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Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law

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International criminal procedure is in a second phase of development, moving beyond the common law/civil law dichotomy and searching for its sui generis theory. The standard line is that international criminal procedure has an instrumental value: it services the general goals of international criminal justice and allows punishment for violations of substantive international criminal law. However, international criminal procedure also has an important and often overlooked intrinsic value not reducible to its instrumental value: it vindicates the Rule of Law. This vindication is performed by adjudicating allegations of criminal violations that occurred during periods of anarchy characterized by the absence of domestic procedural law. This suggests a theoretical insight: the anti-impunity norm and its concern with punishment should be read in tandem with a meta-theory that emphasizes that international criminal procedure has an irreducibly intrinsic value because it returns legal process to procedural vacuums. The present literature generally ignores this non-consequentialist value. In addition to this theoretical reorientation, several practical consequences follow, including a revised understanding of the principle of legality, the importance of local
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INTRODUCTION

Procedure was largely absent from the great scholarly debates that grew out of Nuremberg. Claims of victor’s justice and nullum crimen sine lege continue to be debated by scholars who evaluate the substance of the charges at Nuremberg and whether they were already offences, codified or
customary, under international law, and whether defendants had adequate warning that their conduct was criminal and would subject them to punishment.\(^1\) But equally important to the outcome of the trials were the procedures adopted for how the trials would function.\(^2\) With jurists from the US, France, and Russia all participating, coming up with a workable compromise generated several questions: Would judges follow the inquisitorial or adversarial model?\(^3\) Would trials in absentia be allowed?\(^4\) Would evidence be shared between the parties through the common law discovery method?\(^5\) Would defendants have the right to represent themselves in court without an

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\(^2\) Compare CHRISTOPH J.M. SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 22 (2001) (discussing flaws in procedural order but noting that generally the tribunal was viewed as procedurally fair) with NEIL BOISTER & ROBERT CRIER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 35-36 (2008) (discussing procedural objections by Hirota as substantially circumscribed version of rules and procedure normally applied by military tribunals). Of particular note was Hirota’s concern that Article 13(a) of the Tokyo Tribunal’s charter explicitly stated that the tribunal was not bound by the “technical” rules of evidence. Id. at 35.


\(^4\) Martin Bormann was convicted in absentia at Nuremberg. See Nuremberg Charter, supra note 3, article 12 (specifically authorizing in absentia proceedings “in the interests of justice”). Bormann was given notice via radio and newspapers in his home city. See Order of the Tribunal Regarding Notice to Defendant Bormann (Oct. 18, 1945), Göring et al., in 1 TRIAL OF THE MAJOR WAR CRIMINALS, supra note 3, at 102-03. The issue of in absentia trials is analyzed in William A. Schabas, In Absentia Proceedings before International Criminal Courts, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW (Göran Sluiter & Sergey Vasiliev eds., 2009).

\(^5\) The rules at Nuremberg allowed the defense to apply to the tribunal for production of documents referred to in the indictment. See Rules of Procedure, Rule 4(e), in 1 TRIAL OF THE MAJOR WAR CRIMINALS, supra note 3, at 20-21.
attorney? Although these decisions had a substantial impact on the outcome of the Nuremberg cases, the procedural aspects took a back seat to substantive criminal law in the great debates of the day.6

In one sense, this article can be seen as a correction to this oversight. International criminal procedure as a field is gaining in momentum, but it is usually eclipsed by the shadow of substantive international criminal law. The first wave of scholarship regarding international criminal procedure traced the sometimes uncomfortable marriage of common law and civil law procedures at the ad hoc tribunals and the permanent International Criminal Court.7 While these courts have largely adopted the common law’s adversarial system, they have combined it with isolated aspects of civil law procedure, including, for example, judges as fact finders (instead of juries), victim participation (in the case of the ICC),8 prosecution appeals of acquittals, and other procedural innovations.9 Judges have a larger managerial role in international criminal justice, more consistent with some civil law jurisdictions.10

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6 See Theodor Meron, Anatomy of an International Criminal Tribunal, 100 AM. SOC'Y INT'L L. PROC. 279, 281-82 (Mar. 29-Apr. 1, 2006) (“the Allies provided these tribunals with shockingly little guidance in the way of procedure”).


A Pre-Trial Chamber at the ICC reviews and confirms indictments issued by the prosecutor—another civil law procedure. Victims have access to the criminal trial—a feature of some civil law systems—though ICC procedures allowing victim participation go well beyond any currently found in either common or civil law systems. The current academic analyses of these procedures have largely taken place through the lens of the so-called common law-civil law dichotomy.

A second wave of scholarship is moving beyond the common law-civil law dichotomy towards a more functional analysis of international criminal procedure. Less concerned with legitimizing international criminal procedure by reference to practice in domestic court systems (hence the earlier focus on common law and civil law distinctions), the new scholarship takes international criminal procedure as *sui generis* and the result of unique policy determinations. Under this view, international criminal procedure is not a deformed monster created from two ill-paired traditions, but a distinctive system designed to meet the needs of international criminal justice and less grounded by universal or common procedures from domestic legal systems. Pioneering work from theorists such as Damask has helped establish the *sui generis* model and helped move the discipline beyond...
simple common law and civil law comparisons.\textsuperscript{17}

That being said, procedure is still considered secondary to substantive international criminal law.\textsuperscript{18} The general underlying principle behind international criminal law is that criminals who perform dastardly acts must be punished, and that some basic grundnorm (e.g. anti-impunity) explains why the international system must step into a field—penal law—once exclusively the domain of domestic systems.\textsuperscript{19} This grundnorm then generates an account of substantive criminal law that enumerates the legal offences for which such criminals should be liable. Then—and only then—procedure is considered for its instrumental value in creating a legal structure that both separates the culpable from the non-culpable and helps ensure the due process rights of international defendants.

This is precisely the scheme that I wish to challenge in this article. After exploring the “standard” or “traditional” view of international criminal procedure, I will argue for a Rule of Law-based understanding of international criminal procedure. Under this view, international criminal procedure is also valued for its intrinsic, not instrumental, functions. In the wake of widespread social breakdown—in the wake of war crimes, crimes against humanity, and particularly genocide—international criminal law has a primary role of subjecting such activity to the Rule of Law. Under this view, international criminal law vindicates the Rule of Law by subjecting conduct arising in a lawless environment to the rule of criminal law; procedure is not just valued for its instrumental function of allowing a substance-based system to proceed, but also for its intrinsic quality of embodying the Rule of


\textsuperscript{18} See generally Gregory S. Gordon, Toward an International Criminal Procedure, 45 Colum. J. Transnat’l L. 635, 637 (2007) (“Neither the framers of the new international tribunals nor the academic commentators have attempted to answer these questions in a systematic or comprehensive way.”).

Law. If this is correct, then arguably the value of international criminal procedure is not wholly reducible to its instrumental function.

Part I of this article will explore in greater detail the traditional, instrumental view. As part of that effort, special attention will be given to the current understanding of the anti-impunity norm. Part II of this article will then posit the competing view of international procedure as intrinsically valuable. Specifically, Part II will advance the notion that vindicating the Rule of Law is the *grundnorm* of international criminal justice. This does not entail that the instrumental value is illusory or unimportant; rather, the claim is simply that it has been given too much attention in the scholarly literature. Finally, Part III will tease out the consequences of shifting from the instrumental view to the intrinsic model. These consequences will be divided between, on the one hand, largely theoretical (though no less important) consequences such as a recasting of the anti-impunity norm and, on the other hand, practical consequences regarding procedural elements such as guilty pleas and plea bargaining.

Before continuing, an important word about methodology is in order. When one speaks about the function of international criminal procedure—whether instrumental or intrinsic—one is implicitly invoking the goals and objectives of international criminal procedure. Usually, such goals are understood to include respect for human rights, due process protections, etc. However, the goals of international criminal procedure can only be understood by also making reference to the more general goals of international criminal justice: punishing perpetrators of international crimes, creating a historical record of atrocities, giving voice to victims through eye-witness testimony, and prospectively strengthening norms of international humanitarian law.20 Procedure bears a specific relationship to these norms that we will attempt to explore in the next two parts of this article. However, it is also crucial that we not collapse the objectives of international criminal justice with the goals of international criminal procedure.21 The two are distinct and the development of this article's argument requires that we untangle the exact relationship between the two. Is the latter just an instrumental aspect of the former, or does the latter embody a rationale independent of the former?


21 *Id.* at 102 (attributing this essential insight to Damaška and his *Faces of Justice*).
I. The Traditional View of International Criminal Procedure

The task of this part is to flush out the traditional view of international procedure. Under this view, procedures have an instrumental function in that they allow international criminal law to achieve its traditional goals. Obviously, the basic question regarding the goals of international criminal justice is fraught with problems, and Damaška has written convincingly about the limitations of finding a coherent answer to the question of the real goal of international criminal justice. There is an “overabundance” of aims, not all of which stand in perfect harmony with each other. The tensions between the aims often pull international criminal justice in competing directions, complicating both the procedural mechanics and the institutional design. Even offering a ranked preference order among the competing aims is difficult. Indeed, each element of the judicial process may require a different ordering of the individual objectives or aims, thus further complicating the ability to provide a global ranked order.

