

Pace University

DigitalCommons@Pace

Pace Law Faculty Publications

School of Law

2011

The Pluralism of International Criminal Law

Alexander K.A. Greenawalt

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Criminal Law Commons](#), [International Humanitarian Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Alexander K.A. Greenawalt, The Pluralism of International Criminal Law, 86 Ind. L.J. 1063 (2011), <http://digitalcommons.pace.edu/lawfaculty/796/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

The Pluralism of International Criminal Law[†]

ALEXANDER K.A. GREENAWALT*

INTRODUCTION	1064
I. THE CONTENT OF INTERNATIONAL CRIMINAL LAW: BACKGROUND AND SOURCES.....	1071
A. DEFINING INTERNATIONAL CRIMINAL LAW.....	1071
B. AD HOC TRIBUNALS AND THE SEARCH FOR SOURCES	1073
C. THE ROLE OF DOMESTIC LAW	1078
D. THE IMPACT OF THE INTERNATIONAL CRIMINAL COURT.....	1079
II. ICL AND ITS JUSTIFICATIONS	1084
A. THE INTERNATIONAL RELATIONS DIMENSION OF ICL.....	1085
B. THE GRAVITY DIMENSION OF ICL	1089
C. THE ENFORCEMENT THEORY OF ICL	1095
III. RULE OF LAW VALUES.....	1100
A. THE CONSISTENCY PRINCIPLE	1100
B. THE LEGALITY PRINCIPLE.....	1103
C. TRIBUNAL ADMINISTRATION	1106
D. NORMATIVE DEVELOPMENT	1109
E. AVOIDING JURISDICTIONAL CHAOS.....	1113
IV. <i>ERDEMOVIĆ</i> AND THE LIMITS OF A UNITARY ICL.....	1114
A. THE MAJORITY'S REJECTION OF THE DEFENSE.....	1114
B. THE DISSENT / ROME STATUTE APPROACH.....	1118
C. EMBRACING PLURALISM.....	1119
V. BEYOND <i>ERDEMOVIĆ</i> : RE-CONCEPTUALIZING INTERNATIONAL CRIMINAL LAW.....	1121
A. FOUR TIERS OF INTERNATIONAL CRIMINAL LAW	1122
B. FORUM-SPECIFIC APPLICATIONS.....	1127
CONCLUSION.....	1129

[†] Copyright © 2011 Alexander K.A. Greenawalt.

* Associate Professor, Pace University School of Law. I am extraordinarily grateful to Mark Osiel for taking the time to provide multiple rounds of detailed comments on an earlier draft of the Article, and to Paul H. Robinson and Luis Chiesa for helpful conversations in the formative stage of this project. I am further indebted to Noa Ben-Asher, Susan Benesch, Donald Childress, Harlan Cohen, Bridget Crawford, Shahram Dana, Margaret deGuzman, Chimène Keitner, Andrew Kent, Lisa LaPlante, Henry Monaghan, Jaya Ramji-Nogales, Sonja Starr, Lesley Wexler, Beth Van Schaack, and David Zaring for their feedback on earlier drafts of this Article. This Article also benefited from presentations at the St. John's Law School Faculty Colloquium, the Fordham Law School Advanced Seminar in National Security and Foreign Affairs Law, the Pace Law School Faculty Colloquium, the 2010 Junior International Law Scholars Association Conference at Hastings Law School, the 2010 Law & Society Conference in Chicago, Illinois, and the Connecticut Journal of International Law's 25th Anniversary Symposium. I am grateful to all who participated in those exchanges. I am indebted to the superb work of my research assistants Deanna Collins and Nicole Grospe. Thank you also to Maggie Flores, Megan Mullett, Megan Shipley, and the staff of the *Indiana Law Journal* for their thorough work editing the Article and preparing it for publication.

This Article develops a pluralistic account of substantive international criminal law (ICL). Challenging the dominant assumption among theorists and practitioners, it argues that the search for consistency and uniformity in ICL is misguided, that the law applicable to international crimes should not be the same in all cases, and that those guilty of like crimes should not always receive like sentences. In lieu of a one-size-fits-all criminal law, this Article proposes a four-tiered model of ICL that takes seriously the national laws of the state or states that, under normal circumstances, would be expected to assert jurisdiction over a case.

After briefly surveying historical complexities concerning the definition and scope of ICL, the Article focuses on standard justifications for the existence of ICL. It looks in particular to justifications rooted in international relations, gravity considerations, and enforcement concerns. While each account provides powerful reasons for seeking uniformity with respect to some components of ICL, neither in isolation nor in combination do these rationales demand uniformity with respect to the entire content of ICL. In particular, these standard theories have difficulty explaining why ICL should seek to monopolize those aspects of criminal responsibility that speak more to the general nature of criminality than to any specific goal of ICL. A review of general rule-of-law values—including the values of consistency, legality, administration, normative development, and avoiding jurisdictional chaos—yields similar results, affirming that contingent domestic law has a vital role to play in ICL prosecutions.

The Article next undertakes a case study of the Erdemović decision, in which the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) announced a new rule of ICL rejecting duress as a complete defense to murder. A close reading of the tribunal's reasoning reveals that the ICTY would have done better to apply Bosnian law considering the Court's inability to articulate why the special context or purpose of ICL requires a specific result, the normative shortcomings of both the majority and dissent's positions, and the availability of a suitable approach under domestic law. The Article then elaborates upon this analysis to set forth a four-tiered model of substantive ICL comprising: (1) truly universal principles of ICL, (2) tribunal-specific rules, (3) rules constraining the acceptable range of domestic discretion, and (4) default rules. While this model has powerful normative force, it also provides a coherent and superior framework for understanding the actual content of ICL in its current state of development.

INTRODUCTION

The case of Dražen Erdemović presented an early and thorny challenge for the International Criminal Tribunal for the Former Yugoslavia (ICTY). The twenty-three-year-old soldier arrived in The Hague after confessing to journalists that, on July 16, 1995, he had participated in a firing line that executed hundreds of Bosnian Muslim civilians captured after Bosnian Serb forces overran the U.N.-declared "safe haven" of Srebrenica.¹ After initially pleading guilty to a crime against

1. See *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Sentencing Judgement, ¶¶ 1–

humanity and receiving a ten-year sentence,² Erdemović appealed, claiming that he was excused on account of having committed his crimes under duress.³ According to his uncontested testimony, which both the prosecution and trial judge accepted as accurate,⁴ Erdemović was a Bosnian Croat living in territory controlled by separatist Bosnian Serb forces.⁵ He joined the Serb military because it was his only means of providing for his wife and young child.⁶ A tolerant, apolitical youth with no passion for nationalism, Erdemović volunteered for the Tenth Sabotage Detachment because the unit included other non-Serbs and was involved in reconnaissance rather than killing.⁷ When ordered to shoot the civilians from Srebrenica, Erdemović protested.⁸ He only complied after his commanding officer threatened to make him join the condemned.⁹ “[I]f I had been alone,” the accused testified, “if I had not had my wife and a son, I would have fled and something else would have happened. I had to do that. I was forced to do that.”¹⁰ By his estimate, Erdemović killed about seventy civilians that day.¹¹

In deciding the appeal, the ICTY’s Appeals Chamber quickly found itself facing a problem that it was, in fundamental ways, unequipped to resolve. Both the ICTY’s statute and international treaty law were silent on the existence and scope of the defense of duress.¹² International judicial precedents were sparse, conflicted, and typically summary in their reasoning.¹³ Domestic criminal justice systems,

4 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998); Stephen Engelberg, *U.N. Prosecutor Asks Serbs to Hand Over War-Crimes Suspect*, N.Y. TIMES, Mar. 8, 1996, at A7.

2. Erdemović, Case No. IT-96-22bis, Sentencing Judgement, ¶¶ 5–6.

3. See Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgement, ¶ 11 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

4. Erdemović, Case No. IT-96-22bis, Sentencing Judgment, ¶ 13 (“The parties were agreed on the facts. . . . [T]he Trial Chamber accepts as fact the version of events which the parties have submitted, that is that the facts alleged in the indictment and the version of events described by the accused in his previous testimonies are statements of fact.”).

5. *Id.* ¶ 17.

6. See *id.*

7. *Id.* ¶ 16.

8. *Id.* ¶ 14.

9. *Id.*

10. *Id.*

11. *Id.* ¶ 15.

12. See Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 51 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) (“[D]uress, either as a general notion or specifically as it applies to murder, is not contained in any international treaty or instrument”); Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 11 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen ¶ 13 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

13. See, e.g., Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 43. In particular, the Joint Separate Opinion concluded that “the only express affirmation of the availability of duress as a defence to the killing of innocent persons in post-World War Two military tribunal cases appears in the *Einsatzgruppen* case before a United States military tribunal.” *Id.* (citing *United States v.*

moreover, differed on whether duress could ever provide a complete defense to murder. Most civil law jurisdictions—including, notably, the laws of the former Yugoslavia—allowed the defense in these circumstances.¹⁴ Common law jurisdictions, with the exception of some U.S. states, denied it for murder.¹⁵

The five-judge chamber ultimately issued a divided judgment¹⁶ rejecting duress as a complete defense for soldiers accused of taking innocent life but directing the Trial Chamber to consider duress as a potential mitigating factor for sentencing purposes.¹⁷ The judgment produced four separately authored opinions that revealed deep differences in methodology and approach. The judges were divided over whether to rely on policy arguments or to apply more formalistic reasoning. They disagreed over whether international law revealed a settled answer and, if it did, what source of international law provided that answer—or indeed what that answer ultimately was.¹⁸

Despite these disagreements, the Appeals Chamber was agreed on one fundamental point: that international criminal law (ICL) should—and perhaps must—answer the question. In this way, the Court's judges embraced the dominant assumption among theorists and practitioners that ICL is, or should aspire to

Ohlendorf ("Einsatzgruppen"), 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 3 (U.S. Gov't Printing Office 1951) [hereinafter T.W.C.]. The opinion further noted, however, that this decision "did not cite any authority for its opinion that duress may constitute a complete defence to killing an innocent individual." *Id.* ¶ 43. With respect to other precedents invoked by the defense, the Joint Separate Opinion reasoned that the cases were either distinguishable based on the nature of the accusation or too unclear in their reasoning to provide guidance in the case at hand. *Id.* ¶¶ 47–48 (collecting cases). In addition, the opinion concluded that the post-World War II military tribunals generally resorted to national rather than international law with respect to the specific question of duress. *Id.* ¶ 54 ("[T]here was no provision in either the 1945 London Charter or in Control Council Law No.10 which addressed the question of duress either generally or as a defence to the killing of innocent persons. Consequently, when these tribunals had to determine that specific issue, they invariably drew on the jurisprudence of their own national jurisdictions. This is evidenced by the fact that British military tribunals followed British law and the United States military tribunals followed United States law.").

14. See, e.g., *id.* ¶ 59 (surveying national laws and concluding that "[t]he penal codes of civil law systems, with some exceptions, consistently recognise duress as a complete defence to all crimes").

15. See, e.g., *id.* ¶ 43 ("The laws of all but a handful of state jurisdictions in the United States definitively reject duress as a complete defence for a principal in the first degree to murder."); *id.* ¶ 49 (noting that some U.S. states had accepted the defense of duress as a general defense for all crimes); *id.* (noting that British and Canadian military tribunals had rejected the defense).

16. See *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment, ¶ 17 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) ("[T]he members of the Appeals Chamber differ on a number of issues, both as to reasoning and as to result. Consequently, the views of each of the members of the Appeals Chamber on particular issues are set out in detail in Separate Opinions . . .").

17. *Id.* ¶¶ 19–21. On remand, the Trial Chamber reduced Erdemović's sentence to five years. See *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Sentencing Judgment, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998).

18. See *infra* notes 61–66; *infra* Part IV.A.–B.

become, a comprehensive and closed body of criminal law, one that exists apart from any particular domestic criminal law and, with the exception of forum-specific procedural rules, applies uniform standards to all aspects of criminal behavior that fall within its ambit, whether it be specific elements of crimes, the general standards of individual liability, or the principles of sentencing.¹⁹ For many—including most of the authors of the *Erdemović* appellate decision—this assumption goes unstated.²⁰ It is simply self-evident that ICL must fill gaps in the law and that there can be one, and only one, answer supplied. Others who have given the matter more explicit attention have portrayed the quest for uniformity and consistency as central to the very integrity of ICL, constituting a core requirement of fairness and the rule of law.²¹

In this Article, I challenge the idea that ICL does, or should require, uniformity in all aspects of its doctrine and practice. I argue that the search for consistency and uniformity is misguided, that the law applicable to international crimes should not be the same in all cases, that those culpable of like crimes should not receive like sentences in all cases, and that this result may in fact better serve the core purposes of ICL than the alternative. I argue for a hybrid or “pluralistic” model of ICL that

19. As in the *Erdemović* Appeals Chamber opinions, this view often reveals itself as a background assumption, needing no specific interrogation. For authorities specifically highlighting the value of uniform ICL in various contexts, see, for example, Prosecutor v. Delalić, Case No. IT-96-21-A, Judgment ¶ 756 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001) (“One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment.”); Robert Cryer, *Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources*, 12 NEW CRIM. L. REV. 390, 394 (2009) (advocating the “judicial wing of the ICC promoting an integrated, consistent regime of international criminal law”); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 96–97 (2005) (arguing that judges should construe both substantive and procedural aspects of international criminal law consistently in order to develop ICL’s legitimacy); Margaret McAullife deGuzman, *Article 21, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES, ARTICLE BY ARTICLE 701, 710* (Otto Triffterer ed., 2d ed. 2008) [hereinafter deGuzman, *Article 21*] (arguing that the International Criminal Court’s resort to general principles of law under Article 21 of the Rome Statute “should be determined on the basis of international law rather than a case by case determination of a particular State’s rules of jurisdiction. A particularized approach would undermine the consistent application of the law to different accused.”); David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT’L L. & POL. 1019, 1026 n.16 (2008) (noting that the developed and recognized justification for international criminal law is an outgrowth of human rights law, and that such law must be applied consistently); Inés Mónica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT’L L. 1, 8 (2008) (appealing to “fundamental principals [sic] of criminal law, including the tenet that similar cases should be treated alike”).

20. As I discuss below, Judge Antonio Cassese’s dissenting opinion did contemplate the application of domestic law as “a last resort.” Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); see *infra* text accompanying notes 75–76; *infra* text accompanying note 182.

21. See *supra* note 19.

does not assume ICL to be a closed system of criminal law, but that instead takes seriously the domestic laws of the state or states which, under normal circumstances, would be expected to assert jurisdiction over a case. In short, I believe that the ICTY should have applied former-Yugoslav law to Erdemović's duress defense, and that the reasons for doing so have additional implications for other aspects of ICL.

My argument proceeds from the acknowledgment that ICL operates in an irreducibly pluralistic environment. Its creation inevitably perpetuates or even creates inconsistencies and tensions in the domestic criminal justice systems to which it applies. On the one hand, the drive towards unification and consistency at the international level necessarily creates fracture and inconsistency at the domestic level. This is true in the obvious sense that international law is meant to bind states: for example, the international prohibition of genocide²² necessarily sits in tension with the laws of states that seek to legalize and encourage genocidal practices. That, of course, is the point. But the creation of a comprehensive and unified international legal system also creates other, less obvious, tensions with domestic criminal law. Even if domestic laws do not directly conflict with international criminal prohibitions, the development of a distinct international criminal law specific to international crimes can threaten the integrity of a state's criminal justice system by causing the state to adopt principles for international crimes that are inconsistent with those otherwise applied. After all, the successful prosecution of an international crime from start to finish necessarily involves the application of a variety of legal principles that may bear little relationship to the particular criteria that define a crime as international. These include, for example, the minimum mental element necessary to establish criminal culpability, the proper scope of duress as an excuse to murder, the correct balance between free speech rights and the criminal law, and the appropriate measure of punishment for the crime. These are all matters that also arise outside the area of international criminal law, and their appropriate resolution, at least as a *prima facie* matter, does not hinge on whether a crime happens to be international. In the context of domestic criminal law, moreover, states can and do take divergent approaches to these matters without violating applicable international obligations, including those imposed by international human rights law.

Thus, the creation of a distinctly international criminal law presents an often-ignored dilemma. The development of a comprehensive, unified body of law for international law provides consistency only within the closed universe of international crimes: those accused of genocide, crimes against humanity, war crimes, and other international offenses are to be treated in the same way and become subject to the same rules no matter what their nationality or where in the world their crimes have occurred. But this consistency comes at the price of inconsistency at the domestic level. A person who might be excused from murder on account of duress may lose this excuse because the underlying crime is categorized as an international crime. The perpetrator of an international crime receives a sentence greater or lesser than what the relevant national court imposes

22. See Convention on the Prevention and Punishment of the Crime of Genocide art. I, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

on those who commit crimes of equal gravity under the domestic law. To the extent these differences are not justified by any substantive differences in the underlying crimes, the result may seem incoherent and even unjust.

At a minimum, these reflections reveal that it is not self-evident that international criminal law must take the form of a uniform, all-encompassing body that trumps contrary domestic laws in every instance. The choice instead is between two kinds of pluralism, one that imposes diverse and potentially inconsistent obligations at the domestic level, and one that imposes them at the international level. The question of which pluralism is preferable, or more accurately, what is the right balance between the two, is one that requires closer analysis and specific justification. I argue in this Article that there are many reasons—including those rooted in ICL's purposes, its legitimacy, and its normative limits—to take applicable domestic law seriously in ICL prosecutions.

My argument takes shape against the background of recent focus on the phenomenon of pluralism in international law.²³ Whether under this label or not, ICL scholars have paid close attention, in both theory and practice, to the competing interests of domestic and international authority in the prosecution of serious crimes. The International Criminal Court (ICC), for example, operates according to the principle of complementarity, which privileges domestic prosecutions of ICL offenses and positions the ICC as a court of last resort in the event that domestic efforts prove inadequate.²⁴ Various hybrid tribunals rooted in cooperation between international and domestic authorities have also emerged,²⁵ and a scholarly literature has emerged to address these and other questions concerning the relationship between the local and the international.²⁶

23. See generally Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

24. See Rome Statute of the International Criminal Court art. 17, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (providing that the ICC shall only exercise jurisdiction if a state is "unwilling" or "unable" itself to prosecute).

25. See, e.g., Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 137 [hereinafter Sierra Leone Statute]; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, June 6, 2003, 2329 U.N.T.S. 117 [hereinafter ECCC Statute]; S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (United Nations Security Council's creation of a Special Transitional Administration in East Timor); S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007) [hereinafter Lebanon Statute] (United Nations Security Council's creation of a Special Tribunal for Lebanon).

26. See, e.g., MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* (2007); JANN K. KLEFFNER, *COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS* (Ruth Mackenzie, Cesare P.R. Romano & Philippe Sands eds., 2008); JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY* (2008); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999); Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts Through Transnational Networks*, 50 B.C. L. REV. 1 (2009); William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts*

This Article contributes to this literature by interrogating the implications of domestic pluralism for substantive ICL. Unlike other scholarly efforts, this Article does not focus primarily on the procedural setting of ICL. My focus is not the comparative value of domestic actors or of domestic trials, but instead, the comparative value of substantive domestic criminal law. Nor does my argument focus on the special dilemmas of transitional justice as a reason to justify local alternatives—such as amnesty or various forms of alternative justice—to international solutions. Although I have given this critical question greater attention in my prior work,²⁷ the focus of this Article is on the application of ICL in its “ideal” context: by a court—either international or domestic—that is fully committed to the prosecution of ICL offenses, undistracted by other mitigating considerations. While the particularities of transitional justice and mass atrocity may justify even greater departures from a one-size-fits-all approach to international criminal justice, I argue that a case for pluralism exists even within a more traditional concept of ICL that emphasizes individual responsibility irrespective of the broader considerations underlying the transitional justice debate.

The argument proceeds in six parts. Part I sets the stage by framing the debate over the sources of ICL in its historical context. This Part provides a working definition of ICL and summarizes the difficulties that international criminal tribunals have faced in identifying the content of ICL. As part of this analysis, I outline the existing relevance of domestic law to ICL decisions, and I consider the impact that the ICC has had on the development of ICL.

Parts II and III consider various justifications for the development of ICL as a uniform body of law. Part II focuses on specific rationales for the creation of ICL as a distinct but limited body of criminal law and, in particular, on theories based on international relations, gravity, and enforcement. I argue that, while each account may claim some role in the content of ICL, neither in isolation nor in combination do they compel ICL to assert a monopoly over the substantive law applicable to the prosecution of ICL crimes. To the contrary, I argue that the best justification for ICL in its present state of development favors a model of so-called “double complementarity,” rooted in qualified deference to both domestic prosecutions and the application of substantive domestic law.

Part III looks to general legal values that, although not specific to ICL, might nevertheless compel uniformity in the law. These include the values of equality, legality, administration, normative development, and the avoidance of jurisdictional chaos. Here too, I conclude that the case for a uniform ICL is not as strong as it might appear, and that, on balance, these considerations supply powerful reasons to incorporate contingent domestic law principles into ICL prosecutions.

in the Rome System of International Justice, 49 HARV. INT'L L.J. 53 (2008); William W. Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2004); Jenia Iontcheva Turner, *Transnational Networks and International Criminal Justice*, 105 MICH. L. REV. 985 (2007).

27. See Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107 (2009) [hereinafter Greenawalt, *Complementarity*]; Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583 (2007) [hereinafter Greenawalt, *Justice*].

Part IV considers the competing interests of international and domestic criminal law in the specific context of the *Erdemović* case. I argue that the problem of duress presents a compelling case for resorting to applicable domestic law, given: (1) the silence of authoritative international legal sources concerning whether duress can be a complete defense to murder; (2) the disagreement among national legal systems over this question; (3) the ICTY Appeals Chamber's inability to articulate why the special context or purpose of ICL requires a particular approach to duress; (4) the normative shortcomings of both the majority and dissent's positions (and, indeed, of the prevailing national law approaches to duress); and (5) the availability of a suitable approach under applicable domestic law.

