropriate medicine to treat the illness most effectively.

Weak or dysfunctional institutions permit leaders to engage in all manner of mischief with the wealth they receive from the sale of natural resources. I argue that this mischief can usefully be divided into two rough categories: personal enrichment at public expense and distributing legitimately obtained revenue in ways that are damaging to the political or economic life of the country. There is, of course, substantial overlap between the categories, and it is certainly true that these categories do not represent the sum total of the activity that contributes to the resource curse. Nonetheless, the categories are useful for two purposes. First, they help disaggregate types of behavior to locate more precisely how that behavior is harmful. For example, the harms that come from investing in wasteful but politically popular infrastructure projects, like building a grand new stadium in an impoverished country, are different from the harms caused when a leader steals revenue that should accrue to the state.

These categories, imperfect as they may be, are helpful for an additional reason as well. The objective of this Article is to identify international substitutes that might do some of the work that is usually performed by domestic institutions. The international mechanisms available to combat outright theft are different than the mechanisms available to influence domestic decisions about the distribution of legitimately-obtained state wealth. Relatedly, the categories help to anticipate the normative justifications for and objections to the idea of using international institutions to affect core domestic functions, such as restricting a country’s ability to determine how to spend its own money on its own people, and to the particular mechanisms that I propose.
A. Personal Enrichment at Public Expense

It is, of course, no longer surprising to learn that leaders of resource rich countries enrich themselves at the expense of their citizens. The more challenging questions center around how leaders enrich themselves, how it affects citizens, and what can be done about it. In many countries the best way to become wealthy is to either hold political power or be related to someone who does. This is not, of course, limited to developing countries or to countries of any particular region of the world. But in places where political power, or proximity to it, is the exclusive path to wealth, the problem takes on added importance. How do political leaders enrich themselves, and why does it matter? There are perhaps as many ways for autocrats to enrich themselves as there are autocrats, but several general patterns stand out. What unites these various mechanisms is that they persist in large measure because of weakened domestic institutions. In this Part, I outline the ways that autocrats are able to enrich themselves and the effects of this behavior. The goal of this Part is not to provide a comprehensive account of corruption or quasi-corruption. Instead, my goal is to provide the backdrop against which to argue that weak domestic institutions are subject to gross exploitation that affects citizens, and that international institutions might provide a mechanism by which to mitigate these harms.

When the president of a country in which the citizens have little power to hold their leaders accountable wants to enrich himself, he has plenty of options. Some autocrats put themselves or their family members in a position to profit personally from state endeavors, by, for example, putting their children on the boards of corporations that profit from business with the state. Others take handsome signature bonuses, ostensibly legal side payments to state officials for their signatures on public-private contracts. Others place family members or close associates in controlling positions in key industries. This might happen by, for example, requiring that foreign corporations wishing to extract oil or natural gas enter into joint ventures with local companies, and then awarding the joint venture

contract to a company owned by their children or close allies. This is the path of the family of Teodoro Nguema Obiang, the president of Equatorial Guinea.⁴⁸ President Obiang’s relatives held official positions which allowed them impose taxes to benefit themselves and exploit their connections to the president for their personal benefit.⁴⁹ Others manipulate domestic regulation to make it difficult to determine how much revenue is coming in to the state’s treasury. This is path of the leaders of Angola, who created a financial structure for the nation’s oil wealth so opaque and convoluted that it is virtually impossible for outsiders to determine how much has been stolen from the national treasury.⁵⁰

None of these paths to enrichment would be as possible without weakened or dysfunctional domestic institutions. If there were a rigorous and independent domestic securities regulatory system, then autocrats would find it much more difficult to engage in securities manipulation or fraud. A stringent corporate governance regime would make it more difficult for autocrats to place their children or cronies in vital positions in joint ventures or other firms that stand to profit from doing business with the government. An

⁴⁸ See, e.g., Xan Rice, Mansions, Memorabilia and Personal Log Tax, FIN. TIMES, June 19, 2012, http://www.ft.com/intl/cms/s/0/ca5d3de0-b93b-11e1-b4d6-00144feabde0.html#axzz2mQWSxpZw (reporting that Equatorial Guinea’s president’s son spent approximately $315 million on houses, cars, and memorabilia, such as Michael Jackson’s white glove, using funds amassed when he served as Minister of Forests at an official salary of $82,000 per year; he reportedly assessed a personal tax on every log exported). See also United States v. One White Crystal Covered Bad Tour Glove & Other Michael Jackson Memorabilia, No. CV 11-3582-GW(SSx), 2012 WL 8467453 (C.D. Cal. Sept. 6, 2012).


informed and engaged electorate might operate as a check on autocrats who wished to sell off vital state assets at below-market rates under terms that enrich themselves personally.

1. Public officials and private companies

In most developing countries, oil and other natural resources are treated as state assets. That is, they belong to the state and can be sold only by the government. Because states are not in the business of developing oil wells or titanium mines, they typically sell the rights to exploit natural resources to private companies. The actual exploitation of the resource is conducted by a complex web of companies, usually involving one or more private companies, a state-owned company, and multiple subcontractors. This complex structure results in opportunities for state officials to insert themselves or their families into the private ownership structure so as to enrich themselves from the sale of state assets. Public officials have two principal ways to help themselves. First, they help themselves politically by doing business with companies headed by potential political supporters. Second, they can directly benefit themselves or their families by ensuring that some or much of the revenue flows to them.

A recent investigation into the labyrinthine structure of the oil industry in Equatorial Guinea illustrates the political dimensions of the phenomenon. Equatorial Guinea is a small country in West Africa sitting on substantial oil reserves and a well-deserved reputation for corruption. People seeking to work in the oil industry in that country actually work for subcontractors, not the oil

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51 See generally Pauline Jones Luong & Erika Weinthal, Rethinking the Resource Curse: Ownership Structure, Institutional Capacity, and Domestic Constraints, 9 ANN. REV. POL. SCI. 241 (2006) (discussing the state ownership of resources and its effect on the resource curse). See id. at 259 (arguing that state ownership and state control over natural resources significantly contributes to the resource curse).


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companies themselves. Because these subcontractors determine who receives the most lucrative jobs in a desperately poor country, they play a role with substantial economic and social importance. The investigation of the industry found that some of the most powerful employment agencies were owned by, among others, the president’s brother (who was also a general in the Army), the president’s son (who was also the Secretary of Mining and Energy), the president’s uncle (who was also a general and Minister of Security), and the president’s father-in-law (the former Minister of Mining). These officials, operating through private companies doing business with the state they represent, are the gateway through which anyone seeking employment in the oil sector must pass. Decisions regarding the sale of the country’s assets are made to ensure that those in power remain in power. They are not made to facilitate broad-based economic development.

The case of Angola illustrates the problem of direct personal enrichment from the sale of state assets. Sonangol is the company responsible for the exploitation of all of Angola’s substantial oil and gas reserves. In this capacity, it manages all 40 of the onshore and offshore concession blocks—the geographically defined areas in which companies with a license are permitted to extract and sell oil. Sonangol, acting on behalf of the state, sells the rights to exploit oil and gas for each block to one or more companies in a kind of auction. The result is that each of the 40 blocks has a different set of owners, and all of the blocks are owned by multiple companies. For example, block two is owned in shares by Petrobras, Chevron, Somoil, Poliedro Oil Company, Kotoil, and a subsidiary of Sonangol.

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54 Id.
55 See Petroleum Activities Law, No. 10/04 (2004) (Rep. of Angola), http://www.eisourcebook.org/cms/files/attachments/other/Angola%20Petroleum%20Activities%20Law.%202004.pdf. Under Angolan law, Sonangol is the sole concessionaire for oil and gas exploration and exploitation rights, which means that the company is the only entity with author to sell the state’s petroleum assets.
itself.\textsuperscript{56} To be sure, the fact that blocks are owned in shares by multiple owners is not itself indicative of wrongdoing. However, the complex nature of the system leaves it vulnerable to abuse by officials wishing to obscure their role in the transaction. In early 2012, the former head of Sonangol, which is solely responsible for the awarding of concession rights, disclosed that he had for years held an ownership interest in a private company which had been involved in a lucrative oil exploitation contract with the state.\textsuperscript{57} Manuel Vincente, the former head of Sonangol, disclosed that the head of the president’s military police agency and the minister for state economic cooperation also held stakes in the same company.

2. Opacity in national accounting

States with abundant natural resources and weak institutions often provide little information about how much of the resource they possess or how much they receive in payments for the resources they sell. This problem takes multiple forms. First, some countries restrict information and decision making authority to a small coterie of individuals, often including relatives or close allies of government officials who are charged with overseeing the industry. This means that very few people, and no one outside the influence of top officials, has information about the value of the resource being sold or the revenue that has come into the country’s treasury. In Angola, for example, auditors appointed by the International Monetary Fund estimated that approximately 50\% of the revenue that should have been received under existing contracts had disappeared from the national treasury.\textsuperscript{58} Even assuming the original contracts represented fair value for the oil, the state could account for only half of the revenue it was supposed to have received.


\textsuperscript{58} See Justin Pearce, IMF: Angola’s ‘Missing Millions,’ BBC, Oct. 18, 2002, http://news.bbc.co.uk/2/hi/africa/2338669.stm (reporting that the IMF found nearly $1 billion had “disappeared” from the Angolan treasury in the previous year).
The problem of opacity manifests itself in other ways as well. In Nigeria, government officials charged with negotiating oil and gas exploitation leases regularly agreed to terms that were well below market rates. In effect, officials sold Nigeria’s natural resources at rates far below the amount those resources would have fetched if sold in a transparent auction. This is a distinct harm from that discussed above. In the previous example, the problem was that revenue to which the state was contractually entitled did not actually flow to the state; it was either stolen by corrupt officials, returned to the oil companies, or not accounted properly accounted for. In this instance, the problem is that the theft was built into the contract. Perhaps unsurprisingly, the report that identified the below-market contracts also identified a number of instances in which the officials who executed these contracts received large signature bonuses, which were not disclosed or properly accounted for.

When ExxonMobil was awarded a lease to extract oil from three blocks off the coast of Nigeria, the company was required to pay a “signature bonus” of approximately $600 million. In Angola, when Sonangol negotiated the sale of lucrative oil blocks off the coast of the country, it obtained a signature bonus of $10 million from the companies awarded the contract. Signature bonuses are payments made after an agreement is concluded but before any of the natural resource is extracted. The size of the payment is determined by the presumed value of the resource to be exploited, but the


60 Id.

61 Tom Burgis, Groups to Dig Deep for Nigerian Leases, FIN. TIMES, Dec. 13, 2009, http://www.ft.com/intl/cms/s/0/355075e0-e80d-11de-8a02-00144fca49a.html#axzz2mQWSxpZw (reporting that ExxonMobil was required to pay a signature bonus “of as much as $600m after securing a new 20-year lease to three blocks”).

62 Tom Burgis & Cynthia O’Murchu, Spotlight Falls on Cobalt’s Angola Partner, FIN. TIMES, Apr. 15, 2012, http://www.ft.com/intl/cms/s/0/1225e3de-854d-11e1-a394-00144fca49a.html#axzz2zF7DuPQ7 (reporting that the companies Nazaki Oil & Gaz and Cobalt International Energy had paid a signature bonus to Sonangol as part of a deal to secure rights to exploit oil in offshore fields).
payment must be made regardless of whether the project succeeds or fails.  

As the law is currently interpreted, signature bonuses do not violate the Foreign Corrupt Practices Act, the United Kingdom’s new anti-bribery statute, or the OECD’s anti-corruption provisions. Moreover, under the appropriate conditions, signature bonuses can help to balance one of the challenges inherent in the sale of the right to exploit natural resources. The state selling the resource wants as much money as possible up front. The company buying the right to exploit the resource wants to pay as little as possible until it is certain of the quantity, quality, and marketability of the resource. Because it is an upfront payment, the signature bonus is a potentially useful way to account for the risks faced by each party.

The principal problem with signature bonuses is that, because they are difficult to trace and account for, they can be used for expenses that would be difficult to justify if subjected to public scrutiny or robust political checks. For example, after officials in Angola received a $900 million signature bonus from the sale of several oil exploration licenses in 1999, officials apparently spent much of the money on weaponry for use in the country’s civil war. Again, it is not the fact of the bonuses that causes the problem.

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63 See Peter Cramton, How Best to Auction Oil Rights, in ESCAPING THE RESOURCE CURSE 114, 126 (Macartan Humphreys et al. eds., 2007), http://works.bepress.com/cgi/viewcontent.cgi?article=1039&context=cramton (defining a signature bonus as an “upfront payment determined in auction for the right to explore and develop the block during the license period”).

64 See, e.g., John McMillan, Promoting Transparency in Angola, 16 J. DEMOCRACY 155, 159 (“[U]se of signature bonuses is not a sign of corruption; it is sound auction design.”).


Instead the problem is the institutional failures that allow officials to use the bonuses without meaningful scrutiny or accountability.

B. Internal Revenue Distribution

States rich in resource revenue must determine how to distribute the revenue from the sale of resources. The most basic goal is to turn a non-renewable resource into permanent improvement—transforming today’s dollars into future development. But resource wealth also raises many other distributional questions. How much should be spent on people living near the extraction site and how much on people living far from it? How much should be devoted to the current generation and how much to future generations? How much should be reinvested in the enterprise and how much extracted to diversify the state’s financial portfolio? Weak institutions permit officials to use resources inefficiently.

1. Investment in unnecessary or inefficient projects

Many resource-dependent economies make substantial investments in infrastructure and the domestic economy, even in the presence of corruption and mismanagement. In one survey of resource dependent economies, the author found that investment projects, along with the state payroll, represented one of the two largest expenditures for the state.\(^{67}\) Thus, the problem is typically not that the state is underinvesting in the domestic economy or in infrastructure. The problem is that the state is making the wrong kinds of investment decisions. Too often, politicians invest in inefficient projects that on their face seem more designed to fail than to succeed. In the field of development economics there is a small but interesting literature on what are often called white elephants; that is, expensive but unnecessary projects whose completion is unlikely or would actually be socially harmful.\(^{68}\) Put somewhat more

\(^{67}\) Frankel, supra note 5, at 23.

\(^{68}\) The term “white elephant” apparently comes from a story told about the kings of Siam. As the story goes, “the kings of Siam were accustomed to make a present of one of the animals to courtiers who had rendered themselves obnoxious in order to ruin the recipient by the cost of its maintenance.” OXFORD ENGLISH DICTIONARY 134 (2d ed., vol. V, 1989).
formally, these are projects “with a negative social surplus.” An example from Nigeria illustrates the point. In the 1970s, the government of Nigeria set out to build Africa’s largest steel plant, but it was not fully operational as late as 2010. The problem continues today. Consider a recent example from Ghana. In the lead-up to the presidential elections in late 2012, the government used the revenue from Chinese investment in the resource sector to finance a number of major infrastructure projects that had little to commend them other than their potential political payoff. White elephant projects are undertaken not because there is convincing evidence that they will be socially useful or economically efficient, but because they provide a payoff to the politicians who champion them. For example, in Zambia, the government ordered the construction of brick factories far from the places where construction would take place, causing the cost of bricks to skyrocket because of transportation costs. Contractors quickly stopped using bricks and began to use concrete blocks. The brick factory was eventually shuttered. Thus, the problem was not that the government failed to invest in development projects—it had actually invested heavily in the brick factory—or that the project itself was without any value. Instead, the problem was that the institutions that

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69 Robinson & Torvik, supra note 18 (developing a typology of white elephant projects).
70 See Nicholas Shaxson, Poisoned Wells: The Dirty Politics of African Oil 22 (2007) (“[Nigeria’s leaders] spent recklessly: building a new national capital in Abuja and pushing ahead with the giant Ajoakuta steel project, a class of white elephant that was supposed to be Africa’s biggest steel plant yet ended up consuming billions of dollars without producing any steel”).
73 Robinson & Torvik, supra note 18, at 201 (arguing that white elephant projects are undertaken because their “inefficiency” is particularly politically beneficial to those who promote them).
74 Id.
should have pushed the government to favor social welfare or long-term development over their own political gain failed to work.

2. Politically-motivated revenue distribution

In many developing countries, particularly those with substantial natural resources, the number of public employees is far greater than would otherwise be warranted. Many political leaders have the power to increase or decrease public employment numbers as they see fit. One extreme example is Kuwait. One recent study found that 91 percent of the Kuwaiti labor force (that is, Kuwaiti citizens) worked in the public sector.\(^{75}\) The problem of political patronage is by no means limited to developing countries or those rich with natural resources. Indeed, one study argued that many cities in the United States use public employment as a way to distribute wealth to politically favored groups.\(^{76}\) But the problem is pronounced in developing countries,\(^{77}\) and it can have particularly bad consequences in resource-rich countries.\(^{78}\) One reason politicians hand out public sector jobs is that the practice can operate as a kind of political insurance. That is to say, politicians can stay in office longer if they distribute at least some of the revenue from resources through public employment. For this to happen, two conditions must be true. First, incumbent politicians must desire to remain in office.\(^{79}\) Second, citizens must have relatively few opportunities for

[75] Laura El-Katiri, Bassam Fattouh & Paul Segal, *Anatomy of an Oil-Based Welfare State: Rent Distribution in Kuwait* 19 (Kuwait Program on Dev., Governance, and Globalization in the Gulf States, Research Paper No. 13, 2011) (noting that 91% of Kuwaiti nationals work in the public sector and that 98% of private sector jobs are held by non-Kuwaitis).


[77] See Alan Gelb et al., *Public Sector Employment, Rent Seeking and Economic Growth*, 101 ECON. J. 1186 (1991) (showing that the size of public sector employment relative to total non-agricultural employment was far higher in developing countries than in industrialized countries).

[78] See Karl, supra note 1, at 27 (describing the political benefits of expanding the public payroll).

employment, a reality in developing countries by definition. Under these conditions, politicians can distribute public sector jobs to favored groups as a strategy to ensure that they remain in power.\textsuperscript{80}

The harms from this activity can take a number of forms. One harm is that it leads to a misallocation of human capital. A rational worker is forced to choose between receiving his or her full share of resource rents in the public sector and foregoing that share in the private sector.\textsuperscript{81} A second harm is that the economy as a whole may become inefficient because there are more workers than are necessary and those workers face little incentive to work hard because their jobs are virtually certain.\textsuperscript{82} As with the other problems described above, it is institutional weakness that permits political leaders to make self-serving decisions with little regard for social welfare or long-term economic development.

III. INTERNATIONAL INSTITUTIONS AS SUBSTITUTES FOR DOMESTIC INSTITUTIONS

To this point I have argued that resource wealth can help or hurt a country depending largely on the quality of its institutions. I have also shown the kinds of institutional failures that lead to harmful outcomes. These include permitting officials to monopolize information about national assets and revenue, arrogate to themselves dual business and public roles in resource transactions, and distribute resource wealth capriciously. In this Part, I argue that these domestic institutional failures can and should be addressed by

\textsuperscript{80} See Richard M. Auty, Resource Abundance and Economic Development 134 (2001) (arguing that patronage jobs are an efficient way to distribute rents from resource revenue).

\textsuperscript{81} See Paul Segal, How to spend it: Resource wealth and the distribution of resource rents, \textit{51 ENERGY POLY} 340, 345 (2012), \url{http://www.lse.ac.uk/IDEAS/programmes/middleEastProgramme/kuwait/documents/Segal.pdf} (arguing that workers “face the following choice: be unproductive in the public sector and be rewarded with oil rents, or be productive in the private sector and not be rewarded with oil rents.”).

\textsuperscript{82} See id. (reporting on a study showing that Mexico’s state-owned oil refineries “are among the least efficient in the world, partly because they employ six times the number of people as US refineries of comparable size and complexity, without higher levels of production.”).
international institutions. Whether by design or happenstance, international institutions already have a profound effect on the domestic institutions of every state. There is an extensive literature on this issue, with which I do not engage here except to note that there is nothing particularly unusual about recognizing the domestic effects of international law and institutions. What is new is the attempt to develop more fully a theory of how and why international institutions can and should serve some of the functions of domestic institutions. To suggest that international law should operate as a substitute for robust and effective domestic institutions is to acknowledge at the outset the deep flaws present in the domestic institutions of the states at issue. It is also to accept that international institutions are inevitably imperfect and incomplete. Nonetheless, concluding that international institutions are imperfect does not undermine my argument that they can be a substitute for domestic institutions under the right conditions.

The objective of this Part is two-fold: to demonstrate that my approach is possible at a doctrinal level and to make the normative case for the use of international institutions when domestic institutions are inadequate. At the doctrinal level, I argue that the use of international institutions is an appropriate and potentially useful tool to address the resource curse in developing countries. I have already discussed what I mean by institutions as a general matter, but it bears explaining what I mean by “international institutions.” For my purposes, the term “international institutions” is a broad placeholder that means almost anything that is not a purely domestic institution of the target country. The term “international institutions” should be understood broadly to include both independent bodies such as the United Nations, disaggregated groups, substantive rules, and the like. Included in this would be measures that are created by

83 See generally Beth A. Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (2009) (showing that, through the lens of human rights, international norms and obligations—what I have labeled international institutions—have had a profound effect on the human rights practices of many countries). Simmons’s work is a kind of corrective to the arguments made by some scholars and others that international norms have not had a profound effect on the actions of states. See also Oona A. Hathaway, Do Human Rights Treaties Make a Difference?, 111 Yale L.J. 1935 (2002) (purporting to show that treaties do not affect human rights practices of states).
super-national bodies (or groups of states) such as the International Criminal Court—an entity that exists apart from any particular state with its own juridical personality and rules. My definition also includes the substantive law the ICC applies. I also include national statutes or regulations that are applied across borders. For example, this can include the U.S. Foreign Corrupt Practices Act, which regulates the conduct of U.S. corporations and those international corporations trading on U.S. stock exchanges who do business outside the U.S. The substantive rules and enforcement institutions are not themselves international, but they reach across borders and affect the substantive behavior of persons and entities outside the U.S. 84

Adopting such a broad definition means, of course, that there are myriad entities, laws, and regulations that could fit my argument. In this Part, my goal is to identify institutions that are plausible. That is to say that the institutions I analyze can be used without radical overhaul and are meant to show the mechanics of my proposal. I do not argue that the set of institutions I have identified is the only, or even the optimal, set of institutions for this purpose. Indeed, one of the goals of this Article is to open a scholarly conversation on the use of international institutions when domestic institutions fail to fulfill their purpose. Thus my doctrinal objectives are largely illustrative.

I build the normative case on two blocks. I argue that states owe positive obligations to their citizens, particularly with regard to the use of non-renewable state-owned resources. When states or their leaders use these resources for anything other than the benefit of citizens, states have failed to fulfill important duties. Thus the first normative building block is the notion of state obligation and stewardship. Next I argue that, because international institutions are already involved in the mechanics of the resource curse, the use of international institutions to address the resource curse is entirely appropriate. For example, state officials who pocket signature bonuses move the money through the international banking system. They rely on international corporations as joint venture partners to

exploit the resources that make them rich and on international lenders to finance their vanity projects.

Before moving on, one caveat is in order. I have argued that the reform of international institutions is a plausible second-best approach to preventing or mitigating the effects of the resource curse, but there is some evidence that international measures may be a first-best approach, at least for some of the countries affected by the resource curse. In some resource-rich countries, politicians can reshape institutions to make it easier for them to capture as much of the resource wealth as possible.\(^8^5\) There is significant debate about how this might occur,\(^8^6\) but three possible explanations stand out. First, governments with enough wealth can use the wealth to mollify potential opponents or otherwise reduce domestic opposition.\(^8^7\) Second, governments with sufficient wealth might deliberately interfere with the formation of opposition groups to ensure their own survival.\(^8^8\) Finally, because political leaders enforce as well as make the law, they can manipulate the enforcement of the law to avoid the consequences of their own misdeeds.\(^8^9\) I do not attempt to resolve this issue here, but it is nonetheless instructive to note that

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\(^{85}\) See Michael L. Ross, *Does Oil Hinder Democracy?*, 53 WORLD POL. 325, 333-36 (2001) (arguing that state-controlled concentrated wealth can permit elites and political leaders to modify existing institutions to insulate themselves from accountability).

\(^{86}\) Indeed, there is debate about whether it occurs at all. See, e.g., Stephen Haber & Victor Menaldo, *Do Natural Resources Fuel Authoritarianism? A Reappraisal of the Resource Curse*, 105 AM. POL. SCI. REV. 1, 3 (2011) (arguing that “increases in natural resource income are associated with increases in democracy”).


what I have labeled a second-best may well be first-best in some circumstances.

The approaches outlined below fit into two broad categories that are ordered roughly by the degree to which they would infringe on the sovereignty of the target country. First, I argue that international institutions can function as collectors and disseminators of information that could be used by an informed and empowered population to hold their leaders accountable. Information is a necessary but certainly not sufficient ingredient in addressing the resource curse. Citizens often simply do not know how much money an oil company is paying for the oil it takes, who receives the money, or how much the resource is truly worth. International institutions often possess or could easily require or facilitate the disclosure of this information.

Second, I argue that there are international institutions that could be used to make access to markets and finance conditional on a state’s compliance with certain norms or regulations. Put slightly differently, states that refuse to disclose how much they receive from oil companies should not be permitted to sell their products using international markets or should be ineligible for participation in international lending or insurance regimes. This approach represents a greater intrusion on the target state’s sovereignty because the state would be required to change its behavior or face exclusion from external sources of finance or markets. Nonetheless, the behavioral change is minimal because it merely requires compliance with existing norms or regulations. It is already a violation of international norms for government officials to personally benefit from the sale of state assets or for a state treasury to fail to record payments for the sale of state assets.

A. The Uses of Information

Perhaps the least intrusive international response would be to require entities involved in transactions to gather and disseminate information about their activities. Scholars and policymakers have long argued that transparency can be a useful tool in the fight against official corruption, regardless of whether the country is affected by
the resource curse.\textsuperscript{90} Entities from the International Monetary Fund to the World Bank to Transparency International have long called for more transparency as a way to fight corruption.\textsuperscript{91} My general approach is therefore not unique. What is different is my argument that international institutions can play an important role in the process.