A. The General Goals of International Criminal Justice

With these caveats, however, it is still possible to offer at least a prima facie list of competing aims that international criminal justice addresses. Without ranking the list, we can then use the list to consider the objectives of international criminal procedure and how they serve, instrumentally, to help promote the objectives of international criminal justice. These objectives

22 See Damaška, supra note 14, at 331 (“current views on the objectives of international criminal courts are in disarray”).
23 Id. at 331.
24 Id. at 332.
25 Id. at 339 (“It is easy to see that these fragmented and discontinuous pronouncements fail to provide much orientation in dealing with the tensions among goals. Deterrence and retribution are themselves in need of balancing, and it remains uncertain how these two conventional aims of punishment relate to the special goals of international criminal courts. It is thus fair to conclude that perplexing ambiguities about the proper mission of international criminal courts persist.”).
26 This point was suggested to me by Mark Klamberg. See also Mark Klamberg, What are the Objectives of International Criminal Procedure: Reflections on the Fragmentation of a Legal Regime (on file with author).
27 For a discussion of the various goals, see generally Note, Developments in the Law - International Criminal Law, 114 HARV. L. REV. 1943, 1974-75 (2001) (“those most intimately connected with the ICTY and the ICTR claim to prosecute in order to achieve a dizzying array of objectives.”).
include, *inter alia*: (1) punishing perpetrators of international crimes;  
(2) creating a historical record of atrocities;  
(3) giving voice to victims through eye-witness testimony;  
(4) strengthening human rights norms prospectively;  
and (5) restoring international peace and security.
This list cannot be defended exhaustively within the short confines of this article and it is not meant to exclude more controversial entries. However, a few brief comments should be made about each objective.

First, international criminal justice exists to punish the highest-level perpetrators of international crimes, as made clear both by the preamble of the Rome Statute and case law. Indeed, the ICTY Appeals Chamber in *Tadić* made explicit reference to this goal when it offered its interpretation of the ICTY Statute’s concept of “commission” as including the doctrine of

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30 See generally MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 16 (1999) (“Victims and witnesses who seek to forget ironically may assist the perpetrators by keeping silent about their crimes. Silence about violence locks perpetrators and victims in the cruel pact of denial, literally and psychologically.”).

31 *Id.* at 49 (discussing an “environment infused by norms of human rights”).

32 This was the primary rationale for the Security Council’s creation of the ICTY and the ICTR. See U.N. Charter arts. 39-41; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 325-26 (2d ed. 2008); Prosecutor v. *Tadić*, Case No. IT-94-1-A, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 18 *passim* (Oct. 2, 1995) [hereinafter Motion for Interlocutory Appeal on Jurisdiction].


34 See Prosecutor v. *Katanga*, Case No. ICC-01/04-01/07, Pre-Trial Chamber, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, ¶ 49 (June 20, 2008) (“After more than a hundred years of struggle, a permanent international criminal court has finally emerged as a unique symbol of the fight against impunity for the most heinous crimes of international concern.”); Prosecutor v. *Rugambarara*, Case No. ICTR-00-59-T, Sentencing Judgment, ¶ 11 (Nov. 16, 2007); *id.*, ICTR Trial Chamber, Judgment, ¶ 11 (Nov. 16, 2007). See also Rome Statute of the Int’l Crim. Court, U.N. Doc. A/CONF.183/9* (July 17, 1998) [hereinafter Rome Statute], preamble ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" and "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes").
joint criminal enterprise.\textsuperscript{35}

Second, human rights groups hope that international tribunals create a record of atrocities not just for the present generation, but one that will survive the passage of time and continue to educate future generations about the horrors of wartime criminality.\textsuperscript{36} This is in keeping with what Damaška refers to as the "didactic" function of international criminal justice.\textsuperscript{37} Indeed, tribunal officials are working on creating permanent archives of their work that will increase public access to the evidence presented at their hearings (which at the moment are not widely distributed and are difficult to access),\textsuperscript{38} long after the tribunals have executed their "completion strategy."\textsuperscript{39}

Third, international criminal justice allows the world to hear directly from the victims, either through eyewitness testimony or, in a mediated fashion, through forensic evidence of the victims after they have died.\textsuperscript{40} Indeed, the forensic information recovered from a mass burial site can be the most powerful and compelling evidence emanating from the victims, even though they are unavailable to testify directly at trial.\textsuperscript{41} Both direct and indirect processes of truth-telling are crucial to the success of international criminal justice.\textsuperscript{42}

\textsuperscript{35} See Tadić, Case No. IT-94-1-A, Appeals Chamber, at ¶ 190 (July 15, 1999).
\textsuperscript{36} See, e.g., Richard Goldstone, Living History Interview, 5 TRANSNAT'L L. & CONTEMPT. PROBS. 373 (1995).
\textsuperscript{37} See Damaška, supra note 14, at 343-48 (discussing "the view that the central mission of international criminal courts should be the socio-pedagogical one of strengthening the public sense of accountability for human rights violations").
\textsuperscript{38} There has been some diplomatic controversy over which country should have custody of the archive. Rwandan officials have argued that the documents should remain in Rwanda or, at the very least, in Africa. See Edward Selasini, Eals out to Push for Retention of ICTR Arch-ives, ARUSHA TIMES, (August 16, 2008).
\textsuperscript{39} The issue of the historical record is just one of the many issues related to the tribunal’s wind-up strategy.
\textsuperscript{40} For an extensive analysis, see the article by Nancy Combs in this volume. Nancy Amoury Combs, Testimonial Deficiencies and Evidentiary Uncertainties in International Criminal Trials, 14 UCLA J. INT’L L. & FOREIGN AFF. 235 (2009).
\textsuperscript{41} See generally RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE (2002).
\textsuperscript{42} M. Cherif Bassiouni tells the following story in a letter to Judge Antonio Cassese about the value of truth-telling:
   
   Allow me to share with you one story which I am sure will move you as deeply as it moved me. It was during the months of February and March [1993] when, along with the team of 31 women, mostly volunteers, investigating rape and sexual as-
Fourth, there is some hope that international criminal justice might strengthen human rights norms in future conflicts. This might be achieved through a putative deterrence function, but it is unclear whether participants in wartime atrocities will be adequately deterred by the prospect of future criminal sanctions at either an ad hoc or permanent tribunal. First, there is

sault, we interviewed 223 victims and witnesses in the territory of the former Yugoslavia. One of the persons who came to speak with us was a young man in his early 40s, but who looked so much older. He was on crutches. He used to be a soccer player, well known in his community; upon retiring he opened a cafe in the suburbs of the major city he lived in and which came to be under siege during this conflict. He was arrested for no other reason than being of another religion, and detained at a local police station ... There some younger guards recognised him and, because of his past successful soccer playing, they broke his legs with rifle butts. Then, while he was tied down to a radiator, with broken legs, they brought in his wife and two stepdaughters, 9 and 13 years of age, and over three days they raped them individually and in groups in front of him and in front of each other. The three women suffered many other indignities and torture before his eyes and then successively each one's throat was cut. They were left to die in his presence as well as in the presence of those who were killed in succession. The ultimate ruthless act was his release, to live with his anguish and torment. When he came to speak to our interviewers, he said that he lived for the day when he could tell his story to the world. Two weeks or so later, he committed suicide. I will never forget his story, along with so many others for the rest of my life and I can only hope for the sake of these victims and for our own humanity that justice will be done.


43 See Prosecutor v. Nikolić, Case No. IT-02-60/1-S, ICTY Trial Chamber Judgment, ¶ 89, (Dec. 2, 2003) ("During times of armed conflict, all persons must now be more aware of the obligations upon them in relation to fellow combatants and protected persons, particularly civilians. Thus, it is hoped that the Tribunal and other international courts are bringing about the development of a culture of respect for the rule of law and not simply the fear of the consequences of breaking the law, and thereby deterring the commission of crimes."); Prosecutor v. Karera, Case No. ICTR-01-74-T, ICTR Trial Chamber Judgment and Sentence, ¶ 571 (Dec. 7, 2007) ("international community [is] not ready to tolerate serious violations of international humanitarian law and human rights"), citing Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, ICTY Appeals Chamber Judgment, ¶ 185 (Mar. 24, 2000). See also MINOW, supra note 30, at 35. Compare with Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT’L L.J. 343, 354-55 ("international criminal prosecutions have neither delivered on the promise of social equilibrium nor served as a chastening influence on impunity in Africa").

the low probability of being caught; second, such individuals often face even greater risks on the battlefield (i.e. death), such that spending time in pre-trial detention in The Hague is hardly a scary prospect.\textsuperscript{45} Indeed, such super-crimes may require super-deterrent penalties, which are unavailable within the international structure due to human rights constraints on punishment.\textsuperscript{46} But even assuming that deterrence is impossible, human rights norms might be strengthened in a more abstract way. By holding public trials, international criminal justice increases public awareness of the underlying human rights norms that were violated.\textsuperscript{47} Such norms are therefore supported and strengthened by a public that increasingly views such norms as legitimate, universal, and mandatory.\textsuperscript{48} Again, this is part and parcel of Damaška’s didactic function of international criminal justice.\textsuperscript{49}

The fifth function of international criminal justice situates it most squarely within the larger structure of public international law. When the Security Council voted to authorize the creation of the ICTY and the ICTR, it did so upon a finding that it was necessary for the restoration of international peace and security.\textsuperscript{50} Such a finding was assumed to be a legal requirement for the exercise of its Chapter VII authority.\textsuperscript{51} Although the Security Council’s Charter authority had never been invoked before to create a tribunal, the Tadić court upheld the legality of the tribunal’s creation.\textsuperscript{52} The ICJ has never directly passed judgment on the matter, nor is it clear whether they could.\textsuperscript{53} Furthermore, the Security Council’s referral power to

\textsuperscript{45} This point is explored in greater detail in Jens David Ohlin, \textit{Towards a Unique Theory of International Criminal Sentencing}, in \textit{INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW}, supra note 4, at 373, 384-86.

\textsuperscript{46} For a discussion, see generally Jens David Ohlin, \textit{Applying the Death Penalty to Crimes of Genocide}, 99 Am. J. Int’l L. 747 (2005).


