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WHAT IS THE POINT OF INTERNATIONAL CRIMINAL JUSTICE?

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INTRODUCTION

The recent proliferation of international criminal courts has inspired human rights activists and votaries of international criminal justice to make triumphant gestures. Their jubilation is readily understandable, since these courts have added teeth—even if milk ones—to norms that outline internationally punishable conduct. As a result, the view that such attempts to enforce international criminal law are lubberly invasions by people in wigs and gowns into an area that should be left open to the play of political forces has been seriously called into question. Despite the justified glee of devotees of international justice, however, it would be wrong to close our eyes to the shortcomings of international criminal courts. Some of these shortcomings are, at present, inevitable. Because no cluster of effective supranational institutions yet exists to enforce international criminal law,

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the effective operation of international criminal courts must depend on the unstable reserve of political will, especially in world capitals. Without the cooperation and support of individual states, international courts are doomed to impotence: for example, they have no power to arrest, to compel the production of evidence, nor to enforce judgments. For these reasons alone, a rigorous system for the rule of law cannot at present be established; justice cannot meaningfully be administered without regard to the volatile and complex world of international politics. Powerful actors in the international arena are in position to ignore the demands of international courts, and the sword of justice tends to be used most against individuals from states that occupy a lowly place in the *de facto* existing hierarchy of states. Absent outside pressures by well-endowed nations, even weak states can defy the mandates of international courts with impunity.¹ But some weaknesses of international criminal courts can be reduced, or eliminated, even in the present state of international relations. These curable weaknesses have many sources. An important one, to which the following pages will be devoted, springs from the array of goals international criminal courts have set for themselves.

We shall begin to explore the goal-related problems with a diagnosis of the present situation. The first part of this article will attempt to show that current views on the objectives of international criminal courts are in disarray. This state of affairs has several disquieting consequences, one of which is that the performance of international criminal courts cannot be assessed reliably. The second part of the article will begin the search for a cure. We shall argue that some presently accepted objectives of international criminal courts should be altered—that is, scaled down, or even abandoned, and left to other mechanisms of public response to massive human rights violations. Criminal courts, we shall contend, should play a more modest role in advancing the rule of law in the domain of international politics. Our next task will then be to explore whether an overarching goal of international criminal courts can be identified, so that presently existing tensions among the remaining objectives can be better managed. It will emerge that no single goal can be found around which other objectives can be rigorously organized. There is no trellis, so to speak, to support the ivy of the courts' aspirations. But we shall try to show that a greater degree of order in thinking about the courts' mission could still be obtained if primary emphasis is placed on the objective of advancing the sense of ac-

1. Thus, for example, the successor states of the former Yugoslavia began to cooperate with the International War Crimes Tribunal for the former Yugoslavia (ICTY) only after sticks and carrots were dangled in front of them by the United States and the European Union.

countability for egregious human rights violations. In the last part of the article, we shall then discuss some salient problems that would arise if this objective were indeed treated as paramount.

I. THE PROBLEM OF GOALS

A. *Overabundance*

The list of goals proclaimed by international criminal courts and their affiliates is very long. Beside standard objectives of national criminal law enforcement, such as retribution for wrongdoing, general deterrence, incapacitation, and rehabilitation, international criminal courts profess to pursue numerous additional aims in both the shorter and longer time horizon. At various times, the courts have expressed their intention to produce a reliable historical record of the context of international crime, to provide a venue for giving voice to international crime's many victims, and to propagate human rights values. Courts have also expressed their aspiration to make advances in international criminal law, and to achieve objectives related to peace and security—such as stopping an ongoing conflict—that are far removed from the normal concerns of national criminal justice. And they have always insisted that these—and some additional—objectives be pursued in proceedings solicitous of the rights of the accused.²

It does not require much pause to realize that the task of fulfilling all these self-imposed demands is truly gargantuan. Unlike Atlas, international criminal courts are not bodies of titanic strength, capable of carrying on their shoulders the burden of so many tasks. Even national systems of criminal justice, with their far greater enforcement powers and institutional support, would stagger under this load. But the overabundance of tasks is not the only problem with these goals.

B. *Tensions*

An additional problem is that the professed goals do not constitute a harmonious whole; rather, they pull in different directions, diminishing each other's power and creating tensions. To begin with, a tension may arise between the aspiration to stop an ongoing conflict and the desire to

2. It should be apparent that these additional goals, properly interpreted, are aims of proceedings rather than aims of punishment. We leave to one side the question of whether all of them are analytically independent. For variously formulated lists, see, for example, GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 284 (2000); Minna Schrag, *Lessons Learned from ICTY Experience*, 2 J. INT'L CRIM. JUST. 427, 428 (2004); Note, *Developments in the Law—International Criminal Law*, 114 HARV. L. REV. 1943, 1961–74 (2001).

bring the suspected leaders of the warring parties to justice. If such leaders expect to be prosecuted after the conflict ends, or after they abdicate, the leaders are likely to hold tenaciously to the reins of power and continue fighting. The demand to enforce international criminal law then begins to clash with deeply troubling prudential calculations: how many lives should be sacrificed to provide justice for the dead?³

Next, consider the uneasy relationship between the objective of producing an accurate historical record and individualizing responsibility. As understood by international criminal courts, individualization does not mean, as it does in many national systems of criminal justice, that the stigma of conviction and the measure of punishment ought to be tailored to the degree of individual culpability.⁴ Rather, individualization is meant to emphasize avoidance of collective responsibility. It is believed that retribution exacted from a few individuals will promote group reconciliation, while the broader imputation of collective responsibility would produce the opposite effect.⁵ Leave to one side that the general validity of this belief

3. Atrocities committed in the Darfur region of Sudan provide an illustration. Following the adoption, by the Statute of the International Criminal Court, of a provision authorizing the U.N. to defer international prosecutions in the interest of peace, this issue came before the U.N. Security Council. When the Sudanese first vice-president and the leader of the rebel movement jointly briefed the Council on the peace pact they had signed, they both vigorously opposed the institution of international prosecutions. The rebel leader declared that punishing killers before achieving real peace would be “putting the cart before the horse, in which case, both the cart and the horse would not move” Warren Hoge, *Sudan Rebuffs U.N. on Trying Darfur War-Crimes Suspects Abroad*, N.Y. TIMES, Feb. 9, 2005, at A5. For the problem of maintaining peace in Uganda and launching prosecutions by the International Criminal Court, see Jeffrey Gettleman, *Uganda Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1.

4. When “individualization” is mentioned in national criminal law systems, it relates to the idea that punishment ought to be adjusted to the degree of individual culpability. For a classical statement of this view, see RAYMOND SALEILLES, *THE INDIVIDUALIZATION OF PUNISHMENT* 8–13 (Rachel Szold Jastrow trans., Patterson Smith Publ’g 2d ed. 1968) (1911). For modern remarks, see 1 JEAN PRADEL, *DROIT PÉNAL* 503–05 (1974). For comparative law remarks on the link between individual culpability and punishment in national legal systems, see HANS-HEINRICH JESCHECK & THOMAS WEIGEND, *LEHRBUCH DES STRAFRECHTS: ALLEGEMEINER TEIL* 883–84 (5th ed. 1996).

5. Individualization of responsibility in international criminal law is emphasized because of the belief that its neglect would lead to the perception in particular ethnic and religious groups that they are collectively responsible. This, in turn, would damage the chances of reconciliation between these groups. See, e.g., S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the International War Crimes Tribunal for Rwanda (ICTR) and creating individual criminal responsibility because it “would contribute to the process of national reconciliation”); *Prosecutor v. Nikolić*, Case No. IT-02-60/1-S, Sentencing Judgement, ¶ 59 n.106 (Dec. 2, 2003); President of the ICTY, *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, ¶ 16, submitted to the Security Council and the General Assembly, U.N. Doc. A/49/342 (Aug. 29, 1994) (“If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, ‘collective responsibility’—a primitive and archaic concept—will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages.”); Jane E. Stromseth, *Introduction: Goals and Challenges in the Pursuit of Accountability*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND

cannot be taken for granted.⁶ It is sufficient for present purposes to observe that while individualization of responsibility may, in some circumstances, be politically desirable, it may also produce distortions of historical reality. An example of how individualization of responsibility may be ill-suited to advance truth telling about human rights violations is provided by the genocide in Rwanda. It is estimated that more than a million people were involved as perpetrators and accomplices in this calamitous event.⁷ Or consider the massive human rights violations attendant upon the disintegration of Yugoslavia. Individualization of responsibility has, in this context, been justified by claiming that widespread atrocities were provoked by a small group of rabid nationalist leaders, whose rancorous propaganda unleashed ethnic furies. But it seems more likely that these leaders took advantage of preexisting, pent-up animosities. After all, the leaders were freely elected, mostly by landslide victories, and were enthusiastically supported by broad swaths of the population—at least so long as the leaders' respective political projects appeared to have a chance of success.⁸ Dispassionate historical research may someday reveal that even ethnic cleansing enjoyed widespread popular support for a while.

Troubling, and therefore less frequently remarked upon, is the rocky relationship between the desire to be solicitous of the accused's procedural rights and the desire to provide satisfaction to victims of international crime. In an ideal world, of course, there would be no reason to balance these two aspirations—they would coexist in harmony. But in the real world, painful tradeoffs between them must often be made. An attempt to restore the dignity of victims and to provide them, or their families, with a forum in which to express their suffering is, of course, an ennobling hu-

INTERNATIONAL RESPONSES 1, 7 (Jane E. Stromseth ed., 2003); Antonio Cassese, President of the Int'l Criminal Tribunal for the Former Yugoslavia, Address to the General Assembly of the United Nations (Nov. 14, 1994), <http://www.un.org/icty/rapportan/genas-94.htm> ("Collective responsibility must be replaced by individual responsibility. Only international justice can dissolve the poisonous fumes of resentment and suspicion, and put to rest the lust for revenge.").

6. The issue of the relationship between blaming a few individuals, on the one hand, and the post-conflict stabilization of a region and reconciliation of the affected populace, on the other, may be more complicated than often assumed. At least in some circumstances, it may be that the suppressed realization of collective moral responsibility creates sympathy for a few individuals singled out for prosecution, galvanizing large segments of society against externally imposed justice.

7. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1250 (2000).