Part V expands this analysis beyond the problem of duress to advance a hybrid model of ICL that incorporates both universal principles of international law and, within limits, the domestic criminal law of the state that would normally exercise jurisdiction over the offense. In particular, I argue that ICL should be reconceptualized as a four-tiered body of law embracing four categories of substantive rules: (1) truly universal principles of ICL, (2) tribunal-specific rules, (3) rules constraining the acceptable range of domestic discretion, and (4) default rules. Although I do not attempt a comprehensive application of the model, I provide examples of rules belonging to each category, and I identify several areas—including modes of individual culpability, standards of *mens rea*, and sentencing practices—where domestic law has a legitimate role to play. Finally, I briefly consider the implications of the framework in three different procedural settings: domestic courts, international tribunals, and hybrid courts.

I. THE CONTENT OF INTERNATIONAL CRIMINAL LAW: BACKGROUND AND SOURCES

A. Defining International Criminal Law

At a rudimentary level, there is nothing in the idea of international obligations pertaining to the criminal law that requires an exhaustive criminal code. According to a broad and literal definition of the phrase, international criminal law could be said to comprise any number of obligations impacting criminal law. For example, international obligations restricting the extraterritorial reach of domestic crimes could be said to constitute ICL.²⁸ Similarly, the entirety of international human rights law—often described as a distinct field—belongs to ICL to the extent that human rights law imposes obligations or constraints on states' administration of their criminal justice systems.²⁹ For these purposes, it does not matter that the obligations may directly bind states rather than individuals, that they apply to ordinary domestic offenses, or indeed, that the same human rights obligations regulating criminal law also extend to other areas. It is enough that a legal

28. See *infra* Part III.E.

29. See, e.g., STEVEN R. RATNER, JASON S. ABRAMS & JAMES L. BISCHOFF, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 12–13 (3d ed. 2009) (noting that to the extent it “address[es] accountability of the individual for [its] violation,” human rights law “overlap[s] with international criminal law”).

obligation arising under international law imposes some constraint on the permissible content of some aspect of domestic criminal law.

Notwithstanding the availability of this broader concept, discussion of ICL typically focuses on a narrower area of law dealing with specific offenses that are directly proscribed by international law. For example, the authors of a leading casebook define ICL as the law that “imposes criminal responsibility on individuals for certain violations of public international law.”³⁰ David Luban has similarly characterized these offenses as “‘pure international crimes,’—pure, in that their criminal character originated in international rather than domestic law, and international rather than domestic legal institutions.”³¹ A paradigmatic example is genocide, which the Genocide Convention defines as “a crime under international law.”³² The treaty provides a definition of the offense, and it obligates the contracting parties to “undertake to prevent and to punish” genocide.³³ Other international offenses, each with its own origin and evolution, include crimes against humanity,³⁴ war crimes,³⁵ torture,³⁶ piracy,³⁷ and aggression.³⁸

While this Article focuses primarily on this narrower body of international law, one’s precise definition of ICL depends in part upon the very questions that this Article explores. To say that ICL assigns individual criminal responsibility³⁹ still leaves open a range of questions regarding state discretion over the enforcement and definition of international offenses. What law, for example, should govern the punishment of international offenses? Do states have any latitude to incorporate general principles of domestic law in ICL prosecutions? Must states prosecute ICL crimes as ICL crimes, or is it sufficient that domestic law also criminalizes the behavior targeted by ICL? On account of these and other complexities, I believe it is useful to also keep sight of the looser, more ecumenical concept of ICL. Indeed, part of my argument is that the distinctions between different types of ICL are less airtight than they might appear.

The prosecution of ICL offenses has often coincided with the establishment of special international courts. The history of modern ICL begins with the Nuremberg

30. BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT: CASES AND MATERIALS I* (2d ed. 2010); see also RATNER ET AL., *supra* note 29, at 10 (“For our purposes, the term refers broadly to the international law assigning criminal responsibility for certain particularly serious violations of international law.”).

31. David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law* 5 (Georgetown Univ. Law Ctr., Working Paper No. 1154117, 2008), available at <http://ssrn.com/abstract=1154177>.

32. Genocide Convention, *supra* note 22, at art. I.

33. *Id.*

34. See, e.g., Rome Statute, *supra* note 24, at art. 7.

35. *Id.* at art. 8.

36. See United Nations’ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

37. See United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

38. See Rome Statute, *supra* note 24, at art. 5; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers, and Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

39. See VAN SCHAACK & SLYE, *supra* note 30, at 1.

and Tokyo tribunals, established after World War II to prosecute senior German and Japanese officials for crimes against humanity, war crimes, and the crime of aggression.⁴⁰ Successor ad hoc tribunals include the international courts created by the U.N. Security Council to address crimes committed in the former Yugoslavia⁴¹ and in Rwanda⁴² in the 1990s and various “hybrid” courts that reflect cooperation between domestic authorities and international institutions, including a mix of local and foreign judges.⁴³ Recent years have also seen the establishment and operation of a permanent tribunal, the International Criminal Court.⁴⁴ Generally speaking, these successor tribunals all focus on a core trio of ICL offenses: genocide, crimes against humanity, and war crimes.⁴⁵ The ICC’s Statute provides for jurisdiction over the crime of aggression contingent upon the State Parties agreeing on how to define the offense.⁴⁶ Some hybrid tribunals also have jurisdiction over select domestic offenses.⁴⁷

ICL offenses are also sometimes prosecuted in domestic courts. Some states employ expansive jurisdictional rules with respect to offenses prescribed by international law. For example, like many other countries, the United States recognizes the principle of universal jurisdiction over “the crime of piracy as defined by the law of nations.”⁴⁸ Other states recognize universal jurisdiction over a broader range of offenses, including the core three that have been the focus of recent international tribunals.⁴⁹

B. Ad Hoc Tribunals and the Search for Sources

While the existence of distinct ICL offenses is neither new nor controversial, much of the modern history of ICL has been consumed by an identity crisis regarding the content and sources of these offenses. Gaps in the law are an endemic aspect of judicial decision making, but with ICL the gaps have at times appeared to swallow the rules. The London Charter of the International Military Tribunal at Nuremberg⁵⁰ provided only bare bones descriptions of the three crimes that the

40. London Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279 [hereinafter *London Charter*]; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20.

41. See S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter *ICTY Statute*] (establishing the ICTY).

42. See S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter *ICTR Statute*] (establishing the International Criminal Tribunal for Rwanda (ICTR)).

43. See *supra* note 25.

44. See Rome Statute, *supra* note 24.

45. See Sierra Leone Statute, *supra* note 25, arts. 2–4; Rome Statute, *supra* note 24, at arts. 5–8; ECCC Statute, *supra* note 25 arts. 4–6; ICTR Statute, *supra* note 42, at arts. 2–4; ICTY Statute, *supra* note 41, at arts. 2–5.

46. See Rome Statute, *supra* note 24, at art. 5.

47. See, e.g., Sierra Leone Statute, *supra* note 25, art. 5 (crimes under Sierra Leonean Law); ECCC Statute, *supra* note 25, art. 3.

48. 18 U.S.C. § 1651 (2006).

49. See generally UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2004).

50. London Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat.

court would prosecute, and two of these—"crimes against humanity" and "crimes against peace"—had no established history as ICL offenses.⁵¹ The Charter was also largely silent on the general principles that would govern culpability determinations. It excluded the defense of acting under orders, denied the availability of official immunity, and—perhaps most controversially—set out a broad conspiracy liability that was largely unknown outside the United States legal system at that point in history.⁵² The Charter did not, however, elucidate such basic questions as the mental and causation standards applicable to individual culpability, the justifications and excuses that might provide complete or partial defenses, or the standards regulating criminal sentences. Nor did the Charter specify what methodology the tribunal should apply to address questions left unanswered by the text of the Charter. All these issues were left to the discretion of the tribunal and its successors to elucidate on a case-by-case basis, often through decisions that were less than lucid in their legal reasoning.⁵³

The post-Cold War tribunals have stood on somewhat firmer ground given the benefit of the Nuremberg precedents and the intervening evolution and codification of ICL through treaties such as the Genocide Convention and the Geneva Conventions. In many ways, however, ICL had not advanced between 1945 and 1993. The statutes of the ICTY and International Criminal Tribunal for Rwanda

1544, 1547, 82 U.N.T.S. 279 [hereinafter London Charter].

51. See Jonathan A. Bush, "The Supreme . . . Crime" and Its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324 (2002); Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787 (1999) [hereinafter Van Schaack, *Definition of Crimes Against Humanity*].

52. See London Charter, *supra* note 50, at arts. 7–9; TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 36 (1992) ("The Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war."). Post-Nuremberg tribunals have excluded direct reference to conspiracy outside the context of genocide. See Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199 (Roy S. Lee ed., 1999) (noting with respect to the drafting of the International Criminal Court's statute that "[a]nother very divisive issue . . . was conspiracy, a concept strongly advocated by common law countries but unknown in some civil law systems").

53. The Judgment of the International Military Tribunal at Nuremberg, for instance, provided only brief and summary explanations of its verdicts with regard to each of the tribunal's twenty-two defendants. More broadly, efforts to derive rules of customary international law from World War II-era cases have commonly struggled with the lack of reasoning in key decisions. See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 201 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (for purposes of identifying elements of aiding and abetting, noting that the British military court decision in *Trial of Schonfeld and Nine Others* "did not make clear the grounds on which it found [three of the accused] to have been 'concerned in the killing'"); Case No. 002/19-09-2007-ECCC/OCIJ (PTC 38), *Public Decision on the Appeals Against the Co-Investigating Judges Order on Joint Criminal Enterprise (JCE)*, ¶ 75 (Extraordinary Chambers in the Courts of Cambodia May 20, 2010) (noting that ICTY jurisprudence concerning extended forms of joint criminal enterprise as a mode of criminal liability relied on military court cases in which "the military courts only issued a simple guilty verdict and made no extensive legal finding on the issue of common plan or mob beatings"); *supra* note 13 (*Erdemović* case).

(ICTR) followed the basic Nuremberg model of listing bare bones offenses, with many of the core standards of culpability and punishment left unspecified.⁵⁴ In its early case law, the ICTY and ICTR's shared Appeals Chamber announced that it would resolve questions of applicable law by looking to the classic sources of international law outlined in Article 38(1) of the Statute for the International Court of Justice.⁵⁵ Namely, it would look to (1) "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states," (2) "international custom, as evidence of a general practice accepted as law," (3) "the general principles of law recognized by civilized nations," and (4), failing the above, "judicial decisions and the teachings of the most highly qualified publicists of the various nations."⁵⁶

This approach raises immediate *prima facie* questions considering the special context of ICL. Is the same methodology that is used to determine disputes between states also appropriate for assessing individual criminal liability—in which the rights of the accused loom larger?⁵⁷ The picture clouds further when one considers that, in practice, international tribunals have construed these traditional sources loosely, and in ways that expand judicial discretion. For instance, the classical definition of customary international law requires widespread and consistent state practice accompanied by a sense of legal obligation (so-called "*opinio juris*").⁵⁸ Questions regarding the consistency of both requirements, and the mix between the two, remain debated,⁵⁹ but the *ad hoc* tribunals have routinely relied on so-called custom, sourced from little more than a handful of Nuremberg-era precedents prosecuted by the Allied Powers against perpetrators who fought against them.⁶⁰ In

54. See ICTR Statute, *supra* note 42; ICTY Statute, *supra* note 41.

55. See Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Declaration of Judge Patrick Robinson, ¶ 281 at n.10 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Declaration of Judge David Hunt, ¶ 2 at n.1 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000); Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 40 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

56. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

57. See Benjamin Perrin, *Searching for Law While Seeking Justice: The Difficulties of Enforcing Humanitarian Law in International Criminal Trials*, 39 OTTAWA L. REV. 367, 372–73 (2007–2008) ("The implications of the modern *ad hoc* tribunals incorporating these public international law concepts into international criminal law have been largely ignored.").

58. See ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 49 (1971); 1 LASSA OPPENHEIM, INTERNATIONAL LAW 22 (2d ed. 1912) ("Jurists speak of a custom, when a clear and continuous habit of doing certain actions has grown up under the aegis of the conviction that these actions are legally necessary or legally right.").

59. See generally Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 76–77 (2007) (summarizing controversies concerning the identification of custom); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757–60 (2001) (distinguishing between traditional and modern approaches to customary international law).

60. See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 191, 193

other cases, the tribunals have dispensed with even the pretense of following custom or general principles to fashion legal standards that ostensibly best suit the purpose of ICL.⁶¹

The impact of judicial construction has hardly been trivial. With little or vague guidance from treaty law, the ad hoc tribunals have, among other important decisions, developed an expansive form of liability known as joint criminal enterprise (JCE),⁶² elaborated elements of command responsibility,⁶³ ruled that the laws and customs of war apply to internal conflicts and not merely to wars between states,⁶⁴ developed principles of sentencing,⁶⁵ and, as I have already addressed,

(Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (identifying standards of aiding and abetting liability based on World War II-era case law after reasoning that "[s]ince no treaty law on the subject exists, the Trial Chamber must examine customary international law in order to establish the content of this head of criminal responsibility" and "[i]t therefore becomes necessary to examine the case law").

61. See, e.g., *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 77 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) (appealing to policy considerations).

62. The ICTY Appeals Chamber first announced this doctrine in the *Tadić* case. See *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999). Pursuant to this mode of participation, an accused is held criminally responsible for an international crime based on his or her participation, with the requisite mens rea, in a common plan among a plurality of persons to commit the crime. See *id.* ¶¶ 227–28. Most controversially, the Court held that participants in a JCE are also liable for crimes outside the common plan committed by other members of the group so long as the commission of the offense was foreseeable and the accused knowingly took the risk of its occurrence. *Id.* ¶ 228. On the controversy surrounding the ICTY's development of JCE, see, for example, MARK OSIEL, *MAKING SENSE OF MASS ATROCITY* 48–90 (2009); Danner & Martinez, *supra* note 19; 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 (2005); David L. Nersessian, *Whoops, I Committed Genocide! The Anomaly of Constructive Liability for Serious International Crimes*, 30 FLETCHER F. WORLD AFF. 81 (2006); Jens David Ohlin, *Joint Criminal Confusion*, 12 NEW CRIM. L. REV. 406 (2009); Jens David Ohlin, *Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 69 (2007); Steven Powles, *Joint Criminal Enterprise: Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?*, 2 J. INT'L CRIM. JUST. 606 (2004); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008).

63. See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004); *Prosecutor v. Delalić*, Case No. IT-96-21-A, Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001). See generally Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455 (2001); Danner & Martinez, *supra* note 19.

64. See *Prosecutor v. Tadić*, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

65. See, e.g., *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR 99-52-A, Judgment, ¶ 1057 (Nov. 28, 2007) ("[T]he Appeals Chamber is of the opinion that, in view of the gravity of the crimes in respect of which the Tribunal has jurisdiction, the two main purposes of sentencing are retribution and deterrence; the purpose of rehabilitation should not be given undue weight."); Sharham Dana, *Genocide, Reconciliation and Sentencing in the Jurisprudence of the ICTY*, in *THE CRIMINAL LAW OF GENOCIDE* 259, 261 (Ralph

ruled that duress cannot excuse soldiers of homicidal war crimes or crimes against humanity. These decisions had varying degrees of support in treaty law and prior precedent, but each involved substantial judicial evolution of the law.

The *Erdemović* decision denying duress as a complete defense to murder ranks among these examples both for its importance and for its controversial outcome. The case presents, in the words of one scholar, a “microcosm of the difficulties of enforcing international humanitarian law through international criminal trials.”⁶⁶ In that decision, the ICTY’s five-member Appeals Chamber proceeded from the unanimous conclusion that neither the ICTY statute nor international treaties resolved whether Erdemović could be excused.⁶⁷ The majority further failed to find a settled answer to the question in either prior international case law or in a survey of national criminal laws that might have evidenced a general principle of law regarding duress.⁶⁸ As I shall detail in Part IV, the majority therefore appealed to policy considerations to rule that international law must reject a complete defense where the killing of innocents is concerned.

Judge Cassese, by contrast, argued in dissent that existing customary international law could, in fact, afford a complete defense of duress, subject to a strict proportionality test requiring that the accused not cause a greater harm than avoided.⁶⁹ This conclusion, however, relied on highly formalistic reasoning. Proceeding from the observation that all legal systems recognize duress as a complete defense to *some* crimes, Cassese characterized the relevant question as one regarding whether international law recognizes a murder-based exception to the defense of duress.⁷⁰ Because there was disagreement on this question, Cassese reasoned that no rule of customary international law had crystallized and that the general rule favoring the defense of duress must prevail.⁷¹ This result effectively reduced the content of ICL to a semantic characterization of the background rule

Henham & Paul Behrens eds., 2007) (“Some trial chambers added two more principles to create ‘four parameters’ for international sentencing: retribution, deterrence, rehabilitation, and protection of society.”).

66. Perrin, *supra* note 57, at 388.

67. See *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 51 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) (“[D]uress, either as a general notion or specifically as it applies to murder, is not contained in any international treaty or instrument”); *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 11 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, ¶ 2 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, ¶ 13 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

68. See *Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 43–48; *Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, ¶¶ 3–10.

69. See *Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶¶ 11–12; *id.* ¶ 50 (concluding that “whether the execution . . . was *proportionate* to the harm . . . sought to [be] avoid[ed]” is a necessary element of the duress rule (emphasis added)).

70. *Id.* ¶ 19.

71. *Id.* ¶ 11.

rather than a reflection of actual consensus among international or domestic sources.⁷²

C. The Role of Domestic Law

The determination of such critical questions through case-by-case evolution, retroactively applied, has raised its share of controversy.⁷³ Yet, despite its obvious potential to alleviate at least some of this concern, the option of applying domestic criminal law has thus far played only a minor role in these debates.

Domestic law has obvious importance to the traditional sources of international law. Identifying rules of customary international law and the general principles of law recognized by civilized nations routinely involves consideration of national legal obligations. In these cases, however, the goal of the interpretive exercise is to announce a single, universal rule of international law and not to give effect to any particular domestic law. Moreover, the ICL case law has given even this limited use of domestic law diminished status, privileging the prior case law of international tribunals over domestic law.⁷⁴

By contrast, states like the former Yugoslavia and Rwanda do, of course, apply their own particular criminal laws to cases arising in their own courts. Had the Bosnian authorities apprehended Erdemović in like circumstances for a mass murder that did not implicate ICL—say for example, a domestic criminal gang had kidnapped him and had forced him to kill the family members of rival gang members—then Bosnia would have applied its own domestic criminal law to adjudicate Erdemović's duress defense. Why shouldn't the ICTY also have applied Bosnian law when faced with a gap in ICL?

72. See, for instance, Perrin, *supra* note 57, at 386, who argues:

The logic applied by Judge Cassese on this point is questionable. It could just as easily be argued that a general rule of international criminal law is that the individual criminal responsibility of an accused can only be justified or excused based on a defence recognized under international law. Since duress is not recognized as a defence to the offences charged, and Judge Cassese falls short of finding a specific rule permitting duress as a defence to the killing of innocent persons, then the purported defence would not exist.

Id.

73. See, e.g., George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 556 (2005) (identifying "fundamental concerns that lead us vigorously to oppose the reliance on [customary international law] as [a] means of inculcation in criminal prosecutions, whether in domestic courts or international courts"); Robinson, *supra* note 62.

74. See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 196 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (determining principles of aiding and abetting liability based on review of international tribunal case law and observing that British military court case law applying domestic law is "less helpful in establishing rules of international law on this issue"); Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 3 ("[T]he traditional attitude of international courts to national-law notions suggests that one should explore all the means available at the international level before turning to national law.").

To date, the direct use of domestic law has received only limited, half-hearted support in the jurisprudence of international criminal tribunals. In his *Erdemović* opinion, Judge Cassese characterized the direct application of former Yugoslav law as an application of “last resort.”⁷⁵ He saw reliance on contingent domestic law as a regrettable, but potentially necessary, step to avoid retroactive punishment and thus protect the principle of *nullem crimen sine lege*.⁷⁶ Although Cassese was confident that there was, in fact, an established ICL law of duress, he would have applied domestic law before explicitly fashioning a brand new rule based on policy considerations, as the plurality had done.⁷⁷

The statutes of the ICTY and ICTR also extend a limited embrace of domestic law. They contain parallel sentencing provisions providing that, “[i]n determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of” the former Rwanda and Yugoslavia, respectively.⁷⁸ The case law interpreting these provisions, however, has been rather dismissive of this legal mandate, emphasizing both the nonbinding phrasing of the obligation,⁷⁹ and the limited force of the legality principle as a constraint on sentences exceeding that authorized by domestic law.⁸⁰

D. The Impact of the International Criminal Court

The recent establishment of the ICC is a significant new chapter in the development of ICL, and it presents yet another context in which questions regarding the sources of ICL will arise. This institution is marked, first of all, by its potential universality. Unlike its predecessor, ad hoc tribunals, the ICC has the potential to reach ICL offenses committed anywhere in the world after the Court’s July 2002 effective date.⁸¹

75. See *Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 49.

76. *Id.* ¶ 11.

77. *Id.* ¶ 49.

78. ICTR Statute, *supra* note 42, at art. 23; ICTY Statute, *supra* note 41, at art. 24.

79. See, e.g., *Prosecutor v. Nahimana, Barayagwiza & Ngeze*, Case No. ICTR-99-52-A, Judgment, ¶ 1063 (Nov. 28, 2007) (“The Trial Chamber is therefore ‘entitled to impose a greater or lesser sentence than that which would have been imposed by the Rwandan courts.’” (quoting *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Appeal Judgment, ¶ 393 (May 20, 2005))); *Prosecutor v. Jokić*, Case No. IT-01-42/1-A, Judgment on Sentencing Appeal, ¶ 38 (Int’l Crim. Trib. for the Former Yugoslavia Aug. 30, 2005) (“[The Statute] ‘does not oblige the Trial Chambers to conform to [Yugoslav sentencing] practice; it only obliges the Trial Chambers to take account of that practice.’” (quoting *Omar Serushago v. Prosecutor*, Case No. ICTR-98-39-A, Sentencing Appeal Judgment, ¶ 30 (Apr. 6, 2000))).

