Defying Gravity: the Development of Standards by States in the International Prosecution of International Atrocity Crimes

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Abstract

The number of nations that have signed and ratified the Rome Treaty of the International Criminal Court continues to expand, but the number of cases prosecuted remains fairly small. One issue that defies resolution is the place of complementarity in the post-conflict jurisdictional decisions of the I.C.C. and national tribunals. Although the Rome Statute crystallizes definitions of core international crimes, the interpretation of processes leaving jurisdiction with the nation or allowing jurisdiction to the I.C.C. continues to lack structure.

One step that some states have taken in implementing legislation and processes in support of jurisdiction over I.C.C. core crimes is to adopt wholecloth the interpretation of crimes made by the I.C.C. and the Office of the Prosecutor. Such an adoption fails to take into account the different levels of jurisdiction allowed to extraterritorial or international tribunals—those tribunals not within the power of the State—and the ability of states to challenge the few precedents in international criminal law as establishing standards of process acceptable to states in responding to I.C.C. core crimes. In acknowledging the debates that have surrounded complementarity—positive complementarity contrasted with the antagonist view that the I.C.C. would seek to usurp jurisdiction given the opportunity; the normative function of a multinational organization versus the ability of state actions and differences to shape customary international law and assist in treaty interpretation—this article recommends a different and complementary normative framework for application of core crimes in national jurisdictions.
Defying Gravity: Processes for the Development of Standards by States in the Prosecution of International Crimes

Matthew H. Charity*

INTRODUCTION

In recent years a number of cases relating to international criminal law have focused on genocide, crimes against humanity and war crimes (together referred to as “atrocity crimes”). The cases vary depending on the situation: the cases and situations before the International Criminal Court, and the International Criminal Tribunals for Yugoslavia and Rwanda; the Extraordinary Chambers of the Court of Cambodia, and the Special Court for Sierra Leone; the national trials in Guatemala, Peru, and other trials in response to alleged war crimes and crimes against humanity.

This article posits that the common thread – impunity for the worst crimes offending ethnic and national societies as well as the international community – must be contextualized as both national and international in nature. To do this, courts must rely on both national and international mechanisms of prevention. The

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1 See, e.g., David Scheffer, Closing the Impunity Gap in U.S. Law, 8 NW. U. J. INT’L HUM. RTS. 30 (2009), at 2.

2 See, e.g., Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), (hereinafter Rome Statute), preambular ¶ 5: Recognizing that the States Parties to the Rome Statute are “[d]etermined to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community as a whole] … and thus to contribute to the prevention of such crimes.”

3 See, e.g., Rome Statute, preambular ¶ 4: “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation…”;
difficulty is that both international and national mechanisms have different strengths, limits, and, to a certain extent, deontological purposes. The Rome Statute creates the International Criminal Court as a body independent from and not directly controlled by the States Parties to the treaty of the court or the United Nations, but in relationship with the United Nations system. States, in dealing with harms occurring within the state’s jurisdiction, may take measures at a national level through legislation, administrative mandate, or judicial action, but in any case acting as the state and, perhaps, placing the interest of the state apparatus ahead of a sometimes amorphous and uneasily defined “justice.” In those circumstances, the potential exists for interference in the judicial processes of the state by parts of the state apparatus seeking to prevent prosecution of crimes.

The Rome Statute attempts to account for that concern in its provisions on admissibility, limiting admissible cases to those where: (1) no State with jurisdiction over the crime investigates or prosecutes the crime; (2) the investigating or prosecuting State is unwilling or unable genuinely to carry out the investigation or prosecution; or (3) after an investigation, the State with jurisdiction has decided not to prosecute, but the decision resulted from the unwillingness or inability of the State genuinely to prosecute; but only where (4) the case is of sufficient gravity to justify further


5 See Jann K. Kleffner, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTION, at 322.
action by the Court. Under this standard, States Parties to the Rome Statute would have the first opportunity to engage in a good faith investigation into the alleged crimes. Much of the scholarship relating to the complementary nature of the Court’s jurisdiction relates to antagonistic complementarity – the ability of the Court to intervene by taking jurisdiction where the State with primary jurisdiction fails to genuinely investigate or prosecute credible allegations of crimes falling within the Court’s jurisdiction. Others have noted the possible obligation to implement the laws against international crimes “subject to the International Criminal Court’s jurisdiction in their national laws and furthermore to establish extra-territorial, universal jurisdiction which enables their national criminal courts to adjudicate these crimes even if they have been committed abroad by a foreign national.”

Even states that do not recognize an obligation on the part of States Parties to incorporate those criminal provisions into their internal law have frequently adopted the language of the Rome Statute to increase the state’s ability to cooperate with the International Criminal Court, both in support of the Rome Statute and, potentially, obligations to enforce decisions taken by the Security Council. One difficulty arises where the Court, which may take advantage of a norm-setting moment in the codification of international criminal law, sets what others might term an  

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6 See Rome Statute, supra n. __, Art. 17.
7 E.g., Kleffner, The Impact of Complementarity on National Implementation of Substantive International Criminal Law, 1 J. INT’L CRIM. J. 86; Triffterer, Bassiou. 
overly high bar for the hearing of international criminal law cases. In doing so, the Court may be setting a precedent for States Parties to avoid prosecutions.

This difficulty has arisen a number of times over the past century, a fly in the ointment of international criminal justice. This article addresses that concern in two contexts: the interaction of states regarding harms in violation of international principles and the adoption by states of mechanisms for the vindication of rights. Taking a transnational legal process approach, national representatives have adopted or recognized existing principles under international law norms (interacting from a positivist (or objective law) perspective), have met in groups to discuss implementation of international law standards (interpreting the standards in specific contexts through commissions or other institutions (an institutionalist perspective, eventually looking to the International Law Commission or committees for the development of the Court)) and have pushed for the internalization of those standards within a transnational, supranational, or international structure (a constructivist approach – determining the constitution of rules related to the identified

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11 Harold Hongju Koh describes the transnational legal process as having three phases: “One or more transactional actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation. By so doing, the moving party seeks not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party’s internal normative system. The aim is to ‘bind’ that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic, and constitutive. The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.” (in Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2634, 2646 (1997)); see Leila Nadya Sadat, The Nuremberg Paradox, 58 Am. J. Comp. L. 151, 162 (2010), describing “the existence of transnational legal processes that lead courts, especially, to adopt international norms,” in the context of French adoption of the Nuremberg principles in prosecutions of crimes against humanity.

norms, and allowing for the further implementation of norms through that construct).\textsuperscript{13}

Although the concern of restrictive standards that undermine the object and purpose of the Rome Statute and the principles of law the Statute supports could be raised in the selection and prosecution of a number of cases and for many reasons, one area in which the conflict in rule-setting with regard to the definition of crimes has clearly arisen is the consideration of gravity as an indicator of admissibility on both qualitative and quantitative grounds.\textsuperscript{14} Considering the usurpation of authority a potential indicator of overall governmental incapacity or specific complicity with the alleged crime suggests an incentive for state governments to make every effort to retain authority over adjudication.\textsuperscript{15} In doing so, however, the state tribunals need not behave as though exercising powers delegated to the States by the International Criminal Court. Rather, to the extent the ICC crimes reflect \textit{jus cogens} forbidding atrocity crimes, the adoption and implementation by States of the ICC statute creates an opportunity for states to define the jurisprudence of international criminal law in conjunction with the ICC statute.

\textsuperscript{13} See John Gerard Ruggie, \textit{What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge}, 52 \textit{International Organization} 855 (1988), noting that “Constitutive rules define the set of practices that make up a particular class of consciously organized social activity—that is to say, they specify \textit{what counts} as that activity.”


\textsuperscript{15} Kleffner, \textit{COMPLEMENTARITY IN THE ROME STATUTE}, supra n. __, at 317-18 (“Complementarity bestows upon national proceedings the pedigree of ‘willingness’ and ‘ability’ when the Court determines that a case is inadmissible in accordance with Article 17(1)(a) to (c) of the Statute.”) and 320 (discussing the “largely antagonist premise on which the regime of complementarity is based … [where States] want to avoid the embarrassment that a declaration of admissibility would entail.”).
I. THE DECOUPLING OF STATE ACTORS’ ROLES AND REDOUBLING OF A STATE ACTORS’ EFFORTS

The concept of *jus cogens*, or “compelling law” – law allowing no derogation – is a kindred spirit to the notion of *le droit des gens*, or “the law of people” described by French law professor and original member of the U.N. International Law Commission Georges Scelle. In Scelle’s *Précis du droit des gens*, he cites to Montesquieu’s definition that “Laws are necessary relationships which derive from the nature of things,” to lead to the concept of a law of integration and progress leading to “objective law.”