8. In Serbia, fears for national survival and the resulting bellicose sentiments in a large segment of the population seem to have been triggered by a "Memorandum" from the prestigious Serbian Academy of Arts and Sciences. See, e.g., BRANKA MAGAŠ, *THE DESTRUCTION OF YUGOSLAVIA, 199–200* (1993). Slobodan Milošević may have been less a nationalist than a "conflict entrepreneur." Nationalist euphoria was also rampant in Croatia, and cannot plausibly be explained as the product of a few skillful demagogues. The same is true of Slovenia, which has escaped the ravages of war, but was—as is now often forgotten—the first to secede from Yugoslavia.

manitarian impulse. It is also a pragmatically useful inclination, in that it has the potential to prevent private vengeance. Permitting victims to tell their stories can also help judges, cloistered in their chambers, to gain a better understanding of the events on which they are required to pass judgment because the reality of victims' suffering may be beyond their horizons of experience. That said, it can hardly be denied that when the interests of the criminal defendant and victims both vie for judicial attention, a point is soon reached beyond which the desire to satisfy the victims' interests begins to impinge on considerations of fairness toward the defendants. The problem is not only that participation of victims of mass atrocities delays proceedings and interferes with the accused's right to speedy trial. There are other, and potentially more serious, difficulties as well. A succession of victims' horror narratives may induce judges to attribute to the accused a larger role in atrocities than the accused really played. Pressures may arise to de facto lower proof sufficiency standards, and the temptation may even emerge to program proceedings for easy conviction. The idea that an acquittal could be justified on grounds of procedural impropriety, even if serious, becomes well-nigh preposterous.⁹ In short, concerns of procedural justice retreat before the desire to reach substantively accurate outcomes.

Somewhat obscured are tensions that arise between the socio-pedagogical aspiration of international criminal courts to propagate human rights and several of their other proclaimed objectives. One source of this tension is the fact that individuals whose convictions are best suited to produce the desired pedagogical effects are seldom those from whose conviction the victims of crimes derive the greatest satisfaction. The reason is that international crime typically results from organizational activity, and victims harbor stronger retributive feelings toward immediate and recognizable physical perpetrators than toward their distant leaders—provided that the leaders were not directly implicated in the commission of crime. But from the perspective of the courts' pedagogical aspirations, the preferred targets of prosecution are top chieftains in criminal organizations. Because of their high visibility and power, their downfall and conviction produce a

9. A case tried by the ICTR is instructive. In its initial decision, the Tribunal's Appellate Chamber released a prominent accused from provisional detention because his rights to speedy trial were violated. But when that decision caused the Rwandan government, looking at the matter from the victims' perspective, to suspend cooperation with the Tribunal, the Appellate Chamber quickly reversed itself. See *Barayagwiza v. Prosecutor*, Case No. ICTR-97-19-AR72, Decision on Prosecutor's Request for Review or Reconsideration, ¶¶ 34, 74 (ICTR Ap. Ch. Mar. 31, 2000). For a similar, more recent case, see *Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Judgment and Sentencing, ¶¶ 208, 320–24 (ICTR Dec. 1, 2003). See also *Prosecutor v. Brdjanin*, Case No. IT-99-36-T, Decision on the Defence Objection to Intercept Evidence, ¶ 61 (ICTY Oct. 3, 2003) (revealing the difficulty in deciding whether to exclude relevant, but illegally-obtained, evidence).

dramatic effect and hold the greatest promise of contributing to the development of a sense of accountability for gross human rights violations. A friction may also arise between the pedagogical aspiration and deterrence, albeit they share the preventive effect in common. While deterrence may lend support to doctrines of responsibility that are insensitive to the degree of personal guilt, the insensitivity could make more difficult the acceptance of courts' decisions in communities affected by international crime, reducing their educative impact.

Last but not least, a submerged tension inheres in the pedagogical aspiration itself, because decisions of international criminal courts are capable of producing disparate effects and reactions in international society at large and in the societies directly affected by human rights violations. If emphasis is placed on positive local effects, close attention must be paid to factors such as local historical experience, local customs and sensibilities, and sometimes even existing loyalties. By contrast, when global effects are given priority, judges are freer to follow impulses of disengaged reason and to concentrate on matters like the perfection of the normative content of international criminal law, or the expansion of its reach.

C. *Institutional Competence*

Several targets exist for arrows of skeptical inquiry into the capacity of international criminal courts to realize some goals they have set for themselves—even if the number of goals were reduced. At this early point, what deserves to be specifically addressed is the courts' capacity to place international crime in a historical context, and especially to inquire into the etiology of crime-producing conflicts. The urge to engage in this pursuit is again readily understandable. Massive violations of human rights, including politically motivated violence, tend to be denied by the perpetrators and their sympathizers. The resulting desire to set the historical record straight, and to restore the integrity of human remembrance, is greatly strengthened by the belief that truth telling about the past is a necessary precondition for reconciliation and avoidance of future conflicts. As Santayana famously put it, those who do not remember the past are condemned to repeat it.¹⁰

10. It is a melancholy fact, however, that we do not really know whether the world is always a better place for knowing the truth. It may be that the single-minded search for the truth may in some circumstances fan the embers of past animosities until ancient flames leap up again. Among the luminaries, Pascal has maintained, for example, that "all the light emitted by the truth is incapable of stopping violence, and may only stimulate it." BLAISE PASCAL, *LES PROVINCIALES* 201 (Michel Le Guern ed., 1987) ("*Toutes les lumières de la vérité ne peuvent rien faire pour arrêter la violence, et ne font que l'irriter encore plus.*"). Renan thought that the stability of some political arrangements depends on

An additional explanation for the urge of international criminal courts to explore the broader context of crime is that a narrow focus on the conduct of a particular individual is not sufficient to establish an international crime. Their definition calls for a broader optic in which individual conduct must be assessed in the light of activity carried out by organizations or groups in specific settings, sometimes over extended periods of time. Judges are thus driven to engage in broad fact findings that easily shade into historical inquiries.

But the intensity of the urge to make a historical record is not matched by the capacity of judges to satisfy it. One reason is that they must act under time constraints and make stable decisions upon which action is taken—the *res* upon which they focus must become *judicata* without undue delay. Historians, on the other hand, are not subject to the constraints of promptness and finality—they need not rush to a decision and can afford to follow the slow breathing of history. Whenever Clio, their elusive mistress, reveals a new veil to fold into, they are free to modify their findings. *Res judicata* in the historians' domain is nothing less than an absurdity—history cannot be arrested by *ukase*.

Another impediment to satisfactory judicial historiography is that judges cannot sufficiently disentangle themselves from the webs of legal relevancy. Even when its limits are considerably enlarged, as they are by the definition of international crimes, matters important to a full historical account still remain legally irrelevant. In explaining what happened in Rwanda or the former Yugoslavia, for example, legal relevancy restrains judges from embarking on an exploration of the role played by the U.N. and foreign states in these tragic events—even if causal links between foreign conduct and triable offenses are probable. Nor can judges freely decide how far to roll back down the slopes of time to explain the causes of crime-generating conflicts. Should the animus that lingered in parts of Serbian society toward Bosnian Moslems, for example, be traced back to a battle lost to Ottoman Turks in the Middle Ages? What whispers from the past can safely be ignored? Seen through the prism of a historian, then, judicial portrayals of the background of international criminality inevitably appear fragmentary, foreshortened, and locked in an arbitrary time frame.

It can scarcely be disputed that these problems inhere in any forensic endeavor to reconstruct the past, and would persist even if international criminal courts were to abandon their aspiration to venture onto the quick-

sands of history.¹¹ There remains a significant difference in the degree and intensity of these difficulties, however, which should not be overlooked. Conventional criminal courts put a magnifying glass on criminal conduct, leaving everything else out of focus, while their international counterparts aspire to focus on both the specific conduct charged and its enveloping context. But such ambitious cultivation of both minute and telescopic concerns comes at a cost, because highly complex matters become the subject of proof. To establish them requires making contestable interpretations and the use of broader generalizations than in less ambitious judicial undertakings. According a final and official imprimatur on the resulting contextual findings is thus bound to be problematic.

All these difficulties of engaging in courtroom historiography are exacerbated when fact finding is organized as a sequence of two partisan cases. Consider that seekers of genuine historical knowledge, rather than depending for their enlightenment on two contrary accounts, prefer to explore a wide range of possibilities and to approach their subject matter from multiple perspectives. And when the contrary accounts are advanced by two self-interested individuals, to historians this is yet another drawback: they do not subscribe to the view that the “clash of bias and counter-bias”¹² favors truth discovery—the more complex the investigated question, the more partisan polarization becomes a straitjacket to historians. This is because each party attempts to present and emphasize only evidence favorable to its claims, while playing down the rest. Now, as the pool of data of interest to a historian grows in size and complexity, so does the partisans’ opportunity to select from the growing pool only data fitting their particular thesis. An increasing number of facts that are important to historical research remain unexamined, because they appear “neutral”—and thus uninteresting—in the beam of partisan lights.

There are several reasons for doubting that this difficulty can be avoided by assigning a complementary fact-finding role to the judges. Judicial interference with partisan management of cases deflates partisan incentives to develop effective trial strategies, and may also appear as help to one side, compromising the court’s neutrality *inter partes*. Forensic psychologists also suggest that evidence initially presented by one side supplies the fact finders with an organizing framework for the subsequent reception and processing of information. Initially-produced beliefs tend to

11. On the endemic nature of the predicament, see, for example, PAUL RICŒUR, *LA MÉMOIRE, L’HISTOIRE, L’OUBLY* 418–23 (2000); WILLIAM TWINING, *RETHINKING EVIDENCE: EXPLORATORY ESSAYS* 106–09 (Northwestern University Press 1994) (1990).

12. See Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way*, 49 AM. J. JURIS. 43, 49 (2004) (quotation marks omitted).

persevere.¹³ When complex historical events are the object of proof, this “anchoring effect” may assume considerable importance because weeks, even months, elapse before the defense can mount its own case. By then, of course, the prosecution’s case has had ample time to take root.

There is also reason to doubt that sufficient room for neutral research under the two-cases approach exists if prosecutors, as officers of the court, are invited to assume non-partisan attitudes and be equally attentive to incriminating and exculpating evidence. This non-partisan posture is easier to postulate in theory than to achieve in practice. For if prosecutors know that at the trial the defense’s case follows their own case, a procedural dynamic develops in which it becomes difficult for them to refrain from using evidence selectively. No wonder when truth is expected to emerge from two competing vectors, their sum is skewed whenever one side exaggerates while the other side refrains from doing so.

For all these reasons, it seems that the contribution international criminal courts can make by inquiring into the deeper background of international criminality is rather modest. The best that can be expected of them is to provide fragmentary material as a scaffolding for subsequent historical research.¹⁴ But the sad truth is that even this material is not as reliable as those who are unfamiliar with goings-on in the courtroom suppose. This is because the legal means of acquiring, marshaling, and presenting evidence in court depart, in various degrees, from optimal methods of reliable historical inquiry. The pressures and passions of legal proceedings tend to produce information that is treacherous to the dispassionate study of the past, and critical attitudes toward this information can be weakened by the layman’s unfamiliarity with applicable standards of proof, or by his unjustified belief in the willingness of procedural participants to elicit the truth. Forensically-generated information may thus be attributed more weight than it deserves and distort the historian’s determination of *wie es eigentlich gewesen ist* (“what actually happened”).