80. See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment, ¶ 681 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004) (“[T]he International Tribunal can impose a sentence in excess of that which would be applicable under relevant law in the former Yugoslavia, and the Appeals Chamber has held that this sentencing practice does not violate the principle of *nulla poena sine lege* because an accused must have been aware that the crimes for which he is indicted are the most serious violations of international humanitarian law, punishable by the most severe of penalties.” (citation omitted)).

81. The Court’s jurisdiction is generally limited to crimes committed on the territory of,

The ICC also differs from its predecessors by virtue of the relative clarity of its governing law. Reflecting a conscious attempt to reduce gaps in the applicable law, the Rome Statute is a comparatively detailed document. In addition to a host of procedural and administrative provisions, the statute refines the definitions of the offenses subject to its jurisdiction, in some cases embracing the case law of the ad hoc tribunals, and in other cases departing from or expanding upon those precedents.⁸² Even more remarkable, the statute dedicates unprecedented attention to the general part of criminal law.⁸³ It includes provisions defining the applicable *mens rea*⁸⁴ and the forms of individual criminal responsibility.⁸⁵ It expressly addresses the problem of duress by adopting the approach set forth in Cassese's *Erdemović* dissent: duress may supply a complete defense to international crimes "provided that the person does not intend to cause a greater harm than the one sought to be avoided."⁸⁶ The statute also enumerates and defines additional defenses, including self-defense, the defense of others, involuntary intoxication, mental incapacity, superior orders, and mistake of fact.⁸⁷

For these reasons, one might expect the establishment of the ICC to eliminate the historical difficulties surrounding the sources of ICL. But this expectation would be mistaken. In the first place, even the relatively detailed provisions of the Rome Statute will require judicial construction.⁸⁸ The Court's early case law has just begun to elaborate the elements of crimes and standards of individual liability. For example, in the Court's first decision confirming charges against a suspect, the presiding Pre-Trial Chamber dedicated substantial analysis to establishing standards of so-called coperpetrator liability, rejecting what it termed the subjective and objective approaches to distinguishing between principals and accessories to a crime in favor of an approach that treats as coperpetrators those who exercised joint control over the offense.⁸⁹ The operative provision of the Rome Statute, by

or by a citizen of, one of its 114 States Parties, *see* Rome Statute, *supra* note 24, at art. 12, but a referral from the U.N. Security Council removes that restriction, *see id.* at art. 13.

82. *See id.* at arts. 5–10. In particular, the statute eschews its predecessors' open-ended mandate to prosecute unenumerated "violations of the laws and customs of war." London Charter, *supra* note 50, at art. 6; *see also* ICTY Statute, *supra* note 41, at art. 3. Instead it provides detailed lists—one for international conflicts and another for internal conflicts—of prosecutable war crimes. Rome Statute, *supra* note 24, at art. 8. The definition of crimes against humanity also receives further refinement, including an expanded list of acts that qualify for prosecution under this category, provided they are committed as part of a "widespread or systematic attack directed against any civilian population." *Id.* at art. 7.

83. *See* Rome Statute, *supra* note 24, at arts. 22–33.

84. *Id.* at art. 30.

85. *Id.* at art. 25.

86. *Id.* at art. 31(1)(d).

87. *Id.* at art. 31.

88. *See* Claus Kreß, *The International Criminal Court as a Turning Point in the History of International Criminal Justice*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 143, 146 (Antonio Cassese ed., 2009) ("Th[e] unprecedented emphasis on the legality principle [in the Rome Statute] should not detract from the fact that the ICC definitions of crimes are nevertheless vague in many respects. Judges interpreting these definitions will therefore need to flesh out and concretize the precise scope of these crimes.")

89. *See* Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 322–67 (Jan. 29, 2007). Notably, this decision declined to

contrast, simply assigns liability to those who commit a crime “jointly with another . . . person.”⁹⁰ Already, the decisions of different Pre-Trial Chambers have revealed a split over the minimum mens rea generally required to secure conviction under the Statute.⁹¹

The principles of sentencing, to take another example, are likewise vague and untested. The Statute authorizes a maximum life sentence⁹²—followed by a second-highest sentence of thirty years⁹³—but it leaves the broader question of sentencing philosophy, including the development of concrete guidelines for sentencing, largely to the discretion of judges. The Statute’s own sentencing philosophy boils down to the vague instruction that “[i]n determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted

embrace the more expansive concept of perpetrator liability recognized by the ICTY under the category of “joint criminal enterprise.” *Id.* ¶¶ 329–30 (contrasting the ICTY’s “subjective approach” according to which “those who make their contribution with the shared intent to commit the offence can be treated as principals to the crime, regardless of the level of their contribution to its commission” with “the concept of control over the crime” according to which those who “control or mastermind [the crime’s] commission” are treated as principals). The Pre-Trial Chamber’s analysis focused on the assignment of principal liability and did not therefore determine the boundaries of accessory liability under the Rome Statute. *See id.* ¶¶ 336–37 (distinguishing coperpetrator liability from the “residual form of accessory liability” provided for by Article 25(3)(d) of the Rome Statute). For additional precedents concerning co-perpetrator liability, see *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009); *Prosecutor v. Katanga & Ngudjolo Chui*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges (Sept. 30, 2008). The ICC’s Appeals Chamber has yet to rule on these issues.

90. Rome Statute, *supra* note 24, at art. 25(3)(a).

91. Compare *Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶ 344 (interpreting statutory definition of intent to encompass situations in which “co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such an outcome”), with *Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶¶ 357–60 (ruling that the statutory standard of “intent” and “knowledge” excludes liability based on “*dolus eventualis* . . . , recklessness or any lower form of culpability” and encompasses only situations in which the suspect either “carries out . . . acts or omissions with the purposeful will (intent) or desire to bring about those material elements of the crime” or with the “aware[ness] that those elements will be the almost inevitable outcome of his acts or omissions”). The cited portions of these decisions concern Article 30 of the Rome Statute, which provides the default mens rea requirement of intent and knowledge applicable “[u]nless otherwise provided.” *See* Rome Statute, *supra* note 24, at art. 30(1). This standard does not therefore have force with respect to determinations for which the Statute explicitly provides a lower mens rea standard. *See, e.g., id.* at art. 28(a)(i) (providing for liability of military commanders for failure to prevent or repress the crimes of subordinates in cases where the commander “either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes”).

92. Rome Statute, *supra* note 24, at art. 77(1)(b).

93. *Id.* at art. 77(1)(a).

person.”⁹⁴ The Rules of Procedure and Evidence, in turn, make more detailed provision for mitigating and aggravating circumstances, but do so broadly, without indicating how much weight should be assigned to each factor or providing anything in the manner of concrete sentencing ranges.⁹⁵

Other questions are procedural in nature, yet contain substantive components. For example, the Statute’s so-called “complementary” provisions prohibit the Court from prosecuting cases that a domestic authority is already “genuinely” investigating or prosecuting.⁹⁶ The question of what substantive law states may apply in these cases and how closely those laws conform to the law of the ICC is left unresolved.

On some matters, the Rome Statute appears to depart from tribunal case law. For example, the standard for aiding and abetting appears narrower than that recognized by the ICTY.⁹⁷ The Rome Statute’s provisions for command responsibility, moreover, elaborate upon tribunal case law by imposing a causation requirement and establishing different elements of superior responsibility for military commanders and other superiors, respectively.⁹⁸

In these and other instances, the Court’s judges will be required to assess how much of the prior case law survives the Rome Statute’s innovations. Complicating matters further, the Statute expressly provides that its definitions of offenses shall not “be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”⁹⁹ Thus, the developing case law of the ICC may or may not embody ICL that binds other courts and tribunals.

Unlike the founding instruments of predecessor tribunals, the Rome Statute does delineate a framework for how the Court should determine its applicable law. Although drawing obvious inspiration from the ICJ Statute’s Article 38(1), Rome

94. *Id.* at art. 78(1).

95. International Criminal Court [ICC], *Rules of Procedure and Evidence*, R. 145, ICC Doc. ICC-ASP/1/3 (Sept. 10, 2002) [hereinafter ICC Rules of Procedure], available at http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf.

96. Rome Statute, *supra* note 24, at art. 17(1)(a).

97. Compare Rome Statute, *supra* note 24, at art. 25(3)(c) (holding culpable those who aid or abet the commission of a crime within the court’s jurisdiction “[f]or the purpose of facilitating the commission of such a crime”), with *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶ 249 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (holding “the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime” and that “the *mens rea* required is the knowledge that these acts assist the commission of the offence”).

98. See Rome Statute, *supra* note 24, at art. 28; see also *Prosecutor v. Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 423 n.550 (June 15, 2009) (“acknowledg[ing] that the *ad hoc* tribunals do not recognise causality as an element of superior responsibility”); Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT’L L. 89 (2000).

99. Rome Statute, *supra* note 24, at art. 10.

Statute Article 21 presents its sources of law in a strictly hierarchical framework.¹⁰⁰ It requires recourse first to the Court's Statute,¹⁰¹ Elements of Crimes,¹⁰² and Rules of Procedure.¹⁰³ Second, and "where appropriate," the Court is to consult "applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict."¹⁰⁴ Finally, failing disposition by those other sources, the Court may look to general principles of law, which are here somewhat oddly defined. The Statute describes these as follows:

{G}eneral principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.¹⁰⁵

Read literally, this last provision makes little sense. To the extent the consultation of domestic law is limited to identifying universal "general principles of law," then the specific "national laws of States that would normally exercise jurisdiction over the crime" have no special relevance. Predictably, this infelicitous phrasing has produced conflicting interpretations. Margaret deGuzman, for example, reads this provision to retain international law's traditional commitment to identifying universally applicable general principles.¹⁰⁶ Benjamin Perrin's interpretation, by contrast, favors something akin to Judge Cassese's "last resort" approach. In the event that the traditional sources of law failed, the Court would look to the specific domestic laws of states that would exercise jurisdiction under normal circumstances, as determined by the locus of the crime or by other bases of jurisdiction.¹⁰⁷

100. *Id.* at art. 21(a).

101. *Id.*

102. International Criminal Court [ICC], *Elements of Crimes*, ICC Doc. ICC-ASP/1/3(part II-B) (Sept. 9, 2002) [hereinafter ICC Elements of Crimes], available at http://www.icc-cpi.int/NR/rdonlyres/9CAEE830-38CF-41D6-AB0B-68E5F9082543/0/Element_of_Crimes_English.pdf.

103. ICC Rules of Procedure, *supra* note 95.

104. Rome Statute, *supra* note 24, at art. 21(1)(b).

105. *Id.* at art. 21(1)(c).

106. See deGuzman, *Article 21*, *supra* note 19, at 710.

107. See Perrin, *supra* note 57, at 400. Perrin concludes that, based on the drafting history:

Article 21(c) would operate to fill gaps first by considering legal systems (or traditions) of the world seeking broad consensus. If judges do not find such agreement, as in *Erdemovic*, then they would examine the smaller subset of national laws that would ordinarily apply on the facts of the particular case. While there could be multiple national laws applicable, in cases of non-international armed conflicts it is conceivable that only one state would normally have jurisdiction.

Id.

II. ICL AND ITS JUSTIFICATIONS

My inquiry into the content of ICL necessarily implicates a broader, foundational question. Why are there ICL offenses in the first instance? This is a distinct question from related inquiries into either the general justification of punishment as a social practice, or the more particular justifications for the establishment of institutions like the ICTY or the ICC to prosecute international crimes. Rather, it asks why international law should be concerned with the definition and punishment of certain crimes—and only certain crimes. As a *prima facie* matter, one would expect that the answer to this question would have further implications for the specific content of ICL, including the relationship between domestic criminal law and ICL.

At the outset, this inquiry faces an initial hurdle in that there is no settled agreement on the appropriate scope of ICL offenses. Debate persists as to whether offenses such as terrorism, drug smuggling, slavery, apartheid, human trafficking, and even piracy (often cited as the oldest ICL offense) should be recognized as distinct ICL offenses.¹⁰⁸ There are also questions concerning the appropriate scope of those offenses that are generally acknowledged to form part of ICL.¹⁰⁹ This

108. Despite various international instruments dealing with the criminalization of terrorism, drug smuggling, slavery, and human trafficking, efforts to establish these offenses as stand-alone ICL crimes have thus far failed to attract universal acceptance. *See* RATNER ET AL., *supra* note 29, at 114–40. Notwithstanding widespread exercise of universal jurisdiction by states over the crime of piracy, Antonio Cassese has reasoned that because piracy, in his view, does not implicate a “community value,” it does not rise to the level of a true international crime. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 12 (2d ed. 2008) (emphasis omitted).

109. The definition of crimes against humanity, in particular, has undergone a dramatic evolution from its initial codification in the London Charter to its more recent codification in the Rome Statute of the International Criminal Court. *See* RATNER ET AL., *supra* note 29, at 48–81. The Rome Statute definition includes an expanded list of criminal offenses, including “enforced disappearance of persons” and “the crime of apartheid,” and it affirms ICTY and ICTR in holding that crimes against humanity are defined by a nexus to a “widespread or systematic attack against any civilian population,” rather than by a nexus to an armed conflict. *See* Rome Statute, *supra* note 24, at art. 7(1); *see also* Van Schaack, *Definition of Crimes Against Humanity*, *supra* note 51, at 793 n.22, 827 n.191. This definition of the offense necessarily invites inquiry into how broadly to interpret the required “widespread or systematic attack.” Although the ICC has yet to produce a conviction for crimes against humanity, its early case law reveals particular disagreement over whether or not the perpetrators of crimes against humanity must be states or “state-like” actors. *Compare* Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Kenya, ¶ 51 (Mar. 31, 2010) (Dissenting Opinion of Judge Hans-Peter Kaul) (interpreting Rome Statute requirement that crimes against humanity are “pursuant to state or organizational policy” to require involvement of an “entity which may act like a State or has quasi-State abilities”), *with id.* ¶ 90 (Majority Opinion) (“Whereas some have argued that only State-like organizations may qualify, the Chamber opines that the formal nature of a group and the level of its organization should not be the defining criterion. Instead, as others have convincingly put forward, a distinction should be drawn on whether a group has the capability to perform acts which infringe on basic human values.” (footnote omitted)). For

history of ICL, moreover, is replete with examples in which conduct once thought to fall outside ICL is newly identified by a treaty or judicial precedent in order to trigger international liability. In this way, questions of “ought” and “is” are intimately connected: judgments about the actual content of ICL depend to some degree on normative claims about the proper reach of ICL.

Notwithstanding this complication, however, one can identify certain uncontroversial propositions about the reach of ICL. First, there are core ICL offenses—genocide, crimes against humanity, and war crimes—that have been subject to the jurisdiction of multiple international tribunals and that apply to some spheres of criminal behavior without triggering debate over the outer boundaries of ICL. Second, the commission of an “ordinary” domestic offense—murder, rape, assault, larceny, and so forth—does not, on its own, give rise to individual criminal liability under international law. Standard justifications for ICL do not advocate a single universal code to regulate all behavior. Instead, debate focuses on how to define the limited sphere of criminal behavior that international law governs.¹¹⁰ Accordingly, a complete justification of ICL must defend not only the existence of ICL but also its limits. A justification that satisfies these requirements has obvious relevance for my thesis, which is concerned precisely with the questions of when international law should speak on matters of criminal liability and when it should be silent.

A. The International Relations Dimension of ICL

One possible explanation for the existence of ICL is that it deals with offenses that are distinctly international in their nature. Whereas most criminal prosecution is a matter of state sovereignty, certain criminal conduct may be sufficiently intertwined with relations among states that its regulation becomes a matter of concern for the international community as a whole. This approach draws support from the traditional account of international law, which itself rests upon an analogy between the state and the individual. Whereas national law governs relations among individuals, each subject to a particular national sovereign, international law governs relations among states, and it is the states, therefore, which are the true subjects of this law.¹¹¹

arguments expanding the notion of crimes against humanity beyond its traditional application to mass atrocities, see, for example, *Doe v. Alvaro Rafael Saravia*, 348 F. Supp. 2d 1112, 1157 (E.D. Cal. 2004), ruling that the assassination of Salvadoran Archbishop constituted a crime against humanity under customary international law. See generally Sonja B. Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257 (2007) (arguing that the Rome Statute of the International Criminal Court should be interpreted to apply to systemic human rights violations untethered to mass atrocity or war).

110. See *supra* note 109 and accompanying text.

111. See, e.g., JEFFREY DUNOFF, STEVEN R. RATNER & DAVID WIPPMAN, *INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM ORIENTED APPROACH* 536 (3d ed. 2010) (“In keeping with the traditional position that international law applies only in the relations between states, the laws of war historically applied only to international armed conflicts.”); GEORGE P. FLETCHER, *ROMANTICS AT WAR: GLORY AND GUILT IN THE AGE OF TERRORISM* 44 (2002) [hereinafter FLETCHER, *ROMANTICS*] (“Traditionally, international law addressed the behavior of states. The state is a collective reduced to a person, a sovereign, a single entity

Superficially at least, this account provides some support for the development of a uniform and autonomous ICL. Indeed, if international affairs are an entirely separate sphere outside the realm of state sovereignty, then domestic laws may be thought to have no legitimate influence. Nevertheless, there are at least two problems with this account that limit its ability to guide the content of ICL.

First, the resort to international relations, without more, risks a formalistic, even tautological account of ICL. To state that international law applies to international affairs or state behavior simply begs the question of why international affairs must be segmented off as a separate sphere of activity subject to separate legal rules in the first instance. The challenge, then, is to develop a functional account that connects the international character of a crime to the law governing its punishment.

Proponents of the international-relations approach can readily point to some ways in which the international character of ICL offenses has consequences for the law's content. The efficacy of some rules, for example, may depend upon reciprocal obligations.¹¹² In the context of international armed conflict, restrictive rules of war will leave states at a military disadvantage if other parties to the conflict do not restrict themselves in the same way. States' willingness to accept and abide by humane rules of war will therefore depend to some degree on the willingness of other states to agree to and abide by the same rules.¹¹³ A focus on international relations may also serve a negative function by placing limits on the reach of international law and protecting certain areas of state sovereignty.

Neither of these considerations, however, requires ICL to take the form of a complete criminal code that comprehensively governs how the rules of war or other international obligations must be reduced to principles of individual criminal liability. States might readily agree that the rules of war must be backed by criminal sanctions while also agreeing that effective enforcement does not hinge on whether states can resolve their differences over, say, capital punishment. A focus on deterring war crimes might emphasize effective rules of command responsibility and nonimmunity for the highest-level perpetrators, while remaining agnostic about the treatment of others farther down the chain of command. It is perhaps not surprising, therefore, that the relevant treaties have emphasized the basic rules of war while remaining generally silent or selective on principles of individual criminal liability.¹¹⁴ Only with the advent of actual international tribunals, and in

that can take its place alongside the other sovereigns in the law of nations. As all human beings are created equal, all states are equal subjects in international law.”); RATNER ET AL., *supra* note 29, at 4 (“As defined by the positivist school that dominated the field from the late eighteenth century, [international law] governed principally relations between states (and between their sovereigns), with individuals usually at best third-party beneficiaries.”).

112. See, e.g., Sean Watts, *Reciprocity and the Laws of War*, 50 HARV. INT’L L.J. 365, 365 (2009) (noting that “the principle of reciprocity has long been foundational to international law and the law of war specifically”).

113. *Id.* at 366 (“Few would consider practicable a legal regime that required one side to ‘fight with one hand tied behind its back’ while its enemy exercised free reign.”); see also H. Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT’L L. 206, 212 (1953) (“[I]t is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them.”).

114. Prior to the London Charter, international treaties establishing the rules of war were generally silent on matters of individual criminal responsibility. See RATNER ET AL., *supra*

particular the ICC, has something resembling a comprehensive criminal law begun to take shape.¹¹⁵

Second, and most obvious, is the failure of the international-relations approach to reflect the breadth of ICL as it has evolved over the last several decades. Historically speaking, the concern for international relations helps explain ICL's early focus on war crimes committed by opposing sides against each others' citizens during international conflicts.¹¹⁶ Since World War II, however, ICL has evolved into a body of law that resists easy distinctions between the international and the domestic. Today, all but one of the core ICL offenses prosecuted by international tribunals can apply to crimes committed exclusively within the territory of a single state, without involvement—as either perpetrators or victims—of the citizens of other states. The law of war crimes has evolved to regulate internal armed conflicts according to largely the same rules that apply to international conflicts.¹¹⁷ The evolution of the more recently established offense of crimes against humanity has abandoned any mandatory link to an armed conflict, international or otherwise.¹¹⁸ Similarly, the crime of genocide, codified in the 1948 Genocide Convention, has never included such a requirement.¹¹⁹ Only the crime of aggression, requiring an illegal use of force by one state against another, retains a clearly international component, and, ironically if not surprisingly, it is precisely this crime that remains the most controversial and elusive to define.¹²⁰

note 29, at 83. The four 1949 Geneva Conventions and two Additional Protocols from 1977 all outline various “grave breaches” that constitute war crimes, but do so without providing detailed elements or standards of criminal liability. *See id.* at 87–89.

115. *See infra* Part III.D.

116. *See* RATNER ET AL., *supra* note 29, at 101 (“The criminality of acts violating the laws or customs of war in non-international conflicts has been somewhat obscure until relatively recently. Although some international law developed to provide minimal levels of protection, there is little evidence that violations were traditionally regarded as criminal. . . . [T]he post-World War II prosecutions for war crimes typically involved incidents of a truly international character.”).

117. *See* Prosecutor v. Tadić, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 129 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“[W]e have no doubt that [the war crimes alleged] entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts.”); *see also* Rome Statute, *supra* note 24, at art. 8(2)(e) (defining war crimes “in armed conflicts not of an international character”).

118. *See supra* note 109.

119. Genocide Convention, *supra* note 22, at art. 2 (stating that genocide includes the commission of an act with “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”).

