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Introduction

Using Courts to Heal Countries – Transitional Justice and International Criminal Law

I THE PROBLEM: CONTEMPORARY CHALLENGES TO INTERNATIONAL CRIMINAL LAW

In August of 1992, images of starving men held in Bosnian Serb detention camps raised the specter of genocide in Europe for the first time since World War II. The following year, the United Nations Security Council passed resolution 827, setting up the International Criminal Tribunal for the former Yugoslavia (ICTY), the first of several ad hoc tribunals inaugurated in the 1990s[1] carrying the threat of criminal sanctions for perpetrators of war crimes, and the promise of justice (as well as international recognition) for victims. The International Criminal Tribunal for Rwanda (ICTR) quickly followed, and the permanent International Criminal Court (ICC) came into being less than a decade later.

The fervor for international criminal justice was animated, at least in some measure, by the promise of law to advance political liberalism (Slaughter 2000) and, therein, peace. In the twentieth century, rule-of-law liberalism[2] underwrote prosperous, democratic, and human-rights-respecting nations (which came to include Germany and Japan, against whom the first international criminal tribunals were constructed) and eventually claimed victory in the Cold War (Fukuyama 1992). It was therefore but a short ideological step to seek to apply law, as operationalized by international courts, to resolve internecine conflict, an experiment that reached its pinnacle with the creation of the ICC in 2002.

[1] A list of such international criminal tribunals from the 1990s and beyond would include the ad hoc tribunals of the ICTY (1993), the International Criminal Tribunal for Rwanda (1994), the Ad Hoc Tribunal for East Timor, Indonesia (2001), the Special Court for Sierra Leone (2002), the Extraordinary Chambers in the Courts of Cambodia (2003), the Special Tribunal for Lebanon (2007), and the permanent International Criminal Court (2002).

[2] Rule-of-law liberalism refers to political liberalism regulated by legalism. In short, it is a commitment to transparent government processes equally applied to all actors in society. The genesis and political work accomplished by these ideas is explored in depth in Chapters 1 and 2.

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More than a decade after its creation, the optimism and enthusiasm that accompanied the ICC's creation is now significantly muted even in the most committed quarters, however. At the time of writing, three African countries have declared their intent to exit the statutory regime constructing the ICC.[3] This follows a recent dismissal by the ICC of an indictment against Kenyan Prime Minister Ruto,[4] citing the same reasons that accompanied its dismissal of an indictment against Kenya's President Kenyatta in 2014:[5] whole-scale witness tampering, including untimely deaths[6] and the recanted testimonies of several prosecution witnesses, which destroyed the prosecution's case. Together with the ICC's "hibernation" of its case against Sudan's Al-Bashir[7] due to repeated failures of member states to turn him over to the court, these abandoned prosecutions against leaders charged with violations of humanitarian law challenge the ICC's capacity to make good on its mandate to "end impunity." The situation at the ICTY, as its practice draws to a close, is arguably no less challenging; on March 31, 2016, the ICTY's ten-year prosecution of Serbian far-right politician and paramilitary leader Vojislav Šešelj ended in acquittal,[8] joining several other failed prosecutions against those alleged to be most responsible for the war.[9] Even the ICTY's "successful" prosecutions generate complaint, such as the mixed reception to the Karadžić (2016) and Mladić (2017) verdicts. Both of these defendants were found guilty for crimes including genocide at Srebrenica, but acquitted of genocide across

[3] South Africa; Burundi; The Gambia.

[4] *The Prosecutor* v. *William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09–01/11 (Int'l Crim. Ct. April 5, 2016).

[5] *The Prosecutor* v. *Uhuru Muigai Kenyatta*, Case No. ICC-01/09–02/11, charges withdrawn (Int'l Crim. Ct.).

[6] See, for example, "Discovery of witness's mutilated body feeds accusations of state killings" *The Guardian* January 6, 2015, www.theguardian.com/world/2015/jan/06/witness-mutilated-body-kenya-government-killing-meshack-yebei-william-ruto.

[7] Cite to Al-Bashir "ICC chief prosecutor shelves Darfur war crimes probe" *The Guardian* December 20, 2014, www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan.