\textsuperscript{48} See Prosecutor v. Naletilić & Martinović, Case No. IT-98-34-A Appeals Chamber Judgment, ¶ 18 (May 3, 2006) (Schomburg J., partially dissenting) (criminal law as a societal “reaction to specific threats to or violations of fundamental values”); Prosecutor v. Orić, Case No. IT-03-68-T, Trial Chamber Judgment, ¶ 720 (June 30, 2006) (“globally accepted laws and rules have to be obeyed by everybody”).

\textsuperscript{49} See Damaška, supra note 14, at 343.


\textsuperscript{51} See \textit{ANTONIO CASSESE, INTERNATIONAL LAW} 455 (2d ed. 2005).

\textsuperscript{52} See Prosecutor v. Tadić, Case No. IT-94-1-1, Motion for Interlocutory Appeal on Jurisdiction, at ¶¶ 32-40 (Oct. 2, 1995).

\textsuperscript{53} It is not clear how the ICJ might exercise jurisdiction in such a case, given that the world
the ICC is also predicated on a finding that a referral is necessary for the restoration of peace and security.\textsuperscript{54} No international court operating post-
Tadić (under Security Council authority) has ever questioned this argument about its own legitimacy.

If one takes this view at face value—i.e. that a finding of a breach of the peace and the triggering of the Chapter VII mechanism is more than just a legal pretext—then one must also take seriously the idea that a tribunal can help restore international peace and security. Of course, it is not entirely clear how this happens.\textsuperscript{55} Most scholars have assumed that the answer has something to do with the deterrence function of international criminal justice, i.e. that the prospect of criminal liability created by the Security Council will stop atrocities even when the Security Council refuses to authorize military intervention.\textsuperscript{56} This is doubtful. But a more plausible argument might be made that retributive considerations might yield positive consequences in repairing international peace.\textsuperscript{57} In such situations, victims often demand justice for their attackers simply because they believe that the attackers deserve punishment.\textsuperscript{58} This is retributivism par excellence. In giving victims retributive justice, one also encourages them to allow their claims to be pursued in a court of law rather than settled on the battlefield.\textsuperscript{59} Reprisals can be replaced by a non-violent forum where justice can be

\textsuperscript{54} See Rome Statute, art. 13(b).

\textsuperscript{55} For critical discussions, see George P. Fletcher and Jens David Ohlin, \textit{The ICC – Two Courts in One?}, 4 J. INT’L CRIM. JUST. 428 (2006).


\textsuperscript{57} A longer discussion of this dynamic can be found in Jens David Ohlin, \textit{Peace, Security, and Prosecutorial Discretion, in The Emerging Practice of the International Criminal Court} 185, 205-07 (Carsten Stahn & Göran Sluiter eds., 2009) (discussing theory of international law's collective consequentialism).

\textsuperscript{58} \textit{Id.} at 206.

\textsuperscript{59} \textit{See Safferling, supra} note 2, at 47 (“If the victims’ rights are disrespected they will not feel vindicated by the trial process.”).
handed down and punishments meted out. Under this view, the international criminal process is directed not at the actual and potential aggressors (as the deterrence theory suggests), but at the victims. This is the collective consequentialism of individual retributivism. Viewing international criminal justice in this way helps illustrate the basic tension between the global aim of repairing international peace and security and the specific aim of deciding individual guilt. Those who are protective of the sanctity and autonomy of the judicial process are skeptical that participants in the trial process should be—in any way—guided by the global aims of peace and security. The preceding discussion explains that they need not be. The criminal trial operates at more than one level. At the level of institutional design, it operates to restore peace and security, but at the internal level of adjudication it operates autonomously to determine individual culpability. Advocates for the autonomy of the criminal law may be correct when they insist that considerations of the former should not infect the operations of the latter.

In conclusion, the traditional view of international criminal procedure takes these objectives of international criminal justice and views procedure as way of fulfilling them. Part IB will consider the instrumental functions of international procedure and their relationship to the overall objectives of international criminal justice just described.

B. The Instrumental Functions of International Criminal Procedure

There are many instrumental functions of international criminal procedure and there is no need to catalogue every one of them. However, any convincing list should include at least the following functions: (1) separating the culpable from the non-culpable; (2) ensuring due process protections; (3) finding the historical truth; and (4) allowing structured victim participation. Each of these functions will be considered in further detail.

1. Culpability Determinations

The procedural dimension of the judicial process structures, to a large extent, the control and handling of evidence to be presented at trial. These

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60 See Osiel, supra note 56, at 1812.
61 See Ohlin, supra note 57, at 205.
63 See CASSESE, supra note 32, at 413 passim.
procedural mechanics dictate how admissible evidence will be channeled to the various parties and at what stages of the judicial process this disclosure will take place. Access to evidence can be either freely exchanged by the parties, exchanged via compulsion or threat of judicial sanction, or maintained in the custody of an investigating judge. Regardless of the method, international criminal procedure focuses on designing a trial framework that allows the admission of relevant evidence and the exclusion of irrelevant evidence. The goal of this procedural matrix is to distinguish between culpable perpetrators and non-culpable defendants.

The relationship between evidence and guilt or innocence is obvious, but it is less obvious how to structure evidence handling to promote a court’s determinations of guilt and innocence. In one sense, global access to all evidence would arguably promote the goal of making culpability determinations better, but this is far from certain. Indeed, it is well understood that information loses heuristic value as its collective size begins to outgrow the capacity of humans to evaluate it. Consequently, a mountain of relevant and irrelevant evidence will only obfuscate, misdirect, and hide the most relevant

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65 See CASSESE, supra note 32, at 414 (discussing lack of technical rules for handling evidence to ensure that all relevant information is presented).

66 Ideally, the procedures should also promote the goal of distinguishing between levels of culpability as well, so that a culpable perpetrator’s level of culpability might also be established. This is necessary so that international criminal law may determine the appropriate sentence for each convicted defendant. For a discussion of the idea that international trials should establish a defendant’s level of culpability at the level of the charge (as opposed to just at sentencing), see Jens David Ohlin, Three Conceptual Problems with the Doctrine of Joint Criminal Enterprise, 5 J. Int’l CRIM. JUST. 69, 87 (2007) (arguing that if the argument were accepted, one could simply eliminate all substantive crimes and replace them with a single crime called “Felony” and make all determinations of relative culpability at the level of sentencing).

67 See Howard M. Erichson, Court-Ordered Confidentiality in Discovery, 81 CHI.-KENT L. REV. 357, 373 (2006) ("Modern United States discovery, in both global and historical perspective, far exceeds the evidence-gathering power litigants have had in other places and times. Such broad power to extract information is justifiable as a means to gather information needed for adjudication, not as an all-purpose public information tool. The discovery rules do not purport to establish a broad information-gathering power divorced from particular litigated disputes.")
information. International criminal procedure allows adversarial parties to present their own version of the relevant facts with the goal of giving the trial judges two pictures from which they make determinations about guilt. Discovery and cross examination allow opposing parties to test the quality of evidence presented in court. Trial judges then make independent judgments about witness veracity to determine defendant guilt or innocence. All of this is required by the anti-impunity norm that demands punishment of international criminals.

2. Due Process Protections

The second instrumental goal of international criminal procedure is ensuring and protecting the due process rights of defendants. Under this view, the criminal trial restricts executive power—whether domestic or international—to summarily punish violators. Left to its own devices, the executive branch would simply make its own executive determinations of...
culpability. However, the criminal trial exists to give a judicial power a check on executive behavior in the area of punishment. The criminal trial is structured with the appropriate procedures to ensure that each defendant is given due process of law.

Of course, as a matter of comparative law, there is great divergence in what qualifies as due process and what this means for a fair trial. One might appeal to a basic level of due process universally recognized among civilized nations and codified in the ICCPR, or regional treaties such as the ECHR. These rights also flow from general principles of criminal law and binding sources of international law.

However, no recourse to a lowest common denominator is necessary. At this stage, it is unnecessary to identify the exact scope of a defendant’s due process rights before an international tribunal. It is sufficient to note the universal acceptance of due process rights—however that basic legal concept is then cashed out.

The due process aspect of international criminal procedure is instrumental in the sense that it is intimately connected with international criminal justice’s objective of punishing perpetrators of international crimes. Due process protections exist to ensure that the prosecution does not have an unfair advantage and taint the outcome of an international trial; a prosecution

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73 One can also see this tension in Packer’s competing models of law enforcement. See generally Herbert L. Packer, Two Models of the Criminal Process, 113 U. Pa. L. Rev. 1 (1964) (comparing “crime control model” with “due process model”); and Herbert L. Packer, The Limits of the Criminal Sanction (1968).
74 See ZAPPALA, supra note 71, at 15; Safferling, supra note 2, at 26.
75 The International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (equality before courts; fair and public hearing; independent and impartial tribunal; presumption of innocence; prompt notification of charges; adequate defense resources; speedy trial; in absentia trials prohibited; confrontation of witnesses; interpreters; right to silence; appeal of sentence; compensation for wrongful imprisonment; double Jeopardy).
77 See ZAPPALA, supra note 71, at 3-5.
78 See, e.g., Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06 OA4, Appeals Chamber, Judgment on Appeal Decision on Jurisdiction, ¶ 37 (Dec. 14, 2006); id., Pre-Trial Chamber, Decision on Confirmation of Charges, at 82 (Jan. 29, 2007) (discussing violations of procedural rules as violating human rights of defendants). Cf Gordon, supra note 71, at 670 (ICC represents “great leap forward” in the due process evolution of international criminal procedure).
with unfair advantages might convict the innocent.\textsuperscript{79} Of course, due process protections also cut against basic determinations of truth and culpability, since violations might require remedies that are inconsistent with finding the truth about a defendant's culpability. For example, the common law exclusionary rule applies even when the evidence indicates that the defendant is guilty.\textsuperscript{80} At the international level, the best example is the \textit{Lubanga} case, where prosecutorial mishandling of the case was so severe that the Trial Chamber initially decided that the only way to vindicate the due process rights of the defendant was to order his release.\textsuperscript{81} This suggests that due process protections have a more complicated relation to the objective of determining culpability.