120. Although the post-World War II International Military Tribunals prosecuted aggression under the label “crimes against peace,” no subsequent tribunal has possessed jurisdiction over the crime. *See generally* Bush, *supra* note 51. After the drafters of the Rome Statute of the International Criminal Court failed to reach agreement on whether and how to give the ICC jurisdiction over the crime, they inserted a placeholder into the Statute, providing that the ICC will “exercise jurisdiction over the crime of aggression once a provision is adopted . . . defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime.” Rome Statute, *supra* note 24, at art. 5(2); *see also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 26–28 (2001). On June 11, 2010 the ICC’s Assembly of States Parties

The erosion of the traditional model also reveals itself not only in the letter of the law, but also in the actual enforcement practices of the international community. The expansion of ICL's substantive reach has coincided with a proliferation of international criminal tribunals and so-called hybrid tribunals to prosecute ICL offenses.¹²¹ Although the post-World War II tribunals dealt with a major international conflict, post-Cold War efforts—including the hybrid tribunals—have focused on crimes committed predominantly in the context of internal armed conflicts. Of these, the former Yugoslav conflict was the most international in its scope, largely by virtue of the fact that a single state, Yugoslavia, disintegrated into multiple entities.¹²² To date, moreover, each of the five situations that has given rise to formal investigations by the ICC has been predominantly domestic in nature.¹²³

There are, of course, ways to account for these developments while still maintaining that ICL crimes exhibit an international character. For example, one can argue that contemporary ICL simply reflects a more expansive view of the international sphere, a view that acknowledges the detrimental effects on the international order of activity that, taken in isolation, may seem purely domestic in scope. The ICTY Appeals Chamber resorted to precisely this reasoning when it argued that the impact of civil strife on the economic, political, and ideological interests of third States favored the extension of international war crimes prohibitions to noninternational conflicts so as to prevent "spillover effects."¹²⁴ Similar arguments can be made about the types of systematic campaigns of persecution and extermination that typically give rise to charges of genocide and crimes against humanity.

adopted an amendment defining the offense and establishing preconditions for the exercise of ICC jurisdiction over it. *See* International Criminal Court Assembly of States Parties [ICC-ASP], *The Crime of Aggression*, ICC-ASP/8/RC/Res.6 (June 11, 2010). The amendment is currently pending ratification by the States Parties and, by its terms, will not take effect until 2017 at the earliest. *See id.* at 4 (art. 15(3) *ter*). Absent a referral from the Security Council, the amendment will allow States Parties to opt out by declaring they do not accept jurisdiction respecting acts of aggression which they have committed. *See id.* at 3 (art. 15(4) *bis*).

121. *See supra* notes 40–47 and accompanying text.

122. *See generally* LAURA SILBER & ALLAN LITTLE, *YUGOSLAVIA: DEATH OF A NATION* (rev. ed. 1997). As detailed above, other tribunals have focused on conflicts in Rwanda, Sierra Leone, and Cambodia, among other places. *See supra* notes 25, 41 and accompanying text.

123. ICC Prosecutor Luis Moreno Ocampo has initiated investigations with respect to alleged ICL offenses committed in the Darfur region of Sudan, Uganda, the Democratic Republic of Congo, the Central African Republic, and Kenya. International Criminal Court, All Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Cases>.

124. *Prosecutor v. Tadić*, Case No. IT-94-I-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 97 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("[T]he large-scale nature of civil strife, coupled with the increasing interdependence of States in the world community, has made it more and more difficult for third States to remain aloof: the economic, political and ideological interests of third States have brought about direct or indirect involvement of third States in this category of conflict, thereby requiring that international law take greater account of their legal regime in order to prevent, as much as possible, adverse spill-over effects.").

These are important considerations that caution against simplistic distinctions between the international and domestic spheres. But the point is also fatal to the traditional model precisely because of the ambiguity it reveals. In a globalized society, the range of activity that has an impact on international affairs is vast. Just as students of the United States Constitution know that Congress can describe almost any activity—in the aggregate—as triggering its right to regulate “interstate” commerce,¹²⁵ so might any criminal law be defended based on international interests. For example, traditional crimes of physical violence and crimes against property all have economic impacts that, in the aggregate, adversely affect the world economy. To take more concrete examples, personal drug abuse fuels an international drug trade, and demand for prostitution fuels an international sex trade. Yet no one seriously argues that common offenses such as larceny, burglary, assault, murder, drug abuse, or prostitution should, without additional elements, all be codified as part of ICL.

An expanded view of ICL, moreover, also undermines the notion that international law must necessarily exercise a monopoly over every aspect of the codification and enforcement of ICL. If anything, the expanded view reveals that there is in fact no clear separation between what we term “international affairs” and what we term “domestic affairs.” While international law may have interests in regulating certain or greater areas of conduct, these interests will inevitably overlap with the interests of domestic authorities.

Another approach is to pose the domestic analogy in different terms. George Fletcher, for example, has distinguished international crimes from domestic crimes based on the ground that all ICL offenses are collective offenses, “deeds that by their very nature are committed by groups and typically against individuals as members of groups.”¹²⁶ This feature, according to Fletcher, reflects continuity with the traditional view of international law which “addressed the behavior of states,” the state being a “collective reduced to a person, a sovereign, a single entity that can take its place alongside the other sovereigns in the law of nations.”¹²⁷

As I shall elaborate further, the problem of collective criminality does play an important role in justifying ICL. For present purposes, however, it is enough to observe that ICL’s focus on collective criminality does not by itself supply a moral justification for the establishment of ICL offenses. While it may be the case that “the crimes of concern to the international community are collective crimes,”¹²⁸ explaining why that should be so requires more specific justification.

B. The Gravity Dimension of ICL

Discussion of ICL routinely focuses on the fact that ICL is concerned with crimes of extraordinary gravity. This consideration provides another possible

125. See, e.g., *United States v. Lopez*, 514 U.S. 549, 600 (1995) (Thomas, J., concurring) (The aggregation principle “has no stopping point. . . . [O]ne *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce.” (alteration in original) (emphasis in original)).

126. FLETCHER, *ROMANTICS*, *supra* note 111, at 45.

127. *Id.* at 44.

128. *Id.* at 45.

justification of ICL that is perhaps best captured by the concept of “crimes against humanity.” Whereas most crimes may be the concern of primarily a single community, other especially heinous offenses are by their nature transcendent, offending all of humanity. In such cases, it becomes the right of the international community as a whole to prescribe and punish. This, in essence, is the argument that Hannah Arendt made with respect to the Holocaust, describing it as a “new crime . . . in the sense of a crime ‘against the human status,’ or against the very nature of mankind.”¹²⁹ The same or a similar argument is also a common feature of other scholarly accounts of crimes against humanity and other ICL offenses.¹³⁰

In its basic structure, the argument parallels the international-relations-based approach to ICL. It is compatible with the Westphalian model of sovereignty in that it justifies international culpability only for crimes that, in some sense, cross

129. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 268 (rev. ed. 1965); see also David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT’L L. 85, 91 (2004).

130. See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 28 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996) (“[Crimes against humanity] are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated.”); LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* 80–95 (2005) (advocating an “international harm principle” according to which crimes against humanity and other ICL offenses require a harm to the international community as a whole); GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY* ix (2006) (arguing that crimes against humanity “demean[] every member of the human race”); SCHABAS, *supra* note 120, at 21 (“The crimes over which the International Criminal Court has jurisdiction are ‘international’ not so much because international cooperation is needed for their repression, although this also true, but because their heinous nature elevates them to a level where they are of ‘concern’ to the international community.”); Paola Gaeta, *The History and Evolution of the Notion of International Crimes*, in *INTERNATIONAL CRIMINAL JUSTICE: LAW AND PRACTICE FROM THE ROME STATUTE TO ITS REVIEW 175–76* (Roberto Bellelli ed., 2010) (arguing that an “international crime proper” must be “regarded by the international community as a whole as a conduct deserving to be criminally sanctioned”); E. Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178, 195 (1946) (“A crime against humanity is an offence against certain general principles of law which, in certain circumstances, become the concern of the international community, namely, if it has repercussions reaching across international frontiers, or if it passes ‘in magnitude or savagery any limits of what is tolerable by modern civilizations.’”). David Luban has argued that crimes against humanity are distinct, not merely in that they violate humanness, but in that they attack humanity in a unique way, namely, by violating our character as “political animals.” Luban, *supra* note 129, at 91. Under this account, it is critical that these crimes are perpetrated by states or state-like entities against individuals based on their membership in a population, thus violating two defining characteristics of the political animal: “individuality” and “the fact that to be human is to live in groups with other humans.” *Id.* at 116–17. In addition, the commission of the crimes by states or state-like organizations reveals them to be “not just horrible crimes; they are horrible *political* crimes, crimes of politics gone cancerous.” *Id.* (emphasis in original). In this respect, Luban’s argument recalls Fletcher’s, which also emphasizes the importance of state action to ICL offenses. See FLETCHER, *ROMANTICS*, *supra* note 111 and accompanying text.

borders. Rather than emphasize the physical crossing of borders, however, it focuses on more abstract harms that become international by offending humanity as a whole. It is a broader humanism, therefore, that guides the distinction between national sovereignty and international interest.

Whether or not gravity supplies a complete theory of ICL, at a minimum, this consideration helps explain the post-World War II evolution of both ICL and international criminal tribunals. International criminal tribunals have almost universally focused their efforts on cases of mass atrocity. The Rome Statute in particular gives pride of place to this mandate when it recalls, in its preamble, the “millions of children, women and men [that] have been victims of unimaginable atrocities that deeply shock the conscience of humanity,” and affirms “that the most serious crimes of concern to the international community as a whole must not go unpunished.”¹³¹ The Statute goes even further by demanding that all otherwise admissible crimes within the Court’s jurisdiction must be of “sufficient gravity to justify further action by the Court.”¹³²

Of the core ICL offenses, both genocide and crimes against humanity are almost by definition crimes of mass atrocity.¹³³ War crimes and aggression present a somewhat more complex picture, as the former may more readily be committed as isolated acts,¹³⁴ whereas the latter focuses on breaches of state sovereignty instead of offenses against the person.¹³⁵ Nonetheless, one can safely say at least that,

131. Rome Statute, *supra* note 24, at pmbl.

132. *Id.* at art. 17(1)(d). The question of how exactly to interpret this requirement has itself become the subject of academic debate. See, e.g., Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, in FUTURE DIRECTIONS IN INTERNATIONAL CRIMINAL JUSTICE (Carsten Stahn & Larissa van den Herik eds., forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270369; Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L.J. 1400 (2009) [hereinafter deGuzman, *Gravity and the Legitimacy of the ICC*].

133. The point is clearest with respect to crimes against humanity which, by definition, involve “widespread or systematic” criminality. Of course, the outer boundaries of this requirement are debatable. See *supra* note 109. Although the definition of genocide does not explicitly require collective or systematic criminality, the crime’s focus on preventing the destruction of entire groups necessarily associates the crime with collective criminality. See, e.g., VAN SCHAACK & SLYE, *supra* note 30, at 479 (noting that a single person “would rarely be capable of destroying an entire group, or even a significant part of a group,” and querying whether “such an individual [should] still be found guilty of genocide where his intended outcome was impossible to achieve”).

134. Criminal liability for war crimes does not hinge upon the criminal act forming part of a larger or systematic pattern of behavior. See *infra* note 158–59.

135. For example, the London Charter defined aggression, or “Crimes Against Peace” as the “planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.” London Charter, *supra* note 50, at art. 6(a). The Assembly of States Parties of the ICC recently adopted a proposed amendment to the Rome Statute that defines the crime of aggression by reference to specified “act[s] of aggression,” all of which involve actions of a state taken against another state. See Int’l Criminal Court Assembly of State Parties [ICC-ASP], *The Crime of Aggression*, ICC-ASP/8/RC/Res.6 (June 11, 2010).

historically speaking, both categories have been associated with great losses to human life that may be sufficient to trigger gravity-based concerns.¹³⁶

In some respects, the gravity of ICL offenses has clear relevance for the content of the law. By proscribing heinous offenses, ICL denies legal effect to domestic law that might legalize the prohibited behavior. Those who commit war crimes, genocide, or crimes against humanity may not claim innocence based on the fact that their government has, for example, adopted a *Fuhrerprinzip*,¹³⁷ absolving all who act in conformity with the head-of-state's directives. The gravity of these offenses is such that states should not have discretion to decriminalize them. Establishing distinct ICL offenses for heinous crimes can also ensure that the law affords these crimes their appropriate legal characterization. In particular, by defining an offense as a crime against humanity or as genocide, rather than simply murder, ICL supplies a vocabulary that gives voice to the special gravity of the offense.¹³⁸ Thus, ICL may also demand that such offenses be prosecuted as crimes against humanity or genocide where the underlying conduct justifies this characterization. In both of these examples, the gravity of the conduct has direct implications for the content of ICL.

Notwithstanding their significant explanatory power, however, considerations of gravity provide problematic and incomplete guidance regarding the content and scope of ICL. The invocation of gravity is not a talisman that automatically eradicates legitimate differences between states' approaches to criminal law. States might agree on the gravity of an offense while disagreeing on whether conspiracy is an appropriate mode of criminal liability. They might agree on a gravity-based hierarchy of offenses while disagreeing on what the appropriate sentence is for the most serious crimes. They might even disagree on the general goals of punishment, including the appropriate balance of retributive and utilitarian considerations. The gravity of the offense, in other words, does not dictate the answer to every question that must be answered in order to punish the offense.

Equally problematic is the fact that gravity-based considerations do not supply a ready framework for identifying the limits of ICL. Why, for example, should international law be concerned with genocide but not with "ordinary" murders? The

136. See, e.g., CASSESE, *supra* note 108, at 29 (emphasizing "[t]he exceptional character of war (a pathological occurrence in international dealings, leading to utterly inhuman behavior)" as a historical justification for the imposition of individual criminal responsibility for war crimes). Note, moreover, that the Rome Statute expresses a preference for ICC jurisdiction over war crimes committed "as part of a plan or policy or as part of a large-scale commission of such crimes." Rome Statute, *supra* note 24, at art. 8(1).

137. See, e.g., Matthew Lippman, *The White Rose: Judges and Justices in the Third Reich*, 15 CONN. J. INT'L L. 95, 114 (2000) (noting that, in Nazi Germany, "the *Fuhrerprinzip*, or leadership principle, required judges to adhere to the Fuhrer's policies and programs").

138. See Prosecutor v. Bagaragaza, Case No. ICTR-05-86-AR11*bis*, Decision on Rule 11*bis* Appeal, ¶ 17 (Int'l Crim. Tribunal for Rwanda Aug. 30, 2006) (distinguishing genocide from homicide on the ground that "the protected legal values are different" because the "penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives").

question may seem absurd, but there are at least two considerations that deserve further exploration.

In the first place, the fact that ICL is concerned with especially grave offenses does not mean that the actual perpetrators of ICL offenses necessarily reflect greater individual culpability than perpetrators of non-ICL crimes.¹³⁹ The point is perhaps clearest with respect to war crimes, given that war itself is not always illegal, and that criminal liability does not in any event hinge upon the legality of the war itself. Accordingly, is a murder committed by a combatant during war necessarily a more serious offense than a murder committed outside the context of armed conflict? What about nonhomicidal war crimes?

Crimes against humanity and genocide present somewhat more complex examples because the perpetration of either involves additional mental elements that aggravate the offense: the perpetrator of a crime against humanity must have knowledge of his participation in a widespread or systematic attack against a civilian population,¹⁴⁰ while genocide requires an intent to destroy a protected group in whole or in part.¹⁴¹ Even here, however, the situation is not so simple. The success of mass atrocity typically hinges upon the organizers' ability to mobilize large numbers of perpetrators whose individual participation reflects varying degrees of commitment and contribution to the overall crime. Indeed, the unique social pressures of state-sanctioned violence are such that some scholars have argued that crimes committed as part of mass atrocities may sometimes reflect less personal culpability than might otherwise be ascribed.¹⁴² The *Erdemović* case presents an extreme case-in-point. Even if one believes that Erdemović should be punished for having committed war crimes or crimes against humanity, the mitigating factor of his having acted under duress supports the conclusion that he acted with less personal culpability than, for example, a murderer who kills with great cruelty and malice but, in doing so, violates only domestic law. From a gravity-based perspective, it is not obvious why Erdemović's deeds belong in the province of ICL, while the actions of more culpable offenders do not.

Second, even if one accepts that ICL regulates the most serious offenses, that acceptance does not explain why ICL should not also regulate other serious offenses that may not rise to the same gravity level. The humanistic impulse that recoils at the gravest atrocities is not indifferent to victimization that occurs in other contexts. Acts like murder, rape, kidnapping, and severe physical assaults all involve grave infractions upon individual autonomy and welfare. Are not such acts also "crimes against humanity" in the sense that, to quote Arendt, they offend "the human status"?¹⁴³ Should not international law reflect a concern for these offenses, even when committed in their everyday setting?¹⁴⁴

139. See, e.g., deGuzman, *Gravity and the Legitimacy of the ICC*, *supra* note 132, at 1407 (observing that "[i]nternational crimes will not always be more serious than domestic crimes").

140. See, e.g., Rome Statute, *supra* note 24, at art. 7(1).

141. See, e.g., *id.* at art. 6.

142. See DRUMBL, *supra* note 26, at 32; RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 50 (2000).

143. ARENDT, *supra* note 129, at 268.

144. On this point, Luban acknowledges that a broader humanism may justify any

As it happens, international law has at least a partial answer to this question: the law does, to some extent, regulate the punishment of offenses outside the category of crimes commonly described as belonging to ICL. The evolution of human rights obligations over the last century, and especially since World War II, embraces precisely the sort of humanism that I have just described—one that rejects parochialism where fundamental liberties are at stake, and which deprives states of unchecked sovereignty with respect to how they treat even their own citizens within their own borders.¹⁴⁵ Although it is common to distinguish human rights law from ICL by virtue of the fact that human rights law traditionally regulates states rather than individuals and does not impose direct criminal liability, it would nevertheless be wrong to suppose that human rights law has no implications for substantive criminal law.

Consider the hypothetical scenario of a state, ruled perhaps by a psychotic dictator, that repeals its criminal code and decriminalizes all human behavior. Does the repeal violate international law? Surely it does. It violates basic human rights such as the right to life, liberty, and security.¹⁴⁶ Although the criminal law is, of course, not the exclusive means by which states can or should protect these rights, any serious account of human rights law must require criminalization of the core offenses against persons and property, such as murder, assault, rape, theft, and so forth.¹⁴⁷ A system solely consisting of civil sanctions, without threat of traditional criminal punishment, could hardly prove adequate. In this way, we can see in human rights law itself the basic requirements of a criminal code.

This insight is significant for several reasons. First, it complicates the gravity-based theory of ICL by showing that international law already does take positions on matters of “ordinary” crimes that, however serious, are not thought to pass the ICL threshold. In addition, it shows that international law may regulate these activities without dictating every aspect of the criminal law. Although the precise boundaries may be unclear and subject to debate, international law imposes some criminal law obligations on states while leaving others to the discretion of each

number of human rights obligations beyond the interests protected by crimes against humanity. He discounts the relevance of such efforts, however, by arguing that human rights obligations are largely unenforceable. *See generally* Luban, *supra* note 129. Of course, one can level a similar charge against ICL itself, given the highly selective history of its enforcement.

145. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III) A, U.N. Doc. A/RES/217(III) (Dec. 8, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

146. *See, e.g.*, UDHR, *supra* note 145, at art. 3 (“Everyone has the right to life, liberty and security of person.”); ICCPR, *supra* note 145, at arts. 6, 9 (right to life and rights of liberty and security of person).

147. An instructive example of the same logic can be found in the European Court of Human Rights’ decision in *Case of M.C. v. Bulgaria*, which found inadequate Bulgaria’s rape law, holding inter alia that “[s]tates have a positive obligation inherent in Articles 3 and 8 of the [Convention for the Protection of Human Rights and Fundamental Freedoms] to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.” App. No. 39272/98, ¶ 153 (2003), available at <http://www.echr.coe.int/eng>. The Court implied this obligation from a treaty provision asserting a right to be free from torture and inhuman and degrading treatment, *see id.* ¶ 110, and from another securing a right to privacy, *see id.*

legal system. Finally, it reveals that the true challenge of the gravity theory is not to explain why international law is concerned only with certain limited offenses—that assumption, again, is misplaced—but instead, to explain why international law should regulate those offenses in particular ways, for example, by identifying discrete international crimes and specifying the elements of those crimes.

To answer this last question, it is not enough simply to point to the gravity of ICL offenses. Instead, one must take account of the practical consequences involved in ICL's definition of an international crime.

C. The Enforcement Theory of ICL

It is with that consideration in mind that I turn to what I call the enforcement theory of ICL. This account emphasizes the jurisdictional consequences of establishing ICL offenses. The development of ICL, after all, has not consisted solely in the definition of offenses. It has served to justify unique forms of international jurisdiction. International criminal tribunals have prosecuted ICL offenses. Domestic legal systems recognizing the principle of universal jurisdiction have invoked ICL to prosecute offenses that otherwise would fall outside the jurisdiction of their courts.¹⁴⁸ And states that do have a traditional basis of jurisdiction may invoke criminality under ICL in order to override domestic laws preventing prosecution.¹⁴⁹

What relevance do these jurisdictional consequences have for a theory of ICL? As a general matter, ICL offenses focus on contexts in which there are special concerns about state willingness and ability to punish wrongdoers. According to the enforcement theory, it is these concerns that dictate the content of ICL with a view toward securing additional bases of jurisdiction.

1. ICL's Enforcement Principle

Although enforcement considerations explicitly figure in some scholarly accounts of ICL, their precise significance remains a source of debate. Larry May, for example, incorporates a "security principle" into his account of crimes against humanity.¹⁵⁰ Focusing on the systematic nature of these crimes, he justifies

148. See *supra* text accompanying note 48.

149. See RATNER ET AL., *supra* note 29, at 25 ("[N]ullem crimen does not serve to exculpate all those who committed atrocities under the color of the law or rules in effect at that time. In other words, the promulgation of new rules by a regime violating human rights does not change the international law or criminality of the offenses."). For example, a 2005 decision of Argentina's Supreme Court relied on international law to deny effect to amnesty laws purporting to shield military officers from prosecution for serious human rights violations. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, "Simón, Julio Héctor," Colección Oficial de Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-2056) (Arg.), available at <http://www.acnur.org/biblioteca/pdf/3560.pdf>. For a summary of this decision and related cases, see generally Lisa J. Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT'L L. 915 (2009).

