


2009

# The Pace of International Criminal Justice

Jean Galbraith

*University of Pennsylvania Law School, [jwg78@crab.rutgers.edu](mailto:jwg78@crab.rutgers.edu)*

Follow this and additional works at: [http://scholarship.law.upenn.edu/faculty\\_scholarship](http://scholarship.law.upenn.edu/faculty_scholarship)

 Part of the [Criminal Law Commons](#), [Criminal Procedure Commons](#), [Criminology and Criminal Justice Commons](#), [International Law Commons](#), [Legal Commons](#), and the [Legal History, Theory and Process Commons](#)

---

## Recommended Citation

Galbraith, Jean, "The Pace of International Criminal Justice" (2009). *Faculty Scholarship*. Paper 1462.  
[http://scholarship.law.upenn.edu/faculty\\_scholarship/1462](http://scholarship.law.upenn.edu/faculty_scholarship/1462)

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact [PennlawIR@law.upenn.edu](mailto:PennlawIR@law.upenn.edu).

# THE PACE OF INTERNATIONAL CRIMINAL JUSTICE

*Jean Galbraith\**

INTRODUCTION .....	80
I. THE AMBITIONS OF INTERNATIONAL CRIMINAL JUSTICE .....	84
A. <i>The Domestic Criminal Law Aims</i> .....	85
B. <i>The Historical Record Aim</i> .....	88
C. <i>The Transitional Justice Aims</i> .....	90
D. <i>The Aims in Context</i> .....	93
II. EXPECTATIONS FOR THE PACE OF INTERNATIONAL CRIMINAL JUSTICE.....	97
A. <i>Domestic Criminal Law Timeframes</i> .....	97
B. <i>Historical Record Timeframes</i> .....	102
C. <i>Transitional Justice Timeframes</i> .....	103
D. <i>The Compatibility of These Timeframes</i> .....	108
III. HOW LONG DO INTERNATIONAL CRIMINAL CASES TAKE?.....	112
A. <i>The Data</i> .....	113
B. <i>The Results</i> .....	116
1. Results to Date.....	116
2. The Impact of Ongoing Cases .....	121
3. Guilty Pleas.....	123
4. Multi-Defendant Trials .....	125
IV. TAILORING THE PACE OF INTERNATIONAL CRIMINAL JUSTICE.....	127
A. <i>The Aims and the Timeframes</i> .....	127
B. <i>International Criminal Justice and       Abruptly Transitioned Societies</i> .....	132
1. Options.....	132
2. Analysis .....	136
C. <i>The ICC, Its Pace, and Transitional Justice Aims</i> .....	138
CONCLUSION .....	142
APPENDIX .....	144

---

\* Associate, Hangley Aronchick Segal & Pudlin. J.D., 2004, Boalt Hall. I drafted this Article while I was an Academic Visitor with the Faculty of Law at Oxford University. I thank Dapo Akande and other members of the international law faculty for facilitating my visit there. I also thank the editors of the *Michigan Journal of International Law*, particularly Dave Fautsch, Alexis Grant, and Louisa Marion, for their invaluable assistance. In the interests of disclosure, I note that I was an Associate Legal Officer in the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) from 2006 to 2007. All views here are of course personal ones, and all errors are my own.

## INTRODUCTION

Over thirteen years after the massacre at Srebrenica, Ratko Mladić is still at large, despite all the efforts of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>1</sup> In Cambodia, the trial of Kaing Guek Eav (also known as Comrade Duch) for atrocities committed during the Khmer Rouge regime of the 1970s has only just begun, although Duch has been in Cambodian custody since 1999.<sup>2</sup> At the International Criminal Tribunal for Rwanda (ICTR), the trial of Colonel Alphonse Nteziryayo and his five co-defendants for their role in the 1994 genocide started in June 2001 and has continued into 2009.<sup>3</sup>

The slowness of such proceedings has taken the international community by surprise. When the Security Council established the ICTY in 1993, it considered as a model the International Military Tribunal (IMT) at Nuremberg.<sup>4</sup> The IMT had worked swiftly, with only fourteen months passing between its establishment and the completion of its single multi-defendant case.<sup>5</sup> While the Security Council surely did not expect the ICTY to match this record, particularly in the absence of comparable police power, it also may not have anticipated that the “ad hoc” tribunal would still be working away more than fifteen years later—and doing so to the tune of \$174 million per year.<sup>6</sup> The ICTR operates on a similar budget.<sup>7</sup>

With the surprise has come outrage. “[T]he personnel of the international tribunals seem never to have heard of th[e] adage” that “[j]ustice

---

1. See Serge Brammertz, Prosecutor, ICTY, Address Before the United Nations Security Council (Dec. 12, 2008), available at <http://www.icty.org/sid/10029> (last visited Oct. 2, 2009).

2. Seth Mydans, *Efforts to Limit Khmer Rouge Trials Decried*, N.Y. TIMES, Feb. 1, 2009, at A8 (noting a trial start date of February 17, 2009); Seth Mydans, *Khmer Rouge Figure Is First Charged in Atrocities*, N.Y. TIMES, Aug. 1, 2007, at A6 (noting that Duch has been in Cambodian custody since 1999).

3. Prosecutor v. Kanyabashi, Case No. ICTR 98-42-T, Minutes of Proceedings on Trial Day 1 (June 12, 2001) (noting that opening arguments were held on this date); Prosecutor v. Kanyabashi, Case No. ICTR 98-42-T, Minutes of Proceedings on Trial Day 726 (Apr. 30, 2009) (demonstrating that the trial is still underway).

4. See Jennifer Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 632–33 (2008) (noting that ICTY trials are based on the Nuremberg model).

5. See *infra* Part III.

6. See Press Release, UN News Centre, General Assembly Approves Nearly \$4.2 Billion UN Budget Despite US Opposition (Dec. 23, 2007), available at <http://www.un.org/apps/news/story.asp?NewsID=25159&Cr=Assembly&Cr1=budget> (last visited Oct. 2, 2009) (describing two-year budget).

7. *Id.* (noting that the International Criminal Tribunal for Rwanda (ICTR) budget for 2008–09 is \$268 million, or \$134 million per year).

delayed is justice denied,” fumes one angry critic.<sup>8</sup> He sees the “agonizingly slow” and “glacial” pace of international criminal tribunals as powerful proof of their ineffectiveness.<sup>9</sup> He is far from alone. Using barely diplomatic language, the U.N. Assistant Secretary-General for Legal Affairs has described the ICTY and ICTR as “too inefficient,” noting that the “delays in bringing detainees to trial—and the trials themselves—have generally been so lengthy that questions have been raised as to the violation by the tribunals of . . . basic human rights guarantees . . . .”<sup>10</sup> The Security Council has shown its frustration in a variety of ways, including setting deadlines for when the ICTY and ICTR must conclude their work.<sup>11</sup> Among those for whom the tribunals’ work should perhaps hold the most relevance—the victims—there is anger and dismay at how long the cases are taking.<sup>12</sup> Similar concerns exist with regard to more recently established international and hybrid tribunals, such as the International Criminal Court (ICC), the Special Court for

---

8. Jeremy Rabkin, *Global Criminal Justice: An Idea Whose Time Has Passed*, 38 CORNELL INT’L L.J. 753, 768 (2005).

9. See *id.*

10. Ralph Zacklin, *The Failings of Ad Hoc International Tribunals*, 2 J. INT’L CRIM. JUST. 541, 543, 545 (2004); see also Patricia McNerney, *The International Criminal Court: Issues for Consideration by the United States Senate*, 64 LAW & CONTEMP. PROBS. 181, 189 (2001) (expressing doubt about the efficacy of the ICTY and ICTR in light of their failure to deliver the “swift justice” of the Nuremberg Tribunal); Sean D. Murphy, *State Department Views on the Future for War Crimes*, 96 AM. J. INT’L L. 482, 483 (2002) (quoting the U.S. Ambassador-at-Large for War Crimes Issues as stating that the process at the ICTY and ICTR “‘at times has been costly, has lacked efficiency, has been too slow, and has been too removed from the everyday experience of the people and the victims’”); Zacklin, *supra*, at 543–44 (“Justice delayed is justice denied, which also raises the question of whether justice has been done to the victims”); Press Release, Int’l Crisis Group, *The International Criminal Tribunal for Rwanda: Time for Pragmatism* (Sept. 26, 2003), available at <http://www.crisisgroup.org/home/index.cfm?id=2303&l=1> (last visited Oct. 2, 2009) (observing that the “cold reality is that the ICTR needs to be a good deal more efficient in handling trials”).

11. See Daryl A. Mundis, *The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals*, 99 AM. J. INT’L L. 142, 144–45 (2005) (discussing the Security Council’s efforts to prod the ICTY and ICTR into setting and sticking to a “completion strategy”). The completion strategy originally called for the ICTY and ICTR to finish all trials by 2008 and all appeals by 2010. S.C. Res. 1534, ¶ 3, U.N. Doc. S/RES/1534 (Mar. 26, 2004). Both tribunals have already missed the trial deadline. See Patrick Robinson, President & Judge, ICTY, Statement to the U.N. Security Council (Dec. 12, 2008), <http://www.icty.org/sid/10030> (last visited Oct. 5, 2009) (acknowledging that “a number of trials will continue into the first part of 2010”); Letter from Dennis Byron, President, ICTR, to Jorge Urbina, President, United Nations Sec. Council (Nov. 21, 2008), ¶ 65, U.N. Doc. S/2008/726 (stating that the ICTR is “strongly committed” to completing trials during 2009, but expressing some doubt as to “whether this goal can be ultimately achieved”).

12. See Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT’L L. 255, 309–10 (2001) (surveying Bosnian Muslims and finding frustration with the ICTY’s pace); Binaifer Nowrojee, “Your Justice Is Too Slow”: Will the ICTR Fail Rwanda’s Rape Victims?, U.N. RES. INST. SOC. DEV., at 5 (2005) (quoting a victim as saying “[w]e will be dead before we see any justice” from the ICTR).

Sierra Leone (SCSL), and the Extraordinary Chambers of the Courts of Cambodia (ECCC).<sup>13</sup> For some, the slow pace of international criminal tribunals, along with related concerns about the small number of defendants tried and high per-defendant costs, has raised serious doubts about the value of these tribunals.<sup>14</sup>

Even firm supporters of international criminal tribunals become apologetic when the tribunals' pace is mentioned. They concede that international criminal cases are slow, or at the very least perceived as slow.<sup>15</sup> Among themselves, they debate the extent to which this slowness is inevitable or improvable,<sup>16</sup> and collectively they assert that international criminal justice is worthwhile despite its pace.<sup>17</sup>

For all the discussion, however, the pace of international criminal justice has not received careful consideration. Instead, there is uncritical acceptance that international criminal tribunals move slowly, and debate only over whether this slowness is inevitable and whether the tribunals

---

13. See Seth Mydans, *Cambodia Tribunal Clears Procedural Hurdle*, N.Y. TIMES, May 1, 2007, at A1 (describing hang-ups in the "slow-moving preparations" of the Extraordinary Chambers of the Courts of Cambodia's (ECCC)); Elizabeth Rubin, *If Not Peace, then Justice*, N.Y. TIMES MAG., Apr. 2, 2006, at 42, 45 (describing how the International Criminal Court (ICC) prosecutor has been moving "[s]lowly, too slowly for some" on Darfur); Press Release, Security Council, President of Special Court for Sierra Leone Briefs Security Council; Addresses Funding Shortfall, Security, Status of At-Large Detainees, U.N. Doc. SC/8391 (May 24, 2005) (describing target deadlines for finishing trials and appeals at the Special Court for Sierra Leone (SCSL) that have since proven unrealistic). Hybrid tribunals differ from international tribunals by having a much tighter legal connection to a single country. Generally speaking, hybrid tribunals will apply some mix of international and domestic law and will employ a mixture of international and domestic judges and prosecutors. See Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295, 295 (2003).

14. E.g., Zacklin, *supra* note 10. This Article focuses on the pace of international criminal cases and gives comparatively short shrift to the number of defendants tried and the costs per defendant. This is partly for the sake of simplicity, and partly because the other two issues have received more thorough scholarly consideration. See, e.g., David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861 (2006).

15. E.g., Stéphane Bourgon, *Procedural Problems Hindering Expeditious and Fair Justice*, 2 J. INT'L CRIM. JUST. 526, 527 (2004) ("uncontrollabl[y]" lengthy proceedings); O-Gon Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench*, 5 J. INT'L CRIM. JUST. 360, 362 (2007) ("notoriously lengthy" proceedings); Mundis, *supra* note 11, at 142 ("criticized . . . as slow"); Patricia M. Wald, *Reflections on Judging at Home and Abroad*, 7 U. PA. J. CONST. L. 219, 226 n.28 (2004) ("criticized as too long"). But cf. Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT'L L.J. 323 (2009) (arguing that the slow pace of international criminal justice has its advantages).

16. E.g., Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 94–102 (2002); Michael J. Dennis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT'L L. 759, 764 (2000) (discussing how the recommendations provided by a U.N.-appointed expert group would expedite operations at the ICTY and ICTR).

17. E.g., Murphy, *supra* note 10, at 484 (quoting the President of the Parliamentary Assembly of the Council of Europe as saying that despite concerns about costs and efficiency, international criminal tribunals should be used to try suspected war criminals).

are nonetheless worthwhile. But given how central the pace of international criminal justice is to considerations of its effectiveness—and indeed its legitimacy—it is crucial to understand both what pace should be reasonably expected and what pace actually occurs. This Article undertakes this project.

In Part I, I discuss the overall aims of international criminal justice. International criminal justice self-consciously aspires to three quite different types of goals: (1) bringing perpetrators to justice and providing retribution for victims—or domestic-criminal-law-styled aims, (2) creating a historical record of mass atrocities, and (3) helping transitioning societies achieve peace and reconciliation.

Part II discusses how these different aims affect the pace of international criminal justice. Each set of aims gives rise to a different kind of timetable. For example, domestic criminal law aims can be expected to be accomplished in a timeframe similar to complex domestic criminal cases. To assess the timeframe for building a historical record, however, a comparison with the timeframes for other types of factual investigations into mass atrocities is appropriate. Helping transitioning societies achieve reconciliation requires careful consideration of the particular needs of each society.

The different aims of international criminal justice also give rise to very different—and often directly contrary—suggestions on how to speed up international criminal justice. Thus, scholars and practitioners who emphasize the domestic criminal law strand call for speeding up international criminal justice by abandoning any conscious emphasis on historical record-building or helping transitioning societies achieve peace. At the other extreme, those who emphasize bringing reconciliation to transitioning societies may seek to speed up the process by using abbreviated trial procedures in ways deemed dubious from a due process perspective. Part II concludes by proposing two techniques for speeding up international criminal justice that may be acceptable from all three perspectives: plea bargains and multi-defendant trials.

Part III looks empirically at the pace of all cases to date in today's international tribunals (the ICTY, the ICTR, and the ICC), in two of today's hybrid tribunals (the SCSL and the ECCC), and in the IMT. As of August 31, 2009, 307 individuals had been publicly charged at these six tribunals and ultimate judgments had been entered with regard to 132 of these individuals.<sup>18</sup> I measure how long each phase of the proceedings

---

18. These numbers include only individuals charged with core crimes within the tribunals' jurisdiction and thus exclude contempt and perjury cases. I use the term "ultimate judgment" to mean a judgment on the merits that ends a case. If there is no appeal, then this is the trial judgment; otherwise, it is the appeal judgment.

has taken on average for each tribunal, as well as for all tribunals collectively. For example, in cases where an ultimate judgment has been entered, an average of 10.7 years has passed between the alleged crime and the entry of ultimate judgment, with 4.4 of these years occurring after the defendant was taken into custody. Part III concludes by considering the effect that plea bargains and multi-defendant trials have on the pace of international justice.

Part IV relates the empirical results from Part III to the framework developed in Parts I and II. From a domestic criminal justice perspective, the ICTY and the SCSL have not been particularly slow. Rather, these tribunals process cases at a pace that is only slightly slower than that found in comparably complex domestic criminal cases. By contrast, the ICTR—which is the only other modern international criminal tribunal to have completed cases—has proved notably slow. Part IV then examines whether these paces are appropriate from a historical record or transitional justice perspective, concluding that they are appropriate from a historical record perspective and relative to most transitional justice needs, but with one important exception: for societies that have abruptly transitioned from oppressive regimes to entirely new ones, as was the case in Germany at the end of World War II and Rwanda in 1994, swifter proceedings are required. In such situations, swift international criminal justice is much more likely to prevent vengeance and influence transitioning societies. If swift international criminal justice is not possible in these societies, then the tribunals should abandon international criminal trials and act only as oversight mechanisms of local justice.

### I. THE AMBITIONS OF INTERNATIONAL CRIMINAL JUSTICE

In a 2004 report, then U.N. Secretary-General Kofi Annan described international criminal tribunals as seeking to advance a number of objectives, including bringing to justice those responsible for serious violations of human rights and international humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for the victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of law, and contributing to the restoration of peace.<sup>19</sup>

---

19. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 38, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Secretary-General's Report*]. Given the key role the United Nations plays in all existing international and hybrid tribunals except the ICC, I consider this list the most authoritative expression of the views of the international community regarding the purposes of international criminal tribunals.

This rather overwhelming list can be broken down into three distinct categories. First, there are the objectives that resemble those of classic domestic criminal law: bringing perpetrators to justice, interrupting crimes and deterring future ones, and providing retribution for the victims. Second, there is the aim of “establishing a record of past events.” Third, there are forward-looking goals of social transformation: reconciliation, promotion of the rule of law, and peacemaking. Part I discusses these three categories in more detail and briefly discusses how each shapes the practice of international criminal justice.

#### A. *The Domestic Criminal Law Aims*

Perhaps the most commonly mentioned objectives of international criminal law are bringing perpetrators to justice, deterring future international crimes, and providing retribution for the victims. Collectively, I will refer to these objectives as “domestic criminal law” aims, for they also underlie domestic criminal justice systems.

These objectives are so well known that they need little discussion. Domestic criminal law focuses on determining guilt and then, if guilt is determined, on punishing the perpetrators so as to deter future crimes and provide justice to the victims. The contours of domestic criminal law systems vary, with a particularly significant split between the civil law and common law systems, but all share these basic aims.<sup>20</sup> International law has appropriated these same aims.<sup>21</sup> Accordingly, in seeking to achieve these objectives—and to do so in a way that is legitimate and perceived as such—international criminal law has borrowed heavily from the processes and principles of domestic criminal law. Indeed, commentators on international criminal practice frequently treat it as differing from domestic criminal practice in developed Western countries only in that it tracks no single domestic legal system but rather blends the approaches of common and civil law jurisdictions.<sup>22</sup>

The borrowing begins with the “basic assumption . . . that in international [criminal] law, as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability.”<sup>23</sup>

---

20. See generally Lutz Eidam, *Facilitating a Comparative Analysis of Criminal Law*, 5 GERMAN L.J. 1171, 1174–85 (2004); Mark Dirk Dubber, *Comparative Criminal Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW 1287 (Mathias Reimann & Reinhard Zimmerman eds., 2006).

21. See, e.g., Prosecutor v. Kordić, Case No. IT-95-14/2-A, Judgment, ¶ 1073 (Dec. 17, 2004) (discussing the aims of retribution and deterrence, among others).

22. E.g., Kenneth S. Gallant, *The Role and Powers of Defense Counsel in the Rome Statute of the International Criminal Court*, 34 INT'L LAW. 21, 21 (2000).

23. Prosecutor v. Mpambara, Case No. ICTR 01-65-T, Judgment, ¶ 26 (Sept. 11, 2006) (quoting Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 186 (July 15, 1999)); see also Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶¶ 760-62 (June 20, 2007); Allison



International criminal law seeks to treat guilt as individual rather than collective, in part to ensure that its determinations of guilt and innocence are deemed acceptable and to provide grounds for just retribution and deterrence. This emphasis has run true since the IMT, where the initial plan of holding individuals criminally responsible simply for membership in certain organizations was ultimately abandoned in favor of a greater emphasis on personal accountability.<sup>24</sup>

International criminal law has also borrowed from the processes of domestic criminal law. While there is some variation in domestic criminal systems, all generally provide for a charge, a trial, an appeal, and punishment for the guilty.<sup>25</sup> The foundational statutes of the international criminal tribunals require this same process.<sup>26</sup> (The only partial exception is the IMT, which did not provide for any appeal<sup>27</sup> despite the fact that well before the 1940s, domestic criminal defendants had a well-established right to seek appeal from a criminal conviction in the United States and in Great Britain.<sup>28</sup>) Moreover, in filling lacunae in their own

---

Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 82–86 (2005).

24. *Compare* Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis art. 10, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter] (stating that in “cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts”), with 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 256 (1947) [hereinafter IMT JUDGMENT] (holding that “[m]embership alone is not enough” and that only individuals who knew of the criminal purposes or acts of the organizations and joined these organizations voluntarily may be held criminally responsible for their membership in the organizations).

25. *See* International Covenant on Civil and Political Rights art. 14, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The ICCPR has 164 states parties, although some have attached reservations and declarations. *See* United Nations Treaty Collection: Status of ICCPR, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en) (last visited Oct. 2, 2009).

26. *See, e.g.*, Rome Statute of the International Criminal Court arts. 58, 61, 67, 77, 81, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. Res. 57/228 B, arts. 10, 12–13, U.N. GAOR, 57th Sess., Annex, U.N. Doc. A/RES/57/228 B (May 22, 2003) [hereinafter ECCC Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, arts. 17–19, 22–24, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]; Updated Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 18–20, 23–25, S.C. Res. 827, Annex, U.N. Doc. S/RES/827/Annex (May 25, 1993), *amended* by S.C. Res. 9462, U.N. Doc. S/RES/9462 (Sept. 29, 2008) [hereinafter ICTY Statute]; The Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, arts. 17–20, U.N. Doc. S/2000/915 (Oct. 4, 2000) [hereinafter SCSL Statute].