[8] *Prosecutor* v. *Vojislav Šešelj*, Case No. IT-03–67 (Int'l Crim. Trib. for the former Yugoslavia March 31, 2016). The Office of the Prosecutor appealed, and in April 2018 the appeals chamber sentenced Šešelj to ten years' prison for events related to a 1992 speech; this sentence is the equivalent of time served. *Prosecutor* v. *Vojislav Šešelj*, Case No. MICT-16-99 (Int'l Residual Mechanism for Yugoslav Crim. Trib. April 11, 2018). Šešelj represented himself and beleaguered the institution with motions and demands; his is a stunning example, more stark even than that of Slobodan Milošević, the president of Yugoslavia who famously used the ICTY as a foghorn, of the efficacy of a *defense de rupture* at international criminal law. *Defense de rupture* is discussed further in Chapter 2.

[9] See, e.g., *Prosecutor* v. *Ante Gotovina, Ivan Čermak, and Mladen Markač*, Case No. IT-06–90-PT (Int'l Crim. Trib. for the former Yugoslavia November 16, 2012); *Prosecutor* v. *Perišić*, Case No. IT-03–69 (Int'l Crim. Trib. for the former Yugoslavia February 28, 2013); *Prosecutor* v. *Jovica Stanišić and Franko Simatović*, Case No. IT-03–69 (Int'l Crim. Trib. for the former Yugoslavia May 30, 2013); *Prosecutor* v. *Vojislav Šešelj*, Case No. IT-03–67 (Int'l Crim. Trib. for the former Yugoslavia March 31, 2016) and *Prosecutor* v. *Slobodan Milošević*, Case No. IT-02–54 (case uncompleted due to Milošević's death) (the evolving pattern of convicting low-level perpetrators and acquitting leaders is discussed further in Chapter 4).

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Bosnia.[10] Writing about the Karadžić verdict in the Guardian,[11] Ed Vulliamy, one of the journalists whose reporting in August 1992 brought the horrors of the war to international attention, spoke of the empty "triumphalism" of a tribunal unable to find Karadžić liable for genocide in rural areas of Bosnia, where official policies of ethnic cleansing disappeared whole villages whose inhabitants are still mostly unaccounted for, likely buried in mass graves still undiscovered.[12]

The political and workaday problems faced by international criminal tribunals (ICTs) such as the ICTY and the ICC serve to illustrate a deeper challenge to their practice. International criminal tribunals have built an impressive institutional legacy: they have produced reams of jurisprudence and hundreds of judgments, and have spawned an industry. Yet as regards the tall order of respect for the rule of law, recognition of "core" rights,[13] and value of transparent governance (i.e., the liberal aims that underwrote the international criminal law project), ICTs' records are, at best, mixed. Although war has not resumed in Bosnia, Rwanda, Sierra Leone, and Lebanon, none of these countries has experienced a concurrent embrace of rule-of-law liberalism. In each of those places, international humanitarian norms are generally celebrated when used against one's enemies, and rejected as means to organize oneself or one's friends. In other words, the experience of post-conflict countries subjected to international criminal justice to date suggests that international criminal law remains a political tool, not an ideological framework, in the regions where it has been applied. Moreover, and perhaps more significantly, as the bold doctrinal pronouncements of early ICT decisions are muted by later jurisprudence, and as ad hoc tribunals close without replacement, it appears that the powers bankrolling the international criminal law experiment may be becoming as unconvinced as the local populations subject to it. This is of course in stark contrast to the

[10] *Prosecutor* v. *Radovan Karadžić*, Case No. IT-95–5/8 TC (Int'l Crim. Trib. for the former Yugoslavia March 26, 2016); *Prosecutor v. Ratko Mladić*, Case No. IT-09–92 TC (Int'l Crim. Trib. for the former Yugoslavia November 22, 2017).

[11] Ed Vulliamy, "I saw Karadžić's camps. I cannot celebrate while many of his victims are denied justice" *The Guardian* March 27, 2016, www.theguardian.com/commentisfree/2016/mar/27/i-saw-radovan-karadzic-camps-cannot-celebrate-verdict-ed-vulliamy.

[12] See, for example, continuing grisly discoveries of mass graves in the Prijedor region: "Bosnia Finds 600 Body Parts in Mass Grave" *Balkan Insight* October 29, 2015, available at www.balkaninsight.com/en/article/six-hundred-mortal-remains-found-in-bosnia-grave-10–29-2015. Ed Vuillaimy, "Bringing up the Bodies in Bosnia" *The Guardian* December 6, 2016, available at www.theguardian.com/world/2016/dec/06/bringing-up-the-bodies-bosnia.