150. MAY, *supra* note 130, at 63–79.

international criminal liability on the grounds that a state sacrifices its sovereign authority over criminal law when it “deprives its subjects of physical security or subsistence, or is unable or unwilling to protect its subjects from harms to security or subsistence.”¹⁵¹ For May, however, this enforcement-based concern is necessary but not sufficient for the establishment of ICL. ICL crimes must also, in his view, satisfy an “international harm principle” of the sort that Hannah Arendt has advanced.¹⁵²

Andrew Altman and Christopher Heath Wellman, by contrast, have developed an account that relies solely on the security principle and dispenses with the search for distinctly international harms. They limit their model to “widespread or systematic” crimes, however, in order to ensure that international intervention is limited to cases in which a state’s response to criminality “falls below what can be reasonably demanded.”¹⁵³ Critically, the authors would extend ICL to a broader range of situations than it presently encompasses. Although they derive the phrase “widespread or systematic” from the Rome Statute’s definition of crimes against humanity,¹⁵⁴ they would include cases where failed states have resulted in widespread criminality that does not take the form of a coordinated attack on a civilian population.¹⁵⁵ They further defend this requirement as a general restraint on international adjudicative intervention rather than as an element of any particular crime.¹⁵⁶

Between these two poles, there is a middle position that I believe better accounts for the core ICL offenses in their present state of evolution. Although ICL need not hinge its fate on the elusive quest for distinctly international harms, its limited scope reflects a security principle that is built into the definitions of each of its offenses. Specifically, ICL is concerned with offenses whose very commission is associated with failures of domestic sovereignty, either because of state inability to prosecute or because of illegitimate state reluctance to prosecute. The very commission of an ICL offense, therefore, justifies heightened concerns that the standard bases of domestic jurisdiction are inadequate and that additional international bases of jurisdiction are appropriate.¹⁵⁷

151. *Id.* at 68.

152. *Id.* at 80–95; see *supra* note 130 and accompanying text.

153. Andrew Altman & Christopher Heath Wellman, *A Defense of International Criminal Law*, 115 *ETHICS* 35, 49 (2004).

154. Rome Statute, *supra* note 24, at art. 7(1).

155. Altman & Wellman, *supra* note 153, at 48–49. More specifically, the authors reject the Rome Statute’s requirement of an “attack” on a civilian population, *id.* at 50, which the treaty further defines as a course of conduct “in furtherance of a State or organizational policy to commit such attack,” Rome Statute, *supra* note 24, at art. 7(2)(a).

156. Altman & Wellman, *supra* note 153, at 49.

157. M. Cherif Bassiouni adopts a similar rationale in developing his theory of crimes against humanity. Bassiouni argues that crimes against humanity require an “international element,” which he defines as the existence of a “state action or policy” underlying the offense. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 247 (1992). According to Bassiouni, “[i]mplicit in the notion of ‘state action or policy’ as the international element, is the realization that national legal systems are frequently incapable of reaching certain persons who, by virtue of their position, are beyond the reach of the law. Thus, there is a necessity for international criminalization” *Id.* My account is

A key advantage of this account is that it provides a principled and functional basis for a limited ICL while simultaneously identifying a common thread among established ICL offenses. It explains, for example, the focus on systematic crimes that often, but not always, reflect official state policy. Where state policy guides the commission of atrocities, the enforcement challenge is obvious: the state's involvement casts immediate doubt on the state's willingness to pursue justice in good faith. It also explains the extension of war crimes law to internal armed conflicts, as well as the extension of crimes against humanity to widespread or systematic attacks that are committed pursuant to a nonstate organizational policy. The very existence of an armed conflict within a state, or of an organization's ability to conduct such attacks, is associated with extraordinary state inability to enforce its criminal law against the wrongdoers, most likely because the state has lost effective control over portions of its territory. In such cases, unwillingness or inability to prosecute presumptively reflects an acute enforcement failure that cannot be ascribed to the general leeway that states rightfully enjoy over the allocation of scarce resources and the balance of conflicting priorities.

Of the core ICL offenses historically prosecuted by international tribunals, only war crimes appear to be a partial standout on the grounds that belligerents can commit war crimes as isolated acts, and there is no reason to presume that states otherwise committed to uphold the law of war will not enforce the law under those circumstances.¹⁵⁸ This may be the exception that proves the rule, however. The Rome Statute gives the ICC jurisdiction over war crimes "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."¹⁵⁹ Thus, even though the customary definition of war crimes may be broader than required by the enforcement theory of ICL, actual judicial intervention by the international community is most likely to focus on the subset of offenses that better fit the theory.

The enforcement theory of ICL gains even greater currency when considered in light of other developments critical to the ongoing evolution of ICL. In particular, it finds a ready procedural parallel in the Rome Statute's system of complementary jurisdiction that situates the ICC as a court of last resort, authorized to proceed only when the state that would normally exercise jurisdiction over the offense has proven "unwilling or unable genuinely to carry out the investigation or prosecution."¹⁶⁰ The enforcement theory reveals that the ICC in fact embraces a system of double complementarity. There is an initial layer of complementarity embedded in the substantive law itself, which, as I have just outlined, focuses on crimes that are most associated with domestic prosecutorial failure. The Rome Statute then adds a second, procedural layer of complementarity designed to ensure

more permissive, however, in that it recognizes that similar enforcement-based concerns may be triggered by crimes that are not themselves the product of state action or policy.

158. For a criminal offense to qualify as a war crime, it must be closely related to an armed conflict. See *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgement, ¶ 14 (May 26, 2003); *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgement, ¶¶ 185–89 (May 21, 1999); *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT 96-23/1-A, Judgement, ¶¶ 82–84 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002). There is, however, no requirement that the offense form part of a broader pattern of criminal behavior.

159. Rome Statute, *supra* note 24, at art. 8(1).

160. *Id.* at art. 17(1)(a).

that the presumptive failure to prosecute has been confirmed by an actual failure to prosecute. Taken together, this system of double complementarity reflects a strong preference for domestic prosecution and positions ICL firmly as a law of last resort.¹⁶¹

None of this is to say that the enforcement theory is a perfect or airtight theory of ICL. Like other approaches to ICL, it has its complications. Where exactly does one draw the line between offenses that trigger special enforcement concerns and those that do not? Under any version, for instance, the enforcement theory must impose some gravity threshold, as the international community is unlikely to commit its own limited resources to support ICL status for offenses that are not

161. Although the concept of complementarity is most closely associated with the ICC, related ideas have found expression in other contexts as well. Some have maintained, for example, that states exercising universal domestic jurisdiction over international crimes owe some deference to domestic courts possessing a more traditional basis of jurisdiction. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (noting, for purposes of recognizing universal civil jurisdiction in U.S. federal courts under the Alien Tort Statute, the European Commission's argument that "before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums [sic] such as international claims tribunals"); Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 80 (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans, and Buerghenthal) ("A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned."). In addition, both the Institut De Droit International and the Princeton Project on Universal Jurisdiction have endorsed frameworks for universal jurisdiction that would give prosecutorial priority to states enjoying a traditional basis of jurisdiction over the crime in question. See Institute of International Law, Resolution, Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity, and War Crimes (Aug. 25, 2005), available at http://www.idi-ii.org/idiE/resolutionsE/2005_kra_03_en.pdf ("Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so. . . . Any State having custody over an alleged offender, to the extent that it relies solely on universal jurisdiction, should carefully consider and, as appropriate, grant any extradition request addressed to it by a State having a significant link, such as primarily territoriality or nationality, with the crime, the offender, or the victim, provided such State is clearly able and willing to prosecute the alleged offender."); Princeton University Program in Law and Public Affairs, *Princeton Principles on Universal Jurisdiction*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 18, 23 (Stephen Macedo ed., 2003) (providing, in Principle 8, a multi-factor test for "Resolution of Competing Jurisdictions"); see also Florian Jessberger, *Universal Jurisdiction*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 88, at 555, 556 ("From a legal policy perspective the exercise of universal jurisdiction may be warranted because, as regards the prosecution of these heinous crimes against international law, the state of commission often is either unable or unwilling to prosecute the offenders."). For a broader discussion of different concepts of complementarity in international criminal law, see MOHAMED M. EL ZEIDY, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE* (2008).

perceived to be among the gravest. For present purposes, it is unnecessary to explore every nuance of the enforcement approach; it is enough to establish that enforcement considerations are central to the present evolution of ICL.

2. Implications for Applicable Law

Although providing perhaps the most complete account of ICL, the enforcement theory also provides the weakest support for developing ICL as a uniform and complete code of universally mandatory criminal law. The underlying assumption is that ICL would not be needed absent special concerns over state willingness and ability to acknowledge and prosecute the offenses in question. In the event that a state can rebut the presumption of bad faith and can demonstrate a good faith commitment to justice, the enforcement theory has difficulty explaining why that state should not have the leeway to apply its own principles of criminal law to ICL offenses.

One may object that I have elided a central problem—that the application of a uniform, internationally agreed-upon ICL is necessary precisely as the means by which a state can rebut the presumption of non-enforcement and evidence its commitment to justice. This objection reaches too far, however. While applying international law may be one means of demonstrating good faith, it is not the only means. A state could also demonstrate good faith by treating ICL offenses in a manner *consistent* with its general treatment of domestic offenses. To return to a previous example,¹⁶² ICL may rightly deny Germany the right to apply a *Fuhrerprinzip* where ICL offenses are concerned. That point leaves open the possibility, however, that the regular German criminal law might still provide an appropriate mechanism for prosecuting ICL offenses in the event the *Fuhrerprinzip* is not applied, at least so far as that law adequately acknowledges the gravity of the offenses and does not run afoul of human rights obligations.¹⁶³

This logic suggests most obviously that domestic courts should be afforded some discretion to apply their own legal principles when prosecuting ICL offenses. It also has implications for international tribunals, however. The double complementarity paradigm reveals that international tribunals exercise a form of surrogate jurisdiction: they exist to prosecute crimes that, in ideal circumstances, a domestic court would be prosecuting. This relationship supplies a powerful argument that when international tribunals do assert jurisdiction, they should respect the legal principles that the domestic court would have applied had it taken jurisdiction over the case. One analogue in U.S. law is the application of state law by federal courts exercising diversity jurisdiction in disputes involving parties from different U.S. states.¹⁶⁴ A related principle also reveals itself in the international human rights jurisprudence, which upholds both the principle of subsidiarity

162. See *supra* note 137 and accompanying text.

163. I put aside for these purposes the problem of whether German law would need to employ the same labels as ICL, for example by prosecuting genocide as genocide rather than as multiple counts of murder. See *infra* note 272 and accompanying text. The potential relevance of domestic law principles is of course broader than that particular question.

164. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

(favoring resolution of disputes at lower levels of governmental authority)¹⁶⁵ and the doctrine of margin of appreciation (affording states latitude over the interpretation of human rights obligations, especially where the international obligation is uncertain or in transition).¹⁶⁶ Another example, also in international law, is the traditional law of occupation, which imposes an obligation upon occupying powers, where possible, to restore and respect the existing laws of the occupied territory.¹⁶⁷ Although international tribunals do not physically occupy territory, the concept of complementarity indicates a kind of occupying jurisdiction by which international tribunals temporarily usurp the jurisdiction that domestic courts are otherwise expected to exercise.

III. RULE OF LAW VALUES

With the standard justifications of ICL failing to assist, defenders of a uniform ICL must look elsewhere. Another set of arguments center on what I generally refer to as “rule of law” considerations. The idea here is that ICL’s very existence as a separate body of law may require doctrinal uniformity even if the specific rationales for the creation of ICL do not do so directly.

A. The Consistency Principle

Undoubtedly the most common argument for developing ICL as a uniform, internally comprehensive body of law has focused on the inherent value of consistency in the law. As the ICTY Appeals Chamber has observed with respect to its sentencing practice:

One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that . . . public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that the punishments imposed would, in justice, be expected to be also generally similar.¹⁶⁸

Although the Court was focused specifically on sentencing, its reasoning has broader applications, and others have invoked similar arguments with respect to the content of ICL as a whole.¹⁶⁹ If principles of justice and equality require that like cases are treated alike, ICL should strive for consistency and uniformity, even in

165. See Berman, *supra* note 23, at 1209–11.

166. See *id.* at 1201–03.

167. See Hague Convention Respecting the Laws and Customs of War on Land, art. 43, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 (1910).

168. Prosecutor v. Delalić, Case No. IT-96-21-A, Judgement, ¶ 756 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

169. See *supra* note 19.

instances where the underlying purposes of ICL may not otherwise dictate a particular doctrinal result.

Consistency in the law is undoubtedly an important value, but the argument only goes so far. Broad-based arguments for consistency in international criminal law necessarily treat ICL offenses as a closed universe in which perpetrators of international crimes are compared only with other perpetrators of international crimes. They ignore the fact that the establishment of ICL offenses necessarily creates or perpetuates inconsistency so long as the international community embraces the system of state sovereignty in which domestic legal systems enjoy discretion to develop and apply their own principles of criminal law.

Perhaps the most famous example of this tension involves Rwanda's relationship with the ICTR. When the U.N. Security Council voted in 1994 to establish the tribunal, Rwanda's delegate to the Council voted against the measure, in part because defendants convicted by the ICTR would not face the death penalty.¹⁷⁰ At the time, Rwanda recognized the death penalty both for international crimes,¹⁷¹ and for other serious offenses under domestic law.¹⁷² The result was that the high-level offenders tried by the ICTR could secure more lenient treatment than could lower-level participants facing domestic trials, as well as non-genocidal perpetrators of murder and serious offenses. One might justify the ICTR's exclusion of the death penalty on moral or other grounds, but the basic point does not depend on one's views about the death penalty. A principled concern for consistency and equal treatment cannot treat ICL offenses or international tribunals as a closed universe concerned only with internal consistency.

Reflection on these matters reveals that the introduction of distinct ICL offenses against the backdrop of transnational pluralism in the criminal law necessarily leads to one of three kinds of inconsistencies:

170. See ICTR Statute, *supra* note 42, at art. 23(1) ("The penalty imposed by the Trial Chamber shall be limited to imprisonment."); U.N. SCOR, 49th Sess., 3453d mtg., at 16, U.N. Doc. S/PV.3453 (Nov. 8, 1994). See generally Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. COMP. & INT'L L. 349, 356-57 (1997) (noting Rwanda's objection that "[t]he leaders of the genocide, tried before the International Tribunal, would escape the death penalty while lower level perpetrators, tried in Rwanda national courts, might be executed").

171. See Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, Art. 14 (Rwanda), available at <http://www.preventgenocide.org/law/domestic/rwanda.htm>.

172. See Republic of Rwanda Décret-Loi No. 21/77, Code Pénal art. 26, 1 Codes et Lois du Rwanda 391 (1995), Université Nationale du Rwanda Faculté de Droit (Fr.). In 2007, Rwanda repealed its death penalty, largely so that as to facilitate the transfer of suspects to Rwandan courts. See Organic Law No. 31/2007 of July 25, 2007, art. 3 (Rwanda) (relating to the Abolition of the Death Penalty) ("In all legislative texts in force before the commencement of this Organic Law, the death penalty is substituted by life imprisonment or life imprisonment with special provisions as provided for by this Organic Law."); Aimable Twahira, "Rwanda to Scrap Death Penalty in Hunt for Genocide Suspects," Inter Press Service, Sept. 4, 2006, available at http://www.genocidewatch.org/images/Rwanda-4-Sep-06-Rwanda_to_Scrap_Death_Penalty_in_Hunt_for_Genocide_Suspects.pdf.

1. Both international and domestic courts prosecuting ICL offenses apply a single uniform ICL, producing nonculpability-driven inconsistencies in the treatment of ICL offenders versus domestic law offenders.

2. International tribunals apply a uniform ICL while domestic courts integrate domestic law principles into ICL prosecutions, producing inconsistency in the treatment of ICL offenders based on which court prosecutes the offense.

3. Both international tribunals and domestic courts integrate domestic law principles into ICL prosecutions, perpetuating existing inconsistencies among different domestic legal systems.

These three options are not mutually exclusive, and in combination they yield even more alternatives. A domestic court might, for example, apply a uniform ICL at the conviction stage while applying its own sentencing law post-conviction. International tribunals, moreover, can apply different versions of ICL, as evidenced, for example, by the ICTY's adoption of legal positions inconsistent with the ICC's Statute.¹⁷³

In short, then, the establishment of ICL as a separate but limited body of criminal law necessarily perpetuates some inconsistency in the criminal law. The question is not how to eliminate inconsistency, but which form of consistency to privilege. While the purposes of ICL, as I have already explored, necessarily require some obligations that override inconsistent domestic laws, there are also powerful arguments for emphasizing domestic uniformity over international uniformity with respect to general questions of criminal law for which the purposes of ICL do not dictate a single result.

There is, in the first place, international law's general presumption in favor of state sovereignty, which gives states broad latitude with respect to governing their territory and population. This principle reveals itself, among other places, in the human rights context. The European Court of Human Rights has defended extending a "margin of appreciation" to national authorities in cases where international consensus on contested matters of public morals is lacking, and where national authorities are therefore "[b]y reason of their direct and continuous contact with the vital forces of their countries, . . . in principle in a better position than the international judge to give an opinion on the exact content of these requirements."¹⁷⁴

173. To take one example, the ICC Elements of Crimes limits genocide prosecutions to cases of criminal conduct where "[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction." Finalized Draft Text of the Elements of Crimes, Preparatory Commission for the International Criminal Court, arts. 6(a)(4), (b)(4), (c)(5), (d)(5), (e)(7), U.N. Doc. PCNICC/2000/1/Add.2 (2000). The ICTY Appeals Chamber has expressly rejected this limitation on the law of genocide. See *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgement, ¶ 224 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 19, 2004).

174. *Handyside v. United Kingdom* (1979-80) 1 EHRR 737, ¶ 48; see also George Letsas, *Two Concepts of the Margin of Appreciation*, 26 OXFORD J. LEGAL STUD. 705, 724-29 (2006). Letsas distinguishes this "structural" concept of the margin of appreciation from a separate "substantive" concept of the doctrine that addresses "the relationship between

In the context of ICL, an analogous deference to national authorities reveals itself in the limited scope of ICL offenses and in the evolving complementarity principle that gives procedural priority to domestic courts.¹⁷⁵ The goals of international criminal trials, moreover, have commonly paid special attention to the interests of the societies most affected by international crimes. The creators and advocates of international tribunals have justified ICL prosecutions on the grounds that criminal justice will foster peace, reconciliation, and political transition in atrocity-marked societies.¹⁷⁶ The establishment of hybrid tribunals has further emphasized the need to domesticate ICL prosecutions by locating trials on the territory of these societies, extending jurisdiction over domestic offenses alongside international offenses, and integrating local prosecutors and judges into the process.¹⁷⁷ Although integration of domestic law into ICL prosecutions cannot by itself ensure the efficacy and perceived legitimacy of international tribunals, it represents another step in that direction.¹⁷⁸

I explore additional advantages of domestic law in the remainder of the Article.

B. The Legality Principle

Another rule of law value to claim a stake in this debate is the legality principle, which demands clarity in the law and prohibits both retroactive punishment for actions not criminal at the time of their offense, and the imposition of punishment beyond what was legally authorized for the offense at the time of its commission. The principle of *nullum crimen sine lege, nulla poena sine lege* has received increasing recognition, not merely as a principle of justice,¹⁷⁹ but as an established and binding rule of international law enshrined in the Rome Statute, among other places.¹⁸⁰

individual freedoms and collective goals.” *Id.* at 706.

175. See *supra* notes 24–26, 108–10 and accompanying text.

176. See generally Greenawalt, *Justice*, *supra* note 27, at 601–05.

177. See Sierra Leone Statute, *supra* note 25; ECCC Statute, *supra* note 25. See generally Turner, *supra* note 26.

178. Mirjan Damaska comes close to endorsing a pluralistic conception of ICL based on this rationale. See Mirjan Damaška, *What Is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 349 (2008) (“Ideally then, international criminal justice would appear in various local garbs. In order to command ‘thick acceptance,’ it would be adapted to local legal culture, the contours of communal experience, and local moral sensibilities.”). He rejects this approach, however, on the grounds that it 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.” *Id.* Damaška therefore argues that local variation is better addressed through exercises of prosecutorial discretion and through judicial decisions that “make it their habit always to explain . . . the reasons or special needs that induce international criminal law to deviate from whatever local norms or practices are deemed fair and appropriate.” *Id.*

179. See International Military Tribunal (Nuremberg), *Judgment and Sentences*, 41 AM. J. INT’L L. 172, 217 (1947) (“[I]t is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice.” (*italics in original*)).

180. Rome Statute, *supra* note 24, at art. 22(1) (“A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”); see also International Covenant on

At the most obvious level, anti-retroactivity concerns provide a strong argument in favor of applying applicable domestic law, considering in particular ICL's checkered history with the principle of legality.¹⁸¹ Where pre-established principles of international law do not resolve a legal question arising in an international criminal trial, the court could instead resort to established domestic law principles to avoid retroactive punishment. This, in essence, is the "last resort" approach that Judge Cassese advanced in his *Erdemović* dissent: if the majority was correct that international law was heretofore silent on whether duress could serve as a complete defense to murder, then it should have relied on applicable domestic law to avoid retroactive punishment.¹⁸² The Rome Statute's Article 21 reference to domestic law arguably adopts this approach,¹⁸³ as do, in a more limited fashion, the penalty provisions of the ICTR and ICTY statutes.¹⁸⁴

The implications of this argument are limited, however, as there is nothing in the concern for legality that asserts a substantive preference for the integration of local law. Rather, domestic law is relevant only as a gap filler, and perhaps a temporary one at that. The "last resort" argument favors the temporary use of domestic law without prejudice to the evolution of a more comprehensive body of ICL that equally satisfies legality requirements. Indeed, one might argue that uniformity better promotes legality because it provides clarity, which eliminates doubts over which body of law (uniform ICL, domestic law, or perhaps one of several competing domestic laws) controls a particular question. From this perspective, even judicial decisions that retroactively announce new ICL standards may be said to promote the long-term interest of legality by contributing to the development of a consistent and clear body of ICL, even as such precedents entail some sacrifice of legality in the short term.

