

# THE FAITH OF THE INTERNATIONAL CRIMINAL LAWYER

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## I. INTRODUCTION

The past fifteen years have witnessed an explosion in the growth of international criminal law as a means to respond to atrocities. After limited progress for almost fifty years, the tradition of the post-World War II Nuremberg and Tokyo tribunals was resurrected by the United Nations (UN) Security

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Council in 1993 with the creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY). This resurgence quickly gained momentum with the creation of a similar tribunal for Rwanda (ICTR), a Special Court for Sierra Leone, and a host of domestic and “internationalized” mechanisms for responding to genocide, war crimes, and crimes against humanity in places ranging from East Timor to Kosovo.<sup>1</sup> Among these measures, the permanent International Criminal Court (ICC) stands out in particular, characterized by UN Secretary-General Kofi Annan as “[u]ndoubtedly, the most significant recent development in the international community’s long struggle to advance the cause of justice and rule of law.”<sup>2</sup>

This rapid development in practice has been accompanied by a strong passionate commitment, especially in academic circles but also among practitioners, to the possibilities of international criminal law. Yet to date there has been little exploration, empirical or theoretical, of either the ultimate goals of international criminal law or the ability of courts and tribunals to achieve these goals. The process of the creation of the ICC, culminating in the 1998 Rome Conference and adoption of the Rome Statute, presented an ideal moment to explore the fundamental arguments for and against international criminal justice, as well as the best means to achieve the desired ends. Theory was eschewed, however, as those involved in the Court’s creation focused on the practicalities of setting up a functional court and attaining an agreeable compromise on politically contentious issues.<sup>3</sup> The lack of theoret-

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1. Throughout this article, the term “international criminal courts and tribunals” will be used generically to refer to all such institutions, aside from ordinary national criminal courts, which hold individuals accountable for genocide, crimes against humanity, or large-scale war crimes.

2. The Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General*, ¶ 49, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 23, 2004) [hereinafter *Rule of Law Report*]. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (Jul. 17, 1998) [hereinafter Rome Statute].

3. See Gerry J. Simpson, “*Throwing a Little Remembering on the Past*”: *The International Criminal Court and the Politics of Sovereignty*, 5 U.C. DAVIS J. INT’L L. & POL’Y 133, 137 (1999); Immi Tallgren, *We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court*, 12 LEIDEN J. INT’L L. 683, 686 (1999) [hereinafter Tallgren, *We Did It?*]. The most extensive exploration of the justifications for an international criminal court were set out by a working group of the International

ical reflection is not necessarily a negative. Had the participants in the Rome Conference or its predecessors focused on discussing abstract philosophical notions underlying international criminal law—let alone tried to agree upon a comprehensive theory for the field—such time and effort would likely have substantially delayed, if not prevented, realization of the practical objective of establishing an international criminal court.

Cognizant of the need to close the gap between theory and practice, scholars and practitioners (by no means exclusive categories) have proffered an increasing number of justifications for international criminal law. These have occasionally been met with vehement criticism. Empirical analysis of the underlying questions has scarcely begun.<sup>4</sup> As a result, sixty years after the Nuremberg Tribunal, we lack a firm understanding of the theoretical foundations of international criminal law to match the strong practical commitment to the field. The pursuit of international criminal justice has thus been characterized as “more of a faith-based conviction than a conclusion based on sober analyses of the legalities of the matter and of the policy dilemmas such situations present.”<sup>5</sup>

That the commitment to international criminal law is a matter of faith more than reason should not necessarily be taken as grounds for criticism. The recourse to faith is something the field of international criminal law shares with all other attempts to address important moral questions through law. In the absence of empirical answers to such questions, one can either act on the basis of faith or refuse to act until these questions can be answered. The development of international criminal law is still at a very early stage. In due course, empirical analysis will, ideally, bring us closer to an-

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Law Commission. Int'l Law Comm'n, *Report of the Working Group on the Question of an International Criminal Jurisdiction*, U.N. Doc. A/CN.4/L.471 (1992), ¶¶ 25-43.

4. See Mark A. Drumbl, *Toward a Criminology of International Crime*, 19 OHIO ST. J. ON DISP. RESOL. 263, 269-70 (2003) [hereinafter Drumbl, *Criminology*].

5. A. Mark Weisburd, *International Law and the Problem of Evil*, 34 VAND. J. TRANSNAT'L L. 225, 230 (2001); see also Tallgren, *We Did It?*, *supra* note 3, at 686; Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 546-47 (2005) [hereinafter Drumbl, *Collective Violence*].

swers to the fundamental questions of whether and how we should pursue international criminal law. Until then, faith will continue to play a critical role in motivating human action in response to genocide, crimes against humanity, and war crimes. Rather than simply dismissing such faith as irrational, we can learn a great deal about international criminal law and its prospects by seeking to understand the motivations for and the tenets of this faith. By examining the role faith has played in the development of international criminal law, the first aim of this Article is to provide a deeper understanding of how and why international criminal law has developed as it has. In particular, this Article looks at the relationship between faith and identity to examine how unquestioned conceptions of personal and communal identity have led to assumptions which have shaped the development of the law.

This approach to understanding the law cannot answer whether faith in international criminal law is justified. That is a question for criminology and political science (and even those fields may not be able to provide an answer). What this method may do is help us to identify where empirical questions have gone unanswered, replaced instead by a reliance on faith. Moreover, by providing a basis for a critical understanding of our own predispositions towards international criminal law, this approach may aid our consideration of international criminal law. As Martti Koskenniemi has described the objective of a constructive project of international law, "the problem of international law is not whether the law adequately reflects some ideas or some facts but whether and how one can *live* in and through it, whether one be a practitioner or a theorist, a diplomat or a professor."<sup>6</sup> Pinpointing where and why our views on international criminal law are rooted in faith is the first step to reconsidering (and thereafter affirming, amending, or rejecting—in whole or in part) our previously unquestioned assumptions about this field of law.

After setting out the extent to which modern international criminal law remains a matter of faith, this article explores the role of this faith in the development of international criminal law beginning with the creation of the Nuremberg Tribunal. Understanding the role of faith requires also

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6. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 490 (1989).

looking into elements of individual and collective identity which tend to give rise to such faith. Following David Kennedy's urging to view legal history as a "terrain on which to read the development of ideas about identity, geography, and entitlement,"<sup>7</sup> this Article explores the concurrent and mutually reinforcing development of international criminal law, faith, and identity. International criminal law has developed as it has in part because of the individual and collective identities of those influencing the course of international law—from ordinary individuals to international lawyers and policymakers. The law has in turn had a reciprocal effect, inculcating the same individuals and future generations with a particular faith in international criminal law. At its most ambitious, faith in international criminal law manifests a hope for a new political reality—both in terms of the decisions made by policymakers and in terms of an underlying globally shared cosmopolitan identity. This Article concludes that one of the most valuable effects of international criminal law may be its contribution to the creation of a sense of cosmopolitan identity, an identity which values all human beings equally, independent of their national or other ties. The second aim of this Article is to explore how the law may be used to generate such a sense of cosmopolitan identity, which is a precursor to the realization of a cosmopolitan community. At the same time, the pursuit of this identity construction project must be tempered by recognition of its potential darker sides. By setting out both the positive and negative impacts of international criminal law, this Article aims to set forth a blueprint for how we might harness the law's identity-constructing power while minimizing its negative effects.

## II. THE CRIMINOLOGICAL VOID

Former United Nations Secretary-General Kofi Annan recently listed the main purposes of international criminal law: "bringing to justice those responsible for serious violations of human rights and humanitarian law, putting an end to such violations and preventing their recurrence, securing justice and dignity for victims, establishing a record of past events, promoting national reconciliation, re-establishing the rule of

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7. David Kennedy, *The Disciplines of International Law & Policy*, 12 LEIDEN J. INT'L L. 9, 101 (1990).

law and contributing to the restoration of peace.”<sup>8</sup> To date, there has been very little in the way of empirical study of how international criminal law achieves any of these purposes.<sup>9</sup> Instead, there has been a largely theoretical (and post-hoc) debate, drawing primarily on domestic criminology, as to whether or not international criminal law can achieve these goals. This debate probably cannot be resolved given the current limited empirical record. However, a brief explication of the debate is useful to illustrate the extent to which belief in international criminal law has remained a matter of faith and to identify the questions which this faith purports to answer.<sup>10</sup>

### A. *Traditional Punitive Justifications*

The arguments in favor of establishing or relying upon international criminal courts and tribunals come in two forms. The dominant set of arguments is based on the nature of such institutions as mechanisms of criminal prosecution. A second, more recent set of arguments focuses not on the criminal prosecution aspect of international courts and tribunals but on the secondary effects of these institutions.

The primary purposes of international criminal courts and tribunals are to investigate serious international crimes and conduct trials of them. These are functions equivalent in form, if not always in scope or detail, to the functions performed by ordinary national criminal courts. Indeed, as made explicit in the case of the ICC, international criminal justice is intended to complement the work of national courts by acting

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8. *Rule of Law Report*, *supra* note 2, at ¶ 38. For an overview of the main criticisms of these justifications, see Drumbl, *Criminology*, *supra* note 4, at 268-72.

9. One notable exception is *MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY* (Eric Stover & Harvey M. Weinstein eds., 2004). As the editors of that study have observed, the exceptional nature of genocide and crimes against humanity also makes empirical study particularly difficult. Eric Stover & Harvey M. Weinstein, *Introduction*, *in id.* at 2-3.

10. The focus here on the arguments against international criminal law is not intended to suggest that the justifications of international criminal law are any weaker than their counter-arguments. On the contrary, the criticisms of international criminal law similarly lack empirical backing. However, as the focus of this Article is on examining the faith of the believer, the concern here is to illustrate the lack of empirical support for belief in international criminal law.

where they are unwilling or unable genuinely to carry out their functions.<sup>11</sup> It should therefore be no surprise that the predominant justifications of international criminal law rely essentially on the two basic paradigms, familiar from domestic criminal law, of retribution and deterrence.<sup>12</sup> These justifications face two significant challenges when applied to international criminal law. First, the application of these two domestic criminal law theories to international law imports any weaknesses inherent in those theories at the domestic level. Second, these theories may not be appropriate in situations where the assumptions underlying domestic theories do not hold true at the international level.

While once the core arguments in favor of criminal law (and still given lip service), arguments from retribution hold little water when subject to criminological analysis. Retribution is based on the idea that the perpetrator's actions upset the moral order, and "the infliction of punishment rectifies the moral balance insofar as punishment is what the perpetrator deserves."<sup>13</sup> As such, retribution is an inherently anti-empirical theory. It draws its entire strength from an explicit appeal to a moral order for the universe which cannot otherwise be justified. Consequently, the retributive theory of punishment largely has been discredited in domestic criminal justice since the very beginnings of modern criminology.<sup>14</sup> As a result, arguments from retribution have made little headway in

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11. Rome Statute, *supra* note 2, pmb., art. 17.

12. For example, the above quotation from Kofi Annan states versions of arguments of retribution ("bringing to justice those responsible for serious violations of human rights and humanitarian law") and deterrence ("putting an end to such violations and preventing their recurrence") as the first two justifications for international criminal law. See also Drumbl, *Criminology*, *supra* note 4, at 270; Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 565 (2002) [hereinafter Tallgren, *Sensibility*]; Louise Arbour, *History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 13 AM. U. INT'L L. REV. 1498, 1499-1500 (1997-98).