27. London Charter, *supra* note 24, art. 26.

28. *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 159–60 (2000).

procedures, international criminal tribunals draw largely from the approaches of domestic criminal courts.<sup>29</sup> Once again, the use of processes similar to those of domestic criminal courts confers legitimacy and an aura of fairness.

International criminal law has further adopted the due process protections available to domestic criminal defendants. Of course, not all domestic legal systems offer the same set of due process protections, with the split between common law and civil law traditions proving especially material.<sup>30</sup> But some protections are shared broadly across all legal systems (at least in theory) and are identified in the International Covenant on Civil and Political Rights (ICCPR). Substantively, these include what Americans would call the prohibition on ex post facto laws and Europeans would call the principle of legality: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.”<sup>31</sup> Procedurally, these protections include defendants’ rights to be “promptly informed of any charges against” them upon arrest; to be “entitled to trial within a reasonable time or to release”; to be “presumed innocent until proved guilty”; “to have adequate time and facilities for the preparation of [their] defence and to communicate with counsel of [their] own choosing”; to be “tried without undue delay”; to be “tried in [their own] presence and to defend [themselves] in person or through legal assistance of [their] own choosing” or in certain situations through free, assigned legal assistance; not “to be compelled to testify against [themselves] or to confess guilt”; and “to [have a] conviction and sentence . . . reviewed by a higher tribunal.”<sup>32</sup> Although the IMT provided only a limited set of due process protections to its defendants,<sup>33</sup> modern international criminal tribunals have emphasized that domestic

---

29. See, e.g., Rome Statute, *supra* note 26, art. 21(1)(c) (providing that where the Rome Statute and international law are silent on a particular point, the ICC shall look to “general principles of law derived by the Court from national laws of legal systems of the world”); Prosecutor v. Erdemović, Case No. IT-96-22, ¶¶ 58–72 (Oct. 7, 1997) (joint separate opinion) (looking to legal systems worldwide in considering the scope of a duress defense).

30. For example, common law systems typically provide for a right of self-representation, while civil law systems do not. See Michael P. Scharf, *Self-Representation Versus Assignment of Defence Counsel Before International Criminal Tribunals*, 4 J. INT’L CRIM. JUST. 31, 35 (2006).

31. ICCPR, *supra* note 25, art. 15.

32. *Id.* arts. 9, 14.

33. See London Charter, *supra* note 24, art. 16 (failing to provide defendants, for example, with adequate time to prepare a defense). While these differences may relate to the fact that there were fewer broadly recognized due process rights in the 1940s (a time that predates the ICCPR), they may also reflect lessened interest on the part of the International Military Tribunal (IMT) in providing defendants with the due process rights available in domestic criminal jurisdictions.

due process guarantees identified in the ICCPR are available to international criminal defendants, as reflected in the statutes of the modern tribunals and in their jurisprudence. The ICTY and ICTR Statutes, for example, simply copy many ICCPR due process protections word for word.<sup>34</sup>

In pursuing the purposes of domestic criminal law, international criminal law also closely tracks the means by which domestic criminal law achieves these purposes. But as discussed in the next two sections, international criminal law has two other sets of objectives that call into question whether exclusive reliance on domestic criminal parallels is warranted.

### B. *The Historical Record Aim*

International criminal justice aspires to be more than just domestic criminal law writ large. As the Secretary-General has observed, another objective of international criminal justice is to “establish[] a record of past events.”<sup>35</sup> International criminal judges and commentators frequently describe this as the “historical record.”<sup>36</sup>

This objective is important because international criminal justice deals not only with situations of mass violence, but also with situations of mass denial. Each side to a conflict will often deny that crimes were committed against the other side—or at least suggest that such crimes were limited in scope or were the responsibility of a few bad apples rather than the result of a centralized plan.<sup>37</sup> This is true while conflicts are ongoing: there are denials, euphemisms like the “Final Solution,” code words like “cockroaches,” and efforts to conceal mass graves.<sup>38</sup> It is also true long after conflicts have ended. Israel’s trial of Adolf Eichmann in

---

34. See ICTR Statute, *supra* note 26, arts. 6, 20; ICTY Statute, *supra* note 26, arts. 7, 21; see also Göran Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 935, 938–40 (2003). For other modern tribunals, see Rome Statute, *supra* note 26, arts. 22, 25(2), 55–57; ECCC Statute, *supra* note 26, art. 13; SCSL Statute, *supra* note 26, arts. 6, 17.

35. *Secretary-General’s Report*, *supra* note 19, ¶ 38.

36. *E.g.*, Gabrielle Kirk McDonald, President, ICTY, Address at Baruch College (Oct. 5, 1998), in 1998 ICTY Y.B. 416, 420 (describing the creation of a historical record as one of the three functions of the ICTY); Richard Ashby Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUM. RTS. Q. 908 (2005).

37. See, *e.g.*, Melynda J. Price, *Balancing Lives: Individual Accountability and the Death Penalty as Punishment for Genocide (Lessons from Rwanda)*, 21 EMORY INT’L L. REV. 563, 579 (2007) (describing denials in relation to the Rwandan genocide).

38. See, *e.g.*, Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, ¶ 382 (Jan. 17, 2005); Prosecutor v. Akeyesu, Case No. ICTR 96-4, Judgment, ¶¶ 148–49, 156 (Sept. 2, 1998); Arthur Isak Applbaum, *Professional Detachment: The Executioner of Paris*, 109 HARV. L. REV. 458, 471 (1995).

1961 was conducted largely to drive home the fact and scope of the Holocaust to the world.<sup>39</sup>

To some extent, the establishment of a historical record is a means rather than an end of international criminal law. It is a means of helping to determine guilt or innocence: by figuring out what has happened, a tribunal can identify who is responsible. It also may be a means of helping to accomplish the goals discussed in the next section: future reconciliation is thought to be more likely where a judicial decision-maker has assessed the nature and scope of past atrocities.<sup>40</sup>

Yet the establishment of a historical record is also an end in and of itself, unlike in the domestic criminal context. Where domestic crimes are concerned, the fact of their occurrence is rarely concealed—we usually know who has been murdered, even if we are not sure of the identity of the murderer—and they are generally isolated incidents rather than part and parcel of the narrative of a national experience. By contrast, in the context of mass atrocities, uncertainty is the horrible norm: there are inevitably hot disputes about the order of magnitude of the atrocities involved, their causes, and the links between the atrocities and the government or the rebel forces. The scale of these atrocities is so great as to create a pressing moral obligation to obtain the truth about them, as best as the truth can be determined.

This goal of establishing a historical record can substantially shape international criminal cases. To begin with, it can affect who is tried and for what. For example, at the IMT and in the U.S.-conducted trials that followed it, prosecutors consciously sought to demonstrate the pervasive criminal nature of the Nazi regime by trying individuals from a range of professions: military leaders, diplomats, industrialists, judges, etc.<sup>41</sup> In the ICTY, the prosecutor charged Slobodan Milošević for crimes in Bosnia, Croatia, and Kosovo in order to demonstrate the sweep of atrocities committed by his regime throughout the Balkans.<sup>42</sup> Indeed, his death during trial led to headlines like “Slobodan Milosevic Dies Alone with History Still Demanding Justice.”<sup>43</sup>

---

39. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 9–10 (2006).

40. For a discussion of how political agendas may affect what history is explored and what conclusions are drawn, see, for example, Eric A. Posner, *Political Trials in Domestic and International Law*, 55 DUKE L.J. 75, 139 (2005) (discussing how, at the IMT, “[e]vents that placed the victors in a bad light were suppressed as much as possible”).

41. See Jonathan A. Bush, “*The Supreme . . . Crime*” and *Its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2377 (2002).

42. See Iain Bonomy, *The Reality of Conducting a War Crimes Trial*, 7 J. INT’L CRIM. JUST. 348, 358 (2007).

43. Peter Beaumont, *Slobodan Milosevic Dies Alone with History Still Demanding Justice*, *GUARDIAN*, at 1, Mar. 12, 2006, available at <http://www.guardian.co.uk/world/2006/mar/12/warcimes.milosevictrial> (last visited Oct. 2, 2009) (noting that “[h]is death is a

The aim of establishing a historical record can also cause prosecutors and judges to consider more than is necessary to convict the individual defendants. The evidence presented often ranges well beyond the individual accused and into the broader context. While some of this may be necessary for developing the proof needed to establish jurisdictional elements of the crimes or to link high-level defendants with on-the-ground crimes, it can sweep well beyond these purposes.<sup>44</sup> As an observer at the *Eichmann* trial, Hannah Arendt was struck by the “prosecutor’s attempt to drag out these hearings forever” by exploring historical questions that she considered irrelevant to the defendant’s guilt or innocence.<sup>45</sup> Similarly, judgments in international criminal trials frequently reflect a preoccupation with historical fact-finding. Reading international criminal judgments, one is immediately struck by how much of the opinions are spent on overall events rather than on the specific defendants. For example, in the first ICTY trial judgment related to the massacre at Srebrenica, the first 296 paragraphs cover the events at Srebrenica and the next 127 paragraphs deal with the specific defendant.<sup>46</sup>

The aim of creating a historical record thus has some role in shaping international criminal trials. Its influence is far less, however, than the influence of the domestic criminal law aims and probably also than the aims of transitional justice.

### C. The Transitional Justice Aims

International criminal justice aspires to the forward-looking goals of societal transformation mentioned by the U.N. Secretary-General: “promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace.”<sup>47</sup> These goals are closely connected with what is termed “transitional justice.”

Transitional justice is a term of recent origin.<sup>48</sup> It refers to the legal and quasi-legal mechanisms by which a society emerging from conflict or systematic human rights abuses comes to grips with its past and

---

crushing blow to the tribunal and to those who wanted to establish an authoritative historical record of the Balkan wars”).

44. Danner & Martinez, *supra* note 23, at 94–95; Wilson, *supra* note 36, at 924–28.

45. ARENDT, *supra* note 39, at 4–5, 9.

46. See Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶¶ 37–67 (June 20, 2007); Prosecutor v. Krstić, Case No. IT-98-33, Judgment, ¶¶ 1–423 (Aug. 2, 2001); see also, e.g., Prosecutor v. Akeyesu, Case No. ICTR 96-4, Judgment, ¶¶ 78–130 (Sept. 2, 1998); IMT JUDGMENT, *supra* note 24, at 174–253.

47. *Secretary-General’s Report*, *supra* note 19, ¶ 38.

48. The earliest usage I have seen to date of the term “transitional justice” is in a publication by the United States Institute for Peace. See 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995).

moves toward a peaceful and rights-respecting future.<sup>49</sup> The emphasis is on the future.<sup>50</sup> Considerations of the past, such as recognition of the past atrocities, restitution for victims, and retribution against certain wrongdoers, are important primarily as a means (albeit perhaps a necessary means) of achieving a peaceful future. This is illustrated by forward-looking phrases used to define the goals of transitional justice, such as “stay[ing] the hand of vengeance,”<sup>51</sup> “breaking the cycle of violence,”<sup>52</sup> and asserting that there will be “no peace without justice.”<sup>53</sup>

The international community has invested in international criminal tribunals in large part because it hopes they can advance transitional justice goals. The ICTY and ICTR, for example, were established by the Security Council under Chapter VII of the United Nations Charter—a Chapter which the Security Council can invoke only to “maintain or restore international peace and security.”<sup>54</sup> International criminal tribunals are thus quite consciously part of a broader project of social stabilization and transformation. They are one of a portfolio of transitional justice

---

49. There is currently no single commonly accepted definition of transitional justice. For instance, Ruti Teitel defines it as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.” Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 69 (2003) (footnote omitted). The U.N. Secretary-General, however, has defined it as “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.” *Secretary-General’s Report*, *supra* note 19, ¶ 8. For the view that transitional justice should not be considered as different from regular domestic justice, see Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761 (2004).

50. See Louise Arbour, *Economic and Social Justice for Societies in Transition*, 40 N.Y.U. J. INT’L L. & POL. 1, 3 (2007) (“Transitional justice must have the ambition to assist the transformation of oppressed societies into free ones by addressing the injustices of the past through measures that will procure an equitable future.”); Danner & Martinez, *supra* note 23, at 90 (describing the goals of transitional justice as “forward looking”).

51. This phrase is derived from Justice Robert Jackson’s famous opening remarks at Nuremberg and has been incorporated into the transitional justice literature. *E.g.*, GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).

52. *E.g.*, Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone art. 26, U.N. Doc. S/1999/777/Annex (July 12, 1999) (calling for the truth commission to “break the cycle of violence”). Other commonly used variations include “breaking the cycle of hatred” and “breaking the cycle of impunity.” *E.g.*, MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* (2002); Juan Méndez, *Lou Henkin, Transitional Justice, and the Prevention of Genocide*, 38 COLUM. HUM. RTS. L. REV. 477, 485 (2007).

53. Press Release, Secretary-General, Secretary-General Welcomes Rwanda Tribunal’s Genocide Judgment as Landmark in International Criminal Law, U.N. Doc. SG/SM/6687/L/2896 (Sept. 2, 1998). This is also the name of an NGO dedicated to creating accountability for rights violations through the international criminal justice system. See No Peace Without Justice, <http://www.npwj.org/> (last visited Oct. 2, 2009).

54. U.N. Charter art. 39.

tools, along with Truth and Reconciliation Commissions (TRCs), lustration proceedings, purges, apologies, and reparations.<sup>55</sup> In this respect, they differ markedly from ordinary domestic criminal courts. While domestic criminal law simply helps preserve a properly functioning society, international criminal law aspires to help create one.

Transitional justice goals influence the workings of international tribunals in a number of ways. Their influence is perhaps most evident in the way they affect prosecutorial discretion. Because the number of perpetrators of international crimes drastically exceeds international capacity for prosecution, international prosecutors have enormous discretion in deciding whom to target.<sup>56</sup> Their charging decisions may well reflect transitional justice goals. On a specific level, one can imagine prosecutors indicting certain extremist leaders partly for the purpose of removing them from the region or at the very least lessening their power.<sup>57</sup> On a more general level, there have been efforts by the ICTY and SCSL to pursue indictments against members of virtually all sides of the conflicts. This is true despite the gravity of the crimes charged varying notably between individuals on different sides. Alexander Greenawalt has observed that had the ICTY made its prosecutorial decisions strictly on the basis of the gravity of the crimes, “it is conceivable that it would have expended its limited resources prosecuting Serb-perpetrated offenses such as the genocide at Srebrenica and other atrocities, without ever reaching Croat and Muslim crimes that, while often hideously grim, were not as large-scale or, at least in the apparent case of the Bosnian Government, did not involve the same degree of high-level sponsorship and planning.”<sup>58</sup> The prosecutors presumably hope that reconciliation and social transformation will prove

---

55. Posner & Vermeule, *supra* note 49, at 766–67.

56. Allison M. Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 520–21 (2003).

57. If this factor does influence prosecutors, they are reluctant to admit it. While I have no certain examples, the indictment of Charles Taylor by the SCSL might fit this pattern. In indicting him, the prosecutors were probably quite conscious of the potential benefits the indictment would bring to Liberia. See Charles Cobb Jr., *Nigeria Will Hand over Charles Taylor; Predicts War Crimes Prosecutor*, ALLAFRICA.COM, Sept. 23, 2003, <http://allafrica.com/stories/200309250972.html> (last visited Oct. 2, 2009) (quoting the SCSL Prosecutor, David Crane, as saying that “Charles Taylor has to be removed from the equation for true peace to start in Liberia”); cf. Ed Royce, *Bring Charles Taylor to Justice*, N.Y. TIMES, May 5, 2005, at A35 (suggesting that Taylor needed apprehending partly because of his past crimes and partly because “[l]eaving him at large threatens to knock down” the fragile peace obtained in Liberia). Given the extent of Charles Taylor’s apparent responsibility for the Revolutionary United Front (RUF) atrocities in Sierra Leone, however, the SCSL Prosecutor might well have indicted him irrespective of transitional justice considerations.

58. Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT’L L. & POL. 583, 648 (2007).

easier to achieve in the future if people from all sides—rather than just one side—are shown to have been criminally responsible.<sup>59</sup>

Doctrinally, transitional justice goals may have played a role in shaping the wide-sweeping liability doctrines used by both the IMT and the modern tribunals.<sup>60</sup> Structurally, transitional justice goals have led the tribunals to establish extensive outreach programs, something well outside the purview of normal courts. The tribunals seek to educate the people of the affected regions about their work and their decisions in the hope that this will lead to greater recognition of past atrocities and acceptance of the tribunals as laying the groundwork for future reconciliation. The outreach program of the SCSL has received particular praise in this regard.<sup>61</sup>

Thus, like the domestic criminal law aims and the historical record aim, the transitional justice aims both underlie international criminal justice and shape it. The next section discusses some difficulties in relation to having and achieving these three types of aims.

#### D. *The Aims in Context*

International criminal justice thus pursues a variety of aims, which in turn shape the process of international criminal law. While the previous analysis presented these aims uncritically, this section identifies some difficult questions that arise from them. First, are these aims appropriate for international criminal justice? Second, does international criminal justice actually accomplish them or can it be made to accomplish them? Third, how compatible are these aims with each other? My object is not to resolve these questions—that would be well beyond the

---

59. See Carla Del Ponte, Prosecutor, ICTY, Address in Bern (Sept. 1, 2005), available at <http://www.icty.org/sid/8544> (last visited Oct. 4, 2009) (discussing the need for all sides to recognize that their leaders were responsible for crimes). Unlike in the ICTY, the ICTR prosecution has only indicted individuals from the Hutu side of the conflict. When the ICTR showed interest in indicting some Tutsi military leaders, Rwanda threatened to suspend cooperation with the ICTR and forced it to replace its Prosecutor. Luc Reydam, *The ICTR Ten Years On: Back to the Nuremberg Paradigm?*, 3 J. INT'L CRIM. JUST. 977, 978–79 (2005).

60. Danner & Martinez, *supra* note 23, at 144–46. In their article, Danner and Martinez explore how international criminal law brings together three strands—domestic criminal law, human rights law, and transitional justice—in formulating its liability doctrines. Their overall approach of exploring how international criminal law balances the tensions arising from different strands has influenced my own thinking significantly. Unlike them, however, I focus on the self-asserted aims of international criminal law (including the historical record objective) rather than on influences that may implicitly underlie it.

61. See ANTONIO CASSESE, REPORT ON THE SPECIAL COURT OF SIERRA LEONE para. 270 (2006), available at <http://www.sc-sl.org/LinkClick.aspx?fileticket=VTDHyHasLc=&> (last visited Oct. 2, 2009) (describing the outreach program as the “crown jewel” of the SCSL).



scope of this Article—but rather to demonstrate that they are the subject of lively and ongoing debate.

The first of these questions is perhaps the least controversial. A few scholars and practitioners do consider that, as a matter of principle, international criminal law should aspire only to domestic criminal law aims. Hannah Arendt expresses this view eloquently:

The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes—“the making of a record of the Hitler regime which would withstand the test of history,” as Robert G. Storey, executive trial counsel at Nuremberg, formulated the supposed higher aims of the Nuremberg Trials—can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment.<sup>62</sup>

Although this purist approach has its supporters, the general trend is otherwise. While domestic criminal law aims unquestionably dominate our current understanding of international criminal law, most commentators are willing to acknowledge that the historical record aim and the transitional justice aims also have at least theoretical appeal.

More significant are concerns about whether international criminal law does or even can accomplish these aims. Can international criminal law really succeed in bringing perpetrators to justice and in providing retribution to the victims when international tribunals only have the capacity to try a tiny percentage of war criminals? Mark Drumbl has argued that “the operation of international criminal law occasions a retributive shortfall in that too few people or entities receive just deserts [sic].”<sup>63</sup> Do international criminal tribunals really effectuate deterrence? Julian Ku and Jide Nzelibe consider this unlikely given that international criminal tribunals prosecute only a tiny fraction of war criminals—and ones who already face substantial likelihood of other extra-legal sanctions like torture or death.<sup>64</sup> Do international criminal tribunals have the

---

62. ARENDT, *supra* note 39, at 253; *see also, e.g.*, Wilson, *supra* note 36, at 912 (quoting a historian as saying about the Klaus Barbie trial that “what is especially worth criticizing . . . is not that they wrote bad history, it’s that they wrote history at all, instead of being content to apply the law equitably and universally”).

63. MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 153 (2007). Drumbl considers that the work of the domestic Rwandan legal system—which encompasses both conventional courts and *gacaca* courts—does a better job in this regard. *See id.* at 161; *see also infra* text accompanying notes 186–192.

64. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. Q. 777, 832 (2007); *see also, e.g.*, David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT’L L.J. 473, 474 (1999) (stating that “the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption”).

expertise to engage in historical fact-finding? As Richard Wilson demonstrates, numerous scholars think that “even if history writing were desirable, the courts could not fulfill this task anyway, since law and history involve different modes of reasoning altogether.”<sup>65</sup> Do international criminal tribunals help with reconciliation, or do they instead drag out tensions in a counterproductive manner? We see this concern most prominently in the context of ongoing conflicts, as where the ICC’s arrest warrants for Ugandan rebel leaders are proving a stumbling block in peace negotiations,<sup>66</sup> but it also arises in post-atrocity situations as well.<sup>67</sup> Finally, even accepting that international criminal law has the capacity to accomplish its aims, there is the question of whether it is the most cost-effective way of doing so.<sup>68</sup>

Perhaps most significantly of all, there is uncertainty over whether the means of achieving the various aims of international criminal justice complement each other. Even the U.N. Secretary-General recognized that “achieving and balancing the various objectives of [international] criminal justice is less straightforward.”<sup>69</sup> The most commonly expressed concern is that the historical record aim and the transitional justice aims will interfere with the domestic criminal law aims. Possible sources of pressure are immediately obvious. If prosecutors take transitional justice aims into consideration in their charging decisions, then they will sometimes go after less culpable individuals while leaving more culpable ones to escape with impunity. If trials incorporate historical evidence (such as expert testimony or victim testimony) that goes well beyond what is relevant or necessary for assessing guilt or sentence, then the interests of the defendants may be prejudiced. And if heavy weight is placed on the historical significance of a trial and on its importance for ensuring future reconciliation, then the judges face strong pressure to convict. Indeed, Justice Robert H. Jackson ended his closing argument at Nuremberg by telling the judges that “[i]f you were to say of these men that they are not

---

65. Wilson, *supra* note 36, at 912 (referencing the work of Mark Osiel, Martha Minow, and John Borneman); *see also id.* at 913 (quoting a French historian who expresses his discomfort with the use of law as a vehicle for historical inquiry).

66. Jeffrey Gettleman, *Uganda Peace Hinges on Amnesty for Brutality*, N.Y. TIMES, Sept. 15, 2006, at A1.

67. *E.g.*, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 128 (1998) (raising the concern that prosecutions can trigger more vengeance and hinting at a preference for Truth and Reconciliation Commissions (TRCs) instead).

68. *See, e.g.*, DRUMBL, *supra* note 63, at 131 (2007) (noting concerns about whether the money spent on the ICTR could have been better spent on restitution or reparations).

69. Secretary-General’s Report, *supra* note 19, ¶ 39; *see also, e.g.*, Danner & Martinez, *supra* note 23, at 100–02 (discussing tensions between various strands of international criminal justice).

guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime.”<sup>70</sup>

Tensions are also often evident between the historical record aim and the transitional justice aims. A full and frank judicial exploration of past atrocities may sometimes advance future reconciliation, but at other times, it may retard it. Eric Posner suggests that the Nuremberg trials failed to help Germany to move on and recover from the Nazi period; and that this was partly because the trial’s historical exploration showed the “vast participation of ordinary citizens in the Nazi extermination machine.”<sup>71</sup> A more recent example relates to the debate as to who was responsible for shooting down the plane carrying Rwanda’s moderate Hutu president in 1994—the event which was the immediate trigger of the genocide: was it extremist Hutus or was it instead Tutsi rebel forces (who now control the current government of Rwanda)?<sup>72</sup> Despite its penchant for developing the historical record, the ICTR has actively avoided this issue,<sup>73</sup> perhaps from fear that the answer might unsettle Rwanda still further and impede its post-conflict transition.

Commentators who recognize these tensions have different ideas about how to react. Some argue that the historical record and transitional justice aims should be abandoned to the extent that they conflict with the domestic criminal justice aims.<sup>74</sup> Others accept that the domestic criminal law aims should continue to be the dominant aims, but suggest that these aims may be modestly compromised in favor of other goals.<sup>75</sup> Finally, a few scholars argue that international criminal justice must abandon its emphasis on the domestic criminal law aims (or at least on the use of Western-style trials to accomplish these aims) and reshape

---

70. 19 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945—1 OCTOBER 1946, at 432 (1947).

71. Posner, *supra* note 40, at 140.

72. See Mark Doyle, *Rwanda’s Mystery that Won’t Go Away*, BBC NEWS, Nov. 29, 2006, <http://news.bbc.co.uk/1/hi/world/africa/6196226.stm> (last visited Oct. 2, 2009). In a controversial report, a French investigative judge found that the Tutsi rebel forces are responsible. See *id.*

73. See Stephanie Nieuwoudt, *New Controversy over Rwandan Genocide*, INST. FOR WAR & PEACE REPORTING, Dec. 13, 2006, [http://www.iwpr.net/?p=acr&s=f&o=326128&apc\\_state=heniacr200612](http://www.iwpr.net/?p=acr&s=f&o=326128&apc_state=heniacr200612) (last visited Oct. 2, 2009).

74. See, e.g., Bonomy, *supra* note 42, at 353; O-Gon Kwon, *The Challenge of an International Criminal Trial as Seen from the Bench*, 5 J. INT’L CRIM. JUST. 360, 372–73 (2007); see also Danner & Martinez, *supra* note 23, at 166–69 (“[W]e believe that faithful adherence to criminal culpability principles is the surest path to actually achieving the human rights and transitional justice aims of international criminal law.”).

75. See, e.g., Posner, *supra* note 40, at 151–52 (suggesting that it may be appropriate to take certain steps, such as relaxing the principle of legality or limiting a defendant’s choice of counsel in transitional trials).

itself to emphasize the other objectives.<sup>76</sup> I will return to these different possibilities in the particular context of considerations of the pace of international criminal justice—to which I now turn.

## II. EXPECTATIONS FOR THE PACE OF INTERNATIONAL CRIMINAL JUSTICE

As discussed in the Introduction, international criminal justice comes under heavy criticism for its slow pace. This Part considers what expectations we should have for the pace of international criminal justice. The different aims of international criminal justice identified in the prior section give rise to quite different expectations on this front, as well as to sometimes conflicting suggestions on how to speed up the pace.

### A. *Domestic Criminal Law Timeframes*

In assessing pace relative to the domestic criminal law aims of international criminal justice, the natural point of comparison is with domestic criminal cases. International criminal law borrows the aims and the methods of domestic criminal law; so from this perspective, it is reasonable to expect that international criminal cases take about as long as comparable domestic criminal cases.<sup>77</sup> By looking at how long comparable domestic

---

76. See, e.g., DRUMBL, *supra* note 63, at 194–205 (calling on international criminal justice to limit its emphasis on trials that track domestic criminal law and instead to explore other more collective mechanisms for doing justice); MARK FINDLAY & RALPH HENHAM, *TRANSFORMING INTERNATIONAL CRIMINAL JUSTICE: RETRIBUTIVE AND RESTORATIVE JUSTICE IN THE TRIAL PROCESS* 273–313 (2005); see also Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 *COLUM. J. TRANSNAT'L L.* 801, 871–72 (2006) (suggesting that where insistence on international criminal trials puts peace at risk, as may be true in Uganda today, the ICC should choose not to pursue cases as long as certain conditions are met). Some go further to argue that international criminal justice should be entirely abandoned in favor of other mechanisms that better promote the historical record and transitional justice aims. See, e.g., Rabkin, *supra* note 8, at 775–77 (suggesting that national justice will do a better job than international criminal justice in acknowledging the crimes against the victims and in offering hope of a peaceful future).

77. More specifically, this expectation should hold for comparisons made once the defendant is in custody or at least within the reach of the court. It is less reasonable to compare the time it takes international and domestic criminal tribunals to get control of defendants since international criminal tribunals are often established after the crimes have occurred, operate without police power, and usually can only gain custody of defendants after the resolution of the conflict at issue. See, e.g., Whiting, *supra* note 15, at 341–48 (discussing how post-conflict societies can only gradually come to cooperate with international criminal tribunals). Of course, domestic criminal courts may at times face similar problems in apprehending defendants. To give a prominent example, the United States has not apprehended Osama bin Laden, who has been indicted in relation to the 1998 embassy bombings (although not in relation to the events of September 11, 2001). See Dan Eggen, *Bin Laden, Most Wanted for Embassy Bombings?*, *WASH. POST*, Aug. 28, 2006, at A13. Also, domestic criminal courts may at times initiate prosecutions long after the crimes at issue where the prosecutions are more

criminal cases take, we can gauge how domestic criminal law balances the needs of victims for prompt retribution and of society for meaningful deterrence with the time needed to ensure fair and thorough proceedings through which to assess innocence on the one hand, or guilt and penalty on the other. Accordingly, this section considers how long comparable domestic criminal cases take. For practical purposes, I focus my analysis on comparable cases in the United States and France. I choose to examine these two countries because they have substantial influence in international criminal law (including in terms of supplying judges and lawyers), generate reasonably good information available as to the length of their criminal cases, and respectively constitute a common law system and a civil law system.<sup>78</sup>

Typical criminal cases in the United States tend to get resolved fairly quickly. Of all federal criminal cases in 2006, a median time period of .6 years passed from the case filing to trial-level disposition in cases that resulted in guilty pleas.<sup>79</sup> In the very small percentage of cases that went to a jury trial and resulted in verdicts, the median time was 1.3 years.<sup>80</sup>

---

significant from a transitional justice perspective. *See, e.g.,* Shaila Dewan, *Mississippi Jury Convicts Ex-Klansman in 1964 Killings*, N.Y. TIMES, June 21, 2005, at A1 (describing the 2005 prosecution of Edgar Ray Killen in a Mississippi state court for murders during the civil rights era).

78. Both countries are also developed Western countries. This may seem an odd choice since the countries with which international criminal law tends to concern itself today are usually developing countries with far fewer resources and with different expectations for the shape and pace of international criminal justice. Nonetheless, in considering what can be reasonably expected of international criminal justice, it makes more sense to look for comparators in Europe and the United States, which have the longest-standing involvement in international criminal law and the greatest role in shaping international criminal law today.

79. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 254–56 tbl.D-6 (2007), available at <http://www.uscourts.gov/judbus2006/contents.html> (last visited Oct. 4, 2009) [hereinafter 2006 ANNUAL REPORT].

Over the years, these timeframes have been growing longer. *See* BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., FEDERAL CRIMINAL JUSTICE TRENDS 2003, at 17 tbl.12, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjt03.pdf> (last visited Oct. 2, 2009) [hereinafter 2003 FEDERAL CRIMINAL JUSTICE TRENDS] (showing an increase from 1994 to 2003 and a 2003 number that is less than the 2006 number). In state courts, the median in 2002 was .5 years for all felonies resulting in convictions, and 1.1 years for murder and manslaughter. *Time Between Arrest and Sentencing for Felons Convicted in State Courts*, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, STATE UNIVERSITY OF NEW YORK AT ALBANY, available at <http://www.albany.edu/sourcebook/pdf/t5502002.pdf> (last visited Oct. 2, 2009).

80. *See* 2006 ANNUAL REPORT, *supra* note 79, at 254–56 tbl. D-6. Of these cases, the median trial takes a day, and only about 1% of trials take twenty days or longer. *See id.* at 183–85 tbl.C-8. The rates of pre-disposition detainment are high, with 77% of all federal defendants experiencing some form of pre-trial detainment in 2004. The majority of these appear to be detained for the duration of the case. SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, tbl.5.13.2004 (2004), available at <http://www.albany.edu/sourcebook/pdf/t5132004.pdf> (last visited Oct. 5, 2009).

Of federal criminal appeals resolved on the merits in 2006, the median time between the notice of appeal and resolution was one year.<sup>81</sup>

These statistics include both misdemeanors and felonies, however, with the felonies running the gamut from immigration offenses to mass crimes. They can hardly be considered comparable to the average international criminal case, which will typically involve large numbers of atrocities and/or the challenge of linking these atrocities to defendants whose high positions keep them several steps removed from the commission of the atrocities.<sup>82</sup>

In comparing the costs of international criminal trials and domestic criminal trials, David Wippman has referenced the prosecutions of Timothy McVeigh for the Oklahoma City bombing and of Jeffrey Skilling for Enron-related offenses as possible benchmarks.<sup>83</sup> Whereas the Oklahoma City bombing case involved the kind of violence associated with international criminal cases, the Enron case involved the complexity. I will therefore use these cases as suggestive of the timeframes we might expect from domestic criminal cases in the United States that are comparable to international criminal cases. Both cases have taken much longer than more typical criminal cases. All in all, almost four years

---

81. See 2006 ANNUAL REPORT, *supra* note 79, at 106–07 tbl.B-4A. Only about 16% of all criminal convictions get appealed. See 2003 FEDERAL CRIMINAL JUSTICE TRENDS, *supra* note 79, at 27 tbl.21. The higher the sentence, however, the more likely the appeal; and there is an appeal rate of over 80% for cases involving sentences of thirty years or higher. John Scalia, *Federal Criminal Appeals, 1999, with Trends 1985–1999*, BUREAU OF JUST. STAT. SPECIAL REP., Apr. 2001, at 5 fig.4, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fca99.pdf> (last visited Oct. 2, 2009). For information on criminal appeal times in state courts, see Dorothy Toth Beasley et al., *Time on Appeal in State Intermediate Appellate Courts*, 37 JUDGES J. 12, 14 (1998) (showing significant variation among the state courts studied, with the fastest resolving 75% of criminal appeals in .6 years from the filing of the notice of appeal and the slowest in 2.2 years). Appeals in death penalty cases take particularly long. See BARRY LATZER & JAMES N.G. CAUTHEN, *JUSTICE DELAYED? TIME CONSUMPTION IN CAPITAL APPEALS: A MULTISTATE STUDY 3*, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/217555.pdf> (last visited Oct. 2, 2009) (showing that in fourteen states it takes a median of 2.65 years from sentencing to resolution by the state court of last result, plus another .52 years to seek certiorari unsuccessfully from the U.S. Supreme Court). Of course, these numbers apply only to the criminal proceedings themselves, and do not consider the additional and often significant time spent in post-conviction proceedings under 28 U.S.C. § 2255 for federal convictions, and under 28 U.S.C. § 2254 and state post-conviction processes for state convictions.

82. There are of course some exceptions, most notably at the ICTY. Initially, that tribunal tried a non-trivial number of low-level defendants (prison guards, militia members, etc.) who were each responsible for a relatively small number of crimes, albeit very serious ones. Such defendants were easier for the tribunal to obtain than high-level ones. Over time, however, the ICTY came to focus on high-level defendants. Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 J. INT'L CRIM. JUST. 585, 586–88 (2004).

83. Wippman, *supra* note 14, at 869–70. For example, Wippman notes that the United States spent over \$82.5 million dollars in prosecution costs alone for McVeigh and his co-conspirator Terry Nichols—a number well above \$18 million per defendant (the ICTY's total budget divided by the number of completed proceedings against individuals). *Id.* at 862, n.11.

passed between McVeigh's arrest to the finalization of his direct appeal: he was arrested in April 1995; his case went to trial in federal court almost two years later, in March 1997; the trial phase and sentencing phase ended with a death sentence in June 1997; his appeal was denied in September 1998; and certiorari was denied in March 1999.<sup>84</sup> The Enron case has taken even longer. Jeffrey Skilling was indicted in February 2004; the trial began in January 2006; the guilty verdict came down in May 2006; and sentencing took place in October 2006.<sup>85</sup> Thus about 2.7 years passed from Skilling's indictment to his sentencing. Skilling appealed and, in January 2009, the Fifth Circuit affirmed his conviction but remanded for new sentencing.<sup>86</sup> To date, Skilling's case has taken over five years since the indictment, and has still not finished.

Although these two cases are only examples, they support the common sense proposition that complex criminal cases do take longer than the average criminal case. Further, that neither of these highly publicized cases has received serious criticism for its length suggests that we accept timeframes of over four years for complex criminal cases. Indeed, four years may well represent a lower bound—as suggested by the fact that Skilling's case still continues, more than five years after the indictment.

How do U.S. timeframes compare with French ones? The French standard is determined by cases that come before the *Cour d'assises*, which has jurisdiction only over crimes that carry minimum sentences of ten years or more, like murder and rape.<sup>87</sup> In the French criminal system, reported crimes are assigned for investigation to investigatory judges.<sup>88</sup> A judge investigating a particular case will assemble a dossier over an often lengthy period of time.<sup>89</sup> If the judge thinks a prosecution is warranted, he or she will take steps to recommend the case move forward to trial.<sup>90</sup> Plea bargains are not permitted but defendants who admit

---

84. United States v. McVeigh, 153 F.3d 1166 (10th Cir. 1998); Stephen Jones & Holly Hillerman, *McVeigh, McJustice, McMedia*, 1998 U. CHI. LEGAL F. 53, 53–56. The federal case against Terry Nichols, McVeigh's co-conspirator, was longer than McVeigh's by about six months. United States v. Nichols, 169 F.3d 1255 (10th Cir. 1999). Because Nichols was not sentenced to death in the federal case, he was tried again in a state criminal case in 2004. Once again, he received a life sentence. *Hung Jury Spares Nichols a 2nd Time from Death*, N.Y. TIMES, June 12, 2004, at A7.

85. Alexei Barrionuevo, *Enron's Skilling Is Sentenced to 24 Years*, N.Y. TIMES, Oct. 24, 2006, at C1; Alexei Barrionuevo, *Two Enron Chiefs Are Convicted in Fraud and Conspiracy Trial*, N.Y. TIMES, May 26, 2006, at A1; Kurt Eichenwald, *Enron's Skilling Is Indicted by U.S. in Fraud Inquiry*, N.Y. TIMES, Feb. 20, 2004, at A1. Kenneth Lay was indicted in July 2004 and was tried with Skilling, but he died after the trial and before sentencing. *Id.*

86. United States v. Skilling, 554 F.3d. 529 (5th Cir. 2009).

87. Renée Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises*, 2001 U. ILL. L. REV. 791, 800 (2001).

88. *Id.* at 801–04.

89. *Id.* at 804.

90. *Id.* at 801–06 (describing this process in much more detail).

their guilt at trial (or before trial) may well end up with lower sentences.<sup>91</sup>

Cases resolved by the *Cour d'assises* in 2005 took an average of 4.7 years from offense to resolution by that court, with 1.7 years passing prior to assignment to an investigatory judge, the investigation lasting 2.1 years, and just shy of a year passing once the investigatory judge had sent the case to the next stage.<sup>92</sup> Appeals in the *Cour d'assises d'appel* averaged another 1.4 years, although only around fifteen percent of cases resulted in appeals.<sup>93</sup> If the cases that are appealed are representative of other *Cour d'assises* cases, then it would take an average of 4.4 years from the time of assignment to the investigatory judge to the completion of the appeal with the *Cour d'assises d'appel*. Moreover, since these numbers include relatively straightforward crimes (such as individual murders), it is reasonable to assume that the timeframes for more complicated cases are longer.

A smattering of cases from other jurisdictions supports the idea that where more complicated criminal cases are concerned, we expect longer timeframes—and particularly longer trials—than in more typical cases. Markus Dirk Dubber describes a handful of criminal trials in Germany in 1994 and 1995 that lasted between two and four years.<sup>94</sup> The trial in a recent terrorism case in the United Kingdom lasted a year; and the trial in a Northern Ireland terrorism case has taken 3.5 years.<sup>95</sup> The Australian

---

91. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CALIF. L. REV. 539, 626–47 (1990).

92. SECRETARIAT GÉNÉRAL, MINISTÈRE DE LA JUSTICE, L'ANNUAIRE STATISTIQUE DE LA JUSTICE: EDITION 2007, at 104, 125 (2007), available at [http://www.justice.gouv.fr/art\\_pix/1\\_annuaire2007.pdf](http://www.justice.gouv.fr/art_pix/1_annuaire2007.pdf) (last visited Oct. 2, 2009) [hereinafter L'ANNUAIRE STATISTIQUE DE LA JUSTICE]. The trials themselves are usually quite short. *But see France Looks Back on Papon Trial*, BBC NEWS, Apr. 2, 1998, <http://news.bbc.co.uk/1/hi/despatches/72215.stm> (last visited Oct. 2, 2009) (noting that the Maurice Papon trial took six months).

93. L'ANNUAIRE STATISTIQUE DE LA JUSTICE, *supra* note 92, at 104, 125. The appeal in the *Cour d'assises d'appel* differs substantially from appeals in U.S. cases, more closely resembling a trial de novo. Lerner, *supra* note 87, at 813. There is also a quite limited possibility of appeal to the *Cour de cassation*. *See id.*

94. Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 569 (1997) (further noting that in one particular region, “[t]wo-, three-, and four-year-long trials are not unusual’”) (quoting Günter Bertram).

95. Nicola Woolcock et al., *Price of Justice Was the Longest and Costliest Criminal Case Ever*, TIMES (London), May 1, 2007, at 10, available at <http://business.timesonline.co.uk/tol/business/law/article1728811.ece> (last visited Oct. 2, 2009) (describing a year-long British jury trial of five men accused of terrorism); *Protestant Extremist Convicted on 48 Terror Counts After Northern Ireland's Longest Trial*, USA TODAY, Jan. 26, 2007, available at [http://www.usatoday.com/news/world/2007-01-26-ireland\\_x.htm](http://www.usatoday.com/news/world/2007-01-26-ireland_x.htm) (last visited Oct. 2, 2009) (describing a bench trial that began in June 2003 and ended in January 2007). The Lord Chief Justice of England and Wales has issued a protocol for dealing with complex criminal cases where the trials are expected to last some months. Iain Bonomy, *The Reality of Conducting a War Crimes Trial*, 5 J. INT'L CRIM. JUST. 348, 349 (2007).



criminal justice system has taken years to try and sentence terrorism defendants detained since 2005.<sup>96</sup> Such lengthy cases are often viewed with disapproval, but they seem to be emerging as the norm where more complex crimes like terrorism are involved.

These comparators from the United States, France, and elsewhere are rough ones. But using these figures, from a domestic criminal law perspective we could conservatively expect international criminal cases that are tried and appealed to take at least four to five years from custody to completion. This is the timeframe found in the McVeigh and Skilling cases, in the French *Cour d'assises*, and in comparable complex criminal cases in other jurisdictions. Indeed, given certain practical differences between international criminal cases and domestic ones (for example, international criminal cases often operate in multiple languages, requiring extra time for document translation), these numbers arguably represent the lower bound of reasonable expectations from a domestic criminal law perspective.