Although this argument has some force, several considerations moderate legality-based concerns against the application of domestic law. First, most ICL offenses involve activity that is also a crime under domestic law.¹⁸⁵ Thus, the perpetrator of genocide or crimes against humanity already faces the prospect of being subject to multiple, possibly conflicting, bodies of law to the extent that one

Civil and Political Rights art. 15, Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 172 [hereinafter ICCPR].

181. See *supra* Part I.B.

182. Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997) ("Were *ex hypothesi* international criminal law really *ambiguous* on duress or were it even to contain a *gap*, it would therefore be appropriate and judicious to have recourse—as a last resort—to the national legislation of the *accused*, rather than to moral considerations or policy-oriented principles." (emphasis in original)).

183. See Rome Statute, *supra* note 24, at art. 21(1)(c); see also *supra* notes 99–106 and accompanying text.

184. See ICTR Statute, *supra* note 42, at art. 23(1); ICTY Statute, *supra* note 41, at art. 24(1).

185. For example, one who murders in violation of domestic law may also be guilty of a war crime, a crime against humanity, or genocide depending on whether, as the case may be, the crime took place in the context of an armed conflict, the perpetrator acted in knowing furtherance of a widespread or systematic attack on a civilian population, or acted with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. See Rome Statute, *supra* note 24, at arts. 6–8.

or more domestic courts (or a hybrid tribunal enjoying jurisdiction over domestic offenses) asserts jurisdiction. Thus, uniformity at the ICL level will, on balance, increase rather than decrease the pluralism of applicable domestic laws.

Second, to the extent that anti-retroactivity norms are driven by concerns about fair warning to the accused,¹⁸⁶ this consideration is less powerful with respect to perpetrators who have engaged in mass atrocities of the kind that ICL has often confronted. The manifestly wrongful nature of the conduct has provided a powerful justification for the perpetrators' punishment, irrespective of whether applicable domestic or international law explicitly criminalized the conduct at the time of its commission. On account of these considerations, the legality case law of the ICTY and ICTR has generally emphasized the foreseeability of punishment over a purely positive law account of non-retroactivity.¹⁸⁷

One can object that the tribunals' focus on fair warning does disservice to other standard justifications underlying the legality principle, specifically those that, as John Jeffries has summarized, would limit judicial discretion based on "the association of popular sovereignty with legislative primacy and the consequent illegitimacy of judicial innovation," as well as "the potential for arbitrary and discriminatory enforcement of the penal law."¹⁸⁸ While this argument has some force with respect to the historical role of judges in the development of international criminal law,¹⁸⁹ it has less obvious bearing on the relationship between domestic and international sources of law in the development of ICL. Considering the democratic deficit inherent in many international institutions,¹⁹⁰ those concerned about popular sovereignty and legislative primacy will generally prefer domestic law.¹⁹¹ By the same token, clear *ex ante* rules will diminish the potential for arbitrary and discriminatory enforcement, but it does not matter for these purposes whether those rules derive from international or domestic sources. The development of a hybrid ICL does risk some judicial arbitrariness, however, to the extent it creates uncertainty about *which* law to apply (international or domestic, or which of multiple domestic laws). There may also be cases where the

186. See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 201 (1985) (identifying "notice" and "fair warning" as common foci of justifications of "*nulla poena sine lege*, the vagueness doctrine, and the rule of strict construction").

187. See Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 145–46 (2008) [hereinafter Van Schaack, *Crimen Sine Lege*].

188. See Jeffries, *supra* note 186, at 201.

189. See *supra* Part I.

190. For a more extensive discussion of this problem in the context of the ICC, see Greenawalt, *Justice*, *supra* note 27, at 657–58.

191. This consideration also supplies one of the rationales underlying the concept of the margin of appreciation in the human rights context. See, e.g., Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?* 16 EUR. J. INT'L L. 907, 908–09 (2005) ("The increased power of judicial review exercised by international courts over national decision-makers raises a host of problems, mainly involving legitimacy and capacity concerns. . . . A general margin of appreciation doctrine responds to some of these concerns through the development of less intrusive and, by implication, more politically acceptable and cost-effective standards of review of national decisions.").

content of domestic law itself is unclear. I consider below some ways to alleviate this problem, including in particular, through the development of default principles of ICL.¹⁹² It remains open to debate, moreover, whether the discretion inherent in the development of a hybrid ICL is of greater concern than the significant judicial discretion that otherwise already accompanies the enforcement of ICL.

A final, important consideration is that not all exercises of judicial discretion equally implicate the core concern of the legality doctrine to prevent retroactive punishment.¹⁹³ Indeed, the potential for case-by-case development of justifications and excuses is arguably a central requirement of justice, a necessary protection against the potentially devastating effects of applying general laws to unanticipated factual scenarios.¹⁹⁴ Thus, even to the extent that legality considerations did raise some concern about the selective application of domestic law, this concern is inapposite in cases where domestic law operates to decrease culpability or reduce punishment.

C. Tribunal Administration

The continued development of ICL as a uniform body of law might also be justified as a means of facilitating the administration of justice for those who must apply ICL. There are at least two varieties of arguments that one could make here. One focuses on uniformity purely as a matter of administrative convenience, and irrespective of considerations rooted in justice or normative preferences. The other focuses on underlying political compromises that can be necessary to the functioning of international justice institutions. I consider each in turn.

1. Administration as Convenience

As with the equal treatment approach, the appeal of a convenience-based argument requires a certain myopia. The argument applies most obviously to the work of international criminal tribunals who employ legal professionals from different legal systems who may lack expertise in the laws of the various jurisdictions in which ICL offenses have occurred. These tribunals already face great logistical challenges¹⁹⁵ as it stands, and there is an apparent convenience to settling on a single set of legal standards and applicable precedents.¹⁹⁶

192. See *infra* Part V.A.4.

193. This concern is reflected in the phrases *nullum crimen sine lege* (no crime without law) and *nulla poena sine lege* (no punishment without law). See *supra* notes 179–80 and accompanying text. There is no corollary principle of “no acquittal without law.”

194. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 569–70 (1978) [hereinafter FLETCHER, *RETHINKING*] (arguing that the prohibition on retroactive punishment should not “preclude the judicial recognition of new claims of excuse and justification”).

195. See Florian Jessberger, *International v. National Prosecution of International Crimes*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 88, at 208, 214 (“[E]xtreme costs, limited capacity and, most importantly, dependence on the cooperation of states make international prosecutions an undertaking that should (and realistically, must) be reserved for just a few cases.”).

196. This or a related concern appears, for example, to underlie Mirjan Damaška’s

Even from the perspective of international tribunals, however, the convenience argument has limited force. In the first place, traditional sources of international law already require international courts to undertake an account of domestic laws in some contexts.¹⁹⁷ In the *Erdemović* case, the Appeals Chamber surveyed the duress law of twenty-seven different jurisdictions before concluding that there was no general principle of law dictating the application of the duress defense to the circumstances of the case.¹⁹⁸ In that situation, resort to a single domestic law, for instance, that of the former Yugoslavia, would, if anything, ease the administration of justice.

Not all international courts, moreover, have been created alike. While the ICC's jurisdiction stretches across the globe,¹⁹⁹ it is unique in this respect. For an ad hoc tribunal like the ICTR that, for over fifteen years, has exclusively focused on crimes committed in Rwanda, the prospect of incorporating local law hardly seems daunting.²⁰⁰ And in the case of hybrid tribunals like those for Sierra Leone and Cambodia, the participation of domestic legal officials and a mandate to apply some domestic criminal law is part of the very mission of the court.²⁰¹

If administrative concerns have limited force for international courts, they have even less force outside that context. Once more, too great a focus on the needs of international tribunals threatens to ignore the perspective of domestic courts. For the latter, the same concerns favor the application of the already familiar domestic principles that are applied generally to criminal law cases. The cost of uniformity at the international level is a fracture at the domestic level. To the extent that the ICL prosecutions are to remain primarily the province of domestic courts, the interests of domestic administration should be given priority.

The potential trade-off between the respective interests of domestic and international tribunals suggests, moreover, that ICL applied by international tribunals should not be conceived of as universally mandatory ICL. If, for example, the Rome Statute's relatively detailed criminal code reflects, in part, interests of administration and convenience that are particular to the ICC, then perhaps some of

concern that the "ideal" of developing ICL in "various garbs" that are "adapted to local legal culture" is unrealizable because it 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." Damaška, *supra* note 178, at 349; *see also* OSIEL, *supra* note 62, at 4 n.14 (2008) (querying in the context of Damaška's argument whether "it would . . . be possible to 'harmonize' national variations in the domestic incorporation of international criminal law on the basis of general principles").

197. *See supra* Part I.C.; *supra* notes 105–07 and accompanying text.

198. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 58–61 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

199. Absent a referral from the United Nations Security Council, and subject to additional procedural requirements, the Court can try cases of crimes committed by, or on the territory of, one of the 108 states that have ratified the treaty. *See* Rome Statute, *supra* note 24, at art. 12. A Security Council referral, however, can extend the Court's reach to states like Sudan that have not ratified the treaty. *See id.* at art. 13(b).

200. The example of the ICTY is only slightly more complicated because that tribunal has focused on crimes committed while Yugoslavia was in the process of dissolving into six separate states, all of which, nevertheless, enjoy a common legal heritage.

201. *See supra* text accompanying note 25.

the law applied by the ICC is in fact specific to the tribunal and does not bind other courts. The Rome Statute itself provides some support for this view. Article 10, placed immediately after the definitions of the crimes subject to the ICC's jurisdiction, states that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."²⁰² Although discussion of Article 10 typically focuses on the idea that customary international law reaches more broadly than the ICC's jurisdiction,²⁰³ the provision also reminds us that providing the law for a particular statute or institution is not the same as establishing a universally binding law. In other words, if the Rome Statute happens to fill some gaps in substantive ICL primarily for the convenience of agreeing on a single approach for purposes of the ICC's own jurisprudence, then there is no particular reason why the ICC's approach should dictate the jurisprudence of other courts applying ICL.

2. Administration as Political Compromise

A second administration-based concern focuses not on convenience per se, but on the political preconditions of particular institutional arrangements. The politics of establishing international tribunals will predictably lead to institutional compromises that may or may not reflect states' views on their broader legal obligations.

The most obvious example is the unavailability of the death penalty at the ICC and other post-Nuremberg tribunals.²⁰⁴ The matter proved especially divisive during the drafting of the ICC's statute, when groups of states respectively lobbied both in favor of and against the provision of capital punishment.²⁰⁵ Ultimately, the states opposing the death penalty carried the day, while states favoring its availability succeeded in including a provision specifying that the Rome Statute's penalty provisions were without prejudice to penalties available under national law.²⁰⁶ This outcome, therefore, is consistent with a view that international law permits capital punishment for ICL offenses outside the particular institutional context of the ICC.

202. Rome Statute, *supra* note 24, at art. 10.

203. See, e.g., SCHABAS, *supra* note 120, at 23 ("Those who argue that customary law goes beyond the Statute, for example by prohibiting the use of certain weapons that are not listed in Article 8, can rely on [Article 10]. It will become more and more important in the future, because customary law should evolve and the Statute may not be able to keep pace with it.").

204. Sierra Leone Statute, *supra* note 25, at art. 19(1) (limiting penalties to life imprisonment); ECCC Statute, *supra* note 25, at art. 10 (same); Rome Statute, *supra* note 24, at art. 77 (same); ICTR Statute, *supra* note 42, at art. 23(1) (same); ICTY Statute, *supra* note 41, at art. 24(1) (same).

205. See SCHABAS, *supra* note 120, at 140 ("The debate about capital punishment threatened to undo the Rome Conference.").

206. See *id.* at 140-41; Rome Statute, *supra* note 24, at art. 80 ("Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.").

States may also have special concerns about the delegation involved in establishing these institutions. The ceding of authority to an international court, after all, necessarily involves a loss of control, especially on the part of those states whose citizens or territory are subject to the court's jurisdiction. Delegation concerns played a particularly decisive role in the drafting of the Rome Statute, when the United States led an effort to restrict the ICC's unprecedented reach as a permanent standing tribunal possessed with authority to investigate and prosecute cases absent specific authorization from a political body.²⁰⁷ Although this effort focused mostly on the role of the U.N. Security Council in triggering ICC investigations, it also impacted the tribunal's substantive law. For instance, U.S. concerns about U.S. peacekeeping troops facing ICC prosecution resulted in the statutory proviso that "[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."²⁰⁸ The Rome Statute's apparent exclusion of recklessness as a general mens rea also likely reflects a decision to reserve the ICC as an institution for the most serious criminal acts.²⁰⁹ To the extent these provisions reflect ICC-focused considerations, however, they should not be read to reflect broader judgments about culpability under ICL.

Thus, as with convenience-based concerns, the requirements of political compromise may produce forms of uniform law that are tribunal specific rather than universal in reach.

D. Normative Development

Advocates of a uniform ICL might also see in ICL a path toward general normative development in the criminal law. According to this view, the goal of ICL is not merely to regulate and prosecute international crimes but, more broadly, to operate as a kind of model penal code that provides the best solutions to problems of criminal law, even with respect to issues that are not unique to the international context. In this way, ICL serves a dual function. It provides the "hard law" that punishes the commission of actual ICL offense, and it simultaneously provides exemplary or "soft law" intended to exert a broader influence on the criminal law.

It is hard to dispute the general value of ICL adopting the most normatively appealing legal principles whenever possible. A ready example is the important

207. See, e.g., David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12 (1999); David Scheffer, Ambassador-at-Large for War Crimes Issues Holds News Conference at National Press Club (July 31, 1998) (transcript available at 1998 WL 431804).

208. Rome Statute, *supra* note 24, at art. 8(1); see also Bartram S. Brown, *The Statute of the ICC: Past, Present, and Future*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 61, 69 (Sarah B. Sewall & Carl Kaysen eds., 2000).

209. See Rome Statute, *supra* note 24, at art. 30(1) ("Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge."). The ICC's early case law, however, reflects a split regarding whether the Rome Statute definition of "intent" should be interpreted to encompass the civil law concept of *dolus eventualis*, which is roughly analogous to the common law concept of recklessness. See *supra* note 91.

role that international tribunals have played in developing international law relating to crimes against women, including rape and other forms of sex-related violence.²¹⁰ Although international prosecutions of sexual violence have necessarily focused on offenses that can be categorized as war crimes, crimes against humanity, and genocide,²¹¹ international trials may also call attention to sexual violence in its often-neglected domestic setting.²¹² Advocates of a uniform ICL may therefore see in ICL the potential to disseminate criminal standards that may reach beyond the context of ICL cases and promote reform in domestic law.

This reasoning works best in cases where the normative pull of ICL's chosen approach is strong, and there is sufficient state consensus on the issue that ICL may commit itself to a single position without excessive controversy or damage to its perceived legitimacy. The problem, however, is that not all legal questions yield a single "best" answer, and some are divisive in ways that render their resolution especially controversial. The very diversity among domestic criminal legal systems suggests that the search for uniformity inevitably involves partiality and controversy.

Although this problem holds true with respect to domestic institutions as well, ICL faces special legitimacy challenges given the democratic deficit inherent in legislating criminal law at the international level,²¹³ which inevitably renders the law less accountable to any particular populace whom it affects. For that reason, domestic institutions may be better equipped to resolve more divisive matters of criminal law. ICL, by contrast, may preserve its legitimacy precisely by remaining silent on contested questions, leaving their evolution to domestic law until sufficient consensus has developed to support enshrining a norm into international law. As Paul Schiff Berman has argued more broadly regarding the normative advantages of global legal pluralism, "[j]ust as states in a federal system function as 'laboratories' of innovation, so too the preservation of diverse legal spaces makes innovation possible."²¹⁴

210. See generally Janet Halley, *Rape at Rome: Feminist Interventions in Criminalization of Sex-Related Offenses in Positive International Criminal Law*, 30 MICH. J. INT'L L. 1 (2008) (surveying feminist influences on the recognition and definition of sex-related crimes at the ICTY, ICTR, and ICC).

211. See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Int'l Crim. Trib. For Rwanda Sept. 2, 1998) (genocide and crimes against humanity); Prosecutor v. Kunarac, Kovac, and Vuković, Case No. IT-96-23-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (war crimes and crimes against humanity); Prosecutor v. Furundžija, Case No. IT-95-17/1-A, Judgement (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (war crimes).

212. See *M.C. v. Bulgaria*, App. No. 39272/98, ¶¶ 101–08 (2003), available at <http://www.echr.coe.int/eng> (relying in part on ICL definitions of the underlying offense of rape to rule that Bulgaria had failed in its obligation to effectively punish rape in the context of ordinary offenses regulated by Bulgaria's national laws); Baylis, *supra* note 26, at 37 (arguing, in the context of prosecuting crimes against humanity in the Democratic Republic of Congo, that resort to Rome Statute definitions provided a superior definition of the underlying offense of rape than would have resulted from applying national law).

213. See Greenawalt, *Justice*, *supra* note 27, at 657–58.

214. Berman, *supra* note 23, at 1190–91 (citing *United States v. Lopez*, 514 U.S. 549, 580–81 (1995) (Kennedy, J., concurring)).

It is far from accepted, moreover, that international criminal tribunals have been especially good at substantive criminal law. A growing body of scholarship has raised troubling doubts about these tribunals' commitments to core principles of justice—in particular, the principles of personal culpability, legality, and fair labeling of offenses—that they purport to espouse and that many domestic legal systems take for granted.²¹⁵ In the words of Daryl Robinson, “serious issues about ICL’s compliance with its fundamental principles may . . . be found in many . . . doctrines, including sweeping modes of liability, expanding definitions of crimes, and reticence towards defences.”²¹⁶

A central concern is that the problem goes beyond the unavoidable circumstance of judges reaching some bad decisions. Instead, the concern is that a structural bias—rooted both in the general gravity of the mass atrocities that tribunals have addressed and in the influence of a broader human rights-based concern for the protection of victims—has tilted ICL jurisprudence in an unacceptably pro-prosecution direction.²¹⁷

These problems are compounded by two additional factors. First, a growing consensus has emerged that case selection at international tribunals like the ICC should target only the worst of the worst, leaving the vast majority of offenders—including the Erdemovičs of the world—to be processed by domestic courts.²¹⁸ This strategy deepens the risk that tribunal case law will reflect an inordinate concern with securing convictions and produce bad law whose injustice only becomes apparent when applied to harder cases heard only by domestic tribunals. To the extent that the harder cases become primarily the domain of domestic courts, it makes additional sense to entrust some of ICL’s legal development to local discretion.

In addition, the tribunals’ routine reliance on the prior case law of international tribunals helps ensure that bad decisions are replicated by future international tribunals.²¹⁹ While greater reliance on domestic law might not offer a complete solution, it may offer at least one positive step in ICL’s rediscovery of a criminal law that better aspires to ICL’s liberal aims.

215. See Diane Marie Amann, *Impartiality Deficit and International Criminal Judging*, in *ATROCITIES AND INTERNATIONAL ACCOUNTABILITY: BEYOND TRANSITIONAL JUSTICE* 208 (Edel Hughes, William A. Schabas & Ramesh Thakur eds., 2007); 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, 101 (2005); Fletcher & Ohlin, *supra* note 73, at 541; Robinson, *supra* note 62.

216. Robinson, *supra* note 62, at 927.

217. See generally Robinson, *supra* note 62, at 929 (arguing that the influence of “influence of assumptions of human rights and humanitarian law,” on ICL, alongside other possible influences such as the gravity of the crimes and institutional or reputational concerns, “actively works at cross-purposes to fundamental criminal principles”).

218. See, e.g., INT’L CRIMINAL COURT OFFICE OF THE PROSECUTOR, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 7 (Sept. 2003), http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf (announcing the policy of the ICC Prosecutor’s office to “focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes” (emphasis omitted)).

219. See *supra* note 60 and accompanying text.

Concerns that are specially focused on judicial attitudes may be allayed to some degree by more detailed codification along the lines of the Rome Statute, but this approach too has its drawbacks. In the first place, the underlying problem of legitimating international regulation in the face of domestic pluralism exists regardless of the specific modus of international lawmaking. Second, the extraordinary consensus required for multilateral treaty making is better suited to political compromise than to normative advancement where disputed issues are concerned.²²⁰ Third, these same dynamics make the law uniquely resistant to change. Amending the Rome Statute, for example, generally requires the ratification of seven-eighths of the States Parties, thus making future refinements next to impossible through the formal amendment process.²²¹ One of the classic rationales for tolerating legal pluralism, by contrast, is that doing so promotes reform precisely by allowing continued experimentation in the law.²²² Finally, no codification process can eliminate the need for judicial construction, thus ensuring that the ICC's judges will inevitably assert substantial control over the court's law-in-action.²²³

All of these considerations reinforce the wisdom of Article 10's qualification that the terms of the Rome Statute should not be read to limit or prejudice existing or developing rules of international law.²²⁴ As I have already detailed, the states negotiating the Rome Statute had good reasons to insist upon a relatively detailed statute for the ICC itself, but this agreement should not be read to impose a single set of ICL rules to be imposed by all tribunals trying ICL offenses.

220. For a related point, see generally Chimène Keitner, Comment, *Crafting the International Criminal Court: Trials and Tribulations in Article 98(2)*, 6 UCLA J. INT'L L. & FOREIGN AFF. 215 (2001) (analyzing the trade-off between developing consistent international law and achieving political consensus in the context of the Rome Statute's negotiation).