A more global understanding of the rationale behind due process protections is required. Due process protections exist not to ensure that the right culpability determinations are made in a specific case, but rather to ensure that the overall system is designed to restrain the prosecution from abusing its discretion when proceeding against defendants.\textsuperscript{82} This structural protection is designed precisely so that trials \textit{in general} produce the right outcomes and make the right culpability determinations. Evidence is excluded in the U.S. so that police and prosecutors will behave, thus increasing the probability that evidence in general can be trusted to be untainted.\textsuperscript{83} Similarly, the ICC issues sanctions to protect the judicial process and avoid future prosecutorial misconduct.\textsuperscript{84} So there is at least some relationship between due process protections and correct outcomes.

\textsuperscript{79} \textit{Id.}


\textsuperscript{81} The decision was prompted by violations of the "rights of the accused to disclosure of potentially exculpatory evidence." Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(c) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, Prosecutor v. Thomas Lubanga Dyilo, ICC 01/04-01/06 (June 13, 2008), para. 73. The case is discussed in Stuart, \textit{supra} note 69, at 409-10. The disclosure problems were subsequently corrected. For a discussion, see Alex Whiting, \textit{Lead Evidence and Discovery before the International Criminal Court: The Lubanga Case}, 14 UCLA J. INT'L L. & FOREIGN AFF. 207 (2009).

\textsuperscript{82} See \textit{ZAPPALÀ}, \textit{supra} note 71, at 40.

\textsuperscript{83} \textit{See also} Mapp v. Ohio, 367 U.S. 643, 655-657 (1961).

\textsuperscript{84} See Stuart, \textit{supra} note 69, at 410.
3. Historical Truth

The third instrumental function of international criminal procedure is designing a trial and judicial framework that promotes the historical truth-finding goal of international criminal trials. This instrumental function is achieved by promoting the admission of relevant evidence, where “relevant evidence” is understood to encompass information needed to ascertain the truth of the entire conflict, as the concept is understood by professional historians. This goal of international criminal procedure is often at odds with the truth-finding aim required to adjudicate individual guilt. To the extent that the criminal trial is limited to determining individual guilt, a wider scope of evidence aimed at capturing the collective nature of the events—above and beyond individual culpability for specific criminal actions—may be irrelevant. Furthermore, it may even be prejudicial and risk attribution of moral or legal responsibility to defendants for the actions of others. Consequently, one might conclude that the historical truth-finding aim of international trials is secondary to the more primary aim of determining the truth of very specific criminal events. That being said, the secondary or

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86 Justice Jackson was well aware of the wide scope of the inquiry and noted during his opening statement at the IMT that “[n]ever before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole Continent, and involving a score of nations, countless individuals, and innumerable events.” Justice Robert Jackson, Opening Statement Before the International Military Tribunal at Nuremberg (Nov. 21, 1945), (transcript available at http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-by-robert-h-jackson/opening-statement-before-the-international-military-tribunal/).


89 Cf. 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, 100 (2005) (“[I]t is especially important that international criminal judges protect defendants through careful attention to the culpability principle and similar doctrines that seek to ensure that defendants are convicted for their own conduct and not merely for the violent trauma experienced by entire nations.”).
subordinate nature of the historical truth-finding aim does not mean that it disappears entirely.

The historical truth-finding aim impacts international procedure in a number of ways. First, international investigations and trials include great redundancies of evidence.\(^9\) Far more evidence is collected and presented at trial than necessary to establish discrete facts relevant to proving the legal charge.\(^9\) International tribunals support these redundancies—or passively acquiesce to them—because a trial involves more than just adjudication of individual guilt. International jurists speak to the ages; they collect a treasure trove of evidence to capture the larger truth of the conflict. Indeed, if international criminal trials were unconcerned with such matters, one could reform their procedure to advance judicial efficiency. For example, the defense might stipulate to a long list of facts before trial that they do not contest.\(^9\) Such stipulations would preclude the prosecution from introducing evidence to prove these facts, because the defense’s concession of these facts would make the introduction of such evidence completely unnecessary.\(^9\) This would produce an enormous gain for international law, particularly because trials have grown so long and complex that they can outlast the life of a defendant.\(^9\) But international criminal law as a system has not systematically encouraged these procedures, thus suggesting that there are other factors besides individual culpability driving the international trial.

The historical truth-finding function of international criminal procedure is related to at least two of the general aims of international criminal justice: creating a historical record of atrocities and strengthening human rights norms through the didactic function. Achieving greater compliance with

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\(^9\) Cf. Osiel, supra note 33, at 560-63.

\(^9\) The most obvious case in this regard involves Milošević, where the ICTY Office of the Prosecutor made the strategic error of amending the indictment in order to create a case that represented the totality of the situation, rather than charging the defendant simply with a few discrete crimes. The trial became unwieldy and Milošević died before its completion. The opposite example is Saddam Hussein, who was executed after he was found guilty of the very limited offense of ordering a collective punishment; his trial for the far more significant allegation of genocide in the Anfal campaign was never completed.

\(^9\) This mechanism is not often used in international trials.


human rights norms in future conflicts requires concentrating on more than just individual crimes. It requires that international jurists identify and publicly condemn the full extent of the collective criminality. Only then will the relevant human rights norms be adequately strengthened.

The complex interplay between the collective historical truth-finding function and individual culpability determinations is readily apparent in the ICTY’s handling of key genocide documents from Serbia. During the ICTY case against Slobodan Milošević, the court demanded access to key documents and minutes related to the activities of the Serbian Supreme Defence Council. Belgrade initially refused to turn over the documents, presumably out of fear that the documents would incriminate not just Milošević (and other top Serbian officials) but also the state of Serbia itself—which was facing suit at the International Court of Justice for genocide against Bosnia. Apparently the Serbian government applied to the ICTY Trial Chamber for protective measures to redact certain portions of the documents that might damage Serbia’s legal position before the ICJ, by invoking rarely used procedural Rule 54 of the tribunal. Presumably the ICTY Office of the Prosecutor was willing to agree to the situation because failure to get the documents protected would mean that the Serbian government would refuse to turn over the documents and they would remain unavailable for use in the Milošević trial. What happened next is not exactly clear. A former ICTY spokesperson, Florence Hartmann, disclosed in her memoirs that the ICTY Appeals Chamber issued a secret ruling declaring that the Trial Chamber was wrong as a matter of law to issue the confidentiality order regarding some of the documents, but that the information should nonetheless remain confidential because Serbia had turned over the documents with the expectation that they would remain confidential on the basis of the Trial Chamber’s erroneous decision. Hartmann, no longer working for the ICTY, was convicted for criminal contempt before the ICTY for having published this

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98 Id.
account, though her case will be appealed.\textsuperscript{99} Regardless of the outcome, though, it is undisputed that key information related to the Serbian SDS was never turned over to the ICJ,\textsuperscript{100} and that court then concluded that it had insufficient evidence of direct Serbian involvement in the genocide to establish state responsibility for the crime of genocide. Bosnia lost the case.\textsuperscript{101} The story highlights perfectly the complex tensions between the collective truth of history and the individual truth of a single defendant’s culpability. Controversy regarding the ICTY’s use of Rule 54, and any Appeals Chamber decision regarding it, suggests continued uncertainty over the exact goals that the procedures should be designed to promote.\textsuperscript{102} But putting aside the uncertainty, all of the positions proceed from the working assumption that international criminal procedure is instrumental.

4. Victim Participation

The fourth and final instrumental objective of international criminal procedure involves structured victim participation at appropriate junctures of the judicial process.\textsuperscript{103} Currently, the appropriate extent of victim participation is one of the most controversial aspects of international criminal proce-
A Meta-Theory of International Criminal Procedure

The International Criminal Court gives victims full status as an official party of the legal proceedings, complete with counsel and a large budget to help represent their interests. This status within the proceedings far exceeds what is allowed in most countries, even in civil law jurisdictions where victims can often initiate a criminal prosecution (even in the absence of a prosecutor's decision to pursue a case—the sole avenue of launching a criminal case in the U.S.). Setting aside the controversy regarding full victim participation at the ICC, it is universally agreed that international criminal procedure should allow some victim participation in the trial process. On the most limited account, the appropriate level of participation for victims should be as witnesses. Under this view, the formal status is unnecessary, but allowing victims to testify in open court—and be cross-examined—is essential. This is consistent with the general goal of international criminal justice to give a voice to victims of war-time atrocity.

5. Background Goals

As a final point, we might also identify “background” goals of international criminal procedure, such as the goal of implementing international criminal justice and bringing war crimes trials from theory into reality. Another background goal might be to conduct trials efficiently. These goals stand in the background because they cannot be the only goals of international criminal procedure; the system must be designed to do something efficiently, rather than seek efficiency for its own sake. International criminal procedure creates an institutional structure that operationalizes international criminal justice into a real system and provides a legal framework for

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104 See Friman, supra note 12, at 205-6; ZAPPALA, supra note 71, at 222.
106 See generally CRIMINAL PROCEDURE IN EUROPE (Richard K. Vogler & Barbara Huber eds., 2008).
108 See Vasiliev, supra note 103, at 637.
109 Id.
110 Id. at 706.
111 This idea was suggested to me by Alexander Zahar.
dealing with the inevitable constraints of limited time and resources. International criminal justice is meaningless if it exists only on paper in the form of a Security Council resolution or a multilateral treaty. It only gains significance when it flourishes as a real court with real prosecutors and real defense attorneys. International criminal procedure is the legal framework to deal with the consequences of limited resources and to resolve the tensions created by these limits, rather than simply succumbing and closing shop. For example, the defense has the right to disclosure of all evidence by the prosecutor.\(^{112}\) However, a complex genocide case produces a mountain of evidence and the prosecutor may be unable to perfectly comply with the disclosure requirements in a short timeframe. Another example is a prosecutor’s duty to find exculpatory evidence.\(^{113}\) This norm can only be understood relative to the resources of the Office of the Prosecutor. International criminal procedure operationalizes the system by allocating burdens to the appropriate parties and establishing standards that help balance the relevant abstract norms with the limits of institutional resources.