### B. Historical Record Timeframes

Where the goal of establishing a historical record is concerned, it is hard to identify an expected timeframe for international criminal justice. Unlike the domestic criminal law objectives, there is no clearly defined reference point from which to base our expectations. Investigative commissions on mass atrocities can operate and issue fact-finding reports within mere months, as did the U.N.-appointed Commission of Inquiry on Darfur.<sup>97</sup> TRCs can take several years, as did the three-year South Africa TRC and the four-year Sierra Leone TRC.<sup>98</sup> Academic historians

---

96. Gary Hughes, *Abdul Nacer Benbrika and Five Followers Guilty of Terror Plot*, AUSTRALIAN, Sept. 16, 2008, at 1, available at <http://www.theaustralian.news.com.au/story/0,,24352375-2702,00.html> (last visited Oct. 2, 2009) (describing convictions after a six-month trial); *Sentencing Delayed by Finding on Abdul Nacer Benbrika*, AUSTRALIAN, Dec. 17, 2008, available at <http://www.theaustralian.news.com.au/story/0,25197,24813229-2702,00.html> (last visited Oct. 2, 2009). For another long terrorism trial, see *Argentina Bomb Suspects Acquitted*, BBC NEWS, Sept. 2, 2004, <http://news.bbc.co.uk/2/hi/americas/3622946.stm> (last visited Oct. 2, 2009) (describing the acquittal after a three-year trial of individuals suspected of bombing a Jewish center in 1994).

97. Int'l Comm'n of Inquiry on Darfur, *Report to the United Nations Secretary-General*, at 2 (Jan. 25, 2005), available at [http://www.un.org/news/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/news/dh/sudan/com_inq_darfur.pdf) (last visited Oct. 2, 2009) (noting that the commission report was issued within three months of the commission's creation).

98. For background information on the creation of the TRCs in Sierra Leone and South Africa, see U.S. INST. FOR PEACE, TRUTH COMMISSION: SIERRA LEONE, <http://www.usip.org/resources/truth-commission-sierra-leone> (last visited Oct. 2, 2009); U.S. INST. FOR PEACE, TRUTH COMMISSION: SOUTH AFRICA, available at <http://www.usip.org/resources/truth-commission-south-africa> (last visited Oct. 2, 2009).

researching mass atrocities can publish their conclusions decades and even centuries after the events at issue.

The absence of any fixed expectations for timeframes is reasonable in light of the nature of the historical record aim. The drive for truth about mass atrocities is not heavily time-sensitive. While there are advantages to swifter inquiries, such as bringing more immediate consolation to survivors and triggering quicker recognition on the part of the international community, additional time may also result in more thorough and perhaps also impartial evaluations. Immediately after World War II, the IMT provided a swift sketch of the historical record of the Nazi regime, but it was left to the *Eichmann* trial in 1961 to explore the horrors of the Holocaust in depth.<sup>99</sup> Historical interest in mass atrocities continues long after most survivors are dead, as is shown by continuing controversy over the Armenian genocide.<sup>100</sup> The historical record aim thus does not give rise to strong needs or expectations with respect to timeframe.<sup>101</sup>

### *C. Transitional Justice Timeframes*

The transitional justice aims give rise to quite different expectations in terms of timeframes. Unlike the domestic criminal law aims, they focus on how long it takes international criminal justice to affect societies rather than on how long it takes to process individual cases. In contrast to the historical record aim, they are often time-sensitive. Finally, they are society-specific in their needs and thus in their time expectations.

Each mass atrocity situation is different. Sometimes the atrocities are linked to an armed conflict and other times they are not; sometimes one group bears primary responsibility for the atrocities and other times the responsibility is more evenly spread; and so forth. Each mass atrocity situation also ends differently: sometimes the existing regime is entirely overthrown, and other times there is a truce or agreement leaving multiple sides with some power, either in terms of discrete geographic control or power-sharing within the new government. Still other times, the oppressive regime surrenders power in a semi-voluntary way but retains

---

99. Danner & Martinez, *supra* note 23, at 94. The IMT touched on the Holocaust, but did not center on it.

100. See, e.g., TANER AKCAM, *A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY* (Paul Bessemer trans., 2006).

101. Of course, a historical record can also be a means to domestic criminal justice ends or to transitional justice ends. For example, a historical record created by a TRC may enhance a peaceful transition by the act of creating a record of what happened. In this regard, the timeframe may become more pressing, as the historical record is needed not for its own sake but for the effect it has on the other ends. Those issues of timeframe, however, are captured elsewhere in the Article; in this section I am considering the historical record only as an end unto itself.

significant influence. The international community can have anywhere from little to immense involvement in ending the atrocities, in shaping the post-atrocity government, and in maintaining the peace.

These differences should and do influence the shape of transitional justice efforts.<sup>102</sup> The broader contours of how they do so are well beyond the scope of this Article. I will focus on the narrower question of how these differences can and do affect expectations for the pace of international criminal justice. For this purpose, it is helpful to categorize transitional societies into four loose groupings.

First, there are “untransitioned societies”: places where the abusive regime remains in power and continues to commit atrocities. The situation in Darfur today is an obvious example.

Second, there are “abruptly transitioned societies”: places where the regime responsible for the bulk of the mass atrocities has been suddenly and thoroughly overturned. Examples include Germany in May 1945 following the unconditional surrender of the Nazi government, and Rwanda in July 1994 following the overthrow of the Hutu extremist government by the Tutsi-dominated Rwandan Patriotic Front (RPF).

Third, there are “slowly transitioning societies”: places where the regimes responsible for the atrocities either remain in power with their wings clipped or surrender power in such a way that their leaders and/or supporters still retain substantial influence. An example is the former Yugoslavia after the 1995 Dayton Accords, where each of the warring parties was left with some territorial control.<sup>103</sup> There, international supervision and carrot-and-stick efforts by western European countries and the United States helped to prevent further violations of humanitarian law and encouraged gradual regime change through the electoral process.<sup>104</sup>

Fourth, there are “uneasily transitioned” societies: places where the mass atrocities lie well in the past but are thought to have festering con-

---

102. See, e.g., MINOW, *supra* note 52, at 132–35 (discussing how factors like the ones identified in the prior paragraph should influence transitional justice choices); STEVEN D. ROPER & LILIAN A. BARRIA, *DESIGNING CRIMINAL TRIBUNALS: SOVEREIGNTY AND INTERNATIONAL CONCERNS IN THE PROTECTION OF HUMAN RIGHTS* 84 (2006) (arguing that transitional justice institutions “must be crafted to reflect the post-conflict environment and the sincerity of the host state and the international community”).

103. RICHARD HOLBROOKE, *TO END A WAR* 288–312 (1998) (describing the final negotiation of the Dayton Accords). Another example of a slowly transitioning society is South Africa in the early 1990s, when the country’s move towards democracy was accompanied by conditional amnesty for former rights-violators. See, e.g., Maryam Kamali, *Accountability for Human Rights Violations: A Comparison of Transitional Justice in East Germany and South Africa*, 40 *COLUM. J. TRANSNAT’L L.* 89, 118–30 (2001).

104. HOLBROOKE, *supra* note 103, at 316–69 (describing initial progress). Of course, this settlement relative to Bosnia and its environs did not prevent the crisis that later broke out in Kosovo.

sequences. Germany around the time of Israel's Eichmann trial is one example; Cambodia is another. While the current government, led by Prime Minister Hun Sen, bears some connections to the Khmer Rouge atrocities of the 1970s and to subsequent violations of international humanitarian law,<sup>105</sup> Cambodia has come a long way from those days and is presently stable.

Of course, some situations fall at the borders between these groups. For example, Sierra Leone lies somewhere between a slowly transitioning society and an abruptly transitioned one. In 1999, there was a truce between the various warring factions,<sup>106</sup> suggestive of a slowly transitioning society. When this truce fell apart, however, international intervention largely neutralized the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC).<sup>107</sup> Sierra Leone could thus be called abruptly transitioned in relation to these groups. Power was retained only by the Civil Defense Forces (CDF), whose atrocities during the civil war had been grave but not nearly as notorious as those of the RUF.<sup>108</sup>

The international community has encouraged the use of international or hybrid criminal tribunals in all four types of transitional situations. The ICC's efforts in Sudan and Uganda today relate to untransitioned societies; the IMT, the ICTR, and arguably the SCSL were created in response to abruptly transitioned societies; the ICTY was initially created in the context of untransitioned societies and now operates with regard to slowly transitioning ones; and the ECCC is set in an uneasily transitioned society.

As I sketch out below, these various transitional situations have different transitional justice needs. They thus give rise to quite different expectations for international criminal justice and its pace.

International criminal justice plays only a limited role in untransitioned societies. Its primary goal in such circumstances is to somehow help trigger a transition. But international criminal prosecutions will likely have difficulty obtaining custody over defendants—and hence moving the criminal proceedings along—until the societies have begun or undergone transitions. Untransitioned societies do not hand over their

---

105. See, e.g., H.R. 533, 105th Cong. (1998) ("Expressing the sense of the House of Representatives regarding the culpability of Hun Sen for war crimes, crimes against humanity, and genocide in Cambodia"); see also Seth Mydans, *Efforts to Limit Khmer Rouge Trials Decried*, N.Y. TIMES, Feb. 1, 2009, at A8.

106. See, e.g., Peter Pham, *A Viable Model for International Criminal Justice: The Special Court for Sierra Leone*, 19 N.Y. INT'L L. REV. 27, 58–59 (2006).

107. See *id.* at 60–63.

108. See William A. Schabas, *The Sierra Leone Truth and Reconciliation Commission*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 21, 28 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

own, as shown by the outstanding ICC indictments in Darfur and Uganda.<sup>109</sup> Accordingly, from the perspective of the pace of international justice, the sole issue is whether it is better to issue indictments before or after the transition—an issue which remains open to debate.<sup>110</sup> By contrast, in abruptly transitioned, slowly transitioning, and uneasily transitioned societies, international criminal prosecutions are likely to result in custody over at least some indictees, and hence the post-custody pace of international criminal cases becomes particularly relevant.

Abruptly transitioned societies present far different circumstances. There, the abusive regime has been overthrown and its leaders and indeed its ordinary supporters either lie in the hands of the new regime or are fugitives. There is a great and immediate demand within the new regime for punishment of the old oppressors. Perhaps the primary concern from a transitional justice perspective is to ensure that this justice does not cross the line into vengeance. Herbert Wechsler, a former law clerk at the IMT, explains as follows:

I say to you on the basis of such observations as I could make while I was in Germany and traveled to other spots of immediate post-war Europe that if the governments of the victorious powers had not declared an intention to render justice on bases at least similar to those that were articulated in the London Charter, the blood bath that would have occurred against anybody asserted to be connected in any way with the German leadership or activities would have been beyond belief.

And so, I say ironically . . . : paradoxically, the principal function of Nuremberg and supplementary trials was not to administer punishment, but to influence its withholding, its postponement, while passions cooled, and to give reason a chance to be operative in determining who deserved to be punished.<sup>111</sup>

International criminal justice in abruptly transitioned societies should be slow enough to provide Wechsler's cooling-off period, but also

---

109. See ICC, Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Oct. 2, 2009) (describing how almost all of the Uganda and Darfur suspects remain at large).

110. Compare Gettleman, *supra* note 66 (discussing how ICC arrest warrants may be impeding the peace process in Uganda), with John P. Cerone, *Dynamic Equilibrium: The Evolution of US Attitudes Toward International Criminal Courts and Tribunals*, 18 EUR. J. INT'L L. 277, 309–10 (2007) (suggesting that the indictment of Charles Taylor hastened his downfall).

111. Norman Silber & Geoffrey Miller, *Toward 'Neutral Principles' in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 913 (1993).

swift enough that frustration with the pace does not trigger private vengeance. It should also set the tone for any non-international prosecutions. The IMT judgment became a guiding norm for subsequent domestic trials in relation to the Nazi regime, particularly for trials conducted by individual Allied powers, mainly the Americans, under Control Council Law No. 10.<sup>112</sup> This influence over subsequent domestic trials (and possibly more broadly over the immediate post-war culture) was possible in part because the IMT judgment preceded these other trials.<sup>113</sup>

We expect less swift justice in slowly transitioning societies. For one thing, it is harder to prosecute those responsible for past atrocities, since they remain in power or at least in positions of influence. Indeed, in slowly transitioning societies, the primary benefit from a transitional justice perspective may be in gaining custody over defendants, rather than in their actual trials. By turning over leaders to a tribunal, a society distances itself from the past atrocities and recognizes the primacy of the rule of law in both a symbolic and practical way. This is true even where the societies act grudgingly and in response to international pressure as shown, for example, in how the states of the former Yugoslavia have responded to ICTY indictments. Croatia's eventual willingness to pursue Ante Gotovina, Serbia's eventual decision to hand over Slobodan Milošević and now—at long last—Radovan Karadžić, and Kosovo's decision to surrender Ramush Haradinaj all furthered and served as symbolic benchmarks of these states' transitions.<sup>114</sup> Moreover, once the defendants are in custody, there is no urgent need for speedy trials from a transitional justice perspective. Unlike where abruptly transitioned societies are concerned, there is little risk of a bloodbath against perceived past oppressors in slowly transitioning societies and thus no need to set an example of how to deal with the defeated. Instead, the trick is to set an example of how societies should deal with individuals who have committed past atrocities but remain linked to the regime in power. Here, somewhat slower and more thorough proceedings have value. As more

---

112. See TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW No. 10, at 20 (1949) (noting that the IMT judgment, "while not in all respects binding on tribunals established under Law No. 10, was certain to be an extremely weighty precedent").

113. Prosecutions were of course only one of many transitional justice measures used after World War II. For a broader picture, see TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 41–62 (2005).

114. See Marlise Simons, *Kosovo Chief Resigns and Surrenders to Hague Tribunal*, N.Y. TIMES, Mar. 9, 2005, at A14; Marlise Simons, *The Handover of Milosevic: The Overview; Milosevic Is Given to U.N. for Trial in War-Crime Case*, N.Y. TIMES, June 29, 2001, at A1; Nicholas Wood, *Croat's Case Offers Guide to Finding Bosnian Serb Fugitives*, N.Y. TIMES, Jan. 2, 2006, at A4.

time passes, the regimes in power and their supporters may take more impartial views of the past atrocities, especially if this time is used to build a strong case that illustrates the scope of the atrocities and the suffering of the victims. This in turn may eventually give rise to domestic prosecutions or to other forms of justice. We see this beginning to happen at last with regard to the massacre at Srebrenica. In prosecuting Milošević, the ICTY obtained and used a videotape showing the slaughter of some Bosnian Muslims at Srebrenica by a Serbian paramilitary unit known as the Scorpions.<sup>115</sup> Thereafter, Serbia domestically prosecuted some of the killers.<sup>116</sup>

Finally, the pace of international criminal justice is perhaps least important where uneasily transitioned societies are concerned. In such cases, the community at issue has returned to normalcy on the surface. There is a perceived need to revisit the past atrocities in order to prevent festering and promote deep-rooted reconciliation. But this need is not particularly time-sensitive because there is no immediate risk of conflict resurgence and because there has already been at least a substantial return to the rule of law. This appears true in Cambodia with regard to long-vanquished Khmer Rouge regime of the late 1970s. From a transitional justice perspective, it does not much matter precisely when the ECCC conducts its trials or how long these proceedings take.<sup>117</sup>

In sum, from a transitional justice perspective, expectations and needs as to the pace of international criminal justice can vary considerably depending on the type of transitioning society at issue. Swiftiness is most important in abruptly transitioned societies and far less significant in slowly transitioning or uneasily transitioned ones.

#### *D. The Compatibility of These Timeframes*

The timeframes given above are sometimes in tension with each other. The most obvious tension lies between the timeframes expected to achieve domestic criminal law and transitional justice goals in abruptly transitioned societies. If an international criminal tribunal takes four to five years to complete the cases of defeated leaders of a past regime,

---

115. See Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law*, 38 GEO. J. INT'L L. 251, 275 (2007).

116. See Matt Prodger, *Serb Video 'Executioners' Charged*, BBC NEWS, Oct. 7, 2005, <http://news.bbc.co.uk/1/hi/world/europe/4320504.stm> (last visited Oct. 2, 2009). Four of the five defendants were ultimately convicted, although the sentences (which ranged from five to twenty years) have been criticized as low. See, e.g., *Jail for Serb Video Death Squad*, BBC NEWS, Apr. 10, 2007, <http://news.bbc.co.uk/1/hi/world/europe/6540645.stm> (last visited Oct. 2, 2009).

117. These questions do matter for other reasons: they may affect the retributive effects or financial costs of the trials, or may cause concern about the death or incapacitation of defendants and witnesses.

then this may prove too slow to stave off on-the-ground vengeance or to influence domestic prosecutions of lower-level perpetrators. I will explore this problem in detail in Part IV.

Even where the timeframes are compatible in theory, however, it is not clear that they are compatible in practice. The historical record aim and transitional justice aims in the context of slowly transitioning or uneasily transitioned societies are not particularly time-sensitive, so on the surface they seem compatible with the four-to-five year timeframe expected from a domestic criminal law perspective. But it will likely take additional time to accomplish these aims. If an international criminal trial incorporates more evidence than is needed for guilt and sentencing determinations in order to build a historical record, then the trial will undoubtedly take longer than it would if it pursued only domestic criminal law aims. Thus there seems to be an inevitable tradeoff between the scope of the aims of international criminal justice and its timeframe.

Some commentators consider that international criminal law should save time by eliminating any conscious steps to accomplish the historical record and transitional justice aims. The British took this view at Nuremberg. “[I]f we undertake to tell the whole story, as history may tell it in the future,” they said disapprovingly to the pro-historical-record Americans, then “it would take us years.”<sup>118</sup> The British lost that round but the argument continues to this day. In a recent symposium, *How to Ameliorate International Criminal Proceedings*, two ICTY judges urged that the need for the “efficient and expeditious completion of [] trial[s]” means that cases should focus narrowly on the guilt or innocence of the particular defendants.<sup>119</sup>

Others suggest speeding things up by limiting the emphasis on domestic criminal law aims. The most common tool is to try only a few defendants—an approach that would not speed up individual cases but would limit the total lifespan and cost of a tribunal. The SCSL is a good example. Its foundational statute gives it jurisdiction only over “persons who bear the *greatest* responsibility” for the atrocities<sup>120</sup> and the tribunal has indicted just thirteen individuals.<sup>121</sup> This approach has lessened the

---

118. ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 17 (1983). The British thought the trial could be completed in two weeks: one week for the prosecution to present its case, and another week for the cases of the twenty-two defendants. *Id.*

119. Bonomy, *supra* note 42, at 353. Judge Bonomy recommends eliminating any explicit focus on “(a) contributing to the establishment and maintenance of peace in the region; (b) giving victims a voice; (c) contributing to reconciliation among the various groups in the region; and (d) compiling a complete historical record of the war.” *Id.* Judge Kwon makes a similar point. See Kwon, *supra* note 15, at 372–73.

120. SCSL Statute, *supra* note 26, art. 1(1) (emphasis added).

121. See Press Release, Office of the Prosecutor, SCSL, Prosecutor Welcomes Discussions to Facilitate the Transfer of Charles Taylor to the Special Court (Mar. 13, 2006), available at



number of perpetrators brought to justice and thus the amount of retribution attained, but on the other hand the trials have been quite comprehensive in scope (thus promoting the historical record aim) and have involved defendants from all sides of the conflict (thus promoting reconciliation and the rule of law). With regard to speeding up individual cases, there are few if any calls for limiting time-consuming due process protections, such as the right to adequate time to prepare a case or the right of appeal.<sup>122</sup> At most, we see small encroachments on domestic criminal law processes. One example is the ICTR's 2006 decision to take judicial notice of the fact that genocide occurred in Rwanda in 1994—a decision emphasizing that “[t]he fact of the Rwandan genocide is a part of world history”<sup>123</sup> but one which may run contrary to the traditional burden of proof.<sup>124</sup>

Finally, there may be some ways of speeding up international criminal justice that are compatible with all the aims. In this respect, two important possibilities stand out: guilty pleas and multi-defendant trials.<sup>125</sup> I will describe these possibilities briefly here, as the next Part will consider their relation to the pace of international criminal justice to date.

Guilty pleas are a legitimate tool of domestic criminal law in common law jurisdictions, although they are less common in civil law ones.<sup>126</sup> They can advance the historical record through detailed admissions that sometimes go beyond what would come out at trial,<sup>127</sup> and

---

<http://www.sc-sl.org/LinkClick.aspx?fileticket=ACIpXVOHCnw%3D&tabid=196> (last visited Oct. 2, 2009).

122. See DRUMBL, *supra* note 63, at 7 (noting that “there is little, if any, questioning of the suitability of the transplant” of the full panoply of due process rights from the domestic criminal context to the international criminal context).

123. Prosecutor v. Karemera, Case No. ICTR 98-44-AR73(C), Decision on Prosecutor's Interlocutory Appeal of Decision on Judicial Notice, ICTR Appeals Chamber, ¶ 35 (June 16, 2006).

124. Brittan Heller, *Noticing Genocide*, 116 YALE L.J. POCKET PART 101, 103–04 (2006), available at <http://yalelawjournal.org/images/pdfs/67.pdf> (last visited Oct. 2, 2009). Heller further suggests that this decision may have unintended counterproductive effects on other aims of the justice process. *Id.* at 104.

125. Of course, these are not the only suggestions for speeding up international criminal justice. See, e.g., Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994*, 18 B.U. INT'L L.J. 163, 195 (2000) (recommending more judges, shorter recess periods, and better staff). I emphasize guilty pleas and multi-defendant trials as suggestions, however, because they have the potential for significant impact and can be implemented without reliance on more funding or on more capable judges, lawyers, and staffers.

126. Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 16–49 (2002).

127. See, e.g., Prosecutor v. Bralo, Case No. IT-95-17-S, Sentencing Judgment, ¶¶ 63–69 (Dec. 7, 2005).

from a transitional justice perspective they offer hope for reconciliation.<sup>128</sup> And the efficiency gains of guilty pleas are obvious: they dramatically reduce pre-trial time if the defendant makes an early decision to plead; they reduce the trial phase to a few hearings on the voluntary nature of the plea and on the sentence (plus whatever time is needed to draft the judgment); and they may also lead to fewer appeals or to appeals that relate only to sentencing. On the flip side, guilty pleas require the cooperation of the defendant, and this cooperation is most likely secured by the inducement of a reduced sentence.<sup>129</sup> But where the defendants are those most responsible for massive human rights atrocities like genocide, sentences for functionally less than life are hard to accept both morally and politically. Either the prosecution must be willing to cut deals with the worst of the worst, or the defendants must be willing to plead guilty without a bargain due to genuine remorse or in the hope that the court will reduce their sentence even without the prosecution's consent. The case of Jean Kambanda, the Rwandan Prime Minister during the genocide, illustrates the difficulties associated with these options. Although the prosecution was unwilling to enter into a sentencing plea bargain with him,<sup>130</sup> he pled guilty anyway, citing his desire to see peace restored in Rwanda.<sup>131</sup> After he received a life sentence, however, he tried to get his plea revoked—and thus undermined any power of reconciliation that it offered.<sup>132</sup>

Multi-defendant trials are also theoretically compatible with all the aims of international criminal justice. They are often found in domestic

---

128. DRUMBL, *supra* note 63, at 164. Following the first guilty pleas by Bosnian Serbs in relation to the 1995 massacre at Srebrenica, a Bosnian Muslim from Srebrenica who lost friends and family there wrote the following:

[T]he confessions have brought me a sense of relief I have not known since the fall of Srebrenica in 1995. They have given me the acknowledgment I have been looking for these past eight years. While far from an apology, these admissions are a start. We Bosnian Muslims no longer have to prove we were victims. Our friends and cousins, fathers and brothers were killed—and we no longer have to prove they were innocent.

Emir Suljagić, Op-Ed., *Truth at the Hague*, N.Y. TIMES, June 1, 2003, at 13.

129. In common law jurisdictions, defendants typically enter into plea bargains with the prosecution. Prosecutors agree to recommend lower sentences in exchange for pleas. Prosecutors can also bargain over the charges they will bring rather than over the sentences they will recommend. Charge bargaining, however, is less common in the international tribunals than sentence bargaining. Combs, *supra* note 16, at 140; *see also* DRUMBL, *supra* note 63, at 164, 179 (noting that charge bargaining disserves the historical record objective).

130. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment, ¶ 48 (Sept. 4, 1998).

131. *Id.* ¶¶ 50–52.

132. *See* Combs, *supra* note 16, at 128–33, 144, 150–51. Kambanda had hoped, of course, that the court would reduce his sentence if he pled guilty. *See id.* at 144.

criminal law;<sup>133</sup> they advance exploration of the historical record because they lend themselves to wide-lens portrayals of the atrocities; and they do not obviously detract from transitional justice aims. But the extent to which they provide efficiency gains is hard to assess. While multi-defendant cases save time per defendant by relying on common evidence, delays with regard to a single defendant may impede the entire case unless, as at Nuremberg, there is forceful trial management and limited regard for the defendants' due process rights.<sup>134</sup> The increased overall length of multi-defendant trials may also raise problems from a transitional justice perspective to the extent that at least a few judgments are needed sooner rather than later.

### III. HOW LONG DO INTERNATIONAL CRIMINAL CASES TAKE?

The discussion above focused on the expectations for international criminal justice and, more specifically, for its pace. This Part takes a different approach: it looks empirically at how long international criminal cases take.<sup>135</sup> This helps show how well or how poorly international criminal practice fits with the expectations set forth above. Only by knowing how long international criminal cases take in practice can we evaluate whether they are fast or slow by domestic criminal justice standards and whether they can meet the needs of transitioning societies in a timely fashion.

In assessing how long international criminal cases take, this Part uses a data set assembled from the cases of all 307 individuals who have been publicly charged at six international or hybrid criminal tribunals since their inception. In addition to producing overall statistics, the analysis is nuanced in three respects. First, it compares the pace across the different tribunals. Second, it compares the timeframes at five different phases of the criminal process. Third, it examines how these timeframes

---

133. The use of joinder in common law jurisdictions, however, may be limited by concerns about prejudice to the defendants. See Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 Vand. L. Rev. 349, 357–59 (2006) (describing possible disadvantages of joinder for U.S. federal defendants). These concerns may not be as significant in international criminal cases, however, due to the lack of evidentiary rules and the use of bench trials rather than jury trials.

134. See London Charter, *supra* note 24, art. 18 (providing that the IMT shall “take strict measures to prevent any action which will cause unreasonable delay” and “deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings”).

135. There has been no comprehensive examination of this issue to date, which is somewhat surprising in light of how often the pace of international criminal justice is criticized. When commentators do look closely at timeframes, they tend to do so in a piecemeal fashion, focusing on one tribunal or one particular phase (such as the trial phase), or both. See, e.g., Combs, *supra* note 16, at 90–92 (discussing the length of ICTY trials).

do or do not change where guilty pleas and multi-defendant trials are concerned. This tailored analysis is important for the later discussion in Part IV.

Section A briefly discusses the data and some qualifications related to it. Section B sets forth the results.

#### A. *The Data*

The following analysis uses all cases from four international criminal tribunals (the IMT, the ICTY, the ICTR, and the ICC), and from two hybrid criminal tribunals (the SCSL and the ECCC).<sup>136</sup> For each of the 307 individual defendants charged at these tribunals to date, the data reflect when the following five phases of their cases began and ended (where relevant): pre-indictment, pre-custody, pre-trial, trial, and appeal. These data are taken primarily from tribunal documents, such as indictments, decisions, judgments, press releases, and informational compilations.<sup>137</sup> All information is current through August 31, 2009.

More precisely, the five phases are measured as follows. First, I generally treat the pre-indictment stage as running from the date of the first crime alleged in the first indictment to the date that this first indictment

---

136. This list covers the majority of international and hybrid criminal tribunals to date. Of the international criminal tribunals, I omit only the IMT for the Far East, which conducted a trial of top Japanese leaders after World War II. There would be little marginal gain from considering both post-World-War-II IMTs, and I have chosen to use the IMT at Nuremberg because it is the more famous antecedent. Moreover, since the IMT at Nuremberg operated on a shorter timeframe than did its cousin in the Far East, it provides a more dramatic and interesting comparison to today's tribunals. For a description of the trial conducted by the IMT for the Far East (which began as the Nuremberg trial was winding down and which lasted well over two years), see generally ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* (1987).

It is more difficult to assess exactly how many hybrid tribunals exist. See, e.g., ROBERT CRYER ET AL., *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 155–62 (2007); Dickinson, *supra* note 13, at 295. Other commonly mentioned hybrid tribunals include the Kosovo and East Timor tribunals set up by the U.N. Missions in these countries and the still nascent Special Tribunal for Lebanon. I focus on the SCSL and the ECCC because they are products of formal agreements between the (non-occupying) United Nations and the host countries.

137. Most of these documents are publicly available on the Internet, either on the tribunals' websites (for the five modern tribunals) or through the Avalon Project at Yale Law School (for the IMT). See generally Yale Law School, IMT at Nuremberg, [http://avalon.law.yale.edu/subject\\_menus/imt.asp](http://avalon.law.yale.edu/subject_menus/imt.asp) (last visited Oct. 2, 2009); United Nations, About the ICTY, <http://www.icty.org/> (last visited Oct. 2, 2009); ICTR Homepage, <http://www.ict.r.org/> (last visited Oct. 2, 2009); ICC Homepage, <http://www.icc-cpi.int/> (last visited Oct. 2, 2009); SCSL Homepage, <http://www.sc-sl.org/> (last visited Oct. 2, 2009); ECCC Homepage, <http://www.eccc.gov.kh/> (last visited Oct. 2, 2009). For the date on which the IMT took custody over the defendants, I have relied on JOE J. HEYDECKER & JOHANNES LEEB, *THE NUREMBERG TRIAL* 66 (R.A. Downie ed. & trans., The World Publishing Co. 1962) (1958). All uncited information in this Part comes from my collected data, which are available on request.

is confirmed.<sup>138</sup> This phase is the hardest to measure, as some indictments are vague about the date of the first alleged crimes.<sup>139</sup> Second, the pre-custody phase is measured as running from the date that the first indictment is confirmed to the date that the defendant comes into the tribunal's custody.<sup>140</sup> (While a defendant may already be in state custody before he comes into the tribunal's custody, and sometimes for a considerable period of time,<sup>141</sup> my analysis looks only at the date that the *tribunal* gets custody.) Third, the pre-trial phase is measured as running

---

138. Throughout the Article, I use the term "indictment" broadly. Indictments are a common law concept and have been used at the IMT, the ICTY, the ICTR, and the SCSL. The ICC and ECCC use processes more akin to those used in civil law jurisdictions, however, and neither institution relies on indictments. The closest proxy is the issuance of arrest warrants or summonses to appear, with the accompanying decisions identifying the alleged crimes for which sufficient evidence justifies these actions. *See, e.g.*, Rome Statute, *supra* note 26, art. 58. My use of "indictments" covers both classic indictments and their civil law analogs.

Very occasionally, I use a different measure of the pre-indictment period. First, where an initial indictment is unavailable online, as is sometimes the case at the ICTR, then I use the date of the first alleged crime in the amended indictment as my starting point. Second, Slobodan Milošević presents a special case. There were multiple initial indictments issued against him: the first related to crimes in Kosovo starting in 1999, and subsequent ones related to crimes in Croatia starting in 1991 and in Bosnia starting in 1992. *See generally* United Nations, *Case Information Sheet: Slobodan Milošević*, [http://www.icty.org/x/cases/slobodan\\_milosevic/cis/en/cis\\_milosevic\\_slobodan.pdf](http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan.pdf) (last visited Oct.4, 2009). For his pre-indictment period, I use the date of the first alleged crime overall (in the initial Croatia indictment) as my starting point and the date of the first indictment against him (the Kosovo indictment) as my ending point.

139. Sometimes this is due to redactions in the publicly available versions, as with some ICC arrest warrants. *E.g.*, Prosecutor v. Ongwen, Case No. ICC-02/04, Warrant of Arrest for Dominic Ongwen (Public Redacted Version), ¶ 10 *et seq.* (July 8, 2005) (publicly identifying only the relevant year). Other times it is simply due to omissions or imprecision. *E.g.*, Prosecutor v. Nizeyimana, Case No. ICTR 2000-55-I, Indictment, ¶ 3.1 (Nov. 27, 2000). Where dates are hard to identify, I make my best guess. For all these vagaries, the range of possibilities is too small to have meaningful overall impact.

It is also worth noting that the date of the first crime alleged in the indictment may understate the date of the first actual international crime considerably, due to the limited temporal jurisdiction of the tribunals. For example, the ICTR only has jurisdiction over crimes committed in 1994, although Hutu leaders were involved in atrocities against Tutsis earlier in the decade. Similarly, the IMT only had jurisdiction over crimes committed in connection with World War II, although the Nazis committed crimes against humanity against Jews and others well before the war began.

140. This can be a negative number when the tribunals gain custody over suspects and detain them prior to indicting them.

141. Examples include Rudolph Hess, who was held by the British from 1941 to 1945 before being turned over to the IMT; Zoran Žigić, who was serving an unrelated sentence in Serbia from 1994 until his surrender to the ICTY in 1998; Alfred Musema, who was held by Switzerland for over two years before being turned over to the ICTR; Foday Sankoh, who was held by Sierra Leone for almost three years before being turned over to the SCSL; Germain Katanga, who was held by the Democratic Republic of the Congo for over two years before being turned over to the ICC; and Duch, who was held by the Cambodian government for eight years before being turned over to the ECCC. Some of these suspects were apprehended by states before the relevant tribunals were created. These examples are outliers, however.

from the date the defendant comes into the tribunal's custody to the date of the opening trial arguments or of the first plea hearing. Fourth, the trial phase is measured as running from the date of opening trial arguments or of the first plea hearing to the date of entry of the trial judgment.<sup>142</sup> Fifth, the appeal phase is measured as running from the date of entry of the trial judgment to the date of entry of the appeal judgment. Of the 307 total defendants, only 87 are linked to data relating to all five phases (including one still ongoing case that has been remanded for further proceedings). The remaining cases are either still ongoing (114); were subject to some disposition other than judgment (namely dismissal (24), death (20), or referral to a domestic court (15)); or were completed with the entry of trial judgment because there was no appeal (47).<sup>143</sup> The last three phases are the ones most in the control of the tribunals.<sup>144</sup>

Finally, a few caveats bear mentioning in relation to comparisons made across the different tribunals. First, there are many extrinsic differences between the tribunals that may affect their comparative timeframes. In particular, they respond to different types of conflict and post-conflict situations; they were set up at varying times both in absolute terms and relative to the crimes over which they have jurisdiction; they receive different levels of funding and state support; and they have different procedures built into their foundational statutes (such as the absence of a right of appeal at the IMT and the use of only one official language at the SCSL). Second, the data are extremely limited for some tribunals. Of the five modern tribunals, the ICTY, the ICTR, and the

---

142. The trial phase includes a substantial amount of time that the court is not in session, including breaks between different portions of the case and the period between closing arguments and the issuance of the written judgment. Where the guilt phases and sentencing phases of a trial are bifurcated, as in the SCSL, I treat the date of entry of the trial judgment as the date of entry of the sentencing-phase judgment rather than of the (earlier) guilt-phase judgment.

143. As mentioned above, there was no possibility of appeal at the IMT. *See supra* notes 185–191 and accompanying text. At the ICTY and ICTR, the prosecution has sometimes chosen not to appeal complete acquittals and defendants have sometimes chosen not to appeal their convictions, especially when they have received relatively low sentences.

144. The tribunals must exist in the first place in order to issue indictments. Because the IMT, the SCSL, and the ECCC were set up well after the crimes over which they have jurisdiction occurred, they cannot be deemed fully responsible for the length of their pre-indictment phases. Similarly, the length of the pre-custody phase lies mostly outside the control of the six tribunals. In Antonio Cassese's apt phrase, the tribunals are "giant[s] without arms and legs." Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 *EUR. J. INT'L L.* 2, 13 (1998). They depend on help from states in tracking down and apprehending suspects. Where such help is readily forthcoming, the pre-custody phase will probably be short, but where states are unenergetic or antagonistic, the pre-custody phase will likely be quite long. For example, the ICC has easily obtained several indictees from the cooperative Democratic Republic of the Congo, but it has so far failed to gain custody over its indictees affiliated with the uncooperative (and untransitioned) government of Sudan.

SCSL have completed a substantial percentage of their cases, but the ICC and the ECCC have each only just begun their first trial. Third, my analysis in this Part relates only to how long cases take within tribunals. It does not directly address the related question of how long the tribunals themselves are in operation, which is a very important question to the funders of ad hoc tribunals and which may also have transitional justice implications.

## B. *The Results*

### 1. Results to Date

Table 1 shows how long each phase takes at each of the six tribunals. For each tribunal, it gives the average (mean), the standard deviation ( $\sigma$ ), the shortest and longest result (range), and the number of cases that have completed that phase (N). At the right-hand side, Table 1 also shows the time that elapsed from the first alleged crime to ultimate judgment and from tribunal custody to ultimate judgment.<sup>145</sup> Ultimate judgment is measured as the date of the appeal judgment or, where there is no appeal, of the trial judgment.<sup>146</sup> Finally, at the bottom, Table 1 shows the overall averages for all the defendants—first, for all the cases in all the tribunals, and second, for all the cases in the five modern tribunals. Because the ICTY and ICTR have had by far the most defendants to date, these overall averages are quite close to the ICTY and ICTR averages.

---

145. Because the IMT tried Martin Bormann *in absentia*, there is a one-person disparity between individuals for whom ultimate judgment issued and individuals in custody for whom ultimate judgments issued.

146. Unlike federal appeals courts in the United States, the appeals chambers of international criminal tribunals almost never remand cases for retrial or further sentencing proceedings. There are a few exceptions, however. The ICTY Appeals Chamber did remand the cases of five defendants in its early years, before abandoning this practice. *See* Prosecutor v. Mucić, Case No. IT-96-21-*Abis*, Judgment on Sentencing Appeal, ¶¶ 1–5 (Apr. 8, 2003); Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-*Abis*, Judgment in Sentencing Appeals, ¶¶ 5–13 (Jan. 26, 2000); Prosecutor v. Erdemović, Case No. IT-96-22, Sentencing Judgment, ¶¶ 4–8 (Mar. 5, 1998). For these five defendants, I have treated the “ultimate judgment” as the *last* judgment entered. Similarly, the ICTR Appeals Chamber has remanded one case for further proceedings—a case that is still ongoing and therefore not marked as having reached ultimate judgment despite having obtained trial judgment and one appeal judgment. Muvunyi v. Prosecutor, Case No. ICTR 2000-55A-A, Judgment (Aug. 29, 2008).

TABLE 1: THE LENGTH OF INTERNATIONAL CRIMINAL CASES (IN YEARS)

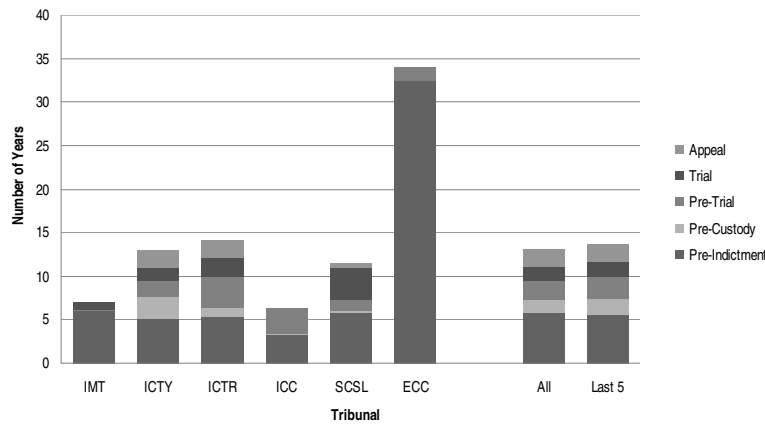
		Pre-Indictment	Pre-Custody	Pre-Trial	Trial	Appeal	1st Crime to Ultimate Judgment	Custody to Ultimate Judgment
IMT	Mean	6.1	-.2	.3	.9	N/A	7.1	1.1
	$\sigma$	(0)	(0)	(0)	(0)		(0)	(0)
	Range	6.1 to 6.1	-.2 to -.2	.3 to .3	.9 to .9		7.1 to 7.1	1.1 to 1.1
	N	24	23	21	22		22	21
ICTY	Mean	5.2	2.5	1.9	1.4	2.1	11.6	4.7
	$\sigma$	(3.1)	(2.8)	(1.1)	(.7)	(.9)	(2.9)	(1.9)
	Range	.2 to 12.9	-.2 to 13	0 to 4.9	.2 to 2.7	.5 to 4.4	2.6 to 17.7	1.4 to 9
	N	161	134	110	85	55	71	71
ICTR	Mean	5.4	1.0	3.6	2.2	2.1	11.1	5.9
	$\sigma$	(2.7)	(2.0)	(1.7)	(1.8)	(.8)	(2.6)	(2.4)
	Range	1.6 to 11.7	-.3 to 9.5	.4 to 7.2	0 to 6.7	1 to 4	6.1 to 14.8	.7 to 10.9
	N	90	74	68	45	27	34	34
ICC	Mean	3.3	.2	2.9	None yet	None yet	None yet	None yet
	$\sigma$	(1.6)	(.2)	(0)				
	Range	1 to 5.9	0 to .6	2.9 to 2.9				
SCSL	Mean	5.8	.3	1.4	3.5	.6	10.7	4.8
	$\sigma$	(.2)	(.9)	(.3)	(1.1)	(0)	(.1)	(.2)
	Range	5.4 to 6.3	-.1 to 3.1	1 to 2	2.4 to 4.8	.5 to .6	10.6 to 10.7	4.4 to 5
	N	13	11	10	8	5	5	5
ECCC	Mean	32.5	0	1.5	None yet	None yet	None yet	None yet
	$\sigma$	(.1)	(0)	(0)				
	Range	32.2 to 32.6	0 to 0	1.5 to 1.5				
	N	5	5	1				
All	Mean	5.7	1.6	2.2	1.6	2	10.7	4.4
	$\sigma$	(4.4)	(2.5)	(1.6)	(1.2)	(.9)	(3.0)	(2.4)
	Range	.2 to 32.6	-.2 to 13	0 to 7.2	0 to 6.7	.5 to 4.4	2.6 to 17.7	.7 to 10.8
	N	307	252	211	160	87	132	131
Last 5	Mean	5.7	1.8	2.4	1.8	2	11.4	5.1
	$\sigma$	(4.6)	(2.6)	(1.6)	(1.3)	(.9)	(2.7)	(2.1)
	Range	.2 to 32.6	-.2 to 13	0 to 7.2	0 to 6.7	.5 to 4.4	2.6 to 17.7	.7 to 10.8
	N	283	229	190	138	87	110	110

Figure 1 converts the means from Table 1 into a chart formation, except that it does not include the two right-hand columns in Table 1. Figure 1 stacks the different phases on top of each other for visual ease, but the cumulative effects overstate the mean length of ICTY and ICTR cases to date (since, for one thing, not all cases get appealed). For mean



lengths of completed cases, the reader should rely on the right-hand columns in Table 1.