Most theories about the utility of transparency focus on the causal pathways by which transparency might reduce corruption. One prominent argument is that officials are less likely to engage in corrupt behavior when there is a greater likelihood that they will be found out.\textsuperscript{92} One strand of this argument is that officials will be deterred if they fear their reputations will suffer if they are exposed as corrupt.\textsuperscript{93} Another strand holds that transparency works because officials are more likely to be caught by law enforcement, and if caught, proof of their crimes will be more readily available.\textsuperscript{94} Regardless of which of these approaches is correct, transparency is likely to work only when the information ends up in the hands of an entity (or population) with the power to hold corrupt leaders accountable.\textsuperscript{95} For this to happen, those who receive the information

\textsuperscript{90} For a thorough discussion of the causes and consequences of corruption, including analysis of the uses of transparency, see SUSAN ROSE-ACKERMAN, CORRUPTION AND GOVERNMENT: CAUSES, CONSEQUENCES AND REFORM (1999) and SUSAN ROSE-ACKERMAN, CORRUPTION: A STUDY IN POLITICAL ECONOMY (1978).

\textsuperscript{91} See, e.g., Susan Rose-Ackerman, Redesigning the State to Fight Corruption: Transparency, Competition, and Privatization, Note No. 75, PUB. POLY PRIVATE SECTOR (April 1996), https://openknowledge.worldbank.org/bitstream/handle/10986/11627/multi0page.pdf?sequence=1 (summarizing best practices with respect to reducing corruption).

\textsuperscript{92} See Rose-Ackerman, supra note 91.

\textsuperscript{93} See, e.g., Gerald Anselm Acquaah-Gaisie, Curbing Financial Crime Among Third World Elites, 8 J. MONEY LAUNDERING CONTROL 371, 377 (2005) (arguing that the “fear of exposure can act as a deterrent” to official misconduct).

\textsuperscript{94} See Ivar Kolstad & Arne Wiig, Is Transparency the Key to Reducing Corruption in Resource-Rich Countries?, 37 WORLD DEV. 521, 523 (2009) (arguing that under “non-transparent circumstances proof is more difficult to generate and corrupt officials are able to buy their way out of punishment”).

\textsuperscript{95} See, e.g., McMillan, supra note 64, at 161-66 (describing the ways policymakers and citizens used information about official corruption and oil revenue in Angola to push for reforms).
must have the capacity to process it and have the means to affect the behavior of those engaging in corrupt behavior.96

At the doctrinal level, what matters is to identify how and where information can be obtained and disclosed.97 I highlight two approaches: disclosure of information about financial movement and transactions, and disclosure of substantive information about a company’s supply chain or other business practices.

It is almost impossible to move money around the world without leaving at least some trace.98 That commercial and financial transactions leave a trail is neither new nor particularly noteworthy in the context of law enforcement or those seeking civil redress or the enforcement of contracts. In most instances, this trail consists of the information gathered by entities that facilitate or regulate such transactions, including banks, regulatory agencies, securities

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96 See Kolstad & Wiig, supra note 96, at 529 (arguing that the “impact of transparency therefore depends on the level of education of an electorate, the extent to which key stakeholders have the power to hold a government to account, and the private or collective nature of the goods about which information is provided”).

97 There have been attempts to harness information in similar ways. For example, the conflict minerals provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act are an attempt to do this. For a full treatment of this issue, see generally Christiana Ochoa & Patrick J. Keenan, Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation, 3 GOETTINGEN J. INT’L L. 129 (2011). Similarly, the Extractive Industries Transparency Initiative attempts to harness the power of information to modify the conduct of corporations and governments. See generally Clare Short, The Development of the Extractive Industries Transparency Initiative, 7 J. WORLD ENERGY L. & BUS. 8 (2013).

98 See, e.g., Caterina Giannetti & Nicola Jentzsch, Credit Reporting, Financial Intermediation and Identification Systems: International Evidence, 33 J. INT’L MONEY & FIN. 60, 64 (2013) (describing various international regulations regarding the obligations of financial institutions to verify the identity of those using the financial system). But see NICHOLAS SHAXSON, TREASURE ISLANDS: UNCOVERING THE DAMAGE OF OFFSHORE BANKING AND TAX HAVENS (2011) (describing the many ways that participants in the financial system can obscure or hide their transactions). Nonetheless, my point is not that the system is perfect. Instead, I argue that there is information available that could be used for the purposes I describe.
This financial trail is perhaps best thought of not as a uniform, unbroken line but as a pointillist representation of a line: a series of discrete points, which take on the shape of a line only when viewed together. Each point might represent the arrival of money in a bank or the registration of a securities transaction with a regulatory or trading house. Regardless of what they are, most of the points exist through the compulsion, either direct or indirect, of the law. Regulatory bodies gather information using legal tools. Trading houses do the same. Institutions that ostensibly operate privately—such as banks—are nonetheless subject to investor protection regulations and other laws that compel them to gather information. Each point in the series is both an example of the law of that jurisdiction regulating the conduct of a non-citizen and an opportunity to gather or obscure information. Both of these issues are relevant to my argument. Recent efforts to recover the proceeds of corruption illustrate the potential of using bits of information gathered from seemingly disparate sources. Using information gathered from financial regulators, customs houses, corporations, and international institutions, litigants have been able to recover some of the money stolen by Frederick Chiluba, the former president of Zambia, and his associates.100

Recent legislation in the United States illustrates the second model: requiring entities to assemble and disclose information about their own operations.101 As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act),102 the U.S.

99 See generally Jackie Johnson, Is the Global Financial System AML/CFT Prepared?, 15 J. FIN. CRIME 7 (2008) (describing information gathering requirements imposed by financial regulators after Sept. 11, 2001 to promote anti-money laundering and countering the financing of terrorism and finding that significant work remains to be done despite the improvements in tracing funds).


101 For a more extensive treatment of this issue, see Christiana Ochoa & Patrick J. Keenan, Regulating Information Flows, Regulating Conflict: An Analysis of United States Conflict Minerals Legislation, 3 Goettingen J. Int’l L. 129, 137-41 (2011) (arguing that requiring companies to assemble and disclose information was a means to promote transparency and reduce corruption).

Congress included provisions designed to address the ongoing conflict in the Democratic Republic of Congo. The conflict minerals provisions, and the regulations that implement them, require manufacturers to determine whether there are any materials “necessary to the functionality or production of a product”\(^\text{103}\) which they manufacture that originate in the DRC or any country with which it “shares an internationally recognized border.”\(^\text{104}\) Importantly, these provisions do not prohibit the use or sale of conflict minerals. Instead they require companies to gather information about their practices and disclose this information to regulators and the public. Thus the use of U.S. markets is conditioned on the disclosure of information about the participant’s financial practices.

I argue that international institutions are a plausible second-best approach, but there is some evidence that, with respect to transparency, they may be more effective than domestic institutions. Broadly speaking, transparency can occur in two ways: through mechanisms controlled by the targeted actor or through mechanisms outside of that actor’s control. For example, freedom-of-information laws are controlled by the source of the information. A free press is outside the control of the source of the information.\(^\text{105}\) In an empirical analysis of transparency reforms, scholars found that the transparency measures under the control of the source of information are less effective at reducing corruption than similar measures that are outside the control of the source.\(^\text{106}\) This suggests that transparency measures under the control of international institutions (and independent from domestic actors) may be more effective than purely domestic measures.

\(^{103}\) Id. at § 1502(2)(B).

\(^{104}\) Id. at § 1502(e)(1).

\(^{105}\) See Catharina Lindstedt & Daniel Naurin, Transparency Is Not Enough: Making Transparency Effective in Reducing Corruption, 31 INT'L POL. SCI. REV. 301, 305 (2010) (arguing that “who controls the release of information” is an important variable in determining the efficacy of transparency as an anti-corruption tool).

\(^{106}\) Id. at 316.
B. Conditional Access to Markets

One way to address the problem would be to recognize and capitalize on the conditional nature of access to markets and financial systems. The international financial system is not an entity unto itself; it is made up of many connected networks, each of which is governed by the national law of one or more states. Access to the financial system is conditional in every case. Firms that wish to raise capital on U.S. exchanges are permitted to do so only if they comply with certain regulations. Firms that wish to raise capital in the City of London must comply with U.K. regulations. For example, in the United States the Office of Foreign Asset Control (“OFAC”) plays this role. OFAC is a part of the U.S. Department of the Treasury that enforces trade and economic sanctions involving foreign individuals and groups believed to be involved in various kinds of illegal activities. Because OFAC is an enforcement mechanism—it executes presidential directives or statutory requirements—the analogy is not perfect, but it is instructive nonetheless. OFAC identifies individuals who, by their actions or position, are considered to be ineligible to do business in the United States or use the U.S. financial system in their dealings. Similarly, access to U.S. consumer markets is conditional. Companies whose products are made with forced labor, for example, are prohibited from selling their products in the U.S. What I propose is to expand the categories of persons who would be subject to heightened scrutiny or outright prohibitions on access to markets. What follows are examples of and justifications for the kinds of categories I propose.

1. Prohibit dual roles in transactions

Politicians often enrich themselves by participating in the same project as both private citizens looking to make money and

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public officials charged with pursuing the public good. Consider again the example from Angola. In his official role, Manuel Vicente was head of Sonangol, the Angolan national oil company. In this capacity he was charged with constructing the best possible arrangement for Angola to exploit its vast oil reserves. In this role he was selling an asset owned by the country with the goal of transforming oil into long-term development. In his private capacity, he had a stake in one of the companies purchasing the very same state-owned asset he was selling in his official capacity.109 In Equatorial Guinea, public officials, who were close relatives of the president, were, in their private capacities, owners of companies that contracted with the state oil company.110

The phenomenon of public officials using official positions for personal gain is not unheard of in wealthy Western countries.111 But the problem is particularly troublesome in resource-rich developing countries.112 The principal check on this kind of official behavior is political. Politicians who abuse their public positions can simply be voted out or otherwise removed from office. This check works only with an informed, empowered electorate, which is absent in most developing countries suffering from the resource curse. In Angola, most citizens do not have the information to hold official accountable, and even if they did there are few opportunities for them to do so.

109 See Tom Burgis et al., Interactive: Angolan Oil Connections, FIN. TIMES, Apr. 15, 2012, http://www.ft.com/intl/cms/s/0/03293b62-84c4-11e1-a3c5-00144fcb49a.html#.axzz2rjxc08vT. Vicente had a private stake in a company named Aquattro, which was a shareholder in Nazaki, which was one of four companies that purchased the right to exploit the oil in blocks 9 and 21.

110 HUMAN RIGHTS WATCH, supra note 53, at 20.


2. Reduce patronage opportunities

One of the causal pathways by which the resource curse affects poor countries is that politicians engage in patronage. That is, they use their official positions to reward supporters by providing civil service jobs or investing in politically useful but socially inefficient projects. To mitigate this effect, it would be useful to reduce opportunities for politicians to directly distribute public benefits in a way that accrues to their benefit. This could be accomplished by reducing the decisional authority of individuals and restricting spending choices.

Perversely, international institutions seem to encourage, or at least facilitate, this behavior. Consider the ways that international institutions encourage or require corporations and countries to interact. It is considered an international best practice for companies and countries to engage in what are often called multi-stakeholder dialogues. These are opportunities for identified stakeholders—those affected by a resource extraction project, for example—to negotiate the contours of the project. There is something intuitively appealing about requiring a large corporation to sit down with community leaders before beginning a project that will affect the community. And there is some evidence that these dialogues can make projects more efficient and reduce their social costs. The problem comes when the government names the stakeholders and designates the local businesses or leaders who will participate in the process. This is a perfect patronage opportunity: in exchange for a seat at the bargaining table or a share of the proceeds, local leaders might reward the politicians who nominate them with political loyalty or with acquiescence in an inefficient or even harmful project.

Domestic institutional failures make this possible. Patronage and other types of abuse are more likely to occur when the control of a complex transaction is vested in a very small handful of officials who play multiple roles in the transaction. This is a distinct problem

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from the dual public/private issue discussed separately. One way this issue comes about is that officials who are charged with determining the optimal process by which to exploit resources are the same officials who are charged with assessing the success or failure of the project. Put slightly differently, those charged with maximizing returns are also given the authority to monitor how well they are doing their job. A second way the issue comes about is that officials who are charged with selling state assets also run the auctions at which those assets are sold.

The harms are similar in both instances. The problem of dual roles—even when both are ostensibly for the benefit of the public—makes self-serving behavior possible and therefore more likely. Consider an example. Chad and Cameroon signed an agreement to extract oil in Chad and transport it through a pipeline in Cameroon for sale on the international markets.114 Officials in Cameroon had to determine how to compensate the communities affected by the pipeline and attendant activity. Those same officials were charged with determining how well the original plan worked, including seeking information from those affected, hearing complaints from citizens, and assessing the environmental impacts of the project. These officials were, in effect, grading themselves. There was little incentive for critical assessment of the initial plan or for identification of corrective measures for problems that arose.

The second, and perhaps more significant problem, has to do with information. As discussed separately, mechanisms that require the production of information that can be used by citizens or other interested parties to hold the government accountable are an important tool. When officials are charged with monitoring themselves, they have no incentive to produce or disseminate information, particularly information critical of their own conduct. One way to address these concerns is to provide a place at the table in any investment dispute for people who are not directly involved in

114 See generally Scott Pegg, Can a Policy Intervention Beat the Resource Curse? Evidence from the Chad-Cameroon Pipeline Project, 105 AFR. AFF. 1 (2005) (describing the legal and policy apparatus created to address potential revenue distribution problems in the Chad-Cameroon pipeline project).
the transaction but who represent the true owners of the asset for sale.

C. Complications and Objections

The claim that international institutions can operate as substitutes for domestic institutions is open to a number of objections, two of which I address here. The first is that taking my approach seriously would undermine the sovereignty of resource-rich states. The second objection is that, because institutional failures occur everywhere, not simply in resource-rich countries, and international institutions are far from perfect themselves, there is not sufficient justification to substitute international institutions for domestic institutions.

1. Sovereignty

The first and most important objection is that my argument is nothing more than neo-colonialism under a different name because it advocates foreign intrusion into what should be purely domestic concerns. The concept of sovereignty is both a foundational concept of international law and affairs and an idea subject to varied and changing definition. For my purposes, sovereignty is the principle that there is a sphere of domestic authority into which external forces may not interfere without permission. The protected domain was never absolute, and it is even more difficult to define in light of the development of human rights law. But even if contours of sovereignty are not susceptible to precise definition, the core concept remains important: countries expect to have unchallenged authority


over their domestic affairs, including the use of natural resources found in their territory. My argument does intrude on this domain. I argue that international institutions should be used, for example, to require states to make substantively different decisions with regard to how they distribute the revenue from the sale of state assets. Instead of spending state revenue on building a new soccer stadium, the state would be required to invest in ways with a greater likelihood to improve the welfare of citizens. In this way, my argument, and the objections to it, bears some resemblance to the arguments over the attachment of conditions to development assistance. In the 1980s and 1990s, the International Monetary Fund and the World Bank, among other international financial institutions, sought to promote economic policy reform based on what was called the “Washington Consensus.”

To accomplish these policy objectives, the International Monetary Fund required countries wishing to avail themselves of the IMF’s resources to adopt reforms in line with the Washington Consensus. One objection to the practice of conditionality was that it intruded on the sovereignty of the recipient states. Put another way, the problem was that the policies required by international financial institutions were those which should have been the prerogative of the recipient country, not an international institution.

The sovereignty issue is important but it does not defeat my argument. I do not attempt to arrive at a theory of optimal social

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119 See, e.g., Daniel D. Bradlow, *The World Bank, the IMF, and Human Rights*, 6 TRANSNAT’l. L. & CONTEMP. PROBS. 49, 50 (arguing that “the IMF is able to exert greater influence over those Member States who need or expect to need its financial assistance” by converting “advice” into “conditionalties attached to IMF financing”); Moises Naim, *Washington Consensus or Washington Confusion?*, 118 FOREIGN POL’Y 86, 90 (2000) (describing the ways the IMF and the World Bank required countries to adopt the Washington Consensus reforms as a condition of receiving development or financial assistance).

Instead my goal is to identify ways to set broad boundaries outside of which countries should not go with respect to how they spend state assets. Conditions on wealth transfers, including resource extraction contracts, are ubiquitous. It is instructive to note that, in the end, the Washington Consensus collapsed not because of the sovereignty objection, but because it failed to achieve its stated objectives. Conditions are a mechanism by which owners of a resource—in this case, the citizens who ultimately own oil or minerals or the like—can affect the behavior of those who wish to use those resources. Lenders do not just give away money for any purpose; instead they inquire about the purpose and incorporate ways to discipline recipients if they use the money for improper purposes. Similarly, I argue that when international institutions are involved in any way in a resource extraction transaction, they are providing a benefit for which they can appropriately request something in return.

Related to this is a second response. International institutions are already associated with every resource extraction transaction. I argue that these institutions amount to tools necessary for the execution of resource extraction transactions. Participants include corporations registered and regulated in the U.S. and around the world, financial institutions whose accounts are used to transfer funds, and courts and other dispute resolution institutions used to enforce contracts in the event of a dispute. My argument is that

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121 There is no shortage of attempts to develop such a program using revenue generated from resources. See generally MINERAL RENTS AND THE FINANCING OF SOCIAL POLICY: OPPORTUNITIES AND CHALLENGES (Katja Hujo ed., 2012). In her concluding article, Katja Hujo summarizes the various ways that development schemes financed by resource wealth can negatively affect a country and the policy interventions best capable of preventing these harms. Id. at 318-31.

122 In previous work I showed the prevalence of conditions on wealth transfers, including development assistance, foreign direct investment, and resource extraction contracts. See Patrick J. Keenan, Curse or Cure? China, Africa, and the Effects of Unconditioned Wealth, 27 BERKELEY J. INT’L. L. 84, 110-17 (2009).


these institutions should use their involvement to benefit local people and avoid permitting others to use them to do harm.

2. The Fallibility of International Institutions

The next objection is actually a cluster of related points. Some argue that there is nothing magical about what I have called international institutions. Recall that my definition includes institutions in one country that regulate or otherwise affect the behavior of actors in other countries. The objection would be that institutions do not function perfectly in any country, and even robust institutions are subject to capture by interest groups, incompetence, and weakness in the face of political pressure or particularly sophisticated schemes to avoid regulation or to defraud. I do not argue is not that international institutions are a panacea for every ill. Instead, I contend that weak domestic institutions provide opportunities for unaccountable political leaders to enrich themselves, and that this enrichment harms the citizens of the country. International institutions are not a panacea, but do have a role to play in mitigating these harms.

A second strand of this objection would be that international institutions have a poor track record with respect to developing countries. There is undoubtedly evidence to support this objection, but the fact that past efforts have not worked is not, standing alone, sufficient reason to abandon any attempt at reform. I do not argue that international institutions are, in a first-best world, preferable to robust domestic institutions. Instead, I argue that international institutions, particularly legal institutions, are a workable second-best option that might mitigate the harms caused by domestic institutions. Citizens in poor countries plagued by corrupt leadership are unlikely

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riggs-bank-a-tangled-path-led-to-scandal.html?pagewanted=all&src=pm (describing the involvement of Riggs Bank in laundering money for corrupt foreign dictators including Augusto Pinochet and Teodoro Obiang).

125 For a thorough treatment of the history of foreign assistance failures, see WILLIAM EASTERLY, THE WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD (2006). Easterly argues that attempts by international institutions such as the IMF and the World Bank to aid poor countries and encourage them to adopt pro-growth policies have done much more harm than good.
to object to international regulations that make their leaders more accountable and less likely to enrich themselves by impoverishing the country. Over the long run the locus of institutional control matters: external regulation might undermine internal efforts to develop strong regulatory institutions. But in the short to medium term, citizens, particularly the poorest citizens, surely are less concerned about the locus of institutional control than they are about having opportunities to better themselves.126

The final strand is that the kinds of institutional failure I have described occur in every country to at least some extent. These phenomena are not unique to developing countries, resource-dependent economies, or any other narrow group of countries.127 It is important to recognize that even if there is not a difference in kind among countries with respect to the types of institutional weaknesses that I describe, there is a difference in degree. There is ample evidence that many developing countries, particularly those rich in natural resources, have a higher incidence of corruption, less transparent and less effective corporate governance, and a greater centralization of control over the business and technical aspects of resource exploitation. My focus is on those states in which the available evidence suggests that weak domestic institutions are subject to exploitation that significantly affects citizens who are already struggling.

126 This is a version of an argument I made in an earlier article. See Patrick J. Keenan, Sovereign Wealth Funds and Social Arrears: Should Debts to Citizens be Treated Differently than Debts to Other Creditors?, 49 VA. J. INTL. L. 431, 453-64 (2009). There I developed a theory of what states owe their citizens and specified the sources and contours of these obligations.

CONCLUSION

The conclusion that the resource curse is caused in large part by weak domestic institutions represents a significant advance in the literature on economic development. At first glance the solution seems to follow from the problem: address the resource curse by fixing domestic institutions. But when that is not possible or is likely to be a slow process, there are good reasons to use international institutions to do some of the work of domestic institutions, at least in the short and medium terms. Particularly with respect to legal institutions, there are a number of ways to apply insights from the development economics literature to mitigate the effects of the resource curse and allow citizens of poor countries to reap more of the benefits of the countries’ wealth.
THIRD TIME’S THE CHARM: WILL BASEL III HAVE A MEASURABLE IMPACT ON LIMITING FUTURE FINANCIAL TURMOIL?

Erin Pentz*

INTRODUCTION

Although international economies have faced financial turmoil many times over the last century, the 2008 financial crisis brought catastrophic bank failures not seen since the Great Depression.¹ Regulatory agencies responded swiftly to identify the source of the developing crisis and establish new rules to reduce vulnerability in the banking sector and prevent future crises.² With the endorsement of the G-20 Leaders,³ the Basel Committee on Banking Supervision established the Basel III capital requirements to be implemented by all member nations⁴ by January 1, 2018.⁵

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⁴ Member nations include: Argentina, Australia, Belgium, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT’L SETTLEMENTS, BASEL III: A GLOBAL REGULATORY FRAMEWORK FOR MORE RESILIENT BANKS.
This comment will consider the feasibility of international banking regulations under Basel III as applied to varying economies. Part I will address the rise of “Too Big to Fail” financial institutions and their effect on international economies, which sparked the desire for uniform international banking standards. Part II will summarize historic international banking regulations and the failures of those measures that have set the groundwork for development of Basel III.

Part III will discuss the post-recession stability of varying economies, the level of pre-recession banking regulation in each of those economies, and the path each is taking to implement the Basel III standards. In Part IV, this comment will evaluate whether Basel III’s uniform application of banking regulation across highly differing economies is feasible or productive.

This comment concludes that Basel III is unlikely to have a major impact on the ability of financial sectors to weather economic storms. As a baseline measure, Basel III may hinder increased efforts for stability because its minimums are set with an eye towards concerns of competitiveness in the international marketplace. Historical practices show that changes to minimum capital requirements may be useless without strong financial regulation and diverse banking sectors.

I. “TOO-BIG-TO-FAIL”

The Secretary General of the Basel Committee on Banking Supervision, Stefan Walter summarized the general causes of banking crises as “excess leverage, too little capital of insufficient quality, and


5 BASEL III, supra note 4, at 10.
6 See infra Part I.
7 See infra Part II.
8 See infra Part III.
9 See infra Part IV.
inadequate liquidity buffers” to weather economic downturns. In the United States, Washington Mutual’s failure in 2008 was record breaking. With assets of $307 billion, but only about $188 billion in deposits, Washington Mutual simply had insufficient liquidity to outlast the collapse of the U.S. housing market.

The U.S. government did nothing to prevent the failure of Washington Mutual. However, in his speech in 2010, Walter recognized that some troubled banks could not be allowed to fail; some were simply “too-big-to-fail.” Certain financial institutions in both the U.S. and abroad have become so interconnected with the global financial system that failure could have repercussions that extend to the entire international banking system. Additionally, in nations with established insurance protocols to protect consumer deposits—for example, the United States’ Federal Deposit Insurance Corporation (FDIC)—some financial institutions have become so large that available insurance funds may not adequately cover


15 The Financial Services Authority in the United Kingdom chose to nationalize Bradford & Bingley before it failed due to over-leveraging because failure may have harmed the banking system as a whole. Treasury to Nationalise Be&B Bank, BBC NEWS (Sept. 28, 2008), http://news.bbc.co.uk/2/hi/business/7640143.stm.

16 Dash & Sorkin, supra note 13.
depositor losses in the event of the institution’s bankruptcy. If one of these large financial institutions failed, agencies like the FDIC would be forced either to seek additional funds from the government or to allow consumers to suffer.

One solution for governments facing the potential failure of a “Too-Big-to-Fail” institution has been for the government to inject capital, occasionally in substantial proportions, into the flailing institutions. In 2008, the government revived Citigroup, a U.S. financial institution with 200 million customers and branches in over 100 countries, by injecting the bank with $45 million in capital. First, the U.S. government attempted to recruit Wachovia, another major financial institution, to help Citigroup reduce risky assets and acquire low-cost funding. When the deal fell through, concerns about the effect of Citigroup’s potential bankruptcy inspired the U.S. to infuse millions in taxpayer dollars into the bank.

In the European Union (E.U.), governments are prohibited from injecting funds into the private sector. However, the extreme repercussions of the failure of “Too-Big-to-Fail” institutions has led to certain exceptions, such as the German banking sector’s injection of $4.8 billion into the failing IKB Deutsche Industriebank.