Underlying all of the functions discussed above is the assumption that international criminal procedure is essentially an instrumental affair, designed and structured to promote the relevant goals of international criminal justice. As the following part indicates, though, this is not the only way of understanding the international trial. One can flip the presumption and consider international procedure as an end in and of itself. A full account follows.

II. THE RULE OF LAW CONCEPTION OF INTERNATIONAL CRIMINAL PROCEDURE

Something deeply disturbing happens during war-time atrocities. In situations such as Yugoslavia or Rwanda or Darfur, the overall picture cannot be reduced to an aggregation of individual criminal acts committed by specific aggressors against specific victims. There is a structural context that allows such criminal violence to occur and this structure is just as disturbing as the individual acts of violence.

Specifically, the substantive crimes of international criminal justice involve more than just regular criminal violence. These atrocities involve the systematic breakdown of the Rule of Law. In Yugoslavia, government

\(^{112}\) See, e.g., ICC Rules, Rule 77; ICTY Rules, Rule 68.

\(^{113}\) See, e.g., ICC Article 54(1).
forces and private militia operating with either the implicit or explicit support of the government went door to door looking for civilians who were then driven from their homes or transported to prison camps or simply taken into fields and murdered. Similarly, the Rwandan genocide involved thousands of genocidaires roaming through the country looking for ethnic Tutsis to rape, mutilate and kill. This violence differs radically from extreme acts of murder in the context of a functioning domestic penal system. In both Yugoslavia and Rwanda, there was no police station to call, no local prosecutors who would investigate what was happening, no judges to declare these acts criminal. The legal institutions that constitute the Rule of Law were entirely absent, in part because governments in both cases were complicit in the genocidal activities. And it was precisely this absence which allowed the criminal activity to continue unabated. Without any legal officials to pursue, capture, or arrest perpetrators, or even call their actions wrong, the perpetrators were permitted to engage in their conduct without legal oversight of their behavior. The atrocity took place within the shadow of anarchy where the worst human impulses were permitted to escape.

A. The Significance of Anarchy

The dynamic of lawlessness can be viewed through the lens of both perpetrator and victim. From the point of view of the victim, the lawlessness produces anxiety, fear, and isolation. In addition to the physical and psychological pain caused by the criminal act itself, the knowledge that no official will respond to such attacks makes the attack even more painful. First, there is anxiety and fear stemming from the realization that if the victim survives the attack, there is nothing to prevent the aggressors from coming back. Second, there is the pain associated with knowing that there is no calling to

114 For a description of the conflict, see David Rieff, Slaughterhouse: Bosnia and the Failure of the West (1995).
115 See Philip Gourevitch, We Wish to Inform You That Tomorrow We Will Be Killed With Our Families 17 (1998) (“[H]undreds of thousands of Hutus had worked as killers in regular shifts.”).
116 Id. See also Roméo Dallaire, Shake Hands with the Devil: The Failure of Humanity in Rwanda 374 (2004).
118 Id.
account for this behavior. The victim suffers from a widespread moral violation but there is no official to declare that the moral violations are in fact legal violations.

One can also view the dynamic of lawlessness from the standpoint of the perpetrator. In such situations the perpetrators not only kill civilians, commit genocidal murder, or violate the laws of war. They do it with full knowledge that no police will arrive to investigate, no district attorney or grand jury will indict them, no judge or jury will adjudicate their guilt or innocence. In a sense, their conduct stands completely outside the bounds of the legal system—the violence takes place within the structure of anarchy. This sounds like a paradox, of course, but anarchy does indeed have a structure.119 It is the structure of the State of Nature without a Leviathan and it is arguably the most terrifying thing that the human mind can imagine.120

Atrocities within the context of anarchy represent a very particular kind of violation because the violation is not reducible to individual criminal action. The murder of a civilian in war-time anarchy cannot be equated with the murder of a single citizen in a functioning domestic penal system—say, for example, a murder committed out of jealousy or for monetary profit. There is an added element of violation present in the former that remains absent from the latter. There is an intrinsic harm created by the breakdown of the Rule of Law, in addition to the fact that the breakdown of the Rule of Law allows the criminal act to happen and may even promote more criminal acts. The breakdown of the Rule of Law violates our normative conception of what it means to live in civilized society.121

Developing a full-blown normative account of “living in a civilized society” is well beyond the scope of this article. But however the normative account is cashed out, it must at a minimum include a conception of the Rule of Law where moral violations are not only restricted by a pre-established legal code but also executive or judicial officials adjudicate and punish conduct that runs afoul of these requirements.122 It is not necessary that all violations be prosecuted; some impunity is inevitable in all sophisticated

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121 See generally JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT, IN BASIC POLITICAL WRITINGS 141 (Donald A. Cress trans., 1987).
civilized societies. But when the structure of the legal system falls below a minimum threshold—when legal adjudication is simply absent from the scene—then we are no longer living under the Rule of Law.123 (This is qualitatively different from when a criminal violation occurs within the Rule of Law.) International criminal justice addresses this extra element of anarchy.

B. Vindicating the Rule of Law

This suggests an altogether different method of understanding the goal of international criminal justice. In the face of widespread anarchy and the complete absence of law as a structure to regulate human conduct, the function of international criminal law is to restore the Rule of Law.124 But it does not restore the law prospectively by setting up domestic systems of justice or repairing them in order to adjudicate future conduct. Rather, it vindicates the Rule of Law retroactively by seeking to impose law where the usual systems of enforcement—local, federal, or regional—have evaporated. Understanding the retroactive nature of international criminal law is essential. The project involves shining the critical light of the law on a time and place where the law was decidedly absent.125 The unique value of the ICTY and the ICTR stemmed from the decision by an international authority—the Security Council—to use the binding power of international law, and the U.N. Charter, to impose the Rule of Law in lieu of actual military intervention.126

Of course, all criminal law is retroactive in some sense: it involves, by definition, the ex post adjudication of past conduct.127 Although penal statutes are drafted ex ante, the bulk of the work of the criminal law happens after the violation has occurred and institutional actors are called upon to

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123 A complete conception of the Rule of Law is beyond the scope of this article, though a more complete discussion of the concept's role in this argument is presented infra in Part IIIIB2. See also Jeremy Waldron, The Concept and the Rule of Law, 43 GA. L. Rev. 1 (2008) (concluding that the concept of law and the concept of the Rule of Law are intertwined).
124 Cf. Damaška, supra note 14, at 330 (“Criminal courts, we shall contend, should play a more modest role in advancing the rule of law in the domain of international politics.”).
125 See COMBS, supra note 19, at 11.
evaluate culpability. In contrast, international criminal justice is retroactive in a much deeper sense. Of course, international trials are ex post and attempt to right a legal (and moral) wrong. More specifically, though, international criminal justice involves the establishment and development of actual institutions, often created ex post, to retroactively judge the conduct of individuals whose actions have taken place within the wake of widespread anarchy.

This is also the most controversial aspect of international criminal justice. The retroactive nature of Nuremberg and Tokyo sparked claims of victor's justice. Did the prosecutions violate the principle of legality? These problems were about more than just substantive international criminal law; they cannot be reduced to the question of whether aggression or crimes against humanity were pre-existing international crimes yielding individual liability. These questions have certainly dominated the scholarly debate, but the procedural aspects were equally troubling. Could a tribunal set up by the Allies adjudicate the guilt of the Axis powers, regardless of the crimes in question? What authority did the Allies have for establishing an ad hoc judicial authority, established quickly for the purpose of passing judgment on the crimes of the Axis powers and then disbanding after the sentences were handed down? What kind of legal system was that?