[13] "Core" rights are protected by international humanitarian law, and are those rights that "may never be suspended at any time or in any circumstances." They include prohibition of slavery, torture, and cruel, inhumane, or degrading treatment. See the International Red Cross Commentary on the Geneva Conventions and their related protocols, at: www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions. International humanitarian law (the law of war) is operationalized by international criminal law, which recognizes four core crimes: war crimes, crimes against humanity, genocide, and aggression. This is further discussed in Chapters 1 and 2. On the overlaps and distinctions between international humanitarian law and human rights law, see Provost 2003; Teitel 2012, and discussion in Chapters 1 and 2.

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central ideological and institutional role that rule-of-law liberalism occupies in these donor nations.

If recognition of core rights is a central achievement of the twentieth century, pushing a global "justice cascade," (Sikkink 2011) and international criminal law is the embodiment of this revolution at a global level, then the question is, what happened? How have ICTs failed to convince their audiences, both local and international? This is the problem animating *Model(ing) Justice*. The book takes as its subject a case study of history's most productive and respected ICT, the ICTY. No ad hoc tribunal has worked longer or produced more jurisprudence than the ICTY, and this makes the ICTY the best test case students of modern international criminal justice have for assessing the field's development. Drawing from emblematic examples of ICTY practice and its evolution, *Model(ing) Justice* demonstrates that the practice of international criminal law does not reflect the ideology of political liberalism driving it.

Model(ing) Justice makes this argument through the development of two theories that describe the paradoxes of illiberal practice in pursuit of rule-of-law liberalism: (1) the international criminal justice template and (2) the problem of non-derogable legal doctrine. Together, these two theories detail the limitations inherent in focusing on liberal outcomes in place of liberal processes, and demonstrate how ICT practice has often consciously and unapologetically departed from liberalism's constraints, a situation the book labels "post-rule of law". Part I of the book constructs and applies the two theories, tracing their emergence from the seminal International Military Tribunal (IMT) at Nuremberg through to the construction of modern ICTs. Part II examines the paradox of "progressive" international criminal law through two detailed case studies, the ICTY's development of procedural law (Chapter 3) and the central substantive legal doctrine developed in ICTY jurisprudence, the "joint criminal enterprise" (JCE) theory of liability (Chapter 4). Part III considers the soft-law elements of ICTY jurisprudence, examining the ICTY's impact in the former Yugoslavia (Chapter 5) and conflicting socio-legal constructions of "reconciliation" between two significant ICTY cases (Chapter 6). In its final chapter, the book argues that a return to process is necessary in order to retain rule-of-law ideas at the center of peace and development in this century.

II THEORIZING LAW AS A TRANSITIONAL JUSTICE MECHANISM

In the more than two decades since the ICTY's creation, a rich field has developed considering the ICTY from a transitional justice perspective (Meernik 2005; McMahon & Forsythe 2008; Orentlicher 2008, 2010, 2013; Subotić 2009; Hodžić 2010; Nettelfield 2010; Hagan & Ivković 2011; Kostić 2012; Nalepa 2012; Clark 2014; Gow, Kerr & Pajić 2014). Transitional justice is a normative and theoretical discourse rooted in law and political science (Israël & Mouralis 2014) that highlights the necessity of acknowledging past events in order to build a secure future (Huyse

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1995; Teitel 2000; Elster 2004; Hazan 2004; Kritz 2009; Quinn 2009; Olsen *et al.* 2010b; Rowen 2017). First theorized and identified in the 1980s in relation to the process of identifying and remembering illiberal state practices in South America, transitional justice exploded in the wake of the Cold War.