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17 Economists predicted that if Washington Mutual had not been seized and the FDIC was forced to insure consumer’s deposits, the funds available would not have been adequate. Regulator Sells Washington Mutual, BBC NEWS (Sept. 26, 2008), http://news.bbc.co.uk/2/hi/business/7637026.stm.
18 Id.
20 Id.
22 Enrich, supra note 19.
23 Buck, supra note 21.
24 German banks, public and private, recognized the need to protect IKB or risk the reputation of the entire industry. They feared a perception of “insufficient risks standards” at German banks and reduced trust in the German banking system. Buck, supra note 21.
When possible, governments have facilitated mergers to avoid bailing out failing institutions using taxpayer dollars. When successful, mergers can help increase funding or decrease liquidity shortfalls by diversifying capital, as was the hope in the proposed Citigroup-Wachovia merger. In other instances, mergers can simply allow larger, more stable banks to absorb the assets and liabilities of failing institutions while increasing their own market share, as was the case in the United Kingdom based Lloyd’s TSB-Halifax Bank of Scotland merger.

One final solution, although utilized less frequently than other options, is the nationalization of failing banks. In 2007, the United Kingdom (U.K.) temporarily nationalized Northern Rock Bank after all other stabilization options seemed ineffective. Taxpayers footed the bill to rescue the bank at a cost of nearly £55 billion.

Although the government injection of capital, the facilitation of mergers, and the nationalization of private banks prevented the failure of major financial institutions during the Great Recession of 2007-2009, the problems within the banking industry became the problems of the entire financial system due to the interconnectivity of the system. These problems have had long-lasting impacts on national economies.

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26 Enrich, supra note 19.
28 Northern Rock to be Nationalized, BBC NEWS (Feb. 17, 2008), http://news.bbc.co.uk/2/hi/business/7249575.stm.
31 BASEL III, supra note 4, at 1.
II. THE BASEL ACCORDS: RESPONSES TO CRISSES

A. The Basel Committee’s Purpose

The Basel Committee on Baking Supervision (BCBS) is one of several committees within the Bank for International Settlements (BIS). The BIS is not a consumer bank, but rather serves central banks to aid in establishing monetary and financial stability and international cooperation. BCBS was created to develop guidelines and supervisory standards for financial institutions and is best known for its development of international standards on capital adequacy. The BCBS does not possess any actual legal authority; rather, it develops best practices and makes recommendations to supervisory leaders to help implement those initiatives endorsed by member nations.

B. Historic Basel

In 1988, the BCBS introduced a framework, known as the Basel Capital Accord or Basel I, designed to manage credit risk in major financial institutions through the establishment of minimum capital requirements. The initial iteration called for a minimum capital ratio of eight percent. Basel I was never intended to be a

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33 Established in 1930, BIS is the world’s oldest international financial institution. Id.
38 Established by factoring capital to risk-weighted assets (with risk based on the credit risk of the borrow). Id.
39 Id.

Throughout the 1990s and early 2000s, Basel I’s development continued with the addition of measures to manage market risk and improve evaluation of capital adequacy. Basel II was released in 2004. The new framework focused on three main “pillars”: (1) minimum capital requirements; (2) supervisory review of an institution’s capital adequacy and internal assessment process; and (3) effective use of disclosure to encourage discipline and sound banking practices. Under Basel II, the minimum capital requirement remained at eight percent. However, unlike under Basel I, the BCBS required half of the total capital under Basel II to consist of Tier 1 capital—the purest and most adequate form of capital (i.e. shareholder capital). Basel II also assigned more stringent risk weights to certain forms of investments and long-past-due loans.

Although implementation of Basel II effectively began in 2004, the Great Recession began only a few short years later in 2007. The causes of the Great Recession are many, but prominent commentators attributed bank failures to the insufficiency of capital

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40 Id. at 3.
41 Some critics argue that even early evolution could not save a scheme that was doomed to fail due to its crudely define risk categories and unfortunate incentives to increase risk, effectively reducing the capital banks actually held. Ranjit Lall, From Failure to Failure: The Politics of International Banking Regulation, 19 REV. INT’L POL. ECON. 609, 612 (2012).
42 Basel Comm. on Banking Supervision, supra note 35, at 3.
43 Id.
44 Id.
45 Id.
46 Just as under Basel I. See supra Part I.
48 Id. at 27, 33 (assigning a risk weight of 150% to consumers whose credit is rated lower than a B- and to past due loans with less than 20% equity).
50 See supra Introduction.
on bank balance sheets coupled with over-leveraging and insufficient liquidity buffers to weather downturns.\textsuperscript{51} Thus, the very problems that BCBS intended to avoid by introducing far-reaching international banking regulation were the causes of a crisis three years after Basel II’s implementation began.\textsuperscript{52} The result was the failure of 443 financial institutions in the U.S. alone.\textsuperscript{53}

C. Basel III

In the wake of the 2008 crisis, the BCBS returned to the drawing board.\textsuperscript{54} Intent on “raising the resilience of the banking sector”, committee members took a five-fold approach to regulation: (1) raising the quality, consistency, and transparency of the capital base; (2) enhancing risk coverage; (3) supplementing the risk-based capital requirement with a leverage ratio; (4) promoting countercyclical buffers and capital conservation buffers; and (5) addressing systemic risk and interconnectedness.\textsuperscript{55} Specifically, Basel III made adjustments to the minimum capital requirement.\textsuperscript{56} Although the total capital\textsuperscript{57} remained at eight percent,\textsuperscript{58} Tier 1 Capital\textsuperscript{59} overall was raised to six percent, and Common Equity Tier 1 Capital\textsuperscript{60} was raised to at least four-and-a-half percent of risk-
weighted assets.\textsuperscript{61} Basel III also established “stress testing” measures.\textsuperscript{62}

Basel III’s main focus has been the rise of “Too-Big-to-Fail” institutions.\textsuperscript{63} The BCBS worked with the Financial Stability Board (FSB)\textsuperscript{64} to determine which financial institutions met the status of “Too-Big-to-Fail”, or termed more specifically, “Systemically Important Banks”\textsuperscript{65} (SIBs), upon which Basel III will have the most significant impact.\textsuperscript{66} In November of 2011, the FSB released a list of 29 SIBs, including eight U.S. banks, seventeen European banks, three Japanese banks, and one Chinese bank.\textsuperscript{67} The BCBS comment regarding SIBs recognized that some institutions are so large that individual operating procedures must be conducted with an eye towards the potential impact on the entire international banking

\begin{itemize}
\item \textsuperscript{61} BASEL III, supra note 4, at 12.
\item \textsuperscript{62} BASEL III, supra note 4, at 46.
\item \textsuperscript{63} Agustino Fontevecchia, The 29 Global Banks that are Too Big to Fail, FORBES (Nov. 4, 2011), http://www.forbes.com/sites/afontevecchia/2011/11/04/the-worlds-29-most-systemically-important-banks/.
\item \textsuperscript{64} The FSB was established to enhance cooperation among national and international supervisory boards and financial institutions. Membership spans the G20 countries, and the intent is to address vulnerabilities and develop and implement regulations and policies in the interest of advancing financial stability. The mandate of the FSB focuses on assessing vulnerabilities, promoting coordination, monitoring and advising markets and policies, and undertaking joint actions to plan and develop guidelines. About the FSB: Overview, FIN. STABILITY BOARD, http://www.financialstabilityboard.org/about/overview.htm (last visited Jan. 4, 2013).
\item \textsuperscript{65} Defined as: “Financial institutions whose distress or disorderly failure, because of their size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity. To avoid this outcome, authorities have all too frequently had no choice but to forestall the failure of such institutions through public solvency support.” Fontevecchia, supra note 63.
\item \textsuperscript{67} Fontevecchia, supra note 63.
\end{itemize}
system. For these 29 banks, BCBS created higher loss absorbency standards, which range from additional Common Equity Tier 1 Capital of one percent to two-and-a-half percent greater than the non-SIB standard, depending on the size and systemic importance of the institution. The BCBS also discouraged these institutions from becoming even more systemically important.

III. COMPARATIVE ANALYSIS IN IMPLEMENTATION EFFORTS

A. Canada

The Canadian economy is one of the fifteen largest in the world (while occasionally breaking into the top ten). And yet, not one of its banks failed during the Great Recession. In fact, the Canadian economy survived the Great Recession relatively unscathed.

One of the potential sources of Canadian economic stability may be the drastic difference between the Canadian banking system

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and other industrialized nations. First, the Canadian banking system consists of five major banks out of a mere 82 banks in the entire country. These 82 banks benefit from great diversity across geographic regions. Because of the concentration of banks, coordination between the banks and regulators is facilitated. Substantial discussions regarding best banking practices and brainstorming on methods to weather downturns are feasible and likely.

Second, the Canadian mortgage market has built-in protections that advance the stability of the banking system. For example, all mortgages in Canada are “Full Recourse” mortgages, meaning that a borrower remains fully responsible for any mortgage, even if the home has been foreclosed upon. This provides a lesser incentive for borrowers to walk away from mortgages while ensuring that lending institutions retain the ability to recoup all mortgage liabilities. Additionally, Canadian mortgage insurance is more widespread than in the U.S., giving Canadian banks a guarantee of repayment for a significant portion of all mortgages. Finally, Canadian banks fix interest rates for only five years at a time for mortgages, retain a large portion of originated loans on their

74 Perry, supra note 72.
75 Id.
76 Id.
77 Id.
78 Id.
79 Id.
81 Economies not using full recourse mortgages incentivize the borrower to walk away from his home and his loan when times become tough. Id.
82 Interestingly, home ownership in Canada is 69%, as compared to homeownership in the U.S. at 67.2%. Perry, supra note 72.
83 Roughly half of all Canadian mortgages carry mortgage insurance; yet, in the U.S. pre-Great Recession, mortgage insurance was found on only fifteen percent of all mortgages and typically only on high leveraged mortgages with less than twenty percent equity. Id.
84 Because rates are fixed for only a short time, every five years an adjustment to interest rates occurs, allowing the interest rates on mortgages to adjust with market conditions. Id.
own balance sheets, and engage in the subprime mortgage market to a lesser degree than banks in other major economies.

Additional sources of Canadian economic stability lie in the Country’s pre-Great Recession regulation of its banks. Canadian banks have maintained a strong regulatory framework since the economic crisis in the early 2000s. They are regulated on a federal level by four major regulatory agencies: The Department of Finance, the Bank of Canada, the Office of the Superintendent of Financial Institutions (OSFI), and the Canada Deposit Insurance Corporation. Each agency has a specific focus or area of expertise. In addition, non-national banks are regulated by agencies at the provincial level. Canada also has several committees that facilitate collaboration between the regulatory agencies, both federal and provincial, so that all issues and regulations are addressed between the sister agencies on both a regional and national scale. Most importantly, however, is the “sunset clause” which causes all federal financial regulations to lapse every five years, ensuring that each of the above named agencies review financial legislation periodically for soundness.

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85 Canadian banks service sixty-eight percent of the mortgages they originate; therefore, they have a continued interest in the risk associated with each loan they write. Id.
86 Id.
87 During that same time period, however, U.S. and E.U. banks were loosening banking regulations to stimulate economic growth following the recession of 2001. Zakaria, supra note 80.
89 The Bank of Canada assesses risk and provides liquidity to the Canadian financial system. Id.
90 OSFI is the regulator and supervisor of federal Canadian financial institutions. Id.
91 The Canada Deposit Insurance Corporation insures deposits of financial institutions. Id.
92 Id.
93 Id. at 10.
94 Id. at 10-11.
95 Id. at 11.
To increase stability further, Canadian regulatory agencies have mandated significant minimum capital requirements since 1999. At that time, banks were required to meet or exceed seven percent Tier 1 capital ratios and ten percent total capital ratios. Additionally, OSFI reserved the right to direct a bank to increase its capital through institution-specific requirements. Regulatory agencies also required Canadian banks to limit leverage to twenty-to-one, and in 2009, Canadian banks were typically leveraged below that rate at eighteen-to-one.

Overall, no one element has led to the strength of the Canadian economy. Certainly the development of a strong regulatory framework, the self-protecting practices of the lending market, and the comparatively high capital requirements in the banking sector had a major impact on the stability of Canadian financial institutions. Nonetheless, Canada, as a member of the G-20, is taking steps to make changes following Basel III’s adoption.

The OSFI established a plan to complete its interpretation of Basel III requirements by the end of 2012 and began implementation in the first fiscal quarter of 2013. In its plan, all deposit-taking institutions were required to meet the seven percent Tier 1 target. Although Canadian deposit institutions were previously required to meet a seven percent Tier 1 minimum, OSFI recognized that some institutions may have fallen below the minimum as a result of pressure from international financial instability. OSFI, therefore,

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96 Id. at 12.
97 Id.; Compare supra Section III.B. and III.C. for a discussion of Basel II and Basel III capital requirements.
98 FIN. STABILITY BOARD, supra note 88, at 12.
99 Id.
100 Zakaria, supra note 80.
101 See supra Section III. As compared to the overall requirements under the Basel models.
103 Id.
104 Id.
recognized that banks should continue to “maintain prudent earnings retention policies and avoid actions that weaken their capital position.” Additionally, OSFI acknowledged that its current leverage ratio calculation did not necessarily conform with the Basel III rules, but intended not to take steps to alter its own ratios and monitoring until the Basel III leverage ratio was finalized. Finally, OSFI made no plans to begin implementation of the liquidity coverage ratio until BCBS deemed such actions necessary. Rather, OSFI planned to work with small banks and foreign bank branches to determine how the new metrics established under Basel III might work with their operations.

In addition to the minimum capital requirements, OSFI addressed the quality of capital necessary under Basel III. It planned a mandatory requirement that all non-common share capital instruments contain a provision in their contract terms that allows for the conversion to common share capital upon a triggering event. Specifically, OSFI established regulations allowing the mandate of a full and permanent conversion of the class of capital if OSFI determines that the financial institution’s viability has ceased or the Canadian government has decided to support the financial institution for any other reason. OSFI also encouraged financial institutions to confirm the quality of capital with OSFI prior to issuing questionable capital instruments. Additionally, financial institutions

105 Id.
106 Id.
107 FIN. STABILITY BOARD, supra note 88, at 15.
108 Id.
112 Id.
are instructed to redeem any capital instruments that do not meet Basel III standards at their regular redemption dates, rather than waiting for regulatory events to trigger redemption.\textsuperscript{113}

The BCSB and FSB did not include any Canadian banks on the SIB list.\textsuperscript{114} As a result, OSFI and other Canadian regulatory agencies were not required to establish heightened minimum capital requirements for its largest financial institutions.\textsuperscript{115} Overall, because Canada has no SIBs, already has substantial minimum capital requirements for financial institutions, and intends to make no additional changes until Basel III liquidity and leverage ratios are finalized, Canadian financial institutions will be in substantial compliance with Basel III goals from its implementation in the first fiscal quarter of 2013.

B. Switzerland

Switzerland has long been known as one of the safest places in the world for affluent individuals to store their wealth.\textsuperscript{116} Prior to the Great Recession, Swiss banks held assets worth more than six times the country’s overall gross domestic product (GDP).\textsuperscript{117} In comparison, U.S. banks held assets totaling a mere seventy percent of


\textsuperscript{114} See supra Part II.C.

\textsuperscript{115} See supra Part II.C. Although no Canadian banks were included on the SIB list, the OSFI designated all of Canada’s six largest banks as domestic systemically important banks. These six banks are subject to a 1% risk-weighted capital surcharge and subject to continued supervisory intensity and enhanced disclosure requirements. Stephen B. Kerr, Canadian Banks Come to Grips with Basel III, LEXOLOGY (Oct. 10, 2013), http://www.lexology.com/library/detail.aspx?g=a815f72b-005e-43b0-b366-0a52f62eda12.


its GDP during the same time period. The sheer size of the Swiss banking sector compared to the Swiss economy substantiates the importance of financial stability to the country.

Two major banks, UBS and Credit Suisse, dominate the Swiss banking sector. Together, UBS and Credit Suisse held $2.85 trillion in assets before the Great Recession, totaling more than four times Switzerland’s GDP at the time. UBS and Credit Suisse operate internationally and focus on investment banking and wealth management, with half of the wealth management assets coming from foreign clients. The Swiss banking sector is also composed of cantonal banks and other regional banks that operate domestically.

In 2008, when the Great Recession began and international financial institutions began failing, the Swiss government looked to UBS and Credit Suisse as possible sources of economic instability. Because of the size of the two banks, Swiss agencies recognized that the Swiss economy was simply not large enough to bail out the banks if they failed and feared that collapse in either could throw the entire country into financial turmoil.

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118 Id.
120 In 2011, the assets of UBS and Credit Suisse totaled more than twice Switzerland’s GDP, a sharp reduction from 2007-2008 dominance. Id.; Whitlock, supra note 116.
121 FIN. STABILITY BOARD, supra note 119, at 9 n.3.
122 Cantonal banks operate within Switzerland’s individual cantons, or states, typically servicing only individual cantons and owned either entirely or in the large majority by the canton. As of early 2013, 24 cantonal banks exist. Cantonal Banks, http://www.kantonalbank.ch/e/gruppe/kantonalbanken/index.php (last visited Jan. 4, 2013).
123 FIN. STABILITY BOARD, supra note 119, at 9.
124 Whitlock, supra note 116.
125 Theil, supra note 117.
126 Whitlock, supra note 116.
In the same time period, as a result of aggressive expansion to its investment banking business, UBS found itself in trouble.\textsuperscript{127} The bank quickly secured billions in capital from new share offerings and injections from international investors and governments,\textsuperscript{128} but the effort was insufficient to stabilize the bank.\textsuperscript{129} As a result, the Swiss government took additional steps to secure the bank.\textsuperscript{130} The Swiss central bank nationalized $54 billion\textsuperscript{131} of UBS’s assets and recapitalized the remaining private assets.\textsuperscript{132} UBS did not fail as a result of the financial crisis, but public perception of the bank did not recover from the negativity surrounding its instability.\textsuperscript{133}

Credit Suisse also suffered major losses as a result of the financial crisis.\textsuperscript{134} However, unlike UBS, a capital injection from international investors was sufficient to prevent the need for government intervention.\textsuperscript{135}

The smaller Swiss banking institutions did not face similar struggles during the financial crisis.\textsuperscript{136} Instead, they were able to gain market share at the expense of UBS’ and Credit Suisse’s questionable

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\item \textsuperscript{127} Id.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Theil, supra note 117.
\item \textsuperscript{130} Id.
\item \textsuperscript{131} Alan Cowell, UBS and Credit Suisse get Urgent Bailout Funds, N.Y. TIMES, Oct.16, \url{http://www.nytimes.com/2008/10/16/business/worldbusiness/16iht-17swiss.17006058.html?_r=0} (last visited Jan. 4, 2013).
\item \textsuperscript{132} Theil, supra note 117.
\item \textsuperscript{133} See Whitlock, supra note 116.
\item \textsuperscript{134} Totaling $19 billion in comparison to UBS’s $53 billion in losses from 2007 until 2009. FIN. STABILITY BOARD, supra note 119, at 11 n.10.
\item \textsuperscript{135} Alan Cowell, UBS and Credit Suisse get Urgent Bailout Funds, N.Y. TIMES, Oct. 16, \url{http://www.nytimes.com/2008/10/16/business/worldbusiness/16iht-17swiss.17006058.html?_r=0} (last visited Jan. 4 2013).
\item \textsuperscript{136} See FIN. STABILITY BOARD, supra note 119, at 7; SWISS FIN. MKT. SUPERVISORY AUTH. FINMA, FINANCIAL MARKET CRISIS AND FINANCIAL MARKET SUPERVISION 15 (Sept. 14. 2009), \url{http://www.finma.ch/e/aktuell/Documents/Finanzmarktkrise-und-Finanzmarktaufsicht_e.pdf}.
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Cantonal banks, in particular, were well capitalized, had higher quality capital than the two largest banks, and in some cases, had their liabilities fully guaranteed by their cantons. Each of these factors led to stability during the crisis.

Three agencies regulate the Swiss financial market. The Swiss Financial Market Supervisory Authority (FINMA) is the supervisory and regulatory authority responsible for the financial industry. It was created in 2007 but did not receive full power until 2009. FINMA works in conjunction with the Swiss National Bank (SNB), the nation’s central bank in charge of monetary policy, and the Federal Department of Finance (FDF), the nation’s ministry of finance in charge of policy.

As a result of the 2008 financial crisis, Swiss regulatory agencies moved quickly to ensure the stability of its two largest banks and to begin tightening banking regulations concerning capital minimums and adequacy. During this time, FINMA mandated quarterly “stress-testing” to determine risk within each institution. FINMA, working with SNB, also set new capital standards for the two major banks, requiring each institution to hold ten percent Tier 1 Common Equity capital by 2018. Additionally, UBS and Credit


138 FIN. STABILITY BOARD, supra note 119, at 7.

139 See id. at 10.

140 Id.

141 Id.


143 FIN. STABILITY BOARD, supra note 119, at 10.

144 Id. at 12.

145 Id. at 25

146 Swiss Banks get Stricter Rules than Basel III, SWISS BROADCASTING CORP., Oct. 4, 2010,
Suisse will be mandated to increase their current total capital requirements to nineteen percent after including nine percent contingent convertible bonds. Contingent convertible bonds are newly developed instruments that would commit their holders to buy shares from the banks in times of dire financial straits. For cantonal and smaller banks, the Basel III framework’s eight percent minimum capital requirement is expected to be adopted into Swiss law, with complete implementation by 2019.

The Swiss Bankers Association predicted in 2010 that Swiss authorities would pressure international agencies like the BCBS to adopt strict standards equal to those the Swiss agencies previously adopted. When the Basel III requirements were subsequently approved, however, swift acting Swiss agencies were forced to confront the reality that such extreme differences in regulations could have a negative impact on the Swiss financial sector. UBS and Credit Suisse’s heightened capital requirements could easily impact Switzerland’s international competitiveness in an already competitive market.

Through the fourth quarter of 2012, UBS struggled greatly to remain competitive in its investment banking business, experiencing a $2.3 billion loss in the third quarter of 2012. The bank also announced plans to lay off more than 10,000 workers over a three-year period. Credit Suisse faced similar problems and potential


147 Id.
148 Id.
149 FIN. STABILITY BOARD, supra note 119, at 14.
152 Allen, supra note 150.
153 Devaney, supra note 151.
154 Id.
restructuring, but with a smaller investment banking business, the pressure to drop the entire business segment was not as great as that which UBS faced.\textsuperscript{155} This deteriorating effect on risky investment banking may likely have been well within the Swiss regulators’ intentions when it implemented more stringent capital regulations than those adopted under Basel III.\textsuperscript{156}

In addition to its struggling investment banking business, UBS stopped paying dividends, hoping that holding onto retained earnings would help it secure the required minimum capital.\textsuperscript{157} Credit Suisse, reporting solid progress towards the new capital minimum goals, continued to pay dividends to its shareholders.\textsuperscript{158} Unfortunately, the bank lagged far behind competitors abroad when using Basel III\textsuperscript{159} standards to evaluate capital adequacy.\textsuperscript{160} Although some approaches to valuation projected Credit Suisse’s 2012 Tier 1 capital above the benchmark required by Swiss law after full implementation in 2019, financial services firm Barclays applied new capital adequacy standards to Credit Suisse’s assets and projected just under six percent adjusted capital.\textsuperscript{161}


\textsuperscript{158} Id.

\textsuperscript{159} As opposed to earlier Swiss standards.


\textsuperscript{161} Id.
Although Swiss banking is synonymous with safety, the structure of the industry showed stability issues that may have remained hidden without the widespread international financial turmoil of the Great Recession. Switzerland's quick action was likely facilitated by its small regulatory system and may have aided the country in warding off major problems. Yet, such swift action may reduce industry competitiveness in the future when Swiss banks vie for business against institutions following Basel III's requirements. Furthermore, implementation may prove to be a burdensome if not impractical task.