Arguably, the retroactive nature of international criminal justice has been fundamentally altered by the ICC; the Rome Statute now establishes a pre-existing prospective legal order to govern future armed conflicts. Unfortunately, though, the prospective nature of the Court does not fully resolve the problem of retroactivity. The ICC still involves the imposition of order retroactively because the adjudicative functions of the ICC are not present at the time of the atrocities. The ICC can prosecute war criminals who are turned over to the court, but they cannot create a fully functioning legal order—complete with police officers, local prosecutors, local judges—to

128 See Meltzer, supra note 1, at 57 (discussing French objections to provisions in the Nuremberg Charter that arguably violated the ban on retroactive legislation).
129 See Taylor, supra note 85, at 635 (arguing that the IMT operated with general international approval).
130 The procedural dimensions of the Tokyo tribunal are discussed in Boister & Cryer, supra note 2, at 102 ("There are few defenders of the procedural fairness of the trial. Some rely on the Charter guarantees, others conclude that the process itself was generally fair, whilst some suggest that the trial met the minimal standards of due process required of military commissions trying enemy offenders.") (footnotes omitted).
131 For a discussion of the creation of the Tokyo International Military Tribunal, see id. at 20 (discussing legal significance of Potsdam Declaration).
respond quickly to criminal behavior like a functioning domestic penal system would. The ICC is removed both in time (trials are far in the future) and place (in The Hague). Indeed, the ICC’s scheme of complementary jurisdiction preserves the court as a gap-filled institution meant to allow for international adjudication of conduct only when the national jurisdictions are unwilling or unable to prosecute criminal behavior.132 By its very institutional design, the ICC will never function like a domestic penal system that stops criminal behavior from spreading. Rather, it works retroactively to vindicate the Rule of Law.133

We have now traveled a far distance from our original distinction between the instrumental and intrinsic functions of international criminal procedure. The Rule of Law conception of international criminal procedure advanced in this part suggests that international criminal procedure has an intrinsic function that cannot be reduced to its instrumental functions. A trial does more than simply advance the traditional goals of international criminal justice, such as repairing international peace and security or ending impunity; instead, trials have a value that is inherent to the judicial process itself. Subjecting lawlessness to criminal procedure—whether national or international—is inherently worthwhile. Or, expressed differently, international criminal procedure has a deontological moral worth and cannot be reduced to consequentialist arguments about the increases in social utility created by the criminal trial. Subjecting conduct to the Rule of Law is a Kantian end in and of itself.134

### III. Consequences of the Rule of Law Conception

There are several consequences to this view, all of which need to be considered. The first group of consequences is largely theoretical: we must reorient our understanding of the relative importance of international substantive law and procedure and we must reinterpret our understanding of the anti-impunity norm. (Several objections to the theoretical account will also be presented and addressed in this part.) The second group of consequences is more practical: greater sensitivity to local procedures, caution regarding

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133 See infra Part III B2 for a full defense of the centrality of the Rule of Law in this argument.
guilty pleas and plea bargains, and a recasting of the argument about in absentia trials. Each will now be considered.

A. Theoretical Consequences

If the Rule of Law conception is correct, then international criminal procedure should never be secondary.\textsuperscript{135} Traditionally, international lawyers have treated the substantive law as primary, with procedure holding a secondary function: the procedure is meant to aid the system in making determinations about the substantive law.\textsuperscript{136} Consequently, substantive international criminal law is well developed, but international criminal procedure is still at a nascent phase (though quickly developing).\textsuperscript{137}

A fundamental reorientation is required. International criminal procedure is far more primary than previously thought. Since the whole goal of international justice is to vindicate the Rule of Law, the procedures used by the international trial are not just means to another end, but also an end itself. Subjecting the conduct to meaningful review is an independent objective of international justice—the process makes international trials important. It represents the stance of the world community that no place should be exempt from the power of the legal order to judge individuals for their conduct.

At the conceptual level, international criminal procedure precedes substantive criminal law. It ought to take precedence in our scholarly evaluation of the enterprise and at the practical level. The judges of the ICTY continue to revise and refine their Rules of Procedure and Evidence, an ongoing process made possible by the authority of the judges to enact new rules of procedure.\textsuperscript{138} In contrast, the judges at the ICC have less authority and the Assembly of State Parties (which negotiated the ICC Rules of Procedure) is currently bogged down with the task of negotiating a working definition for the crime of aggression.\textsuperscript{139} The judges who preside over trials at both tribun-

\textsuperscript{135} Indeed, even the distinction between substance and procedure may be suspect. See GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 10-14 (1998).

\textsuperscript{136} Cf. SAFFERLING, supra note 2, at 4.

\textsuperscript{137} Id. at 23.


\textsuperscript{139} The first review conference of the Assembly of State Parties will be dominated by negotia-
als should insist on efficient and well-managed trials. Under the view proposed in this article, it not only matters what law the judges are applying, it also matters how they are applying it. This is a counter-intuitive claim and requires that we reconsider the classic relationship between international substance and procedure.\(^{140}\)

One sees this most clearly in the recent shift towards complementarity.\(^{141}\) Though the ICTY and ICTR exercised primary jurisdiction, the ICC exercises complementary jurisdiction and only prosecutes when domestic authorities are unable or unwilling to act.\(^{142}\) In situations where domestic authorities do investigate and prosecute, they necessarily do so under domestic enabling legislation and they usually apply domestic substantive law—a perfectly acceptable outcome under the Rome Statute.\(^{143}\) Why is the absence of international adjudication—with substantive international criminal law—not considered more problematic? Simply because the scheme recognizes that the greatest evil is the absence of the Rule of Law, and domestic trials (not just international trials) vindicate the Rule of Law as well. True, domestic trials hopefully result in fair substantive outcomes as well, though they are also valuable under the complementarity scheme because they vindicate the Rule of Law as an avenue of first resort.\(^{144}\)

If the Rule of Law conception is correct, we also need to reinterpret the anti-impunity norm that underlies much of international criminal law.\(^{145}\) If procedure is inherently valuable, then punishing criminals for their culpable conduct is not the primary function of international criminal justice, as the traditional understanding of the anti-impunity norm suggests. The goal is not just preventing international criminals from escaping their just deserts, but insisting that no conduct stands outside the scope of legal regulation. In far away places where the Rule of Law has broken down there will be an

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\(^{140}\) The distinction between substance and procedure is often taken for granted by international lawyers, though the dividing line is difficult to draw. See Fletcher, *Basic Concepts of Criminal Law*, supra note 135, at 7-23.

\(^{141}\) This idea was suggested to me by Frédéric Mégret.

\(^{142}\) See Rome Statute, art. 17. For a discussion, see Heller, *supra* note 132, at 256 (discussing whether procedural failings at the domestic level allow the international court to seize jurisdiction over a situation).

\(^{143}\) See Rome Statute, art. 17(1) & 17(2).

\(^{144}\) For a full discussion of the relevance of substantive outcomes to the Rule of Law, see *infra* Part III B1.

\(^{145}\) See also *supra* note 19 and related text.
international legal institution that insists on vindicating the Rule of Law.

None of this entails that substantive law is irrelevant. Nor does the argument imply that punishment is irrelevant. Both are central to our understanding of international criminal law. But the current emphasis on substantive criminal law and punishment has led us to turn the equation upside down. Subjecting behavior to legal adjudication is the central aspect of the international trial from which all other elements then flow. Once we are committed to ensuring an international procedure to vindicate the Rule of Law, then and only then do the demands of substantive law and punishment come into play, not the reverse. The distinction is subtle.

B. Objections to the Rule of Law Conception

Before continuing with the practical consequences of the Rule of Law conception, we should consider and respond to two objections. The first deals with the relationship between procedure and substance and the second questions whether we have met our burden of developing a full fledged account of the Rule of Law.

1. Procedure without Substance

The first major objection is that it is incoherent to speak of procedure without substance or to speak of procedure as preceding substance. There are at least two versions of this objection. First, procedure is never independent of substance because the only way to identify "fair" procedures—procedures that vindicate the Rule of Law—is to determine which procedures produce the right outcomes. If one cannot define the procedures without reference to the outcomes, then it seems impossible to think of the procedural aspect as anything other than instrumental. The second objection is that procedure is necessarily secondary because it is impossible to imagine an international trial—or any criminal trial—without substance. Although we argued earlier that applying procedure and vindicating the Rule of Law is more important than applying the substantive law, it is impossible to hold a trial that is pure procedure. This implies a reductio ad absurdum, i.e. we have given procedure far too prominent a place in our theory. Maybe applying substance and producing the right outcomes (punishment for the culpable) is the primary rationale.

The first objection appeals to procedural justice and its alleged indepen-
dence from substantive justice. One way of understanding the objection is to think of a well-known debate between Habermas and Rawls over competing conceptions of the public use of reason. Habermas advanced a procedural theory that stemmed from the legitimate public use of reason—a conception that he claimed was far more modest that Rawls’ substantive theory of justice as fairness.\textsuperscript{146} It would appear that this article advances a quasi-Habermasian vision of international trials that relies on procedural justice.

Rawls’ response to the objection was to insist that procedural justice and substantive justice were connected because the fairness of the procedures (whether in the political or legal sphere) depended in part on whether they produced the right (i.e. fair) substantive outcomes.\textsuperscript{147} It was therefore implausible for Habermas to suggest that his own account could be purely procedural. As support, Rawls referred to the classic procedure for fairly dividing cake: one person cuts the cake while the other person selects the piece he or she wants.\textsuperscript{148} The procedure is fair, in part, because it produces the right outcome (equal slices). Procedures for justice, whether political or legal, share the same connection as procedures for cake-splitting, though they are admittedly more complex.\textsuperscript{149} The argument, if accepted, suggests that international criminal procedure has no intrinsic value. International criminal procedure works only when it produces the right outcomes (i.e. convictions for the guilty, acquittals for the innocent, restoration of peace and security), which is a completely instrumental equation.

The objection, as applied to our argument here, is a straw man and need not be directly demolished; Habermas need not be rehabilitated in the face of the Rawlsian objection. Even Rawls admitted that though “procedural and substantive justice are connected and not separate... [t]his still allows that fair procedures have values intrinsic to them—for example, a procedure having the value of impartiality by giving all an equal chance to present their

\textsuperscript{146}See generally Jürgen Habermas, Reconciliation through the Public Use of Reason: Remarks on John Rawls’s Political Liberalism, 92 J. Phil. 113 (1995).


\textsuperscript{148}See Rawls, supra note 147, at 422.

Applying this insight to our discussion, it is clear that even if the fairness of international criminal procedure is largely dictated by the fairness of the outcomes that it generates, this is not to say that the value of international criminal procedure stems wholly from the fairness of the outcomes it generates. True, the value of international procedure may be partly, even largely, derived from the fairness of the substantive outcomes it generates. But this value does not subsume the entire value of the procedure; some of its value stems from outcomes, some from intrinsic qualities. The problem is that the intrinsic value of international criminal procedure has been systematically overlooked. Neither the scholarly literature nor the case law gives this intrinsic value the prominent attention that it deserves. The Rule of Law conception corrects this oversight and refocuses our attention on the value of international criminal procedure in vindicating the Rule of Law.