In most transitional justice-based assessments of the ICTY's impact in the former Yugoslavia, the scholarly debate generally ranges between those who insist that the ICTY should or will contribute meaningfully to the construction of history, progressive legal norms, and reconciliation/social reconstruction, and those who agree with this construct, but who regardless find that the data show that ICTY-generated narratives are not taking root among local populations. These empirical considerations, however, overlook the larger theoretical discussion of whether, or how, the policy and legal-consciousness-building capacities attributed to domestic courts (Scheingold [1964] 2004) might function at a transnational level. International criminal tribunals are structurally distinct from domestic courts in myriad ways, from their often-international staff, location, and procedure, to their discretionary choice of cases and lack of enforcement powers. Yet despite these important differences, proponents of using ICTs to perform transitional justice functions often look past the question of whether ICTs enjoy the same constitutive social capacity that domestic courts arguably do to assert ICTs' potential social impact. Transitional justice itself has developed into a broad and amorphous field.

Recent transitional justice literature has begun charting this boundlessness (Israël & Mouralis 2014; Vinjamuri & Snyder 2015; Ainley 2017; Daly 2017; Gissel 2016; Sharp 2018). *Model(ing) Justice* joins this literature, addressing transitional justice's theoretical indeterminacy through its introduction of (1) the international criminal justice template and its discussion of (2) the problem of non-derogable legal doctrine.

A *The International Criminal Justice Template*

Model(ing) Justice's first theoretical contribution is a tripartite prototype of international criminal justice enumerating ICTs' received benefits, *the international criminal justice template*. This is an ideal type designed to demonstrate the illiberal construct of international criminal law institutions to date. The template identifies the prototype that underlies assumptions about ICT capacity as transitional justice or governance mechanisms. This ideal type holds that ICTs (i) bring progressive international criminal law to bear on individual actors, (ii) establish the facts of crimes committed in the chaos of war or secret chambers of government and (iii) assist in social reconstruction and reconciliation through both the content and the process of their practice.

The book argues that this template emerged from the first ICT prototype, the IMT at Nuremberg; this is the subject of Chapter 1. The prototype's three elements can be divided into *first-order* functions regarding legal doctrine (the articulation of progressive international criminal law jurisprudence) and *second-order* functions regarding social impact (the capacity to articulate history and the ability to shape

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discourse and narrative). The first- and second-order functions are related, because it is the received legitimacy of the first that impacts the capacity of the second.

The first element of the international criminal justice template, the development of progressive international criminal law, is the element most directly related to ICTs' institutional design as tribunals tasked with finding the guilt or innocence of individuals through judicial processes. International criminal tribunals require international criminal legal content in order to adjudicate cases, and ICTs must necessarily make interpretations of international criminal law, which is predominantly treaty and customary international law, in order to bring it within ICT ambit. Central to the international criminal justice template's categorization is that such articulation will be "progressive." The injunction that ICTs produce progressive international criminal law is central to the legitimizing narrative for ICTs, the book shows, because ICTs often breach strict legality rules by retroactively articulating law. The principle of legality is the constraint that turns the rules associated with law into "justice" rather than the raw application of force. Retroactive articulations of law breach "the principle of legality." Yet under international criminal law, such retroactive legal pronouncements are legitimized as means of advancing rights, combatting impunity, and achieving social progress. "Progress" is therefore central to international criminal law's legitimacy, and the international criminal justice template teases out the articulation of progress as a response to legality challenges in individual adjudications beginning at the IMT, and continuing through to ICTs today.

The second and third functions of the international criminal justice template – ICTs as (ii) historians (iii) capable of pronouncing an "objective" "official version" of events that may assist a population in reconciliation – are not directly related to ICTs' primary case adjudication mandate but rather are argued to flow from it (Wilson 2011; Rauxloh 2010). These second and third "indirect" functions are the capacities imagined for ICTs that have made them central as transitional justice mechanisms. They are also the amorphous functions that are simultaneously claimed by ICTs in defense of the value of their work and rejected by ICTs as bars against which to assess their accomplishments. This leaves a conflicting situation where the ICTY justifies its value in terms of reconciliation in some circumstances[14] while steadfastly rejecting such a measurement in others.[15]

[14] The ICTY's discussion of its outreach program reads as follows:

> The establishment of Outreach in 1999, six years into the ICTY's existence, was a milestone in the Tribunal's progression to maturity. It was a sign that the court had become deeply aware that its work would resonate far beyond the judicial mandate of deciding the guilt or innocence of individual accused. With the establishment of Outreach, the Tribunal recognized that it had a role to play in the process of dealing with the past in the former Yugoslavia, one of the key challenges for societies emerging from conflict.
>
> www.icty.org/en/outreach/outreach-programme (accessed January 20, 2017).