13. Drumbl, *Collective Violence*, *supra* note 5, at 559.

14. See, e.g., JEREMY BENTHAM, THE THEORY OF LEGISLATION 76 (C.K. Ogden ed., Richard Hildreth trans., Harcourt, Brace, and Co. 1931) (1802). The argument against retribution actually has a much longer history, having been made, for example, by Plato in *Protagoras*. However, it is Bentham's withering criticism of the "false reasoning" underlying retribution which effectively ended the theoretical vitality it enjoyed since the writings of Immanuel Kant.

international criminal law and were sharply criticized even before the first international tribunal was established at Nuremberg.<sup>15</sup> In addition, arguments from retribution face further hurdles in the context of international criminal law. As a practical matter, penal sanctions of any form are comparatively trivial as retribution for the crimes addressed by international criminal law, such as genocide or other instances of mass atrocity. If a domestic court sends the murderer of one person to prison for life or even executes him, what punishment is appropriate for the mass murderer of thousands?

Moreover, arguments from retribution are fundamentally inconsistent with the basic dictates of international human rights law that underlie international criminal law.<sup>16</sup> Human rights law demands that the violation or limitation of one individual's human rights be justified by the need to protect the rights of others from deprivations.<sup>17</sup> Retribution, on the other hand, argues that an individual may be deprived of liberty for past actions. As such, retribution requires assuming a moral perspective which is fundamentally incompatible with human rights law. Human rights law is inherently forward looking, while retribution is inherently backward looking. This backward-looking justification cannot be sustained without seriously undermining the critical human rights element of the foundation of international criminal law. These challenges have added to the rejection of retribution as a justification of international criminal law. Arguments from the retributive

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15. See Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, 30 April 1945, [hereinafter San Francisco Memorandum] (criticizing the retributive justification for what would become the Nuremberg trials), *reprinted in* REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS (U.S. Dep't of State 1949) (1945), *available at* <http://www.yale.edu/lawweb/avalon/imt/jackson/jackson.htm> [hereinafter JACKSON REPORT].

16. As a means for responding to serious violations of international human rights law, international criminal law should be applied and interpreted consistently with human rights law. This is specifically provided for in the instance of the ICC. See Rome Statute, *supra* note 2, art. 21.

17. See David S. Koller, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 HARV. INT'L L.J. 231, 244-46 (2005); see generally James Bohman, *Punishment as a Political Obligation: Crimes Against Humanity and the Enforceable Right to Membership*, 5 BUFF. CRIM. L. REV. 551 (2002) (discussing the moral justification for punishment in the context of international human rights violations).

need for punishment may continue to be adduced in certain specific areas, such as in justifying sentences (here again, partly as a result of the lack of a sufficient theory).<sup>18</sup> However, the argument that punishment may be justified on retributive grounds has largely been abandoned.<sup>19</sup>

With the rejection of retribution, deterrence theory is today largely accepted as the primary justification for international criminal law.<sup>20</sup> Deterrence theory posits that the possibility of punishment may deter future offenders, thus preventing crimes and, most importantly, avoiding harm to potential victims. Deterrence theory has some supporters in national criminal justice systems, although even there the empirical record is inconclusive.<sup>21</sup> Even assuming that deterrence is a valid theory of domestic criminal justice, however, it does not necessarily apply in the international context, given the substantial differences that exist between the two domains.<sup>22</sup>

In the international arena, there are significant structural impediments which lead to further questions concerning the applicability of deterrence theory. As a practical matter, deterrence theory is generally assumed to require a credible threat of prosecution, but prosecutions of more than a handful of

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18. Drumbl, *Collective Violence*, supra note 5, at 561.

19. Retributive arguments only continue to live on in very specific and limited areas, such as debates on sentencing, where there has been a particular dearth of empirical or theoretical analysis.

20. In the same report setting out the purposes of criminal trials, the UN Secretary-General stated that "prevention is the first imperative of justice." *Rule of Law Report*, supra note 2, at ¶ 4; see also BENTHAM, supra note 14, at 272; Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 474 (1999).

21. Antonio Pagliaro, *Empirical Verification of the Effects of General Prevention and Incapacitation*, 11 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 398, 410 (2003); Tallgren, *Sensibility*, supra note 12, at 569.

22. One commentator on the uniqueness of international criminal justice has observed that "[t]he implication of this supranational criminal law as a system sui generis is in practice that every dogma, every issue has to be discussed from scratch again, almost as if they have not been discussed at all until now." Roelof Haveman, *Introduction: A System Sui Generis*, in SUPRANATIONAL CRIMINAL LAW 5 (Roelof Haveman, Olga Kavran & Julian Nicholls eds., 2003); see also Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 TEX. INT'L L.J. 237, 251 (1998).

perpetrators of major atrocities appear unlikely.<sup>23</sup> Even if there were to be significant prosecutions (taking into account the often ignored fact that the punishment of serious international crimes is intended to be addressed primarily by national courts), a credible threat of punishment may not affect the choices of the perpetrators of serious international crimes, given supposed differences between these crimes and national crimes.<sup>24</sup>

Instances of mass atrocity may result from a complex mix of systematic factors as much as individual decisions. Many of those committing atrocities could be caught up in unique situations over which they can exert little personal influence.<sup>25</sup> In situations of mass or group violence, some have argued that prevailing norms against violence may be replaced with new norms which are more accepting of violence.<sup>26</sup> Even where individuals retain strong internal moral prohibitions against violence, social pressures may overcome these prohibitions and lead them to behave in ways they would otherwise consider unacceptable.<sup>27</sup> When individuals' actions go against their own deep moral convictions, what can the threat of punishment add? As for those leading or planning atrocities, they may view their actions as justified by reasons far outweighing any possible punishment.<sup>28</sup> They may consider themselves wholly justified in overthrowing existing institutions and creating what in their eyes is a more perfect regime, one which will reward their vengeance.<sup>29</sup> Finally, even if one accepts the value of de-

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23. *Rule of Law Report*, *supra* note 2, at ¶ 46; Wippman, *supra* note 20, at 476-81.

24. Often the different characteristics ascribed to international as opposed to national crimes rely on oversimplified generalizations of the nature of the two types of crimes. More research is needed into the mindsets of those who commit international crimes, in particular crimes of group violence.

25. See Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. OF UNITED NATIONS L. 1, 8-9 (2002); Tallgren, *Sensibility*, *supra* note 12, at 573.

26. See, e.g., Drumbl, *Collective Violence*, *supra* note 5, at 566-75.

27. See CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* (1993).

28. Wippman, *supra* note 20, at 477; see also Drumbl, *Criminology*, *supra* note 4, at 268; Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 12 (2001).

29. See Koskenniemi, *Between Impunity and Show Trials*, *supra* note 25, at 8.

terrence, it must be asked whether the benefits are worth the inherent deprivations of the liberty of those punished for the sake of deterrence.<sup>30</sup>

Future empirical research may indeed prove deterrence to be a sound rationale for international criminal law. In the meantime, given the lack of conclusive support for deterrence theory at the national level, and the additional structural difficulties with applying deterrence theory at the international level, a sound defense of the commitment to the deterrence justification for international criminal law has yet to be offered. Rather, belief in this justification has remained largely a matter of faith that deterrence *does* work, even if it cannot be proven.

### B. *More Recent Justifications*

In recent years, a new set of arguments in favor of international criminal law has emerged, focusing less directly on the core function of punishment, but more on other effects. These “effects arguments” seek to direct our attention to the broader consequences of trials, including their contribution to other objectives—such as peace or national reconciliation,<sup>31</sup> the delivery of justice to victims,<sup>32</sup> the establishment of a historical record,<sup>33</sup> or the isolation and marginalization of leaders and other political actors.<sup>34</sup> In particular, there has been a growing argument, manifest in the ability of victims to participate in proceedings before the ICC, that international criminal trials can also provide “restorative justice” to victims.<sup>35</sup> In

30. See BENTHAM, *supra* note 14, at 323.

31. See, e.g., *Rule of Law Report*, *supra* note 2, ¶¶ 39-41; Rome Statute, *supra* note 2, pmb.; Akhavan, *supra* note 28, at 9, 27; Wippman, *supra* note 20, at 486.

32. See generally THE VICTIM IN INTERNATIONAL PERSPECTIVE (Hans Joachim Schneider ed., 1979); Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. Doc. A/RES/40/34 (Nov. 29, 1985); Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1235 (2000).

33. Koskenniemi, *Between Impunity and Show Trials*, *supra* note 25, *passim*; Simpson, *supra* note 3, at 144.

34. Graham T. Blewitt, *Ad Hoc Tribunals Half a Century after Nuremberg*, 149 MIL. L. REV. 101, 102 (1995).

35. See Rome Statute, *supra* note 2, art. 68; HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE (2002); RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? (Andrew

practice, variations of these effects arguments are often combined as part of an argument for a comprehensive approach to international justice and the rule of law. For example, punishing perpetrators may be said to provide victims with a sense of justice while also establishing a historical record, both of which might be instrumental in solidifying a transitional political order.

In analyzing these effects arguments, it is necessary to consider two different versions of these arguments. First, international courts may contribute to the relevant objective through the function of the criminal trial itself, which results in the specified effects. Second, international courts and tribunals may contribute to the objectives through means other than their punishment function.

The first version of such effects arguments is simply a restatement of the standard arguments for retribution or deterrence.<sup>36</sup> For example, punishing offenders could benefit victims either by delivering retributive justice (appreciated by both the offender and the victim, as well as society at large) or by preventing persons from becoming victims in the future. As such, these versions of the effects arguments are subject to the above-discussed criticisms of retribution and deterrence.<sup>37</sup>

The second version of the effects arguments relies on effects of the criminal trial process which are ancillary to, and can be separated from, its core trial and punishment function. For example, the arrest of political officials by courts or tribunals may have positive effects independent of whether or not a trial takes place. The arrest serves a function similar to capture during wartime, isolating officials from the political scene, independent of whether a trial actually occurs. As such, it is considered conceptually separate from the core punishment function of the trial.

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von Hirsch et al. eds., 2003). Restorative justice involves not only victims, but may also be concerned with the restoration of the offender and of society at large.

36. Cf. Tallgren, *Sensibility*, *supra* note 12, at 568 (describing the multitude of justifications for international criminal law as mixtures or variations on the two strands of retribution and consequentialism).

37. *Id.* at 592-93; Charles Villa-Vicencio, *Why Perpetrators Should Not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 209-13 (2000).

To the extent that justifications for international criminal law rely on aspects of international courts and tribunals other than their punishment functions, is international criminal law a suitable, let alone desirable, means of achieving such objectives? It is possible that alternative mechanisms could be designed to achieve the same purposes directly and more efficiently.<sup>38</sup> For example, a civil reparations mechanism could provide financial remedies to victims, a fact-finding commission could establish a historical record, or a truth and reconciliation commission could achieve both goals. Similarly, the UN Security Council can specifically contemplate and take actions to restore or maintain peace and security, whereas a court or tribunal—bound to follow its limited legal mandate—can only have ancillary and unpredictable effects on peace and security. Attempting to combine these different functions with a criminal trial could actually interfere with the conduct of the trial.<sup>39</sup> More importantly, trials may actually impair the international community's ability to accomplish these other goals.<sup>40</sup> While criminal trials may play a part in post-conflict reconciliation, they can in theory just as easily undermine a society's efforts towards transition.<sup>41</sup> Consequently, these secondary effects arguments for international criminal law provide, at best, extremely limited and highly contested justifications for the value of international criminal trials in and of themselves.

Given the credibility of the challenges, both to the primary justifications of retribution and deterrence and to the

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38. I will show later that, for reasons which have not been adequately explored to date, international criminal law may in fact be the only—or at least the best—way to pursue these objectives. See *infra* Part IV.A.

39. The judges of both the ICTY and ICTR considered and rejected the amendment of the Tribunals' Statutes to provide for compensation to victims. See Letter from Claude Jorga, President of the ICTY addressed to Kofi Annan, Secretary-General of the UN, U.N. Doc. S/2000/1063, annex (Nov. 3, 2000); Letter from Navanethem Pillay, President of the ICTR, to Kofi Annan, Secretary-General of the UN, U.N. Doc. S/2000/1198, annex (Dec. 15, 2000).