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16 See, e.g., Hubert Thierry, *The Thought of Georges Scelle*, 1 E.J.I.L. 193, 198 n.10 (using the “law of people” as opposed to the more typical translation “Law of Nations” clarifies the role of the individual as “the only genuine subject[] of international law.”).
17 Id. at 199, citing Scelle, *Précis du droit des gens* (Vol. I), at 37, for the concept that objective law develops from social reality. See also, Scelle, Règles Générales du Droit de la Paix, pp. 348-50, 46 RECUEIL DES COURS DE L’ACADEMIE DE LA HAYE 327-703 (1933) («Le droit objectif est l’ensemble des lois causales qui déterminent l’apparition, la permanence et le développement du fait social…. La traduction normative de ces lois causales immanentes s’appelle le droit positif. Le droit positif n’est donc, par définition, que la transposition sur le plan normatif des lois causales d’une société. Cette transposition peut être d’ordre coutumier ou instinctif ; d’ordre législatif, réglementaire ; d’ordre autocratique ou conventiennel…. Il se peut, il est même fréquent, que le droit positif diffère et s’écarte du droit objectif, que la norme sociale diffère de la loi causale, soit parce que l’infirmité de l’agent coutumier ou législatif empêche le droit objectif d’être totalement perçu, soit parce que les insuffisances techniques de l’organisation sociale empêchent une totale juxtaposition du système de lois et du système de normes. Cependant, par une hypothèse nécessaire, il faut considérer comme acquis, jusqu’à preuve contraire, qu’il y a coïncidence exacte entre l’un et l’autre, car sans cela le droit positif ne pourrait pas avoir de valeur obligatoire. *La validité* (geltung) du droit positif réside, en effet, dans sa concordance avec le droit objectif») (italics in original) («Objective law is the conglomeration of causal laws which determine the appearance, permanence, and development of social facts… The normative translation of these self-made causal laws is positive law. Positive law, then, is only, by definition, the *transposition of a society’s causal laws onto a normative plane*. This transposition can be either through custom or instinct; through a legislative or regulatory means; from a despotic or conventional society…. It can happen, it’s even frequent, that positive law differs and separates from objective law, that the social norm differs from the causal law, either because a weakness in the customary or legislative agent prevents the law from being totally perceived, or because insufficient technique in the social organization
Because this objective law conforms to social necessities, positive law that derogates from objective law – that fails to conform to those social necessities – becomes anti-legal, and may be rejected. Binding positive law gains its validity from the bundle of conditions necessary for the existence of a social fact, without which the social fact could neither come about nor persist. These purported causal laws that support social functioning are not necessarily enunciated as positive law, but are the basis around which legislators might construe and assess positive law.

In the context of international, supranational, and extra-national relations, actions taken by state actors “are by nature international, since their goal, and result, is to realize this phenomenon of [legal monist] solidarity or international relations, and they are, and can only be, accomplished in conformity to international norms.” While the state actors could, therefore, act from a national or international perspective, and where there exist no specifically international leaders or agents the state leaders and agents that stand in for the specifically international leaders/agents taken on a “double role.” “They are national agents and leaders when they function in the state juridical order; they are international agents and leaders when they act in the international juridical order.” Scelle describes this – dédoublement fonctionnel – as the “fundamental law of the uncoupling of functions,” but most describe it as “role-splitting.”

prevents a total juxtaposition of the system of norms and the system of laws. However, as a necessary hypothesis, one must take for given, until the opposite is proven, that the two exactly coincide, because otherwise positive law could have no obligatory value. The validity of positive law rests, in effect, in its agreement with objective law.

18 Id.
19 Id. A rule not necessary toward the existence of a social fact would, therefore, not be “objective law.”
20 Thierry, supra n. __, at 198.
21 Scelle, REGLES GENERALES DU DROIT DE LA PAIX, supra n. __ at 358 (« …il reste que ces fonctions sont par nature internationales, puisqu’elles ont pour but et pour résultat de donner satisfaction à un phénomène de solidarité ou à des rapports internationaux et qu’elles sont et ne peuvent être accomplies que conformément aux normes internationales. »).
22 See, e.g., Antonio Cassese, Remarks on Scelle’s Theory of “Role Splitting” (dédoublement fonctionnel) in International Law, 1 E.J.I.L. 210, 212 (1990).
In the context of complementarity before the International Criminal Court, some have posited that instead of having to uncouple a national and international function, the national court and the international court exist in a relation of role concurrence— in the first instance, the national court may take jurisdiction over the trial of an alleged perpetrator of an atrocity crime, but the international court will exercise its role in prosecuting the perpetrator when the national court’s failure to prosecute activates the international court’s concurrent jurisdiction. 23 Because they may both take responsibility for the prosecution, the international

23 Some have referenced such an obligation as “role concurrence,” or the simultaneous protection of important legal values of the international community and the national legal order. Jann K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions, p. 32 (Oxford 2008) citing Otto Triffterer, Preliminary Remarks: The Permanent International Criminal Court—Ideal and Reality, in Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court—Observers’ Notes, Article by Article, pp. 26-28 (Nomos, Baden-Baden 1999). While the concept of role concurrence is, indeed, a departure from Scelle’s construct, it would appear less a departure in translating dedoublement as uncoupling—that is, each state that acts in the international community necessarily acts through its organs in both domestic and international spheres. Where law exists in the international sphere and international courts do not exist or are otherwise unable to implement that law, the courts of the state act to fulfill the obligations of the state. Because such courts are applying binding international standards on behalf of the state, the courts must uncouple the two roles—that of state court with that of international court. The court doing otherwise would be anti-legal, undermining an international rule of law. See, e.g., Scelle, supra n. __ at 657 (“if the connection of juridical situations puts into play the competence of government actors of other states, or actors with concurrent responsibility, the role of government actors careful to procure the realization of law in a recognized interstate milieu will consist of a coercive act exercised on their governmental actor colleagues to obtain from them the regular utilization of their competences.”) and at 667 (“we are preoccupied with intervention only in international relations. But we know as well that there’s no divider between an internal juridical order and the international juridical order: the extent of the latter determines the structure of the former, and when the competence of subjects of law, including nationals in interstate commerce, are covered by an international norm, the application of this norm stems from international law, even in relations between the governing and the governed, immediate subjects of the law of people.”).
and national courts would share the role of preventing and punishing atrocity crimes.\textsuperscript{24}

As discussed further below, the potential for \textit{shared jurisdiction} may deviate from the notion of a concurrent role, as opposed to a \textit{shared role}. To the extent that national courts have a responsibility to vindicate supranational or meta-national\textsuperscript{25} harms arising from atrocity crimes, the role is certainly not dissimilar from that exercised by the Court – both the Court and national courts are prosecuting alleged perpetrators of atrocity crimes. However, to the extent that the crimes vindicated by the Court must be limited qualitatively and quantitatively\textsuperscript{26}, the national courts have an opportunity to revisit the goal of what Scelle would refer to as the underlying “objective law,” to determine which cases can and should be prosecuted by the national courts, even where the International Criminal Court would elect not to

\textsuperscript{24} This shared responsibility echoes the logic of the Responsibility to Protect, in that the state would have primacy over the international community, but the international community may need to act to put an end to crimes against humanity (including the crime of persecution through ethnic cleansing), genocide, or war crimes. See Responsibility to Protect Resolutions (World Summit Outcome Document 2005, ¶¶ 138-39; S/Res/1674 (2006) (Security Council Resolution reaffirming World Summit Outcome on Responsibility to Protect). See also, Gareth Evans, \textit{Crimes Against Humanity and Responsibility to Protect}, in \textit{Forging a Convention for Crimes Against Humanity} (Leila Nadya Sadat, ed.) (Cambridge 2011) at 2; see generally, Matthew H. Charity, \textit{The Criminalized State: The International Criminal Court, the Responsibility to Protect, and Darfur, the Republic of Sudan}, 37 Ohio N.U. L. Rev. 67 (2011).

\textsuperscript{25} “Meta-national” refers to the community of peoples, and the joint interest of the nation of nations, as opposed to any smaller group that may have bilateral or other smaller group commonalities at a level hierarchically superior to the nation (supranational) (see Kleffner, \textit{Complementarity in the Rome Statute}, \textit{supra} n. __, p. 316 (claiming state promotion of matter from a national to the international realm ensures and protects “meta-national values, such as peace, human dignity and the needs of all mankind,” in describing gradual development toward a “universal” law of the world community)).

\textsuperscript{26} Schabas, \textit{Victor’s Justice}, \textit{supra} n. __, at 542, 544 (noting that there are simply not enough resources for international criminal tribunals to aspire to prosecute all international crimes within their jurisdiction, and that the Office of the Prosecutor of the International Criminal Court explains the choice of situations selected by referencing the “gravity” of the situation).
prosecute or would find the case inadmissible for lack of gravity.\textsuperscript{27} The role of the national court is, in the first instance, a greater role, because it may act without the strictures and limitations of the Rome Statute to prosecute perpetrators in a manner that effectively protects its populations prior to the International Criminal Court considering admissibility under a complementarity regime.

That is not to say that national courts should elect to use substantially different national standards over international standards; rather, the use of international standards in the investigation and punishment of crimes against humanity by courts should, and must, be done differently in domestic tribunals than in international tribunals, based on the deontological differences in the international and domestic tribunals (that is, the international standards require different duties of international courts than of national courts).\textsuperscript{28} Even in approaching the same end, the complementarity regime, and indeed the history of the development of the atrocity crimes, demands a different approach of national courts.

This article looks at the development of transnational and international responses to atrocity crimes, including its burst of development in the last twenty-five years.

First, to understand the development of international criminal law’s focus on atrocity crimes through a transnational legal process lens, we must start where the nations focusing on atrocities are interacting. By looking at responses to wars, starting in the mid-19\textsuperscript{th} century, we can see the slow, but continuing process of interaction, interpretation, and internalization of the social mitigation of war crimes, aggression, and crimes against humanity.