[15] "Where did you hear that, that the ICTY does reconciliation? Where, on what website? I'd like to see it, we'll find it right now! There is only one website [that matters] and there is no mandate for reconciliation. Look in the Security Council documents, the court documents, it's not there. This

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Model(ing) Justice shows that the structure of international criminal law to date works directly to undermine ICT capacity in the spheres of value defined by the international criminal justice template. Drawing from criminal law theory and criminology studies, the book argues that ICTs as currently constructed cannot produce progressive law – the very task that animates and legitimizes them – due to their illiberal structure and function. This illiberal function, in turn, impacts ICTs' potential as socially constitutive organs, either in terms of producing official histories/narratives or in advancing reconciliation.

The international criminal justice template defines an ideal-type, notional value of ICT capacity to further transitional justice ideals. Few observers would argue that ICTs are certain to produce these outcomes; even the most idealistic, early proponents of ICTs as transitional justice mechanisms spoke of ICT *potential* to produce progressive international criminal law, establish historical fact, and effect social reconstruction (Akhavan 1998). Rather, as with Weber's ideal types (Weber 1904/1949; Swedberg 2017), or Shapiro's (1986) prototype of courts, the template's value lies in identifying the imagined, aspirational capacities surrounding ICTs as transitional justice mechanisms. *Model(ing) Justice* argues that these ideological elements of ICT capacity continue to define our expectations of ICTs, in spite of the empirical, theoretical, and historical evidence challenging ICT capacity in these areas. We know that ICTs often fail to produce progressive law, write official histories, or reconcile bitter foes. Yet these tasks, in the aggregate, continue to describe the entirety of ICTs' purpose, providing the terms and ideals against which even the most sophisticated recent assessments of international criminal law institutions measure ICTs (Subotić 2009; Nettelfield 2010; Wilson 2011; Clark 2014).

B The Problem of Non-Derogable Legal Doctrine

The book's second theoretical contribution lies in showing how the elements of the international criminal justice template, though routinely articulated or assumed as legitimizing arguments for international criminal law, are in fact structurally unachievable for ICTs. This is due to the paradoxical standard at the center of international criminal law: the *problem of non-derogation*. The scope and power of international humanitarian law lies in its protection of rights presented as "non-derogable": such rights, emerging from natural-law constructions (Sohn 1982) are immutable, inalienable, universal, and absolute, admitting no contingency or context. The absolute and universal status of core rights secures the legitimacy of those institutions of international criminal law that would try violations of these rights

idea of reconciliation has been projected on to the ICTY by diplomats. But it's ridiculous to charge the court with reconciliation . . . It is true that senior ICTY officials sometimes mention reconciliation. Goldstone, Cassese, etc. But just because some senior officials say it doesn't make it our mandate." Interview, Senior ICTY official, The Hague, May 5, 2005, notes on file with author.

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through processes approximating domestic criminal law trials, trumping positive law particulars that might prevent protection of non-derogable rights through law.

It is the use of individual criminal trials at international criminal law that triggers the problem of non-derogation. Domestic criminal law is rife with mitigating circumstances and affirmative defenses, many of which can completely protect an individual from punishment (beyond the punishment incurred by being subjected to the intrusion of the state [Feeley 1979]). Almost any definition of crime is subject to forms of derogation, alienation, and/or challenges to universality at domestic criminal law: only those crimes that fall under "absolute" or "strict" liability escape such derogation. Domestic criminal processes resist absolute liability: justice and fairness concerns advocate on behalf of the importance of context and/or intent in the adjudication of criminal culpability (Hart 1968). Absolute liability at criminal law makes for unpopular domestic policy for precisely this reason (de Than & Heaton 2013: 432–433).

International criminal law practice is challenged by the confrontation between the non-derogable norms accompanying violations of core rights with the justice and fairness demands present in criminal law. This is because natural-law-based rights face predictable structural obstacles when operationalized as sovereign-based criminal justice. At international criminal law, violations of international humanitarian law are always criminal, regardless of context. Moreover, this doctrinal insistence is central to the "progress" imagined for international criminal law, and a key element legitimizing international criminal law practice, *Model(ing) Justice* shows. In contrast to human rights legal practice, which recognizes a "margin of appreciation" that imagines the possibility of different standards for different acts in different contexts, international criminal law explicitly forbids such recognition. The catch is that, in order to legitimize itself, international criminal law forbids such recognition in the name of universally recognized human rights. In this way, human rights (though not its doctrinal tradition, specifically its recognition of context) are put in service to international criminal law. The problem of non-derogation describes the phenomenon of international criminal law that renders it closer to "strict" or "absolute" liability than to the communicative purpose (Ashworth 2009; Duff 2009) animating liberal domestic criminal legal orders.