C. European Union

The European Union's financial industry saw some of the earliest turmoil during the Great Recession. In fact, as early as August 2007, Deutsche Bank and other private German lending institutions were forced to inject $4.8 billion in capital to save the struggling IKB Deutsche Industriebank. Shortly thereafter in September 2007, the Bank of England provided emergency aid to Northern Rock. Since those initial rescues, and as recently as June of 2012, E.U. member countries chose to rescue major banks within their financial sector. The size and importance of many

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164 Id
European banks means that countries cannot allow banks to fail without compromising the stability of the E.U.’s entire economy.\textsuperscript{168}

The framework of the European banking sector is complex.\textsuperscript{169} Although the E.U. is made up of seventeen independent banking systems using a singular currency,\textsuperscript{170} since the adoption of the Euro, financial integration across member states increased up until the Great Recession.\textsuperscript{171} The European banking sector as a whole is large, even when compared to other major financial powerhouses.\textsuperscript{172} Banking sector assets are five times as great in the E.U. than in the U.S., and make up about 350\% of the E.U.’s GDP.\textsuperscript{173} The United Kingdom, Germany, and France are home to the largest banking sectors when measured by total assets.\textsuperscript{174} Additionally, the size of individual financial institutions within the E.U. is great—half of the world’s thirty largest banks when ranked by total assets are in the E.U.\textsuperscript{175} Specifically, fifteen of the twenty-nine SIBs\textsuperscript{176} are located in E.U. member countries.\textsuperscript{177} However, the E.U. is not made up exclusively of large financial institutions, as Europe is home to more than 8,000 banks with smaller institutions comprising a quarter of total banking assets in the E.U.\textsuperscript{178}

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\item\textsuperscript{168} Stephen Castle, \textit{Europe to Approve Guidelines on Bank Failures}, N.Y. TIMES, Apr. 4, 2008, \url{http://www.nytimes.com/2008/04/04/business/worldbusiness/04regs.html}.
\item\textsuperscript{169} See generally EUROPEAN COMMISSION, \textit{supra} note 165, at 11-19.
\item\textsuperscript{170} Angelo Young, \textit{Danger from European Banks’ Too-Big-To-Fail Syndrome Keeps Growing: Report}, INTERNATIONAL BUS. TIMES (Sept. 18, 2012), \url{http://www.ibtimes.com/danger-european-banks-too-big-fail-syndrome-keeps-growing-report-790102}.
\item\textsuperscript{171} EUROPEAN COMMISSION, \textit{supra} note 165, at 11, 30.
\item\textsuperscript{172} \textit{Id.} at 13.
\item\textsuperscript{173} \textit{Id.} at 11-12.
\item\textsuperscript{174} \textit{Id.} at 12-13.
\item\textsuperscript{175} France, Sweden, and the United Kingdom each have banking markets dominated by large domestic banks, while countries such as Austria, Germany, and Spain, have more, smaller banks. \textit{Id.} at 18.
\item\textsuperscript{176} See \textit{supra} Part II.C.
\item\textsuperscript{177} Agustino Fontevecchia, \textit{The 29 Global Banks That Are Too Big to Fail}, FORBES, Nov. 4, 2011, \url{http://www.forbes.com/sites/afontevecchia/2011/11/04/the-worlds-29-most-systemically-important-banks/}; EUROPEAN COMMISSION, \textit{supra} note 165, at 38.
\item\textsuperscript{178} EUROPEAN COMMISSION, \textit{supra} note 165, at 34-35.
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The integration of the E.U. financial network across member countries increases need for a stable banking industry because failure in any of the major banks within a single member country raises the likelihood of economic crisis affecting multiple member countries. As a result of such overlap and potential repercussions of bank failures, E.U. governments recognized the compelling need to inject funding into the private sector, even though such action violates traditional E.U. policy. In addition, in 2010, the E.U. chose to create the European Banking Authority (EBA). The E.U. had a predecessor advisory group, but the EBA is the first body with the power to create a singular E.U. rulebook that will be binding on all E.U. banks. In December of 2012, the E.U. also agreed to expand the European Central Bank’s (ECB) supervisory power to include direct supervision of the largest 100 to 200 banks in the E.U. Previously, banks were overseen primarily by national regulators. Under the agreement, smaller banking institutions would remain subject to their current regulators. The aim of ECB in its improved

180 Buck, supra note 163.
185 Such a set up proved ineffective when dealing with a financial sector that has become integrated across national borders. EUROPEAN COMMISSION, supra note 165, at 107.
186 Under the agreement, the ECB at its discretion could step in and take over supervisions of any bank in the E.U., if deemed necessary. Kanter, supra note 184.
state is to create uniformity and reduce the domestic political influences that permeated the national banking regulation scheme.\textsuperscript{187}

Leading up to the Great Recession and in response to the Basel I and II frameworks, the E.U. passed two directives designed to implement minimum capital requirements.\textsuperscript{188} These directives were known as Capital Requirements Directives (CRD) I and II, and were packages of non-binding legislation designed to implement the various aspects of Basel I and II.\textsuperscript{189} Each directive established a minimum and total common equity requirement of two percent,\textsuperscript{190} and each required no countercyclical buffer and no capital conservation buffer, but permitted banks to use their own internal risk models to calculate risk weights.\textsuperscript{191} Additionally, because CRD I and CRD II were directives, they were not binding.\textsuperscript{192} Rather, they were merely legislative acts that set out goals for each EU state to achieve, and member states were permitted to diverge significantly in their own individual implementations.\textsuperscript{193} In fact, some member states chose a transitional opt-out of the standards.\textsuperscript{194} Moreover, leverage ratios in European banks often exceed thirty-to-one, and in some cases, are as great as fifty-to-one.\textsuperscript{195}

\begin{itemize}
\item \textsuperscript{189} Id. at 68-69.
\item \textsuperscript{190} Id. at 69.
\item \textsuperscript{191} \textit{See}, Regulations, Directives and other acts, EUROPEAN UNION, \url{http://europa.eu/eu-law/decision-making/legal-acts/index_en.htm} (last visited Jan. 31, 2014), for a brief overview of European law.
\item \textsuperscript{192} Id. at 71.
\item \textsuperscript{193} CRD II was passed after the transitional opt-out for CRD I, but still, several member states did not meet the implementation requirements CRD II. Id.
\end{itemize}
Under the E.U. legislation implementing Basel III, CRD IV, the capital requirements generally follow those outlined by BIS.\textsuperscript{196} Total capital requirements under the legislation are eight percent, a total of four-and-a-half percent of which must be common Tier 1 capital.\textsuperscript{197} The E.U. differs from Basel III requirements in that the percentage of Tier 1 capital must be gradually increased until it reaches six percent by 2019.\textsuperscript{198} The legislation also permits member states, in coordination with the E.U., to require higher levels than those established under CRD IV.\textsuperscript{199} Unlike previous regulations, however, the E.U. will enforce the law as a mandatory regulation, rather than a directive, to reduce the ability of national regulators to diverge or reduce the weight of the proposal.\textsuperscript{200} Although the percentages of capital remain consistent with the aims of Basel III, the E.U. legislation does diverge on certain details.\textsuperscript{201} Specifically, the E.U. counts as Tier 1 capital lesser types of capital\textsuperscript{202} than those supplied under Basel III and places a maximum on the capital ratio that member states may impose on their banks.\textsuperscript{203}

Even though the E.U. took steps to increase the stability of its financial sector by increasing union-wide banking regulations for the first time since the formation of the E.U., it failed to meet a major benchmark in Basel III implementation.\textsuperscript{204} The E.U.’s new minimum capital rules would complement the creation of the banking-union and create a measure for the ECB to enforce through

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\textsuperscript{196} Compare BASEL III, supra note 4, at 2, with EUROPEAN COMMISSION, supra note 165, at 69.
\textsuperscript{197} Commission Regulation 575/2013, art. 92, 2013 O.J. (L176) 64; EUROPEAN COMMISSION, supra note 165, at 69.
\textsuperscript{198} Commission Regulation 575/2013, art. 92, 2013 O.J. (L176) 64.
\textsuperscript{199} See EUROPEAN COMMISSION, supra note 165 at 70.
\textsuperscript{201} Id.
\textsuperscript{202} Such as deferred tax assets and minority interests. Id.
\textsuperscript{203} Id.
\end{flushleft}
its new supervisory powers.\(^{205}\) However, the E.U. failed to pass Basel III regulation by the January 1, 2013 deadline established by BIS.\(^{206}\) Although the E.U. legislature recognized the need for stronger regulation of the banking industry, given the systemic importance of the many E.U. banks, passing new minimum capital measures before other competitive nations (such as the U.S.) could have compromised the recovery of the E.U. financial sector and may have been the major cause for the delay.\(^{207}\) The regulation was adopted on June 27, 2013 with implementation set to commence on January 1, 2014 and full implementation to be reached by 2019.\(^{208}\)

IV. IS UNIFORMITY POSSIBLE?

Enacting capital requirements for financial institutions across industrialized nations seems to be the most basic step in preventing the recurrence of financial turmoil similar to that of the Great Recession. Establishing minimum capital levels for banks, with increased requirements for large, systemically important institutions, may help institutions weather the storm of financial strife so that banks do not go bankrupt or suffer bank runs.\(^{209}\)

Several major problems exist with Basel III. Because Basel III is a recommendation of best practices, introduced with no legal

\(^{205}\) Id.


\(^{209}\) See supra Part II.C.
authority from BCBS, countries may modify the terms or fail to implement the measures altogether. The E.U.'s passage of directives concerning Basel I and II and national failures to adopt such measures are a stark example of the ineffectiveness of recommendations lacking legal authority.\textsuperscript{210} As mentioned above, after the directive implementing Basel I and II, some E.U. member states failed to follow through with their own regulations by taking advantage of a transitional opt-out period. Still many E.U. member states failed to ever follow through with implementation of the new regulations.

Basel III implementation may face difficulties similar to Basel I and II in the E.U. The initial deadline for Basel III implementation to begin was January 1, 2013. Sixteen members of the G-20 did not meet that benchmark.\textsuperscript{211} However, one year later, the majority of the G-20 took steps to implement some form of Basel III regulation, with most becoming effective on January 1, 2014.\textsuperscript{212}

Of those member nations that chose to follow through with implementing Basel III regulations, the risk remains that the intent of Basel III will be diluted by changes at the national level. Switzerland has stepped up the recommendations of Basel III.\textsuperscript{213} However, by acting ahead of the final Basel III recommendations, Swiss banks may face a disadvantage in competitiveness.\textsuperscript{214} Nations slow to follow through with implementation may recognize the Swiss setback and set standards below those recommended under Basel III to protect the competitiveness and recovery of their own banking institutions. Further, the E.U., although adopting the minimum ratios, intends to

\textsuperscript{210} The E.U. proposal for Basel III implementation will likely take the form of a mandatory regulation to correct the problem of previous iterations. \textit{See supra} pp. 22-23.
\textsuperscript{211} \textit{Brinded, supra} note 206.
\textsuperscript{213} \textit{See supra} pp. 17-18.
diverge from Basel III’s capital adequacy standards.\textsuperscript{215} The E.U. will accept lesser forms of capital than those suggested by Basel III as Tier 1, diluting the effectiveness of the minimum Tier 1 capital ratio established by the BCBS.\textsuperscript{216}

Finally, the minimum recommendation may be deceiving as a baseline measure because it may ultimately function as a maximum requirement. Switzerland recognized the need for greater requirements than those suggested by Basel III in order to protect its massive institutions and the media responded with concerns regarding competitiveness.\textsuperscript{217} Conversely, it is speculated that the E.U.’s delay in passing a final measure concerned the feared lack of competitiveness with the U.S. market due to the U.S.’s failure to meet the same deadline.\textsuperscript{218} Thus, many nations may look to the actions of their peers and focus on competitiveness rather than stability, choosing not to enforce minimums above those established under Basel III even if such a choice is made at the expense of their financial sector’s stability.

The Canadian financial sector is a great example of the positive effects of maintaining certain levels of capital has on the stability of a financial industry. As discussed in Part IV.A, Canadian regulations leading up to the Great Recession required Tier 1 and overall capital ratios just above those established by Basel III. In effect, the Canadian banking sector experienced no bank failures and managed to thrive while the international economy floundered.\textsuperscript{219} Alternatively, the E.U. member states stand as a prime example that bank failures or necessary rescues may occur when capital minimums

\textsuperscript{215} See supra pp. 22-23.
\textsuperscript{216} Additionally, the E.U. proposal of a maximum capital ratio is troubling in light of the stabilizing aims of Basel III because banks should not be discouraged from favoring stability over competitiveness in a systemically important industry. See supra pp. 22-23.
\textsuperscript{217} Allen, supra note 214.
\textsuperscript{218} Europe ‘to Push for Basel III Delay as it Lobby U.S.,’ TELEGRAPH (Nov. 12, 2012), http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9704822/Europe-to-push-for-Basel-III-delay-as-it-lobbies-US.html; see also supra, Part III.C.
\textsuperscript{219} See supra p. 9, notes 72-74.
and liquidity are insufficient to weather downturns in related financial markets and economies.\textsuperscript{220}

Conversely, although Swiss regulators have traditionally gone above and beyond recommended standards, including those under Basel I,\textsuperscript{221} Swiss banking institutions struggled to maintain stability during the Great Recession.\textsuperscript{222} In Switzerland, it was not the lack of capital alone that worried regulators. Rather, the sheer size of Swiss major banking institutions and the perceived inability of the government to bail out the institutions if they failed caused concern. It took a combination of international investors, nationalization of assets, and recapitalization of private assets to secure the fates of the largest institutions, even with minimum capital safeguards.\textsuperscript{223}

Establishing minimum capital requirements may be a step towards stabilizing banking sectors,\textsuperscript{224} but those measures alone, as evidenced by Switzerland’s struggles, are insufficient to offer broad protection to the banking industry. From an analysis and comparison of the Canadian, Swiss, and E.U. financial industries, certain other factors appear to be necessary for long-term stability.

Using Canada as a blueprint, it appears that emphasis on a strong regulatory framework, control of the size of institutions, and strong coordination between institutions and regulators is necessary for resiliency in the banking industry.\textsuperscript{225} Both Switzerland and the

\textsuperscript{220} See supra pp.19-20.  
\textsuperscript{222} See supra Part III.B. (discussing the Swiss banking crisis in 2008).  
\textsuperscript{223} See supra Part III.B.  
\textsuperscript{224} The author recognizes that capital adequacy and minimums are not the sole focus of Basel III, however, points out that the “five-fold approach” of Basel III (raising the quality, consistency, and transparency of the capital base; enhancing risk coverage; supplementing the risk-based capital requirement with a leverage ratio; promoting countercyclical buffers and capital conservation buffers; and addressing systemic risk and interconnectedness) focuses on these measures as the saving grace of the regulation.  
\textsuperscript{225} No doubt, the use of “sunset clauses,” strict lending laws favoring creditors, and diversified financial institutions contribute to the strength of the industry. See discussion supra Part III.A.
E.U. seem to have recognized the importance of strong financial regulatory bodies, with each creating a new regulatory agency in the wake of the Great Recession.  

Further, the Great Recession has brought about financial institutions larger than those pre-Recession due to buyouts and mergers. Because half of the world’s SIBs lie in Europe, the stability of the region’s financial sector may be increased by the reduction of such systemically important institutions. Basel III acknowledges the necessity of regulating SIBs; however, if the E.U. fails to take major steps towards regulation and size limitation, the presence of so many major institutions could prove destructive to its long-term financial stability. Switzerland has already taken major steps to protect its two largest institutions, but long-term monitoring will likely be necessary for its continued stability.

One final element to long-term stability may rest less on the regulations placed on the financial industry and more on the actions and goals of the industry itself. Canadian banks, for instance, seem to focus on the good of its economy and the long-term viability and success of its financial industry as the primary goals. Competitiveness in, and dominance of, the international financial sector appear not to be major focuses of business in Canada. In contrast, Switzerland and the E.U. both have concerns about international competitiveness as a result of new minimum capital and liquidity requirements, appearing to deemphasize the resiliency and long-term viability of their banking sectors. Although the Canadian difference may be a cultural one, it should be a role model for other nations struggling to keep their banking industries and economies afloat.

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226 See supra Parts III.B., III.C.  
227 See supra Part I.  
228 See supra pp. 20-21.  
229 See supra pp. 8-9.  
230 See supra Part III.C.  
231 See supra Part III.B.  
232 See supra Part III.A.
CONCLUSION

As international economies began to suffer financial distress as a result of the Great Recession, the Bank for International Settlements and the Basel Committee on Banking Supervision gathered with leaders of the G-20 to modify international banking standards to secure the stability of financial institutions. With the agreement known as Basel III, the Basel Committee recommended that members of the G-20 agree on national regulations with increased minimum capital and liquidity requirements for banks within their countries to help prevent future banking failures and the resultant impact such failures have on individual economies. Although some nations, such as Canada and Switzerland met the January 1, 2013 deadline, others, such as the E.U. and U.S. failed to do so.

Basel III, in its most basic form, appears to be a strong solution and response to the financial crisis of 2007 and 2008. Upon examination of divergent economies and a study of pre-Recession banking regulation, it becomes clear that standards which focus on capital and liquidity alone are not sufficient to prevent struggles in the banking sector. The measure, although agreed upon by members of the G-20, is plagued with difficulties that will limit its effectiveness. The ability of nations to dilute the recommendations or fail to implement the regulations altogether will likely have a detrimental effect on the sufficiency of Basel III. Additionally, earlier iterations have failed to prevent financial crises, and it is unlikely the third iteration will be any different without substantial changes to national financial regulation as a whole. Although any strengthening of the financial industry may provide some benefit to national economies, Basel III is unlikely to provide significant protections from future crises if economies face instability on par with that of the Great Recession.
NATIONAL SECURITY AND THE PROTECTION OF CONSTITUTIONAL LIBERTIES: HOW THE FOREIGN TERRORIST ORGANIZATION LIST SATISFIES PROCEDURAL DUE PROCESS

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INTRODUCTION

In the aftermath of the attacks perpetrated against the United States by a foreign terrorist organization on September 11, 2001, President Bush avowed that “[t]errorist attacks can shake the foundations of our biggest buildings, but they cannot touch the foundation of America.”

President Bush’s declaration highlights the twin role of government in safeguarding the nation and upholding its foundational liberties. Unfortunately, these goals are sometimes at odds. Vital U.S. anti-terrorism laws have been criticized for unduly infringing upon fundamental constitutional rights. This Comment will explore one of these controversial laws—the Foreign Terrorist Organizations List—and assess whether Congress effectively balanced its duty to protect the nation’s security and liberty in authorizing such legislation.

The Foreign Terrorist Organization List was created by Congress in response to the 1993 terrorist attack at the World Trade Center and the 1995 bombing of the Federal Building in Oklahoma

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1 George W. Bush, President of the United States of America, Address to the Nation (Sept. 11, 2001).
City. Buried within Section 1189 of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress authorized the Secretary of State to designate international groups that threatened the U.S., its citizens, and its interests, as “Foreign Terrorist Organizations” (FTOs). The purpose of Section 1189 is to stigmatize and punish rogue organizations, and “prevent persons within the [U.S.] . . . from providing material support or resources.”

In this way, Section 1189 offers the U.S. government an effective legal tool to impede terrorist organizations that threaten U.S. national security interests. Critics argue, however, that the legislation is unconstitutional because Section 1189 does not compel the Secretary of State to provide listed organizations adequate notice or a hearing as required by the Fifth Amendment. This comment

2 Threat of Terrorism: Hearing on Terrorism Before the S. Comm. on the Judiciary, 104th Cong. 1995 WL 247423, (1995) (noting the statement of Sen. Specter, Member, Sen. Comm. on the Judiciary, who stated “I am committed, as I believe is every Senator on this Committee and in this body, to taking any and every step necessary to assure that there is never another devastation like Oklahoma City”).


4 Id. (finding that international terrorism is a serious and deadly problem that threatens the vital interests of the U.S.).


6 H.R. REP. No. 104-383, pt. 2, at 38 (1995) (stating that “the fundamental purpose of this legislation, then, is to provide our law enforcement agencies – within carefully prescribed constitutional boundaries – with the tools necessary to prevent and punish criminal terrorist enterprises”).

7 AEDPA § 301(b).

8 BARACK OBAMA, THE WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM, (June 28, 2011) (finding that these organizations make it their purpose to undermine the security and stability of the U.S.), http://1.usa.gov/19TulpH. See also RAPHAEL F. PERL, CONG. RESEARCH SERV., RL33600, INTERNATIONAL TERRORISM, THREAT, POLICY, AND RESPONSE 3-4 (2007) [hereinafter “CRS REPORT 2”] (explaining that “policy and counterterrorism analysts are concerned that economic and political tensions throughout the Middle East might allow FTOs to gain power, legitimacy, and political clout, and if that comes to pass, the risks to American interests and security would be heightened substantially”).

9 Randolph N. Jonakait, A Double Due Process Denial: The Crime of Providing Material Support or Resources to Designated Foreign Terrorist Organizations, 48 N.Y.L. SCH.
seeks to quell this criticism by demonstrating that the FTO designation procedures satisfy contemporary due process standards.

Part I reviews the procedural background and history of Section 1189. Part II describes the “what” and “when” requirements of procedural due process. Part III discusses a series of cases challenging FTO designation on procedural due process grounds. Finally, Part IV covers due process in light of those decisions, and concludes that Section 1189 complies with Fifth Amendment standards.

I. PROCEDURAL BACKGROUND AND HISTORY OF THE FTO LIST

A. The Purpose of the FTO Compared to Other U.S.-Government-Maintained Terrorist Lists

The FTO List is one of several terrorism lists maintained by the U.S. Government. While there is an overlap between lists, each possesses a unique scope and purpose within the context of U.S. national security.

The FTO List is limited to foreign organizations that engage in terrorist activities that “threaten American security.”10 Section 1189 authorizes the Secretary of State to identify and designate the organizations in consultation with the Attorney General and Secretary of Homeland Security.11 Consequences of designation are social, financial, and legal.12

11 Id.
12 See infra Part 2.C (describing these consequences in detail).
The State Department also maintains the State Sponsors of Terrorism (SST) List.\textsuperscript{13} SST only applies to states that support acts of international terrorism.\textsuperscript{14}

A third list maintained by the State Department is the Terrorist Exclusion List (TEL).\textsuperscript{15} TEL impacts individuals and applies strictly for immigration purposes, and authorizes the Secretary of State, in consultation with the Attorney General, to deny known members of terrorist organizations entry to the U.S.\textsuperscript{16}

The fourth list, the Specially Designated Terrorists (SDT) List, originally targeted individuals or entities that threatened to disrupt the Middle East peace process.\textsuperscript{17} Subsequent legislation, however, expanded the SDT List to allow the President to regulate international economic transactions during times of war or national emergencies.\textsuperscript{18} Following the events of September 11, 2001, President Bush exercised his presidential authority to create the Specifically Designated Global Terrorist (SDGT) List.\textsuperscript{19} Together SDT and SDGT freeze the U.S.-based assets of any person, organization, or nation the President determines has planned, authorized, aided, or engaged in hostilities or attacks against the U.S.\textsuperscript{20} The U.S. Department of Treasury is in charge of managing SDT and SDGT.\textsuperscript{21}

\textsuperscript{13} See Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503, § 6(j) (1979) (as amended).
\textsuperscript{14} As of July 31, 2012, the States listed as “sponsors of terrorism” included Cuba, Iran, Sudan, and Syria. \textit{U.S. DEP’T OF STATE, OFFICE OF THE COORDINATOR OF COUNTERTERRORISM, COUNTRY REPORTS ON TERRORISM 2011} (2012), \texttt{http://1.usa.gov/KnEtOF}.
\textsuperscript{16} Id.
\textsuperscript{18} Id.
\textsuperscript{20} 50 U.S.C. § 1702(b) (2001).
\textsuperscript{21} Id.; see also \textit{U.S. DEP’T OF TREAS., SPECIALLY DESIGNATED NATIONALS LIST} (2013), \texttt{http://1.usa.gov/1ausowX} (listing the organizations and
In sum, the Executive branch maintains several avenues to categorize and sanction terrorist organizations and activities. Among all lists, however, the FTO holds unique importance, “not only because of the specific measures undertaken to thwart the activities of designated groups but also because of the symbolic public role it plays as a tool of U.S. counterterrorism policy.”

B. The Process of Designating FTOs

Section 1189 of the AEDPA authorizes the Secretary of State to designate entities as “foreign terrorist organizations.” Designation requires the Secretary to provide an administrative record reflecting that (A) the organization is foreign, (B) the organization engages in terrorist activity, and (C) the terrorist activity directly threatens U.S. national security.

individuals designated under the Office of Foreign Asset Control’s economic sanctions regimes, which includes those entities designated as FTOs by the Secretary of State).

See supra Part II.A. For more information on the lists and their procedural safeguards and judicial oversight visit the State Department’s Bureau of Counterterrorism, http://1.usa.gov/JOtuMZ.

CRS REPORT, supra note 6, at 5.

Although the Secretary of State officially designates a group, a number of agencies play important roles in helping the Secretary make the determination. See id. at 2.

AEDPA at § 219(a)(1) (defining terrorist activities as: “activity which is unlawful under the laws of the place where it is committed (or which, if it had been committed in the United States, would be unlawful under the laws of the United States or any State) and which involves any of the following: (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle); (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained; (III) A violent attack upon an internationally protected person (as defined in section 1116(b)(4) of Title 18) or upon the liberty of such a person; (IV) An assassination; (V) The use of any— (a) biological agent, chemical agent, or nuclear weapon or device, or (b) explosive, firearm, or other weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property; (VI) A threat,
The State Department’s Bureau of Counterterrorism (S/CT) is tasked with monitoring the activities of suspected terrorist groups around the world and identifying organizations that qualify for designation under the Act.\footnote{8 U.S.C. § 1189(a)(1) (2004) (stating that notification occurs through classified communication).} S/CT deems entities suitable for designation based on whether the organization (1) has carried out any terrorist attacks, (2) is planning or preparing to carry out possible future acts, and/or (3) retains the capability and intent to carry out such acts.\footnote{Id.} The S/CT receives support in this endeavor from the intelligence community and the Department of Homeland Security.\footnote{Id.}

The S/CT’s reports and findings form the basis of the administrative record, which is presented to the Secretary of State for consideration.\footnote{CRS REPORT, supra note 6, at 2.} If approved, the request for designation passes to the Department of Justice and the Department of Homeland Security for independent evaluation and recommendation.\footnote{Id.}

Seven days before an organization is officially designated, the Secretary is required to notify specified members of Congress of “the intent to designate the organization . . . and the factual basis therefore.”\footnote{Id. (requiring notification to relevant congressional committees, the Speaker and Minority Leader of the House of Representatives, the Majority and Minority Leader, and the President pro tempore of the Senate).} Congress may block a designation, but if no action is taken the designation becomes final when notice is published, or “listed,” in the Federal Register.\footnote{8 U.S.C. § 1189(a) (requiring constructive, not actual, notice).}
C. Consequences of FTO Designation

The consequences of designation are manifold. First, the Treasury Department may block or control the funds of the organization and all known agents.\(^ {35}\) Second, the Justice Department may prosecute third parties that provide material support to the designated entity.\(^ {36}\) Third, known members of the organizations are deported, denied visas, and summarily excluded from the U.S.\(^ {37}\)

Finally, designation as an FTO allows the U.S. Government to exercise a form of soft power.\(^ {38}\) By designating an entity as a “terrorist organization,” the U.S. formally signals to the international community that the U.S. is concerned with the named organization’s activities.\(^ {39}\) Often, other nations will then react pursuant to their own law and jurisdiction to similarly curb the organization’s financing and activities.\(^ {40}\) This heightened international cognizance may also cause private citizens to abstain from donating, contributing, or otherwise engaging in economic transactions with the named organization.\(^ {41}\) Consequently, designation is said to stigmatize and isolate the entity, acting as \textit{de facto} economic sanctions.\(^ {42}\)

D. Removal from the FTO List

There are several ways an entity may be removed from the FTO List. First, removal may be granted by an Act of Congress or at the discretion of the Secretary of State.\(^ {44}\)

\(^{35}\) CRS REPORT, supra note 6, at 2.
\(^{36}\) Id. at 3.
\(^{37}\) Id.
\(^{40}\) Id.
\(^{41}\) Id.
\(^{42}\) Id.
\(^{43}\) CRS REPORT, supra note 6, at 2-3.
\(^{44}\) 8 U.S.C. § 1189(a)(4). Prior to the Intelligence Reform and Terrorism Prevention Act of 2004 designations were effective for two years at which time the Secretary could choose to re-designate an organization or allow designation to
Second, an organization may request judicial review “within thirty days of publication in the Federal Register of a designation, an amended designation, or a determination in response to a petition for revocation.” The request must be made to the United States Court of Appeals for the District of Columbia Circuit. The scope of judicial review is limited to unclassified material in the administrative record, but the government may also “submit, for ex parte and in camera review, classified information.” The court may only overturn a designation that was (A) “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law”; (B) “contrary to constitutional right, power, privilege or immunity”; (C) in “excess of statutory jurisdiction, authority or limitation or short of statutory right”; (D) “lacking substantial support in the administrative record as a whole”; or (E) not made “in accord with the procedures required by law.”