Second, it notes the structural differences that require the decoupling of the national and international apparatuses of

\textsuperscript{27} One might reference this as a “redoublement fonctionnel,” or a functional redoubling of the state actor’s efforts – exercising a metanational responsibility that the state could have chosen to opt out of, for the purpose of vindicating a core international responsibility.

international criminal law. In separating those mechanisms, it explains why national courts must act, and why the purported sanctioning tools of negative complementarity fail to provide a remedy to at risk populations.

Finally, the article analyzes the process of norm development within the International Criminal Court to suggest the difficulty of creating effective limits in developing standards. Because of the slow process and the confusion in the development of the law divided by the roles of the Office of the Prosecutor, the Pre-Trial Chamber, and the Appeals Chamber, the article suggests further development at a national level, as the Rome Statute specifically calls on the Court to consider “general principles of national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards,” but only where the Statute, treaties, and principles and rules of international law are not clearly applicable. The article concludes by arguing that the best way to develop those international principles are by having a robust interaction and interpretation of atrocity crime principles, allowing for an interpretation of those crimes that would give guidance to victim groups, world leaders, and the world community generally such that binding internalization of norms would effect the meta-national goals of protecting populations.

First: Development of International Laws Capable of Dealing with Atrocity Crimes

The 1874 Brussels Conference

Following the Franco-Prussian War, fifteen European states gathered to discuss laws of war, some of which had been violated during the course of the relatively brief, but bloody conflict.30 In


30 For a cogent analysis of the conflict, see generally Geoffrey Wawro, *THE FRANCO PRUSSIAN WAR* (Cambridge 2003).
considering a transnational legal process approach, the interaction of the war raised questions as to the proper approach to war. For example, the states had to address whether an occupying power had the right to protect itself against guerilla warfare (in the guise of the francs-tireurs, 31 and the mass conscription of citizens in France who were not regular soldiers), or whether those rising up to defend their country deserved prisoner-of-war status.

The fifteen states utilized the code developed during the U.S. Civil War by Francis Lieber 32 to attempt to develop an “International Declaration concerning the Laws and Customs of War”. By building on the Lieber Code, which in turn relied on a number of 17th and 18th century European Law of Armed Conflict theorists, the leaders hoped to set stricter guidelines for warfare – Lieber’s code purported to be “strictly guided by the principles of justice, honor, and humanity.”

The Lieber Code required that soldiers show more discipline during war than civilians. Soldiers violating the Lieber Code might face death, “or such other severe punishment as may seem adequate for the gravity of the offense.” 34 The penal codes applicable to soldiers during combat would “not only punish[ soldiers] as at home, but in all cases in which death is not inflicted, the severe punishment shall be preferred.” 35 The shared standard and joint interpretation of the Lieber Code, and the interactive response of agents of several nations to the perceived violation of rights in the Franco-Prussian War allowed the parties to develop their interpretation of the laws and customs of war, advancing the discussion on the protection against war crimes.

Although the parties did adopt the International Declaration concerning the Laws and Customs of War, they did not create a

31 Francs-tireurs were, literally, “free shooters,” men living in eastern France who trained with high quality rifles and were sometimes affiliated with the French army. When franc-tireurs were captured, Prussians did not wish to treat them as captured enemy soldiers because the free-shooters did not dress in uniform or fight with an organized group.
32 The code was entitled, “Instructions for the Government of Armies of the United States in the Field” but is generally referred to as the Lieber Code.
33 Sandoz, supra n. ___ at 661, citing Lieber Code Art. 4.
34 Sandoz, supra n. ___ at 661-62, citing Lieber Code Art. 44.
35 Id., citing Lieber Code Art. 47.
binding convention, and, thus, did not bind themselves through positive law. Notwithstanding the failure to create a convention, one delegate suggested that states coordinate their internal legislation to ensure equal punishment for those violating the rules of war.36 This, again, was not done, leaving the parties’ interpretation on the table at the end of the Brussels Conference.

The Oxford Manual of 1880

The Lieber Code was not without impact, notwithstanding the failure of the Brussels Declaration to be made a convention. In 1880, the Institute of International Law adopted its Manual of the Laws of War on Land, and stated that where the violation of the laws of war are at the same time offenses against the general criminal law, the perpetrator should be liable to trial and punishment by the courts of the injured adversary: “the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are … [with the ] offenders against the laws of war [being] liable to the punishments specified in the penal or criminal law,” when the person of the offender could be secured.37 The articulation of this standard in 1880, which would be repeated in a second Oxford Manual of 1913, would have a strong effect in the rules agreed to by the victorious powers who would be able to claim almost thirty years of recognition of the standard prior to seeking to apply it.

The Hague Conference of 1899

Twenty-five years after the Brussels Conference, European states again gathered to reach consensus to regulate the laws and customs of war. In June 1899, the Hague Diplomatic Conference revisited topics covered in the Brussels Declaration, including the legality of acts between occupying powers and citizens of the occupied state. The representative of Belgium argued that rights recognized in the Brussels Declaration granted too great a power to an occupying force, and forbade the recognition of civilians as

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36 Id., at 663.
lawful combatants when fighting an occupying force. As opposed to codifying such a standard, the Belgian delegate argued, “In my opinion, there are certain points which cannot be made the object of a convention, and which it would be better to leave as they stand today, under the rule of the tacit and common law which results from principles of the law of nations.” In interpreting the language of the Brussels Declaration, the Belgian delegate recognized the agents of the various states were interpreting and, potentially, codifying a standard that the representatives of smaller states could not support. The Belgian delegate reframed the question, so that the Conference would not decide the legality or illegality of the particular act; rather, the Conference would determine whether new law would be needed as part of the Hague Convention Respecting the Laws and Customs of War on Land, limiting harms that could be perpetrated by either party.

Fyodor Fyodorovich Martens served as a delegate from Russia, one of the Great Powers, which supported the principles recognizing rights in occupying powers. When the parties had reached an impasse, Martens provided the following clause:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience. They declare that it is in this sense especially that Articles 1 and 2 of the Regulations must be understood.

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38 Cassese, The Martens Clause, supra n. __, at n. 11, citing Conférence Internationale de la Paix, La Haye 18 Mai-29 Juillet 1899, Troisième Partie (1899) at 111 (« A mon avis, il y a certains points, qui ne peuvent faire l’objet d’une convention et qu’il vaudrait mieux laisser comme aujourd’hui, sous l’empire de cette loi tacite et commune qui résulte des principes du droit des gens, »).

39 This component of the 1899 and 1907 Hague Conventions Respecting the Laws and Customs of War on Land, known as the Martens clause after the Russian diplomat who recommended it, may do no more than to extend to those engaging in combat as francs-tireurs the protections recognized for other lawful
The Belgian delegation understood this as a major check on potential occupying powers: “Tomorrow, as today, the rights of the conqueror, far from being unlimited, will be restrained by the laws of public conscience (conscience universelle) and not one country, not one general would dare to transgress them, since that would submit oneself to banishment from the civilized nations.”

Notwithstanding arguments over the correctness of the Belgian delegate’s understanding of the law regarding those fighting occupying forces, the norm the Conference in fact interpreted, the law the States Parties to the Hague Convention of 1899 internalized was the place of laws of humanity and dictates of public conscience alongside the (non-conflicting) terms of the treaty. By shifting the interaction – the question of what law the parties sought to reach agreement on – the interpretation and


\[\text{combatants, if it goes even that far. See, e.g., Antonio Cassese, The Martens Clause: Half a Loaf or Simply Pie in the Sky?, 11 E.J.I.L. 187-216 (2000) (arguing that custom did not permit attacks on the occupying force and would not have protected francs-tireurs, but Martens used the somewhat vague language of the clause to appease smaller countries while not affecting the responsibilities of the great Powers). Nevertheless, the reasoning allowed for under the Martens clause calls for the application of recognizable but not fully enunciated rules over a variety of circumstances not yet fully developed. Again, it may be of interest that the smaller states, such as Belgium, are looking to the protection of individuals (under the droit des gens) as opposed to the rights of states.}

\text{\textsuperscript{40} Conférence Internationale de la Paix at 153 (cited in Cassese, The Martens Clause at n. 29) (“Demain comme aujourd’hui les droits des gens dans les termes de la déclaration seront restreints par les lois de la conscience universelle et pas un pays, pas un général n’oserait les enfreindre, puisque ce serait se mettre au ban des nations civilisées”).}

\text{\textsuperscript{41} Indeed, Cassese references the speech made by Martens after Martens tabled his proposal of the clause: “Il faut se rappeler que ces dispositions [on lawful combatants and mass conscription (lévée en masse)] n’ont pas pour objet de codifier tous les cas qui pourraient se présenter.” (“We must recall that the object of these clauses is not to codify every eventuality that could present itself.”). Despite Cassese’s (and Martens’) view that the clause was meant to deal only with these two aspects of guerilla warfare, the defense of the limitations on the clause make the very point raised by the Belgian delegate – the smaller states could continue to look to custom and general principles in response to the overwhelming force of an occupying power.}

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internalization of the norm became much broader. And, although the Hague Convention called only for state liability for compensation and not for criminal sanctions, the normative effect of the clause’s adoption allowed for a second iteration in the 1907 Hague Convention Respecting the Laws and Customs of War on Land, and the adoption of language reflecting a belief in the legality of the public conscience and laws of humanity moving forward.