40. PHILIP ALLOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 66-67 (2002).

41. See Orentlicher, *supra* note 19, at 2544-46; see also Eric Stover & Rachel Shigekane, *Exhumation of Mass Graves: Balancing Legal and Humanitarian Needs*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 9, at 85 (observing that war crimes investigations of mass graves have normally occurred in a way that has delayed personal identification of the bodies necessary for the victims' families to heal).

more recent effects arguments, the development of, and commitment to, international criminal law cannot be explained by the rationality of the underlying arguments in defense of the field. Rather, the history and current acceptance of the law are better seen as matters of faith. While empirical analysis is necessary to tell whether this faith is justified, significant insight into the emergence and development of international criminal law can be obtained by examining the field through the lens of faith.

### III. FAITH, IDENTITY, AND THE DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

In his groundbreaking work *The Structure of Scientific Revolutions*, Thomas Kuhn illustrated the critical role played by faith in underpinning paradigms such as that of international criminal law.<sup>42</sup> Faith—in the sense of belief in the absence of a sufficient rational basis—has a natural and essential role to play in all human endeavors where science and reason have been exhausted, or have not yet become available.<sup>43</sup> The fields of law and criminology are no exceptions.<sup>44</sup> The rejection of any idea not fully grounded in rationality or empirical evidence is not realistic, as absolute knowledge is not possible. To demand absolute certainty before believing—and, more importantly, before acting—would leave us paralyzed in a solipsistic world of Cartesian doubt. Yet there are plenty of times when faith plays no role—when, in the absence of conclusive proof, we choose neither to believe nor to disbelieve. What, then, is driving faith in international criminal law?

In his lecture *The Will to Believe*, William James observed that faith plays a crucial role in morality. According to James, “[m]oral questions immediately present themselves as questions whose solution cannot wait for sensible proof.”<sup>45</sup> This provides the first insight into the turn to faith in international

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42. See THOMAS KUHN, *STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996).

43. *Id.* at 20-21 (3d ed. 1996).

44. See, e.g., John J. Parker, *The Faith of the Lawyer*, 11 TENN. L.R. 71 (1933). Judge Parker was subsequently the alternate American judge on the Nuremberg Tribunal.

45. William James, *The Will to Believe*, An Address to the Philosophical Clubs of Yale and Brown Universities, Part IX, (1896), available at <http://www.philosophyonline.co.uk/pages/will.htm>.

criminal law. The subject matter of international criminal law is seen to implicate such serious moral questions—the demand of “never again” is so intense—that we must believe something. Agnosticism is not an option. Immi Tallgren, a participant in the Rome Conference which established the ICC, observed that underlying the field of international criminal law is a creed, a profession of faith that “the unambiguously devastating quantity and quality of the suffering of the victims of serious international crimes calls for intuitive-moralistic answers, in the manner of ‘[c]ertain things are simply wrong and ought to be punished. And this we do believe.’”<sup>46</sup>

This connection between faith and moral questions helps to suggest why faith in international criminal law is considered preferable to no faith at all.<sup>47</sup> However, it leaves two fundamental, closely interrelated questions unanswered. First, what are the moral questions which merit such a leap of faith? Contrary to James’s earlier stated assumption, not every question with a possible moral dimension will require an immediate response. Why act on faith in some situations but not in others? Second, why place this faith in the particular mechanisms of international criminal law?

The answers to both of these questions depend in large part on the intimate connection between matters of faith and conceptions of identity. Borrowing from Ludwig Wittgenstein, Martti Koskenniemi has characterized the point where faith takes hold as follows: “If I have exhausted justification I have reached bedrock, and my spade is turned. Then I am inclined to say: ‘This is simply what I do.’”<sup>48</sup> The statement that “This is simply what I do” further implies “this is who I am.” Faith is not externally given and—following Kuhn’s definition—is not decided upon following rational arguments, but is determined

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46. Tallgren, *Sensibility*, *supra* note 12, at 564 (quoting ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* xxix (1976)).

47. See Martha Minow, *Breaking the Cycles of Hatred*, in MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW AND REPAIR* 14-16 (Nancy L. Rosenbaum ed., 2002); cf. Simon Chesterman, *Law, Subject and Subjectivity in International Relations: International Law and the Postcolony*, 20 MELB. U. L. REV. 979, 981 (1995-96) (noting a disconnect between the demand for a response and the decision that response should involve the criminal law).

48. Martti Koskenniemi, *Faith, Identity, and the Killing of the Innocent*, 10 LEIDEN J. INT’L L. 137, 157 (1997) (quoting L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* at 85a (1995)).

by the identity (or, more precisely, the identities) of the believer at this bedrock level.

The manner in which identities and the faith to which they give rise have shaped the development of international criminal law is best illustrated in the creation and operation of the Nuremberg Tribunal. Of all international criminal courts and tribunals, the creation of the Nuremberg Tribunal was unique in the extent and depth of reflection and discussion on the values which the international community sought to advance through international criminal law.<sup>49</sup> To the extent that subsequent developments provide useful illustrations for how conceptions of identity and their impact on faith change over time, I touch on these as well.

A. *The Turn to Faith in General: A Matter of Collective Identities*

Those perceived moral questions which demand belief and action are determined by the identity of the believer at the bedrock level. This identity includes elements of individual identity, for example “I am a good person who responds to bad things,” and, more importantly for understanding the development of international criminal law, it also includes critical elements of communal identity. The decision to respond (or equally not to respond) to certain atrocities assumes some sort of community connecting the responders. This is reflected in the ICC Statute, which defines the crimes within the Court’s jurisdiction as “the most serious crimes *of concern to the international community as a whole*.”<sup>50</sup> At any one moment an individual will have a sense of belonging to several overlapping communities. The history of defining the crimes to be punished by the Nuremberg Tribunal illustrates how the shape taken by international criminal law has in large part been determined by the different communal identities of those in a position to influence policymakers to act.

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49. As noted in the introduction, a similar process did not accompany the creation of the ICC—which is in itself a sign of the extent to which the initial skepticism of some for international criminal law has been replaced by an unquestioned faith. Other courts and tribunals have been created in environments which have not been as encouraging of international dialogue. For example, the ad hoc tribunals for the former Yugoslavia and Rwanda were created in a very short time, with their statutes drafted by the UN Secretary-General without substantial external dialogue.

50. Rome Statute, *supra* note 2, pmbl. (emphasis added).

The Charter of the Nuremberg Tribunal enumerated three offenses: war crimes, crimes against peace, and crimes against humanity.<sup>51</sup> Each offense was based on a distinct communal identity. The degree to which the relevant decision-makers shared the sense of this identity determined the ease with which a particular offense was included within the Charter and subsequently accepted by the Tribunal.

War crimes were the least controversial offense for inclusion within the Nuremberg Charter and the initial basis for planning post-war trials.<sup>52</sup> There existed a long-standing body of law regulating warfare that allowed one side in a war to punish members of the opposition forces for violations of the laws of war.<sup>53</sup> This body of law may be seen as a manifestation of either of two communities: that of the military or that of the nation-state.

On the one hand, the development and implementation of these laws has historically been a universal concern of soldiers.<sup>54</sup> This “community of soldiers” had existed for centuries; over which time it developed and internalized a normative system based on reciprocity of treatment. Within this system, military courts could punish enemy combatants for violations of the laws of war. The strength of this community among the Nuremberg decisionmakers was reflected in the fact that many of those involved in the establishment of the

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51. CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, art. 6, *reprinted in* 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 473-79 (1998).

52. *See, e.g.*, Draft of Memorandum from the Secretaries of State and War to the President (Nov. 27, 1944) (in which the Navy Department disclaimed interest in pursuing any offenses other than traditional war crimes), *in* BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944-1945, at 61 (1982); *see also* Jonathan A. Bush, “*The Supreme . . . Crime*” and its Origins: *The Lost Legislative history of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324, 2353 (2002) (noting that initial planning for war crimes trials focused on war crimes); ARIEH J. KOCHAVI, PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT 209 (1998) (noting the same).

53. *See* Comments of Robert Jackson, Minutes of Conference Session of July 23, 1945, *reprinted in* JACKSON REPORT, *supra* note 15.

54. *See* Major Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, ARMY LAW, Dec. 1997, at 4. For the development of the laws of war, *see* JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR (1981).

Tribunal were military officers (a dynamic that would recur at the Rome Conference).

On the other hand, a more cynical understanding would identify the community concerned with war crimes as a Hobbesian minimal community of States, each looking out to protect its own interest. According to such a view, the corpus of war crimes law was developed not to constrain warfare and protect soldiers but rather to free the war-machine of the State to conduct war unencumbered.<sup>55</sup> The self-interest of victorious States brought them together at Nuremberg not to punish violations of the laws of war *per se* but to reappropriate the war-machine to their own political ends. As war crimes reflect a lack of discipline and inefficient use of force, their occurrence subverts States' aims to conduct efficient, lethal military operations.

These two communities are not mutually exclusive. The Nuremberg Charter may reflect both the community of soldiers and the community of self-interested States. Together, these communal identities had a strong influence on the development of the law, largely precluding any questions arising about the propriety of the allied powers punishing war crimes.

The relevance of the strength of a sense of community to the development of the law can be seen by contrasting the consensus which existed on war crimes with the more difficult negotiations over the other crimes included in the Nuremberg Tribunal's Charter.

The primary impetus behind the Nuremberg Tribunal was not war crimes, but aggression or "crimes against the peace," described by Robert Jackson, the U.S. Supreme Court justice, who was both a participant in the drafting of the Tribunal's Charter and subsequently a Nuremberg Prosecutor, as "the supreme crime."<sup>56</sup> Among the drafters of the Charter,

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55. See GILLES DELEUZE & FÉLIX GUATTARI, *A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA* 425 (Brian Massumi trans., 1987); Chris A.F. Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 53 (1994).

56. Justice Robert H. Jackson, Opening address at the Nuremberg Tribunal, *reprinted in* I U.S. CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION, 114 (U.S. Gov't Prtg. Off. 1946), *available at* [http://www.yale.edu/lawweb/avalon/imt/document/nca\\_voll/chap\\_05.htm](http://www.yale.edu/lawweb/avalon/imt/document/nca_voll/chap_05.htm) [hereinafter Opening Address].

there existed broad support that aggression was an offense against the law of nations.<sup>57</sup> The right to go to war had historically been considered a sovereign prerogative of States.<sup>58</sup> However, developments since World War I suggested the emergence of an international prohibition of aggressive war.<sup>59</sup> An international community of States governed by law (what some would call a Grotian understanding of community) was seen by those behind the Tribunal to exist.

There was no principled objection about the illegality of and State responsibility for crimes against peace under international law. However, there was considerably less support for the idea that launching an aggressive war incurred *individual criminal* responsibility as well as State responsibility.<sup>60</sup> The resolution of this question required reconciling different perspectives which can be traced to different national identities. The American insistence on including the charge of crimes against peace was opposed by the formal concern that a norm prohibiting aggression was not yet clear. Justice Jackson convinced the other participants in the 1945 London conference which drew up the Tribunal's Charter to include crimes against peace by stressing that the belief in the injustice of German aggression was so central to the American identity and to his country's perception of its role in the war that it *must* be included.<sup>61</sup> Such a fundamental, bedrock view could not be compromised, unlike the more formal concern of other participants that the particular norm prohibiting aggressive war had not yet crystallized into a rule of international law.

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57. See Memorandum for the Judge Advocate General (shortly before Dec. 18, 1944), in SMITH, *supra* note 52, at 78, 80-81.

58. See, e.g., Quincy Wright, *The Outlawry of War*, 19 AM. J. INT'L L. 76, 76-77 (1925). The effect of Nuremberg on legal thinking is reflected in Quincy Wright's post-Nuremberg article along the same lines as the previous one, but incorporating the Tribunal's precepts. Quincy Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT'L L. 365 (1953).