Third, two years after the initial designation, an organization may file a petition with the State Department requesting removal. The Secretary must review this request and respond within 180 days. A successful petition requires the organization to demonstrate the circumstances of designation are “sufficiently different”—i.e., the organization no longer engages in terrorist activities. If the petition is rejected, the entity must wait two years before re-filing.

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46 Id.
47 8 U.S.C. § 1189(b)(2); see also BLACK’S LAW DICTIONARY 1324 (9th ed. 2009) (defining ex parte review as a proceeding conducted without both parties to the suit being present; and defining an in camera review as a proceeding where the Judge assesses confidential, sensitive, or private information outside the public’s purview in order to determine what, if any, information may be used by a party to the suit or made public).
49 8 U.S.C. § 1189(a)(4)(B)(i). Notably, this procedure was not in the original legislation, but was added by the 2004 Amendment. IRTPA, n. 9 § 7119(a)(2).
51 See supra Part II.B.
five years pass without review, the State Department must initiate its own review of the organization’s status and determine whether continued designation is justified.\(^{54}\)

E. History of the FTO List

In October 1997, the State Department released the first FTO List.\(^{55}\) Thirty entities were designated.\(^{56}\) In October 1999, the first review occurred.\(^{57}\) Twenty-seven of the original groups were re-designated, three designations lapsed, and one entity was added.\(^{58}\) Two years later, in the wake of 9/11, the total number of designated organizations grew significantly.\(^{59}\) At the time this comment was published, fifty-seven groups were listed as FTOs and nine previously designated organizations have been de-listed.\(^{60}\)

II. THE CONSTITUTION, PROCEDURAL DUE PROCESS, AND 8 U.S.C. § 1189

A. The Scope of Constitutional Protection

Prior to appearing before a federal court, a plaintiff must demonstrate Article III standing.\(^{61}\) Standing “focuses on the party


\(^{55}\) CRS REPORT, supra note 6, at 6 (noting that the first designations took place about “eighteen months after the passage of AEDPA”).

\(^{56}\) Id.

\(^{57}\) Because the first review occurred before the 2004 amendment, the Secretary was statutorily required to review designations every two years. See IRTPA, at § 7119.

\(^{58}\) CRS REPORT, supra note 6, at 6 (noting the group added in 1999 was al-Qaeda because of its involvement in the August 1998 bombings of the U.S. embassies in Nairobi, Kenya, and Darr Es Salaam, Tanzania).


\(^{60}\) Id.

\(^{61}\) State of Mich. v. U.S., 994 F.2d 1197, 1204 (6th Cir. 1993) (stating that “[s]tanding, which comes from Article III’s requirement that federal courts determine only those issues that arise in a ‘case or controversy,’ is a threshold requirement to any suit); see also U.S. CONST. Art. III, § 2 (stating, “The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which
seeking to get his complaint before federal court and not on issues he wishes to have adjudicated.”\textsuperscript{62} The elements of standing are: (1) injury in fact, (2) a causal connection between the injury and the conduct complained of, and (3) that the injury is likely redressed by a favorable decision.\textsuperscript{63} When an entity challenges its designation as an FTO, the repercussions of designation satisfy the first and second element of constitutional standing,\textsuperscript{64} and the legislation’s removal provision satisfies the third element.\textsuperscript{65}

However, because Section 1189 only applies to foreign terrorist organizations, the entity must demonstrate a fourth element—that it has “come within the territory of the United States and develop[ed] substantial connections with this country.”\textsuperscript{66} Although the U.S. Supreme Court has not clarified how “substantial” connections must be to merit protection,\textsuperscript{67} the Court extends constitutional standing to any alien that voluntarily and “lawfully enters and resides in this country.”\textsuperscript{68}

\section*{B. Qualifying Entities and Procedural Due Process}

Once the foreign organization proves constitutional standing,\textsuperscript{69} it may challenge its designation on Fifth Amendment due process grounds.\textsuperscript{70} The Fifth Amendment does not, however, have

\begin{itemize}
  \item \textit{shall be made, under their Authority;}—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects”).
  \item \textsuperscript{62} Flast v. Cohen, 392 U.S. 83, 99 (1968).
  \item \textsuperscript{63} Lujan v. Defendents of Wildlife, 504 U.S. 555 (1992).
  \item \textsuperscript{64} \textit{See supra} Part I.C.
  \item \textsuperscript{65} \textit{See supra} Part I.D.
  \item \textsuperscript{67} Nat’l Council of Resistance of Iran v. Dep’t of State, 251 F.3d 192, 202 (D.C. Cir. 2001) [hereinafter “PMOI II”].
  \item \textsuperscript{68} Bridges v. Wixon, 326 U.S. 135, 161 (1945).
  \item \textsuperscript{69} \textit{See supra} Part III.A.1.
  \item \textsuperscript{70} The Due Process Clause of the Fifth Amendment states, “No person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S.
fixed technical requirements; its standards vary depending on particular situations and circumstances.\textsuperscript{71}

In its most basic form, procedural due process mandates \textit{some} notice of the impending deprivation and \textit{some} form of a hearing.\textsuperscript{72} When the notice and hearing must occur depends on the private interest affected, the risk of erroneous deprivation, the value of additional safeguards, and the government interest at stake.\textsuperscript{73} Also, the type of notice and hearing depends on (1) if the notice was “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections”;\textsuperscript{74} and (2) if the hearing was “appropriate to the nature of the case” and “minimizes substantively unfair or mistaken deprivations.”\textsuperscript{75} Additionally, where due process and national security concerns conflict, the U.S. government is allowed wider latitude to act “because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot

\textsuperscript{71} Verduugo-Uriqueidez, 494 U.S. at 270 (Kennedy, J., concurring) (citing Reid v. Covert, 354 U.S. 1, 75 (1957) (explaining that “the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”)).

\textsuperscript{72} Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). The Supreme Court originally created the Matthews test to determine the requirements of due process. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976). However, recently, the Court uses the Mullane test instead of Mathews to examine the sufficiency of notice. See, e.g., Jones v. Flowers, 547 U.S. 220, 223 (2006); Dusenbery v. United States, 534 U.S. 161, 161-162 (2002) (stating, “the straightforward reasonableness under the circumstances test of Mullane, not the balancing test approach of Mathews, supplies the appropriate analytical framework for the due process analysis.”).

\textsuperscript{73} Matthews, 424 U.S. at 335.

\textsuperscript{74} Mullane, 339 U.S. at 313.

be swiftly presented to, evaluated by, and acted upon by the legislature . . . .'”

C. Section 1189 and the Due Process Debate

Section 1189 is facially constitutional because the legislation requires the Secretary of State to provide designated organizations some notice of designation and some opportunity for judicial review." Critics argue, however, that the legislatively prescribed notice and hearing provisions are insufficient and inappropriate. Specifically, a foreign organization is unlikely to actually receive notice of the “pendency of the action,” and Section 1189 only requires constructive notice—i.e., notice through publication in the Federal Register. Moreover, the post-deprivation hearing fails to provide putative organizations with a “meaningful opportunity to be heard” because the U.S. government is not required to disclose all evidence contained in the administrative record. Critics also question the sincerity of the judiciary’s review, citing the court’s weariness to second-guess the Executive branch in matters of foreign policy and national security.

This comment rebuts these assertions and demonstrates how the FTO designation procedures comport with public policy and practical due process considerations. In this manner, Section 1189 represents an effective balancing of national security interests and core foundational liberties.

77. 8 U.S.C. § 1189.
78. A Double Due Process Denial, supra note 9, at 167-172.
79. Id.
80. Id. (noting that the Secretary may rely on confidential evidence that does not have to be disclosed to putative organizations in the administrative record).
81. See, e.g., PMOI II, 251 F.3d at 208-209; People’s Mojahedin Org. of Iran v. State Dept’, 613 F.3d 220, 229 (D.C. Cir. 2010) [hereinafter “PMOI V”]; In re People’s Mojahedin Org. of Iran, 680 F.3d 832, 837 (D.C. Cir. 2012) [hereinafter “PMOI VI”].
III. SECTION 1189, PROCEDURAL DUE PROCESS, AND THE CASE OF THE PEOPLE’S MOJAHEDIN ORGANIZATION OF IRAN

One organization—the People’s Mojahedin Organization of Iran (PMOI)—has challenged its FTO designation on six different occasions, most recently in May 2012. The PMOI cases provide insight into how courts review a designated organization’s challenge, and how Section 1189 satisfies contemporary procedural due process requirements.

A. A Short History of the PMOI

The PMOI (also known as the Mujahedeen-e-Khalq (MEK)) is a Marxist-Islamic organization that was founded in 1963 in order to overthrow the Shah of Iran and his Western-backed allies. At its inception, the PMOI possessed a militant wing (the National Liberation Army (NLA)) and a political front (the National Council of Resistance of Iran (NCRI)).

In the 1970s, the PMOI began an active, worldwide campaign of propaganda and terror, claiming responsibility for bombing the U.S. Information Service office in Iran (part of the U.S. Embassy), the Iran-American Society, and the offices of several U.S. companies. According to the U.S. government, the PMOI also played an important role in the 1979 takeover of the U.S. Embassy in Tehran.

In 1981, displeased with the new Islamic regime implemented after the Shah’s fall, the PMOI began to attack Iranian security forces.


83 Id.

84 Id. (noting that the PMOI was also held answerable for the assassination of U.S. military personnel and civilians working in the region, notably the deputy chief of the U.S. Military Mission in Tehran, members of the U.S. Military Assistance Advisory Group, and an American Texaco executive).

85 COUNTRY REPORTS, supra note 78.
forces. The Iranian government responded harshly, executing the organization’s original leadership and forcing the remaining known members to flee to France.

In 1986, France expelled the PMOI in an attempt to improve relations with Iran. The organization relocated to Iraq, where it found an ally in Saddam Hussein. Hussein provided the PMOI with military bases and financial support. In return, the PMOI supported Baghdad in the Iran-Iraq War and the bloody crackdown on Iraqi Shia and Kurds that rose up against Hussein’s regime.

With Hussein’s blessing, the PMOI continued its campaign of terror against the Iranian regime. In 1992, the PMOI attacked Iranian embassies and consular missions in thirteen different countries; including the Iranian mission at the United Nations in New York. In 1997, in response to the PMOI’s history of terror and violence, the U.S. State Department designated the organization as an FTO in the first FTO List.

In 2003, the U.S. invaded Iraq and overthrew Saddam Hussein’s regime. Without Hussein, the PMOI lost its financial and military support. In short order, the PMOI negotiated a cease-fire and surrendered its heavy arms to coalition forces.

As of 2011, the U.S. State Department estimates global PMOI membership of between 5,000 and 13,500 persons scattered throughout Europe, North America, and Iraq. The State

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86 Id. (noting that “the [PMOI] instigated a bombing campaign, including an attack against the head office of the Islamic Republic Party and the Prime Minister’s office, which killed some 70 high-ranking Iranian officials”).
87 Id.
89 COUNTRY REPORTS, supra note 78.
90 Id.
91 Id.
92 Id.
93 COUNTRY REPORTS, supra note 78.
94 Id.
95 Id.
96 Id.
Department also officially recognizes that most of the PMOI’s current efforts are political in nature—citing the entity’s “well-developed media communications strategy” and “active lobbying and propaganda efforts.”

B. The First Challenge: PMOI I

In 1997, the PMOI filed the first request for judicial review of its designation as an FTO. In the complaint, the PMOI urged the D.C. Circuit to assess the administrative record and decide whether sufficient evidence existed to demonstrate that the PMOI engaged in “terrorist activities that threatened the national security of the United States.”

After reviewing the PMOI’s complaint, the court held the administrative record contained sufficient evidence the PMOI was a foreign organization that “engaged in bombing[s] and killing[s] in order to further their political agenda.” Moreover, the court did not find the presence of any actionable rights violation because the PMOI lacked constitutional standing, and because the unique procedures provided by AEDPA did not require an adversarial hearing, general agency presentation of evidence, or advanced notice provided to the entity.

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97 COUNTRY REPORTS, supra note 78.
98 People’s Mojahedin Org. of Iran v. U.S. Dep’t of State, 182 F.3d 17, 19 (D.C. Cir. 1999) [hereinafter “PMOI I”] (noting that, the PMOI’s designation was considered alongside the Liberation Tigers of Tamil Elam because “the separate petitions involved the same statute and similar claims”).
99 Id.; see also supra Part II.D.
100 The court noted that AEDPA limits the scope of its review to evaluating whether the designation was arbitrary or capricious, contrary to a constitutional right, in excess of authority, lacked support in the administrative record, or violated procedures. See PMOI I, 182 F.3d at 22; see also 8 U.S.C. § 1189(b)(3); supra Part III.B.1.
101 PMOI I, 182 F.3d at 25.
102 PMOI I, 182 F.3d at 22 (noting that similar to a foreign nation opposing “an embargo on it for the purpose of coercing a change in policy” the PMOI may not claim a constitutional right to due process).
103 PMOI I, 182 F.3d at 25.
C. Satisfaction of Constitutional Standing: PMOI II

In 2001, two years after the court decided PMOI I, the PMOI again requested that the D.C. Circuit review its FTO designation. This time, the court determined that the PMOI passed constitutional muster because its “alter-ego,” the NCRI, owned a U.S. bank account and had “an overt presence within the National Press Building in Washington D.C.”

Having demonstrated constitutional standing, the court found the PMOI had an actionable due process claim because FTO designation stigmatized the PMOI, limited the mobility of PMOI members already in the U.S., and restricted PMOI access to its U.S. bank accounts. The Fifth Amendment therefore required the Secretary of State to provide the PMOI pre-designation notice, access to any “unclassified items upon which [the Secretary] proposes to rely,” and an opportunity “to present, at least in written form, such evidence . . . to rebut the administrative record or otherwise negate the proposition that they are foreign terrorist organizations.”

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104 See supra Part II.D.
105 PMOI II, 251 F.3d at 195-196.
106 Id. (refusing to assess how “substantial” a connection there must be in order to merit protection, but stating that the PMOI satisfies this requirement.).
107 Id. at 201 (reaching this conclusion despite the PMOI and NCRI’s insistence that the two are separate entities).
108 Id. at 204, (citing Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (finding that stigmatization in a community without process is a deprivation of one’s liberty)).
109 PMOI II, 251 F.3d at 204 (finding that if such individuals left the country, they would be denied readmission).
110 Id.
111 Id. at 206 (citing Matthews, 424 U.S. at 334-335 (holding that prior to a deprivation, due process requires the government to weigh: the private interest affected by the official action; the risk of “erroneous deprivation of such interest . . . and the probable value . . . of additional or substitute procedural safeguards”; and “the government’s interest, including the function and fiscal and administrative burdens that the additional or substitute procedural requirement would entail”)).
112 Id.
Consequently, the court concluded that the PMOI’s due process rights were violated because the government failed to provide the PMOI with (1) an opportunity to file evidence that rebutted the non-classified evidence, and (2) a meaningful opportunity to be heard by the Secretary upon the relevant findings.\footnote{Id.} The court, however, refused to vacate the PMOI’s designation due to U.S. foreign policy and national security concerns.\footnote{PMOI II, 251 F.3d at 208.} The court instead remanded the complaint and instructed the Secretary to follow the procedures outlined herein.\footnote{Id.} The Secretary complied with the order, and in 2001 re-designated the PMOI as an FTO.\footnote{See Re-designation of Foreign Terrorist Organizations, 66 Fed. Reg. 51,088 (Oct. 5, 2001) (re-designating PMOI and its aliases as FTOs).}

D. The Use of Classified Information: PMOI III

On January 17, 2003, the D.C. Circuit again entertained the PMOI’s request for judicial review.\footnote{People’s Mojahedin Org. of Iran v. Dep’t of State, 327 F.3d 1238 (D.C. Cir. 2003) [hereinafter “PMOI III”].} This time, the PMOI argued the Secretary of State’s reliance on “secret evidence”—i.e., “the classified information that the respondents refused to disclose and against which PMOI could therefore not effectively defend”—violated its due process rights.\footnote{Id. at 1242.} In support of its position, the PMOI cited D.C. Circuit precedent that held “a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions.”\footnote{Id. \textit{(d)}iscussing \textit{Abourzek v. Reagan}, 785 F.2d 1043, 1060-1061 (D.C. Cir. 1986) (emphasizing that “judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts” and it is therefore a “firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions” except “in the most extraordinary circumstances”).} The court acknowledged the persuasiveness of the PMOI’s argument, but denied the PMOI’s appeal because holding otherwise would violate constitutional separation of powers.\footnote{Id. at 1243.} The court
explained that “the Executive Branch has control and responsibility over access to classified information and [a] compelling interest in withholding national security information from unauthorized persons in the course of executive business.” The court also emphasized that courts are “often ill-suited to determine the sensitivity of classified information.”

E. We’re Different Entities: PMOI IV

On April 2, 2004, the PMOI, through the NRCI, again requested judicial review of its designation. This petition contended the PMOI and NRCI were separate entities, which made simultaneous designation improper. The court disagreed, citing substantial evidence on the record that the NCRI was “dominated and controlled by” the PMOI.

F. A Winning Argument: PMOI V

On July 15, 2008, the PMOI again requested the Secretary of State review its FTO designation, citing a fundamental change in circumstances. The request emphasized that since its designation as an FTO in 1997, the PMOI had: (1) ended its military campaign against the Iranian Regime; (2) renounced violence; (3) handed over arms to U.S. forces in Iraq; (4) cooperated with U.S. officials at Camp Ashraf and obtained “protected person” status for all PMOI

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121 PMOI III, 327 F.3d at 1242.
122 Id. (explaining that the role of the court is to determine “that process which is due under the circumstances of the case”) (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (explaining that “due process is flexible and calls for such procedural protections as the particular situation demands”)); see also United States v. Yunis, 867 F.2d 617, 623 (D.C. Cir. 1989) (explaining that “[t]hings that did not make sense to [a judge] would make all too much sense to a foreign counter intelligence specialist . . .”).
123 Nat’l Council of Resistance of Iran v. Dep’t of State, 373 F.3d 152 (D.C. Cir. 2004) [hereinafter “PMOI IV”].
124 Id. at 157.
125 Id. at 159.
members under the Fourth Geneva Convention; (5) shared intelligence with the U.S. government regarding Iran’s nuclear program; and (6) been de-listed as a terrorist organization by the United Kingdom and European Union.127

On January 12, 2009, the Secretary dismissed the PMOI’s appeal without explanation, and re-listed the PMOI as an FTO the following day.128 The PMOI then filed an appeal in the D.C. Circuit.129

Citing the PMOI’s petition to the Secretary and the alleged change of circumstances, the court held that the U.S. government violated the PMOI’s due process rights130 because the Secretary’s notice failed to (1) specify the unclassified material “on which the Secretary proposes to rely” and (2) allow the PMOI an opportunity for rebuttal prior to re-designation.131 The court again hesitated to vacate the PMOI’s designation because of the realities of U.S. foreign policy and national security.132 The court, therefore, remanded the decision and allowed the Secretary 180 days to amend the administrative record and provide the PMOI with an opportunity to respond.133

G. The Government’s Failure to Respond: PMOI VI

The Secretary of State failed to comply with the court’s order.134 Consequently, two years later, on May 8, 2012, the PMOI

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127 PMOI V, 613 F.3d at 225.
128 PMOI V, 613 F.3d at 220; see also Review of Designation, supra note 124.
129 PMOI V, 613 F.3d at 226.
130 Id. at 228; see also supra note 123 (listing the alleged changed circumstances).
131 Id. at 227-228.
132 Id. at 229.
133 Id. at 232 (Henderson, J., concurring) (emphasizing that the Secretary needs not disclose any confidential information and the Secretary appears to recognize the ambiguity of the record by “recommending a sua sponte reexamination of the PMOI’s status in two years”).
134 PMOI VI, 680 F.3d at 834 (citing PMOI III, 613 F.3d at 225).
petitioned the court to issue a writ of mandamus that ordered “the delisting of the PMOI or, alternatively, required the Secretary to make a decision on the PMOI’s petition.”

In support of its petition the PMOI offered the following evidence. In September 2010, two months after the court remanded the case, the U.S. government provided the PMOI all unclassified material contained in the administrative record and indicated that the State Department would follow up with additional materially relevant information. In October, the Department of Justice notified the PMOI that the State Department was still updating the record but had nothing more to add at that time. The Department of Justice also requested that the PMOI respond to the September 2010 material by December 29, 2010, which the PMOI did. In April 2011, counsel for the PMOI met with officials from the Department of Justice and the State Department and submitted further information in support of its cause. In May 2011, the government added ten documents to the record, and the PMOI responded to each. On August 4, 2011, the Department of Justice informed the PMOI that the declassifying process was complete and that the State Department was working “as quickly as possible on their review of the designation.” On September 27, 2011, two more documents were added to the record, which the PMOI cited as duplicative.

After this request, the Department of Justice did not ask the PMOI

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135 A writ of mandamus requires that the requesting entity prove that the Secretary had a duty to act and unreasonably delayed in acting. PMOI V, 613 F.3d at 226.

136 PMOI VI, 680 F.3d at 834 (citing PMOI III, 613 F.3d at 225).

137 PMOI VI, 680 F.3d at 835.

138 Id. at 836.

139 Id.

140 Id. (describing that the “allegedly deteriorating conditions at Camp Ashraf and letters and affidavits in support [of its petition were] written by American and Foreign leaders”).

141 PMOI VI, 680 F.3d at 836.

142 Id.

143 Id.
for any additional information, nor did the Secretary take any final action on the PMOI’s petition.\textsuperscript{144}

The court found these facts demonstrated that the Secretary egregiously delayed in responding to the PMOI’s petition.\textsuperscript{145} Noting the breach of a Congressional timetable “does not, alone, justify judicial intervention,”\textsuperscript{146} the court held the Secretary’s twenty-month failure to act “plainly frustrates the congressional intent and cuts strongly in favor of granting PMOI’s mandamus petition.”\textsuperscript{147}

The government responded by arguing that the “demands placed upon the Secretary” should allow for greater flexibility.\textsuperscript{148} The court found this unpersuasive, explaining, “Congress undoubtedly knew of these demand[s]” and chose to limit the Secretary’s response time to 180 days.\textsuperscript{149} Moreover, if the court upheld the Secretary’s actions, it would effectively nullify the court order and insulate the agency from review “by making it impossible for the petitioners to ‘mount a challenge to the rules.’”\textsuperscript{150}

Despite strongly condemning the government’s actions the court denied the writ and remanded the decision to the State Department, citing U.S. foreign policy and national security concerns.\textsuperscript{151} The court’s order warned the Secretary that any failure to comply with this 180-day deadline would result in the issuance of a writ of mandamus that sets aside the PMOI’s designation.\textsuperscript{152}

\textsuperscript{144} PMOI VI, 680 F.3d at 837.
\textsuperscript{145} Id.
\textsuperscript{146} Id. (citing In re Barr Labs., Inc., 930 F.2d 72, 75 (D.C. Cir. 1991)).
\textsuperscript{147} Id. at 837.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} PMOI VI, 680 F.3d at 838 (citing In re Core Communications, Inc., 455 F.3d 267 (D.C. Cir. 2006) (invalidating the Federal Communications Commission’s inter-carry compensation rules after finding six years passed without the agency adhering to a court order)). In this case the court noted that the Secretary’s inability to provide a decision within the last 600 days exemplifies the nullification of the court’s decision and deprivation of an organization’s right to judicial review under AEDPA. PMOI IV, 190 F.3d at 837.
\textsuperscript{151} PMOI VI, 680 F.3d at 836.
\textsuperscript{152} Id.
H. De-Listing the PMOI

On September 28, 2012, three days before the court’s deadline, the U.S. Department of State, Office of the Spokesperson, issued a media note stating that, effective immediately, the PMOI was delisted as an FTO under Executive Order 13224.153 Pursuant to this order, the organization’s property was no longer blocked, and U.S. entities could “engage in transactions with the [PMOI] without obtaining a license.”154

The Secretary explained the decision by citing the PMOI’s “public renunciation of violence, absence of confirmed acts of terrorism for more than a decade, and their cooperation in the peaceful closure of Camp Ashraf, their historic paramilitary base,”155 as evidence of changed circumstances.156 The release also noted that the State Department continued to have “serious concerns about the [PMOI] as an organization,” and the Secretary of State’s decision did not overlook the PMOI’s past—specifically, the organization’s “involvement in the killing of U.S. citizens in Iran in the 1970s and an attack on U.S. soil in 1992.”157

IV. SECTION 1189 AND DUE PROCESS IN LIGHT OF THE PMOI CASES

There are three primary considerations when reviewing the constitutionality of Section 1189 in light of due process requirements. First, due process is not a fixed technical concept—requirements vary depending on particular situations and circumstances.158 Second, where an organization demonstrates constitutional standing, the

154 Id.
155 Id. Regarding Camp Ashraf, the press release also specifically noted that the U.S. “has consistently maintained a humanitarian interest in seeking the safe, secure, and humane resolution of the situation at Camp Ashraf, as well as in supporting the United Nations-led efforts to relocate eligible former Ashraf residents outside of Iraq.” Id.
156 Id.
157 Id. For a review of the holdings discussed, see infra Appendix.
158 See supra Part III.B.
entity automatically possesses an actionable due process claim because of the stigma that attaches to designation constitutes a legally cognizable injury. Third, where due process rights and national security interests overlap, courts permit the U.S. government wider latitude in its actions. With these considerations in mind, the remainder of this comment analyzes the PMOI cases in light of the Fifth Amendment’s procedural due process clause.