Finally, the problem of non-derogation is made possible by the conflict of interest faced by ICTs in terms of their own accountability. International criminal tribunals generally answer to the UN or donor nations, while often serving a population distinct from the UN and donor nations, resulting in what Jan Klabbers (2015) has identified as a generalized problem of accountability characteristic of international organizations. For ICTs, accountability issues assume particular significance because the perceptions of third-party observers (the tribunals' audiences) are central to institutional legitimacy. Thus while all international organizations suffer accountability challenges, these are particularly acute for ICTs because they implicate their legitimacy and thus their efficiency.

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III STRUCTURE AND CONTENT OF THE BOOK

The book is divided into three parts of two chapters each. The book's first two chapters articulate and explore its two theoretical contributions, the structural impossibility of the prototype that governs aspirational, imagined capacity for ICTs, the international criminal justice template and the conflict between international criminal law's universalist, natural-law foundations and its application as criminal law, the problem of non-derogation. Its final four chapters apply those ideas to examples culled from ICTY practice and impact, using the work and reception of the ICTY as a paradigmatic argument for the challenges facing ICTs and international criminal law more generally. While much of *Model(ing) Justice* is rooted in the particulars of ICTY practice, procedure, and experience, its arguments are not case or circumstance specific, but rather generalizable across ICTs.

Part I, consisting of Chapters 1 and 2, develops the book's two central theories. Chapter 1 shows how the IMT at Nuremberg, the progenitor of ICTs and the immediate ancestor of the ICTY, defined an ideal type of what ICTs might accomplish, setting up the future development of transitional justice; Chapter 2 discusses theoretical, structural challenges to international criminal law's practice. Part II maps those central theories onto ICTY practice, considering ICTY procedure (Chapter 3) and the ICTY's most notorious contribution to substantive law (Chapter 4). Part III examines the second-order functions of the ICTY identified by the international criminal justice template, as historian and reconciler, to connect the theoretical shortcomings evidenced by the international criminal justice template and the problem of non-derogation to the ICTY's social "legacy" project. Each part is preceded by a short introduction to situate the reader, and readers most interested in, for example, legal constructions of reconciliation in the former Yugoslavia can skip directly to Part III, aided by the short introduction summarizing the theoretical work of Chapters 1 and 2. The comprehensive Appendix A, summarizing all ICTY decisions at the time of writing (a nearly complete record of the institution's work) is available to assist the reader in making sense of ICTY jurisprudence.

Chapter 1 demonstrates how the international criminal justice template emerges from the legacy of the IMT at Nuremberg, history's seminal ICT. The legacy of the IMT at Nuremberg credits it with several achievements beyond the adjudication of the individual cases that came before it, including recognition of the Holocaust and the construction of democratic Germany. Modern ICTs operate in its shadow. The bulk of the chapter demonstrates the emergence of an IMT legacy, where "Nuremberg" has become synonymous with social reconstruction along democratic and human rights-recognizing axes, as the basis for the international criminal justice template. The mixed reception and tangled legacy of the International Military Tribunal for the Far East at Tokyo is briefly considered, as a counter-demonstration

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of the dominant international criminal law narrative emerging from the legacy of the IMT. Finally, the chapter traces the lineage between the IMT and the ICTY.

Chapter 2 considers the ideals underwriting the ICTY against the practice of the institution, over its twenty years. The chapter argues that the transitional justice aims assigned to ICTs (which include acting as historians and models of institutional governance) derive from the social control associated with domestic criminal justice. At the end of World War II, the Allied powers formed ICTs and tasked them with public identification and punishment of those individuals "most responsible for the war." The Allied trials at Nuremberg – and, as discussed in Chapter 1, to a lesser degree at Tokyo – heralded a new era both in international law and in the Kantian (1991), political liberal project of "cosmopolitan law." When international law was retooled, via a Kantian search for total justice, from the law between states to a law capable of directly impacting individuals, the field of international criminal law was born.