59. See, e.g., KOCHAVI, *supra* note 52, at 97-100 (giving an overview of the main arguments as debated by the United Nations War Crimes Commission).

60. See *id.* (describing debates in the United War Crimes Commission focusing precisely on the question of penal responsibility); Bush, *supra* note 52, at 2346-50.

61. Jackson's spirited defense of including the crime of aggression is set out in Minutes of Conference Session of July 25, 1945, *reprinted in* JACKSON REPORT, *supra* note 15.

Whatever opposition there was to including crimes against peace, even the most outspoken advocates for the trial of Nazi atrocities found it nearly impossible to legally justify punishing acts by German officials against their own population.<sup>62</sup> While international law recognized the transnational community of soldiers and the international community of States, it did not at that time recognize a broader community of individuals transcending national borders, let alone encompassing all of humanity. Here there was a significant difference in perception between the immediate decisionmakers who held tightly to international law and those on the outside of this process who saw a broader identity to be fundamental. Inclusion of crimes against humanity in the Nuremberg Charter only became a reality because of the efforts of those outside of the decisionmaking circles pushing for a new law.<sup>63</sup> For many individuals, it was absolutely essential that the law also punish these offenses because they struck at the core of a common human identity—whether this identity was defined as universal or based on ties such as nationality, religion, or history.<sup>64</sup> These advocates of an expanded law argued, “These crimes cannot go unpunished without destroying the legal and moral foundations upon which our civilization rests.”<sup>65</sup> While largely outside the decision process, the consistent pressure of these advocates had some effects on the lawyers responsible for drafting the Nuremberg Charter. In the end, the reluctant drafters sought a compromise whereby such offenses could be punished through complicated arguments tying the offenses

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62. See Secretary of War (Stimson) to the President, (Sept. 9, 1944), in SMITH, *supra* note 52, at 30; Aide-Mémoire from Lord Halifax, British Ambassador, to Cordell Hull, U.S. Secretary of State (Aug. 19, 1944), in SMITH, *supra* note 52, at 16.

63. See KOCHAVI, *supra* note 52, at 170-71, 244.

64. See, e.g., Statement on War Criminals Submitted by the American Jewish Conference to the Secretary of State (Aug. 25, 1944), in SMITH, *supra* note 52, at 17; Memorandum from John W. Pehle, Executive Dir. of the War Refugee Bd., to Mr. Stettinus (Aug. 28, 1944), in SMITH, *supra* note 52, at 21; see also David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85 (2004); Bohman, *supra* note 17, at 553.

65. Statement on War Criminals Submitted by the American Jewish Conference to the Secretary of State, *supra* note 64, at 18.

to the launching of an aggressive war.<sup>66</sup> The judges of the Tribunal rejected these innovations in its verdict, declaring that it only had jurisdiction over crimes against humanity “committed in execution of, or in connection with,” the war.<sup>67</sup>

### B. *Faith in the Criminal Law: A Question of Professional Identities*

Having determined the crimes that demanded an international response, the creators of the Nuremberg Tribunal need not have turned to the mechanisms of the criminal law. At the trial, Robert Jackson famously declared: “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”<sup>68</sup> However, in light of the weaknesses of the justifications for international criminal law discussed above, the Tribunal’s creation should be more properly seen as motivated not by reason but by faith. The wellspring of this faith was the shared personal and professional identities of those behind the Tribunal.

In 1943, the Soviet Union, United Kingdom, and United States issued the Moscow Declaration, announcing that German criminals would be punished for atrocities—primarily those committed in occupied territories.<sup>69</sup> While it appeared to rule out impunity for high-ranking German officials, the Declaration included few details as to what the Allies intended as their punishment.<sup>70</sup> Serious discussion on this topic would not begin until the latter half of 1944, following D-Day and the increased likelihood of an Allied victory. In deliberating what

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66. See Comments of Robert Jackson, Minutes of Conference Session of July 23, 1945, *reprinted in* JACKSON REPORT, *supra* note 15; Draft of Memorandum from the Secretaries of State and War to the President, *supra* note 52.

67. TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, PROCEEDINGS OF 27 AUGUST 1946-1 OCTOBER 1946, at 493 (1948) *available at* [http://www.loc.gov/ir/frd/Military\\_Law/NT\\_major-war-criminals.html](http://www.loc.gov/ir/frd/Military_Law/NT_major-war-criminals.html) (relying on CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 51, art. 6).

68. Opening Address, *supra* note 56, at 98-99.

69. The Moscow Declaration (Nov. 1, 1943), *in* SMITH, *supra* note 52, at 13. The Moscow Declaration focused primarily on offenses committed outside of Germany, which would be punished by the countries where committed.

70. *Id.*

to do with Axis leaders, the Allied postwar planners considered two general options. The first, considered to be the “judicial option,” envisaged some sort of trial of the major criminals, encompassing sufficient guarantees of fairness and protection of the rights of the accused.<sup>71</sup> The second, which may euphemistically be termed the “political option,” was a plan for summary executions after confirming the identities of persons believed to be former high-ranking officials.<sup>72</sup> Both plans were considered viable, and the political option could very easily have been chosen over the judicial legacy we now associate with Nuremberg.<sup>73</sup> The debate between the two schools of thought was played out first within the U.S. administration and subsequently between the American strategists, who advocated trials, and the British, who favored summary executions.<sup>74</sup> In both settings, the individual and shared identities of the decisionmakers had significant impacts on the outcome of the debate.

The process leading to the Nuremberg Tribunal must be viewed in the context in which it occurred. In the wake of World War II, American faith in the judiciary and in legal solutions had an impact on negotiations.<sup>75</sup> Many of those involved

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71. Aide-Mémoire from the United Kingdom, April 23, 1945, handed to Judge Samuel Rosenman by Sir Alexander Cogan, *reprinted in* JACKSON REPORT, *supra* note 15 [hereinafter Aide-Memoiré UK].

72. San Francisco Memorandum, *supra* note 15.

73. In fact at the Quebec Conference in September 1944, the Allies appeared to accept a plan of summary executions, only to retreat later. SMITH, *supra* note 52, at 9; Memorandum to President Roosevelt from the Secretaries of State and War and the Attorney General, Jan. 22, 1945, *reprinted in* JACKSON REPORT, *supra* note 15 (this document is commonly referred to as the Yalta Memorandum or the Crimean Proposal); *see also* KOCHAVI, *supra* note 52, at 87-89.

74. Theodor Meron, *From Nuremberg to The Hague*, 149 MIL. L. REV. 107, 109 (1995); Bush, *supra* note 52, at 2365. France and the Soviet Union were largely on the sidelines of this debate, leaving it primarily to the Americans and British. *Id.* To the extent the Soviets took a position, they were willing to go much further than the British and execute large numbers of German officers as reprisals for German war crimes, without any proof of their responsibility for particular actions. KOCHAVI, *supra* note 52, at 63-64; *see also* John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law?: Legalism and the International Criminal Court*, 79 NOTRE DAME L. REV. 55, 65 (2003).

75. Meron, *supra* note 74, at 109 (referring to the effect of the American “historical respect for due process” on negotiations). *See also* Richard H. Pildes, *Conflicts between American and European Views of Law: The Dark Side of*

in the decisionmaking process which would lead to formulation of the American pro-trial policy shared this faith as members of the legal profession.<sup>76</sup> More specifically, key players in the decisionmaking process had substantial background in the criminal law. The debate between the two options was not, however, simply one between lawyers compelled to have recourse to the mechanisms of law, on the one hand, and non-lawyers on the other. Identities are complex and multifaceted, and each individual has several overlapping, sometimes conflicting identities. At issue was a conflict between parties with differing understandings of the law and their role in the law.

Within the U.S. administration, support for summary executions came principally from Secretary of the Treasury Henry Morgenthau, with some backing from the State Department.<sup>77</sup> Morgenthau's approach was tied into a comprehensive plan involving the "cultural transformation" of Germany and its economic pastoralization (preventing the rebuilding of its previous industrial power). Against this perspective, the Secretary of War and the Judge Advocate General—who, in addition to their personal backgrounds as lawyers, oversaw the military justice system—argued that trials were necessary.<sup>78</sup> Among the reasons they advocated a trial were that it would establish a historical record and avoid making martyrs out of

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*Legalism*, 44 VA. J. INT'L L. 145, 147 (2003) (noting how American faith in legalism has decreased beginning approximately twenty years ago).

76. In becoming a lawyer accepted as such by one's peers, one is expected to adopt (or at least to profess through a solemn oath) a certain bedrock faith in the law. This faith is central to (and constitutive of) the very identity of the international lawyer, presenting itself in the idea of a "culture of legality," one of the hallmarks of which is that "[i]ts premises are taken for granted so much that they become the 'way things must be done' without much self-conscious reflection." Pildes, *supra* note 75, at 149.

77. Henry J. Morgenthau, Jr., The Morgenthau Plan, Appendix B (Sept. 5, 1944), in SMITH, *supra* note 52, at 27; Excerpt from Memorandum from the State Department to the Cabinet Committee on Germany (Sept. 5, 1944), in SMITH, *supra* note 52, at 27; see also KOCHAVI, *supra* note 52, at 80-87.

78. Secretary of War (Stimson) to the President, *supra* note 62; Report by John McCloy, Assistant Secretary of War, of a telephone conversation with Henry Stimson, Secretary of War (Sept. 5, 1944), in SMITH, *supra* note 52, at 24; Memorandum from the Judge Advocate General to the Assistant Secretary of War (Nov. 22, 1944), in SMITH, *supra* note 52, at 58; see also KOCHAVI, *supra* note 52, at 80-87.

those punished.<sup>79</sup> However, the core of their argument against summary executions was a direct appeal to their fundamental belief in upholding the rule of law, noting that “while the advantages of this method are that a sure and swift disposition would be made of the criminals, it is an arbitrary action violative of Anglo-American systems of justice.”<sup>80</sup>

President Roosevelt appeared initially to favor the summary execution plan, but negative public reaction stalled any immediate implementation of this approach.<sup>81</sup> At the time of Roosevelt’s death in April 1945, the question of the proper response to Nazi atrocities had not been settled as a matter of administration policy, although most involved had lined up behind the judicial method. Upon taking office, President Truman quickly consolidated the U.S. administration behind the judicial approach. Truman had a background in the law, including having served as a judge. This background influenced his decision to opt for punishment through criminal trials.<sup>82</sup>

At the international level, the cause of advancing the U.S. position for trials against a British predilection for summary executions was led by Supreme Court Justice Robert Jackson, himself a former Attorney General.<sup>83</sup> Like Truman, Jackson brought a strong and passionate commitment to the rule of law and the appropriateness of criminal law mechanisms to his approach to atrocities.<sup>84</sup>

The attachment of Jackson, Truman, and their compatriots in the War Department and Judge Advocate General’s Corps to trials can be understood in light of both their particu-

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79. Memorandum from the Judge Advocate General to the Assistant Secretary of War, *supra* note 78.

80. Memorandum for the President (Jan. 18, 1945), in SMITH, *supra* note 52, at 108.

81. SMITH, *supra* note 52, at 9-10.

82. Eric L. Chase, *Fifty Years after Nuremberg: The United States Must Take the Lead in Reviving and Fulfilling the Promise*, 6 U.S. AIR FORCE ACAD. J. LEGAL STUD. 177, 179-80 (1995-96) (noting the strong influence of Truman’s judicial background on his opting for the judicial approach) (citing BRADLEY F. SMITH, *THE ROAD TO NUREMBERG*, 194-95 (1981)).