A. Due Process and Section 1189: The Notice Requirement

Procedural due process requires that affected parties be given notice “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” In other words, the notice must inform the recipient what is being proposed, and what must be done to prevent the deprivation of rights. Post-deprivation notice is only permissible where pre-deprivation notice is impractical or impossible, and post-deprivation remedies exist.

In the initial designation of an FTO, the U.S. government provides notice of designation when the entity is “listed” in the Federal Register. This post-deprivation notice informs the putative organization of its designation and cites to Section 1189, which outlines the proper methods of appeal. Requiring pre-deprivation notice would plainly frustrate the purpose of Section 1189 because it would inform putative organizations that the U.S. is investigating its clandestine activities. The organization would then (1) tighten up its network—which negatively impacts the ability of the U.S. to gather

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159 See PMOI II, 251 F. 3d at 204, (citing Constantineau, 400 U.S. at 436 (holding that stigmatization in a community without process is a deprivation of one’s liberty)).
160 See id.
161 Mullane, 339 U.S. at 314.
165 See, e.g., Review of Designation, supra note 124.
information on the organization—and (2) withdraw all funds from U.S. controlled banks.\textsuperscript{166}

Alternatively, when re-designating an FTO, the Fifth Amendment’s burdens adjust. Here, the U.S. government must provide putative organizations with pre-deprivation notice and access to all unclassified material on the record.\textsuperscript{167} Post-deprivation hearings are not permissible because national security and public policy concerns are diminished; the organization has already been notified of its designation, and its assets are already frozen.

By applying a heightened standard for re-designated organizations satisfying constitutional muster, the FTO designation process properly conforms to the “what” and “when” notice requirements of procedural due process.\textsuperscript{168} In fact, the Act’s adaptability to particular situations and circumstances underscores why due process is an adaptable concept.\textsuperscript{169}

B. Due Process and Section 1189: The Hearing Requirement

The essence of the hearing requirement is to ensure that designated entities are given a meaningful opportunity to “be heard in [its] defense.”\textsuperscript{170} In order to satisfy this requirement, the hearing must be commensurate with the interest affected, taking into account the State’s administrative needs.\textsuperscript{171}

In PMOI II, the court properly used the test developed by the Supreme Court in Matthews v. Eldridge\textsuperscript{172} to determine whether due

\textsuperscript{166} See supra Part I.C. (discussing the purpose and consequences of designation).

\textsuperscript{167} See id. (discussing PMOI II, 251 F.3d at 205).

\textsuperscript{168} See supra Part IV.B.

\textsuperscript{169} Verdugo-Urquidez, 494 U.S. at 271 (Kennedy, J., concurring) (citing Reid v. Covert, 354 U.S. 1, 75 (1957) (explaining that “the question of which specific safeguards . . . are appropriate to be applied in a particular context . . . can be reduced to the issue of what process is ‘due’ a defendant in the particular circumstances of a particular case.”)).


\textsuperscript{171} Matthews, 424 U.S. at 349.

\textsuperscript{172} While Mullane’s reasonableness standard could address all of these concerns, the court in PMOI II applied the Matthews test. PMOI II, 251 F.3d at
process is satisfied when a putative organization is given a post-deprivation hearing “in written form.” The Matthews test balances (1) the private interest affected by the government’s action, (2) the risk of erroneous deprivation of that interest by the procedures employed by the government as well as the probable value of any additional procedural safeguards, and (3) the government’s interests, including the administrative burden of any additional procedural requirements. The weighing of these interests indicates that procedural due process does not require the government to give putative organization more than a post-deprivation hearing in written form.

1. The private interest

Putative organizations always have at least two significant liberty interests at stake. The organization has an interest in the stigma that attaches to designation, and in the right of members to travel or make contributions to its cause. However, in addition to assessing the private interest at stake, Matthews also instructs courts to consider (1) “the possible length of wrongful deprivation of . . . benefits" and (2) “the degree of potential deprivation that may be created by a particular decision.”

208; see also supra note 69. Further, the Matthews test is arguably better suited to determine the specific factors that should be examined in conducting this particular type of due process analysis. PMOI II, 251 F.3d at 208; see also Broxmeyer, supra note 9, at 464-65.

173 PMOI II, 251 F.3d at 208.
174 Matthews, 424 U.S. at 335.
176 See PMOI II, 251 F. 3d at 204, (citing Constantineau, 400 U.S. at 436 (holding that stigmatization in a community without process is a deprivation of one’s liberty)).
177 See PMOI II, 251 F. 3d at 208.
178 See supra Part IV.C; cf. Dixon v. Love, 431 U.S. 113, 113-14 (holding that a “driver’s license may not be so vital and essential” as to be considered “significant”).
179 Id. (citing Fusari v. Steinberg, 419 U.S. 379, 389 (1975).
180 Matthews, 424 U.S. at 341.
An FTO’s deprivation lasts a minimum of two years and a maximum of five. The degree of deprivation also varies from case to case, depending on the putative organization’s presence and membership in the U.S. Consequently, while the liberty interests at stake might first appear to favor providing more than a post-deprivation hearing “in written form,” further exploration demonstrates that this factor fails to provide a stable guide for the type of hearing required or when the hearing should take place.

2. The risk of erroneous deprivation

“Procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases.” In this manner, the “risk of erroneous deprivation” factor focuses on the “fairness and reliability” of the procedure.

Critics may point to PMOI VI as evidence that the FTO designation process carries a high risk of erroneous deprivation. That argument, however, ignores the PMOI’s long history of violence and terror. During the 1970’s the PMOI bombed U.S. targets in Iran and assisted in the takeover of the U.S. Embassy in Tehran. Further, when the PMOI was first designated as an FTO in 1997, the organization was only five years removed from a terrorist attack on U.S. soil. Finally, the PMOI supported Saddam Hussein in bloody crackdowns on Iraqi Shia and Kurds, and only reformed after Saddam Hussein’s fall in 2003.

Meanwhile, the U.S. government expends a great deal of resources and effort to ensure that C/ST, with the support of the intelligence community and the Department of State, properly identifies organizations that are foreign, engage in terrorist activities, and threaten American national security.

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181 See 8 U.S.C. § 1189(a)(4)(C) (explaining that the State Department must review designations every five years).
182 Matthews, 424 U.S. at 344.
183 Id.
184 See supra Part IV.A.
185 Id.
186 Id.
procedural safeguards that permit the review of a designated organization’s status every two years, and require review every five.\textsuperscript{188} Erroneous deprivations are atypical and highly unlikely because the designation of an entity as an FTO follows carefully prescribed procedures and is neither random nor arbitrary.

3. \textit{The government interest}

The last \textit{Matthews} factor assesses the government’s interest, including the fiscal and administrative burden of any additional procedural requirements.\textsuperscript{189}

Trial type hearings are a massive expenditure both in terms of time and resources. A Congressional Service Report on the FTO List suggests that, “[i]t is a significant bureaucratic burden to ensure that the designations are appropriately reviewed, investigated, the administrative records updated, the appropriate agencies consulted, and the public statement of renewal made every two years after the initial designation.”\textsuperscript{190} Moreover, the number of designated organizations has almost doubled since 1997, and continues to grow.\textsuperscript{191}

The nature of foreign affairs and the purpose of this legislation also favor construing due process requirements in a manner that grants deference to the “changeable and explosive nature of contemporary international relations.”\textsuperscript{192} In other words, the executive branch should be given a “brush broader than that it customarily wields in domestic areas.”\textsuperscript{193} This ensures that the U.S. government is not bogged down in administrative procedures when it must react quickly to developments abroad.

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\item \textsuperscript{188} 8 U.S.C. § 1189(a)(4)(C).
\item \textsuperscript{189} Matthews, 424 U.S. at 344.
\item \textsuperscript{190} AUDREY KURTH CRONIN, \textit{CONG. RESEARCH SERV.}, RL32120, \textit{THE \textquotedblleft FTO LIST\textquotedblright \ AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 10 (2003)}.
\item \textsuperscript{191} CRS REPORT, \textit{supra} note 6, at 6.
\item \textsuperscript{192} \textit{See supra} Part II.B (citing Zemel, 381 U.S. at 17, 85).
\item \textsuperscript{193} Zemel, 381 U.S. at 17, 85).
\end{enumerate}
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4. What kind of hearing is appropriate and when should it occur?

In light of the small risk of erroneous deprivation and the onerous burden of oral hearings (and because private interests may vary substantially), the court in PMOI II was correct to suggest that FTO designations satisfy the requirements of procedural due process when putative organizations are given a post-deprivation hearing “in written form.”

The U.S. government has a considerable interest in fighting terrorism. Similar to requiring pre-deprivation notice, requiring a pre-deprivation hearing would allow an organization to withdraw its funds and supporters from the U.S. This would frustrate the purpose and effectiveness of the legislation. Moreover, the procedures described herein provide designated organizations with the opportunity to be heard “at a meaningful time and in a meaningful manner.”

C. Does the Use of Undisclosed Classified Information Raise Any Due Process Concerns?

Closely related to the hearing requirement is the right of a party to be confronted with the evidence against it. Critics argue that the government’s reliance on ex parte and in camera submissions impermissibly deprives organizations of due process. While there is certainly some precedent and credence to this argument, the importance of national security overrides any limited benefits of disclosure.

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194 PMOI II, 251 F.3d at 208.
195 See AEDPA, Pub. L. No. 104-132 (stating that deterring terrorism is the purpose of the law); see also supra note 2.
196 See supra Part IV.A.
197 AEDPA at § 301(b).
198 Id. at 1242.
199 Reagan, 785 F.2d at 1061.
200 See PMOI III, 327 F.3d at 1243 (emphasizing that “judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts” and it is therefore a “firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions” except “in the most extraordinary circumstances”).
In *PMOI III*, the court emphasized the importance of allowing the Executive to control access to classified information, and that courts are “ill-suited to determine the sensitivity of classified information.”\(^{201}\) Perhaps more persuasive is the fact that the organizations requesting access to classified materials are the very organizations the U.S. government believes to be engaging in operations adverse to U.S. interests. Requiring the disclosure of classified information is akin to asking the U.S. to hand over its secrets to the “enemy.” Not only would such a requirement frustrate the purposes of the law, but it would also jeopardize national security. Because of these considerations, the Supreme Court properly recognizes that “confidentiality is essential to the effective operation of our foreign intelligence services,”\(^{202}\) and the government must be able to “tender as absolute an assurance of confidentiality as it can.”\(^{203}\)

While it is easy to consider the unfortunate organization that is wrongfully designated, every organization listed as an FTO has raised a legitimate flag in the eyes of the U.S. government. A wrongfully designated organization should be able to demonstrate its innocence without access to classified information, as exemplified by the PMOI.\(^{204}\)

**CONCLUSION**

Foreign terrorist organizations pose a real and constantly evolving threat to U.S. national security. The AEDPA tempers that threat by allowing the U.S. government to bring “legal clarity to efforts to identify and prosecute members of terrorist organizations and those who support them.”\(^{205}\) At the same time, the U.S. must not lose sight of foundational principles upon which it was established. As Justice Hand noted, “[j]ustice is the tolerable accommodation of

\(^{201}\) *PMOI III*, 327 F.3d at 1242; *see also* Yunis, 867 F.2d at 623 (explaining that “[t]hings that did not make sense to [a judge] would make all too much sense to a foreign counter intelligence specialist. . . .”).

\(^{202}\) *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980).


\(^{204}\) *See supra* Part IV.F.

\(^{205}\) *CRS REPORT*, *supra* note 6, at 7.
the conflicting interests of society.”\textsuperscript{206} The government must walk a fine line between protecting the rights of its citizens and protecting their safety.

While there may have been initial due process concerns raised by the enactment of Section 1189, the PMOI cases illustrate how the FTO designation processes effectively balance the government’s twin interests. If the government missteps, \textit{PMOI VI} demonstrates that the judiciary is willing to involve itself, remedy the deprivation, and reset the precarious balance between freedom and security.

\textsuperscript{206} Philip Hamburger, \textit{The Great Judge}, LIFE, Nov. 4, 1946, at 117 (quoting Judge Hand).
Appendix: A Synthesis of the PMOI Decisions

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<th>Case</th>
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<td>PMOI I</td>
<td>1999</td>
<td>Whether there is sufficient evidence demonstrating the PMOI conducts terrorist activities and threatens the security of the U.S.</td>
<td>In denying the petition for review, the court held that FTO designation procedures did not require adversarial hearings or advance notice because the PMOI lacked constitutional standing and the administrative record contained sufficient evidence.</td>
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<td>PMOI II</td>
<td>2001</td>
<td>Whether there is sufficient evidence demonstrating the PMOI conducts terrorist activities and threatens the security of the U.S.</td>
<td>In remanding the petition for review, the court found (1) the PMOI satisfied constitutional standing, (2) the U.S. government deprived the PMOI of liberty and property, and (3) the U.S. government did not provide the PMOI with adequate process. However, foreign policy and national security concerns required the court to remand the complaint and afford the Secretary of State an opportunity to remedy these violations.</td>
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<tr>
<td>PMOI III</td>
<td>2003</td>
<td>Whether the Secretary of State’s reliance on classified information violates procedural due process.</td>
<td>In denying the petition for review, the court held the Act only required disclosure of unclassified information because the executive branch has a compelling interest in controlling access to classified information and courts are ill-equipped to make such decisions.</td>
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### Appendix: A Synthesis of the PMOI Decisions (cont’d)

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<td>PMOI IV</td>
<td>2004</td>
<td>Whether the PMOI and the NCRI are separate entities, making simultaneous designation improper.</td>
<td>In denying the petition for review, the court held that substantial evidence on the record demonstrated the NCRI is controlled by the PMOI.</td>
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<tr>
<td>PMOI V</td>
<td>2009</td>
<td>Whether there is sufficient evidence demonstrating the PMOI conducts terrorist activities and threatens the security of the U.S.</td>
<td>In remanding the petition for review, the court held the Secretary of State violated the PMOI's procedural due process rights by failing to consider the PMOI's allegations of a change in circumstances prior to redesignation. However, foreign policy and national security concerns required the court to remand the petition and afford the Secretary of State an opportunity to remedy these violations.</td>
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<tr>
<td>PMOI VI</td>
<td>2012</td>
<td>Whether a writ of mandamus is an appropriate remedy.</td>
<td>In remanding the petition for review, the court condemned the Secretary for failing to respond to the PMOI's petition. However, the court again deferred to foreign policy and national security considerations and demanded the Secretary respond to the petition within 180 days or the writ would be granted.</td>
</tr>
<tr>
<td>Delisting the PMOI</td>
<td>2012</td>
<td>On September 28, 2012 the U.S. State Department delisted the PMOI as a FTO.</td>
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LEARNING FROM OUR MISTAKES: 
THE BELFAST PROJECT LITIGATION AND 
THE NEED FOR THE SUPREME COURT TO 
RECOGNIZE AN ACADEMIC PRIVILEGE IN 
THE UNITED STATES 

Kathryn L. Steffen*

INTRODUCTION

“History must not be a weapon against those trying to 
seize the opportunity of today to build a more 
promising tomorrow.”

Senator John F. Kerry

In the United States, we hail the freedom of expression and 
the right to education as cornerstones of our democracy. Under our 
belief system, academia is the oasis in an ever-changing world where 
people from various backgrounds flock to freely exchange 
information. Not only is this exchange of information intrinsically 
valuable, but it also has extrinsic worth. History is compiled through 
the shared experiences of others and becomes a guide to creating a 
better future when new generations heed the lessons of the past. However, the Supreme Court recently denied a controversial petition 
for writ of certiorari, which presented the Court with an opportunity 
to solidify and protect these ideals by recognizing a constitutional 
privilege for academic researchers.

* J.D. Candidate, The Dickinson School of Law of the Pennsylvania 
State University, 2014

1 John Kerry, Op-Ed, Irish Future Shouldn’t Get Lost in Violent Past, 
BOSTON HERALD, April 4, 2012, 
In 2001, researchers sponsored by Boston College began to compile an oral history of “The Troubles,” a decades-long period of violent political conflict in Northern Ireland. Through this oral history, titled the Belfast Project, the researchers hoped to gain insight into the thought processes of individuals who become personally engaged in violent conflict by interviewing people who took up arms during “The Troubles.” The interviewees’ participation was conditioned on a strict promise of confidentiality.

Based on its suspicion that the interviews contained evidence of criminal activity, the United Kingdom requested that the United States subpoena the controversial materials on its behalf, pursuant to a mutual legal assistance treaty. Boston College and the individual researchers involved in the Belfast Project challenged the subpoena, asserting an academic privilege that would allow them to protect confidential information from compelled disclosure. The First Circuit denied the existence of this privilege, and the lead Belfast Project researchers petitioned the Supreme Court for a writ of certiorari in November 2012. The Supreme Court denied the

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2 In re Request from the U.K., 685 F.3d 1, 4 (1st Cir. 2012); United States v. Trs. of Boston Coll., 831 F.Supp.2d 435, 440 (D. Mass. 2011), aff’d, 685 F.3d 1 (1st Cir. 2012).
3 Request from the U.K., 685 F.3d at 4; Trs. of Boston Coll., 831 F.Supp.2d at 440.
4 See Request from the U.K., 685 F.3d at 5 (explaining that interviewees were required to contract with Boston College to protect their anonymity).
5 Trs. of Boston Coll., 831 F.Supp.2d at 452.
7 Trs. of Boston Coll., 831 F.Supp.2d at 453.
8 Request from the U.K., 685 F.3d at 16.
9 Petition for Writ of Certiorari at 37, Moloney v. United States, No. 12-627 (petition for cert. denied April 15, 2013).
petition in April 2013, and the case returned to the First Circuit, which limited the amount of interview materials to be surrendered.

Anthony McIntyre, one of the lead researchers, also petitioned the High Court in Belfast to protect the interviews from compelled disclosure. The sitting judge dismissed the case upon his belief that McIntyre’s life would not be jeopardized by satisfaction of the subpoena, and McIntyre expressed his intention to appeal.

This comment argues that compelling academics to disclose confidential information significantly obstructs the free flow of information that is essential to a thriving democratic society. Through the lens of the Belfast Project controversy, this comment examines the state of an academic privilege in American jurisprudence and then advocates that the U.S. adopt the reasoning of the European Court of Human Rights when the right to freedom of expression is implicated. A license to disregard confidentiality agreements would imperil all individuals involved in high-intensity research and would threaten to tarnish the integrity of academic endeavors.

At first blush, the United States appears to be the ideal forum to champion researchers’ rights. However, considering the applicable law and the context of the Belfast Project, had certiorari been granted, the Supreme Court likely would have found against the researchers and declined to recognize an academic privilege. Instead, this issue should be more favorably litigated in the United Kingdom, where the European Convention on Human Rights applies. Finally, if

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11 The Belfast Project, Boston College, and a Sealed Subpoena, BOSTON COLLEGE SUBPOENA NEWS, http://bostoncollegesubpoena.wordpress.com/ (last visited January 8, 2013)(“The ruling reduced the amount of material to be handed over from 85 interviews (roughly half of the archive) to segments of 11 interviews.”).
12 McIntyre’s role in the Belfast Project and the subsequent litigation is explained in depth infra Part I.A.2.
14 Id. This decision was based on Article 2 of the European Convention of Human Rights, not on Article 10, the focus of this comment. At the time of writing, there has been no update given about the anticipated appeal.
the researchers are unsuccessful in both American and European courts, the comment suggests that the U.S. Secretary of State should decline to enforce the British authorities’ request because it contravene public policy.

I. THE BELFAST PROJECT

A. Purpose and Design of the Belfast Project

1. The purpose of the Belfast Project

In 2001, Boston College initiated its sponsorship of the Belfast Project, an oral history project dedicated to gathering and preserving the recollections of members of the paramilitary organizations actively engaged in both the Republican and Loyalist sides of the conflict during “The Troubles” in Northern Ireland from 1969 forward.

“The Troubles” refers to the violent conflict between the Republican Nationalists and the Loyalist Unionists that plagued Northern Ireland from 1969 until 1998, when the parties finally reached the Good Friday Agreement. The seeds of “The Troubles” were planted in 1920, when Great Britain granted home rule to Northern Ireland, releasing it from its former dependence on London. Protestant Unionists who wanted Northern Ireland to remain unified with Great Britain comprised the majority of the Northern Irish population. Contrarily, the Nationalist, mainly Catholic, minority wanted to unite Northern Ireland and the Republic of Ireland to create an all Irish state. “Republican” and

15 Trs. of Boston Coll., 831 F.Supp.2d at 440. Boston College has a continued academic interest in Irish Studies. The College was also involved in the peace process in Northern Ireland, following “The Troubles.”
16 Request from the U.K., 685 F.3d at 4 (1st Cir. 2012); Trs. of Boston Coll., 831 F.Supp.2d 435 at 440 (D. Mass. 2011), aff’d, 685 F.3d 1 (1st Cir. 2012).
18 Petition for Writ of Certiorari, supra note 9, at 26-27.
19 Bosi, supra note 17, at 355.
20 Id. at 378.
21 Id. at 355, 378.
“Loyalist” are the terms given to those sympathizers who were prepared to use political violence to further their respective causes.\(^{22}\)

Tensions erupted in 1969 when interactions between Nationalist civil rights activists, the Royal Ulster Constabulary (RUC), and the Loyalist countermovement became violent.\(^{23}\) The violence spread rapidly to Belfast, where Nationalists were a distinct minority.\(^{24}\) There, the RUC and Loyalist mobs attacked the Nationalist communities, hoping to quell an anticipated Nationalist rebellion.\(^{25}\) Considering the worsening upheaval in Northern Ireland, the British Government ended its longstanding policy of non-involvement and deployed British troops to restore order in Northern Ireland.\(^{26}\) The Republicans and Loyalists took up arms to protect their interests, characterizing the tense and violent political climate of Northern Ireland until the Good Friday Agreement in 1998.\(^{27}\)

In addition to creating a historical account of “The Troubles,” the Boston College researchers also aspired to gain insight into the personality and mindset of an individual who engages in violent conflict.\(^{28}\) According to the project’s creators, the Belfast Project is a vital step toward understanding not only the conflict in Northern Ireland, but also the dynamics of conflicts worldwide.\(^{29}\)

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\(^{22}\) Id. at 378.
\(^{23}\) Bosi, supra note 17, at 355. The Royal Ulster Constabulary (RUC) was the state police force in Northern Ireland from 1922 until the initiation of the Good Friday Agreement reforms, and it was closely associated with the British government during “the Troubles.” Per the Good Friday Agreement, the RUC was renamed the Police Service of Northern Ireland in 2001. Royal Ulster Constabulary, in ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/EBecheckd/topic/511633/Royal-Ulster-Constabulary-RUC (last updated June 11, 2013).
\(^{24}\) Bosi, supra note 17, at 356.
\(^{25}\) Id.
\(^{26}\) Id.
\(^{27}\) Id. passim.
\(^{28}\) Trs. of Boston Coll., 831 F.Supp.2d at 440.
\(^{29}\) Id.
2. The Belfast Project’s design evinces the importance of confidentiality

Because of the continuing sensitivity and danger characterizing the conflict in Northern Ireland, the Belfast Project’s structure was essential to its success. Ed Moloney, the journalist and writer who initially proposed the project, entered into an agreement with Boston College to become the project’s director. Moloney’s contract required him to ensure that the interviewers and interviewees signed and adhered to a strict confidentiality agreement. The agreement prohibited all participants from disclosing the existence and scope of the project without the permission of Boston College. Furthermore, the contract mandated that interviewers use a coding system when documenting their research to protect the anonymity of interviewees. Only Ed Moloney and Robert K. O’Neill, the librarian of the Burns Library where the project was stored, had access to the coding system’s key. Therefore, they were the only persons able to identify the interviewees.

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30 See id. at 441 (indicating that, because of the continued tensions in Northern Ireland, the Belfast Project leaders determined that the interviews could not safely be housed in Ireland). See also Petition for Writ of Certiorari, supra note 9, at 9 (discussing a report from the Police Ombudsman for Northern Ireland, stating that there are significant risks to the lives of people who are publicly revealed to be, or suspected of being, paramilitary informants).
31 See Trs. of Boston Coll., 831 F.Supp.2d at 441 (“In general, Boston College believes that interviewees conditioned their participation on the promises of strict confidentiality and anonymity”).
32 Id. at 440.
33 Request from the U.K., 685 F.3d at 4.
34 Id. at 4-5.
35 Id. at 5.
36 Trs. of Boston Coll., 831 F.Supp.2d at 440-41. Boston College’s Burns Library of Rare Books and Special Collections houses many valuable documents. Id. at 440. In July 2013, it was reported that Boston College might have lost the coded keys to the Belfast Project interviews, rendering the interviewees unidentifiable. Ed Moloney denies responsibility for the mistake. Jim Dee, Boston Tapes Gaffe: Confessions May Be Useless After Identity Codes Lost, BELFAST TELEGRAPH, July 29, 2013, http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/boston-tapes-name-gaffe-confessions-may-be-useless-after-identity-codes-lost-29455178.html.
37 Trs. of Boston Coll., 831 F.Supp.2d at 441.
In addition to Moloney and O’Neill, the Belfast Project employed two researchers to interview members of paramilitary groups associated with both sides of the conflict. Antony McIntyre, the Lead Project Researcher who himself was a former member of the Irish Republican Army (IRA), entered into a contract with Moloney, which was governed by the same terms as Moloney’s contract with Boston College. Under the contract’s terms, McIntyre was likewise legally bound to protect the privacy of the project and the identities of its subjects. By the project’s end in 2006, McIntyre had conducted twenty-six interviews of individuals associated with the Republican side of the conflict in Northern Ireland.