The second and third parts of the book apply the theories developed in Chapters 1 and 2 to the practice and impact of the ICTY. Chapter 3 demonstrates that the ICTY's hybrid procedure sacrifices defendants' rights to procedural efficiency and institutional demand. In so doing, it fails to articulate a progressive international criminal law standard. Relying on legal positivism – the fact that each element of procedure adopted by the tribunal has roots in a balanced and just criminal procedure – the tribunal has looked past the *purpose* of the domestic criminal systems from which it has borrowed procedure. Such purpose, domestically, is always to balance the power of the state against the rights of the individual; without effective balance, the state's legitimacy – and with it, law's legitimacy and capacity as a social agent – is threatened. While the debate between the letter of the law and the purpose of the law is a classic one within legal studies (Hart & Fuller 2010), the ICTY articulates a jurisprudence the book labels "post-rule of law" because it rejects an interest in legal purpose altogether.

Chapter 4 considers the paradox of legitimizing the work of ICTs through their articulation of progressive law by examining the legal substance of the ICTY's controversial articulation of JCE, a theory of liability that stretches "commission" along a common law conspiracy scale to reach, at its farthest point, crimes that are "foreseeable consequences" of individuals' projects and actions. Following the troubled, and troubling, development of the ICTY's JCE jurisprudence, this chapter demonstrates the difficulty of articulating the content of illegality for international criminal institutions, where institutions such as the ICTY are required to translate non-derogable human rights norms into criminal law specifics that can be applied to individuals.

Part III considers the second-order functions of the international criminal justice template, the social impact of ICTs, by looking at the ICTY's work as a historian and reconciler. Chapter 5 considers the distinction between the history uncovered by the ICTY's case law and the narratives of the war that obtain across the former

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Yugoslavia. Chapter 6 contrasts the divergent treatment of two "remorseful" defendants before the ICTY to consider problems in the tribunal's practice.

IV JUSTICE MODELS AND MODEL JUSTICE

Published as the ICTY closes down, reflecting on ICTY practice and looking to the future, *Model(ing) Justice* has several goals. Centrally, as demonstrated by the title, it seeks to consider the distinction between that justice which rule-of-law liberalism aspires to construct and which follows from a Lockean social-contract-legitimizing government (which might be considered a "model" justice, communicating shared norms transparently, predictably, and with equanimity) against the illiberal justice practiced by ICTs at present, i.e., the institutional practice they are in fact "modeling."

International criminal law draws on the Kantian project of "cosmopolitan justice," seeking a universal human rights standard (Rawls 1999, 2001; Kymlicka 1992). In the 1960s and 1970s, lawyers and activists "rediscovered" law's humanitarian capacity. In works like *A Theory of Justice* (Rawls 1971) and in the creation of organizations like Amnesty International and Helsinki Watch, law was set at the center of the discourse of fairness and political legitimacy. These supporters of law as insurer of human rights placed stock in law vesting at the level of the individual (Dworkin 1986) whereas realists, rationalists, and liberals had always viewed international law and actions as a purview of the state. Günther Teubner (2015: 10) calls these former constructions "sociological natural law" because they "use[s] societal constitutions to reconstruct the rationalities of diverse subsystems within the legal system and transform them into binding principles." In this projection, international law is universal based on its underlying morality. Such morality may be based on fairness (Franck 1995) or universality (Koh 1997). These "universal" fairness principles are the substitutes for consent, i.e., that which relays legitimacy, in public international law.[16] International criminal law presents a series of moral claims drawn from a natural-law base regarding the universal nature of the rights that it recognizes, and thus does not require the "consent" of individuals because its universality constitutes its legitimacy.

Rule-of-law liberalism argues for the didactic value in modeling justice for states perfecting their own governance structures. International criminal tribunals such as the IMT at Nuremberg and the ICTY have been fêted as such model institutions, where part of their value lies in their capacity to teach a target populace. In calling attention to the illiberal practice of the model (be it the IMT at Nuremberg, the ICTY, or other ICTs), the book challenges the capacity for ICTs as model mechanisms. As such, and informed by the critical legal studies movement (which has

[16] Public international law as used here includes international human rights law, international criminal law, and international humanitarian law.