The 1919 Treaty of Versailles

The transnational legal process that led to the recognition of liability for violations of the laws of war in the Hague Conventions of 1899 and 1907 were coupled with questions of individual culpability that came to fruition during the Peace Conference of 1919 following World War I. As noted previously, the 1907 Hague Convention restated, and thus reiterated, the 1899 clause used by the Russian delegate, F.F. Martens, to call for a

42 See the Dissenting Opinion to the Advisory Opinion of the International Court of Justice on Legality of the Threat or Use of Nuclear Weapons (ICJ Reports (1996) at 408, where Judge Shahabuddeen argues that “the basic function of the clause was to put beyond challenge the existence of principles of international law which residually served, with current effect, to govern military conduct by reference to the ‘principles of humanity and … the dictates of public conscience.’” One should also note Martens’ own investment in, and his reminder to his colleagues regarding, the Conference’s successfully codifying some of the standards the Brussels Declaration had failed to codify. Czar Alexander II had convened the 1874 Brussels Conference, and Czar Nicholas II convened the 1899 Hague Conference, such that Martens reminded his colleagues that the failure of the diplomatic community to agree on specific treaty rules for a second time would show the military that diplomats could not fashion rules regarding the laws and customs of war, leaving the military free to interpret the laws of warfare as they pleased. See Cassese, The Martens Clause at 195; Sandoz, The History of the Grave Breaches Regime, supra n. __, at 663.

43 Although Cassese argues that Martens’ references in the clause may have been a political expedient to appease the Belgians, Martens’ belief in a limited natural law depiction of human rights foreshadows the “objective law” view of Scelle: “These [human] rights flow from the nature and from the conditions of humanity and so cannot be created by legislation. They exist in themselves.” (« Ces droits [de l’homme] découlent de la nature et des conditions de l’humanité et ne peuvent donc pas être créés par la législation. Ils existent par eux-mêmes ».) Martens, Traité de droit international, vol. 1, at 14 (1883-87), cited by Cassese, The Martens Clause, n. 45.
broader reading of positive law as expressed through principles and the laws of humanity, beyond the written word articulated in the codification completed during the 1899 and 1907 Conferences. The continued interaction among institutional actors – other delegates who accepted the terminology of the clause – allows for its repeated use through the institution (the Conferences), and its internalization by representatives of States Parties. During the 1907 negotiations, and of import to the Commission on Responsibility of Authors for the War, the German representative to the Hague Conference speaking with regard to submarine mines stated that certain acts would not be taken by the German Navy, not because of the codification undertaken by the Conference, but because such actions would be contrary to the unwritten law of humanity. The Commission appeared to take particular offense that “those Powers … a short time before had on two occasions at The Hague protested their reverence for right and their respect for the principles of humanity,” allowing the commission to decide that “the public conscience insists upon a sanction which will put clearly in the light that it is not permitted cynically to profess a disdain for the most sacred laws and the most formal undertakings.” However, the Hague Conventions did not set up a mechanism for the investigation and prosecution of a premeditated war of aggression. Instead, the Commission recommended based

44 See analysis of charge to Commission allowing for investigation into crimes against humanity, 14 Am. J. I. L. 95, 117-18, especially n. 65, citing the declaration of Baron Marschall von Bieberstein to the Hague Conference of 1907: ““Military operations are not governed solely by stipulations of international law. There are other factors. Conscience, good sense, and the sense of duty imposed by the principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses.

‘The officers of the German Navy, I loudly proclaim it, will always fulfill in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization.”’

45 Id. at 118 (stating that a suddenly declared war under false pretexts, “is conduct which the public conscience reprobates and which history will condemn, but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace (International Commission of Inquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a
on the gravity of the outrages upon the principles of the law of nations and upon international good faith, that certain acts “be made the subject of a formal condemnation by the Conference,” and that “for the future penal sanctions should be provided for such grave outrages against the elementary principles of international law.”

The Commission focused on the inability to act promptly with regard to an investigation into the causes of war, and distinguished the ability of the several Allied powers to engage a tribunal appropriate to the trial of offenders against the laws and customs of war – the purpose for which the commission was created – from the development of an international tribunal and truth-gathering organization, a job better left to historians.

The Commission’s treatment of laws and customs of war and the Laws of Humanity could be, and was, much broader than its treatment of aggressive war. The Commission concluded that “All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution.” In addition to the parties culpable for breaches of the laws of humanity, the Commission report added responsibility for those who failed to prevent violations of the laws or customs of war – some of the highest ranking military leaders and officials of the German government. Some noted that Kaiser William II had instigated the war, and believed his stepping down and trial would be good both for international justice and morality, but also for his own subjects. While during the course of the war politicians and

tribunal such as the Commission is authorized to consider under its terms of reference.”).

46 Id. at 120. Again, the Commission considers the gravity of the outrages on the principles of international law or the law of nations as creating sufficient reason for future penal action.


48 Id. at 121.

49 See, e.g., James F. Willis, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR, p. 38 (Greenwood Press 1982) (Willis notes former U.S. President Howard Taft
lawyers called for the punishment not just of the immediate perpetrators but of those with some degree of command responsibility,\textsuperscript{50} at war’s end all parties were waiting to see where the chips would fall.\textsuperscript{51} Even among the Allies in favor of the Commission report, some nationals had questioned the logic of this submissive sovereignty - an international court would engage in overreach, as decisions relating to imprisonment were typically left to the sovereign\textsuperscript{52}, not to a third-party. Respected scholars were incredulous at the idea a sovereign would allow international tribunals of third states or enemy states to judge deeds typically left to the national courts.\textsuperscript{53}

\textsuperscript{50} See Professor Weiss of the Law Faculty of the University of Paris in a 1915 address: “I think that not only the direct immediate offenders should be held responsible, but that we must go to the top; we must pass over the heads of the primary offenders, to the chiefs, to those of whom the soldiers and officers have been only the servants and valets.” 14 AM. J. INT’L L. 70, 88-89, citing 39 REVUE PÉNITENTIAIRE (1915), p. 457.

\textsuperscript{51} See, e.g., France’s statement to Germany of October 4, 1918: “Conduct which is equally contrary to international law and the fundamental principles of all human civilization will not go unpunished…. The authors and directors of these crimes will be held responsible morally, judicially, and financially. They will seek in vain to escape the inexorable expiation which awaits them.” Willis, supra n. __, at 51.

\textsuperscript{52} See Harry D. Gould, \textit{The Legacy of Punishment in International Law}, p. 16 (Palgrave MacMillan 2010), discussing sovereignty as the contrapositive to punishment in defining sovereignty as that which exists above punishment.

\textsuperscript{53} See Garner, \textit{Punishment of Offenders Against the Laws and Customs of War}, at 71, n. 2, quoting a speech from Professor Renault in which Renault was asked about the enforceability of a provision in a treaty of peace requiring delivery of principal offenders against the laws of war: “I do not see how a government, even if conquered, could consent to such a clause: it would be the abdication of all its dignity; moreover, almost always, it is upon superior order that infractions on the law of nations have been committed. I have found the proposal excessive, though I understand the sentiment that inspired it. I cite it because it shows well to what point men, animated by justice and shocked by what has taken place, desire that the monstrosities of which French and Belgians have been victims should not go unpunished.” 25 REV. GÉN. DE DROIT INT. PUB., p. 25. See also, Carlos S. Nino, \textit{The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina}, 100 YALE L.J. 2619, 2638-39 ("Violations of human rights belong with crimes such as terrorism, narcotics-trafficking, and destabilizing democratic governments, in a category of deeds..."
The Commission suggested two mechanisms of prosecution. First, each belligerent had the power to set up, or use from its current system, “an appropriate tribunal, military or civil, for the trial of such cases … [which] would be able to try the incriminated persons according to their own procedure, and much complication and consequent delay would be avoided which would arise if all such cases were to be brought before a single tribunal.” Second, the Peace Conference would create a high tribunal that could try special cases, including (1) those belonging to enemy countries that have committed outrages against civilians and soldiers of several Allied nations; (2) persons in authority whose orders affected the conduct of operations against several of the Allied armies; (3) all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defence for the actual perpetrators); and (4) such other persons belonging to enemy countries as, having regard to the character of the offence or the law of any belligerent country, it may be considered advisable not to proceed before a court other than the high tribunal set up by the Conference.54

The Commission stated that the tribunal would apply “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.” The language of the

which may, because of their magnitude, exceed the capacity of national courts to handle internally. … But if the establishment of international courts seems impossible, intermediate solutions could be implemented, such as the internationalization of jurisdiction, and the refusal of foreign courts to recognize amnesties, pardons, or special statutes of limitations for these kinds of crimes.”).

54 Commission on Responsibility Report, supra n. __, pp. 121-22. Of note, the high tribunal also has preference over national courts for the same offence (p. 123), has the ability to transfer cases to national courts for inquiry or for trial and judgment, and allows for prosecutorial discretion, as the Commission plan states “the duty of selecting the cases for trial before the tribunal and of directing and conducting prosecutions before it shall be imposed upon a Prosecuting Commission of five members….”
Martens clause would set sufficient parameters to allow for the trial of war criminals. The tribunal would “have the power to sentence [the guilty party] to such punishment or punishments as may be imposed for such an offence or offences by any court in any country represented on the tribunal or in the country of the convicted person.”