FIGURE 1: THE MEAN LENGTH OF STAGES OF INTERNATIONAL CRIMINAL CASES



Among all the tribunals, the phase that has taken the most time to date has been the pre-indictment phase. This is most starkly illustrated by the ECC's thirty-two-plus year lag, but the IMT, ICTY, ICTR, and SCSL all have issued their indictments on average between five and just over six years after the first alleged crimes. The delays at the IMT, the ECC, and the SCSL mostly reflect the fact that these tribunals were founded well after the crimes over which they have jurisdiction occurred,<sup>147</sup> while the delays at the ICTY and the ICTR likely stem from some combination of low initial funding, investigative difficulties, prosecutorial caution, and bad management.<sup>148</sup> In contrast with the other tribunals, the ICC has averaged only 3.3 years from the first alleged crime to the indictment. This may be partly because the ICC had no ju-

147. See London Charter, *supra* note 24 (founding the IMT at the end of World War II in August 1945); ECC Statute, *supra* note 26, arts. 1, 32 (establishing the ECC in 2003 and giving it jurisdiction over crimes that occurred from 1975 to 1979); SCSL Statute, *supra* note 26, art. 1 (establishing the SCSL with jurisdiction over crimes going back to November 1996, although the U.N. agreement giving rise to the SCSL came about only in August 2000, and the SCSL Statute itself was drawn up later).

148. See, e.g., The Secretary-General, *Report of the Secretary-General on the Activities of the Office of the International Oversight Services*, ¶¶ 50–60, delivered to the General Assembly, U.N. Doc. A/51/789 (Feb. 6, 1997) (describing understaffing and management problems for the ICTR Prosecution); Cassese, *supra* note 82, at 586–88 (describing initial ICTY prosecutorial strategy); United Nations, *About the ICTY: The Cost of Justice*, <http://www.icty.org/sid/325> (last visited Oct. 2, 2009) (stating that the ICTY's 1993 budget was \$276,000 and in 1994 was \$10.8 million).

isdiction over crimes committed before its 2002 founding and has been well-funded from the start.<sup>149</sup>

The pre-custody phase at the different tribunals also varies widely, probably because this phase depends substantially on the context in which the tribunals operate, especially with regard to state cooperation. At the IMT, the SCSL, and the ECCC, the tribunals swiftly obtained custody over most, if not all indicted individuals who were already in the hands, or at least within reach, of cooperative governments.<sup>150</sup> Similarly, four of the five indictees over whom the ICC has custody were easily obtained from the cooperative Democratic Republic of the Congo and Belgium.<sup>151</sup> At the ICTR and ICTY, however, we see longer timeframes. It has taken the ICTR an average of one year to gain custody of indictees, reflecting that while some leaders of the genocide were easily obtained after the RPF conquered Rwanda, others managed to flee and proved difficult to track down. The ICTY's even higher average of 2.5 years reflects its difficulties in persuading the slowly transitioning states of the former Yugoslavia to surrender their own.<sup>152</sup>

The subsequent phases—pre-trial, trial, and appeal—are most within the tribunals' control. Here, there is a stark difference between the IMT and its descendants. Where the IMT spent a scant .3 years at the pre-trial stage, the SCSL and the ICTY have averaged 1.4 and 1.9 years respectively and the ICTR clocks in at a disturbingly high 3.6 years. Although the ECCC and ICC have only begun one trial each, the pre-trial times for these cases are in line with the modern trend: 1.5 years for the ECCC's Duch case, and 2.9 years for the ICC's Lubanga case. The IMT's .9-year trial is also notably shorter than the trial phase averages to date at the

---

149. See Coalition for the ICC, Budget and Finance Background, <http://www.iccnw.org/?mod=budgetbackground> (last visited Oct. 2, 2009) (describing the ICC's budget for 2002–03 as €30,893,500, for 2004 as €53,071,846, and for 2005 as €66,784,200).

150. See Gary T. Dempsey, *Policy Analysis, Reasonable Doubt: The Case Against the Proposed International Criminal Court*, CATO INST., July 16, 1998, <http://www.cato.org/pubs/pas/pa-311.html> (last visited Oct. 2, 2009) (describing how IMT defendants were already in custody); Pham, *supra* note 106, at 95–97 (describing how some SCSL defendants were in custody at the time of their indictments); Padriac J. Glaspy, Note, *Justice Delayed? Recent Developments at the Extraordinary Chambers in the Courts of Cambodia*, 21 HARV. HUM. RTS. J. 143, 147 (2008) (describing in general terms the ECCC's obtaining custody over its accused).

151. See Press Release, ICC, First Arrest for the International Criminal Court, ICC-CPI-20060302-125 (Mar. 17, 2006); Press Release, ICC, Second Arrest: Germain Katanga Transferred into the Custody of the ICC, ICC-20071018-250 (Oct. 18, 2007); Press Release, ICC, Third Detainee for the International Criminal Court: Mathieu Ngudjolo Chui, ICC-CPI-20080207-PR284 (Feb. 7, 2009); Press Release, ICC, Jean-Pierre Bemba Gombo Arrested for Crimes Allegedly Committed in the Central African Republic, ICC-CPI-20080524-PR315 (May 24, 2008). These press releases are available at <http://www.icc-cpi.int/Menu/ICC/Press+and+Media/Press+Releases/> (last visited Oct. 4, 2009).

152. The difference between the ICTY and the ICTR's precustody times is statistically significant at the 1% level.

modern tribunals. The ICTY and ICTR have respectively averaged 1.4 and 2.2 years at the trial phase, while the SCSL has an even longer average of 3.5 years. Finally, the SCSL has managed to process its appeals more quickly, averaging .6 years per appeal, relative to the ICTY and the ICTR (which share an Appeals Chamber), which have each averaged 2.1 years per appeal.<sup>153</sup>

Overall, the timeframes from custody to ultimate judgment show that the IMT processed its defendants more than four times faster than its descendants. The IMT took a mere 1.1 years from custody to ultimate judgment—a brevity attributable largely to its very short pre-trial time and complete absence of an appeal stage. By contrast, the ICTY has averaged 4.7 years from custody to completion, with the SCSL just behind at 4.8 years and the ICTR trailing with an average of 5.9 years.<sup>154</sup>

The ranges and standard deviations within the tribunals vary substantially. There is no variation within the IMT, given its single indictment and trial for all defendants, and relatively little variation to date at the SCSL, which has had few indictees and has emphasized multi-defendant trials. It is too early to assess ranges at the ICC and ECCC. At the ICTY and ICTR, however, there are wide ranges at almost every stage. In some instances, these tribunals have moved with surprising speed: the ICTY indicted Milan Martić just .2 years after the shelling of Zagreb, added Dragoljub Prcać to an ongoing trial only days after his capture, and took less than half a year for the trial of Anto Furundžija, while the ICTR took a mere .7 years to process the case of Joseph Serugendo from custody to completion.<sup>155</sup> In other instances, however,

---

153. The differences between the ICTY and the ICTR are statistically significant at the 1% level for the pre-trial and trial phase, although not significantly different for the appeal stage. This difference for the trial phase holds up—albeit at the 10% level—even when measuring the trial phase based not on the number of individual defendants but instead on the number of total trials (whether individual or multi-defendant). The differences between the ICTY and the ICTR are also statistically significant for custody to ultimate judgment at the 1% level (measured per defendant) and at the 10% level (measured per trial).

154. It is somewhat surprising that the ICTY has shorter per-defendant averages than the SCSL, given the hope that the SCSL would provide faster justice than the ICTY. *See* TOM PERRIELLO & MARIEKE WIERDA, INT'L CTR. FOR TRANSITIONAL JUSTICE, *THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY* 12, 32, 43 (2006). It should be kept in mind, however, that the SCSL has tried only high-level defendants, which may have led to more complex cases. *See id.* at 26. Also, all SCSL cases to date have been appealed, while sixteen ICTY cases have not been appealed. Finally, as discussed *infra* Part III.B.3, the ICTY has had some guilty pleas while the SCSL has had none.

155. *See* Prosecutor v. Serugendo, Case No. IT-05-84, Judgment, ¶ 95 (June 12, 2006) (noting that Serugendo was arrested on September 16, 2005 and his trial ended on June 12, 2006); Prosecutor v. Kvočka, Case No. IT-98-30, Judgment, ¶¶ 768, 787 (Nov. 2, 2001) (noting that Prcać was arrested on March 6, 2000); Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 17, 36 (Dec. 10, 1998) (noting that Furundžija's trial began on June 8, 1998 and ended on November 12, 1998); Prosecutor v. Martić, Case No. IT-95-11, Indictment, ¶¶ 8,

Jeremy Rabkin's use of the word "glacial" is chillingly justified.<sup>156</sup> It took the ICTY 12.9 years to indict Mićo Stanišić for crimes against Bosnian Muslims.<sup>157</sup> The ICTR held Edouard Karemera, Joseph Nzirorera, and Mathieu Ndirumpatse in pre-trial custody for over seven years each before their ultimate trial began, and spent more than six years on the trial of Theoneste Bagosora and his three co-defendants.<sup>158</sup> The ICTY took four years to process the appeal of Tihomir Blaškić.<sup>159</sup> And the ICTR spent 10.8 years on the case of Ferdinand Nahimana from custody to completion.<sup>160</sup> These and other instances at the upper ends of the ICTY and ICTR ranges provide fair fodder for anecdotal complaints about the length of international criminal justice.

## 2. The Impact of Ongoing Cases

In measuring a particular phase, my results above do not include cases that are ongoing at that phase. The reason is obvious: until a case has completed a particular phase, I cannot measure the total length of that phase for that case. This omission could bias the results above in either direction. It could be that the numbers for the five modern tribunals are higher now than they will be when those tribunals have completed their pending cases (for example, if the tribunals get more efficient over time). Or it could be instead that these numbers are artificially low (for example, if the tribunals have knocked off the easier cases and are still slowly processing the harder ones). To give one specific example, my results above showed an average pre-custody time at the ICC of .2 years, based on measuring the pre-custody periods of the five defendants now in the ICC custody. But each of the eight defendants who

---

9 (July 25, 1995) (noting that Martić was indicted roughly three months after his shelling Zagreb on May 2, 1995 and on May 3, 1995).

156. Rabkin, *supra* note 8, at 768.

157. See *Prosecutor v. Stanišić*, Case No. IT-08-91, Decision on Prosecution's Motion for Joinder and for Leave to Consolidate and Amend Indictments, ¶¶ 4, 6 (Sept. 23, 2008) (Stanišić was first indicted for crimes committed in 1992 on February 25, 2005).

158. See *Prosecutor v. Bagosora*, Case No. ICTR 98-41-T, Judgment, ¶ 2314 (Dec. 18, 2008); *Prosecutor v. Karemera*, Case No. ICTR 98-44-T, Minutes of Proceedings (Sept. 19, 2005); Press Release, ICTR, Four Suspects, One Accused Transferred to Arusha, ICTR/INFO-9-2-131 (July 11, 1998), available at <http://ictt.org> (follow "Press Centre" hyperlink; then follow "Press Releases"; then select "1998" from the dropdown menu) (last visited Oct. 2, 2009) (indicating when the ICTR first obtained custody over the accused). Prior to the start of their 2005 trial, Karemera and his two co-accused had an earlier trial, which began in November 2003 and was discontinued due to an appearance of bias on the part of one of the judges. See generally *Prosecutor v. Karemera*, Case No. ICTR 98-44, Decision on Interlocutory Appeals Regarding the Continuation of Proceedings with a Substitute Judge and on Nzirorera's Motion for Leave to Consider New Material, ¶ 2 (Oct. 22, 2004).

159. See *Prosecutor v. Blaškić*, Case No. IT-95-14, Judgment, ¶ 1, (July 29, 2004).

160. See *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment (Nov. 28, 2007); *Prosecutor v. Nahimana*, Case No. ICTR 99-52, Judgment & Sentence, ¶ 13 (Dec. 3, 2003).

remain alive and outside the ICC's custody has been free for longer than .2 years since the ICC issued its arrest warrants.<sup>161</sup>

It is beyond the scope of this Article to assess what the numbers will look like once the modern tribunals have completed all pending cases. Nevertheless, for illustrative purposes, I have recalculated all numbers above with the wildly optimistic assumption that all ongoing proceedings moved to the next phase on September 1, 2009. If the numbers calculated in this fashion show greater averages than the actual numbers calculated above, then we can be certain that ongoing proceedings at a particular phase are taking longer, on average, than did completed proceedings at that phase.

Many recalculated averages are below or roughly equivalent to the averages provided above. In some instances, however, the recalculated averages are substantially higher than the ones given in the prior section, showing that ongoing proceedings in these instances are already taking longer on average than did the completed proceedings. The most noticeable change is that the averages for the pre-custody period go up at all tribunals with defendants still at large. This reflects the fact that the defendants who are still not in custody have been on the run for a long time. Specifically, the ICTY average would rise slightly from 2.5 to 2.6 years; the SCSL average would rise modestly from .3 to .8 years; the ICTR average would rise substantially from one year to 2.3 years; and most noticeably of all, the ICC average would rise from .2 to 2.0 years.

The length of trials would also go up at the ICTY and the ICTR. At the ICTY, this increase is relatively small: rising only from 1.4 to 1.6 years. At the ICTR, however, the average trial time would rise from 2.2 to 3.0 years. This difference stems from the fact that the ICTR has several multi-defendant trials that have been proceeding for intolerably long amounts of time, including a trial of six defendants that began in June 2001, a trial of four defendants that began in November 2003, and a trial of four defendants that began in September 2004.<sup>162</sup>

---

161. For details about the various defendants, see ICC Situations and Cases, <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/> (last visited Oct. 2, 2009) (indicating, for example, that the arrest warrants for four still at-large leaders of the Lord's Resistance Army in Uganda were unsealed on October 13, 2005).

162. Respectively, these are the "Butare" case of Joseph Kanyabashi et al., the "Government II" case of Casimir Bizimungu et al., and the "Military II" case of Augustine Ndindilyimana et al.. See *Prosecutor v. Kanyabashi*, Case No. ICTR 98-42-T, Minutes of the Proceedings (June 12, 2001) (describing the first day of Butare Trial); *Prosecutor v. Kanyabashi*, Case No. ICTR 98-42-T, Minutes of Proceedings (Feb. 25, 2009) (describing the 717<sup>th</sup> day of the Butare Trial); *Prosecutor v. Bizimungu*, Case No. ICTR 99-50-T, Minutes of Proceedings (Nov. 3, 2003) (describing the first day of the Government II Trial); *Prosecutor v. Bizimungu*, Case No. ICTR 99-50-T, Minutes of Proceedings (Dec. 5, 2008) (describing the 404<sup>th</sup> day of the Government II Trial); *Prosecutor v. Ndindilyimana*, Case No. ICTR 00-56-I, Minutes of Proceedings (Sept. 20, 2004) (describing the first day of the Military II Trial);

Finally, the time between custody and ultimate judgment would rise at both the SCSL and the ICTR. At the SCSL, it would rise from 4.8 to 5.4 years and at the ICTR it would rise from 5.9 years to an even higher 6.4 years. These changes reflect the fact that the SCSL and ICTR cases now on appeal spent a long time in the trial and pre-trial stages.

### 3. Guilty Pleas

Of the six tribunals discussed in this part, to date only the ICTY and ICTR have had defendants who have pled guilty.<sup>163</sup> Table 2 compares the timeframes in cases that resulted in guilty pleas (“GP”) with those that went to trial (“No GP”). Specifically, I compare the pre-trial, trial, and appeal phases, as well as the time period from custody to ultimate judgment.

TABLE 2: TIMEFRAMES IN RELATION TO GUILTY PLEAS (IN YEARS)

		Pre-Trial	Trial	Appeal	Custody to Ultimate Judgment
ICTY No GP	Mean	2	1.6	2.3	5.5
	$\sigma$	(1.1)	(.6)	(.8)	(1.6)
	Range	0 to 4.9	.5 to 2.7	.9 to 4.4	2.3 to 9
	N	88	65	45	51
ICTY GP	Mean	1.5	.5	1.2	2.6
	$\sigma$	(.9)	(.2)	(.5)	(1)
	Range	.2 to 3.6	.2 to 1.1	.5 to 2.3	1.4 to 4.8
	N	19	19	9	19
ICTR No GP	Mean	3.7	2.6	2.2	6.7
	$\sigma$	(1.7)	(1.7)	(.9)	(2.0)
	Range	.6 to 7.2	.9 to 6.7	1 to 4	3.4 to 10.8
	N	60	37	25	26
ICTR GP	Mean	2.4	.2	1.6	3.1
	$\sigma$	(1.7)	(.1)	(.8)	(1.4)
	Range	.4 to 4.7	0 to .4	1 to 2.1	.7 to 4.9
	N	8	8	2	8

Prosecutor v. Ndindilyimana, Case No. ICTR 00-56-T (Feb. 18, 2009) (describing the 392<sup>nd</sup> day of the Military II Trial).

163. For a list of the ICTY defendants who have pled guilty, see United Nations, ICTY, <http://www.icty.org/sections/TheCases/GuiltyPleas> (last visited Oct. 2, 2009). One defendant, Goran Jelisić, pled guilty to certain charges but was tried for genocide. Prosecutor v. Jelisić, Case No. ICTY 95-10-A, Appeals Judgement, ¶¶ 2–5, 86 (Jul. 5, 2001). Since he both pled guilty and had a trial that went to judgment, I have excluded him from this analysis. The ICTR defendants who have pled guilty are Paul Bisengimana, Jean Kambanda, Joseph Nzabirinda, Juvénal Rugambarara, Georges Ruggiu, Vincent Rutaganira, Joseph Serugendo, and Omar Serushago. See United Nations, ICTR, <http://www.ict.rg/default.htm> (follow “Cases” hyperlink; then follow “Status of Cases” hyperlink) (last visited Oct. 2, 2009).

The results show that guilty pleas are strongly correlated with shorter timeframes. On average, cases with guilty pleas have shorter pre-trial times (.5 years shorter at the ICTY and 1.3 years shorter at the ICTR), substantially shorter “trial” times (1.1 years shorter at the ICTY and 2.4 years shorter at the ICTR),<sup>164</sup> and shorter appeal times (1.1 years shorter at the ICTY and .6 years shorter at the ICTR) than cases that go to trial. Moreover, a much smaller percentage of cases with plea bargains get appealed: of the fifty-one cases in the ICTY that went to trial and now have ultimate judgments entered, forty-five had appeals, while of the nineteen cases in the ICTY with guilty pleas that now have ultimate judgments entered, only nine had appeals. The contrast is even starker at the ICTR, where only two of the eight cases with guilty pleas gave rise to appeals. Finally, on average, cases with guilty pleas have taken around half the total time from custody to ultimate judgment than have cases that have gone to trial. Overall, ICTY cases with guilty pleas have taken an average of 2.6 years from custody to ultimate judgment, while cases that go to trial have taken an average of 5.5 years. At the ICTR, cases with guilty pleas have taken an average of 3.1 years from custody to ultimate judgment, while cases that have gone to trial have taken an average of 6.7 years.<sup>165</sup>

Although the results above merely show a correlation between guilty pleas and shorter time horizons, it seems reasonable to assume some causal linkage. Guilty pleas are likely to save time at the pre-trial stage. It is thus no surprise that ICTY and ICTR timeframes become longer when we take out guilty pleas and look only at cases that go to trial. Indeed, if we exclude ICTY guilty pleas, the ICTY loses its small edge over the SCSL in terms of average time from custody to ultimate judgment, slipping from 4.7 years to 5.5 years.

But the results above also support arguments that, despite their possible time savings, guilty pleas have only limited potential in international criminal trials. Only 26% of completed cases in the ICTR and ICTY involved guilty pleas, whether due to prosecutorial hesitation to offer deals to the worst offenders or to other reasons. And the percentage of total ICTY and ICTR cases with plea bargains is likely to be lower, as most of the ongoing cases are already either in trial or on appeal (and thus highly unlikely to involve guilty pleas). Moreover, there have been no guilty pleas in the SCSL—the only other tribunal to have

---

164. Where a plea bargain is concerned and where the plea did not occur after the trial had begun, I measure “trial” time as running from the time of the first plea hearing to the entry of the sentence. *See supra* note 142 and accompanying text.

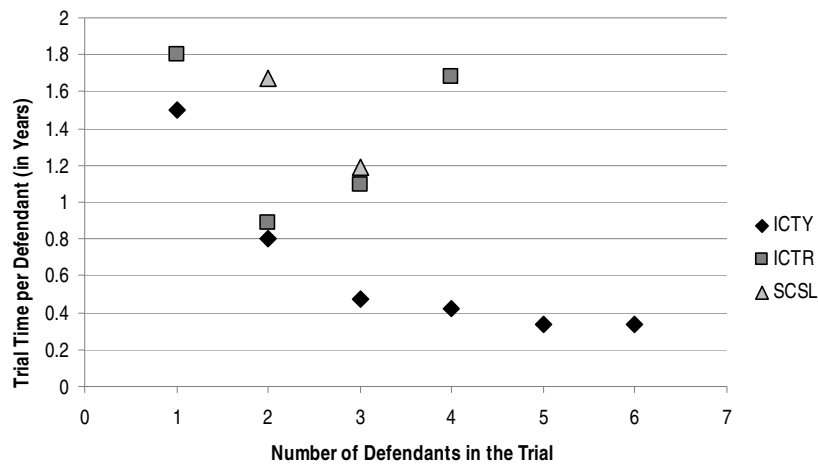
165. Both custody and ultimate judgment differences are statistically significant at the 1% level.

tried a large percentage of its defendants. If this relates to the SCSL's narrow focus on top-level perpetrators, for whom plea bargains are less palatable to prosecutors, and if this focus is likely to continue in international criminal law, then the ICTY and ICTR may well represent the high water mark for guilty pleas in international or hybrid tribunals.