The second objection suggests that it is impossible to imagine an international trial without substance and therefore procedure is not truly independent of substance. A trial without substantive law would have no value, according to this objection, so procedure cannot have value independent of the substantive law that is applied. The objection fails because it confuses substantive law with substantive outcomes. The claim asserted here is simply that international criminal procedure has an intrinsic value independent of the fairness of its substantive outcomes. This does not imply that one could hold a trial with only procedure and no substantive law—an absurdity. Rather, the value of the procedure is not wholly derived from the fairness of the substantive outcomes that it generates—in this case punishment or exoneration.

2. Rounding out the Rule of Law Conception

One might also object that this account is incomplete because we have not detailed the exact content of what qualifies as the “Rule of Law”—an essentially contested concept that may be difficult or impossible to define. Is the existence of a criminal justice system with lawyers and judges sufficient to qualify as the Rule of Law? Is a written constitution (with due process protections) required? If so, which ones: the right to remain silent, the right to face the accuser, etc.?

150 See RAWLS, supra note 147, at 421-22.
the right to counsel at public expense, the right to a speedy trial, the right to indictment? The list is problematic since even well-respected jurisdictions differ in their commitment to these principles. Having failed to adequately defend a robust and detailed conception of the Rule of Law, the objection implies that the Rule of Law conception of international criminal procedure is fatally flawed, or at the very least incomplete until a promissory note is redeemed.

It is incomplete perhaps, but not fatally flawed. The Hart-Fuller debate exposed a rift over whether the Rule of Law was a purely procedural norm or whether it embodied substantive fairness. Fuller argued persuasively that even if the Nazi legal system had many of the procedures of a well-developed legal system, it did not operate under the Rule of Law because the substance of its lawmaking violated intuitive moral notions of justice and fairness. Even if one accepts the Fuller position, which mixes substance and procedure together to form the basic building blocks of the Rule of Law, it is still possible to think of the Rule of Law in elliptical terms. The content of the list is contested, but that does not tell us much. The fact that the list is contested does not mean the concept is trivial or that the concept is not theoretically useful (in pragmatist terms). Such debates merely indicate that the concept is used as the center for discussions regarding justice in particularly sticky situations. As applied to our current discussion, the concept will be contested as we debate whether a particular international tribunal or domestic court is sufficiently developed to qualify as vindicating the Rule of Law. This demonstrates that the concept works exactly as it should.

C. Practical Consequences

Having defended the Rule of Law conception against these objections, it is time to evaluate the consequences of this shift. Is this largely a theoretical

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152 Cf. Waldron, supra note 151, at 154.
154 See also Lon L. Fuller, THE MORALITY OF LAW (1964).
156 See Waldron, supra note 151, at 154.
157 Id. at 162-63.
reorientation, or does it have practical consequences as well? This section considers several practical consequences which arguably flow from this theoretical reorientation. There may be others as well. But the brief list that follows will start us down the path of reconsidering some of the basic elements of the international trial.

1. Respecting Local Procedures

The first practical consequence that flows from the Rule of Law conception should be a recognition that the international trial functions as a stand-in for local Rule of Law. The international trial vindicates the Rule of Law by adjudicating conduct that should have been dealt with by domestic police officers, prosecutors, and judges. Given this gap-filling nature of the international trial, it makes sense that international criminal procedure should be more sensitive to the local procedure that it replaces.\(^{158}\)

At a practical level, this counsels against a one-size fits all system of international criminal procedure and the creation of a static body of procedural law meant to apply at all tribunals in all parts of the world. Indeed, recent scholarship regarding international criminal procedure seems to be moving in this direction, insofar as it seeks to establish general and universal rules and principles of international criminal procedure.\(^{159}\) The result is a static view of the international trial wherever it is conducted. This goal is thought to be consistent, and perhaps even required, by our ambition of turning international criminal procedure into a fully developed and scientific field of law.\(^{160}\)

If the Rule of Law conception is correct, we might wish to resist this temptation. Instead of a static model of international criminal procedure, a more flexible approach would allow for specific procedural innovations in some places and not others, depending on the expectations and legal norms of the local culture. If international criminal procedure will vindicate the Rule of Law that evaporated by the collapse of the domestic legal order, international criminal law should echo the domestic system. The creation of specialized hybrid tribunals pushes in this direction, each with their own

\(^{158}\) See Alvarez, supra note 126, at 409.

\(^{159}\) See supra note 16 and related text.

national procedure and staffed by some domestic jurists, while the creation of a permanent ICC, with a single set of procedural rules and staff, pulls in the opposite direction.

One obvious objection is that there is no reason that international criminal procedure ought to respect or replicate deficient local systems, especially when they are corrupt, procedurally undeveloped, or fall below basic standards of due process. Nothing in the Rule of Law conception requires that we respect these deficiencies and replicate them at the international level. To understand why, it is helpful to view the issue through both the lens of the victim and the defendant.

From the perspective of the victim, the local procedures represent their expectations about how the law will respond to violations of the criminal law. These expectations are of more than just psychological comfort. They represent a social contract between a citizen and his or her community or nation, an understanding about how local officials will respond to allegations that the legal order has been violated. This expectation is implicit in the Rule of Law. Part of living under the Rule of Law means that officials will follow through on their pre-existing announcements about how such claims will be treated by the system. Citizens rely on such pronouncements and expectations.

However, where a local system never dealt with such complaints appropriately, the international system obviously need not replicate such inaction. Rather, international criminal procedure ought to be flexible enough to invoke procedures relied upon by victims that such victims reasonably consider to be constitutive of living under the Rule of Law in their home state. To the extent that no adequate local procedures exist on that particular issue, international criminal procedure can then exercise its gap-filling prerogative.

From the perspective of the offender, local procedures represent their expectations about how guilt will be adjudicated in light of allegations of criminal impropriety. This too represents a form of social contract, in the sense that all citizens are comforted by the knowledge that the executive’s power to detain and punish is bounded by a judiciary with predefined procedures for making such determinations.

161 See Alvarez, supra note 126, at 403 ("For victims of mass atrocities, international justice is not indistinguishable from national justice. The survivors of mass atrocities cannot reasonably expect, nor are they likely to receive, the same thing from both processes.").
162 Cf. Alvarez, supra note 126, at 412-13 ("[T]he ICTR’s jurisdictional primacy is not premised on greater fairness to defendants but on the flawed premises of the international legal paradigm. The rules and procedures for the ad hoc tribunals are justified on the basis that they
This leads to a corollary of the problem considered above. If an offender relies on systems of procedure that are inherently skewed against meaningful review of criminal allegations, must international criminal procedure replicate the local system's infirmities? Certainly not, and here we can refer to threshold requirements for procedural rights codified in human rights instruments.\(^\text{163}\) International criminal procedure is bound to respect due process protections, but after that minimum floor is reached, the design of the procedural system should reflect local procedures to the extent that it is consistent with a meaningful system of legal review.

This suggests a new gloss on the traditional understanding of the principle of legality. Typically, legality is understood to involve pre-announcement of criminal law, either in the form of *nulla poena sine lege*, *nullum crimen sine lege*, or *nullum crimen sine lege scripta*. And this is usually cashed out in terms of substantive law: defendants cannot be prosecuted for conduct not previously defined as criminal by legislative enactment. But the preceding analysis places a different gloss on the principle of legality.\(^\text{164}\) Do defendants have a right to have legal allegations against them adjudicated according to pre-existing procedures for which they had adequate notice? If indeed the point of international criminal procedure is to vindicate the Rule of Law, then some consideration to this principle is warranted, especially if the change in procedure from the local to the international involves such a substantial increase in legal liability that it will change the outcome of the legal proceeding.

That being said, the Rule of Law conception does not entail a procedural principle of legality that prevents the international system from imposing an international procedural device that did not previously exist at the local level. This result would be absurd and would violate the entire idea of the Rule of Law conception: that criminal conduct should always receive meaningful scrutiny, even if that scrutiny must be imposed at the international level when lawlessness takes over at the domestic level. This is at the heart of the Rule of Law conception. Consequently, the principle of legality demands that the international system take into account the meaningful

\(^{163}\) See ZAPPALÀ, *supra* note 71, at 247.

\(^{164}\) Cf. FLETCHER, *supra* note 135, at 206-11.
expectations of a defendant with regard to how their fate will be decided, but only insofar as such expectations are consistent with creating a system that vindicates the Rule of Law in the first place.

2. Guilty Pleas and Plea Bargaining

The Rule of Law conception also counsels caution when considering guilty pleas and plea bargaining. Both are areas of continuing controversy in the literature. The ICTY rules originally contemplated guilty pleas but included no explicit procedures for plea bargaining, though the exigencies of the tribunal's operation spurred officials to gradually develop an informal system of plea bargaining. But it is less structured than the U.S. system.

Allowing a defendant to plead guilty in return for a reduced sentence has several obvious benefits, including increasing judicial efficiency by reducing the number of trials, giving defendants an incentive to confess and testify against their superiors, giving defense attorneys the opportunity to reduce risk for their clients, and allowing prosecutors to complete their work on schedule. Victims may get satisfaction from defendants who acknowledge their actions, tell the truth, and even apologize.