Looking at the list of crimes reported by the Commission, the crimes are neither divided between war crimes and crimes against humanity, nor are they systematically compiled. Instead, the list is illustrative of “diverse” and “painful” crimes, with additions “daily and continually being made.” None of the European powers serving on the Commission sought to challenge this fairly expansive power. The Martens clause had matured into settled law.

**Challenges to the 1919 Commission Report**

The twentieth-century saw the rise of a voluntary-positivist view of international law – law as an expression of the will of the state, based in sources on which the state representative might rely. The bases of international law were recognized and formalized by the international community in the Charter of the Permanent Court of International Justice, to be later restated in the Statute of the International Court of Justice. Independent sources of international law include treaty law, customary international law, and general principles of law, with decisions of jurists and writings of scholars taking on a supporting role in understanding the law. These sources are a minimum – that is, courts may look to these sources and give them weight, notwithstanding arguments made by a party before the court that a particular source is not properly law.

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56 Sandoz argues that the list, while “somewhat interesting historically, … cannot be viewed as the result of a serious and systematic work of scholarship carried out to show established doctrine or state practice.” 7 J. Int’l Crm. Just. 657, 668.
58 Statute of the International Court of Justice, Art. 38(1).
59 See, e.g., Maritime Delimitation and Territorial Questions (Qatar v. Bahrain), 1994 I.C.J. 112 (1994), where the International Court of Justice finds the existence of a treaty notwithstanding denial of intent to treat meeting minutes as binding by party seeking to challenge I.C.J. jurisdiction.
In applying international law the international community must also decide what weight to give arguments stating a law has reached customary status, or reflects a general principle. This is so whether the international community interprets international law through a designated international body, or allows for interpretation of the law to devolve back to the states.

In its challenges to the Commission Report the delegates of the United States raised a number of issues deriving from a claimed distinction of legal and moral obligations: the United States noted that “The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations,” while the “laws and principles of humanity vary with the individual,” preventing them from being considered in a court of justice, particularly in the administration of criminal law. Rather than vindicating rights that exist according to the laws or principles of humanity a term negotiated, adopted, and utilized within a

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60 Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities, 14 AM. J. INT'L L. 70, 134 (the United States representatives here distinguish between responsibilities of a legal nature and those of a moral nature (see p. 128), but also to the political question of sovereignty and head of state immunity (p. 136), to the submission of a non-binding commission of inquiry for aggressive war, to the extent any body can investigate and distinguish between an aggressive and defensive posture, and to note that such a body would be responding to a moral and not legal question (pp. 139-40); that tribunals to hear war crimes must consider only war crimes over which the individual states already have jurisdiction, as there was “no international statute or convention making a violation of the laws and customs of war—not to speak of the laws or principles of humanity—an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence” (p. 146), and the United States was “averse to the creation of a new tribunal, of a new law, of a new penalty, which would be ex post facto in nature, and thus contrary to the Constitution of the United States and in conflict with the law and practice of civilized communities” (p. 147); that heads of state who violate the laws and customs of war “are, as agents of the people, in whom the sovereignty of the state resides, responsible to the people for the illegal acts which they may have committed, and that they are not and that they should not be made responsible to any other sovereignty” (p. 148); that a head of state is morally, but not legally, responsible to mankind, such that the authority of the Commission was circumscribed by its mandate: to report on “facts as to the violations of the laws and customs of war committed by the forces of the German Empire and its allies...” (pp. 129 (mandate) and 149).
European context, the United States looked to apply the written laws of the parties regarding their own courts applying penal laws to enemy belligerents.

The Japanese delegates similarly questioned whether international law recognized a penal law for a belligerent presumed guilty of a crime against the laws and customs of war, but appeared to challenge only the inclusion of heads of state in those to be charged under high tribunal, and the punishment for failure to “abstain from preventing or taking measures to prevent, put[,] an end to, or repress[,] acts in violation of the laws and customs of war.” Thus, while the European members of the Commission on Responsibility looked to interpretations of law developed through and internalized following the Brussels Declaration and Hague Conventions, the United States and Japan did not recognize the developments as having achieved the standard of law in a strict sense.

In practice, following the First World War, the Allied governments decided to limit their requests, “only want[ing] to make an example. To try very large numbers would be to create great difficulties for the German Government,” which some states viewed as easier to work with than a potential Bolshevist or Militarist Government. The Inter-Allied Mixed Commission shifted membership from legal experts to those who would assist in the political expedient of selecting a number of cases for Germany to conduct, “to uphold moral principles and treaty rights.”

The Nuremberg Charter of the International Military Tribunal

Thus far, we have seen that the European powers developing penalties for crimes engaged in during a conflict have used war and the legal issues raised through the conflict to

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62 Willis, supra n. __, p. 117, referencing the English view that the Allies should seek the surrender of “the most important and let the rest go,” and the French view to commence with “a few symbolic persons.” While even a shortened list of Germans sought by the Allies for trial had 1,580 alleged offenders on it, compromise among the Allies brought the list down to 890. Eventually, the Allies allowed Germany to try an almost negligible number of alleged war criminals.
63 Id., at 124.
crystallize legal questions regarding rights and responsibilities of parties to the conflict. Following the First World War, the great Powers of Europe had recognized a legal standard, but were unwilling or unable to enforce that standard.

The United Nations prepared for the end of the Second World War, and the prosecution of Nazi war criminals. The United States delegate to the United Nations War Crimes Commission, Herbert Pell, sought retribution for atrocities committed against people on racial or religious grounds based in the application of the “laws of humanity” and suggested crimes committed against persons based on their race or religion constituted “crimes against humanity.”

British prosecutor Hartley Shawcross noted that Crimes Against Humanity were different in kind from the crime against peace and the ordinary war crime. To a certain extent, the crime was carried out as part of the Nazi Party’s total war policy, thereby raising international issues of crimes against peace; but, in addition to its impact on the international community, its criminalization derived from “matters which the criminal law of all countries would normally stigmatize as crimes—murder, extermination, enslavement, persecution on political, racial or economic grounds.”

Shawcross noted that the nations adhering to the Nuremberg Charter “felt it proper and necessary and in the interest of civilization to say that these things … were, when committed with the intention of affecting the international community … not mere matters of domestic concern but crimes against the law of nations…. ” Again, we had the interaction of states and peoples during a time of war; as a supranational or international community, the rules that should have protected populations needed to be interpreted in a way that was acceptable within a legal framework; and the states and international community

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internalized the notion that these crimes were cognizable in the international sphere.

Development of Atrocity Crime Regulation Since Nuremberg

One of the initial agenda items of the nascent United Nations organization was the codification of the Nuremberg Principles, undertaken by the International Law Commission in a draft Code of Offences Against the Peace and Security of Mankind. The International Committee for the Red Cross prepared a draft of re-articulated international humanitarian law, which after diplomatic Conferences in Geneva, became the 1949 Geneva Conventions, some aspects of which clarified the need for states to prosecute grave breaches of the Laws of Armed Conflict. The early 1950s saw an advance toward an International Criminal Court, and moves toward the end of impunity for war crimes and crimes against humanity (including genocide) was progressing well. We have come to accept that “international law now protects individual citizens against abuses of power by their governments [and] imposes individual liability on government officials who commit grave war crimes, genocide, and crimes against humanity.” The General Assembly unanimously affirmed the principles of the Nuremberg Charter, which many courts, international and municipal, have understood as an authoritative declaration of customary international law.

66 By G.A./Res./174(II) (1947), the United Nations General Assembly decided “To entrust the formulation of the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal to the International Law Commission, the members of which will, in accordance with resolution 174 (II), be elected at the next session of the General Assembly,” and asked the I.L.C. to “(a) Formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal, and (b) Prepare a draft Code of Offences against the Peace and Security of Mankind, indicating clearly the place to be accorded on the principles mentioned in subparagraph (a) above.”

67 Sandoz, supra n. __, at 673-75.


Despite a period where the growth of international criminal law slowed, development of international criminal law has increased greatly with ad hoc tribunals, the creation of the international criminal court, and the development of international criminal law claims in national jurisdictions. Similar to the recommendation of the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,\(^\text{70}\) and the limited number of perpetrators—twenty-two—prosecuted at the IMT Nuremberg trial, as opposed to the trials of over 1,000 alleged perpetrators of war crimes and crimes against humanity pursued under Control Council Law No. 10 by military tribunals in occupied Germany and in liberated or Allied nations,\(^\text{71}\) the International Criminal Court and the \textit{ad hoc} tribunals for the former Yugoslavia and for Rwanda allow for a greater number of trials to occur outside the international court context.\(^\text{72}\)

The reliance on the national courts makes structural sense, to the extent that the International Court (1) recognizes the primacy of the national courts\(^\text{73}\), and (2) is a reserve court, intended to take cases only when the national courts are unwilling or unable to prosecute the case, notwithstanding the national court’s obligation

\(^{70}\) Again, but for the four areas of exceptional cases recommended for an international or mixed tribunal, the Commission recognized the right of each belligerent to try “incriminated persons” in the belligerent’s custody in an appropriate military or civil tribunal existing under, or set up pursuant to, national legislation, and according to the belligerent’s own procedure. \textit{Commission Report, supra} n. __, p. 121. Presumably the vast number of trials would have taken place within a national jurisdiction.