83. For a formulation of the British summary execution plan, see KOCHAVI, *supra* note 52, at 73-80.

84. The strong participation of domestic criminal lawyers in the field of international criminal law continues to this day; see Drumbl, *Collective Violence*, *supra* note 5, at 567.

lar familiarity with domestic criminal law and the approach such lawyers generally adopt when confronted by new and important problems. Lawyers are trained to abhor gaps in the law. Faced with massive international atrocities, the natural tendency of these lawyers was to borrow mechanisms from the domestic setting so as to close the gap between the national and the international, thus ensuring that there was “no outside-of-law.”<sup>85</sup> They did so not out of studied convictions that the domestic mechanisms were the best suited for addressing the problems at hand. Rather, they approached the problem with what Jackson elsewhere described as lawyers’ natural “rather emotional attachment to forms and customs to which they are accustomed.”<sup>86</sup> The inevitability of continuity between the domestic and the international was taken for granted, as evidenced by Jackson’s opening statement to the Tribunal: “The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people.”<sup>87</sup>

That these lawyers were in positions to influence the decisionmaking process was an important, but not necessarily decisive, factor in the establishment of the Tribunal. Other actors, including other lawyers, had to be converted to the judicial option through the evangelism of Jackson and his colleagues.<sup>88</sup> As the Americans framed their plea to other allies, to be part of the United Nations community was to adhere to certain values which formed the basis of a common identity. The belief that individuals should only be punished after trial was represented as a fundamental value for all members of this community. To believe otherwise was to define oneself as

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85. Koskeniemi, *Between Impunity and Show Trials*, *supra* note 25, at 2; see also PAUL KENNEDY, *THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS* 114 (2006) (noting that the concurrent establishment of the UN more generally owed to policymakers importing their experience in domestic governance to the international plane).

86. JACKSON REPORT, *supra* note 15, preface.

87. Opening Address, *supra* note 56.

88. See Bush, *supra* note 52, at 2341; see also Chase, *supra* note 82, at 178. For a good example of the role of specific individuals in part of the Nuremberg tribunal’s creation, namely adoption of aggression as a crime, see Bush, *supra* note 52, at 2363. For some of the ways in which different identities determine which ideas will triumph, see David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT’L L. & POL. 335, 428-34 (2000).

outside the United Nations and on the side of the Axis. These principles were also reflected in the Charter of the United Nations that was being drafted at the same time.<sup>89</sup>

The concept of communal identity alone cannot explain why the American argument came to triumph over the British view. Other factors, including the relative negotiating strength of the two parties and constraints on the negotiating environment affected the outcome.<sup>90</sup> Nonetheless, the extent to which particular ideas were seen as intrinsic to the different parties' identities also played a role, as is borne out by a closer examination of the debate between the American and British negotiators.

As expressed by the Lord Chancellor, the British opposition to trials was that "[a]part from the formidable difficulties of constituting the Court, formulating the charge, and assembling the evidence, the question of their fate *is a political, not a judicial question*. It could not rest with judges, however eminent or learned, to decide finally a matter like this, which is of the widest and most vital public policy."<sup>91</sup> While trying to characterize the fate of Axis war criminals as something not suitable for judicial decision, the Lord Chancellor's lack of faith in the judiciary was really a practical concern that the judges would not see what for him were so obviously the right answers.<sup>92</sup> For the Americans who had a deep faith in the judiciary, these political concerns could be effectively subsumed under the procedural issues about how the trial would be set up.<sup>93</sup>

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89. U.N. Charter, arts. 4(1), 6, 53, 107.

90. See, e.g., Elizabeth Borgwardt, *Reexamining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 422 (2005).

91. Memorandum from Sir John Simon, British Lord Chancellor (Sept. 4, 1944), in SMITH, *supra* note 52, at 31. This paper was discussed with American officials at Quebec.

92. Draft Memorandum prepared by John McCloy, Assistant Secretary of War, for Henry Stimson, Secretary of War (Apr. 20, 1945), in SMITH, *supra* note 52, at 158, 160; Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders (Apr. 25-30, 1945), in SMITH, *supra* note 52, at 162, 169.

93. Telford Taylor, *An Approach to the Preparation of the Prosecution of Axis Criminality* (June 1945), in SMITH, *supra* note 52, at 209, 210-11; Draft Memorandum prepared by John McCloy, Assistant Secretary of War, for Henry Stimson, Secretary of War, *supra* note 92; Memorandum of Proposals

In response to the British approach, memoranda from U.S. officials were overtly moralistic in tone. A memorandum circulated by the United States to representatives of other countries to convince them of the U.S. position stated, "No principle of justice is so fundamental in most men's minds as the rule that punishment will be inflicted by judicial action."<sup>94</sup> This memorandum went on to declare that "[t]his principle is applied in greater or less degree by all nations, and historically its recognition is the first step in the approach to the democratic standard of liberty under law."<sup>95</sup> An earlier draft of the memorandum went even further to highlight the moral issue, arguing that "[a]ny other method of punishment involves resort to primitive practices of murdering helpless prisoners. It is a reverting to the bare concept of might based on force. There is no real middle ground."<sup>96</sup> Only after this moral argument was set forth did the United States turn to deterrence as an additional justification for trials, and even later to the creation of a historical record.<sup>97</sup>

The point of the American memoranda is clear: Criminal trials were so central to the Americans' identity as believers in the rule of law that there could be no other option. To do otherwise would put one on the same footing as the Nazis.<sup>98</sup> For the Americans, any of the difficulties which might emerge, such as the trial martyring the defendants, were procedural questions easily dismissed by the judges.<sup>99</sup> The British, on the other hand, had less faith in the judiciary<sup>100</sup>: They argued that any procedural solutions would be impossible, given the un-

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for the Prosecution and Punishment of Certain War Criminals and Other Offenders, *supra* note 92.

94. San Francisco Memorandum, *supra* note 15.

95. *Id.*

96. Draft Memorandum prepared by John McCloy, Assistant Secretary of War, for Henry Stimson, Secretary of War, *supra* note 92, at 158.

97. *Id.*; Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, *supra* note 92.

98. Draft Memorandum prepared by John McCloy, Assistant Secretary of War, for Henry Stimson, Secretary of War, *supra* note 92, at 159; Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, *supra* note 92.

99. San Francisco Memorandum, *supra* note 15; Memorandum on Aggressive War by Colonel William Chandler (Nov. 28/30, 1944), *in* SMITH, *supra* note 52, at 68, 72.

100. *See*, Pildes, *supra* note 75, at 147.

predictability of judges.<sup>101</sup> When the time for compromise came, however, the British practical concerns could be addressed through rational arguments and amendments to the Nuremberg Charter, while the bedrock commitment to trials could not be so easily dissipated.<sup>102</sup> In the end, the U.S. position won out—in large part because of the strong moral tone its proponents had adopted.<sup>103</sup>

C. *Changing Identities, Shifting Faith, and the Development of the Law*

The various identities which shaped the early establishment of international criminal law have changed over time, precipitating concurrent changes in attitudes to international criminal law, as well as changes in the law itself.

The divergence of opinion which has emerged in recent years between the United States and most of the rest of the world with regard to the International Criminal Court illustrates just such a change. Since the Second World War, a growing faith in the criminal law specifically, and in the rule of law in general, has led to increased demand for strong international institutions around the world, especially in Europe and Latin America and more recently in Africa.

The faith of Justice Jackson and President Truman in criminal trials is mirrored today by the faith of many in the ICC. Some of this shift can be traced to the early efforts of the United Nations to build on and capture the legacy of the Nuremberg Tribunal both directly, as in the form of the International Law Commission's *Nuremberg Principles*, and indirectly, as in the wealth of international human rights law that followed the Tribunal and its piercing of the veil of national sovereignty. As a result, the initial U.S. faith in international law has diffused throughout the international community and be-

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101. Aide-Mémoire UK, *supra* note 71. The British argument was characterized within American circles as a lack of faith in "the ability of Allied brains." Draft Memorandum prepared by John McCloy, Assistant Secretary of War, for Henry Stimson, Secretary of War, *supra* note 92; Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, *supra* note 92.

102. The British Foreign Secretary had been instructed to agree to a trial plan if the other Allies were united in this option. SMITH, *supra* note 52, at 140.

103. See SMITH, *supra* note 52, at 142.

come a part of the national identity of individuals and States around the world.

Meanwhile, current U.S. opposition to the ICC—despite the numerous safeguards built into the Court to prevent frivolous or politicized prosecutions—is reminiscent of the early British opposition to trials at Nuremberg, which contended that no procedural mechanisms could guarantee the solution desired by the political actors. This reflects not only domestic political considerations, but a fundamental shift in American legal culture. Americans today are much more wary of placing faith in judicial institutions. The Critical Legal Studies movement, which developed as a particularly American phenomenon, has contributed to shaking American faith in the judiciary within academia.<sup>104</sup> At the same time, this faith has not yet completely disappeared, as witnessed by the broad public support for the ICC among the U.S. public at large.<sup>105</sup>

Similarly, shifts in underlying conceptions of community have influenced the development of the law itself. Recent tribunals have given much greater recognition to the cosmopolitan community of individuals.<sup>106</sup> The ICTY has jurisdiction over crimes against humanity committed within the borders of a State, although its jurisdiction still requires a nexus to armed conflict.<sup>107</sup> The statutes of the ICTR and the ICC have gone further by eliminating any requirement that crimes against humanity be connected to armed conflict.<sup>108</sup> In the

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104. Kennedy, *The Disciplines of International Law & Policy*, *supra* note 7.

105. See, e.g., THE CHICAGO COUNCIL ON GLOBAL AFFAIRS, THE UNITED STATES AND THE RISE OF CHINA AND INDIA: RESULTS OF A 2006 MULTINATION SURVEY OF PUBLIC OPINION 29 (2006), available at <http://amicc.org/docs/GlobalViews06Final.pdf> (noting that support for the ICC was over seventy percent among the US population).

106. See generally Neil Boister, 'Transnational Criminal Law?', 14 EUR. J. INT'L L. 953 (2003); but see Frédéric Mégret, *Epilogue to an Endless Debate: The International Criminal Court's Third Party Jurisdiction and the Looming Revolution of International Law*, 12 EUR. J. INT'L L. 247, 260-65 (2000).

107. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, art. 5, U.N. Doc. S/25704 at 36, annex and S/25704/Add. 1 (May 25, 1993). See also *Prosecutor v. Tadic*, Case No. IT-94-I-T Decision and Judgment, ¶ 627 (May 7, 1997).

108. Statute of the International Criminal Tribunal for Rwanda, 33 I.L.M. 1602, adopted by S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1600; Rome Statute, *supra* note 2, art. 7.

meantime, the characteristics of the more Statist Grotian and the Hobbesian communities have become less prominent. Most notably, the crime of aggression, which being an act primarily between States implicates the Grotian and Hobbesian identities much more than the cosmopolitan, has become a lesser focus. Although it is included in the ICC Statute, the ICC cannot yet exercise jurisdiction over this crime.<sup>109</sup> Other crimes which implicate interests of States more than individuals (and which would thus reflect a Hobbesian or Grotian community more so than a cosmopolitan one), such as drug trafficking (which prompted the beginnings of negotiations on the ICC), have been left out altogether.<sup>110</sup>

The emergence of different communal identities and their reflection in international criminal law has not necessarily been a straightforward process. Closer inspection of which communities are most salient may reflect hidden biases. For example, some have alleged that the ICTR was only created because the Security Council would have opened itself to serious charges of racism if it did not establish a tribunal for Rwanda after the precedent set by the ICTY.<sup>111</sup> We must be conscious that the communities underlying international criminal law may be fractured along lines of race,<sup>112</sup> gender,<sup>113</sup> or

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109. See Rome Statute, *supra* note 2, art. 5; Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15-17, 1998, *Annex I of Resolution E to the Final Act*, U.N. Doc. A/CONF.183/10, (July 17, 1998) [hereinafter *Resolution E*]. The inclusion of the crime of aggression may be explained in part by the effect of law in shaping identity, discussed below. The Nuremberg precedent has become such a central part of the international criminal lawyer's identity that it could not be omitted.