#### 4. Multi-Defendant Trials

Figure 2 considers how long average trial phases of multi-defendant trials have taken per defendant in the ICTY, the ICTR, and the SCSL to date.<sup>166</sup> I determine per-defendant trial time for a trial by taking the total length of the trial phase and dividing it by the number of defendants.<sup>167</sup>

FIGURE 2: AVERAGE TRIAL TIME PER DEFENDANT



166. Figure 2 does not include the IMT, which has the shortest per-defendant trial times of all tribunals: its single ten-month trial of twenty-two defendants resulted in an average trial time of only .04 years per defendant.

167. I only use cases where trials were actually completed and there was no guilty plea. As of August 31, 2009, the ICTY has completed seventeen single-defendant trials, six two-defendant trials, five three-defendant trials, one four-defendant trial, one five-defendant trial, and two six-defendant trials. The ICTR has completed twenty-three single-defendant trials, two two-defendant trials, two three-defendant trials, and one four-defendant trial. The SCSL has completed one two-defendant trial and two three-defendant trials.

In calculating the number of defendants per trial, I consider only the number of defendants at issue at the time of the trial judgment. For example, one SCSL trial originally had three defendants, but one died between closing arguments and issuance of the trial judgment. See *Prosecutor v. Fofana*, Case No. SCSL-04-14-A, Judgment, Annex A at 1 n.1354 (indicating that the proceedings against one of three defendants, Samuel Hinga Norman, terminated upon his death). Accordingly, although Norman was present during the trial and the trial itself would probably have gone more quickly had he not been a part of it, I treat this as a two-defendant trial.



In the ICTY, there is a noticeable negative correlation between the number of defendants in a trial and the trial time per defendant. Per-defendant trial times progressively decline as the number of defendants in the trial rises. While single-defendant trials have averaged roughly 1.5 years of trial time per defendant, three-defendant trials have resulted in averages of roughly .5 years of trial time per defendant, and the five- and six-defendant trials have taken only about .3 years of trial time per defendant. This correlation must be viewed with caution, however. For one thing, the data are very limited, particularly with respect to trials with four defendants or more.<sup>168</sup> Moreover, a quick glance at the ongoing multi-defendant trials suggests that many are likely to clock in at higher per-defendant trial times than the existing averages.<sup>169</sup> For another thing, the results above show only a correlation, and do not necessarily imply a causal link between the number of defendants at trial and per-defendant trial times. There are good intuitive bases for assuming some causal linkage—such as the fact that common evidence only needs to be heard once—but there may be independent causes as well. A scan of ICTY trials completed to date suggests that the ones with fewer accused have tended to involve bigger fish than the ones with more accused.<sup>170</sup> To the extent that bigger fish generate more complicated (and thus time-consuming cases), this may partly explain why single-defendant trials take longer per defendant than do multi-defendant trials.

In the ICTR and SCSL, however, this pattern is less readily discernible. We can infer little from the SCSL results given that they reflect only two trials and that the two-defendant trial had a third defendant involved for most of the case.<sup>171</sup> The ICTR results have multi-accused trials that take almost as long per defendant as single-accused trials. It is hard to say what accounts for this difference from the ICTY. It may be that the ICTR has more big fish involved in multi-defendant trials than does the ICTY. For example, the chief military leader of the genocide, Theoneste Bagosora, was part of the ICTR's only four-defendant trial completed to date.<sup>172</sup>

Finally, I briefly looked at how the pre-trial and appeal times for defendants involved in multi-defendant trials compare with the pre-trial and appeal times for defendants tried alone.<sup>173</sup> My hypothesis was that

---

168. *See id.*

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

170. For example, leaders like Tihomir Blaškić, Radoslav Brđanin, Stanislav Galić, Momčilo Krajišnik, Radislav Krstić, and Milomir Stakić all received individual trials, while the six defendants in *Kupreskić* were low-level soldiers.

171. *See supra* note 167.

172. *Prosecutor v. Bagosora*, Case No. ICTR 98-41, Judgment (Dec. 18, 2008).

173. While multi-defendant trials may have valuable returns to scale at the trial stage, they are less likely to have such returns at the pre-trial and appeal stages because these stages

defendants involved in multi-defendant trials would spend more time at the pre-trial stage (and thus probably in pre-trial detention) and at the appeals stage than defendants being tried alone because difficulties involving one of several co-defendants can conceivably slow things down for everyone else.<sup>174</sup> To date, however, the average differences between pre-trial and appeal time for defendants tried singly and in multi-defendant trials have been minor.<sup>175</sup>

#### IV. TAILORING THE PACE OF INTERNATIONAL CRIMINAL JUSTICE

This Part relates Part III's findings to the framework developed in Parts I and II. Today's international and hybrid criminal tribunals are operating at a reasonable pace with regard to domestic criminal law aims and the historical record aim, but they do not always process cases fast enough to satisfy transitional justice aims. This Part also discusses ways in which international criminal justice could address this concern. Finally, the implications of these arguments for the ICC are addressed.

##### A. *The Aims and the Timeframes*

From a domestic criminal justice perspective, today's international criminal tribunals do not deserve all the criticism about their pace that they receive. For instance, the ICTY and the SCSL process cases at a reasonable pace once the defendants are in custody, averaging between four to five years per defendant from custody to completion—numbers that are on par with the timeframes for complex criminal cases in developed Western countries.<sup>176</sup> We cannot fairly call this pace “glacial”<sup>177</sup>

---

involve fewer courtroom appearances. Accordingly, I look at these times in absolute terms rather than calculating “per defendant” times.

174. See, e.g., Prosecutor v. Nahimana, Case No. ICTR 99-52-A, Decision on Ngeze's Motion for an Additional Extension of Time to File His Notice of Appeal and Brief (Feb. 6, 2004) (extending the deadline for one defendant on the grounds that his co-defendants had received time extensions).

175. At the ICTY, defendants tried singly spent an average of 1.9 years pre-trial and 2.3 years on appeal, compared with an average of 1.8 years pre-trial and 2.3 years on appeal for defendants tried in multi-defendant trials. At the ICTR, defendants tried singly spent an average of 3.1 years pre-trial and 1.9 years on appeal, compared with an average of 3.3 years pre-trial and 2.6 years on appeal for defendants tried in multi-defendant trials. (Of these differences, only the ICTR appeal time is statistically significantly different at the 5% level for defendants tried singly and those tried in multi-accused trials.) Once again, however, it is hard to tell the extent to which these numbers are shaped by the number of accused at trial and to what extent they are shaped by other possible factors.

176. See *supra* Part II.A. While the average case duration at the ICTY rises when guilty pleas are taken out of the picture, see *supra* Part III.B.3, in my view this difference does not move the ICTY beyond the pale.

177. See Rabkin, *supra* note 8, at 768.

unless we are willing to apply the same adjective to our own domestic criminal cases. The ICTR, however, merits far more criticism. Its 5.9-year average from custody to completion not only is substantially above the ballpark for complex domestic criminal law cases, but is also slower at a statistically significant level than its sister tribunals. Moreover, a look at the cases in the pipeline suggests that ICTR averages will balloon alarmingly once these cases are factored in. Even so, however, the criticism flung at the ICTR for its pace may come less from careful consideration of its pace relative to complex domestic criminal trials, and more from comparisons to the IMT.<sup>178</sup> Such comparisons are dubious from a domestic criminal justice perspective, given that the IMT explicitly emphasized speed in its Charter, allowed its defendants little chance for pre-trial preparation, and provided no right of appeal.

Since the historical record aim has no definite timeframe attached to it, we can presume that international criminal law also performs at a reasonable pace in light of this objective. Indeed, the fact that the international tribunals spend a disproportionately large amount of time in the trial phase relative to domestic criminal tribunals may be due in part to this aim,<sup>179</sup> as the presentation of evidence aimed at advancing the historical record and the drafting of judgment sections on the historical record undoubtedly take additional time.

From the perspective of the transitional justice aims, however, there is cause for serious concern about the pace of international criminal justice today. The IMT took “far longer than had been anticipated” at the time,<sup>180</sup> but it moved quickly enough to help head off private vengeance and to serve as a guiding precedent for subsequent trials of Nazi leaders conducted by individual Allied countries under Control Council Law No. 10.<sup>181</sup> Lacking the speed of the IMT, today’s tribunals also lack the ability to play this role as effectively.

This consideration is less significant in the context of slowly transitioning societies like the states of the former Yugoslavia. The need to stave off immediate vengeance is lessened because there is less opportunity for such vengeance: the bulk of wrongdoers either remains in

---

178. See *id.* (drawing comparisons to the IMT).

179. Because my focus in this Article is on the pace rather than the price of international criminal justice, I do not discuss separately the financial implications of the fact that international criminal cases spend a disproportionate percentage of time at the trial phase—which, while judge-based rather than jury-based, is still very expensive. For more discussion of the costs of international criminal justice and particularly of the trial phases, see generally Wipman, *supra* note 14.

180. TAYLOR, *supra* note 112, at 20–21.

181. See *supra* notes 111–112 and accompanying text.

positions of influence or is elsewhere entirely.<sup>182</sup> The greater transitional justice need is to push these societies to come to terms with and apply the rule of law to the wrongdoing of their own leaders and followers. This takes time. The ICTY has thus been able to process cases along domestic criminal law timeframes and yet still influence the slowly transitioning states of the former Yugoslavia. Only now, many years after the conflict, are these states developing the will to prosecute their own.<sup>183</sup> Just as the IMT judgment preceded the Control Council Law No. 10 cases, so too have ICTY judgments preceded and influenced the cases that go to the domestic war crimes chambers in the states of the former Yugoslavia.<sup>184</sup>

The ICTR's pace presents a graver problem from a transitional justice perspective. Like the IMT but unlike the ICTY, the ICTR was established in the wake of an abruptly transitioned society. The new Tutsi-led government of Rwanda had both the desire for retribution and the opportunity to obtain it, as most of the perpetrators (especially low-level ones) were in Rwanda.<sup>185</sup> At first, Rwanda asked the Security Council to set up an international tribunal precisely to avoid "any suspicion of its wanting to organize speedy, vengeful justice,"<sup>186</sup> but later it voted against

---

182. This is not to say that the slowly transitioning societies have no opportunity for retribution. States of the former Yugoslavia have proved quite willing to try perceived wrongdoers aligned with *other* sides of the conflict—even where these wrongdoers were not within their reach. See, e.g., Milena Sterio, *Seeking the Best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions*, 18 FLA. J. INT'L L. 887, 890 (2006) (describing how a majority of war crimes trials in Croatia were against Serbs *in absentia*). *In absentia* trials of dubious fairness were frequent immediately after the conflict, but the states of the former Yugoslavia subsequently agreed to let the ICTY Prosecution screen all intended domestic war crimes prosecutions. ROPER & BARRIA, *supra* note 102, at 72–73. Domestic prosecutions could go forward only in cases where the ICTY Prosecution considered there to be sufficient evidence of guilt. See *id.*

183. See Cody Henson, *Life After the ICTY: How Modeling New Legislation After the European Arrest Warrant Could Aid in the Domestic Prosecution of War Crimes in Serbia, Croatia and Bosnia and Herzegovina*, 14 NEW ENG. J. INT'L & COMP. L. 75, 90–99 (2007).

184. See generally Daryl A. Mundis, *Completing the Mandate of the Ad Hoc International Criminal Tribunals: Lessons from the Nuremberg Process?*, 28 FORDHAM INT'L L.J. 591, 607 (2005). Sponsored largely by international funding, the War Crimes Chamber of the State of Bosnia and Herzegovina has jurisdiction over cases referred to it by the ICTY pursuant to the completion strategy, over suspects investigated but not ultimately indicted by the ICTY Prosecution, and over the cases described *supra* note 182. *Id.* at 609. The ICTY has referred cases to this Chamber and also to Serbia and Croatia. See ICTY, *The Cases: Transferred Cases*, <http://www.icty.org/action/cases/4> (last visited Oct. 2, 2009) (noting a handful of referrals to Bosnia, the referral of Rahim Ademi and Mrko Norac to Croatia, and the referral of Vladimir Kovačević to Serbia).

185. Many high-level perpetrators had fled the country following the Rwandan Patriotic Front (RPF) invasion. See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 23 (2001) (describing the long list of countries who have arrested leaders of the genocide for the ICTR).

186. *Id.* (quoting U.N. SCOR, 3453d mtg. at 14, U.N. Doc. S/PV.3453 (Nov. 8, 1994)).

the establishment of the ICTR because the tribunal's temporal jurisdiction was limited in a way that would exclude crimes committed before 1994 and because the tribunal could not impose the death penalty.<sup>187</sup> Rwanda was also determined to hold more perpetrators accountable than an international criminal tribunal could process. Its legal system was in shambles, but it took over 120,000 genocide suspects into custody.<sup>188</sup> In April 1998, it processed its first cases and carried out twenty-two death sentences. Martha Minow writes:

[A]ccording to news reports, the crowd watching the executions at times seemed overtaken with bloodlust. International human rights leaders objected that the underlying trials failed to comport with international standards of justice. Some defendants had no legal representation; others had lawyers without time to prepare. . . . Rather than ending the cycles of revenge, the trials themselves were revenge.<sup>189</sup>

Rwanda thus processed its first domestic criminal cases before the ICTR issued any judgments. Not until September 1998 did the ICTR issue its first trial judgment, and its first ultimate judgment took longer still.<sup>190</sup> The first ICTR judgment thus had no way of influencing the prior Rwandan cases. The story since has been much the same: the ICTR has had little influence over domestic prosecutions in Rwanda, and there is a perception of inconsistency between ICTR prosecutions and Rwandan prosecutions, particularly where sentences are concerned.<sup>191</sup> Indeed, Rwanda has abandoned Western-style trials for many suspects in favor of a community court system known as *gacaca*.<sup>192</sup> The tension between the

---

187. Madeline H. Morris, *Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 DUKE J. INT'L & COMP. L. 349, 353–56 (1997).

188. Timothy Longman, *Justice at the Grassroots? Gacaca Trials in Rwanda*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE, *supra* note 108, at 206, 208 (noting also that this was roughly 2% of Rwanda's population).

189. MINOW, *supra* note 67, at 124.

190. Prosecutor v. Akeyesu, Case No. ICTR 96-4-A, Judgment (June 1, 2001); Prosecutor v. Akeyesu, Case No. ICTR 96-4-T, Judgment (Sept. 2, 1998). For discussion of the friction emerging between the ICTR and Rwanda even before 1998, see Morris, *supra* note 187, at 364.

191. See ROPER & BARRIA, *supra* note 102, at 91. Recently, however, Rwanda has abolished the death penalty in response to international pressure, including the ICTR's refusal to shift pending cases to Rwanda otherwise. See *Rwanda Scraps Death Penalty*, BBC NEWS, June 8, 2007, <http://news.bbc.co.uk/1/hi/world/africa/6735435.stm> (last visited Oct. 5, 2009).

192. For a detailed discussion of the *gacaca* process, see generally Longman, *supra* note 188. Rwanda shifted toward *gacaca* partly because it proved impossible to process the cases of the 120,000 suspects through conventional trials: by 2004, only about 9,000 had been tried. See ROPER & BARRIA, *supra* note 102, at 77; Maury D. Shenk et al., *International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 37 INT'L LAW. 551, 564 (2003). Obvi-

ICTR and Rwanda is so acute that the ICTR has refused to send certain lower-level suspects back to Rwanda for trial on the grounds that they will not receive fair trials.<sup>193</sup>

It would be unfair to attribute the ICTR's minimal transitional justice role in Rwanda solely to its pace. Given Rwanda's quite understandable determination to punish on-the-ground genocidaires—and given how many of these there were—it is unclear how much any international criminal tribunal, no matter how swift, could have done to influence the domestic criminal justice process. Nonetheless, the ICTR's slow pace prevented it from having any influence on the first Rwandan judgments, and thus reduced the odds that Rwanda would look to it in later ones. By completing at least some cases speedily, the ICTR could have offered a precedent on the law, on the facts (from the broader historical record perspective), and on sentencing. If linked to outreach efforts and emphasized by human rights groups, such judgments arguably could have impacted Rwandan domestic prosecutions. They could also have given the ICTR more credibility in trying to influence Rwandan domestic practice through means other than judgments, along the lines of the ICTY's role in screening domestic prosecutions and in helping plan the shape of the Bosnia War Crimes Chamber. As a tribunal operating in an abruptly transitioned society, one might expect the ICTR to have prioritized speed more so than other modern tribunals, but instead it has averaged the slowest case processing times to date.

It is harder to assess how compatible the SCSL's pace has been with transitional justice aims. At the time the SCSL was established in 2002, there was comparatively little risk of private vengeance or unfair domestic trials against RUF and AFRC supporters in light of the heavy international peacekeeping presence. In addition, Sierra Leone had already committed to a TRC and had no interest in conducting prosecutions other than those done by the SCSL.<sup>194</sup> Accordingly, the SCSL did not face the typical time pressures involved in abruptly transitioned societies, as there was neither an urgent need to stave off vengeance, nor a demand for swift judgment that would shape future domestic prosecutions. The SCSL's pace therefore does not seem to have hindered its ability to accomplish transitional justice aims.

---

ously, pre-trial detention time has been a huge concern from a human rights perspective. In 2003, Rwanda released 25,000 suspects pending *gacaca* proceedings. *See id.* at 77.

193. *See* U.N. SCOR, 64th Sess., 6039th mtg., U.N. Doc. S/PRST/2008/46 (Dec. 12, 2008) (noting that Rwanda is trying to make changes that will satisfy the ICTR's concerns).

194. *See* Pham, *supra* note 106, at 75–76; Jennifer Trahan, *Reflections on the Difficulties of Enforcing International Criminal Justice*, 30 U. PA. J. INT'L L. 1187, 1206 (2009).

### B. *International Criminal Justice and Abruptly Transitioned Societies*

International criminal justice as practiced today processes cases too slowly to have a timely and meaningful impact on abruptly transitioned societies. What can be done about this? There are five possible options where abruptly transitioned societies are concerned: 1) ignoring transitional justice aims; 2) abandoning international criminal justice; 3) abandoning international criminal cases and using international criminal justice only as a means for monitoring local prosecutions; 4) making international criminal justice the sole criminal justice mechanism; and 5) reshaping the practice of international criminal law to ensure justice at a speed commensurate with the societies' needs. Each option has good points and bad points. In my view, however, the last three options are the best ones.

#### 1. Options

1. *Ignore transitional justice aims.* One possible response to the problem is simply not to worry about it. This view is a corollary to the position of Hannah Arendt and others that international criminal justice should simply be about accomplishing domestic criminal law aims.<sup>195</sup> As long as the tribunals do in fact bring key organizers of heinous atrocities to justice by means of fair trials, then they are doing their job and there is no cause to worry about whether they are or are not moving quickly enough to help the affected societies promote reconciliation, reestablish the rule of law, and return to peace. This is a principled view. But the international community's investment in international criminal tribunals is about peace and security as well as justice,<sup>196</sup> and it is dubious whether it will or should choose to spend between ten and fifty million dollars per individual defendant to pursue only the domestic criminal law and historical record aims.

2. *Abandon international criminal justice.* Another possible solution is to abandon international criminal justice when faced with an abruptly transitioned society. Since international criminal justice moves too slowly to promote transitional justice needs in these societies, it is simply not worth it. Jeremy Rabkin would favor this approach and would leave criminal justice to the societies themselves.<sup>197</sup> Unlike slowly transi-

---

195. See *supra* note 62 and accompanying text.

196. See *supra* note 54 and accompanying text.

197. See generally Rabkin, *supra* note 8. Indeed, Rabkin would abandon international criminal justice in all situations. He emphasizes how slowly international criminal tribunals have proceeded since the IMT (which he considers an occupational court rather than an international court). *Id.* at 756, 768–70. In his view, although the IMT may have been “far from perfect,” it achieved the needed “rapid sense of closure,” whereas today’s tribunals refuse to move forward “until every procedural refinement has been considered.” *Id.* at 771.

tioning societies, abruptly transitioned societies generally have the will to pursue the perpetrators of the abusive regime. They may not be as effective as international criminal tribunals in persuading other states to find and extradite past leaders turned fugitives, but they will go after those whom they can likely bring into custody. The domestic criminal law and historical record aims will thus be at least partially fulfilled, and the international community will save itself money and effort. The risk is that these societies will cross the line between justice and vengeance. Even if there is no retaliatory bloodbath along the lines that Wechsler thought the IMT averted,<sup>198</sup> the new government may conduct trials that are unfair or insufficient. Such proceedings not only raise due process concerns but also may negatively affect transitional justice goals of peace and reconciliation. To give but one example, the domestic proceedings against Saddam Hussein may have satisfied the Shiite-dominated government, but the vengeance-laden manner of his execution infuriated Sunnis.<sup>199</sup>

3. *Conduct no international criminal trials but use international criminal justice to monitor local justice.* A third option is to use the international criminal justice process purely as a means for monitoring local justice mechanisms. Under this approach, international criminal tribunals would provide training and support to local justice entities—and monitor their proceedings—but step in to try defendants only as a last resort. This approach has never been tried to date. Yet increasingly international criminal tribunals are acting to influence local justice. The ICTY has done this in three ways in the context of the slowly transitioning societies of the former Yugoslavia: by requiring local war crimes prosecutions to be vetted by the ICTY Prosecutor, by referring cases to the national courts (and keeping a light eye on them thereafter), and by undertaking training and outreach in the local legal systems.<sup>200</sup> Such efforts could shine the way forward for the ICC in dealing with abruptly

---

198. See *supra* note 111 and accompanying text.

199. See *Angry Protests in Iraq Suggest Sunni Arab Shift to Militants*, N.Y. TIMES, Jan. 2, 2007, at A9 (describing Sunni protests over how Saddam Hussein was taunted at the time of his execution); Hassan M. Fattah, *For Arab Critics, Hussein's Execution Symbolizes the Victory of Vengeance over Justice*, N.Y. TIMES, Dec. 31, 2006, at 13 (noting how perceptions of the trial's unfairness could trigger broader regional unrest). Additionally, Kurds were frustrated that Hussein was executed for a conviction in relation to atrocities against 148 Shiites before the completion of his trial for atrocities committed against vast numbers of Kurds during the Anfal campaign. See *Iraq Court Drops Saddam's Charges*, BBC NEWS, Jan. 8, 2007, [http://news.bbc.co.uk/2/hi/world/middle\\_east/6239853.stm](http://news.bbc.co.uk/2/hi/world/middle_east/6239853.stm) (last visited Oct. 2, 2009).