\(^{71}\) Scharf, \textit{supra} n. __, at 454; Kleffner, \textit{COMPLEMENTARITY, supra} n. __, p. 34 (for the claim of over 17,000 prosecutions in East Germany for crimes during the Second World War, with 1,800 for capital offenses, \textit{citing} C.F. Rüter, \textit{Door Nederland gezoche oorlogsmisdadigers allang berecht door de DDR—Prof. Rüter krijgt toegang tot Stasi-achieven, 49 FOLIA 1-2, 8-11 (1996)).

\(^{72}\) Indeed, the completion strategies for the ICTY (found at \textit{http://www.icty.org/sid/10016} (last visited 25 Sept. 2012) and the ICTR (\textit{http://www.unictr.org/AboutICTR/ICTRCompletionStrategy/tabid/118/Default.aspx} (last visited 25 Sept. 2012) called for their prosecutors to transfer cases of mid-level and lower-level perpetrators to national courts to allow the international courts to focus on the most responsible senior leaders.

\(^{73}\) \textit{See} Rome Statute, Arts. 1, 17, 53, and 58, referencing complementarity, admissibility, and the issuance of a warrant of arrest when a case is within the jurisdiction of the Court.
to prosecute. \textsuperscript{74} Nevertheless, the Nuremberg Tribunal has noted that \textit{individuals} who commit a crime under international law can be punished for violations of international law. \textsuperscript{75} The International Law Commission clarified as early as 1950 that the duties imposed on individuals by international law require no interposition of internal law, and reiterated the principle in the 1954 Draft Code of Offences Against the Peace and Security of Mankind. \textsuperscript{76} The responsibility for compliance lies with the people, and the remedy for a breach should be immediately available, without further action taken by their leaders or government agents prior to the enforceability of the peoples’ rights.

However, it may be difficult to vindicate a right that individuals cannot pin down. In revisiting the language of the Crimes Against Humanity provision of the Nuremberg Charter, interaction and interpretation led to fragmentation of the crime. For example, the 1954 Draft Code of Offences Against the Peace and Security of Mankind specifically referenced (a non-exhaustive list of) Crimes Against Humanity in the context of whether such crimes must be in the context of a war. \textsuperscript{77} The 1991 Draft Code of Crimes Against the Peace and Security of Mankind\textsuperscript{78} referenced the same material, but expanded it into “Systematic or Mass Violations of Human Rights,” and, to conform with the principle of \textit{nullum crimen sine lege}, purported to make the list exhaustive. Because the violation of human rights would need to be of an extremely serious character, only systematic violations – a constant practice or a methodical plan – or mass scale (based on the number of people or the size of the entity affected) violations would fall within the 1991 Code. The party violating the human right could be a public official, or “private individuals with de facto power or


\textsuperscript{76} Ibid.


organized in criminal gangs or groups might also commit the kind of systemic or mass violations of human rights covered by the article....” This response to systemic/mass scale human rights abuse was framed quite differently from the crime against humanity claims brought before the Nuremberg Tribunal.\textsuperscript{79}

The 1993 and 1994 International Criminal Tribunals for the Former Yugoslavia and for Rwanda, respectively, split the difference. The ICTY Statute\textsuperscript{80} required the perpetrator commit the Crime Against Humanity during an armed conflict, but expanded the definition of the crime to include “other inhumane acts,” such that the list no longer purports to be exhaustive. The ICTR Statute,\textsuperscript{81} on the other hand, does not require Crimes Against Humanity occur during armed conflict, but the perpetrator must “commit[ the crime] as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds....” The 1996 Draft Code of Crimes Against the Peace and Security of Mankind requires that the crime be “committed in a systematic manner or on a large scale and [be] instigated or directed by a government or by any organization or group.” The International Law Commission commentary claims to apply “the Charter of the Nürnberg Tribunal, as applied and interpreted by the Nürnberg Tribunal, taking into account subsequent developments in international law since Nürnberg.”\textsuperscript{82}

In lieu of the systematic human rights violation required under the 1991 Draft Code, the 1996 Code references the Nazi policy of terror having been “in many cases ... organized and systematic,” to maintain that Crimes Against Humanity should be carried out in a systemic manner. Instead of relying on the massive human rights violation of the 1991 Code, the 1996 Code points out that the Nazi

\textsuperscript{79} But see Schabas, Victor’s Justice, supra n. __, at 536, noting that with the end of the Cold War and fall of the Berlin Wall, proposals for an international criminal court were strengthened by the growing emphasis of the human rights movement on accountability for atrocity crimes.

\textsuperscript{80} The ICTY Statute can be found, as updated, at http://www.icty.org/x/file/Legal\%20Library/Statute/statute_sept09_en.pdf (last visited 25 Sept. 2012).

\textsuperscript{81} The ICTR Statute can be found, as updated, at http://www.unictr.org/Portals/0/English/Legal/Statute/2010.pdf (last visited 25 Sept. 2012).

\textsuperscript{82} 1996 Draft Code at 47, Art. 18, Commentary (2).
policy of terror was “certainly carried out on a vast scale,” in order to suggest that, if the crime is not systemic, it must be widespread. The group instigation or direction of the 1996 Code was new, and was intended “to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own plan… [particularly as] it would be extremely difficult for a single individual acting alone to commit the inhumane acts as envisaged in article 18 [the Crimes Against Humanity provision].”

The International Criminal Court Statute defines Crimes Against Humanity as “any of the following acts [listing acts virtually identical to the 1996 Draft Code] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” Not surprisingly, when U.S. Senators Durbin, Leahy, and Feingold introduced the Crimes Against Humanity Act of 2009, the Act tracked the language of the Rome Statute. The baseline for a crime against humanity, specifically in its attack requirement, thus appears to be higher than the standard set in the 1996 Draft Code, and different than the standard for crimes against humanity in the Statutes of the ICTY and ICTR. Assuming that the state has an obligation in the international sphere to enforce the international understanding of crimes against humanity, it is unclear in this fragmented model – the Draft Code as custom derived from state practice by the I.L.C.? 

83 Id., at Commentary 5.
84 See David Scheffer, Closing the Impunity Gap in U.S. Law, 8 NW. U. J. INT’L HUM. RTS. 30, at *20 (2009). Ambassador Scheffer noted that the Act required “the attack be systematic and widespread, while the Rome Statute allows for the attack on a civilian population to be systematic or widespread – but, given that the Rome Statute definition describes an attack directed against a civilian population” to mean “a course of conduct involving the multiple commission of acts referred to in [the listing of crimes against humanity] against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack …,” the crime must be widespread (multiple commission) and systematic (pursuant to a policy), as formulated by the Rome Statute Elements of Crimes. See http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf at p. 5 (last visited by author 25 Sept. 2012). Thus, while the wording of the crime appears to be stricter than wording found anywhere else protecting against crimes against humanity, the distinction made no difference.
the Rome Statute as Treaty and the customary law adopted by over 120 states? The international tribunals created by the Security Council that have been in existence for nearly 20 years? – which definition would apply.

**Second: Decoupling International and National Mechanisms for the Prevention of Harms**

**International Purposes vs. National Purposes**

Looking at the question of an international purpose, on the eve of the British election in October 1918, Lord Finlay, the Lord Chancellor, said to an Inter-Allied Parliamentary Committee: “Britain had ‘two aims in this war. One of them was the punishment of those who could be proved guilty of outrages,’ and ‘the other was reparation for the wrongs that had been done.’ Prosecution of ‘offenders would not be mere vengeance; it would be the vindication of international morality.’”

The question of control by the state apparatus of mechanisms to prevent the international crimes described in the Rome Treaty goes to the core of complementarity. As previously discussed, there exist numerous reasons that a local trial under the authority of a state with an interest in the outcome of the case would be preferable to an international trial. Only where the state exercising primary jurisdiction proves unable or unwilling to engage in genuine investigations or trials would the international tribunal consider the admissibility of the case for international adjudication.

The state apparatus has a clearly differentiated system of a judiciary, legislature, and executive. All aspects of the state may have an interest in the outcome – some in responding to constituent concerns for vindication (perhaps as indicative of justice – i.e., the justice system will vindicate the rights of various classes of people), some in response to stability (either through prevention of escalation, or through maintenance of power structures that support the status quo within the state, or minimize individual needs or desires of various parties within the state), some in application of

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85 See Willis, PROLOGUE TO NUREMBERG, p.53,
their own authorities within the state (responsive executive desirous of recognition to a problem that a court cannot respond to with adequate alacrity). Some have argued that the international community attempts to replicate the governmental structures, such that nothing immunizes the International Criminal Court from the concerns raised within a state structure.