13. For abundant literature and a supporting argument, see Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1269, 1286–87 (2005).

14. The Nuremberg trials in the aftermath of World War II are often invoked as an example of how precious historical material may be unearthed by court proceedings. This is somewhat misleading, however. Much of this material was in the form of documents that would have been available for the judgment of history anyway. What was truly generated for, or by, court proceedings was mainly testimonial evidence.

D. *Absence of a Ranking Order*

Managing tensions among the goals, and dealing with the courts' limitations in attaining some of them, would be greatly facilitated if a set of priorities existed based on an understanding of the relative weights of competing goals. Acceptable terms of trade-offs among the contenders could then be identified, and greater coherence established in decision making. Procedural means also could be designed to facilitate the realization of what is agreed upon as most important to the mission of international criminal courts. Yet no clear set of priorities has emerged so far from the operation of international criminal courts.¹⁵ In the adolescence of ad hoc tribunals, the cardinal importance of general deterrence was frequently invoked. The exaltation of this goal flowed from the hope that the mere threat of punishment would produce a moderating effect on the brutalities of conflicts. But as the threat failed to prevent horrendous atrocities, initial optimism surrounding this objective abated.¹⁶ Despite this disappointment, however, general deterrence, along with retribution, is still assigned a prominent place in discussions about the goals of international punishment. Among other proclaimed goals specific to international criminal courts, the making of a historical record and the didactic objective of improving respect for human rights by expressing outrage for their violation are most frequently singled out for emphasis.¹⁷

It is easy to see that these fragmented and discontinuous pronouncements fail to provide much orientation in dealing with the tensions among goals. Deterrence and retribution are themselves in need of balancing, and it remains uncertain how these two conventional aims of punishment relate to the special goals of international criminal courts. It is thus fair to conclude that perplexing ambiguities about the proper mission of international criminal courts persist.

15. Most judicial pronouncements on the goals of their activity can be found in the sentencing parts of judgments. For a well-articulated account, see, for example, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgement, ¶ 678 (ICTY Ap. Ch. July 29, 2004). As was observed *supra* in note 2, however, many proclaimed goals of international criminal courts are aims of proceedings rather than aims of punishment.

16. The disappointment with the deterrence potential of international criminal courts led the first ICTY Prosecutor, Richard Goldstone, to opine that it is "hopelessly idealistic" to maintain that international criminal justice serves an effective deterrent purpose. See Richard Goldstone, Letter to the Editor, *WALL ST. J.*, July 7, 2000, at A13. And in the late history of the Tadić case, the ICTY Appeals Chamber stated that deterrence should not be given "undue prominence." See *Prosecutor v. Tadić*, Case Nos. IT-94-1-A and IT-94-1-*Abis*, Judgement in Sentencing Appeals, ¶ 48 (ICTY Ap. Ch. Jan. 26, 2000).

17. See, e.g., *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, ¶ 185 (ICTY Ap. Ch. Mar. 24, 2000).

In defense of this state of affairs, it is tempting to say that neither does a coherently integrated set of aims, or a clear ranking order of objectives, exist in domestic systems of criminal justice. Insufficient information makes relational comparisons difficult, and even if sufficient information were available, disparate factors, some of them incommensurable, resist the gradation of goals. Any attempt to impose order in this area seems as hopeless as trying to capture spilled mercury. But this pessimism is not compelling in the case of international criminal courts. Their *sui generis* features and the special character of their jurisdiction greatly reduce the dense tangle of issues, suggesting that their mission could be defined with greater clarity. Of course, if one expected to establish a rigid ranking order of goals, pessimism would be warranted even in that regard. But as we will see, one need not aim so high, or expect so much, to reduce the present indirection—some might say farrago.

These remarks conclude our survey of problems concerning the goals international criminal courts have set for themselves. Having identified the problems, the question then becomes whether these problems can be alleviated.

II. AVENUES OF IMPROVEMENT

A. *Reduced Aspirations*

Let us first examine whether some goals might be abandoned, muted, or downplayed. In light of what has been said before, the most obvious candidate to take a more modest role is the goal of making a historical record of events. Even if courts were better equipped to engage in this pursuit, the wisdom of attempting to do so would remain problematic. One reason is the complexity and cost of the enterprise. Consider that even if international criminal judges have no transcending ambitions to make contextual determinations, the contextual elements in the definition of international crimes can raise issues of great complexity: events involving a range of conduct of many people—often over wide areas and over considerable time periods—must be determined. But when judges aspire to paint a broader historical tableau, the issues involved in trial may become staggeringly complicated. A dramatic illustration of these complications is the Milošević case, in which judges intended to produce a record of events accompanying the disintegration of Yugoslavia. The indictment related to crimes committed in Kosovo, Croatia, and Bosnia-Herzegovina spanning an eight year period, and containing sixty-six counts. At the time of Milošević's death—when the trial was still in progress, and lengthy appel-

late proceedings had to be anticipated—the Tribunal sat for 466 days, listened to 295 witnesses, saw about 5,000 exhibits, and generated a transcript of over forty-nine thousand pages.¹⁸ Decision making on the basis of such mountainous material alone would have presented challenges to several accepted procedural principles, challenges yet to be recognized and explored by legal and interdisciplinary scholars.¹⁹

But the cost and complexity of the undertaking is not the only reason for doubting the wisdom of attempting to use criminal proceedings to provide a comprehensive portrayal of events surrounding massive human rights violations. The proclaimed ambition to do so gives rise to expectations by victims that all incidents of atrocity will be prosecuted. Where this is impossible, the likely result in communities affected by violence is a sense of disappointment and a feeling of betrayal. Nor is this all. Under the loupe of legal analysis, nagging technical problems arise, of which the most frustrating is the applicability of contextual findings made in one case to the adjudication of subsequent ones. To deny the former any effect on the latter is not only costly, but it raises the possibility of gritty dissonances in findings. On the other hand, if judicial notice is taken of original findings, then individuals who are prosecuted later are prevented from effectively challenging earlier determinations. This is hard to accept for a number of reasons, but especially because international criminal cases are replete with valences, and new material for a different narrative may surface. Add to all these problems the fact that deeper background issues tend to dwarf the subject of individual culpability, and it becomes clear that it is best for judges to limit their inquiries into the larger context to the very minimum required by the definition of international crimes.²⁰

To advocate this form of judicial restraint is not to deny that probing into matters that transcend the narrow concern with specific crimes is a desirable undertaking. If criminal trials were the only instrument for placing international criminality into broader context, then the abandonment by

18. Stephen Castle & Vesna Peric Zimonjic, *Day of Conjecture Ends as Autopsy Reveals Heart Attack was Cause of Milosevic's Death*, THE INDEP., Mar. 13, 2006, at News 5; Transcript of Record at 49,191, Prosecutor v. Milošević, ICTY-IT-02-54 (ICTY Mar. 14, 2006).

19. Leaving aside the process of deliberation itself, even its duration may be problematic. In the Blaškić case, for example, it took the ICTY Trial Chamber seven months (from July 30, 1999 to March 3, 2000) to deliberate before delivering the judgment. If this delay, agonizing to the accused, occurred in domestic criminal proceedings, human rights activists would be rightly up in arms.

20. It is worthy of note that the ambition of ICTY judges to write history has more recently been dampened by the rapidly approaching time limit on the Tribunal's existence. Negotiated guilty pleas have become popular, underscoring the gap between facts in the plea agreement and facts that belong to comprehensive historical records. For an acknowledgment of this gap, see, for example, Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgement, ¶ 122 (ICTY Dec. 18, 2003) (stating that "this Tribunal is not a final arbiter of historical facts. That is for historians.").

the judges of their aspiration to be historians might plausibly be criticized as foreshortening the horizons of those who have the advancement of human rights at heart. But potentially superior mechanisms for achieving that purpose are available. In some circumstances, for example, properly organized historic commissions are much better equipped than a criminal court to compile a comprehensive record of events. All things considered, then, there would be no reason to shed tears if international criminal courts were to tame their ambition to play the role of historians.

Another candidate for a reduced role in international criminal justice is the objective of making trials into a venue to satisfy the interests of victims and their families. We have previously attempted to show that the implementation of this idea tends to generate a conflict with considerations of fairness to the accused. But there are other problems with this objective as well, especially if international criminal trials continue to be organized as a contest between two partisan cases, with judges performing only a supplemental fact-finding function.²¹ Observe that in order to effectively satisfy the victims' interest, they, or their representatives, have to be assigned tasks that transcend strictly testimonial roles: they must also be permitted to address questions to witnesses, comment on statements by witnesses, and even make legal arguments. But this enlarged role of victims, even if properly controlled by the court, clashes with incentives needed to maintain the vitality of bipolar trials. It is difficult to see, for example, why the prosecution and the defense would take pains to prepare for effective direct and cross-examinations, if questioning of witnesses by victims could easily throw their trial strategy into disarray. Observe also how easily cross-examination—the hallmark of party-managed presentation of evidence—generates tensions with the concern for the interests of crime victims. When individuals who were subjected to gross human rights abuses are called to the stand, challenging questions addressed to them by the defense easily exacerbate their traumatic experiences. It will be said that the court is there to protect vulnerable witnesses from inappropriate queries. But judges are in many situations reluctant to interfere with vigorous cross-examination, for fear of crossing the fine line beyond which the defense has reason to complain that it was prevented from putting the prosecution's witnesses to an adequate test. And even if international criminal trials were largely free of bipolar pressures, as they someday might be in the International Criminal Court, downplaying the aspiration to

21. The ICC trial regulation provides for the possibility that judges abandon the "two cases" structure and organize the production of evidence in different ways. *See Rome Statute of the International Criminal Court*, art. 64(8), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter *Rome Statute*].

satisfy victims' interest in criminal prosecution would still be worth considering. The main reason is that effective measures to provide victims with satisfaction require that elements of restorative justice be injected into criminal proceedings, and, as is well known, retributive and restorative forms of justice do not mix very well.