Interviewees also contracted with Boston College to protect their anonymity and the contents of their interviews. Specifically, interviewees signed donation agreements, which transferred possession and absolute title to their interview recordings and transcripts to Boston College upon their deaths. The following clause contained in the donation agreements restricts access to the interview materials:

Access to the tapes and transcripts shall be restricted until after my death except in those cases where I have provided prior written approval for their use following consultation with the Burns Librarian, Boston College. Due to the sensitivity of the content, the ultimate power of release shall rest with me. After

38 Id.
39 Petition for Writ of Certiorari, supra note 9, at 2.
40 Request from the U.K., 685 F.3d at 5.
41 Trs. of Boston Coll., 831 F.Supp.2d at 441.
42 See id. (explaining that Moloney’s contract prohibited him from disclosing the existence or scope of the Belfast Project to anyone without the permission of Boston College. Additionally, Moloney was required to use a strict coding system to preserve the interviewees’ anonymity).
43 Request from the U.K., 685 F.3d at 5 (noting that the Belfast Project ended in 2006. In total, the Belfast Project is comprised of a forty-one interview series, each of which may contain multiple interviews with the same individual).
44 See id.
45 Id. (explaining that the donation agreement included a provision that also transferred the rights to whatever copyright an interviewee may own in the contents of the interview).
my death, the Burns Librarian of Boston College may exercise such power exclusively.\textsuperscript{46}

Per the agreement, only the signing participant has the authority to release information pertaining to his or her interview.\textsuperscript{47} Neither the interviewer nor Boston College was permitted to disclose the identities of the participants or the contents of their interviews until the interviewees either gave permission or died.\textsuperscript{48} Therefore, the Belfast Project researchers assumed a duty of confidentiality to protect the identities of the participants and the contents of the interviews.

B. Litigation Surrounding the Belfast Project

In 2011, two sets of subpoenas requesting information related to the Belfast Project were issued to Boston College\textsuperscript{49} on behalf of the Police Service of Northern Ireland\textsuperscript{50} pursuant to the Mutual Legal Assistance Treaty between the United States and the United Kingdom (US-UK MLAT).\textsuperscript{51} The US-UK MLAT, which was signed in 1994, is a bilateral treaty intended to improve law enforcement cooperation between the United States and the United Kingdom.\textsuperscript{52} A request for a subpoena under the US-UK MLAT is a direct request by the Executive Branch on behalf of a foreign power—in this case, on behalf of the United Kingdom.\textsuperscript{53}

\textsuperscript{46} Id. (noting that this quoted portion of the agreement was executed by Brendan Hughes, a deceased interviewee). Although the other interviewees’ agreements were not part of the record, the First Circuit reasonably extrapolated that each interviewee signed the same agreement.

\textsuperscript{47} Id. at 5-6.

\textsuperscript{48} See Request from the U.K., 685 F.3d at 5-6.

\textsuperscript{49} See id. at 3.

\textsuperscript{50} Petition for Writ of Certiorari, supra note 9, at 1.

\textsuperscript{51} Request from the U.K., 685 F.3d at 3, 12 (noting that the statutory authority to be applied as the procedural mechanism for executing subpoenas under the US-UK MLAT is codified as 18 U.S.C. § 3512). Section 3512 was enacted as part of the Foreign Evidence Request Efficacy Act of 2009. This is the first court of appeals decision to interpret a mutual legal assistance treaty and § 3512 together.

\textsuperscript{52} Trs. of Boston Coll., 831 F.Supp.2d at 442.

\textsuperscript{53} Id. at 452.
According to the United Kingdom, the requested information from the Belfast Project is connected to the abduction and murder of Jean McConville, which occurred in 1972.\textsuperscript{54} McConville was believed to be an informant to the British, making her a prime target for the Republicans in Northern Ireland during “The Troubles.”\textsuperscript{55}

The first set of subpoenas, issued in May 2011, requested the recorded interviews and documents associated with interviewees Brendan Hughes and Dolours Price,\textsuperscript{56} two former IRA members.\textsuperscript{57} The May 2011 subpoenas did not mention McConville specifically.\textsuperscript{58} Rather, the request stated that the materials were needed to assist the United Kingdom’s investigation of alleged crimes.\textsuperscript{59} Boston College supplied the information associated with Brendan Hughes because his confidentiality was not at issue, as he died prior to the request.\textsuperscript{60} However, the College moved to quash or modify the subpoena for information related to Dolours Price, who was still living at the time.\textsuperscript{61}

Later, in August 2011, Boston College was served with another set of subpoenas requested by the United Kingdom pursuant to the US-UK MLAT, this time demanding the recordings, transcripts, and records of all interviews containing information about the death and abduction of Jean McConville.\textsuperscript{62} Boston College promptly moved to quash the August 2011 set of subpoenas as well.\textsuperscript{63}

\textsuperscript{54} Request from the U.K., 685 F.3d at 6.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 3; Trs. of Boston Coll., 831 F.Supp.2d at 440.
\textsuperscript{57} Petition for Writ of Certiorari, supra note 9, at 11.
\textsuperscript{58} See Request From the U.K., 685 F.3d at 6.
\textsuperscript{59} Id. (listing the crimes under investigation as murder, conspiracy to murder, incitement to murder, aggravated burglary, false imprisonment, kidnapping, and causing grievous bodily harm with intent to cause such harm).
\textsuperscript{60} Id. at 3.
\textsuperscript{62} Trs. of Boston Coll., 831 F.Supp.2d at 441.
\textsuperscript{63} Request from the U.K., 685 F.3d at 3.
In support of its motions to quash, Boston College asserted an academic privilege, arguing that the First Circuit has recognized protections for confidential academic research material and that those protections apply to the information at issue. Under the case law of the First Circuit, a subpoena to obtain information from a confidential source in a criminal case implicates First Amendment concerns and, therefore, calls for a balancing of considerations before it is executed. The general rule is that confidential information cannot be compelled from a reporter or an academician unless it is directly relevant to a serious claim made in good faith, and the same information is not available from a less sensitive source. If these threshold conditions are met, a court must then balance the government’s need for the evidence against the risk of potential harm to the free flow of information between informants and academicians if confidentiality is broken.

The District Court of Massachusetts denied the existence of an academic privilege, but proceeded to apply the case law of the First Circuit to determine if the subpoenas should be executed. The district court found that, although the targeted materials were indeed confidential, they were relevant to a serious claim, requested in good faith, and were not available from a less sensitive source. Next, the district court conducted the balancing test and found that the considerations weighed strongly in favor of disclosing the confidential information to the government.

Ed Moloney and Anthony McIntyre moved to intervene, claiming an interest not only in defending their pledge of confidentiality, but also in guarding their personal safety and the

63. Trs. of Boston Coll., 831 F.Supp.2d at 453.
65 Id.
66 Id.
67 Id.
68 Id. at 457.
69 Id. at 456.
70 Request from the U.K., 685 F.3d at 4 (noting Boston College appealed the order regarding the August subpoenas, but it did not appeal the order regarding the May subpoena requesting the interviews of Dolours Price. Presently, the Boston College portion of the litigation is over, and only Moloney and McIntyre’s claims continue); Tr. of Boston Coll., 831 F.Supp.2d at 457.
safety of their sources.\textsuperscript{71} The district court denied the motion to intervene on the ground that Moloney and McIntyre did not have a private right of action under the US-UK MLAT.\textsuperscript{72} Furthermore, the district court concluded that Boston College adequately represented any interests that Moloney or McIntyre may have relating to their involvement in the Belfast Project.\textsuperscript{73}

After the district court denied their motion to intervene, Moloney and McIntyre filed an original complaint, which the district court dismissed for the same reasons it denied their motion to intervene.\textsuperscript{74} Moloney and McIntyre appealed to the Court of Appeals for the First Circuit, challenging the district court’s denial of their motion to intervene\textsuperscript{75} and the dismissal of their original complaint.\textsuperscript{76}

The First Circuit affirmed the district court’s ruling as it pertained to a private right of action.\textsuperscript{77} The Court held that Moloney and McIntyre could not assert a legally cognizable claim under the US-UK MLAT because the treaty specifically disclaims the existence of a private right of action upon which relief can be granted.\textsuperscript{78} Furthermore, the First Circuit dismissed Moloney and McIntyre’s claim of academic privilege under the First Amendment, holding that the Supreme Court decision in \textit{Branzburg v. Hayes}, 408 U.S. 665 (1972), was controlling.\textsuperscript{79}

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\textsuperscript{71} Trs. of Boston Coll., 831 F.Supp.2d at 458.
\textsuperscript{72} Request from the U.K., 685 F.3d at 7, 8 (explaining that Article 1 of the US-UK MLAT specifically states that the Treaty is intended solely for mutual legal assistance between the United States and the United Kingdom, and that the Treaty does not give rise to a right of private action on the part of an individual to obtain, suppress, or exclude any evidence, or to impede the execution of a request).
\textsuperscript{73} Id. at 7.
\textsuperscript{74} Id. (assuming arguendo that Moloney and McIntyre had standing, the District Court dismissed their complaint for lack of subject matter jurisdiction and for failure to state a claim).
\textsuperscript{75} Id.
\textsuperscript{76} Request from the U.K., 685 F.3d at 4.
\textsuperscript{77} Id. at 20.
\textsuperscript{78} Id. at 13.
\textsuperscript{79} Id. at 16 (noting that, in \textit{Branzburg}, the Supreme Court rejected the existence of a reporters’ privilege. \textit{Branzburg} is developed in sufficient detail in Part II).
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In *Branzburg*, the Supreme Court held that a reporter does not have the privilege to withhold information from criminal justice authorities in the face of a grand jury subpoena, even if the reporter has promised confidentiality to his source.\(^{80}\) Although Moloney and McIntyre were not claiming a press privilege, the First Circuit has established that academic researchers are entitled to the same protections that the law provides for journalists.\(^{81}\) Moreover, the First Circuit found that the rationale behind *Branzburg*, although it involved a reporter being subpoenaed to testify before a grand jury, applied to Moloney and McIntyre’s action under the US-UK MLAT.\(^{82}\)

In *Branzburg*, the Supreme Court held that the government’s interest in law enforcement outweighed the risk that compelling the press to disclose confidential sources would freeze the free flow of communication.\(^{83}\) Similarly, the First Circuit explained that the US-UK MLAT serves the strong law enforcement interests of the United States and the United Kingdom, and the court agreed with the district court’s holding that compelling the information from the Belfast Project would not severely inhibit the success of the Belfast Project or future academic endeavors.\(^{84}\)

\(^{80}\) *Branzburg* v. Hayes, 408 U.S. 665, 690 (1972). *See also* Request from the U.K., 685 F.3d at 16.

\(^{81}\) *Cusumano* v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998)(“Academics engaged in pre-publication research should be accorded protection commensurate to that which the law provides for journalists”).

\(^{82}\) Request from the U.K., 685 F.3d at 16.

\(^{83}\) *Branzburg*, 408 U.S. at 690.

\(^{84}\) *See* Request of U.K., 685 F.3d at 19. *Branzburg* and its progeny took the risk of the potential chilling effect into account and came to the same determination. In its application of the balancing test, the district court gave weight to the fact that the Belfast Project concluded in 2006, arguing that the subpoena would not inhibit the Belfast Project researchers to gain information.
II. ACADEMIC PRIVILEGE IN AMERICAN JURISPRUDENCE

A. The Supreme Court Denied the Existence of a Journalists’ Privilege

1. The background of Branzburg v. Hayes

To fully understand the progression of the Belfast Project litigation, one must first understand the important precedent set by the Supreme Court in Branzburg v. Hayes. In Branzburg, the Supreme Court granted certiorari to decide four separate appeals, each of which raised the proposition that the confidentiality of a reporter’s sources is privileged under the First Amendment. Specifically, the reporters asserting the privilege in Branzburg argued that their First Amendment rights were abridged when they were required to testify to confidential information before grand juries.

Two of the four appeals heard in Branzburg concerned publications by Petitioner-Branzburg, a staff reporter for a daily newspaper published in Louisville, Kentucky. On two occasions, Branzburg was subpoenaed to testify before grand juries in Kentucky, and he moved to quash the subpoenas each time on the grounds that, if required to testify, he would be forced to disclose information revealed to him in confidence.

In Branzburg’s first controversial story, he recounted his observations of two individuals synthesizing marijuana into hashish. Shortly after the story’s publication, Branzburg was subpoenaed to testify as to the identities of the drug users before the grand jury. Although he appeared before a county grand jury, Branzburg refused to name the individuals he saw in possession of the drugs. Branzburg claimed that his refusal to answer was authorized by the

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85 See Branzburg, 408 U.S. at 667.
86 Id. at 667.
87 Id.
88 Id. at 668-70.
89 Id. at 667; Branzburg v. Pound, 461 S.W.2d 345, 345-36 (Ky. Ct. App. 1970).
90 Branzburg, 408 U.S. at 668; Branzburg v. Pound, 461 S.W.2d at 346.
91 Id.
First Amendment to the United States Constitution, in addition to other laws.\footnote{Branzburg, 408 U.S. at 668; Branzburg v. Pound, 461 S.W.2d at 347.} The trial court disagreed and required Branzburg to answer.\footnote{Id.} Thereafter, Branzburg sought prohibition and mandamus from the Kentucky Court of Appeals on the same grounds, but the court denied his petitions.\footnote{Id.}

Branzburg’s second appeal was sparked by a later story describing the use of drugs in another Kentucky town.\footnote{Branzburg, 408 U.S. at 669; Branzburg v. Meigs, 530 S.W.2d 748, 749 (Ky. Ct. App. 1971).} While researching the story, Branzburg spent two weeks interviewing drug users.\footnote{Branzburg, 408 U.S. at 669.} Once more, Branzburg was summoned to appear before a county grand jury to testify about the statutory violations concerning the sale and use of drugs, to which he was made privy.\footnote{Branzburg, 408 U.S. at 669; Branzburg v. Meigs, 530 S.W.2d at 749.} Branzburg’s motion to quash the subpoena was denied.\footnote{Id.} Branzburg then petitioned the court of appeals for writs of prohibition and mandamus, as he had in his earlier case concerning the use of drugs.\footnote{Id. at 670.} Again, Branzburg’s petitions were denied.\footnote{Id. at 672.}

The next judgment under review in Branzburg was \textit{In re Pappas}.\footnote{Branzburg, 408 U.S. at 672; In re Pappas, 266 N.E.2d 297, 298 (Mass. 1971).} Petitioner-Pappas was a television newsman and a photographer for a Massachusetts television station.\footnote{Branzburg, 408 U.S. at 672; In re Pappas, 266 N.E.2d 297, 298 (Mass. 1971).} Pappas was called to New Bedford, Massachusetts, to report on civil disorders in
the area, which were related to activity of the Black Panther Party. Pappas gained access to the Black Panther headquarters in the area, where he recorded and photographed a prepared statement read by one of the group’s leaders. The Black Panther leaders admitted Pappas to their meeting place on the strict condition that he promised not to disclose anything he heard or saw inside of the headquarters.

Two months later, Pappas was called before a county grand jury as part of an investigation into the criminal acts during the period of civil disorder on which he had reported in New Bedford. Although he appeared and willingly answered questions regarding his name, address, employment, and observations outside of the Black Panther headquarters, Pappas refused to testify about his observations during his stay inside the headquarters. Like Branzburg, Pappas claimed that he, as a reporter, had a First Amendment privilege to protect confidential information he received in the course of investigative work. After Pappas refused to answer, he was served with a second summons to appear before the grand jury and to provide all evidence connected to the matters about which he was questioned. Pappas claimed a First Amendment

103 Branzburg, 408 U.S. at 672, 674; In re Pappas, 266 N.E.2d at 298, 299. While reviewing Pappas’ case, the Supreme Judicial Court of Massachusetts took judicial notice that, in July 1970, New Bedford, Massachusetts, was rife with civil disorder, which included “street barricades, exclusion of the public from certain streets, and similar turmoil.”

104 Branzburg, 408 U.S. at 672; In re Pappas, 266 N.E.2d at 298. The Black Panther headquarters was located in a boarded-up store. The streets surrounding the store were barricaded, but Pappas was eventually able to enter the area.

105 Branzburg, 408 U.S. at 672; In re Pappas, 266 N.E.2d at 298 (noting that, per his agreement with the Black Panthers, Pappas was at liberty to photograph and report the anticipated police raid).

106 Branzburg, 408 U.S. at 672-73, 674. The Supreme Judicial Court of Massachusetts did not have a record of the hearing below, but the court assumed that the grand jury investigation at issue was an effort to identify and indict those responsible for the criminal acts that occurred during the period of civil disorder in New Bedford.

107 Branzburg, 408 U.S. at 673; In re Pappas, 266 N.E.2d at 298.

108 Id.

109 Id.
privilege and moved to quash the subpoena, but the trial court denied his motion.110

Reviewing Pappas’ appeal, the Supreme Judicial Court of Massachusetts specifically rejected the holding of the Ninth Circuit in *Caldwell v. United States*, described below, and held that reporters do not have a constitutional privilege authorizing them to refuse to appear and testify before a court or a grand jury.111 Additionally, the court reaffirmed its prior holdings that testimonial privileges must be limited.112 According to Massachusetts’s precedent, the principle that the public has a right to every man’s evidence has traditionally outweighed competing interests.113 Furthermore, the court went on to conclude that any adverse effect on the free flow of news by requiring reporters to testify would be indirect, theoretical, and uncertain.114

Finally, the last decision under the Supreme Court’s review in *Branzburg* was the Ninth Circuit’s holding in *United States v. Caldwell*.115 Caldwell, a reporter for *The New York Times*, had written stories covering the Black Panthers and other black militant groups in California.116 In a fact pattern similar to that surrounding the Belfast Project litigation, Caldwell was subpoenaed to testify before a federal grand jury regarding various potential criminal violations committed by the militants.117 The first summons served on Caldwell ordered him to bring all notes and tape recordings from his interviews with the officers and spokespeople of the Black Panther Party regarding

110 Branzburg, 408 U.S. at 673 (noting that, in contrast to Kentucky, Massachusetts did not have a statutory reporters’ privilege at the time of Pappas’s motion.)
111 Branzburg, 408 U.S. at 674; *In re Pappas*, 266 N.E.2d at 302-03.
112 Branzburg, 408 U.S. at 674.
113 Branzburg, 408 U.S. at 674; *In re Pappas*, 266 N.E.2d at 299-300.
114 Branzburg, 408 U.S. at 674 (quoting *In re Pappas*, 266 N.E.2d at 302)
115 Branzburg, 408 U.S. at 675.
116 Branzburg, 408 U.S. at 675; *Caldwell v. U.S.*, 434 F.2d 1081, 1083 (9th Cir. 1970).
117 Branzburg, 408 U.S. at 675-76, 677. Possible violations included threats against President Nixon, assassination, conspiracy to assassinate, and interstate travel to incite a riot.
the organization’s aims, purposes, and activities. After Caldwell objected to the scope of the subpoena, the government modified its request, calling only for the reporter to appear before the grand jury.

Caldwell and The New York Times moved to quash the subpoena, arguing that, if required to testify, Caldwell’s working relationship with the Black Panther Party would be destroyed, effectively suppressing essential First Amendment freedoms by chilling the flow of communication between the press and the militants. The District Court denied the motion to quash but instituted a protective measure allowing the journalist to refuse to disclose confidential information in the absence of a showing by the government of a compelling and overriding interest in disclosure. A second subpoena was issued, and Caldwell filed another motion to quash, which was subsequently denied.

In the face of the order, Caldwell refused to testify before the grand jury and was held in contempt of court. Caldwell appealed the contempt order, and the Ninth Circuit reversed, holding that requiring a journalist to testify before a grand jury would dissuade informants from communicating with him in the future. Furthermore, the Ninth Circuit recognized the potential chill to the free flow of information as a threat great enough to require the government to show necessity before compelling a reporter to appear before a grand jury.

118 Id. at 675.
119 Id. at 675–76.
120 Branzburg, 408 U.S. at 676; Caldwell, 434 F.3d at 1084.
121 Branzburg, 408 U.S. at 677.
122 Id. at 678; Caldwell, 434 F.3d at 1083.
123 . Id. (noting that, during the time the district court was reviewing Caldwell’s first motion to quash, the grand jury’s term expired, and a new grand jury was convened. After the second grand jury was assembled, the second subpoena was issued to Caldwell. Caldwell’s new motion to quash was submitted on the prior record).
124 Id.
125 Branzburg, 408 U.S. at 679; Caldwell, 434 F.2d at 1084.
126 Branzburg, 408 U.S. at 697; Caldwell, 434 F.2d at 1085–86.
The Ninth Circuit’s holding that requiring a reporter to testify would substantially deter future communications between the media and informants marked a stark split from the perspectives of the appellate courts in *Branzburg I*, *Branzburg II*, and *Pappas*, which found that any negative effect of requiring a journalist to disclose confidential information on the free flow of communication was tenuous and indirect. The Supreme Court granted the writ of certiorari to address the disputed journalists’ privilege claimed by Branzburg, Pappas, and Caldwell.

2. Summary of the argument for a privilege before the U.S. Supreme Court in *Branzburg v. Hayes*

In *Branzburg*, the Supreme Court considered the newsmen’s contention that a reporter should not be required to appear or testify before a grand jury or at a trial unless the government sufficiently shows that: (1) the reporter is privy to evidence relevant to the crime under investigation; (2) the evidence is not available from another source; and (3) the government’s need for the evidence is sufficiently compelling to outweigh the First Amendment interests at stake. Journalists Petitioner-Branzburg, Petitioner-Pappas, and Respondent-Caldwell each refused to respond to grand jury subpoenas and testify about evidence relevant to criminal investigations. Generally, citizens are not exempt from answering a grand jury subpoena; however, a constitutional provision may authorize a citizen to refuse to appear and testify.

The *Branzburg* journalists submitted that the First Amendment freedom of the press authorized their refusal to appear and testify before a grand jury because, if they were forced to respond and divulge confidential sources, future informants would withhold important, newsworthy information. Essentially, if journalists could be required to divulge their confidential sources,

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127 See *id.* at 671, 674, 679.
128 *Id.* at 679.
129 *Id.* at 680.
130 *Branzburg*, 408 U.S. at 682.
131 *Id.*
132 See *id.*
133 *Id.*
then sources would not come forward with information.\textsuperscript{134} Without the participation of informants, newsworthy information would be unavailable for dissemination to the public, placing a burden on the free flow of communication in violation of the First Amendment.\textsuperscript{135}

3. \textit{Why the Branzburg majority refused to recognize a journalists’ privilege under the First Amendment}

To arrive at its conclusion that journalists do not have a constitutional privilege to keep confidences in the face of a grand jury subpoena, the Court first reviewed other, well-accepted limitations on the freedom of the press.\textsuperscript{136} For example, journalists do not have the right to violate the liberties of others,\textsuperscript{137} nor may journalists publish any story they wish with impunity.\textsuperscript{138} Although the journalist’s task is to disseminate news to the public, the journalist is not granted special access, constitutional or otherwise, to judicial conferences, grand jury proceedings, or crime scenes.\textsuperscript{139}

Despite these limitations, the Majority was compelled to acknowledge the importance of the freedom of the press in the United States and in American jurisprudence.\textsuperscript{140} The Court recognized that newsgathering is indeed protected by the First Amendment.\textsuperscript{141} In fact, the court asserted that the freedom of the press would be eviscerated without the protection of the First Amendment.\textsuperscript{142} However, the Majority determined that Petitioner-

\begin{itemize}
\item \textsuperscript{134} See id.
\item \textsuperscript{135} See Branzburg, 408 U.S. at 682.
\item \textsuperscript{136} See id. at 683-86.
\item \textsuperscript{137} Id. at 683. In Associated Press v. NLRB, 301 U.S. 103 (1937), the Supreme Court held that the Associated Press was bound by the standards of the National Labor Relations Act.
\item \textsuperscript{138} Id. at 683-84 (elaborating that, for example, the press may be subject to liability for circulating knowing or reckless falsehoods. In such cases, journalists may be held responsible for compensatory and punitive damages. Moreover, journalists may also be criminally prosecuted for publications of this nature).
\item \textsuperscript{139} Id. at 684-85. Notably, the press may also be prohibited from publishing information about trials if such publications threaten to prejudice a defendant’s right to a fair and impartial trial.
\item \textsuperscript{140} See Branzburg, 408 U.S. at 681.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\end{itemize}
Branzburg, Petitioner-Pappas, and Respondent-Caldwell’s claims did not implicate the First Amendment because (1) the journalists were not subject to any restraint on the contents of their publications, (2) they were not forced to publish stories they wished to conceal, and (3) they were not penalized for the contents of their publications.\footnote{Id.}

The fact that the journalists were not prohibited from using confidential sources in their task of newsgathering was also crucial to the Court’s decision.\footnote{Id. at 681-82.} Although the journalists’ access to confidential informants was not explicitly restricted, the Court did not find that requiring journalists to appear before grand juries would pose a significant threat to the newsmen’s access to information from confidential sources.\footnote{See Branzburg, 408 U.S. at 681-82, 693 ("[T]he evidence fails to demonstrate that there would be a significant construction of the flow of news to the public. . . .").}

Rather than recognizing the utility of receiving important information from confidential sources and crediting legitimate reasons for an informant’s desire for discretion, the Majority’s perception was that informants seek confidentiality chiefly to avoid criminal prosecution.\footnote{See id. at 691 ("The preference for anonymity of those confidential informants involved in actual criminal conduct is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection").} The Majority failed to see the utility in transmitting controversial news to the public and failed to give adequate import to a journalist’s integrity in his attempts to keep a confidence.\footnote{See id. at 692 ("Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it").}

In situations where the confidential informant is not a criminal offender but has knowledge of illegal activity, the Court posited that the informant may want to protect his reputation, keep his job, or avoid becoming involved in criminal litigation.\footnote{Id. at 693.} In its list
of considerations, the Majority also casually noted that the informant may fear for his personal safety, but failed to acknowledge the reality of this concern and how it could affect the free flow of information between informants and the media, and, in turn, between the media and the public.\textsuperscript{149}

Reaching its holding, the Majority was unwavering in concluding that the public interest in prosecuting a crime outweighs any interest the public may have in receiving information obtained from a confidential informant.\textsuperscript{150}

III. THE PERSPECTIVE OF THE COUNCIL OF EUROPE

A. The European Convention on Human Rights

Unlike the \textit{Branzburg} Majority, the Council of Europe has recognized that the interest in protecting confidentiality may outweigh other concerns, including the prevention of crime.\textsuperscript{151} The Council of Europe’s main purpose is to achieve unity\textsuperscript{152} between its forty-seven member nations.\textsuperscript{153} In furtherance of its progressive goals, the Council of Europe developed the European Convention on Human Rights to promote and protect the human rights and fundamental freedoms of the citizens of its member nations.\textsuperscript{154} The Convention is a binding international agreement,\textsuperscript{155} and all member

\textsuperscript{149} \textit{Id.}

\textsuperscript{150} See \textit{Branzburg}, 408 U.S. at 695.