The Gravity Standard Since the Inception of the International Criminal Court

In negotiating the Rome Treaty, much of the language for the underlying crimes comes from recent precedent: the Convention on the Prevention and Punishment of the Crime of Genocide; the Statutes for the International Criminal Tribunals for the Former Yugoslavia and Rwanda; and the Draft Code of Crimes

86 The writings of Georges Scelle on the permeability of the domaine réservé responds to this. A counterargument to state access to protection for those threatened by atrocities is now, and has always been, the concept of a domaine réservé – the space in which the state can distant itself from the international community. When the international community comes together and relinquishes authorities previously within the power of individual states to accomplish an international or transnational aim, the community creates a supranational system. In order for the system to function, there must be an agreement that the participants will follow the rule of law as expressed by the community. The government of a state must often represent the state in its international dealings, creating a dual role: both representing the interests of the constituents of the state, and representing a participant in the joint undertaking in a transnational sphere. Some international undertakings allow for or, indeed, require the actions of entities within a state system. One such example is the complementarity envisioned by the ICC Statute – while the international community responds to issues of concern, it does so because the actions are violative of both the international interest in the shared undertaking, as well as the constituents’ individual interests. Scelle argues against states, such as the United States, that have an overbroad reading of the domaine réservé.

87 Scelle, RÈGLES GÉNÉRALES, at 358 (“Social functions must be fulfilled in international collectives just as in national collectives, or the phenomenon of solidarity would rapidly disaggregate and the social tie would founder.” (“il faut que les fonctions sociales soient remplies dans les collectivités internes, sans quoi le phénomène de solidarité désagrégerait rapidement et le lien social péricliterait »). Scelle gives examples of the various branches of a state government acting with an international motive.
against the Peace and Security of Mankind. The interaction with others prevalent during the U.S. Civil War, the Franco-Prussian War, and the World Wars – all times that demanded interpretation of protection from atrocities and the extent of punishment for wrongdoing – has been lacking. For the majority of that time period, there existed little interest in the creation of a fairly powerful permanent institution with components of criminal law authority. Because our analyses have us fighting the last war (responding to previous problems of which we are aware from recent experience, as opposed to developing best responses for the problems that we have today or are likely to face tomorrow), much of the discussion has focused on rights of the accused, the application of *lex lata* at a time of legal development, and interpretation of treaty provisions in a strict sense such that the defendant benefits from any confusion in the law of the Court. While this may give comfort to States signing the Statute that smaller steps will prevent surprise and allow for the Office of the Prosecutor to develop clear and cogent theories of a fairly narrow reading of the case, this very behavior undermines some of the purpose of the Court. Based on the difficulty of prosecution by an international tribunal, criminal trials undertaken by individual states may suffer from every structural and procedural weakness of the ICC, but without the perceived autonomy or international legitimacy (in many cases) that the court has.

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88 These in turn derive from the Articles of the Nuremberg Charter, which also derive description of criminal acts from the World War I Commission.
89 Settled law, law no longer in development.
90 See Julian Ku co-authored piece asking whether international tribunals actually deter crimes.
91 The resistance received by certain states that were more likely to allow for trials of higher ranking officials under a theory of universal jurisdiction evidences this problem: the financial incentives to allow for greater trade and to continue involvement in regional organizations may influence states such as Afghanistan, Belgium, and Spain to create laws that will limit rather than further enhance jurisdiction. [cite to arts. on Kenya and other North African states (e.g., Sudan), the United States and Belgium (Sean Murphy), push back on Spain and Judge Garzon, who is currently under investigation by Spain for two acts, one of which is the opening of a case against those involved in the Franco regime given amnesty by the Spanish government as a universal jurisdiction issue (notwithstanding the specific exemption granted from Spanish jurisdiction).]
This creates the opportunity for our national leaders and agents, our judges, and our non-governmental organizations to demand that we decrease barriers to seeking a remedy – that a greater number of trials become possible, implementing the laws of the International Criminal Court as the law of the state by seeking the adoption of terms broader than that of the ICC statute as legislation within the state. While the perceived lack of legitimacy of national courts may indeed be an issue, the national courts’ implementation of a lower threshold to entry than that of the International Criminal Court may be the only manner to effect both the underlying purpose of the Court, and to create a body of law from which other international criminal cases can begin the process of interaction anew.

In addition, the international community has evolved in not only recognizing a duty under international law to prosecute international crimes as defined by international law, but also a responsibility to protect our populations from the very harms caused by atrocity crimes. In addition to the obligation to give effect to criminal law recognized in the Rome Statute, the United Nations has recognized that primary protection falls to the state, with secondary responsibility exercisable by the international community through the U.N. Security Council.92 This secondary right in the international community to invest in state security even against national will is also exercisable through the Security Council, which can refer matters to the International Criminal Court, and delay the matter’s consideration in the interest of international peace and security.93

While the conflict in the Great Lakes region of Africa will likely continue for years to come, the Court has also give some evidence of compliance pull in the application of amnesty laws in Uganda. In communications with the Court, Uganda was able to pass an amnesty law for the largest portion of those involved in regional conflict, while retaining the International Criminal Court as a reserve court. If that decision does not work to Uganda’s

93 Rome Statute, Arts. 14 and 16.
benefit, the compliance pull for such an act will decrease, and the Court will not establish a norm in support of similar negotiations.  

Why National Courts Must Act

Some principal issues arise in the application of the law: (1) the preparation for the I.C.C. planned around the concept of a reserve court; (2) the complementarity provisions recognize a much more robust and active international community acting through national courts; and (3) the National Courts are in at least as good a position to express the will of the states-parties to the I.C.C. Statute as the International Criminal Court itself, until such time as the I.C.C. has clarified its interpretation of the interpretive issues surrounding the crimes within its jurisdiction.

This holds particular truth where there exists a gap between what the International Criminal Court purports to do, and what the Statute requires the member states to do in conjunction with the Court. The application of international criminal law has been, to a certain extent, a gap-filling exercise – allowing for us to recognize the imperfections in our protective processes, and to then better articulate standards and processes to close the gaps. Where the international community recognizes a gap and does not act to close that gap, later arguments surrounding application and/or codification may lean towards implementing the gap, so as not to create or expand on the laws recognized by states.

The application of gravity by the Court is paradigmatic; in raising what appears only an issue of complementarity, the Court risks allowing for state practice that redefines how crimes are prosecuted within the ICC system. As discussed in greater detail in Part V, the Court controlling admissibility by refusing to hear cases involving serious crimes unless the alleged perpetrator is among those most responsible puts the

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94 In addition to support for norm creation through a transnational/supranational dialogue, the negotiations recognize different levels of criminality and gravity in the International Criminal Law sphere, and allow Uganda a voice in managing some of the lower level perpetrators. See also Uwe Ewald, “‘Predictably Irrational’ – International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices,” 10 Int’l Crim. L.R. 365, 396 (2010)
In allowing for the national courts to apply ICL terms as understood by the national courts, the ICC will be in a better position to rely on the judgments made at various levels of responsibility, and to recognize an international harm, even where the Court cannot or would not hear the case at an international level.

Gravity is a good point of comparison, in that the ICC Statute considers gravity both in the substance of the action\textsuperscript{95} taken and its processes for responding to alleged acts.

**Why Negative Complementarity Fails to Offer Sufficient Incentives to Ensure Enforcement**

In looking at the object and purpose of the Rome Statute, negative complementarity – the ability of the Court\textsuperscript{96} to initiate an investigation only after the state that would otherwise have jurisdiction has failed to do so – it is imperative to look at the goal of the international community and the roles of the state and the International Criminal Court in that process. If the goal of the community – the objective law that we all wish to enforce – is the protection of human lives from the harms of aggressive war, genocide, crimes against humanity, and war crimes (the subjects of the Rome Statute), do both the international mechanism (the Court) and the municipal mechanism (the national courts and governments) have us achieve the same end?

One theory on the efficacy of negative complementarity relies on the principle of state interest in (1) the world perception of the state’s judiciary – its general capacity and support for the rule of law over anti-legal government acts or actors\textsuperscript{97}, (2) the

\textsuperscript{95} ICC St. Preamble ¶¶ 4, 6, Arts. 17(1)(d), 53.
\textsuperscript{96} Rome Statute, Art. 17.
\textsuperscript{97} See, e.g., Jann K. Kleffner, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS, 317 (O.U.P. 2008) (“There is no need for international adjudicative fora if, and when, national courts can adequately achieve effective adjudication,” citing to the requirement in the Report of the Secretary General on the Establishment of a Special Court for Sierra Leone that local courts in Sierra Leone acquire additional capacity prior to the determination of the international community’s referring matters back to the state by limiting the longevity of the Special Court, implicitly recognizing a lack of capacity at the state level (4 Oct. 2000, U.N. Doc. S/2000/915 [10]).
interest in the state of maintaining its sovereignty over matters arguably within its domestic sphere, as opposed to yielding sovereignty over certain criminal matters to an extra-national court, and (3) the application of the underlying laws for which the extra-national court complements the state apparatus.

This predicts and is predicated on the state’s reaction to (1) censure (or the opinion that an act by the state breaches an international obligation), (2) anything undermining state control where it might otherwise be applied, and (3) an agreement between the state and the international community (defined as the Court of complementary jurisdiction recognized by the state and acting for the international community under an agreement, the states-parties to the agreement complementing state authority, or the larger community recognizing an international law outside the context of the specific agreement) on the extent of the underlying laws. Negative complementarity suggests that the state will do all in its power to prevent the assertion of authority by the complementing body.98

Negative complementarity also assumes that the Court will do all in its power to prosecute an alleged atrocity crime perpetrator if the state will not. As noted earlier, from a resource perspective that cannot always be the case.