Again, if there were no other ways to respond to the plight of victims, all of these difficulties in organizing criminal proceedings might have to be tolerated: it would be heartless, indeed, to shortchange individuals aggrieved by the most egregious misdeeds in the catalog of crimes. But as with the demand for an historical record, other instruments exist to serve victims' interests. Sweeping victim compensation schemes, enforced disgorgement of profits derived from crime, civil litigation, and various other forms of restorative justice are available as alternatives. Because their implementation does not depend on meeting the heavy burden of proof required for conviction of crime, they are—in this sense—more easily accessible to victims. Nor is punishment by international criminal courts the only measure available to provide satisfaction to victims whose vindictive feelings and retributive demands cannot be appeased by instruments of restorative justice. Where circumstances permit, national criminal prosecutions can be instituted, and individuals implicated in human rights violations can be disqualified from holding important offices, purged from civil service, or subjected to some other *de facto* punitive sanction.²² Thus, if international criminal trials were to give voice only to those victims, or their families, whose testimony is indispensable for proving the charges, this would not indicate the judges' lack of compassion. It would be unfair to accuse them of having “turned to stone within.”²³

B. *The Primacy of the Didactic Objective*

Having argued that the aspirations of international criminal courts should be more modest, the next subject we want to address is whether a greater measure of order can be introduced among the unruly judicial objectives. As already noted, no metric is available to establish a rigid set of

22. An interesting proposal has recently been made to impose monetary penalties on leaders of collective entities, such as an officer corps, that were involved in international crime. Not criminal in nature, these penalties would be imposed on strict liability grounds against the officers of the unit, with the view to stimulate the collective to *ex ante* monitor compliance with the law, and *ex post* to report those individuals who were actually involved in crime. Proceeds from penalties would be earmarked to victims and their families. See Mark Osiel, *The Banality of Good: Aligning Incentives Against Mass Atrocity*, 105 COLUM. L. REV. 1751, 1842–46 (2005). If difficulties in the practical implementation of this proposal could be resolved, it need not end up as a still-borne child of the intellect.

23. DANTE ALIGHIERI, *INFERNO*, canto 33:49 (Charles Eliot Norton trans., Project Gutenberg 1999) (1891–92), <http://www.gutenberg.org/etext/1995>.

priorities for the goals of adjudication: they are simply too disparate to be susceptible to being ranked against a common measure. But as was also noted, this does not mean that one must accept the existing absence of orientation. An improvement over the present situation would be if a goal could be selected as central to the mission of international criminal courts in the sense of providing an argumentative advantage in balancing competing goals. Thus, for example, if a substantive doctrine or a procedural arrangement seemed disadvantageous from the standpoint of this goal, that doctrine or that arrangement would not be *ipso facto* rejected—but its survival would require a compelling justification. Let us then revisit the goals of international criminal courts in search of a candidate that might be considered paramount in this weak sense.

Some commentators whose speculative eyes have pondered this murky issue maintain, or tacitly assume, that deterrence of mass atrocity is the best candidate for being placed at the heart of international criminal justice. According to them, the cardinal function of international criminal courts should be the use of punishment as a means to generate disincentives through the special features of international crime.²⁴

There are two main reasons why it is questionable to accord deterrence pride of place among the objectives of international criminal courts. One reason is that deterrence is premised on the idea that criminals include the threat of punishment in calculating the utility of their alternative courses of action, and that their utility functions, or their perception of pay-offs, are rational. But the number of coolly rational calculators of costs and benefits may regrettably be considerably smaller among those who commit international crimes than among those who commit crimes that constitute the staple of domestic criminal law enforcement. The conflicts with which international criminal justice is concerned often engage powerful passions—even self-transcending behavioral motives—and tend to involve individuals who are ready to accept the risk of punishment. To use an extreme, but by no means rare example, it is not clear how deterrence could work against people who regard death in pursuit of their actions as vindication and beatification.

But even if rational calculators of costs and benefits were prevalent among international criminals, as some think is the case in military hierarchies, the environment in which international criminal courts presently

24. A few commentators even favor group sanctions (albeit not always of a criminal nature) for this purpose. See Osiel, *supra* note 22, at 1768, 1837–38; Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1322 (2005) (reviewing FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE (Philippe Sands ed., 2003)).

operate does not favor placing deterrence at the center of their mission. The main reason is that the probability that the courts will realize the threat of punishment on their own is minuscule—unfortified by state support, they are powerless. It would thus bear more than a whiff of paradox for courts to regard as paramount a goal the attainment of which escapes their endogenous powers, and depends entirely on outside agents over whom they have no control, and whose support may or may not be forthcoming. If, like a modern Jove, they were someday to acquire independent power to call down lightning on transgressors with some regularity, then to rely on deterrence as their paramount goal might perhaps be justified.

In the meantime, it seems more appropriate for international criminal courts to place greater emphasis on suasion than on threats as their main preventive strategy. They should look beyond the effect of their decisions on potential criminals. Instead, they should aim their denunciatory judgments at strengthening a sense of accountability for international crime by exposure and stigmatization of these extreme forms of inhumanity. This exposure is apt to contribute to the recognition of basic humanity. To the extent that international criminal courts are successful in this endeavor, humanitarian norms would increasingly be respected—the low probability of their violations being visited with criminal punishment notwithstanding.²⁵ But as the interdisciplinary literature on norm acceptance through persuasion suggests, there exists a necessary condition for their success in performing this socio-pedagogical role: they should be perceived by their constituencies as a legitimate authority. Lacking coercive power, their legitimacy hangs almost entirely on the quality of their decisions and their procedures.²⁶

25. So understood, this socio-psychological goal of trials is close to those retributive theories of punishment which intertwine the intrinsic and consequentialist aspects of criminal justice by emphasizing the beneficial effect of punishment. See generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997). But the view expressed in the text could more easily be assimilated to expressive theories of punishment. See, e.g., Elisabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000). An influential advocate of the socio-pedagogical function of criminal trials was the late Norwegian scholar Andenaes. See Johs Andenaes, *General Prevention—Illusion or Reality?*, 43 J. CRIM. L. & CRIMINOLOGY 176, 179–80 (1952). It is interesting to note that even some systems of national criminal justice, whose deterrent effect exceeds that of international criminal courts, accept moral reinforcement, or moral education, as the ultimate aim of criminal justice. For the German example, see Winfried Hassemer, *Variationen der Positiven Generalprävention*, in POSITIVE GENERALPRÄVENTION: KRITISCHE ANALYSEN IM DEUTSCH-ENGLISCHEN DIALOG 29, 43 (Bernd Schünemann, Andrew von Hirsch & Nils Jareborg eds., 1998).

26. See, e.g., TOM R. TYLER, WHY PEOPLE OBEY THE LAW 64 (1990); Gerald R. Miller, *On Being Persuaded: Some Basic Distinctions*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 4–5 (James Price Dillard & Michael Pfau eds., 2002); Winfried Hassemer, *Warum und zu Welchem Ende Strafen Wir?*, 30 ZEITSCHRIFT FÜR RECHTSPOLITIK 316, 321 (1997).

Many will dismiss reliance on the educative role of international criminal courts as naive. To expect that observance of human rights may be influenced by expression of disapproval, and appeal to humanitarian values implicit in such disapproval, appears to them as no more than an axiom of unjustified hope.²⁷ Humans, they believe, are moved by self-interest, and moral principles are, at best, no more than fuel lent to its fire. Quite obviously, we cannot plunge here into the morass of the debate, clamorous with contending voices, about factors that motivate human behavior. For the purposes of this article, we will simply assume the intuitively plausible position that while the better angels of our nature have only a tenuous control on our behavior, and while evil cannot be educated out of the human heart, humans respond to both self-interest and moral values. And we will also assume that attempts at suasion would not be futile even if self-interest were the only spirit to move human beings: ideas are contagious, and may change perceptions of what is to one's own advantage, so that a previously disinterested human rights concern may turn into an aspect of self-interest.

Another objection to the role of international judges as moral teachers has emerged from reflections about the proper role of courts in transitional societies trying to come to terms with human rights abuses of the previous regime. In this context, it has been argued that the variety of perspectives on events surrounding mass atrocities, as well as the ambiguity of moral issues involved, require that courts refrain from cutting short the discussion over conflicting positions by making authoritative findings. Reconciliation and genuine social solidarity do not require locating an elusive consensus but, rather, finding a way to live with the absence of consensus. In seeking to make differences manageable, or perhaps to find a key to a symphonic consonance, the didactic role of courts, properly understood, should be not to propagate any particular moral view, but to use trials as a "theater for the clash of ideas."²⁸

Insofar as this theory relates to broad contextual issues surrounding incriminated acts, it should be taken seriously. It was because of the variety of perspectives on these issues that we have urged, *inter alia*, that they should not be the business of international criminal courts. But if the theory

27. Some commentators have inferred the futility of international criminal courts' didactic aspirations from the absence of discernible educational effects of their decisions. *See, e.g.*, Jack Snyder & Leslie Vinjamuri, *Trials and Errors*, 28 INT'L SEC. 5, 39-40 (2004). But the absence of these effects in the short run does not preclude the possibility of their appearance in a time horizon of longer range. This is especially the case in communities traumatized by atrocities, where intense passions unleashed by conflict take time to subside. Jumping to pessimistic conclusions is also unwarranted, so long as the working of international criminal courts is not properly attuned to pedagogic objectives.

28. *See* MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 52, 164, 208, 241, 298 (1997); RICÉUR, *supra* note 11, at 423-27.

is meant to relate to the narrow question of whether committed acts were in fact inhumane, it cannot be accepted without undermining the foundations of international criminal justice which we take for granted here. For this species of justice presupposes that acts which it threatens with punishment are contrary to existing and reasonably clear moral fundamentals, or, alternatively, that they flout agreements on basic protections—even if those do not spring from a common theoretical source. If such moral fundamentals or agreements do not exist, or are not yet capable of authoritative determination, then the ground on which international criminal justice rests collapses. Furthermore, if these moral minima are not universal, or if no affront to them can be asserted outside of the contingencies of time and space, than human rights law is no more than an ethnic custom of the West, and its penal branch no more than an attempt of Western elites to impose their moral ideals on other parts of the world.²⁹ Now, because this possible implication of the theory cannot be reconciled with international criminal justice, we can leave this theory to one side. But we will have to return to it later in discussing the desirable scope of didactic trials.

With these two distracting criticisms out of the way, let us return to the view that the central mission of international criminal courts should be the socio-pedagogical one of strengthening the public sense of accountability for human rights violations. What would the acceptance of this position entail? Since it is not possible for us to linger here over most of these entailments, a closer look at four prominent ones should suffice.