221. Rome Statute, *supra* note 24, at art. 121(4); see also Van Schaack, *Crimen Sine Lege*, *supra* note 187, at 137 ("The only way treaties can be amended is through the sporadic and sluggish multilateral treaty drafting process. Indeed, states are loath to renegotiate existing treaties, not only because of the transaction costs inherent to such an endeavor, but also because of the confusion wrought in trying to keep track of which states have ratified which version of which treaty."). In June 2010, the ICC's Assembly of States Parties adopted a proposed amendment adding the crime of aggression to the Rome Statute, and in doing so took the view that the 7/8th ratification requirement did not apply to Articles 5, 6, 7, and 8 of the Rome Statute, which identify the offenses over which the ICC has subject matter jurisdiction. David Scheffer, *States Parties Approve New Crimes for International Criminal Court*, ASIL INSIGHTS (June 22, 2010), <http://www.asil.org/insights100622.cfm>; see *supra* note 120. At minimum, however, a two-thirds majority of States Parties is required to adopt an amendment prior to ratification, see Rome Statute, *supra* note 24, at art. 121(3), and amendments to Articles 5, 6, 7, and 8 do not bind non-ratifying states, see *id.*, at art. 121(5).

222. See *supra* note 214 and accompanying text.

223. See *supra* notes 88–107.

224. See Rome Statute, *supra* note 24, at art. 10.

E. Avoiding Jurisdictional Chaos

Concerns about pluralism in ICL may also focus on another problem: Which domestic law should ICL defer to in any given case? Depending on the facts of the case, any number of jurisdictions may claim the power to apply their own criminal laws based on the locus of the alleged crimes, the nationality of the suspect and victims, the fact that the crime in question may have been directed against the security of a particular state, or the fact that the crime is one subject to universal jurisdiction.²²⁵ One convenience of a uniform ICL lies in its ability to avoid the potential chaos involved in choosing an applicable law.

Although the problem of jurisdictional reach is real, it should not receive overriding weight in determining the reach of ICL. In the first place, the perpetration of ICL offenses need not trigger difficulties of this sort. As I have already outlined, the focus of international criminal tribunals in recent years has been predominantly on internal conflicts in which perpetrators and victims are co-citizens of the state in which the crimes took place.²²⁶ In these cases, there is little doubt as to which national law is most relevant. In cases where jurisdictional conflicts do arise, moreover, the problem is not unique to ICL offenses, or indeed to criminal law. Jurisdictional conflicts can arise whenever conduct implicates overlapping domestic laws. The question of how to resolve such conflicts of law is a central problem of the international law of extraterritorial jurisdiction.²²⁷ The problem, moreover, already complicates the work of the ICC to the extent the Court must decide which domestic investigations are entitled to deference under the Rome Statute's complementarity framework,²²⁸ and which jurisdictions deserve consideration under Article 21's mandate to consult "the national laws of States that would normally exercise jurisdiction over the crime."²²⁹

A court faced with conflicting national laws may resolve the conflict by identifying the jurisdiction that has the greatest interest in the offense.²³⁰ Domestic courts may apply a similar analysis in deciding whether to prosecute or extradite suspects.²³¹ Traditionally, authorities have given greatest priority to the territory of

225. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987) (identifying bases of jurisdiction to prescribe); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 301–14 (7th ed. 2008) (same).

226. See *supra* notes 116–17 and accompanying text.

227. See Rep. of the Int'l Law Comm'n, 58th Sess., 1 May–9 June and 3 July–11 August 2006, U.N. Doc. A/61/10, Annex E, [hereinafter International Law Commission, Extraterritorial Jurisdiction]; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 225, §§ 402, 403.

228. Pursuant to Article 17(1) of the Rome Statute, a case is inadmissible when "[t]he case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution." Rome Statute, *supra* note 24, at art. 17(1)(a). The Statute does not specify which bases of jurisdiction are to be privileged under this framework.

229. Rome Statute, *supra* note 24, at art. 21.

230. This is the approach endorsed by the American Law Institute in its *Restatement (Third) of Foreign Relations Law*. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 225, § 403 (jurisdiction to prescribe); *id.* at § 404 (jurisdiction to adjudicate).

231. See *id.* at § 421.

the crime.²³² The territorial preference also reveals itself in the statute of the Special Court for Sierra Leone, which provides jurisdiction over some domestic crimes based on the territory of the offenses,²³³ and in the statutes of the ICTY and ICTR, which require consideration of Yugoslav and Rwandan law respectively for sentencing purposes.²³⁴ The ICC Statute gives pride of place to both the territory of crimes and the nationality of perpetrators when determining jurisdiction based on state ratification of the treaty.²³⁵

In cases where it is too difficult to identify a single state with the greatest interest, the trying court could resort to other options. In cases where overlapping domestic laws do not, in fact, conflict, the court need not choose between them. As I explore below, moreover, default ICL rules may be useful in cases where the applicable domestic law is too difficult to determine. The resolution of these hard cases, however, need not prejudice the outcomes of those not infrequent cases where the applicable domestic law is obvious.

IV. ERDEMOVIĆ AND THE LIMITS OF A UNITARY ICL

I return now to *Erdemović*, which provides an especially fascinating case study for considering the competing interests of international and domestic law in the prosecution of ICL offenses. As I argue below, the problem of duress presents a particularly powerful case for resort to domestic law given: (1) the silence of authoritative international legal sources concerning the applicability of the duress defense to murder, (2) the disagreement among domestic legal systems on the issue, (3) the Court's inability to articulate why the special context or purpose of ICL requires a specific result, (4) the normative shortcomings of both the majority and dissent's approaches, and (5) the availability of a suitable approach under applicable domestic law.

A. The Majority's Rejection of the Defense

I consider first the majority conclusion that ICL precluded the use of duress as a complete defense to *Erdemović*'s actions. Judges McDonald and Vohrah's plurality opinion (tracked, in important respects, by Judge Li's separate opinion)²³⁶ is

232. See International Law Commission, *Extraterritorial Jurisdiction*, *supra* note 227, ¶ 18 ("[T]he 'territoriality principle' is considered the primary basis for jurisdiction in criminal law matters . . ."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 225, § 403 cmt. f at 247 ("[T]he presence of substantial foreign elements will ordinarily weigh against application of criminal law. In such cases, legislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication.").

233. See *Sierra Leone Statute*, *supra* note 25, at art. 1(1) (establishing jurisdiction over the "serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996").

234. See *supra* note 78 and accompanying text.

235. Rome Statute, *supra* note 24, at art. 12(2).

236. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

remarkable both for its open embrace of policy considerations, and also for its attempt to root its conclusion in the distinct purposes of ICL. The opinion expressly divorces its analysis from domestic law considerations by emphasizing the special gravity of the crimes at issue: "Whilst reserving our comments on the appropriate rule for domestic national contexts," the plurality notes, "we cannot but stress that we are not, in the International Tribunal, concerned with ordinary domestic crimes. The purview of the International Tribunal relates to war crimes and crimes against humanity committed in armed conflicts of extreme violence with egregious dimensions."²³⁷

Considerations of gravity, as I have already detailed, play a central role in the theory of ICL.²³⁸ But it is not enough to simply state the general gravity of the offense. How exactly do considerations of gravity shape ICL's answer to the specific problem of duress? The majority's response fails on multiple counts. First, there is the problem of identifying what sort of gravity is operative in the first instance. Judges McDonald and Vohrah identify—without distinguishing—different sorts of gravity at play involving different levels of generality: there is the gravity of Erdemović's own deeds, the gravity of the broader massacre in which he participated, the combined gravity of the crimes associated with the war in the former Yugoslavia, and the general gravity of war crimes and crimes against humanity as a whole.²³⁹ Notwithstanding this analytical confusion, the plurality arrives at a relatively blanket holding: "[D]uress," it maintains, "cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives."²⁴⁰ The particular scale of Erdemović's own acts is largely irrelevant, therefore. It matters only that he was a soldier, that he took an innocent life, and that he committed war crimes.

At times, Judges McDonald and Vohrah appear to assign the concept of gravity almost talismanic significance. They note that if one accepts the general common law denial of a complete defense for cases "in which a single innocent life is extinguished due to action under duress," then "international law . . . cannot admit duress in cases which involve the slaughter of innocent human beings on a large scale."²⁴¹ True enough, but what then of "the civil law jurisdictions [that] allow

237. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 75 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

238. *See supra* Part II.B.

239. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶¶ 22, 37 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

240. *Id.* ¶ 88. Judge's Li's opinion does not explicitly limit the analysis to soldiers, and instead endorses the apparently broader holding that "that duress can only be a mitigating circumstance and is not a defence to the massacre of innocent persons." *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997). Neither opinion highlights this apparent point of difference, however, and in the very next sentence Judge Li states that his "view agrees with and is in support of the Joint Separate Opinion of Judges McDonald and Vohrah." *Id.*

241. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 75 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7,

duress as a defence to murder”)?²⁴² The answer, once again, is gravity: “It cannot be denied that in an armed conflict, the frequency of situations in which persons are forced under duress to commit crimes and the magnitude of the crimes they are forced to commit are far greater than in any peacetime domestic environment.”²⁴³

This is not to say that gravity is irrelevant to the question of duress. To the contrary, the traditional common law approach emphasizes gravity considerations by allowing duress as a complete defense to some crimes, but not to murder.²⁴⁴ The proportionality approach incorporates gravity in a different way by demanding that the perpetrator not cause a greater evil than is averted.²⁴⁵ Even theorists who would broaden the defense acknowledge that the law may demand heroic self-sacrifice where doing so would save an especially high number of lives.²⁴⁶ Gravity, in sum, is relevant under any account, but the law can and does take account of gravity in different ways. The challenge is to justify the *Erdemović* court’s categorical rejection of duress in the context of soldiers accused of murderous war crimes while also defending the court’s agnosticism regarding whether the defense should apply in other homicide cases. The fact that armed conflict may confront with greater “frequency” crimes of great magnitude committed under duress is hardly reassuring as support for a blanket rule.

Elsewhere, the focus in Judges McDonald and Vohrah’s opinion is on deterrence. The plurality highlights the “protection of the weak and vulnerable” as a “prime objective” of international humanitarian law, and it expresses the concern that “in relation to the most heinous crimes known to humankind, the principles of law to which we give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations.”²⁴⁷ This argument does not fare much better.

The judges are rightly troubled by the dynamics of mass atrocity in which criminality takes the form of a systematic, organized campaign that mobilizes countless perpetrators who likely never would have committed such horrendous acts absent the broader context of organized, officially sanctioned violence. It is this concern that gives particular resonance to the quotation of Lord Simon’s opinion in *Lynch v. DPP for Northern Ireland*, which focused on similar “social

1997).

242. *Id.* ¶ 76.

243. *Id.*

244. See Luis E. Chiesa, *Duress, Demanding Heroism, and Proportionality*, 41 VAND. J. TRANSNAT’L L. 741, 751–54 (2008).

245. *Id.* at 770.

246. See, e.g., FLETCHER, *RETHINKING*, *supra* note 194, at 833 (“[I]f the cost in human lives is sufficiently high, we could properly expect someone to resist threats to his own life.”); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1373–74 (1989) (“Society . . . has a right to expect a person to demonstrate a higher level of moral strength when ordered to kill a hundred innocent children than when commanded to kill one.”).

247. Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 75 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); see also *id.* ¶ 88 (appealing to the court’s “mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined”).

evils which might be attendant on the recognition of general defence of duress.”²⁴⁸ “Would it not,” Lord Simon asks, “enable a gang leader of notorious violence to confer on his organisation by terrorism immunity from the criminal law? Every member of his gang might well be able to say with truth, ‘It was as much as my life was worth to disobey.’”²⁴⁹ Judge Li’s separate opinion puts the matter in even stronger terms, arguing that:

Admission of duress as a complete defence or justification in the massacre of innocent persons is tantamount to both encouraging the subordinate under duress to kill such persons with impunity instead of deterring him from committing such a horrendous crime, and also helping the superior in his attempt to kill them. Such an anti-human policy of law the international community can never tolerate, and this International Tribunal can never adopt.²⁵⁰

As a general matter, the special dangers of mass atrocity are indeed justifiably a central concern of ICL.²⁵¹ But the judges’ talk of deterrence and humanitarian protection has limited purchase in the context of duress. The perpetrator who kills with a gun to his head will hardly be deterred by the perhaps distant threat of future incarceration. As Immanuel Kant noted, “no punishment threatened by the law could be greater than losing [one’s] life.”²⁵² Indeed, one of the traditional justifications for the defense focuses on the diminished capacity of persons in Erdemović’s position.²⁵³ This point is as true in the domestic context as it is in the international context, and the *Erdemović* majority gives it no explicit attention but to argue that “soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians” because “[s]oldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight.”²⁵⁴ There is, however, a difference between “envisag[ing] the possibility of violent death” and actually facing the

248. *Lynch v. DPP for N. Ir.*, [1975] A.C. 653, 687–88, *quoted in* *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 73 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

249. *Lynch*, [1975] A.C. at 687–88, *quoted in* *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 75 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

250. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, ¶ 8 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

251. *See supra* Part II.B.

252. IMMANUEL KANT, *Introduction to the Elements of Justice*, in *THE METAPHYSICAL ELEMENTS OF JUSTICE* 33, 41 (John Ladd trans., 1965); *see also* Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 263 (1995) (quoting the same and observing that “Kant[] defended the duress defense on deterrence grounds”).

253. *See* Chiesa, *supra* note 244, at 759. As Chiesa notes, however, diminished capacity to reason might not provide a fully satisfactory account. *Id.*

254. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

precise sort of pressure that Erdemović faced, and the majority provides no support for its expectation that combatants as a class are better able to resist that pressure than civilians are. This point, moreover, does nothing to support the majority's emphasis on deterrence as the combatant who does have the fortitude to sacrifice himself remains unlikely to be acting out of fear of incarceration.

Most remarkable, the *Erdemović* majority contradicts its own emphasis on deterrence by maintaining that "[t]he law, in our view, does not 'expect' a person whose life is threatened to be hero [sic] and to sacrifice his life by refusing to commit the criminal act demanded of him."²⁵⁵ For that reason, Judge McDonald and Vohrah embrace the approach of English judges who "have consistently argued that in cases of murder, duress could in appropriate cases be taken into account in mitigation of sentence, executive pardon or recommendations to the Parole Board."²⁵⁶ In this way, the plurality seeks to escape the "difficulties [that] are clear where the court must decide whether or not duress is a defence by a straight answer, 'yes' or 'no.'"²⁵⁷ But the law cannot hope to deter a person from conduct that is not "expect[ed]" to be abandoned. Why then should Erdemović be punished at all?²⁵⁸

As Luis Chiesa has observed, the majority's reasoning reveals a blindness to the distinction between justification and excuse in the criminal law.²⁵⁹ The concern about "straight answers" implicitly treats duress as a justification and reflects the concern that granting Erdemović's defense would somehow endorse his behavior. The criminal law is more nuanced than that, however. Not every complete defense purports to justify the accused's behavior, and duress in particular typically operates as an excuse rather than as a justification. The law may maintain that Erdemović's actions were regrettable and that self-sacrifice would have been the morally desirable choice while at the same time acknowledging, as the majority did, that self-sacrifice may be too much to expect under the circumstances. Embracing this nuanced perspective does not require downgrading duress into a mere partial defense that offers only mitigation of punishment. Instead, if the law does not expect self-sacrifice on Erdemović's part, it should afford a complete defense while recognizing that his behavior is merely excused, rather than justified.

B. The Dissent / Rome Statute Approach

Two of the five judges who heard Erdemović's appeal dissented, arguing that duress may provide a complete defense to murder provided the defense passes a strict proportionality test that is common to civil law jurisdictions: there must be "a high probability that the person under duress will not be able to save the lives of the

255. *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 85 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

256. *Id.* ¶ 86.

257. *Id.* ¶ 81.

258. On remand, the Trial Chamber sentenced Erdemović to five years' incarceration. *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 23 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998).

259. Chiesa, *supra* note 244, at 746-48.

victims whatever he does.”²⁶⁰ Erdemović’s case would have met this test because his self-sacrifice likely would not have saved lives: had he disobeyed he would have joined the victims, who would have perished at the hands of Erdemović’s commanders anyway. This approach to duress would also exclude a complete defense in cases where a perpetrator saved his own life at the expense of his victims. Although this view did not carry the day in *Erdemović* itself, it has received subsequent vindication in the Rome Statute, which extends a complete defense to a perpetrator acting under “duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat.”²⁶¹ For these purposes, the statute does not distinguish between murder and other crimes, but it limits the defense to cases where “the person does not intend to cause a greater harm than the one sought to be avoided.”²⁶²

While the dissenters’ more permissive approach avoids the majority’s pitfall of drawing an arbitrary line between murder and other crimes, it suffers from a surprisingly similar defect. The strict proportionality requirement implicitly treats duress as a justification rather than an excuse.²⁶³ In other words, the requirement that Erdemović pursue the greater good by avoiding the lesser harm suggests that the law may in some way be endorsing his choice. If, however, duress is better characterized as an excuse in these circumstances, then the defense should not require the achievement of a socially desirable result. The point of excusing Erdemović is not to endorse his actions, but to acknowledge the difficulty of the extreme coercion he faced. As Chiesa observes, “[t]he reason excused actors are acquitted is that it is not fair to blame them for their actions, not that their actions were right. Thus, the only pertinent inquiry is whether society could have reasonably required the defendant to overcome the coercion and resist the threats.”²⁶⁴ On the other hand, the defense must have some limits. Most would agree, for example, that saving one’s own life is not a tolerable reason to cause the destruction of a crowded city.²⁶⁵

C. Embracing Pluralism

How then should the ICTY have resolved the *Erdemović* appeal? One option would be to craft a normatively superior duress doctrine. Chiesa, for example, has advanced an alternate theory of duress that dispenses with strict utilitarian balancing in favor of a broader range of factors—including, for example, the special duties that soldiers owe to innocent civilians, the gravity of the harm caused, and the likelihood that the perpetrator would have saved lives by refusing to comply—to determine whether, on balance, society should deem the

260. Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Cassese, ¶ 42 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

261. Rome Statute, *supra* note 24, at art. 31(1)(d).

262. *Id.*

263. See Chiesa, *supra* note 244, at 749–50.

264. *Id.* at 753.

265. See *id.* at 756–57.

perpetrator's choice "understandable" and thus excuse his wrongful conduct.²⁶⁶ While this proposal has normative attraction, immediate adoption at the international level would require international tribunals or treaty makers to endorse a legal doctrine that is neither particular to the international context nor reflective of current domestic practice. While that is certainly possible, and perhaps even desirable, future evolution of basic principles of criminal law is more likely to begin at the domestic level.

Alternatively, the ICTY could have consulted the most directly applicable local law for guidance. In Erdemović's case, this would be the law of the former Yugoslavia, and, in particular, that of Bosnia and Herzegovina. As it happens, that law would likely have exonerated Erdemović. Mirroring the dissenters' approach, it allows a complete defense of "extreme necessity" for acts "performed in order that the offender avert from himself or from another an immediate danger which could not have been averted in any other way, provided that the evil created thereby does not exceed the one which was threatening him."²⁶⁷ The law does not distinguish between murder and other crimes. It does, however, exclude a complete defense in cases where "the perpetrator himself has negligently created the danger, or if he has exceeded the limits of extreme necessity," as well as in cases "where the perpetrator was under an obligation to expose himself to the danger."²⁶⁸

As Judge Cassese's dissent argued, the ICTY could have reached that result strictly based on retroactivity considerations.²⁶⁹ Concerns about retroactivity, however, are somewhat less compelling in the context of excused wrongful conduct where fair notice has little role to play. Erdemović could hardly argue that he reasonably relied on the legality of his conduct: doing so would have undermined his claim of duress by suggesting that his conduct was, in fact, deterrable. Cassese's last resort approach, moreover, says nothing about the longer-term desirability of developing a uniform ICL of duress. That approach is entirely consistent with the majority's view that ICL should assert a uniform answer to the

266. *See id.* at 771-72.

267. Krivici Zakon Socijalisticke Federativne Republike Jugoslavije [Criminal Code of The Socialist Federal Republic of Yugoslavia], art. 10, Sluzbeni List Socialisticke Federativne Republike Jugoslavije (SFRJ) [Official Gazette of the Socialist Federal Republic of Yugoslavia (SFRY)], No. 44/1977, 1977 (reflecting the law prevailing prior to the breakup of the former Yugoslavia). Bosnia subsequently enacted a criminal code that mirrors the approach to duress reflected in earlier Yugoslav law. *See* Krivici Zakon Bosne i Hercegovine [KZBiH] [Criminal Code of Bosnia and Herzegovina], art. 25, Sluzbeni glasnik Bosne i Hercegovine [Official Gazette of Bosnia and Herzegovina], No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 2006.

268. Krivici Zakon Socijalisticke Federativne Republike Jugoslavije [Criminal Code of The Socialist Federal Republic of Yugoslavia], art. 10, Sluzbeni List Socialisticke Federativne Republike Jugoslavije (SFRJ) [Official Gazette of the Socialist Federal Republic of Yugoslavia (SFRY)], No. 44/1977, 1977 (reflecting the law prevailing prior to the breakup of the former Yugoslavia). Bosnia subsequently enacted a criminal code that mirrors the approach to duress reflected in earlier Yugoslav law. *See* Krivici Zakon Bosne i Hercegovine [KZBiH] [Criminal Code of Bosnia and Herzegovina], art. 25, Sluzbeni glasnik Bosne i Hercegovine [Official Gazette of Bosnia and Herzegovina], No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 2006.

269. *See supra* note 182 and accompanying text.

problem of duress, and do so in way that denies the excuse to soldiers accused of murder.

A more robust rationale for applying Yugoslav law highlights the positive benefits of doing so. By affording Erdemović the same defense available to other criminal suspects in the former Yugoslavia, the tribunal would have fostered a uniform application of domestic law, and protected against arbitrary and unprincipled distinctions among similarly situated defendants. In this instance, Yugoslav law happens to correspond to the view of both the *Erdemović* dissenters and the subsequently enacted Rome Statute.²⁷⁰

Applying the Yugoslav law of duress would also have the additional advantage of saving ICL from commitment to the normative shortcomings of the dissenters' approach. A resort to domestic law allows ICL to decide the case while remaining agnostic on the underlying philosophical difficulties that pervade domestic approaches to duress. Rather than freeze a single, debated perspective as the single correct approach under ICL, deference to domestic law encourages the continued development of duress law at the local level, deferring judgment until such time as a sufficient consensus may develop to justify a uniform ICL law of duress.