More importantly, the role of the national tribunal can, and should, be broader than that of the international tribunal, where the state is willing and able to pursue a case against an alleged perpetrator. The development of the laws on atrocity crimes has done well when leaders were communicating with each other and, unfortunately, when their populations were impacted by the atrocities. While the international court and the national court may have the same goal under Scelle’s analysis – responding to an objective law relating to the prevention of atrocity crimes – the roles of the courts will differ. One failure of the international tribunal is the institutionalization of its voice and the impact of its

98 Kleffner, COMPLEMENTARITY, supra n. __, at 320 (“for the first time in international criminal law, State Parties have agreed ex ante that this failure [to adequately investigate and prosecute core crimes within its jurisdiction] will entail a concrete legal consequence: States forfeiting the claim to exercise jurisdiction, including over their own nationals and officials.”).
interpretation. The example of the prosecution of Bosco Ntaganda illustrates the point.

Third: Norm Development within the International Criminal Court

The difficulties are best seen in considering norm development within the International Criminal Court structure. Article 58 of the Rome Statute requires that the Court’s Pre-Trial Chamber be satisfied in issuing a warrant of arrest that “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court.” Due to complementarity concerns and the Court’s reserve status, the Court only has jurisdiction where the case is of sufficient gravity for the higher level of international consideration.

On February 10, 2006, Pre-Trial Chamber I of the International Criminal Court refused to grant a warrant for the arrest of Bosco Ntaganda, the third-in-command of the Forces Patriotiques pour la Libération du Congo. The Pre-Trial Chamber recognized that Ntaganda conscripted, trained, and forced to participate in hostilities children under the age of fifteen. Ntaganda was subject to an arrest warrant in Bunia, Democratic Republic of Congo, on charges of joint criminal enterprise, arbitrary arrest, torture, and complicity of assassination. Although the arrest warrant had issued, the DRC did not seek Ntaganda for the conscription of child soldiers.

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100 While not probative of the proper interpretation, the travaux préparatoires may be considered to confirm an understanding of a treaty, under a customary law application of the Vienna Convention of the Law of Treaties Art. 32(a). One can, therefore, look to The Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, G.A. 51st Sess., Supp. No. 22, A/51/22 (1996), in The Statute of the International Criminal Court, at 394, to confirm Article 17’s limit on the scope of jurisdiction: “There was general agreement concerning the importance of limiting the jurisdiction of the Court to the most serious crimes of concern to the international community as a whole, as indicated in the … preamble, to avoid trivializing the role and functions of the Court and interfering with the jurisdiction of national courts.”
101 Situation in the Democratic Republic of Congo, Decision on the Prosecutor’s Application for Warrants of Arrest, ICC-01/04-01/07 (10 Feb. 2006), ¶ 25, 34, 40.
That said, the Pre-Trial Chamber decided to look at admissibility prior to making a determination, and set a standard that matched the Prosecution’s own prioritization of cases using a gravity\textsuperscript{102} standard, “that, as a general rule, the Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”\textsuperscript{103}

The Pre-Trial Chamber went on to set up a definition of an Article 17(1)(d) gravity threshold for admissibility:

“any case arising from an investigation before the Court will meet the gravity threshold provided for in article 17(l)(d) of the Statute if the following three questions can be answered affirmatively:

“1. Is the conduct which is the object of a case systematic or large scale (due consideration should also be given to the social alarm caused to the international community by the relevant type of conduct);

“2. Considering the position of the relevant person in the State entity, organisation or armed group to which he belongs, can it be considered that such person falls within the category of most senior leaders of the situation under investigation?; and

“3. Does the relevant person fall within the category of most senior leaders suspected of being most responsible, considering (1) the role played by the relevant person through acts or omissions when the State entities, organisations or armed groups to which he belongs commit systematic or large-scale crime within the jurisdiction of the Court; and (2) the role played by such State entities, organisations or armed groups in the overall commission

\textsuperscript{102} Under Rome Statute Art. 17(1)(d), “the Court shall determine that a case is inadmissible where:

\textsuperscript{103} Id. at ¶ 62, \textit{citing} Paper on some Policy Issues Before the Office of the Prosecutor, p.7, [previously] available at \url{http://www.icc-cpi.int/library/organs/otp/030905_policy_paper.pdf}
of crimes within the jurisdiction of the Court in the relevant situation.”

The Pre-Trial Chamber looked at the scale of the conduct (regional instead of national and therefore not widespread); Ntaganda’s role in the organization (third in command of the military wing, having little control over the political wing of the organization); and Ntaganda’s inability to sign agreements binding the political organization, and the lack of social alarm at his acts, showed that his arrest would not serve as a deterrent to other leaders, such that the prosecutor should focus its efforts on others who were the most senior leaders. Because Ntaganda was not one of the most senior leaders of the conflict, the Pre-Trial Chamber denied the requested warrant of arrest.

The Appeals Chamber pointed out numerous flaws in this analysis, including: (1) Ntaganda was deeply involved with the recruiting of child soldiers, the war crime with which he was charged that did not require it be widespread (and there was nothing in the Rome Statute that would allow for a subjective “social alarm test”); (2) failing to arrest Ntaganda would put a large number of alleged criminals on notice that they need not fear arrest, even for serious crimes (the standard required under the Rome Statute); and (3) even if he were not the most senior in this conflict, lower and mid-level operatives sometimes are, and should be, arrested to help build a case against the most senior leaders.

The effect of the initial failure to prosecute in the Ntaganda case is profound. This had the initial effect of expanding the loophole created by an agreement with the government of Uganda in 2003 in another case, to a practice of the Court not to

104 Id. at ¶ 64.

prosecute perpetrators other than those few most responsible. Indeed, in issuing a decision for the warrant of arrest of Omar al-Bashir, ICC Pre-Trial Chamber I noted in 2009 that the flawed test offered in the Ntaganda case was still the only standard for consideration by the Courts, if the Court did consider it appropriate to determine the admissibility of a case on gravity grounds.\textsuperscript{107}

Were national courts more actively describing their own understanding of the core crimes, similar to the analyses that must be made in considering potential prosecutions by the International Criminal Court, there would be greater interaction among parties trying to achieve the goal of ending impunity, and helping to determine a causal law that might prevent harm to populations caused by atrocity crimes.

Unfortunately, the same standards that lead to compliance pull may evidence the limits on complementarity’s applicability. An ability to comply with the letter of the law – here, the terms of the Rome Statute – may undermine some purposes of international criminal law. In explaining and acting under prosecutorial discretion, and with continuing precedent that explains the discretionary standards as a component of admissibility, states are under less pressure to reach beyond the highest level offenders. In determining compliance, the Court looks first to the terms of the Rome Statute, the ICC Elements of Crimes, and the Rules of Procedure and Evidence (\textit{lex specialis} relating to statutory interpretation of I.C.C.-instituted International Criminal Law)\textsuperscript{108}, it looks second to applicable treaties other than the Rome Statute, and principles and rules of international law, including established principles of the Law of Armed Conflict;\textsuperscript{109} and, only absent general principles of international law, principles derived by the Court from national laws of legal systems of the world, where those laws are not inconsistent with the Statute, or with

\footnotesize{\textsuperscript{107} In the Case of the Prosecutor v. Omar Hassan Ahmad al-Bashir, No.: ICC-02/05-01/09 (04 Mar. 2009), Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, n. 51.\textsuperscript{108} ICC Stat. Art. 21(1)(a).\textsuperscript{109} ICC Stat. Art. 21(1)(b).}
international law and internationally recognized norms and standards.\textsuperscript{110} Notwithstanding and separate from these recognized sources of law, the Court may look to apply interpretations of principles and rules of law from its own previous decisions, which one might presume would not conflict with the Statute or other international standards of international criminal law.\textsuperscript{111}

CONCLUSION

Within the realm of atrocity crimes, no answer will serve as a panacea for all humanity’s ills. That does not mean that we should not continue working toward as many remedies as possible. The International Criminal Court, by design, requires input from various levels – from States Parties, from individuals seeking investigations by sending communications to the Office of the Prosecutor, from other entities seeking to resolve conflicts.

Where the individual members of the international community rely on the Appellate Chamber to set rules for the gravity of a harm subject to remedy, or allow for decisions to be relayed between the International Law Commission, the Office of the Prosecutor, and the leaders of States, individuals will have no voice in the international planning that would protect so many from systematic or widespread violence. Only in redoubling our efforts – through our legislatures, through our executive, through our courts, and

\textsuperscript{110} ICC Stat. Art. 21(1)(c). The drafters compromised further by stating that “general principles of law derived by the Court from national laws of legal systems of the world include[s], as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime.” Although such a reading might prevent harm to the accused under the\textit{nulla poena sine lege} standard, in that the accused might have greater awareness of the illegality of an act under, for example, national or territorial jurisdiction of a particular state, the Conference of the ICC Statute “rejected the view of some delegations that the phrase ‘including, as appropriate’ should be replaced with ‘especially’.” See, Margaret McAuliffe deGuzman on Art. 21 in O. Triffterer, \textit{COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE}, (2d Ed. 2008). Thus, the laws of the state that would normally exercise jurisdiction have no presumptive authority greater than other national laws of legal systems of the world.

\textsuperscript{111} ICC Stat. Art. 21(2).
through ourselves – will the international community be able to respond to our needs.