III. CHALLENGES TO THE DIDACTIC FUNCTION

A. *The Dilemma of the Target Audience*

The first question to be addressed is who should be the primary recipient of the courts' pedagogic messages. As alluded to before, a court decision suitable for the advancement of human rights culture in world society at large may produce a negative effect in communities from whose horrors international criminal courts derive their cases. In other words, a judicial

29. This negative view about the possibility of planetary concord on human rights is more widespread than votaries of international criminal justice like to think. All those who embrace the gospel of postmodernism, for example, are driven to this conclusions by their belief that different "moral narratives" are non-commensurable. Such pessimistic conclusions can also be found among anthropologists. See, e.g., CLIFFORD GEERTZ, *AVAILABLE LIGHT: ANTHROPOLOGICAL REFLECTIONS ON PHILISOPHICAL TOPICS* 258 (2000). For a lawyer's opinion along these lines, see Antoine Garapon, *Three Challenges for International Criminal Justice*, 2 J. INT'L CRIM. JUST. 716, 720, 724 (2004).

message appropriate *orbi* need not be appropriate *urbi*. How should the dilemma resulting from these discrepant effects be resolved?

Sometimes the answer is easy. Circumstances exist in which global horizons of concern clearly should prevail. International judges should not be swayed by hostile local responses to their decisions if they are generated by values or attitudes whose transcendence is the pedagogic aim of international criminal justice.³⁰ The lingering belief in some societies that should thus be disregarded is that the justness of one's political cause—such as a community's defense against aggression—allows for all sorts of indignities directed at combatants and civilians belonging to the other side in the conflict. Albeit weakened, this belief still survives in some communities in the territory of the former Yugoslavia. Disregarding such beliefs, despite adverse local responses, may be facilitated by the prospect that they will lose their virulence as soon as passions unleashed by conflict subside, and extra-territorial pedagogic signals encounter a more congenial climate.

All this said, the importance of considering local responses to the decisions of international criminal courts can hardly be overemphasized. From the standpoint of the courts' pedagogic mission, these responses may often deserve to be attributed greater weight than favorable, but more speculative, worldwide effects. Because it tends to be overlooked, the fact deserves special emphasis that adverse local reactions may sometimes spring from values that cannot be faulted from a humanistic standpoint. Some may even be closer to human rights ideals than those animating aspects of international criminal law in its present form. As we will presently try to show, a prominent source of this discrepancy is the desire of those who administer international criminal justice to overcome proof difficulties that arise in the prosecution of high-ranking officials who are remote from the immediate perpetrators. That desire may lead international criminal courts to adopt legal doctrines that exhibit less ethical delicacy than local laws, or reflect less refined moral sentiments than those shared by the local populace.³¹ When this is the case, hostile local reactions generated by this

30. As we have noted earlier, however, this is not to say that some sensitive decisions about launching prosecutions should not be postponed when hostile local reactions to them are likely to lead to violence and exact a heavy cost in terms of human lives.

31. The discrepancy can emerge in the procedural domain as well. Under the ICTY Rules of Procedure and Evidence, for example, an indictment is routinely filed before the accused is given any chance to challenge the prosecutor's evidence. By contrast, under former Yugoslav law—as well as the laws of many continental European countries—this feature of the pretrial process is considered inappropriate. No wonder, then, that the belief can spread in some local communities that the international system is unfair, or inferior to the domestic one, because it exposes individuals to the stigma of indictment for horrendous crimes before they are given the chance to respond to incriminating evidence and avert the stigmatization.

discrepancy deserve attention: to adjudicate while between their teeth may damage the educational mission of international criminal courts, and provide an opening for their enemies to portray international justice as an alien imposition—a storm to be weathered. Whether speculative influences on the platitudinous immensity of world community are capable of balancing adverse local consequences is highly questionable.

Ideally then, international criminal justice would appear in various garbs. In order to command “thick acceptance,” it would be adapted to local legal culture, the contours of communal experience, and local moral sensibilities. But realization of this ideal would entail fragmentation of international criminal law: the multiplicity of its variations would be difficult to order in ways capable of preserving the system’s coherence.³² What then emerges as the next best solution? International prosecutors—who have great leeway in choosing whom to prosecute, when, and on what charges—should carefully weigh local factors in discharging their responsibilities. Dismissive or condescending attitudes toward local culture or laws and insensitivity to state identity (especially if fragile) should be anathema. And international judges, while following the uniform legal regime, should make it their habit always to explain, in their decisions, the reasons or special needs that induce international criminal law to deviate from whatever local norms or practices are deemed fair and appropriate. Generally speaking, a high priority demand on international criminal courts should be to establish effective lines of communication with local audiences.³³

32. It has been suggested that these difficulties could be obviated by limiting international criminal law to the articulation of guiding principles for local variations, as is the case with attempts to harmonize, rather than unify, the law of various nations. See MIREILLE DELMAS-MARTY, *GLOBAL LAW: A TRIPLE CHALLENGE* 74–96 (Naomi Norberg trans., Transnat’l Publishers 2003) (1998). It is doubtful, however, whether this intriguing proposal is presently in the feasibility mode.

33. In this regard, the record of ad hoc criminal courts for Rwanda and former Yugoslavia is unsatisfactory. For many years, little effort was made to explain to the local public and legal profession the unfamiliar aspects of international criminal procedure, most of them of common law pedigree. Even less effort has been spent in dispelling unrealistic local expectation that all episodes of atrocity will be prosecuted, which then became a source of widespread and often unfounded perceptions of prosecutorial bias toward one or another ethnic group. It remains to be seen whether this state of affairs will be improved by more recently adopted outreach programs, and by educational measures taken in connection with the transfer of less serious cases to domestic courts. See Ivana Nizich, *International Tribunals and Their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal*, 7 *ILSA J. INT’L & COMP. L.* 353, 355, 361 (2001) (“Even proponents of the ICTY in the former Yugoslavia are disillusioned by its performance,” and “the Office of the Prosecutor has made little effort to communicate with the public of the former Yugoslav countries despite the fact that one of its primary goals is to provide justice to the victims of the region.”); The Human Rights Center, University of California, Berkeley et al., *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 *BERKELEY J. INT’L L.* 102, 103–04 (2000) (finding that a universal criticism of ICTY by Bosnian legal professionals is that officers of the court behave in a way which suggests disrespect). For a critique of ICTR, see Etelle R. Higonnet, *Restructuring Hybrid Courts: Local*

B. *Problematic Substantive Doctrines*

If the didactic function of international criminal courts is extolled, then some aspects of their substantive doctrines come under a cloud. This applies primarily to doctrines of criminal liability whose application lead to results at odds with ordinary moral intuitions, or whose range is uncertain and potentially overbroad. The lower limits of command responsibility provide an example of doctrines of the first type. According to this doctrine, a person in a leadership position who is negligent in the supervision of his underlings is liable as if he himself committed the crimes that were intentionally perpetrated by them. The same theory holds for a superior who, having been informed of the crime of his minions, fails to bring them to justice.³⁴ It is not a leap to see that the doctrine facilitates convicting individuals belonging to the upper echelons of authority. Even if the prosecutor cannot prove that they induced their subordinates to commit a crime, or that they were in some other way directly implicated in its commission, she may still procure their conviction, as if she has proved the truth of these two propositions. This is because the substantive law renders facts immaterial that would otherwise have to be proven.

But this boon to the prosecution comes at a cost. By placing in the same stigmatizing category with intentional perpetrators of a crime those who negligently failed to prevent it, or knowingly failed to report it, the law obliterates distinctions that belong to the universal vocabulary of moral experience. Ordinary people do not lump together intentional perpetrators of heinous crimes and those who failed to bring them to justice. They also do not omit to distinguish intentional from negligent commission of offenses—particularly when the crimes are of serious and morally disqualifying nature. Thus, if a minor child murders or sexually assaults someone, the man in the street does not view the minor's parents as murderers or rapists because they failed to supervise him: the failure of supervision appears to the ordinary observer as a distinct, separate, and less serious offense, rather than a mode of perpetrating murder or rape. And even if he is informed that the duty of supervision is in certain institutional settings, such as in the

Empowerment and National Criminal Justice Reform, 23 ARIZ. J. INT'L & COMP. L. 347, 417–22 (2006) (stating that most Rwandans think ICTR “is a foreign and removed body alien in procedure, whose slow pace of trials is proof of UN inefficiency, or worse, indifference to Rwandan needs.”).

34. See Rome Statute, art. 28, *supra* note 21, 2187 U.N.T.S. 90; Statute of the International Tribunal for the Former Yugoslavia art. 7(3), May 25, 1993, 32 I.L.M. 1192. For variously formulated critiques of the doctrine, see Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001); Kai Ambos, *Superior Responsibility*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 823, 850–70 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002); Thomas Weigend, *Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht*, 116 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 999 (2004).

military, more stringent than analogous parental duties, his perception is not likely to change.

There are several reasons why this doctrine of responsibility appears undesirable when the courts' didactic function is extolled. As we have just seen, the doctrine creates a net with such a mesh that the prosecutor can entangle not only truly reprehensible individuals but also those who are only marginally culpable. To treat the latter as perpetrators of the most heinous crimes imaginable strikes ordinary people as too harsh or morally obtuse. These negative reactions may become intense in communities where some of the marginally culpable leaders are perceived, as they sometimes are, as morally upright, tragic figures. The problem is aggravated by the previously noted fact that—reality of international politics being what they are—prosecutions tend to be instituted against high-ranking individuals from small or vanquished nations, where arguments of enemies of international courts may easily resonate that this harsh doctrine would not have been adopted were it not tailored for use on top chieftains of less than well-endowed nations. The impression of undue harshness springing from these perceptions detracts from the moral authority of international criminal courts and impairs the readiness of the local community to accept their messages. An additional, but related, objection is that the doctrine dilutes the stigma of conviction for grossly inhuman acts by attaching it indiscriminately to intentional acts and negligent omissions. Remember that until quite recently—and not without reason—the belief was widespread that only intentional crimes are part of international criminal law.³⁵

An example of a legal construct problematic because of its uncertain range is the doctrine of “joint criminal responsibility” as crafted by the case law of the Yugoslav War Crimes Tribunal.³⁶ The doctrine provides that persons who designed a plan, or exhibited a common purpose, that amounts to (or merely involves) the commission of an international crime are responsible as perpetrators of crimes committed in execution of this plan or purpose, provided that they engage in some act which—although not

35. This belief stemmed from the understanding of international crimes as especially heinous. As a result, the stigmatization flowing from their commission seemed to require that they be committed intentionally. Reflecting this belief, many international treaties provided that their violations be punishable only if committed “willfully.” See, e.g., ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 160–61 (2003). Only gradually, and by way of exception, have lesser forms of culpability crept into international criminal law. Article 30 of the Rome Statute of the International Criminal Court still preserves the view that international responsibility can only in special circumstances be based on forms of culpability other than intent and knowledge. See Rome Statute, art. 30(1), *supra* note 21, 2187 U.N.T.S. 90.