But the increased incentives and efficiency gains are not achieved without cost. The most important cost is that some allegations against the defendant are never adjudicated according to the rich procedures of the trial; they are conceded by the defendant in pro forma fashion. The fact that a defendant concedes to certain facts or conclusions of law is not the same as having these conclusions determined according to a judicial process ruled by established procedure. The latter is the result of precisely the kind of rule-of-law

166 COMBS, supra note 19, at 223.
167 Id. at 58. See ICTY Rules, Rule 62; ICTR Rules, Rule 62.
168 The early experiments with plea bargaining at the ICTY were confused. Erdemović entered into a specific plea bargain with prosecutors but the court was told that the plea was not in exchange for a sentence. COMBS, supra note 19, at 61. Jelisić pled guilty but still received a 40 year sentence. Id.
169 Id. at 62.
170 Id. at 224.
determinations that are related to the intrinsic goals of international criminal procedure; the former are the result of pragmatic Realpolitik and hardly vindicate the Rule of Law with regard to those specific legal allegations. In some cases, the facts conceded are bargained away so the defendant pleads guilty to a small fraction of the allegations. But vindicating the Rule of Law means adjudication according to procedure for its own sake—not simply punishment. Guilty pleas skip the former step and proceed via negotiation to the second step. This does not violate the Rule of Law per se, but it does suggest that there are hidden costs associated with removing legal allegations from the process of trial adjudication.

The exact same considerations apply to guilty pleas outside the context of plea bargaining. There might be circumstances when a defendant wishes to plead guilty for reasons other than a bargained-for reduction in sentence: accepting responsibility for one’s actions, apologizing, showing remorse, and throwing oneself on the mercy of the court to receive leniency. There might be other considerations as well. There is no a priori reason why such guilty pleas must be allowed. Many civil law jurisdictions, as well as U.S. military courts martial, restrict the ability and manner in which a defendant can plead guilty; it is hardly an absolute right. Doing so robs the system itself of an important opportunity.

3. Amnesties

Our meta-theory of international criminal procedure also provides a new understanding of what makes amnesties so problematic for international criminal law. Traditionally, public international lawyers and diplomats have issued cautious support for amnesties, whether contained in bilateral or

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171 Id. at 63 (explaining introduction of “charge bargaining” at the ICTY).
172 The standard model in the plea bargaining literature is that plea bargaining takes place in the shadow of trial, i.e. parties bargain in order to avoid a better outcome that they would otherwise receive at the end of the trial. See Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950 (1979). The standard model is not without its critics. See Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463 (2004).
174 Id.

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multilateral peace treaties or codified simply by domestic legislation. Such amnesties are often the only avenue of getting a repressive regime to relinquish power. Few in a position of power will voluntarily give up power when doing so directly results in a criminal trial for their conduct. Supporting and encouraging these amnesties has obvious advantages: stopping civil wars faster by encouraging government forces to relinquish power. In turn, human rights abuses and violations of international criminal law will end sooner. And it goes without saying that the twin aims of U.N. Charter system—restoring international peace and security—may also be advanced.

Criminal lawyers, and international lawyers with a criminal bent, have traditionally been skeptical of such arrangements. On one level, the problem stems from a suspicious case of utilitarian balancing: forego the demands of individual justice against one defendant in order to increase overall social stability, perhaps even promote nation-building (or rebuilding, as it were). The suspicion is usually grounded by some variant of the anti-impunity norm. The anti-impunity norm in these contexts is usually given one of two glosses. On the first version, there is an inherent wrong involved in letting perpetrators go free; on the second version, promoting impunity will only damage the very utilitarian considerations (peace and stability, nation-building, stopping human rights violations) in the long run, by giving future perpetrators hope that they might escape the consequences of their actions by negotiating amnesties.

Our meta-theory of international criminal procedure provides an alternative account for skepticism about amnesties. Defendants not only escape punishment but, more importantly, defendants escape the rigors of the criminal process, irrespective of whether they will face punishment or not. It violates our conception of the Rule of Law to exempt individuals from the procedural process that will evaluate their conduct. This is not to say that failure to punish might not also violate the Rule of Law. It arguably does.

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176 Cf. CASSESE, supra note 42, at 5.
177 Id.
178 Id.
179 See M. Cherif Bassiouni, Searching for Peace and Achieving Justice: The Need for Accountability, 59 LAW & CONTEMP. PROBS. 9, 12 (1996) ("Sometimes this dichotomy is presented along more sophisticated lines: peace now, and justice some other time. The choice is, however, frequently fallacious and the dichotomy may be tragically deceptive. Surely no one can argue that peace is unnecessary and preferable to a state of violence. But the attainment of peace is not necessarily to the exclusion of justice, because justice is frequently necessary to attain peace.").
180 See, e.g., Pensky, supra note 19, at 6.
But failure to punish is arguably secondary to failure to adjudicate. Although the two usually coincide in most amnesties, they are conceptually distinct.

A thought experiment might be useful.\footnote{This thought experiment was suggested to me in conversation with Max Pensky.} Although it is rare, consider a strongman who gives up political power in exchange for an amnesty that only gives him immunity from punishment. For example, perhaps the immunity agreement states that an incoming executive official promises that, in the event of the defendant’s conviction, his sentence will be commuted or he will be pardoned. In contrast, consider the individual whose immunity agreement provides protection from arrest, prosecution, and punishment for crimes enumerated in the agreement. Such agreements short circuit the entire criminal process. It is clear that the protection-from-punishment agreement is deeply problematic and threatens every ideal that a criminal lawyer holds dear. But the blanket protection-from-trial is offensive to a greater degree, and the problems stem from more than just the failure to punish. A blanket exemption from all criminal process violates the Rule of Law and is only marginally better than the lawlessness that international criminal law seeks to replace.

4. In Absentia Trials

In absentia trials are frequently discussed, though rarely the subject of serious consideration. Although the recently created Special Tribunal for Lebanon allows in absentia trials,\footnote{See Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, U.N. Doc. S/RES/1757 (May 30, 2007), art. 22. The ICTR Rules allows trials to continue if a defendant who makes an initial appearance before the tribunal subsequently refuses to attend. See ICTR Rules, Rule 82bis (Mar. 14, 2008) (but requiring counsel in defendant’s absence).} scholars and practitioners usually assume that the presence of the defendant is always necessary for the continuation of a trial.\footnote{Compare with Schabas, supra note 4, at 335.}

There are multiple reasons for this assumption, though the strongest is a perceived due process protection.\footnote{Id. at 353-54.} Ever since (if not before) the Russell Tribunal by Sartre, Bertrand Russell, and other European intellectuals of U.S. officials for war crimes in Indochina,\footnote{See generally AGAINST THE CRIME OF SILENCE: PROCEEDINGS OF THE RUSSELL INTERNATIONAL WAR CRIMES TRIBUNAL (John Duffett ed., 1968).} lawyers have been skeptical of
in absentia war crimes trials, notwithstanding the fact that plenty of civil law jurisdictions allow trials in the absence of the accused, especially when the accused has received notice of the proceedings but has voluntarily absented himself from the jurisdiction of the court in order to avoid prosecution.\footnote{The ICC can hold a confirmation hearing in the absence of the accused, but not a trial. Compare ICC Rules, Rule 125 \textit{with} Rome Statute, art. 63(1) ("The accused shall be present during the trial.").}

Although some in absentia trials such as the Russell Tribunal were kangaroo courts, it is doubtful that they were kangaroo courts \textit{because} they proceeded in absentia. Rather, it is more likely that the farcical nature of such courts is dependent on other factors.

Our meta-theory of international criminal procedure suggests that we ought to tread carefully before establishing a blanket prohibition on the use of in absentia trials. When a defendant escapes the jurisdiction of an international court, they do more than simply rob the tribunal of the opportunity to punish them.\footnote{Cassese concludes that it would be an "extreme solution" to stay proceedings for defendants who escape after the commencement of their trial. \textit{See} CASSESE, \textit{supra} note 32, at 393-94 (defendants would be able "to stultify international justice outright").} They also deprive the tribunal of the power to exercise its procedural functions to adjudicate behavior. Even assuming that there is no possibility of punishing a defendant who cannot be located and might never be found, the trial still has an intrinsic value of vindicating the Rule of Law. The important part is having the trial itself, not just punishing the defendant.

Holding in absentia trials risks violating the due process rights of defendants, who by definition do not assist in their own defense, do not select their own counsel, do not confront the witnesses and evidence that the prosecution has marshaled against them, and may or may not have notice that their fate is being decided by an international court.\footnote{\textit{Cf.} Schabas, \textit{supra} note 4, at 353-54 (noting that Human Rights Committee case law has not categorically prohibited \textit{in absentia} trials).} Of course, a defendant may be partly responsible for these consequences if they have received notice but have voluntarily fled the jurisdiction of the court.

In the final analysis, the question is whether the due process rights of the defendant are sufficiently grave that they outweigh the intrinsic value of the international trial as a procedural vehicle that vindicates the Rule of Law.\footnote{\textit{See id.} at 380 (discussing balancing).} In this limited forum I will not hazard an answer; the variables in the calculation are complex. However, I do insist that this formulation of the balancing question is as important as the traditional formulation that focuses
more on punishment outcomes. Putting a procedural gloss on the question highlights that in absentia trials could, in theory, promote international criminal law’s objective of subjecting otherwise lawless activity to the critical gaze of legal evaluation, even in the absence of an actual defendant. Whether this goal is worth the costs is another matter. Another way of putting the point is whether in personam adjudication is an essential (or dispensable) element of the Rule of Law.

CONCLUSION

This article has not defended, nor did it attempt to defend, a complete theory of international criminal procedure. This was never the aim. However, we have developed a foundational theory that explains the central role of criminal procedure in the overall structure of international criminal law. On top of that foundational structure, specific questions of procedure remain, many of which are not determined by the foundational account offered here. Secondary procedural theories must be constructed in order to develop a sui generis system, and the scholarly literature now contains a vast array of workable theories. Underlying all of them ought to be the meta-theory that international criminal procedure vindicates the Rule of Law. The meta-theory as I have outlined it here will certainly influence the direction of the second-order theories, but it will not fully determine their outcome—it is simultaneously ambitious and modest.