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generally sought to reveal how law's "objectivity" serves particular political and power interests), *Model(ing) Justice* might be read as a critique of liberal legalism.

Yet although the story told within these pages styles itself as an alternate reading of the practice and structure animating ICTs, the book's central purpose remains the *perfection* of international criminal law, not its elimination. In calling attention to the ways that ICTs, as self-styled representatives of a universal, global rule-of-law liberalism, have used their position as a "global conscience" to justify an illiberal development of international criminal law and its related legal phenomena, the book seeks to modify such practice. Thus, to the degree that the international criminal justice template assists in defining expectations of ICTs, the critique is positioned within liberal legalism. *Model(ing) Justice* would address the "mainstream," practitioners and students of international criminal law, transitional justice, or peace studies, those students and professionals working towards the heady utopian goals of increasing rights awareness and reducing violations of international humanitarian law. The failure of ICTs has so far been a failure of recognition of the structural features inherent in their practice that render such practice illiberal. While the challenges ICTs currently face are significant, they are not insurmountable.

In the 2003 *Nikolić* sentencing judgment[17] the ICTY trial chamber articulated the potential, and the impact, of the tribunal as follows:

> [At the time the Srebrenica massacre took place in July 1995] [t]he Tribunal was seen by many – including persons in the former Yugoslavia – as more of an academic or diplomatic response to the armed conflict and the violations being committed therein rather than as an operational institution where one might face criminal proceedings … International humanitarian law and international criminal law were not seen as enforceable law, but rather aspirational, if not academic, ideas. Thus, expectations of impunity for ones [*sic*] crimes, no matter how egregious, were the norm. A stark example of this expectation of impunity and total disregard for the law in 1995 was provided by [the defendant] Momir Nikolić … when he was asked during his cross-examination in the Blagojevic trial whether he was required to abide by the Geneva Conventions in carrying out his duties in and around Srebrenica in July 1995. Momir Nikolić replied with a mix of incredulity and exasperation:
>
> "Do you really think that in an operation where 7000 people were set aside, captured, and killed that somebody was adhering to the Geneva Conventions? Do you really believe that somebody adhered to the law, rules and regulations in an operation where so many were killed? First of all, they were captured, killed, and then buried, exhumed once again, buried again. Can you conceive of that, that somebody in an operation of that kind adhered to the Geneva Conventions? Nobody … adhered to the Geneva Conventions or the rules and regulations.

[17] *Prosecutor* v. *Momir Nikolić*, *Sentencing Judgment*, Case No. IT-02–60/1-S (December 2, 2003) ("*Nikolić* Sentencing Judgment"); see Appendix A for a full list of all ICTY cases.

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> Because had they, then the consequences of that particular operation would not have been a total of 7000 people dead."
>
> During the past ten years, as international criminal law has moved from "law in theory" to "law in practice," the principles of international humanitarian law have taken hold to the extent that in the face of such widespread and massive crimes a person being called to participate in the criminal enterprise might consider the Geneva Conventions and the consequences of disregarding the principles contained therein.

For the *Nikolić* sentencing chamber, the ICTY's impact can be measured in a heightened awareness of the international humanitarian norms enshrined in the Geneva Conventions.

International criminal law is built on the theory that *awareness* of international humanitarian law might direct, and ultimately deter, those individuals who would otherwise violate international humanitarian norms. Surely most would agree that this worthy goal animating international criminal law practice merits our efforts and excuses some growing pains. *Model(ing) Justice* is written in the shadow of this aim, the "more just world" to which the ICC aspires.

In the following pages, *Model(ing) Justice* illustrates the structural obstacles that inhibit international criminal law from embodying its rights mandate in order to make the case for a vigorous application of liberalism's processes, rather than liberalism's borrowed outcomes, in the expansion of the recognition and protection of core rights in the twenty-first century. The book argues that the focus on liberalism's ideal outcomes rather than its processes explains the gap between the justice ICTs are designed to model and the work they in fact perform. In response to the structural challenges the book identifies in ICTY practice, it invites reforms designed to address the structural inadequacies that render ICTs illiberal, so that international criminal justice might come closer to realizing its potential as a progenitor of peace, rule of law, and respect for human rights.

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