36. For an account, see Verena Haan, *The Development of the Concept of Joint Criminal Enterprise at the International Criminal Tribunal for the Former Yugoslavia*, 5 *INT'L CRIM. L. REV.* 167, 169–94 (2005). The most recent judicial attempt to define the requirements of the doctrine can be found in *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Judgement, ¶¶ 357–450 (ICTY Ap. Ch. April 3, 2007).

criminal by itself—can be interpreted as a contribution to the ultimate crime. It is again plain that this doctrine facilitates conviction of powerful individuals who orchestrate international crimes, but are not physically involved in their commission. On the prevailing understanding of the doctrine, for example, the prosecutor is relieved of the burden of proving any communication, or causal link, between them and the physical perpetrators.

Clearing the conceptual underbrush of this doctrine cannot be attempted here. It should be conceded, however, that its animating idea—that of reaching the criminal masterminds—is sound. It responds to the fact that most international crimes are committed in an organizational context, so that looking for principal culprits behind hands-on perpetrators makes eminent sense. It is the elaboration of that idea that causes concern. Under the presently prevailing understanding, the scope of membership in the enterprise, as well as its temporal and spatial range, are uncertain and liable to arbitrary extension.³⁷ Observe also that under one of the three variants of the doctrine, the accused may be convicted as a perpetrator of crimes that go beyond the common plan or purpose, provided that they are its foreseeable consequence. And because what appears foreseeable in judicial hindsight need not be foreseeable amidst the pressures and confusions of an ongoing conflict, the possibility exists that liability be imposed on an even stricter standard.³⁸ A further and somewhat neglected source of the doctrine's potential overreach is that the common plan or purpose need not be criminal per se, but merely *involve* the commission of crime.³⁹ Now, “involvement” is a protean concept. If broadly interpreted, it can bring legitimate policy decisions, or indeed any plan for change in a political *status*

37. When a criminal enterprise is attributed to state policy, almost anybody in the governmental and political apparatus may be branded as the enterprise's member. An extreme example in point is *Prosecutor v. Cermak*, Case No. IT-03-73-PT, Amended Indictment, ¶¶ 9–10 (ICTY May 6, 2005). In addition to specifically named top government officials, including the first President of the Croatian Republic, the indictment lists as members of the criminal enterprise officers, officials and members of the Croatian government and political structures at all levels, various officers and members of the armed forces, the military and civilian police, other security and intelligence services, and “other persons, both known and unknown.” *Id.* ¶ 12.

38. Cognitive psychology appears to confirm this tendency. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 591 (1998). No wonder that one encounters mounting criticism of the doctrine on the ground that it obliterates important moral distinctions. See, e.g., Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69, 83 (2007); Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J. INT'L CRIM. JUST. 660, 672 (2006). For cautionary remarks on the attribution of responsibility for mere foresight, see also Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 128 (2007). For a somewhat different critical approach, see, for example, Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 103–20 (2005); Osiel, *supra* note 22, at 1791–804.

39. The sufficiency of “involvement” was established by the ICTY Appeals Chamber in the case *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgement, ¶ 227 (ICTY Ap. Ch. July 15, 1999).

quo, dangerously close to a joint criminal enterprise—on condition, of course, that it is foreseeable that human rights violations may occur in the decision's execution. On this broad interpretation of involvement, even the military intervention of Western powers in Afghanistan could be classified as criminal: those who planned the intervention were aware that it might lead to (or "involve") war crimes, since they decided to rely for ground fighting on the troops of the Northern Alliance whose reputation for disregard of the laws of war was well known.⁴⁰ All in all, the application of the doctrine of joint criminal enterprise may blur the boundary between atrocities beyond the pale and legitimate policy decisions accompanied by violence: the taint of criminality may extend too far into the sphere of political decision making.

The reasons why this vague doctrine weakens the capacity of international courts to be moral teachers are largely the same as with command responsibility. By including large numbers of individuals with different contributions to crime and different modes of culpability into a single stigmatizing category, the doctrine disregards differences that in many societies are morally relevant. Some will argue that the problem may be solved at the sentencing level by mitigating the punishment of those who are found less culpable. But this argument ignores the effects of the indiscriminate stigma of conviction, and differences in the length of time spent in prison cannot remove this effect. When we turn to the problem of selective enforcement, we will see how this can be exploited by local politicians to the detriment of the reputation of international criminal courts. A related negative impact of the doctrine is again the dilution of the disgrace of convictions for grossly inhuman acts—an effect that spreads *pari passu* with the ease with which people are convicted of conduct regarded as only slightly culpable, or even morally justifiable in communities affected by crime.

What results from these reflections? If the didactic goal of international criminal courts is to be central to their vocation, then liability doctrines that blur over moral distinctions shared by ordinary people would have to be corrected. To trace the many ways in which this could be achieved would require too much of a digression here. For present purposes it is enough to allude to three possible solutions—all of them known to national criminal laws. Apropos command responsibility, the superior's

40. The assumption here is that commanders of the Northern Alliance units were involved in the planning of military operations. Even the Slovenian and Croatian plans to secede from Yugoslavia could, perhaps, be subject to that interpretation. While these plans were arguably not illegal, it was nevertheless foreseeable that internecine fighting in violation of the laws of war would result from their implementation.

negligent failure to supervise subordinates and his failure to punish them could be converted from a mode of contribution to the subordinates' crimes into separate, less serious offenses.⁴¹ Joint criminal enterprise could be confined by requiring an actual agreement as a predicate of its existence, and by limiting its scope in ways similar to those that have been elaborated, or advocated, for the common law conspiracy-complicity doctrine in its American variant.⁴² Superiors in an organization that committed the crimes could also be made responsible as "intermediate" perpetrators. The basis for the extension of the concept of perpetration would rest here not only on the fact the superiors share the state of mind of hands-on perpetrators, but also on the additional fact that the former exercise control over the organization, or a part thereof.⁴³

The suggestion to modify the harshness of the two liability doctrines we have described will be opposed on many grounds. The most easily anticipated line of criticism is likely to come from those who maintain, or tacitly assume, that deterrence should be the chief aim of international criminal justice. Paying attention to degrees of personal culpability appears to them to neglect incentives the law should create to counter, or deter, the organizational tendencies of international crime. To insist on punctilious observance of the culpability principle, or on conventional mens rea requirements, is to disregard the practical difficulties of convicting individuals in positions of leadership, and courts the possibility of acquittals capable of discrediting the project of international criminal justice.⁴⁴ Another objection to changes in liability doctrines is likely to come from those who find the changes unnecessary on the ground that the prosecutor's po-

41. This is, for example, the approach taken by the new German Code of Crimes Against International Law (*Volkerstrafgesetzbuch*). It excludes the superior's negligent failure to supervise his underlings, as well as his failure to bring them to justice, from the concept of command responsibility, and converts them into separate crimes. See *Volkerstrafgesetzbuch* [VStGB] [Code of Crimes Against International Law], June 26, 2002, BGBl. I at 2254, §§ 13–14, available at http://www.bmj.bund.de/files/-/408/Englische_Fassung.pdf (English translation). Remember that the older view, limiting international criminal law to intentional criminality, is no longer valid.

42. See, e.g., WAYNE R. LAFAVE, *CRIMINAL LAW* 641–43 (4th ed. 2003).

43. I am alluding to the theory of "perpetrator behind the perpetrator," accepted by German, Spanish and Argentine authorities. See, e.g., Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. INT'L CRIM. JUST. 159, 183 (2007). The prototype of this theory was crafted by the German scholar Claus Roxin. See CLAUDIUS ROXIN, *TÄTERSCHAFT UND TÄTHERRSCHAFT* 242–52 (7th ed. 2000). The theory has recently been recommended for ICTY use by one of its judges. See *Prosecutor v. Simić*, Case No. IT-95-9-A, Judgement, J. Schomburg Dissenting, ¶¶ 15–20 (ICTY Ap. Ch. Nov. 28, 2006).

44. See Osiel, *supra* note 22, at 1774–76. The importance we accorded to personal culpability appears to him as a regrettable blend of "liberal morality" and "Kantian retributivism." And, rather than restricting command responsibility as was proposed in the above text, he would make convictions under this rubric easier. See Mark J. Osiel, *Modes of Participation in Mass Atrocity*, 38 CORNELL INT'L L.J. 793, 793–800 (2005).

litical savvy and proper sense of measure are sufficient safeguards against extending criminal liability too far.

What can be said in response to these criticisms? So far as reliance on prosecutorial restraint in bringing charges is concerned, the answer is easy: widespread experience gained in national law enforcement strongly indicates that this reliance is risky, and often unwarranted. Objections from the deterrence perspective have greater weight, but it is impossible to answer them adequately without extended discussion of the relationship between deterrence and culpability. But we need not be drawn into the vortex of these profundities here. Staying on the ground of those who focus on the creation of proper incentives, observe that even if international criminal courts were capable of strong deterrence, it would still be a mistake to neglect socially accepted degrees of culpability. For when the restraint exerted on punitive urges by basic moral distinctions is gone, the specter of overdeterrence raises its ugly head. The easy attribution of responsibility, coupled with the harshness of response to it, might generate perverse incentives: morally upright individuals might be driven away from positions of influence in military or political organizations, leaving them open to reckless, or morally insensitive, persons.⁴⁵

Arguments invoking the possibility of embarrassing acquittals are not susceptible to rapid dispatch, and require a closer look. To begin with, it is not clear that individuals in leadership positions would escape scot-free from the grasp of justice if liability doctrines were made more precise, and their reach narrowed to accord with common understanding of culpability. A more probable consequence would be the conviction of such individuals on a lesser number of indictment counts, which tend to be inflated anyway, or, if this were not possible, for less serious crimes whose making we have just proposed. The latter prospect is regrettable, of course. But it is more regrettable still to craft liability doctrines that make facts needed for the proper assessment of personal culpability immaterial, and to do so for the purpose of avoiding proof difficulties that would arise in proving these facts. If criminal law principles fail under pressure of heinous crime, they are like a sprinkler system that turns itself off when the fire gets hot. It would indeed be a disheartening irony if a justice system, designed to contribute to the protection of human rights, could properly function only by disregarding humanistic values rooted, *inter alia*, in the presumption of

45. Research in the domain of criminality in business organizations suggests the possibility of the perverse effect adverted to in the text. See Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 869–71 (1984). Issues that arise in this regard may not be much different from those of adverse selection in insurance matters.

innocence. For it does not require much reflection to discover the silent assumption of guilt lurking under the surface of arguments that harsh liability doctrines are necessary to avoid embarrassing acquittals. Once this unspoken assumption is accepted, it is only a short step from it to a criminal justice system programmed to convict.