200. See, e.g., *supra* note 182 (describing the vetting process of local prosecutions); Mundis, *supra* note 184, at 607–14 (discussing referrals); Press Release, ICTY, Tribunal Reviews Outreach and Capacity Building with Serbian Judiciary (Feb. 12, 2009), available at <http://www.icty.org/sid/10054> (last visited Oct. 5, 2009) (describing a sample outreach program with Serbian courts).



transitioned societies. The ICC could conduct trials only in relation to slowly transitioning or uneasily transitioned societies, and leave prosecutions in abruptly transitioned societies to these societies subject to support and monitoring. This approach prevents a disconnect between international criminal justice and local justice, while allowing international criminal justice room to pressure the local justice mechanisms away from vengeance and toward restraint. This approach, however, will only work with a general tribunal like the ICC because it would be impractical to set up an ad hoc tribunal solely for monitoring purposes. In addition, monitoring may not be able to stave off all unfair or insufficient proceedings.

4. *Make international criminal justice the sole criminal justice mechanism.* Another option is to turn international criminal justice into the sole criminal law mechanism for dealing with perpetrators. The SCSL is an example. As noted earlier, the SCSL has processed its cases to date in an average of 4.8 years from custody to completion. Since Sierra Leone has no other plans to prosecute perpetrators, the SCSL has no need to worry about whether this timeframe is quick enough to influence subsequent domestic prosecutions. But the feasibility of this approach for every abruptly transitioned society is unclear. The most challenging hurdle is that the society must be willing to accept that only a very few perpetrators—generally, the high-level organizers—will be tried.<sup>201</sup> This is difficult from a domestic criminal law perspective. Retributive needs may be somewhat satisfied by trials of the high-level officials, particularly where the trials are conducted by a hybrid tribunal that is geographically accessible to the victims, like the SCSL in Freetown. Where the international community has had a large role in ending the conflict, as in Sierra Leone, it can perhaps pressure the society into accepting international criminal justice as the only criminal justice response to the past atrocities (perhaps in conjunction with other transitional justice measures like TRCs). But even in Sierra Leone, there remains distress at how few perpetrators face criminal trials,<sup>202</sup> and it would be close to impossible to adopt this solution in places like Rwanda, where the scale of the genocide was almost unimaginable and where the abrupt transition was brought about by local forces affiliated with the victims rather than by international intervention.

5. *Speed up international criminal justice.* The fifth option is to deliver international criminal justice swiftly enough that it can influence

---

201. Where mass atrocities are concerned, there will always be more perpetrators than can be tried; but the retributive gap is even greater if international or hybrid criminal tribunals are the only criminal justice mechanisms.

202. PERRIELLO & WIERDA, *supra* note 154, at 28.

domestic criminal prosecutions in abruptly transitioned societies. Virtually everyone is in favor of speeding up international criminal justice, at least until one starts thinking about what it will take to do so. Undoubtedly some time can be saved by conventional measures. Good pre-trial and trial management, shorter recesses, the use of written testimony, a civil-law approach to self-representation, and similar measures can accelerate the process to some degree.<sup>203</sup> Guilty pleas also offer some potential: as shown in Part III, the ICTR has averaged only 3.1 years from custody to ultimate judgment where guilty pleas are involved. This potential is limited, however, by the political and moral difficulties of offering any kind of a bargain to the highest-level perpetrators. Multi-accused trials offer some limited potential as well—while they may not reduce time from custody to completion, they can help a court process more defendants with the resources available to it than would be possible with all single-accused trials. Finally, the SCSL's current average of .6 years for appeals demonstrates that international criminal tribunals can process appeals much more rapidly than the ICTY and the ICTR's two-plus-year average. But these measures are insufficient to match the IMT's average of fourteen months from custody to completion. In order for an international criminal tribunal to approach this record—say, to be able to process the cases of five to ten former leaders from custody to completion in two years—would demand much more drastic measures. Such measures might include limiting defendants' right to choose counsel and mandating that trials start within a few months of custody. There would also need to be very substantial funding available to both the prosecution and the defense in order to prepare such complex cases within the shorter timeframe, as well as sufficient judges and courtrooms to process the cases promptly.<sup>204</sup>

The chief down-side to this approach is that it constrains defendants' due process rights, namely their rights under the ICCPR "to have adequate time and facilities for the preparation of [their] defence," and to have "legal assistance of [their] own choosing."<sup>205</sup> Such curtailments raise fairness concerns and run counter to the tribunals' traditional insistence that "[t]here can be no cutting corners" with regard to due process.<sup>206</sup> This approach would also increase the risk of sloppily

---

203. See, e.g., Bonomy, *supra* note 42, at 355–57. Civil law systems do not give defendants the right to self-representation where they stand accused of serious crimes. See Michael P. Scharf, *Self-Representation Versus Assignment of Defence Counsel Before International Criminal Tribunals*, 4 J. INT'L CRIM. JUST. 31, 35–36 (2006).

204. If effective, this would not necessarily mean more total funding. While the cases would be more costly per diem, the total number of days would be substantially shortened.

205. ICCPR, *supra* note 25, arts. 9, 14.

206. Molly Moore, *Trial of Milosevic Holds Lessons for Iraqi Prosecutors*, WASH. POST, Oct. 18, 2005, at A19 (quoting ICTY President Theodor Meron).

prepared cases, which in turn increases the risk of incorrect outcomes and poorly developed historical records. Lastly, this approach would take great discipline and commitment on the part of the international criminal tribunals—perhaps more than can realistically be expected.

## 2. Analysis

Which of these five approaches is best? Each has its appeal, and none is perfect. The first option satisfies the need to bring high-level perpetrators to justice but risks tension-enhancing disjunction between the international criminal cases and simultaneous domestic prosecutions. The second saves the international community's time and money but increases the likelihood of unfair domestic proceedings that generate bitterness rather than reconciliation. The third limits the disjunction between international and domestic proceedings but its success will depend heavily on how effectively the international criminal tribunal can influence and monitor local proceedings. The fourth enables international criminal prosecutions to proceed at a domestic criminal law pace without the risk of inconsistencies found in the first option, but depends on the abruptly transitioned societies accepting these prosecutions as the sole means of criminal prosecution and leaves open a substantial retribution gap. The fifth offers the hope of international cases influencing domestic ones in ways that enhance reconciliation and the rule of law, but risks abandoning some due process rights and may prove difficult to achieve in practice.

Of these various tradeoffs, the third, fourth, and fifth options provide the best ones. They offer the most hope for fulfilling transitional justice goals in abruptly transitioned societies, while the first option would ignore such goals and the second option would trust too much in the restraint of the newly transitioned society.

The third option will require an international criminal tribunal with general jurisdiction. Such a tribunal would hone its own skills and employ its courts in the context of slowly transitioning or uneasily transitioned societies, and then use a mix of friendly support and targeted pressure to influence the execution of local justice in abruptly transitioned societies. Done correctly, the potential for influence is substantial. The local community will have primary ownership over the trials, thus fulfilling the need for retribution at the local level, while the international criminal tribunal will nudge or push the local tribunal to hold trials that satisfy certain fundamental fairness minimums (even if below those set forth in the ICCPR) and amount to justice rather than vengeance.

The fourth option will prove feasible only in the rare circumstance where the affected society is willing to turn over all criminal justice responses to past atrocities to an international or hybrid tribunal. But where this is done, the prosecutions will have the imprimatur of the international community and be conducted under internationally accepted standards of fairness. This in turn will make the results more likely to be accepted in a way that promotes reconciliation and is influential in shaping the rule of law. Such potential for furthering transitional justice aims seems worth significant expenditure by the international community in a way that might not prove true of the first option. The large accountability gap created by the absence of criminal proceedings against lower-level perpetrators can be partly—although only partly—fulfilled by other transitional justice measures like TRCs, apologies, and reparations.

The fifth option is fraught with difficulty, but holds the promise of significant benefits. The concerns regarding due process rights can probably be overcome or countered. While the international community is unlikely to accept explicit disregard of defendants' ICCPR rights in international criminal trials, it might accept narrow interpretations of these rights. A defendant's right to counsel of his choosing is naturally subject to reasonableness limits, and in the international criminal context these could acceptably include requirements that the defendant pick counsel promptly, choose counsel with proven capacity to litigate complex criminal cases within a tight timeframe, and not attempt to change counsel midstream. It is somewhat more difficult to conceive that a few months of pre-trial time would be adequate for preparing a defense in complex international criminal cases. This point can be partly remedied by substantial funding and partly countered by the defendant's right to be tried without undue delay—a right that the current pace of international justice does not always honor. I do not think that such limits on defendants' due process rights, whether done explicitly or implicitly, would significantly jeopardize the actual or perceived fairness of the proceedings provided that other indicia of fairness were met, such as impartial judges, significant funding for the defense, and, on the outcomes side, occasional acquittals and gradients of sentences. The greater difficulty would simply be instilling and maintaining a culture of swiftness among lawyers accustomed to treating speed as the most dispensable virtue. If it could be done, however, then international criminal law could recapture IMT-style influence in abruptly transitioned societies. Moreover, the international criminal cases could precede the domestic criminal trials, serving as an influential precedent and setting the tone for fairness.

In comparing these five options, Holmes's dictum about the life of the law being experience rather than logic comes to mind.<sup>207</sup> Experience in this matter is—and hopefully always will be—limited, and it is difficult to isolate how choices about international criminal justice have or have not influenced societal transitions. That said, my own preferences in this matter are influenced by the perceived success or failure of examples. The ICTR, which fits the first option, has failed to meaningfully affect Rwanda's transition. The Saddam Hussein trial, which fits the second option, forcefully demonstrates how domestic prosecutions in an abruptly transitioned society can cross the line from justice to unprofitable vengeance. The SCSL, which fits the fourth option, seems to have done a reasonable job in advancing transitional justice goals. The IMT, which fits the fifth option, remains widely acclaimed. As for the third option, although it has not been tried to date, the success of other outreach and monitoring programs suggest that it has significant potential. Although the palate of experience may look different in another twenty years, the third, fourth, and fifth options hold the greatest present appeal.

So far, I have focused on the advantages and disadvantages of these options in the abstract. In the next and final section, I briefly discuss how these various options might play out in practice at the ICC, which is the most significant of the international and hybrid criminal tribunals.

### C. *The ICC, Its Pace, and Transitional Justice Aims*

The future of international criminal justice largely lies with the ICC. Not only is it the only permanent international criminal tribunal, it is also the only international criminal tribunal whose jurisdiction is wide-ranging rather than linked to a specific crisis.<sup>208</sup> Given the ICC's importance, it is worth specifically considering how issues relating to pace can and should affect international criminal justice.

To date, the ICC has issued arrest warrants or summons for fourteen suspects and gained custody over five of them. It has begun only one trial: that of Congolese rebel leader Thomas Lubanga Dyilo. Given that Lubanga spent almost three years in ICC custody before the start of this trial, the ICC clearly has not expedited his pre-trial period.<sup>209</sup> Signs of

---

207. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (Dover Publications 1991) (1881).

208. The ICC has jurisdiction over specified international crimes committed on the territory of states parties or by nationals of states parties. Rome Statute, *supra* note 26, art. 12. It also has jurisdiction over situations referred to it by the Security Council acting under Chapter VII of the U.N. Charter. *Id.* art. 13. The Rome Statute currently has 110 states parties. See ICC, The States Parties to the Rome Statute, <http://www2.icc-cpi.int/Menus/ASP/states+parties/> (last visited Oct. 2, 2009).

209. The trial start date was pushed back several times before it finally began on January 26, 2009. See, e.g., Press Release, ICC, The Trial in the Case of Mr. Thomas Lubanga Dyilo

similar deliberateness are evident with regard to the three other suspects who have been in ICC custody for over a year.<sup>210</sup> Projecting from these admittedly limited instances, it seems likely that the ICC will process cases post-custody at a pace similar to—or perhaps even slower than—the ICTY, the SCSL, and the ICTR.

This deliberate pace may be acceptable within the purview of domestic criminal law and historical record aims. It too may be considered reasonable in relation to transitional justice aims where slowly transitioning societies are concerned, as leisurely international criminal prosecutions may still predate domestic ones in these circumstances. These trials may also be effective in uneasily transitioned societies, where there is no urgent need for speed. But what if the ICC is confronted with an abruptly transitioned society—a prospect which has not yet occurred but likely will someday? How can and should the ICC react?

In the prior section, I argued that the third, fourth, and fifth options outlined above each represent a reasonable approach for international criminal justice in the context of abruptly transitioned societies. That analysis was deliberately abstract. In considering the viability of those options at the ICC, however, only the third option seems likely to succeed. The fourth option—of *solely* international criminal trials for an abruptly transitioned society—is most feasible where the tribunal is geographically located in the society and thus can fulfill at least some retributive needs in an immediate and satisfying way. The ICC does not fit this description given its location in The Hague. As for the fifth option—of processing cases from abruptly transitioned societies swiftly enough to influence local justice—the ICC's leisurely pace to date does not inspire confidence that it can undertake this approach. A change would take significant effort on the part of the prosecutors, judges,

---

Will Commence on 31 March 2008 (Nov. 12, 2007); Press Release, ICC, The Trial in the Case of Mr. Thomas Lubanga Dyilo Will Commence on 23 June, 2008 (Mar. 13, 2008); Press Release, ICC, The Trial in the Case of Mr. Thomas Lubanga Dyilo Will Not Start on 23 June 2008 (June 11, 2008). For ICC Press Releases, see the ICC website, <http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/> (last visited Oct. 4, 2009). See also Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) 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, ¶ 94 (June 13, 2008) (temporarily halting the trial process).

210. See, e.g., Press Release, ICC, Confirmation of Charges Hearing Postponed in the Case Against Germain Katanga and Mathieu Ngudjolo Chui (Apr. 28, 2008); Press Release, ICC, The Confirmation Hearing in the Jean-Pierre Bemba Gombo Case Will Not Commence on 4 November 2008 (Oct. 20, 2008). For ICC Press Releases, see the ICC website, <http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/> (last visited Oct. 4, 2009).

defense attorneys, and staff of the ICC. It might also require changes to the structure of the Rome Statute itself, which has provisions mandating time-consuming procedures<sup>211</sup> but none encouraging haste. In this, the Rome Charter differs from the London Charter, which explicitly instructed the IMT to “take strict measures to prevent any action which will cause unreasonable delay.”<sup>212</sup> If the ICC does take cases from abruptly transitioned societies, then, it is likely to process them with the same deliberate pace it is currently using on the four suspects in custody.<sup>213</sup>

The ICC should therefore focus on the third option. It should avoid trying cases from abruptly transitioned societies within its jurisdiction, and instead aim to influence and monitor local justice mechanisms within these societies. Institutionally, the ICC is well-equipped to have such influence. The Prosecutor can offer tremendous assistance in tracking down and apprehending high-level suspects from the past regime.<sup>214</sup> On a technical level, the ICC can offer trainings in international humanitarian law and trial management, and maybe even loan staff for selected missions. Perhaps most significantly, the ICC, and particularly its Prosecutor, can have a great deal of influence on the conduct of other states and non-governmental organizations (NGOs). For example, strong support for local justice mechanisms from the Prosecutor could encourage other states to finance these mechanisms. With such tools as leverage, the ICC can push for local proceedings that bear the key hallmarks of justice rather than vengeance: impartial judges, a fair opportunity for defendants to present their cases, occasional acquittals, and the orderly enforcement of sentences.

Besides these carrots, the ICC also has available significant sticks. The ICC could withhold the kinds of support mentioned above. Indeed, the ICC could potentially use its influence to deter other countries and

---

211. See, e.g., Rome Statute, *supra* note 26, arts. 61, 82 (providing in Article 61 for a pre-trial hearing to confirm the charges and in Article 82 for interlocutory appeals on a range of matters).

212. London Charter, *supra* note 24, art. 18(b); see also *id.* arts. 18(a), 18(c) (further emphasizing haste).

213. Moreover, the ICC might have difficulty tailoring its pace in light of the varying timeframes needed by different types of transitioning societies. Among other things, this approach would raise the specter of different defendants being treated differently with regard to time for pre-trial preparation (and possibly in regard to choice of counsel). This is perhaps not a significant concern. If transitional justice seeks to influence those whom the prosecution chooses to pursue, see *supra* notes 56-59 and accompanying text, why may it not also influence the procedures of specific cases?

214. The Prosecutor can command significant international cooperation. See generally Rome Statute, *supra* note 26, arts. 86-102 (providing for international cooperation and judicial assistance). The Prosecutor could thus do the groundwork for finding a fugitive, and the abruptly transitioned society could then seek extradition of this suspect. See *id.* art. 90.

NGOs from helping an abruptly transitioned society that the ICC deems is engaging in unfair trials. In addition, the ICC is authorized in limited circumstances to step in and take cases away from the abruptly transitioned society. Under what is known as the principle of complementarity, the ICC may pursue cases where the affected state is “unwilling or unable genuinely” to do so.<sup>215</sup> Thus, while the ICC must give an abruptly transitioned society first dibs in prosecuting overthrown leaders for violations of international humanitarian law, the ICC can step in and take over if it finds this society to be unwilling or unable to prosecute effectively.<sup>216</sup> To be sure, the “unwilling or unable” standard was likely crafted to enable the ICC to take over from slowly transitioning societies uninterested in prosecuting their own leaders, rather than to take over from abruptly transitioned societies that are eager to prosecute past oppressors but may do so in an unfair and vengeance-laden way.<sup>217</sup> Nonetheless, this principle offers the ICC a powerful rationale for monitoring local justice proceedings in abruptly transitioned societies, namely, to ensure that such societies are “willing” to prosecute impartially and “able” to carry out their proceedings in a fair way. In turn, these societies have strong incentives to follow suggestions made by the ICC, since they might otherwise risk findings of unwillingness or inability. Such findings would

---

215. See Rome Statute, *supra* note 26, art. 17(a). For more information about the principle of complementarity, see, for example, WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85–89 (2d ed. 2004). In this respect, the ICC differs from the ad hoc tribunals, which have dibs over domestic jurisdictions.

216. Articles 17(2)–(3) of the Rome Statute, *supra* note 26, provides as follows:

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5;

(b) There has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

*Id.* arts. 17(2)–17(3).

217. The text of Article 17, *id.*, seems to focus on local prosecutions aimed at “shielding” the defendant rather than on those which stack the deck against the defendant.



not only deeply embarrass the abruptly transitioned societies, but also force them to turn over the defendants at issue to the ICC pursuant to their obligations under the Rome Statute.

### CONCLUSION

The pace of international criminal justice is both better and worse than conventional wisdom suggests. On the plus side, international criminal tribunals are processing most cases at a reasonable speed from a domestic criminal law perspective. On average, the pace of international criminal cases is only modestly slower than complex criminal cases in the Western domestic jurisdictions that have most influenced international criminal law. When one considers that international criminal tribunals have difficulty obtaining evidence, substantial needs in terms of translation, and the objective of creating historical records, then their average timeframes are entirely understandable.

The adage “justice delayed is justice denied” is thus invoked with respect to international criminal tribunals far more than is justified. Nevertheless, justice is delayed in three situations. The first is where defendants are not indicted and/or apprehended until long after their crimes. It is tragic that Ratko Mladić is still at large, and that Radislav Karadžić was apprehended only recently. But the fault here does not lie with international criminal tribunals, and the answer is not to say “well, justice denied” but rather to pursue what it takes to have justice done. The second situation is where defendants are detained for long periods of time prior to transfer to the tribunals, as in the case of Duch. The number of such defendants is relatively small, and, once again, these delays are usually not attributable to the tribunals.<sup>218</sup> The third situation is where the tribunals process cases at an unreasonably slow speed and are thus at fault for failing to deliver timely justice. The ICTR in particular has many pending cases that are taking an intolerably long time. These failures should and do generate harsh criticism, but they should not overshadow the reality that, on average, international criminal cases to date have proceeded at tolerable paces from a domestic criminal law perspective.

But if international criminal justice is about more than delivering justice—if it is to help bring about peace, reconciliation, and the rule of law to the affected society—then there is reason to be concerned about its pace. Unless international criminal cases speed up substantially, international criminal tribunals will not be able to have an impact on

---

218. See *supra* note 142.

Fall 2009]

*The Pace of International Criminal Justice*

143

domestic criminal proceedings in abruptly transitioned societies. Instead, inconsistencies between simultaneous international and domestic criminal proceedings may heighten tensions all around. If international criminal law is to influence transitional justice positively in abruptly transitioned societies, it must either try suspects swiftly or instead monitor their trials in the abruptly transitioned society.