110. UN G.A. Res. 44/39, U.N. Doc. A/RES/44/39 (Dec. 4, 1989); *Resolution E*, *supra* note 109. One of the reasons often given for exclusion of drug-trafficking was precisely that it was of a different nature from the other crimes and would be better dealt with through inter-State cooperation rather than through an international criminal court.

111. Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 TEMP. INT'L & COMP. L.J. 167, 176 (1997).

112. See, e.g., Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence Racing American Foreign Policy*, 94 AM. SOC'Y INT'L L. PROC. 260, *passim* (2000).

113. See, e.g., Hillary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 *passim* (1991); Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of*

class,<sup>114</sup> among others. Even where the community is not so fractured, the sense of community may be either a thin one, bringing individuals together only to address certain limited crimes, or it may be a thick community which recognizes the deeper connections between individuals and prompts a more comprehensive response to human suffering.<sup>115</sup> Issues which seemingly pose an equivalent threat to the cosmopolitan community, such as terrorism or the use of nuclear weapons (both of which were considered for inclusion in the ICC Statute, but ultimately excluded), may be left unregulated due to other concerns.<sup>116</sup> These hidden biases may serve as warnings for the future. Looking at international criminal law through the lens of identity may make some of these different biases and limitations more apparent as we seek to determine how to improve the law.

#### IV. TOWARDS A NEW POLITICS

The influence of changing conceptions of identity on the transformation and development of the law is only one half of

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*War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, *passim* (1997) [hereinafter Chesterman, *Never Again*].

114. See, e.g., B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES *passim* (1993).

115. Compare MICHAEL WALZER, THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD (1994) (arguing that there is a more limited "thin" bond among peoples), with Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48 (1992), and Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591 (1983) (perceiving a thicker cosmopolitan community, bonding individuals closer together).

116. Some would contend that the exclusion of terrorism and nuclear weapons from the ICC was an instance of *Realpolitik* trumping morality. See, e.g., M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability Over Realpolitik*, 35 CASE W. RES. J. INT'L L. 191 (2003); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 19 HARV. HUM. RTS. J. 11, 12-13 (1997). However, this simply raises the related questions of what the domain of politics, as opposed to morality, ought to be, and when, in practice, political concerns ought to trump moral ones. *Realpolitik* as an abstract idea has no say in negotiations. Rather, its triumph depends on those who see other concerns as more important than the professed faith (or who may have a different moral understanding—for example, one that values State security over individual suffering). It is the existence of these non-believers, the heretics, which illustrates the difficulty in identifying the moral questions which merit the faith of the international community.

the story. The process can also work in reverse, as development of the law itself can have a transformative impact on the law. The faith of Jackson and Truman in the Nuremberg Tribunal, and of their successors in the ICC, is more than a faith in the ability of international criminal law to achieve the goals of retribution or deterrence. It is a much deeper faith—common among lawyers—in the ability of law to transform (or even replace) politics. Several years before he would become an alternate judge on the Nuremberg Tribunal, the American judge John Parker noted that lawyers tend to share a faith in the law “as the instrumentality of justice, as man’s highest achievement in his reaching after righteousness.”<sup>117</sup> For Parker and his contemporaries, the Nuremberg Tribunal was to play an essential part in laying the foundations of a new postwar order ruled by law and not politics.<sup>118</sup> A similar faith is manifest today in the belief that the ICC will contribute to an end to impunity and to lasting respect for, and the enforcement of, international justice.<sup>119</sup>

The faith of these international criminal lawyers is a particular manifestation of a broader, deep-rooted faith among all international lawyers in the progressive development of international law. More than just a descriptive term, “progressive development” embodies the normative idea that the development of the law will lead progressively towards the establishment of first an international community and then a cosmopolitan community (a community in which all individuals are accorded equal moral status, independent of any national borders).<sup>120</sup> David Kennedy has observed that this commitment

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117. Parker, *supra* note 44, at 74.

118. See, e.g., John J. Parker, *The Nuernberg Trial*, 30 J. AM. JUDICATURE SOC’Y. 109, 115 (1946); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 226 (1993). One of the first efforts of the young United Nations was to codify the principles of Nuremberg and to begin consideration of establishing a permanent international criminal court. However, it was precisely the prevailing political environment, namely the Cold War, that frustrated efforts towards such a court.

119. See Rome Statute, *supra* note 2, pmbl.; Akhavan, *supra* note 28, at 7, 12.

120. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 15-18, 42-47 (2001) [hereinafter KOSKENNIEMI, *GENTLE CIVILIZER*]; see Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 EUR. J. INT’L L. 215, 219-20 (1997). See also David Kennedy, *The Disciplines of International Law & Policy*,

of mainstream international law to the moral virtue and the inevitable emergence of the international community “lies so deep that to argue it explicitly, as has been tried from time to time, comes across as vaguely vulgar and unnecessary.”<sup>121</sup> In the initial stages, the transformation would be from a Hobbesian world of self-interested States, competing in a zero-sum game, to a “Grotian” world in which a true community of States existed.<sup>122</sup> As the law continued to develop, it would progress towards the ultimate aim of a cosmopolitan community.<sup>123</sup> As expressed by Thomas Pogge, the fundamental element to this cosmopolitan community “is that every human being has a global stature as an ultimate unit of moral con-

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*supra* note 7, at 10; David Kennedy, *My Talk at the ASIL: What Is New Thinking in International Law?*, 94 AM. SOC'Y INT'L L. PROC. 104, 107-08 (2000); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Steven R. Ratner, *Welcoming Remarks*, in INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE? PROCEEDINGS OF AN INTERDISCIPLINARY CONFERENCE AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW 12 (Steven R. Ratner & James L. Bischoff eds., 2003). The centrality of the rule of law as an organizing principle of the international community is demonstrated by the fact that in his address at the opening of fifty-ninth session of the General Assembly, the Secretary-General focused on the rule of law, announcing that this subject would be a priority for the remainder of his tenure. Kofi Annan, U.N. Sec'y-Gen., Secretary-General's Address to the General Assembly (Sept. 21, 2004), available at <http://www.un.org/apps/sg/sgstats.asp?nid=1088>. For a description of cosmopolitanism, see Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 49 (1992); Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 593 (1983).

121. Kennedy, *When Renewal Repeats*, *supra* note 88, at 470; see also KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 120, at 515.

122. See, e.g., KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 120 *passim*; RICHARD TUCK, THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT (1999).

123. The term “cosmopolitanism” is often associated with Immanuel Kant, based on his moral philosophy. See, e.g., Immanuel Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in KANT: POLITICAL WRITINGS 41-53 (Hans Reiss, ed., 2d ed., Cambridge Univ. Press 1990). However, in the international arena, Kant remained a statist, imagining a perpetual peace based on the formation of federations of peace-loving States. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in KANT: POLITICAL WRITINGS, *supra*, at 93, 102-105. It would be for later scholars to apply the logic of Kant's cosmopolitan theorizing to the international level without the obstruction of national borders.

cern.”<sup>124</sup> Moreover, this stature applies equally and globally to all persons, independent of their nationality or other such status.<sup>125</sup> As such, while cosmopolitanism is not necessarily aimed at the elimination of States, the realization of a cosmopolitan community implies at a minimum a fundamental transformation in the international order, which currently privileges the State as the unit of normative concern.<sup>126</sup>

The process through which this transformation of politics by law takes place occurs on two levels. At the instrumental level, the introduction of new legal norms and new institutions can change the calculus of political actors by affecting the costs and benefits of possible courses of action. At the moral level, the new norms can gradually become internalized by the different actors—and by the system at large—leading to a fundamental shift in the identities and self-conceptions of those participating in this system of law and politics. The development of international criminal law generally, and the establishment of the ICC in particular, have already clearly changed international politics at the instrumental level.<sup>127</sup> For many this transformation is presumably only the beginning of a desired much deeper contribution to an emerging ethical consensus and the realization of the cosmopolitan-internationalist project envisioned to be at the heart of international law.<sup>128</sup>

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124. Pogge, *Cosmopolitanism and Sovereignty*, *supra* note 120, at 49; *see also* THOMAS W. POGGE, *REALIZING RAWLS* (1989); CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1999); Beitz, *supra* note 120, at 595.

125. *See* Pogge, *Cosmopolitanism and Sovereignty*, *supra* note 120, at 49.

126. *See, e.g.*, HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 152 (3d ed., Columbia Univ. Press 1977); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 54 (1992).

127. While empirical analysis of the effects of the ICC is still at an extremely early stage, a number of reputable sources have already identified instances of how the ICC has led to changes in the political calculus of diverse actors. *See, e.g.*, *Rule of Law Report*, *supra* note 2, at ¶ 49; Int'l Crisis Group, Northern Uganda Peace Process: The Need to Maintain Momentum, Africa Briefing No. 26, Sept. 14, 2007, *available at* <http://www.crisisgroup.org/home/index.cfm?id=5078>; Human Security Centre, *Human Security Report 2005*, at 155.

128. Martti Koskeniemi has argued that this desire underlies the entire project of international law. KOSKENIEMI, *GENTLE CIVILIZER*, *supra* note 120, *passim*.

### A. *International Criminal Law and the Instrumental Transformation of Politics*

The adoption and enforcement of new provisions of international criminal law may affect international discourse as States and other actors incorporate these new norms into their arguments and seek to secure the compliance of others with these norms. This shift in discourse may then lead to shifts in behavior as States and other actors seek to avoid censure or condemnation for their violations of these norms (or equally seek to gain benefits associated with compliance).<sup>129</sup> Over time, States may even internalize these norms and adopt them as their own.<sup>130</sup>

#### 1. *Norm Development*

As international criminal law has evolved, a wealth of substantive norms covering genocide, crimes against humanity, and war crimes has emerged. With respect to many substantive norms, the influence of international criminal law *per se* is difficult to separate from the influence of other developments in related fields such as human rights or humanitarian law. Genocide was prohibited (and deemed criminal) by an international convention, considered to be customary law, long before it was ever punished by an international court.<sup>131</sup> International courts and tribunals have not substantially developed further the underlying prohibition against genocide; the definition of the offense included in the Genocide Convention is reproduced verbatim in the Rome Statute and other sources.<sup>132</sup> Similarly, most, if not all, war crimes within the ju-

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129. One example of seeking other States' compliance through the promise of benefits is the European Union States' conditioning the accession of potential new member States on compliance with norms of international criminal law such as the surrender of war criminals to the ICTY by the countries of the former Yugoslavia. See *Netherlands Stands Firm in Opposing Deal for Serbia*, EUBUSINESS, Jan. 16, 2008, <http://www.eubusiness.com/news-eu/1200499324.24>.

130. See *infra* note 142.

131. Convention on the Prevention and Punishment of the Crime of Genocide art. 4, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention]; Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

132. Rome Statute, *supra* note 2, art. 6.

isdiction of the ICC were considered to be violations of international humanitarian law treaties or customary humanitarian law before the ICC Statute was adopted.<sup>133</sup> Nonetheless, there are several areas where the development of international criminal law has clearly led to a concurrent growth of important norms. The emergence of the concept and content of crimes against humanity is indebted largely to the statutes and case law of international courts and tribunals.<sup>134</sup> International criminal law also contributed directly, through the Nuremberg trials and subsequent developments, to the rejection of immunities for heads of State or other government officials as well as to the abolition of the defense of superior orders.<sup>135</sup> Similarly, international criminal law has played a significant part in the gradual, ongoing elimination of many of the distinctions which have historically existed under humanitarian law between State and non-State actors.<sup>136</sup>

## 2. *Institutional Influence*

Proving to what extent these norms have influenced actual behavior or interests is exceedingly difficult, especially in light of the early stage of this field of inquiry. The impact of the institutions of international criminal law, however, is much clearer and more concrete. One of the defining characteristics of the evolution of international criminal law has been the emergence of a network of independent courts and tribunals, both domestic and international, applying the underlying substantive norms. A description of international law and politics

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133. Herman von Hebel & Darryl Robinson, *Crimes within the Jurisdiction of the Court*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 79, 80, 103-26 (Roy S. Lee, ed., 1999); Michael Bothe, *War Crimes*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT—A COMMENTARY 379 (Antonio Cassese et al. eds., 2002); William J. Fenrick, *Art. 8*, in COMMENTARY ON THE ROME STATUTE FOR THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 173, 181, 185, 263 (Otto Triffterer ed., 1999).