One wonders whether the advocates of harsh substantive doctrines realize the uncanny similarity of their position to the adjudicative temperament and punitive animus that permeated the inquisitorial procedure of the much maligned continental Old Order. Impelled by the desire that no crime remain unpunished (*ne crimina remaneant impunita*), the architects of the system did not tinker with substantive doctrines, but provided instead that evidentiary barriers to conviction should be lowered for crimes difficult to prove.⁴⁶ Some legal authorities went even further and advocated a general dispensation from legal principles in the case of “atrocious” crimes.⁴⁷ In making proof standards less demanding, the system’s demiurges thus achieved directly what they could have achieved indirectly by making substantive liability doctrines less discriminating. To bring back to life a variant of this punitiveness, no matter how well intentioned it may be, is uncalled for—especially if the pedagogical role of international courts is viewed as central. For in order to preserve their moral muscle, international criminal courts should maintain a creative suspense in regard to procedural outcomes, and accept the possibility of proper or justified failures. If the perception were to spread that the courts stack the deck against the accused, this realization would in the long run be more harmful to their legitimacy than sporadic acquittals. The courts’ constituencies, both global and local, might come to view them as administering only show trials and dispensing only second-rate justice.

46. Presumptions of intent, relaxation of witness disqualification rules, and similar evidentiary devices abounded for crimes that were difficult to prove (*propter crimina difficile probationis*). See, e.g., PROSPERI FARINACII, TRACTATUS INTEGER DE TESTIBUS, titul. VI, qu. 62, nos. 28, 31, 32 (Osnaburgi, Joannis Viereggi 1677) (witnesses who are otherwise disqualified (*testes inhabiles*) can be admitted when crimes are difficult to prove because otherwise truth could not be established (*veritas per alios haberi non potest*)); *id.* at titul. VII, qu. 64, no. 220 (the general rule of inquisitorial evidence law requires two unimpeachable eyewitnesses to fully prove a crime, but “treason” (*crimine læsæ majestatis*) can be proved by the testimony of a single credible witness). The relaxation of evidence law in the prosecution of the most serious crimes was still permitted on the eve of the French Revolution. See 1 DANIEL JOUSSE, TRAITÉ DE LA JUSTICE CRIMINELLE DE FRANCE 828 (Paris, Debure Père 1771). It was only in the second part of the nineteenth century that this tilting of scales against the defendant was subject to obloquy and gradually disappeared—not only from the law but from acceptable discourse about its reform. The contrary position came to be advocated—at least in non-authoritarian regimes—that evidentiary rules command greatest observance in prosecution for the most serious offenses because the harm of erroneous conviction is the greatest.

47. See 1 BENEDICTO CARPZOV, PRACTICÆ NOVÆ IMPERIALIS SAXONICÆ RERUM CRIMINALIUM, pars III, qu. 102, nos. 66–67 (Frankfurt, Wittebergæ 7th ed. 1677).

C. Procedural Implications

The decision to make the didactic objective central to the mission of international criminal courts is pregnant with implications for their procedural arrangements. An implication of general nature is the desirability of relaxing the bipolar pressures that arise from proceedings organized as a contest of two partisan cases. One reason for the relaxation is that the clash of conflicting positions tends to relativize, or weaken, both—including the courts' intended educational message. A related reason is that the defense's freedom to mount its own case provides it with ample opportunity to spread ideas contrary to human rights values.⁴⁸ The *pro se* defense of a charismatic leader may be especially damaging in this regard. His questions on direct and cross-examination may, by themselves, become an instrument for turning the trial into a stage for the promotion of causes that human rights champions find repulsive. Judicially directed trials, while not immune to the danger of being used in this way, are better able to contain the damage. Since judges appropriate more of the procedural action, building their own "meta-story," fewer openings remain for the defense to propagate its own views. In judicially directed trials, it is also easier for the courts to deny the accused the right to self-representation without creating the impression of trying to muzzle him: since the defense is entrusted with fewer means to influence the course of procedural action, less is taken away from the accused than in a system where he could organize his own case. In other words, the denial of a *pro se* right is a much less dramatic decision than in a party-orchestrated system.

From the perspective of the courts' didactic aspirations, another disadvantage of a competitively structured process is the difficulty of organizing trial proceedings in those cases in which the accused refuses to oppose the charges. The reason is straightforward, for it is hard to organize a forensic battle if one combatant refuses to fight. Those procedural systems which rely on bipolar pressures as their moving spirit tend in this situation to forego the open-court airing of evidence and to move on to the determination of sentence. But this movement away from the focus on trial is undesirable in international criminal courts because the public presentation of human rights violations is an essential part of the courts' pedagogical function.⁴⁹ By contrast, in proceedings structured as a court-directed official

48. If humanistic arguments were always to prevail over their detractors, this would be no problem, of course. But as the ideology of militant Islam illustrates, some ideas alien to the culture of human rights may be capable of finding receptive audiences in many communities.

49. Consider that techniques for achieving negotiated outcomes, such as plea-bargaining, are natural byproducts of bipolar procedures. But the opening of a plea-bargaining bazaar, while increas-

inquiry, the trial proceeds whether the accused opposes the charge or not. Even the accused's full and circumstantial confession does not relieve the court of the duty to consider all the assembled evidence in open court. And even if this is done in a perfunctory fashion, the human rights violations are thereby exposed, and may be used for socio-pedagogical effects.

A further reason why the bipolar structure of proceedings appears as a drawback from the perspective of a didactically oriented process is the presence of the accused's state in the wings of international justice. Since international crime is often linked to state policy, the government—and if democratically elected, large swaths of its population—may feel that it is itself *de facto* on trial. The government's interest to inject itself in to proceedings and avoid damage to its reputation may be particularly intense when an accused, linked to the state and desirous to improve his lot, pleads guilty, or confesses to charges which implicate the government in crime. It thus often appears that basic fairness requires that the government be permitted an input in proceedings. Convictions obtained without it may easily be perceived in affected states as an attribution of criminality without possibility of defense.⁵⁰ Yet, as we have seen before in talking about the role of victims, it is difficult to integrate a third voice in proceedings exposed to bipolar pressures without damage to their internal logic and incentive structure. The closest, but mostly ineffectual, compensatory expedient is to grant the state permission to file an *amicus curiae* brief.⁵¹

Earlier, we suggested that it would be best if international criminal courts refrained from delving into the etiology and surrounding context of crime. These broader concerns, we have argued, are too volatile to be subject to the regime of finality. But we have also acknowledged that some elements in the definition of international crimes make a degree of contex-

ingly popular in national systems, is of dubious value for international justice—not only because deals struck behind the scenes raise the suspicion of manipulation for political purposes, but also because bargained outcomes lead to sentencing inequalities. This factor alone is capable of tarnishing the moral authority of international courts, most pointedly to audiences affected by human rights violations.

50. On the basic unfairness of deciding broader context issues of international crime without state participation, see Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J.L. & POL'Y 87, 117–18 (2001).

51. If ICTY practice is any indication, it is also not easy to persuade international criminal judges to accede to governmental requests for *amicus curiae* status. Recently, for example, the Tribunal has rebuffed the Croatian government's effort to appear as *amicus curiae* in two cases in which the first President of the Republic is named as an unindicted member of a joint criminal enterprise. The request was denied, despite the fact that the late President is considered by large segments of the Croatian population as the founder of the state, and despite the likelihood that the Tribunal's judgments, obtained without the state's input to defend the President's reputation, have a reduced chance of being locally accepted as legitimate. See *Prosecutor v. Prlić*, Case No. IT-04-74-T, Decision on Request by the Government of the Republic of Croatia for Leave to Appear as *Amicus Curiae*, (ICTY Oct. 11, 2006).

tualization inevitable. Does this mean that a different trial regimen would be desirable for determining the existence of criminal conduct, on the one hand, and whatever minimum backdrop of contextual matters is needed on the other? A theory we have already encountered answers this question in the affirmative, and proposes a solution.⁵² Trials, the theory holds, should comprise two separate spheres—one concerned with narrow, legally relevant issues pertaining to the accused's personal liability, and the other devoted to broader matters. But in this second sphere, judges should refrain from pronouncing any authoritative judgment: no account, or interpretation of events, should be declared superior to another, and endowed with official status. Even reversals of roles between the prosecution and the defense may be permitted here. The sole task of judges in this second sphere should be to enable the parties to freely develop their conflicting positions side by side, leaving the denouement of the controversy to civil society.

We have earlier noted the discrepancy between optimal methods for adjudicating narrow, legally relevant matters of liability, and for determining broader contextual issues. The metaphor of two separate spheres of activity captures this discrepancy well. But where we part company with the theory is in its insistence that issues from the broader sphere be entrusted to criminal courts, and their consideration incorporated into a single trial. Powerful reasons weigh against this proposal. The decisive one is the practical difficulty of keeping the two spheres apart. It defies imagination to develop procedural arrangements whereby aspects of a proceeding in which criminal liability must be established beyond a reasonable doubt could be combined with other aspects in which contextual issues are to be left open. But even if these two spheres could somehow be compartmentalized, a serious problem would remain—at least from the standpoint of the courts' pedagogic goal. If in the broader sphere the main task of the court were to provide the accused freedom to advance his own account of events, unconstrained by the limits of legal relevancy, he would be assured a platform from which to propagate views international criminal justice seeks to discourage.

We are thus driven to conclude that contextual matters required by crime definitions must be processed in the same way as issues of personal liability, despite the fact that this is not the optimal arrangement. The sub-optimal nature of the arrangements confirms our earlier suggestion that discourse in international criminal courts should be kept within narrow

52. See Osiel, *supra* note 28, at 127, 208.

bounds. Despite the contrary temptation, it should be pulled centripetally, rather than exploded centrifugally.

What then appears to be the proper focus of trials? Judges should fasten their attention upon what they do best: establish whether particular individuals—especially those in positions of power—committed specific wrongs. Aside from facilitating more expeditious prosecution, the simpler tableau of justice is congenial to the didactic mission of international courts on several grounds. To begin with, consider that the judicial ambition to provide a comprehensive panorama of events produces, almost inevitably, a gap between expectation and performance (to which we referred at the beginning of the article). Broad historical inquiries tend to produce not only controversial findings, but also, in communities affected by crime, expectations that all crime scenes will be depicted and all reported incidents of atrocity adjudicated. When this turns out to be impossible, as it is typically is, the criticism is likely to arise in these communities that only some incidents have arbitrarily been selected for adjudication, and that, in selecting them, the prosecution has displayed bias as between the groups in conflict.