\textsuperscript{154} Article 10, \textit{supra} note 152.

nations, including the United Kingdom, have ratified or acceded to it.\textsuperscript{156}

The Convention both enshrines the fundamental rights that are guaranteed to all citizens and is legally binding, similar to the Bill of Rights of the United States Constitution.\textsuperscript{157} When an individual feels that his rights under the Convention have been violated or restricted, he can lodge an application with the European Court of Human Rights.\textsuperscript{158}

1. \textit{A journalistic privilege exists under Article 10 of the Convention on Human Rights}

Article 10 of the Convention on Human Rights protects the individual’s right to express himself. Specifically, Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such

\textsuperscript{158} DEPT FOR CONSTITUTIONAL AFFAIRS, supra note 155, at 5. The European Court of Human Rights is located in Strasbourg, France. Before lodging an application with the European Court of Human Rights, the applicant must first exhaust all available state remedies. The applicant has six months from the date of the final domestic court decision to petition the European Court of Human Rights. \textit{EUROPEAN COURT OF HUMAN RIGHTS, QUESTIONS & ANSWERS} 6 (undated), \url{http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf}. 
formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.\[159\]

Relevantly, the European Court of Human Rights has interpreted Article 10 to protect journalists from being compelled to disclose the identities of their sources.\[160\] Furthermore, the Committee of Ministers of the Council of Europe has specifically declared that Article 10 protects a journalist’s right to maintain the confidentiality of his sources.\[161\]


Like the Brandenburg Court,\[162\] the European Court of Human Rights noted in Goodwin v. United Kingdom that compelling journalists to disclose the identities of their confidential sources could have a chilling effect on the free flow of communication between the media and the public.\[163\] However, the European Court of Human Rights found the threat to be more palpable, explaining that the important public watchdog function served by the press would be undermined

\[159\] Article 10, supra note 152.


\[162\] See Brandenburg, 408 U.S. at 681-82, 693.

if journalists were unable to obtain accurate and reliable information from sources who wish to remain unnamed. 164

When evaluating a cause of action under Article 10, the European Court of Human Rights will first look to the facts of a particular case to determine if a public authority has interfered with the applicant’s right to freedom of expression guaranteed under paragraph 1 of Article 10. 165 For example, in Voskuil v. The Netherlands, the Court found that the Court of Appeal, a public authority, interfered when it ordered the detention of the applicant in an attempt to compel him to name his source for a news story. 166

If the Court finds that a public authority has interfered with the applicant’s right of expression, then the Court will proceed to analyze the facts of the case under paragraph 2 of Article 10 to determine if the interference was justified. 167 Analysis under the second paragraph of Article 10 requires an assessment of three prongs. 168 First, the Court will determine if law prescribed the interference. 169 In other words, the Court inquires whether the government’s action had a lawful basis in domestic law. 170

Second, if the Court determines that the government’s mode of interference had an adequate basis in the relevant domestic law, the Court will consider whether the interference pursued a legitimate aim. 171 According to the Committee of Ministers of the Council of Europe, the legitimate aims that justify interference with the journalistic freedom of expression are set forth in the exhaustive list

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164 Id. at 693. The Brandenburg court did not find that requiring disclosure would significantly obstruct the free flow of communication.
165 See id. at 496.
168 See Article 10, supra note 152.
169 See Article 10, supra note 152; see also Goodwin v. United Kingdom (No. 7), 1996-II Eur. Ct. H.R. 483, 496.
A public authority need only pursue one of the enumerated aims to satisfy this prong of the test. Furthermore, the interference must have been foreseeable by the applicant in light of the stipulated restrictions.

Finally, the Court must determine whether the interference is necessary in a democratic society. If the interference is necessary, it must also be proportionately calculated to achieve the legitimate aim pursued by the restriction. If the limiting authority cannot establish proportionality and relevance to an extent sufficient to override the vital public interest in a free press, then interference is not necessary in a democratic society, and the applicant’s rights under Article 10 will be deemed violated.

According to case law from the European Court of Human Rights, necessity is a difficult standard for the government to prove when it restricts journalistic confidentiality. The Council of Europe acknowledges that freedom of expression is a cornerstone of democracy and declares that protecting the freedom of the press is an important and fundamental requirement in this regard.

In Goodwin, the European Court of Human Rights expressed that the protection of journalistic sources is so essential to a free press that an order compelling a journalist to disclose his source’s identity must be justified by an overriding requirement in the public interest. Restrictions on journalistic confidentiality require the Court’s strictest scrutiny, and the scales weigh heavily in favor of

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172 COUNCIL OF EUROPE, supra note 161, at 35.
174 COUNCIL OF EUROPE, supra note 161, at 35.
177 See id. at 502-03.
178 See id. at 500-01.
179 Id. at 500.
180 Id.
maintaining a free press. The test of necessity is fact-intensive, and the court must look to the totality of the circumstances to determine if the government’s reason for interfering with the freedom of the press is both relevant and sufficient.

3. What if the interference was intended to prevent crime?

The Convention considers the prevention of crime to be a potential justification for restricting journalistic confidentiality. Although specified in Article 10, the goal of preventing crime or disorder will not always justify a restriction on expression. For instance, in Voskuil v. The Netherlands, a police officer informed a journalist that the police staged a flood to gain access into an apartment belonging to a group of individuals who were subsequently prosecuted for arms trafficking after the officers’ entry revealed weapons.

The journalist was called as a trial witness for the defendants, but he refused to disclose the identity of the police officer who had tipped him off. When he refused, he was held in contempt and sentenced to a detention for a maximum of 30 days. The journalist then filed a complaint with the European Court of Human Rights, alleging a violation of his rights under Article 10.

Evaluating the journalist’s Article 10 claim, the Court accepted the Government’s contention that it interfered to further the prevention of crime, a legitimate aim under paragraph 2 of Article 10. The confidential information that the journalist held, the Court explained, implicated the integrity of the Netherlands police force.

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182 Id.
183 Article 10, supra note 152.
185 Id. at 2.
186 Id. at 15.
187 Id. at 3.
188 See id. at 14.
and contained facts that could secure the defendants a fair trial.\textsuperscript{190} Regardless, the Court held that the Government’s interest in the informant’s identity could not overcome the journalist’s interest in protecting his source’s confidentiality.\textsuperscript{191}

The \textit{Branzburg} Court differed fundamentally in its analysis of journalistic privilege in the context of criminal activity. While the European Court of Human Rights placed great significance on the journalist’s integrity and livelihood, as well as the public’s right to information,\textsuperscript{192} the Supreme Court was preoccupied with the source’s motives behind his wish to remain confidential.\textsuperscript{193} The European Court of Human Rights is willing to conduct the balancing of interests under Article 10, even in the context of high stakes criminal cases,\textsuperscript{194} but the Supreme Court in \textit{Branzburg} tersely concluded that the public’s interest in the prosecution of crime almost always outweighs its interest in information.\textsuperscript{195}

\section*{IV. The United Kingdom Presents the Best Available Forum to Seek Protection of the Belfast Project Materials}

\subsection*{A. The Council of Europe Takes a More Practical Approach Toward Protecting Freedom of Expression than the United States}

Although Article 10 of the Convention on Human Rights specifically protects journalistic freedom of expression,\textsuperscript{196} academic privilege may properly be analogized to a journalistic privilege. Like journalists, academic researchers are devoted to collecting and analyzing information, then disseminating their findings to an audience with the hope that the audience will be enriched as a

\begin{itemize}
\item \textsuperscript{190} \textit{Id.} at 17.
\item \textsuperscript{191} \textit{Id.} at 18.
\item \textsuperscript{192} \textit{See id.}
\item \textsuperscript{193} \textit{See Branzburg}, 408 U.S. at 691.
\item \textsuperscript{194} \textit{See Voskuil v. Netherlands, 2007-III Eur. Ct. H.R. 1 passim.}
\item \textsuperscript{195} \textit{See Branzburg}, 408 U.S. at 695.
\end{itemize}
The value of academic research, like the news, hinges on the availability, reliability, and accuracy of sources. The U.S. Supreme Court and the European Court of Human Rights agree that a free press is a cornerstone of democracy. However, the two authorities diverge in their perspectives on how to protect the press’s freedom of expression.

In Branzburg, the Supreme Court articulated that public authorities must not place restrictions on the content of publications, force journalists to publish stories against their will, or prohibit the use of confidential sources. From the Supreme Court’s perspective, requiring a journalist to disclose the identity of a confidential source does not constitute a prohibition on the use of confidential sources. Furthermore, the Branzburg Court and the First Circuit determined that compelled disclosure of a confidential source would have only a theoretical and uncertain chilling effect on the free exchange of information between the press and the public.

The European Court of Human Rights takes a more practical approach. Rather than accept at face value the fact that journalists were not forbidden from obtaining information from confidential sources, the Court stressed that, under Article 10, a journalist’s right to use and keep a confidence is vital to a thriving, free press.

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197 See Murray, supra note 157, at 3-9, for an in depth discussion of the functions researchers perform in society, both historically and contemporarily, and why an academic privilege is essential to the successful performance of these functions.

198 See Cusumano, 162 F.3d at 714.


201 See Branzburg, 408 U.S. at 681-82.

202 See id.

203 See Request of U.K., 685 F.3d at 19.

204 See Branzburg, 408 U.S. at 674 (quoting In re Pappas, 226 N.E.2d at 302). Although it is quoting the Massachusetts decision here, the Supreme Court adopts the proposition in its own analysis and conclusion on appeal.

205 But cf. Branzburg, 408 U.S. at 681-82.

While the United States federal courts have characterized the chilling effect as an uncertain harm, the European Court of Human Rights more accurately observed that if journalists were compelled to divulge confidences, then sources who wish to remain anonymous would be discouraged from coming forward with information, thereby undermining the ability of the press to present useful and reliable news to the public. For the press to be truly free, they must be protected from the threat of compelled disclosure of their confidential sources.

B. Applying Article 10 Jurisprudence to the Belfast Project Litigation

When assessing whether a public authority’s attempt to compel a journalist to disclose a confidential source violates Article 10, the European Court of Human Rights begins with the understanding that a journalist’s right to keep a confidence is so essential to democracy that the disclosure must be justified by an overriding public interest. The law is positioned in favor of nondisclosure, and the public authority must satisfy the difficult standard of necessity. Regarding McIntyre’s application in Belfast, the High Court based its analysis—and subsequent denial—of the petition on Article 2 of the Convention, not Article 10. This comment argues that the writ should have been decided in his favor. Considering that it was not, the following analysis predicts how the Court of Appeal or European Court of Human Rights would review McIntyre’s Article 10 claim.

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207 See In re Pappas, 226 N.E.2d at 302. For a detailed discussion of cases addressing a scholarly privilege in the United States federal courts, see also Murray, supra note 157, at 9-18.
209 See id.
210 See id. at 500-01.
1. Applying the Article 10 test to the facts of the Belfast Project Litigation

a. Did a public authority interfere with the Belfast Project researchers’ right to freedom of expression? - Yes, the government of the United Kingdom interfered with the rights of Boston College, Moloney, and McIntyre to keep the Belfast Project sources and interview materials confidential when it requested the materials on behalf of the Police Service of Northern Ireland.212

b. Was the interference prescribed by law? - Yes, the United Kingdom, on behalf of the Police Service of Northern Ireland, was acting within the bounds of domestic law when it interfered with the researchers’ right to maintain confidentiality because it requested the Belfast Project interview materials to pursue a criminal investigation.213

c. Was the interference directed toward the pursuit of a legitimate aim? - To meet this prong of the test, the Government must show (1) that it subpoenaed the information in pursuit of the public interest214 and (2) that the researchers could have foreseen the interference for that particular purpose.215 Under Article 10, the prevention of crime or disorder is a legitimate aim.216 In the case of the Belfast Project, the United Kingdom requested the interviews on behalf of the Police Service of Northern Ireland217 because the police suspected that the materials contained information essential to the investigation of a variety of crimes.218 Taken at face value, the prevention and prosecution of criminal activity are clearly legitimate pursuits for the

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213 See Request from the U.K., 685 F.3d at 3.
215 Council of Europe, supra note 161, at 35.
216 Article 10, supra note 152.
217 Petition for Writ of Certiorari, supra note 9, at 1.
218 Request of U.K., 685 F.3d at 6.
good of the public. However, stating a legitimate motive does not necessarily justify an interference with the right to free expression.\textsuperscript{219}

Foreseeability on the parts of Moloney and McIntyre is more challenging to establish. Considering the highly political nature of “The Troubles” and the amnesty provision under the Good Friday Agreement\textsuperscript{220} the researchers could have reasonably concluded that the Police Service of Northern Ireland would not attempt to prosecute cold cases, such as the 1972 murder and abduction of McConville.\textsuperscript{221} Furthermore, Moloney and McIntyre have described the McConville situation as a “longstanding ‘non-investigation,’” further supporting the proposition that they could not have foreseen that the United Kingdom would request the interviews to inquire into 40-year-old crimes.\textsuperscript{222}

d. Was the interference necessary in a democratic society? - An analysis under\textsuperscript{223} Branzburg would have ended when the Government established that its purpose for compelling disclosure was to prevent and prosecute criminal activity. However, the European Court of Human Rights takes the analysis a step further. In fact, the European Court of Human Rights performs the very test that the petitioners argued for in\textsuperscript{224} Branzburg: the government must show that its interest in disclosure is compelling enough to outweigh the value of the fundamental right to expression. In making this showing, the Government must also establish that the level of interference is proportionately calculated to achieve the legitimate aim pursued and that the information is not reasonably available from an alternative source.\textsuperscript{225}

\textsuperscript{220} Petition for Writ of Certiorari, supra note 9, at 26-27. Under the terms of the Good Friday Agreement, almost all prisoners, including many who had been convicted of murder, were released by the British government.
\textsuperscript{221} Id.
\textsuperscript{222} Id. at 26.
\textsuperscript{223} See Branzburg, 408 U.S. at 695.
This approach is similar to that adopted in Branzburg, however, the European Court of Human Rights places greater weight on the journalist’s right to nondisclosure. Moreover, the totality of the circumstances must be carefully considered, with weight placed in favor of protecting the right to freedom of expression. Regarding the Belfast Project litigation, the U.S. District Court for Massachusetts determined that the requested information was not available to be readily obtained from another, less sensitive source. Considering the secrecy shrouding the paramilitary groups involved in “The Troubles,” the courts of the United Kingdom would likely reach the same conclusion.

The main point of contention, however, is on the proportionality of the request. The United Kingdom sought information to aid in the investigation of crimes; however, the crimes in question occurred in 1972—almost 40 years prior to the request. Additionally, the Police Service of Northern Ireland elected not to pursue this particular investigation for a long period of time. Moreover, pursuant to the terms of the Good Friday Agreement between the United Kingdom and the IRA, many prisoners,

226 See Goodwin v. United Kingdom (No. 7), 1996-II Eur. Ct. H.R. 483, 500-01.; but cf. Branzburg, 408 U.S. at 695 ([W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.”).
228 Trs. of Boston Coll., 831 F.Supp.2d at 456.
229 See id. at 441. The code of silence is evident through the extreme measures taken by the Belfast Project researchers to ensure that the participants’ identities would be concealed.
230 Anthony McIntyre himself claimed that the compelled disclosure would disproportionately interfere with his right to life under Article 2 and his right to prevent the disclosure of information received in confidence under Article 10. Statement Filed Pursuant to Order 53, Rule(3)(2)(a) of the Rules of the Court of Judicature (NI) 1980 at ¶ 3(b)-(d), In re Application by Anthony McIntyre for Leave to Apply for Judicial Review, [2012] NIQB 65 (N. Ir.), http://www.scribd.com/fullscreen/99166414?access_key=key-jadvo5q2krzoyln48ye&allow_share=true&escape=false&view_mode=scroll.
231 Request from the U.K., 685 F.3d at 6.
232 Petition for Writ of Certiorari, infra note 9, at 26.
including those convicted of murder during “The Troubles,” have been released.233

Contrary to the current, ongoing criminal activity at issue at the time of the Branzburg litigation,234 the criminal activity at issue in the Belfast Project litigation was long over, and the actors were given amnesty in furtherance of the political peace process.235 The participants came forward to share the ghosts of their past with the hope of providing insight and preventing future harm.236 In fact, if the United Kingdom truly wishes to prevent future harm, crime, and disorder, then it should strive to protect the participants’ identities.237 The IRA, of which McIntyre, Hughes, Price, and many other participants were members, enforces a strict code of silence.238 If the interviewees are revealed to have breached this code, their own safety and the safety of the researchers involved in the Belfast Project likely will be threatened.239

Furthermore, the inevitable chill to the free flow of information is startling. Although the aim of prosecuting and preventing crime is venerable, the consequences are too great to justify a violation of the researchers’ right to keep their sources confidential. If the disclosure is compelled, the United Kingdom may have clues about their 40-year-old investigation; however, in so doing, they will have placed their own citizens in harm’s way, compromised the ongoing peace process in Northern Ireland, inhibited the success of valuable research to prevent future conflict,

233 Id. at 26-27.
234 See Branzburg, 408 U.S. passim.
235 See Request from the U.K., 685 F.3d at 6; see also Petition for Writ of Certiorari, supra note 9, at 26-27.
236 See Request from U.K., 683 F.3d at 4 (noting that this was the goal of the Belfast Project: to understand the minds of those engaged in violent conflict, with the hope of preventing it in the future).
237 See Trs. of Boston Coll., 831 F.Supp.2d at 441 (explaining that tensions still exist in Northern Ireland).
238 See id. (noting that interviewees conditioned their participation on strict promises of confidentiality in order to protect their safety); see also Petition for Writ of Certiorari, supra note 9 (explaining that IRA members are forbidden from sharing anything about IRA membership or operations with anyone, at penalty of punishment at the hands of the Army).
239 See Trs. of Boston Coll., 831 F.Supp.2d at 441.
and tarnished the reputation of the Belfast Project researchers. Therefore, compelled disclosure of the Belfast Project participants’ identities is not necessary in a democratic society. Conclusively, courts in the United Kingdom, which are bound by Article 10, should find that the researchers’ Article 10 rights were violated.

V. FULFILLING THE UNITED KINGDOM’S REQUEST CONTRAVENES PUBLIC POLICY

If the researchers cannot protect the confidentiality of the interview materials through the European court system, Article 3 of the US-UK MLAT, which lists limitations on assistance, presents another solution. Under Article 3, the United States may refuse its assistance if the Attorney General, the treaty’s designated Central Authority for the U.S., determines that the request, if granted, would impair essential American interests or contravene United States public policy. In this case, the United Kingdom’s request would compromise the peace process in Northern Ireland, put the lives of many at risk, and jeopardize the success of future academic endeavors. Considering that the United States played a key role in the Northern Ireland peace process and has a vested interest in the safety and progress of British and American citizens, fulfilling the United Kingdom’s request would impair the essential interests of the United States and contravene public policy.

Because the Belfast Project implicates foreign relations, it falls under the purview of Secretary of State John Kerry. Secretary Kerry has evinced a special interest in the Belfast Project litigation, both as

240 See Petition for Writ of Certiorari, supra note 9 passim.
242 Id. art. 3.1(a), art. 2.2.
243 See Kerry Op-Ed, supra note 1 (expressing concern about the consequences of fulfilling the United Kingdom’s request under the US-UK MLAT).
244 See id. (acknowledging that the Good Friday Agreement was signed under the “enormous leadership” of President Clinton and Prime Minister Blair).
a Senator of Massachusetts and as the Chairman of the Senate Foreign Relations Committee. In January 2012, he urged former Secretary of State Hillary Clinton to work with British authorities to revoke their request for the Belfast Project materials. Senator Kerry was concerned that the United Kingdom’s request would disturb the fragile Northern Ireland peace process and offend the spirit of the Good Friday Agreement because any crimes recounted in the interviews would have occurred prior to the accords. In addition to the inherent political dangers, Senator Kerry also acknowledged the threats to the Belfast Project participants and academia in general: “It is my great hope that the academic integrity of these documents is maintained and that these transcripts remain confidential because for some this has become a matter of life and death.”

According to Senator Kerry, the US-UK MLAT is a “vital” instrument; however, it was “never meant to be used as a method of reaching far back into a difficult history and perhaps eroding a delicate truce that could lead to more lives being lost.” Based on his earlier statements, Secretary Kerry has acknowledged that fulfillment of the United Kingdom’s request would contravene important public policy concerns and impair the United States’s

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245 See Kerry Op-Ed, supra note 1; Letter from John Kerry, Mass. Senator and Chairman of the Senate Foreign Relations Comm., to Hillary Clinton, Sec’y of State (Jan. 23, 2012), http://htmlimg2.scribdassets.com/9nepmj1w8w1d29bd/images/1-c3ae96f326.jpg [hereinafter Letter from John Kerry].

246 Letter from John Kerry, supra note 245. Secretary Kerry is not alone in his efforts. Other members of Congress who have written to Secretary Clinton on the matter include Congressman Ackerman, Congressman Crowley, Senator Menendez, Congressman O’Flaherty, Senator Schumer, Senator Brown, Congressman Pascrell, Congressman Rothman, Congressman Doyle, Senator Lautenberg, Congressman Murphy, Senator Lugar, Congressman Critz, Senator Casey, Congressman Sires, Senator Cardin, Congressman Neal, Congressman Pallone, Senator Gillibrand, and Congressman Higgins. Congress, BOSTON COLLEGE SUBPOENA NEWS, http://bostoncollegesubpoena.wordpress.com/congress/ (last visited Jan. 22, 2013).

247 See Letter from John Kerry, supra note 245; Kerry Op-Ed, supra note 1.

248 Kerry Op-Ed, supra note 1.

249 Id.
interest in a peaceful Northern Ireland. To protect the integrity of the Belfast Project and the lives of those involved, Secretary Kerry should work toward an agreeable resolution with the United Kingdom that does not involve compelled disclosure of the participants’ identities.

Although declining to enforce the United Kingdom’s request would not create a constitutional privilege for academic researchers, it would be a major step toward recognition of such a right. The executive branch would demonstrate that the protection of confidentiality in academic research could outweigh the prosecution of crimes. Additionally, the decision would further legitimize endeavors like the Belfast Project as important tools in American culture, moving the standard of protection of researchers closer to that for journalists.

CONCLUSION

The time is ripe to recognize an academic privilege in the United States. In their petition for certiorari, Moloney and McIntyre indicated that the circuit courts have inconsistently applied Branzburg, disagreeing whether and to what extent the First Amendment protects against compelled disclosure of confidential information. When the Belfast Project litigation was before the First Circuit initially, Circuit Judge Torruella explained that he concurred in the judgment of the First Circuit only because he was compelled to do so by the Supreme Court’s holding in Branzburg.

Although the Belfast Project will not be the vehicle for the Supreme Court to revisit its holding in Branzburg, the controversy surrounding the project indicates that the trend, both nationally and internationally, is in favor of affording more, not less, protection to journalists, academics, and other professionals who promise

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250 See Kerry Op-Ed, supra note 1; Letter from John Kerry, supra note 245.
251 See id. at 13.
252 Request of U.K., 685 F.3d at 20 (Torruella, C.J., concurring).
confidentiality in exchange for information on important matters of public interest.\textsuperscript{253}

After examining academic privilege through the lens of the Belfast Project, it is evident that compelling academicians to divulge their confidential sources will inevitably and significantly obstruct the free flow of information between researchers and their participants, thereby depriving the public of valuable information. The protection of academic confidentiality agreements is essential in two important ways. Firstly, when individuals are encouraged to share their life experiences in a safe, academic environment, researchers are able to transmit the wisdom they glean to the public. Enlightening society affords future generations the ability to learn from the mistakes of the past and craft a better future. Simply put, if researchers cannot promise anonymity to those informants who require it, then informants will be hesitant to participate in studies, and researchers will never be able to gather true and accurate information to disseminate to the public.

Secondly, the safety of researchers and their sources hinges on their ability to enter into and enforce confidentiality agreements. As this comment has explained in its discussion of the Belfast Project, research participants put themselves at risk when they share their experiences regarding high-stakes, controversial, and dangerous topics. Furthermore, academicians who conduct such projects also expose themselves to peril. For endeavors like the Belfast Project, confidentiality is virtually mandatory, not optional, for many research participants. When considering claims such as those of Moloney and McIntyre, courts should conduct the appropriate balancing test with the understanding that an academic’s right to maintain confidentiality is essential to a thriving, free society. If courts fail to do so, policy makers must use the tools at their disposal to protect this vital interest.

\textsuperscript{253} See Petition for Writ of Certiorari, supra note 9, at 14.
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