134. von Hebel & Robinson, *supra* note 133, at 90-103.

135. See David S. Koller, *Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as it Pertains to the Security Council and the International Criminal Court*, 20 AM. U. INT'L L. REV. 7, 19-22 (2004).

136. See Valentin Zellweger & David Koller, *Non-State Actors, International Criminal Law and the Role of the International Criminal Court*, in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: *Liber amicorum Luzius Wildhaber* 1619-1634 (Stephan Breitenmoser et al. eds., 2007).

today must account for this multiplicity of new actors—both new international institutions and courts once restricted to domestic affairs—now influencing international politics.

These courts and tribunals are the creations of States and remain accountable to States in some senses (e.g. for their budgets, or for the election, appointment, or removal—in accordance with specified procedures—of judges and prosecutors). Nonetheless, to ensure the legitimacy of these courts, States have had to guarantee their independence. As a defining part of their independence, these courts and tribunals must apply their legal mandates equally and objectively to all situations. Where once States were free to turn a blind eye to situations where action was not in their immediate political interest, these judicial institutions will take action—which may in turn influence the actions of States.

The ICC provides a good example of how the existence of a court can influence events before it has prosecuted even a single case. The Court has jurisdiction over the nationals and territories of the 106 States Parties to the Rome Statute and other States accepting the ICC's jurisdiction, as well as over situations referred by the UN Security Council.<sup>137</sup> Intervention by the ICC, adhering strictly and objectively to its narrow mandate to investigate and prosecute the most serious international crimes, can have notable ancillary benefits in at least two ways.

First, the opening of an investigation or prosecution by the ICC can bring international attention to grave situations around the world that were previously ignored for political or other reasons. This attention, in turn, can catalyze global or, equally important, regional action. In selecting cases for investigation or prosecution, the Prosecutor is independent from the control of States, as are the judges who rule on his decisions. The Prosecutor is not bound to the short-term political interest of States, but applies the objective criteria set forth in the Statute, including in particular the gravity of the alleged crimes.<sup>138</sup> Where States may previously have engaged in ex-

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137. Rome Statute, *supra* note 2, arts. 12-13.

138. See Office of the Prosecutor of the International Criminal Court, PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 6 (2003), available at [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf).

tensive efforts to characterize events so as to forestall international intervention, the ICC provides a neutral, objective basis on which to understand particular situations and to call for international action.

Second, by opening an investigation, issuing an arrest warrant, or taking other action, the ICC establishes facts which must be taken into account by political actors. If the Court issues an arrest warrant and a request for arrest and surrender, States Parties are obliged to cooperate with the Court. While non-States Parties are not obligated to cooperate under the Rome Statute, they are unlikely to entirely ignore the existence of an ICC warrant—and in certain situations, non-cooperation can be referred to the UN Security Council for action.<sup>139</sup>

No longer can the perpetrator of international crimes easily hide behind the protection of States. In a world where conflicts or crimes often transcend borders, and may involve cross-border alliances between and among States or non-State armed groups, the impact of the ICC should not be understated.<sup>140</sup> In this way, the ICC may play an important part in achieving some of the ancillary purposes ascribed to international courts and tribunals.<sup>141</sup> Where States or international organizations may previously have been deterred from taking actions against another State or a non-State group for fear of the reaction this would provoke (not only from the target of such actions, but also from other actors), the ICC can provide States with sufficient political cover to take such actions. Executing an ICC arrest warrant against an agent or agents of a State's leadership is one of several means of marginalizing that regime. However, unlike when utilizing other means (abduction, invasion, sanctions, etc.), the acting State does not bear the same political cost, as it is not acting on its own initiative, but rather out of a legal obligation imposed on it.

The establishment of the ICC set off a process of development which continues to build on itself. The mere existence of the ICC may catalyze States to join, or to refer cases to the Court. Where previously a State may have been content to denounce genocide or other crimes without taking any action, it

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139. Rome Statute, *supra* note 2, art. 87(5)(b).

140. See Zellweger & Koller, *supra* note 136, at 1630.

141. See *supra* Part II.

is now more difficult to do so. If crimes within the ICC's jurisdiction are indeed being committed, it is only logical that a concerned State refer the situation to the Court directly or through the Security Council. In doing so, that State may only be lukewarm about acting. However, once it does so, the ICC will follow its mandate, thereby spurring further international action as indicated above.

### B. *International Criminal Law and the Construction of Identity(ies)*

To its proponents, the intended effects of international criminal law are not only instrumental: International criminal law may also contribute to a change in politics by influencing our underlying conceptions of identity.<sup>142</sup> The construction of a shared global identity is a necessary first step in the establishment of a cosmopolitan community.<sup>143</sup> The process by which legal developments contribute to identity creation is complex.<sup>144</sup> Nonetheless, just as conceptions of identity constructed the law, the law itself is critical to the construction of the cosmopolitan identity in at least four ways.

The first and most fundamental way in which international law has an effect on identity creation is by contributing to building the particular community which identifies the need to respond to crimes. Most recently, this has been the development of a cosmopolitan community, reflected in the idea that crimes against humanity and genocide are of univer-

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142. While the focus of this section is on how participation in international criminal law may influence the identities of individuals, constructivist literature in international relations theory has shown how the same could be applied to the formation of States' interests and identities. Martha Finnemore has argued that the participation of States in the International Committee of the Red Cross and the regime of international humanitarian law has socialized States to accept and internalize the underlying humanitarian values. The development of international criminal law can be seen as a further evolution of this process. See MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 1-33 (1996); Jutta Weldes, *Constructing National Interests*, 2 EUR. J. INT'L RELATIONS 275, 276-77 (1996); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 394 (1992).

143. See Koller, *supra* note 17, at 263-64.

144. See, e.g., Susan Opatow, *Psychology of Impunity and Injustice: Implications for Social Reconciliation*, in POST-CONFLICT JUSTICE 201 (M. Cherif Bassiouni ed., 2002).

sal moral concern.<sup>145</sup> As set out in Part III.A, *supra*, this community was first expressed in the law, in limited form, at Nuremberg.<sup>146</sup> Following the Second World War, the UN undertook a number of initiatives to capture and institutionalize the Nuremberg legacy.<sup>147</sup> Over time, these crimes came to be enforced by national and international courts and tribunals, each time further reinforcing the sense that these crimes were of concern to all humanity. The recent emergence of attempts to exercise universal jurisdiction over such crimes is an explicit endorsement of their universal moral concern. The impact of this process has been so dramatic as to shape the memory of history; to speak of Nuremberg today is to call to mind the idea that genocide and crimes against humanity are matters of universal concern, even if this was not well accepted at the time.<sup>148</sup>

A second way in which international criminal law may be claimed to have the socializing effect of establishing a communal identity is by reintegrating victims into the international community. For victims of crimes against humanity, these crimes “[exclude] them from the human political community.”<sup>149</sup> Trials are a way of redefining the community to include the victim within the community. While the unprecedented role for victims to participate in trials, even if not called as witnesses at the ICC, may in part be motivated by a desire to provide victims with a forum to tell their story, it is also a means for establishing a community between the victims

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145. See Bohman, *supra* note 17, at 567; see also Luban, *supra* note 64.

146. See DAVID HIRSH, LAW AGAINST GENOCIDE: COSMOPOLITAN TRIALS 21 (2003); Chesterman, *Never Again*, *supra* note 113, at 305 (discussing the significance and history of the Nuremberg trials).

147. See, e.g., Genocide Convention, *supra* note 131; Int'l Law Comm'n, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, YILC (1950) Vol. II, 374, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf); Int'l Law Comm'n, Draft Code of Crimes Against the Peace and Security of Mankind, YILC (1996) Vol. II, 25, available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf).

148. See GEOFFREY BEST, NUREMBERG AND AFTER: THE CONTINUING HISTORY OF WAR CRIMES AND CRIMES AGAINST HUMANITY 3 (1984); MARK A. DRUMBL, FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE xii, 192 (Philippe Sands ed., 2003), as reprinted in Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1299 (2005).

149. Bohman, *supra* note 17, at 568-69.

and the supporters of the Court, thereby expanding the boundaries of the cosmopolitan community.<sup>150</sup>

Third, a legal regime also helps to constitute our identity as individuals who believe in the rule of law. The Nuremberg precedent addressed the worst that man can do to man, but it is also about the possibility of hope for a better future through law.<sup>151</sup> It is, in its essence, the manifestation of the idea that we can and we should respond to mass atrocity through law. It is a moment pregnant with belief in the need for justice, and also in the possibilities and prospects of law. The trial of a former head of State or high-ranking official sends a message that even the most powerful political actors will be held answerable to the law. Repeated often enough, this lesson will gradually be internalized and passed down to successive generations.

Finally, international criminal law may serve the important purpose of declaring that individuals are responsible for their actions.<sup>152</sup> Theories of social context and conditioning may provide more accurate descriptions of reality, but they can also serve as an excuse for genocide or other atrocities. By declaring that individuals are accountable for their actions, international criminal law can contribute over time to a belief in individual responsibility that may influence the decision-making of individuals.<sup>153</sup> The actual effect of this aspect of the law is an interesting psychological question which deserves further analysis.

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150. A word of caution is needed here, however. While trials may contribute to the integration of victims in the community, it may also press them into a particular role: They are not necessarily part of the community as individuals, but may be cast forever as victims. See David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 111-12 (2002); see also Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1348 (1989). In so doing, the uniqueness of each victim may be overshadowed by their status as victim.

151. See Stephen G. Breyer, *A Call for Reasoned Justice, in WAR CRIMES: THE LEGACY OF NUREMBERG* 40 (Belinda Cooper, ed., 1999).

152. Cf. Chesterman, *Law, Subject and Subjectivity*, *supra* note 47, at 997-1007 (observing that international criminal law has greatly increased the role of the individual as a subject of international law).

153. Cf. Paul Davies, *Undermining Free Will*, 144 FOREIGN POL'Y 36-38 (Sept./Oct. 2004) (noting the importance of enforcing individual responsibility).

These different elements of identity collectively go some way toward explaining the passionate commitment to international criminal justice. None of the rationales may be sufficient on their own, but together they may be part of the identity of one who believes wholeheartedly in the prospect and promise of international criminal law. This understanding also helps to shed some additional light on the growing acceptance of a role for tribunals and other accountability mechanisms in transitional and post-conflict societies.<sup>154</sup> In a transitional situation such as that which follows genocide, or, in the case of apartheid South Africa, where the majority of the population has had its identity repressed, there is an effort to establish a new identity. In such circumstances, the mechanisms of international criminal law or truth and reconciliation commissions may help to establish a new communal identity.<sup>155</sup>

The ultimate value of international criminal law may rest not in its functions of retribution or deterrence, but in its role in identity construction, in particular in constructing a cosmopolitan community identity embracing all of humankind. Continuing to pursue the international criminal law project may be valuable insofar as it gives voice to, and thus shapes, the identity of individuals as participants in an international community. To abandon international criminal law would not only lose this socializing aspect of the law, but it might also send the message that we are giving up on trying to realize a globally shared cosmopolitan identity.