An added advantage of narrowing the trial focus on matters relevant to liability is to reduce the accused's opportunity to use the courtroom for making political speeches and promoting his persona. Also, by unburdening themselves from the task of documenting all horrors that transpired, judges acquire the freedom to limit themselves to adjudicating only a few representative episodes of atrocity for which the strongest evidence exists, sparing themselves—or, at least reducing—controversies over the propriety of procedural outcomes. This last aspect of functional parsimony is likely to appear objectionable on the ground that it precludes the courts' constituency from gaining an understanding of the total horror of human rights violations. But the revulsion provoked by persuasive portrayal of only a few episodes in a large series of atrocities may exert an equal—sometimes even stronger—impact on the public than that arising from a more comprehensive account which takes years to obtain. The relatively brief attention span of the courts' public should be taken into account.

D. Selectivity of Enforcement

The most sensitive problem that arises if the pedagogical function of international criminal courts is extolled, and the last one we will address in this article, is the selectivity of international criminal law enforcement. Of concern to us here is not selectivity in the sense that prosecutors charge only a handful of individuals, or, as was just recommended, only a few emblematic episodes of international criminality. All terrestrial justice is in

this sense selective, and only divine justice on Judgment Day will be all-encompassing.⁵³ Of concern to us here is only selectivity in the initially-mentioned sense that international prosecutions are instituted mainly against citizens of states that are weak actors in the international arena or fail to enjoy the support of powerful nations. This is a more troubling form of discrimination than one springing from limited resources for law enforcement, unavailability of sufficient proof, or similar factors that affect the prosecutor's decision as to whom to charge and with what. For when international prosecutors bring to justice only, or mainly, criminals from weak nations, the result is that they discriminate among human rights abusers on the basis of their citizenship.

Like sex in Victorian England, selectivity in this sense is well known but seldom discussed.⁵⁴ But if the over-arching objective of international courts is to be a moral teacher, and if the reactions of local audiences to their decisions are attributed great importance, then this issue cannot be passed over in silence. To begin with, consider that while the didactic objective accords prominence to ethical issues, the type of selective enforcement we have in mind makes international criminal courts vulnerable to charges of applying a morally disturbing double standard. And if attitudes in regions where atrocities were committed merit special attention, it is deeply upsetting that corrosive cynicism engendered by the perception of double standards is most likely to take root in precisely these locations. Selective enforcement also provides support to those who argue that the creation of international criminal courts has been premature. The precondition for a genuine takeoff of international criminal justice, they argue, is the emergence of strong supranational institutions capable of acting independently from the political will of states. In the absence of implementing institutions, only flawed justice, tainted by politically motivated selectivity, can be administered. In order to fly, these skeptics seem to be saying, one must not only have wings, but also sufficient strength to lift off.⁵⁵

If the resulting damage to the moral standing of international criminal courts is to be contained, the problem of selective enforcement should be confronted, and the courts' supporters should strive to show that interna-

53. National prosecutors also fail to institute proceedings in regard to all crimes that come to their attention. This is true even in countries whose law denies prosecutors the discretion not to prosecute. In some countries, such as Italy, this law may even be of constitutional stature. See Mirjan Damaška, *The Reality of Prosecutorial Discretion: Comments on a German Monograph*, 29 AM. J. COMP. L. 119, 122–28 (1981) (reviewing THOMAS WEIGEND, ANKLAGEPFLICHT UND ERMESSEN (1978)).

54. But see Garapon, *supra* note 29, at 717.

55. A well-known exponent of this view in the post-Nuremberg period was Georg Schwarzenberger. See Georg Schwarzenberger, *The Problem of an International Criminal Law*, in 3 CURRENT LEGAL PROBS.: 1950, at 263, 263–88 (George W. Keeton & Georg Schwarzenberger eds., 1950).

tional criminal justice is desirable despite its presently unavoidable blemish of selectivity. When properly understood, the supporters should urge, the task of international criminal courts is to make incremental headway toward a system unstained by the flaw of selectivity. Many other international institutions are similarly affected by the taint of de facto state inequality, and yet few would want to see them disbanded. To wait for the global community to supersede states as the dominant actor in the international arena would be to succumb to self-subversion, or worse, to surrender to the blackmail of perfection. It is better to bring some human rights abusers to justice than none at all: the best should not be the enemy of the good. Arguments of this genre could have at least some traction even in communities whose members are selected for prosecution, provided that they were given reasons to believe that law enforcement, though selective, may accrue to their benefit by reducing violence from which they suffered, and may suffer again.⁵⁶

A side glance at the evolution of national criminal justice systems is helpful in placing the matter in proper perspective. For long stretches of their history, these systems were blatantly discriminatory. But instead of treating criminals differently according to the place of their *nation* in international hierarchy, they discriminated among them on the basis of their *personal* place in internal social hierarchy. Throughout medieval times, for example, responses to crimes committed by the lowest orders and those committed by the social elite were strikingly different: only serfs and unfree people [*Unfreie*] were subject to corporal punishment.⁵⁷ And while the nobility settled disputes arising from the commission of crime mainly through negotiations and compositions, or by seeking a potentate to serve as an *ad hoc* judge, misdeeds committed by the lower orders were adjudicated in regular courts.⁵⁸ Despite its equalizing tendencies, and albeit spreading the realistic threat of punishment across the social spectrum, even the French Revolution did not put an end to all open and legally sanc-

56. Think of Rawls's "difference principle," according to which some inequalities of wealth may be justified by their potential to improve the prospects of the least advantaged members of society. JOHN RAWLS, *A THEORY OF JUSTICE* 75–80 (1971).

57. This has led the famous German legal scholar, Gustav Radbruch, to advance the theory that the harsh punishment of the late Middle Ages evolved from punishments first imposed only on serfs and unfree people. See GUSTAV RADBRUCH, *ELEGANTIAE JURIS CRIMINALIS* 5–12 (2d ed. 1950).

58. See, e.g., Louis Halphen, *Les Institutions Judiciaires en France au XI Siècle*, 77 *REVUE HISTORIQUE* 279, 304 (1901). Also, in the period when torture was on the Continent a legitimate judicial instrument to procure incriminating evidence, social elites were for a long time legally exempted from its application. Mirjan Damaška, *The Death of Legal Torture*, 87 *YALE L.J.* 860, 878–89 (1978) (reviewing JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIEN RÉGIME* (1977)).

tioned aspects of separate treatment.⁵⁹ That this discrimination was invidious, at least by our contemporary standards, is beyond dispute. Yet it is only an ironic academic scherzo to claim that society in those periods of history would have been better off without criminal courts and official law enforcement.

The apology for selective enforcement does not end here, however. For although the targets of international prosecution tend to be individuals from weak states, it would be wrong to assume that powerful governments are completely unaffected by the operation of international criminal courts. To observe the impact of these courts on well-endowed governments, pressures should be recalled that are at work in the international arena to exhibit a commitment to human rights values and express willingness to react to their violation. Human rights ideas having run passportless, most nations, including major powers, have joined human rights conventions and incorporated criminal law provisions of these conventions into their municipal law. What this suggests is that even powerful members of the society of nations feel pressure to condemn egregious human rights violations and express readiness to sanction them. To be sure, these proclamations are often merely declamatory and limited to lofty rhetoric. But this is not to say that they are without impact even on higher reaches of international society. By making criminal prohibitions operational, international criminal courts contribute to the emergence of a moral climate in which even big and powerful actors in the international arena find it increasingly difficult to ignore their verbal commitments. The evident discrepancy between word and deed may affect their reputation, or damage some of their perceived self-interests. In pluralist democracies, maintaining a large gap between governmental declamation and action may even be internally troublesome, since it can be exposed and publicly denounced by domestic non-governmental organizations dedicated to human rights causes.⁶⁰

59. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 101–07 (2003).

60. The growing literature on reasons why states comply with human rights conventions suggests that state behavior in this sphere cannot be explained solely in terms of power politics. See, e.g., MARKUS BURGSTALLER, *THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW* 90–92 (Developments in International Law, Volume 52, Martinus Nijhoff Publishers 2005); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 *DUKE L.J.* 621, 652–56 (2004); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 2019–20 (2002).

POST SCRIPT

Having examined these challenges to the didactic role of international criminal justice, we have traversed the territory outlined in the introduction, and come to the end of our journey. Before we close, a few concluding remarks are in order, however. On the preceding pages we have largely drawn on the experience of ad hoc international criminal courts, rarely mentioning the potentially more important player in the field—the permanent International Criminal Court. The alibi for this neglect is the bias of our concern in this article. Our subject—exploring the ways in which the mission of international court can be better defined and their legitimacy strengthened—called for inquiry into matters other than the courts' normative framework. Lawyers may polish this framework as meticulously as Spinosa did his lenses, without decisively contributing to institutional legitimacy. And because the International Criminal Court is still taking the first baby steps toward converting its normative framework into living law, we were driven to look for our material elsewhere—to fully functioning international courts.

But although the role of the International Criminal Court is somewhat different from that of its ad hoc predecessors, so that it will be driven to perform its normative script in *sui generis* ways, some of our critical remarks directed at ad hoc courts may be applicable as caveats to this Court as well. One caveat relates to the danger of diversion generated by global aspirations away from paying close attention to the reactions of the Court's local constituency. The facts that the Court's jurisdiction is complimentary, and that precedence in principle is given to national courts,⁶¹ underscore the importance of taking into account the local culture and its laws in those cases where the Court decides to spring into action. The second caveat relates to the temptation of making an inclusive historical record of massive human rights violations, and planning comprehensive prosecutions for this purpose. The ill-fated *procès monstre* against Slobodan Milošević stands as a dramatic warning here. The third caveat concerns the need for taking a critical view of overbroad liability doctrines shaped by ad hoc courts. Constant vigilance is needed lest the moral authority of international criminal courts be compromised for the sake of facilitating conviction of high-profile individuals.

The last and most general cautionary lesson to be derived from the foregoing pages relates to the wisdom of modesty in setting objectives. Critics are likely to claim that playing down aspirations because of the

61. Rome Statute, art. 17(1)(a), *supra* note 21, 2187 U.N.T.S. 90.

difficulty of attaining them unduly foreshortens the prospects of international justice. Present goal-related weaknesses of international courts appear to them as minor blemishes on the face of a still adolescent system of justice, and attributing great importance to them is said to be as unfair as judging a lovely garden by its weeds. But these weaknesses should not be taken lightly. An overly ambitious, or otherwise inappropriate, selection of goals generates disparities between declaration and achievement, and uncertainty about their relative importance produces disorientation. Disillusionment stemming from unfulfilled expectations and inconsistencies that spring from disorientation are harmful to any system of justice, and especially to an evolving one whose legitimacy in the communities affected by international crime is still as delicate as the wings of a butterfly. Nor should the danger be overlooked that overly ambitious attempts by courts to impose monocacy on the volatile world of international politics may induce powerful actors in the political arena to withdraw their support from the fledgling institutions of international criminal justice. Thus, when pruned of presently unrealistic aspirations, these institutions are likely to grow more vigorously in the future.