This is not to say, of course, that ICL should take no position on the acceptable boundaries of the duress defense, or that it must blindly defer to any domestic law defense that labels itself duress. The argument for deference rests on the conclusion that the applicable domestic law is within an acceptable range of options available to a state committed to vindicating the purposes of ICL, including core principles of justice. The *Erdemović* example presents a relatively easy case considering (1) the silence of existing ICL sources, (2) the availability of applicable Yugoslav law that embraces a relatively standard approach to duress, embraced by many civil law jurisdictions, and (3) that applying Yugoslav law would ensure treatment consistent with all similarly situated offenders, without fear of special discrimination against accountability for ICL offenses.

V. BEYOND *ERDEMOVIĆ*: RE-CONCEPTUALIZING INTERNATIONAL CRIMINAL LAW

Although the *Erdemović* decision presents an especially compelling case study of the limits of ICL, the concerns it raises are in no way limited to the specific context of duress. They arise whenever ICL confronts problems whose resolution has more to do with general problems of criminal responsibility than with interests that are integral to the establishment of ICL itself. One way to approach the issue is to frame it in expressive terms. What message does the law send by declaring a particular rule of ICL? When the Genocide Convention defines genocide and declares the offense to be a crime under international law, it broadcasts the gravity and intolerability of this specific offense in a manner clearly justified by the gravity and enforcement-based approaches to ICL that I have already outlined. But when an international tribunal rules that duress is no defense to murder, develops principles of individual liability, or identifies general sentencing guidelines, it sends a different message, one much more focused on the general question of what

270. See Rome Statute, *supra* note 24, at art. 31(d).

it means to be a criminal. In those cases, the demands of ICL become weaker as the link to ICL's core interests become more tenuous.

It is time for the theory of ICL to take more specific account of how these differences impact international law's content. In this Part, I outline such a theory, one that rejects the universalist aspiration to pronounce a monolithic, uniform code of ICL, and instead embraces a more flexible account of the law, one that gives different weight to different legal principles depending on the strength of ICL's interest to control the specific norm in question. I first outline an expanded, four-tiered account of substantive ICL, and then briefly consider its implications for different procedural contexts.

A. Four Tiers of International Criminal Law

Rather than take the form of a single, universal criminal code, ICL should be recharacterized to reflect four distinct tiers of law: (1) universally binding law, (2) tribunal-specific law, (3) restraints on domestic law, and (4) default law. I outline each category below with specific examples. In so doing, I aspire neither to elaborate a comprehensive account of ICL's content nor to deny room for reasonable disagreement concerning what that content should be. Rather, my aim is to enunciate a more general framework that provides a basis for further analysis and discussion.

1. Universally Binding Law

My framework accepts that ICL properly establishes certain universally binding requirements. Principal among these are the basic elements of ICL offenses. Consistent with the enforcement-based approach to ICL, the elements of genocide, crimes against humanity, war crimes, and other ICL offenses delimit the sphere of criminal activity that triggers special international concern and gives rise to unique jurisdictional consequences.²⁷¹ Gravity considerations also play a role, as the elements of crimes often serve to emphasize the unique gravity of the offenses in questions.

Even here there is some room for ambiguity as states might decide to prosecute such conduct using different labels. For example, a state might prosecute genocidal acts under its regular murder law, or even as some form of aggravated hate crime, without explicitly designating the offense as genocide. Should ICL tolerate that decision? The question is complex, and gains even greater complexity when one considers that there are other ways beyond formal labels to convey gravity—for example, in the conduct of the trial or in the sentencing judgment. Nevertheless, my

271. In this respect, my category of universally binding law overlaps with the idea that the core ICL offenses are *jus cogens* norms from which no state may derogate. See M. Cherif Bassiouni, *International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 88, at 131, 131. For my purposes, however, the critical question is to determine not whether these crimes are *jus cogens* in some broad sense, but precisely how much of the applicable law is in fact universal.

approach accepts that gravity considerations have a role to play in ICL, and that ICL may legitimately demand that states adopt the labels ICL has devised to describe criminal conduct.²⁷²

I would also include in the category of universally binding norms some rules that belong to the general part of the criminal law but which have special application to international crimes. For example, the respective doctrines creating special forms of liability for commanders and determining the relevance of illegal superior orders have emerged as special rules of criminal law that regulate the operation of military and military-like hierarchies in the specific contexts of armed conflict and mass criminality.²⁷³ Given the centrality of these contexts to the core ICL offenses, it is therefore appropriate for ICL to define these doctrines more narrowly, with less, if any, room for domestic discretion.

2. Tribunal-Specific Law

Other rules of ICL reflect the dictates of specific tribunals without necessarily reflecting universally binding law. In this context, I have already made reference to

272. In its broad outlines, this approach is consistent with the ICTR Appeals Chamber's refusal to refer the prosecution of a suspect to Norway on the ground that Norway, lacking a genocide statute, would have pursued prosecution under its murder statute. *See Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-AR11bis, Decision on Rule 11bis Appeal (Aug. 30, 2006). Although "appreciat[ing] fully that Norway's proposed prosecution of Mr. Bagaragaza, even under the general provisions of its criminal code, intends to take due account of and treat with due gravity the alleged genocidal nature of the acts underlying his present indictment," the Appeals Chamber noted that "in the end, any acquittal or conviction and sentence would still only reflect conduct legally characterized as the 'ordinary crime' of homicide." *Id.* ¶ 17. It therefore rejected the referral both on the ground that the ICTR's statute would have allowed re prosecution of the suspect for genocide irrespective of the domestic prosecution outcome, and on the ground that "the protected legal values are different. The penalization of genocide protects specifically defined groups, whereas the penalization of homicide protects individual lives." *Id.* The strictness of the ICTR's approach, however, risks turning the issue into one of pure semantics, especially considering the Court's acceptance that Norwegian proceedings would have "treat[ed] with due gravity the alleged genocidal nature of the acts underlying . . . [the] indictment." *Id.* Note, however, that the text of the Rome Statute suggests a more flexible approach for the International Criminal Court. It provides, with limited exceptions, that "[n]o person who has been tried by another court for conduct also proscribed [by the Rome Statute] shall be tried by the Court with respect to the same conduct." Rome Statute, *supra* note 24, at art. 20(3). This phrasing suggests that another court might prosecute a suspect for the "same conduct" under a different legal label.

273. Notably, international instruments have consistently given special attention to the doctrines of command responsibility and acting under orders, even where they have otherwise given short shrift to the general part of criminal law. *See* London Charter, *supra* note 50, at art. 8 (superior orders); Allied Control Council Law No. 10, art. II(4)(b), Dec. 20, 1945 (superior orders); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts (Protocol I), art. 87, Dec. 12, 1977 (duty of commanders); ICTY Statute, *supra* note 41, at art. 7(3) (command responsibility); *id.* at art. 7(4) (superior orders); ICTR Statute, *supra* note 42, at art. 6(3) (command responsibility); *id.* at art. 6(4) (superior orders).

the ICC, whose statute expressly contemplates that it may not reflect customary international law.²⁷⁴ The Statute's relative detail need not represent universal norms but may instead reflect agreements and compromises among states necessary to attract support for that particular tribunal. In this context, specificity in the law may serve various purposes—including constraining the delegated discretion of international judges, easing the court's administration, and avoiding divisions over lighting rods such as the death penalty—without prejudicing the application of different law in other procedural contexts where the same concerns do not apply.²⁷⁵

Although the focus of this Article is substantive, rather than procedural, criminal law, the concept of tribunal-specific law also readily embraces differences in the criminal procedure used to prosecute ICL offenses in different courts.

3. Limits on Domestic Law

A third category of ICL deals with general questions of criminal law, where the specific purposes of ICL do not override reasonable differences among national systems. Rather than impose a single uniform approach, ICL should instead focus on constraining the acceptable margin of state discretion to apply local law to the prosecution of ICL offenses.

I have already discussed the example of duress in detail. A similar approach could extend to other defenses, as well as to general standards of individual responsibility. One example is *mens rea*. Although the definitions of ICL offenses typically contain special mental elements that are central to the offense and are appropriately universal—for example, the definition of genocidal intent, or the requirements that perpetrators of crimes against humanity act with knowledge of a widespread or systematic attack against a civilian population—different legal systems might still require that culpability for underlying criminal acts conform with their respective general approaches to *mens rea*. For example, common law and civil law systems might maintain their admittedly subtle distinction between culpable recklessness, on the one hand, and *dolus eventualis*, on the other hand.²⁷⁶

National criminal justice systems also differ in defining forms of personal responsibility. In *Prosecutor v. Furundžija*, for example, an ICTY Trial Chamber relied almost exclusively on a handful of seemingly contradictory World War II-era precedents to announce an international criminal law of aiding and abetting.²⁷⁷ Given that aiding and abetting is a generally applicable form of criminal participation, and that national systems differ on how to define it, the ICTY could have given greater weight to former Yugoslav law. The doctrine of joint criminal enterprise (JCE) presents a somewhat more difficult problem.²⁷⁸ One might defend the ICTY's development of JCE (or perhaps defend some alternate standards for group criminality) on the ground that the doctrine is specially tailored to confront

274. See *supra* notes 202–03 and accompanying text.

275. See *supra* Part IV.C.

276. FLETCHER, *RETHINKING*, *supra* note 194, § 6.5.2.

277. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, ¶¶ 187–249 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

278. See *supra* notes 62, 90.

problems of mass criminality that are a central focus of ICL offenses.²⁷⁹ On the other hand, the controversy surrounding that doctrine—combined with the ICC’s apparent retreat from it—suggests that ICL may do better to simply incorporate existing national approaches to group criminality.²⁸⁰

Perhaps most significantly, my approach suggests that ICL should abandon the search for uniform principles of sentencing.²⁸¹ Rather than assure consistent sentences for all ICL offenders, ICL should promote consistency with applicable domestic sentencing practices. Thus, ICL should generally defer to national judgments concerning appropriate sentencing ranges and seek to ensure that ICL offenders receive sentences that are consistent with what national law would consider appropriate for offenses of like gravity under similar circumstances. ICL should also defer to national judgments concerning the appropriate mix of retributive and utilitarian considerations in sentencing.

In none of these cases do I contemplate ICL extending blanket deference to national law. Instead, ICL should operate to establish limits on the acceptable range of domestic discretion. In particular, ICL should ensure that any application of national law conforms to evolving international human rights standards, does not frustrate core purposes of ICL, and maintains consistency with the national law’s general approach to criminal culpability. Thus, ICL must not operate to endorse cruel and unusual punishment or violate core principles of individual responsibility and fair notice. It must also ensure that applicable domestic law would not operate to deny the special gravity of the offense at issue.²⁸² Within appropriate limits, however, ICL may nevertheless tolerate diversity among domestic laws.

Once again, of course, there is room for reasonable disagreement on precisely what range of discretion ICL should be afforded, and the aim of this Article is more to provide a framework for analyzing and debating these issues than to achieve clarity on the exact demands of ICL with respect to every application of my model. That said, one can already see distinctions along the lines I am proposing in the

279. See, e.g., Damaška, *supra* note 178, at 352 (“[JCE’s] animating idea—that of reaching criminal masterminds—is sound. It responds to the fact that most international crimes are committed in an organization context, so that looking for culprits is behind hands-on perpetrators makes eminent sense.”). Damaška nevertheless laments that “[i]t 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.” *Id.*

280. See *supra* notes 62, 89.

281. In this respect, my approach contrasts with recent work that has focused on establishing a coherent, uniform framework of ICL sentencing. See, e.g., Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, in *INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW* 373 (Göran Sluiter & Sergey Vasiliev eds., 2009); William Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 462 *DUKE J. INT’L L.* 461 (1996); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 *STAN. J. INT’L L.* 39 (2007).

282. For example, while domestic law may supply general sentencing ranges, ICL must still assert the relative gravity of ICL offenses. A state may not, for instance, rank rape behind shoplifting in its sentencing scheme. Similarly, ICL should generally not allow states to adopt more lenient standards of culpability for ICL offenses than for domestic offenses.

practice of international tribunals. For example, both the ICTR and ICTY have referred some of their indictments to domestic jurisdictions pursuant to the tribunals' respective procedural rules.²⁸³ While the ICTR Appeals Chamber has refused to refer cases to jurisdictions that do not expressly distinguish genocide from murder in their domestic law,²⁸⁴ the ICTY has referred cases to a Bosnian court that applies some general principles of Bosnian law to the prosecution of ICL offenses.²⁸⁵ Notably, the applicable statute codifies the old Yugoslav law of duress to ICL offenses, rather than the ICTY's *Erdemović* approach.²⁸⁶ Although the case law does not expressly recognize these distinctions, this aspect of the tribunals' referral practice affirms the idea that different aspects of ICL should be given different weight for purposes of demanding uniformity.

4. Default Rules

A fourth and final category consists of default ICL rules for situations where there is no appropriate or available domestic law to apply. It may be the case that ICL confronts crimes committed in a failed state with no legal system to speak of, or by a regime whose law so departs from acceptable standards of human rights that there is no room for deference. A state's laws may be irredeemably vague on a matter vital to the prosecution of an ICL offense. ICL may confront a pattern of criminality that deeply implicates so many different jurisdictions that it becomes impossible to identify a single jurisdiction with a greatest interest in the case. In such cases, it is desirable for ICL to develop default rules that may be applied to ensure prosecution of ICL offenses consistent with the legality principle.

ICL already possesses the basic foundation of a default law in the Rome Statute of the ICC, whose geographic reach is potentially universal.²⁸⁷ Even states that have not joined the Court may find themselves subject to its jurisdiction, at the discretion of the U.N. Security Council, with respect to crimes committed after the Rome Statute entered into force.²⁸⁸ The Rome Statute is, of course, binding law when applied by the ICC itself.²⁸⁹ At the same time, the Court's broad geographic reach renders the Statute a convenient source of law for other courts and tribunals

283. See ICTR Rules of Procedure and Evidence, Rule 11 *bis* (as amended Mar. 14, 2008) (providing for the referral of indictments to other courts); ICTY Rules of Procedure and Evidence, IT/32/Rev. 44, Rule 11 *bis* (as amended Dec. 10, 2009) (same).

284. See *supra* note 272.

285. See Krivični Zakon Bosne i Hercegovine [KZBiH] [Criminal Code of Bosnia and Herzegovina], arts. 173–84, Službeni glasnik Bosne i Hercegovine [Official Gazette of Bosnia and Herzegovina], No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 2006. See generally William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 COLUM. J. TRANSNAT'L L. 279 (2008).

286. See Krivični Zakon Bosne i Hercegovine [KZBiH] [Criminal Code of Bosnia and Herzegovina], art. 25, Službeni glasnik Bosne i Hercegovine [Official Gazette of Bosnia and Herzegovina], No. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 2006.

287. See *supra* note 81 and accompanying text.

288. Rome Statute, *supra* note 24, at art. 13(b).

289. *Id.* at art. 20.

not so bound, while reducing the retroactivity concerns that have marked the prior history of ICL.

By labeling this use of the Rome Statute as one of “default rules,” my point is to convey its nonmandatory nature. In other words, to the extent that some of the ICC’s law is merely the law of the tribunal and not universally binding ICL, its availability in other fora should not preclude appropriate deference to domestic law where the conditions for such deference are otherwise met. Default rules may nevertheless be desirable to cover situations where domestic law is inadequate or silent.

B. Forum-Specific Applications

As should already be evident, the specific application of my four-tiered framework depends to some extent on which court or tribunal is applying ICL. Below I briefly consider the implications of the model in three procedural settings: (1) domestic courts, (2) international tribunals, and (3) hybrid tribunals.

1. Domestic Courts

The implications of my framework are perhaps most obvious for domestic courts trying ICL offenses in circumstances where the court hearing the case is the court that, under normal circumstances, would be expected to do so. In such cases, the domestic court should be free to apply its own domestic criminal law, subject to its incorporation of universally applicable ICL and its conformity with limits on acceptable domestic discretion. Among other implications, this means that domestic courts need not apply the identical criminal law applied by international tribunals. In the context of the ICC especially, it suggests that, pursuant to the ICC’s complementarity framework, the ICC may defer to genuine investigations and prosecutions whose substantive criminal law does not mirror the ICC’s law.²⁹⁰

The case of courts trying ICL offenses purely based on principles of universal jurisdiction is more complex, as there are now multiple potentially competing legal regimes in play.²⁹¹ There are the demands of international law, the demands of the national jurisdiction or jurisdictions that would normally be expected to prosecute the case based on traditional jurisdictional principles, and the law of the court exercising universal jurisdiction. Although the multiplicity of potentially applicable laws might suggest that uniform default rules should apply in all such cases, that is not the inevitable solution. To the extent practicable, the prosecuting jurisdiction might, for example, resort to rules of dual criminality that favor the application of criminal legal principles that are shared by both the prosecuting state and the state that would normally be expected to assert jurisdiction. Doing so would preserve the diversity of domestic law while minimizing concerns of fair notice to the accused.

It is debatable, moreover, whether domestic courts need even go so far. Notwithstanding the theoretical reach of the concept of universal jurisdiction, states have generally proved reluctant to abandon completely traditional principles of

290. See *supra* note 24 and accompanying text.

291. See *supra* notes 230–35 and accompanying text.

jurisdiction requiring some connection between the crime and the prosecuting forum.²⁹² The two states that have come the closest to recognizing universal jurisdiction in its purest forum—Spain and Belgium—have both amended their statutes so as to privilege linkages between the forum and defendant.²⁹³ The future of ICL prosecutions in domestic courts is therefore likely to concentrate in jurisdictions that have a reasonable basis to apply their domestic laws to the offenses at issue.

2. International Tribunals

With respect to international tribunals, I have already argued that the ICTY should have applied the Yugoslav law of duress. More broadly, my framework suggests ad hoc tribunals like the ICTY and ICTR could have made better use of domestic law to fill the broad interstices of their respective statutes.

The ICC presents a different context given the relative detail of its Statute. For many issues, therefore, the Court will simply apply its own binding statutory law. There are, however, at least two circumstances in which the ICC could embrace a broader, more diverse view of ICL.

First, as I have just explained, the ICC's complementarity process need not require domestic courts prosecuting ICL offenses to incorporate the entirety of the Rome Statute's law. A national court applying some national law to ICL offenses may still claim deference from the ICC if this yields different outcomes than would have resulted from application of the Rome Statute.

Second, the ICC may still resort to national law in cases where the ICC's own law is unclear. Doing so would be consistent with at least one reasonable interpretation of Article 21, which contemplates the resort to

[G]eneral principles of law derived by the Court from national laws of legal systems of the world *including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime*, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.²⁹⁴

The significance of this provision necessarily depends on the Court's interpretive approach. If the ICC interprets its statute and customary international law as broadly as the ICTY has, for example, then it may leave no room for Article

292. See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3. (Feb. 14) (joint separate opinion of Judges Higgins, Kooijmans and Buergenthal) (surveying national laws). The view that universal jurisdiction should respect a hierarchy of jurisdictional priority has also gained acceptance among influential scholars. See *supra* note 161.

293. See Ignacio de la Rasilla del Moral, *The Swan Song of Universal Jurisdiction in Spain*, 9 INT'L CRIM. L. REV. 777, 803–04 (2009); Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AM. J. INT'L L. 888, 891–92 (2003).

294. Rome Statute, *supra* note 24, at art. 21(1)(c) (emphasis added); see *supra* notes 100–107 and accompanying text.

21's residual resort to domestic law. My framework, by contrast, suggests that the ICC need not fear gaps in international law, and that greater resort to domestic principles may be desirable.

Of those areas where the Rome Statute does leave major gaps, among the most significant, once again, is sentencing.²⁹⁵ Here, the ICC should resist the urge to develop a single, uniform sentencing approach applicable to all its cases, and should instead integrate, subject to the qualifications of my framework, the sentencing law of the jurisdiction that would normally exercise jurisdiction over the offense.

3. Hybrid Tribunals

The statutes of so-called "hybrid" tribunals already present a close fit for my model given that these courts typically exercise jurisdiction over some domestic crimes in addition to ICL offenses. This incorporation of domestic offenses ensures that the tribunal will embrace at least some principles of domestic law. That said, my approach argues for greater clarity in the way that domestic and international law interact at hybrid tribunals. For example, the statute of the hybrid Cambodian court prosecuting Khmer Rouge offenses, the Extraordinary Chambers in the Courts of Cambodia, provides for jurisdiction both over defined domestic crimes²⁹⁶ and over core ICL crimes.²⁹⁷ Because the statute does not contain a general part, the law leaves open the possibility that the court will apply entirely separate principles to domestic and international crimes. Thus, a court following this framework might acquit someone in *Erdemović's* position of all domestic offenses on the ground that domestic law excuses the conduct, but then convict the same offender of war crimes or crimes against humanity on the theory that customary international law denies the defense. My framework, by contrast, would recognize that international law is domestic law for these purposes and that domestic law may inform the prosecution of both domestic and international offenses.

CONCLUSION

The implications of ICL for substantive criminal law remain an under-theorized area of inquiry. The dominant aspiration to develop a general criminal law specific to ICL focuses insufficient attention on both the goals of ICL and the pluralism inherent in its creation. ICL, after all, is a species of criminal law. So long as national legal systems continue to embrace different views on the nature and consequences of criminality, the introduction of a distinctly international criminal law will inevitably perpetuate or foster unequal treatment of one form or another.

This Article confronts the pluralism of ICL head on, and argues that the theory of ICL must take better account of the environment in which this body of law operates. I have argued that the goals of ICL do not speak with equal voice on all matters of the law's content and that the evolution of ICL will be better served by a

295. See *supra* notes 92–95 and accompanying text.

296. ECCC Statute, *supra* note 25, at arts. 4–6.

297. *Id.* at art. 3.

more nuanced, multi-layered account of the law. In this context, the Article makes several arguments for reform. The ultimate aspiration, however, is a broader one: to invite deeper inquiry into the normative foundations of ICL's substantive law. This Article marks one contribution to that broader project.