The importance of this identity-constructing project is demonstrated in the deep commitment of human rights organizations to international criminal law. In the face of the wide range of what appear to be more pressing serious human rights problems, it is puzzling, to say the least, that non-governmental organizations devote substantial efforts to the development and enforcement of international criminal law. The overlap between international criminal law and the cosmopolitan project is particularly evident in the activities of the World Federalist Movement. This non-governmental organization has a broad internationalist agenda with cosmopolitan elements. It provides substantial support to the strengthening of international criminal law in the form of the secretariat of the

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154. See *Rule of Law Report*, *supra* note 2, *passim*.

155. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 225 (2000).

umbrella coalition of non-governmental organizations devoted to the International Criminal Court.<sup>156</sup> This coalition has united groups with a diverse range of interests and projects in a common project with a common identity.<sup>157</sup> These commitments are much more understandable if one views the field of international criminal law as setting the stage for a possible cosmopolitan ethical revolution.<sup>158</sup>

### C. *The Cosmopolitan Revolution*

Revolutions do not emerge overnight, but slowly grow as the problems of the existing regime become increasingly apparent.<sup>159</sup> The sense of cosmopolitan identity has grown gradually through individuals advocating for a cosmopolitan approach within whatever cracks and fissures have appeared in the Statist system of international law.<sup>160</sup> One of the reasons for the hope placed in international criminal law is its possibility to exploit these cracks and fissures.<sup>161</sup> International courts and tribunals present a particularly unique opportunity for change as they are answerable to their underlying legal texts and enjoy substantial autonomy from States.<sup>162</sup> Once organizations or individuals have a foot in the door, they may seek to push the field in a direction which may not necessarily contribute to the immediate mandate of the relevant institutions as

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156. See Factsheet, About the Coalition for the International Criminal Court, [http://iccnow.org/documents/CICCFSA-AboutCICC\\_8May071.pdf](http://iccnow.org/documents/CICCFSA-AboutCICC_8May071.pdf).

157. Tallgren, *We Did It?*, *supra* note 3, at 684-87.

158. See BULL, *supra* note 126, at 152; Tesón, *supra* note 126, at 54.

159. KUHN, *supra* note 42, at 98-99.

160. See HIRSH, *supra* note 146, at xv, 6.

161. The major developments in international criminal law all arose in such cracks or fissures. The Nuremberg Tribunal and its sister tribunal at Tokyo both emerged out of the cataclysmic second world war, a point when the whole world order was being reformulated. The ICC and the ad hoc tribunals for the former Yugoslavia and Rwanda all emerged in a similarly transitional period, as the cold War ended and a new world order had yet to take hold.

162. Compared to other international organizations, the staff of international courts and tribunals possess more autonomy from States. See LYAL S. SUNGA, *THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW* 324, 333-35 (1997). For other international organizations, see Veijo Heiskanen, *Introduction*, in *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* 7 (Jean-Marc Coicaud Veijo Heiskanen eds., 2001).

envisioned by their creators, but which will build towards establishing the cosmopolitan community.<sup>163</sup>

We saw above how outside actors pushed and lobbied for the inclusion of the crimes of the Holocaust in the Nuremberg Tribunal, which, while meeting with limited initial success, set the stage for the emergence of genocide and crimes against humanity. By establishing a tribunal to respond to Nazi aggression and war crimes, the founders of Nuremberg provided an opening in international law that was also seized upon by human rights lawyers and activists who lobbied for the creation of the ICC and other aspects of international criminal law.<sup>164</sup> These efforts have subsequently opened up further space for the continued evolution of a cosmopolitan community in what remains a primarily Statist legal order.<sup>165</sup>

## V. THE DANGERS OF IDENTITY CONSTRUCTION THROUGH LAW

Notwithstanding the possible benefits, one must be mindful of the potential negative effects of building a community through the law. In defining a communal identity, one also defines the community's boundaries and thus who is excluded from the community.<sup>166</sup> While performing an important role in affirming the community of the believers, faith in this field may have the unintended effect of excluding the non-believer.<sup>167</sup>

The cosmopolitan elements to international criminal law suggest that its audience is the entire human community. Yet Philip Allott contends, "The true *telos* of the criminal law is not

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163. See, e.g., Laurel E. Fletcher and Harvey M. Weinstein, *A World unto Itself? The Application of International Justice in the Former Yugoslavia*, in MY NEIGHBOR, MY ENEMY, *supra* note 9, at 29, 34-38 (observing such forces on the ICTY); HIRSH, *supra* note 146, at 72. Faith in the law is thus not faith in its legal institutions as they exist, but rather faith in what these institutions may become over time. See Annette Baier, *Secular Faith*, 10 CAN. J. PHIL. 131, 135-37 (1980); Tallgren, *We Did It?*, *supra* note 3, at 693.

164. See HIRSH, *supra* note 146, at 70-78 (describing individual efforts as being necessary to the success of the ICTY).

165. See Mégret, *supra* note 106. William Lietzau argues that the establishment of the ICC redistributes authority in international law. William K. Lietzau, *International Criminal Law after Rome: Concerns from a U.S. Military Perspective*, 64 LAW & CONTEMP. PROBS. 119, 135 (2001).

166. See KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 120, at 517.

167. See Kennedy, *The Disciplines of International Law & Policy*, *supra* note 7, at 93.

deterrence or retribution, as generally supposed, but exclusion. It is a system of exclusion from the affective bonds of the social family and the human family.”<sup>168</sup> This sentiment is reflected in the often repeated statement that the perpetrator of international crimes is an enemy of all humankind—*hostis humani generis*.<sup>169</sup> That a court or tribunal defines the accused out of the international community raises a fundamental question about the justice of its trials. To the supporter of such trials this exclusion is presumably justified on the grounds that the accused has defined himself or herself outside the community through his or her actions and that these actions have destroyed the community in such a way that it can only be rebuilt at the expense of the accused’s exclusion.

Justifying international criminal law on the strength of its community-building function must account for the law’s effect on the punished. As Robert Cover has observed, “the function of ideology is much more significant in justifying an order to those who principally benefit from it and who must defend it than it is in hiding the nature of the order from those who are its victims.”<sup>170</sup> If, following Jeremy Bentham, we are to accept that all punishment involves certain inherent evils,<sup>171</sup> to what extent should those seeking to build a cosmopolitan community use the mechanisms of international criminal law? The answer is far from clear. If—absent further proof of the validity of one of the other justifications of international criminal law, such as deterrence—the criminal law is the only plausible means for bringing about a cosmopolitan community, and if one can minimize the criminal law’s exclusionary effect of singling out only those most responsible for serious atrocities, then the pursuit of international criminal law is likely to be

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168. ALLOTT, *supra* note 40, at 65; see also Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608 (1986).

169. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1979) (“Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an *enemy of all mankind*.”). During World War II, the British government similarly proposed to declare the Axis war criminals as “World-Outlaws.” KOCHAVI, *supra* note 52, at 75.

170. Cover, *supra* note 168, at 1608.

171. BENTHAM, *supra* note 14, at 323. The former Nuremberg Prosecutor Telford Taylor subsequently described the incarceration of Rudolf Hess as “a crime against humanity.” TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 618 (1992).

justified. If, however, international criminal law is not likely to make any difference to whether a cosmopolitan community is realized, then the injustice of punishment would be the deciding factor.

More serious difficulties may begin to emerge if the law excludes not only the accused but also those who are intended to be included in the normative consensus to be established (for example, the co-nationals of an accused in an ethnic conflict who will be expected to integrate peacefully with members of other nationalities in a post-conflict society). The likelihood of such exclusion is a particular risk, given that international criminal law is often deployed as a response to situations in which group identities are at issue. The big question in these trials is whether the international community can succeed in placing the individuals tried outside the international community, or whether the accused can portray the trial as one in which an entire collectivity is on trial.

This tension between the need to establish a community with certain boundaries and the desire to avoid excluding anyone from the community is reflected in a paradox that arises when the accused wishes to tell a history which challenges the boundaries of what the tribunal perceives as the underlying community. Koskenniemi describes it as follows:

This is the paradox: [T]o convey an unambiguous historical 'truth' to its audience, the trial will have to silence the accused. But in such a case, it ends up as a *show trial*. In order for the trial to be legitimate, the accused must be entitled to speak. But in that case, he will be able to challenge the version of truth represented by the prosecutor and relativise the guilt that is thrust upon him by the powers on whose strength the Tribunal stands. His will be the truth of the revolution and he himself a martyr for the revolutionary cause.<sup>172</sup>

This paradox reflects a conflict between two identities which the tribunal depends on, and which it seeks to reinforce. The cosmopolitan identity calls out for a tribunal to reaffirm the cosmopolitan community against the individual aggressor. The legalist identity proceeds, however, on the basis that for a

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172. Koskenniemi, *Between Impunity and Show Trials*, *supra* note 25, at 35.

fully fair trial the defendant must be able to question any assumption underlying the trial, including introducing the idea of long-standing, if not intractable, incompatibility among communities.<sup>173</sup> These represent different, but equally fundamental, bedrock identities.

The difficulty of the paradox is that in order to defend one set of bedrock beliefs, the international criminal lawyer must reject the other identity. The defendant's challenge to the legitimacy of the tribunal is an attempt to drill through the exposed bedrock belief in a certain history. The challenge for the tribunal is that it can only prevent this at the expense of the other equally bedrock belief that a trial should guarantee the right of the accused to defend himself or herself fully. As the collapse of either bedrock would lead to a crisis of faith, the tribunal must strive to find a compromise, but a true compromise between two equally fundamental and totally incompatible beliefs is impossible. Instead, the tribunal recognizes the paradox and adopts an uncomfortable balancing act whereby it shifts continuously between the two paradigms, in places allowing the defense some latitude to challenge the historical record, while in other places silencing the accused.<sup>174</sup>

The question is whether this is an approach with which we (i.e. international lawyers), as aspiring cosmopolitans committed to the rule of law, can live. On the one hand, the awkward hybrid approach might be seen as destructive of the entire process of international criminal law. On the other hand, allowing minimal deviations from one set of bedrock beliefs is valuable, insofar as they are necessary to protect the other bedrock. Limiting the rights of the accused is necessary to affirm our identities as good people who respond to evil. Allowing the accused to challenge accepted facts is necessary to our identities as people who believe in the rule of law. One cannot act otherwise. If we are to maintain international criminal law, this awkward compromise is the only solution. Insofar as the challenges to the bedrock occur only at the margins of the criminal trial, it may be possible to close one's eyes to the de-

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173. For an example, see *id.* at 17.

174. This is not just hypothetical conjecture. Former ICTY President Meron, during his term of office, acknowledged just such a balancing in the face of paradox. Emma Thomasson, *Big Advances in Justice Since Nuremberg*, REUTERS, Nov. 17, 2005.

structive challenge posed by the critic to one or the other set of bedrock beliefs. We acknowledge that no process will be perfect and are willing to overlook minor imperfections. Furthermore, such a tension may be essential to growth of the law by opening the individual lawyer or the community of international lawyers to the possibility of self-criticism, and more importantly to self-correction.<sup>175</sup>

The question then becomes at what point placing limits on either the demand for justice or the right of the accused to contest the history before the tribunal ceases to become a minor imperfection, and instead destroys the foundations upon which the tribunal is built. In other words, how do we identify the boundaries of what Koskeniemi refers to as the area “between impunity and show trials”? The acceptability of deviations from fundamental bedrock beliefs depends on the trial’s audience. If all members of the audience share the same fundamental beliefs, they can more easily overlook any inconsistency, as the audience too must reconcile the conflict in the same way. If, however, they do not share these fundamental beliefs, then the legitimacy of the trial is in great danger.<sup>176</sup>

In addition to these basic challenges to law’s community-building function, one must consider what is omitted or ignored by the decision to pursue international criminal law. For example, those who do not fit within its paradigm and its vocabulary—such as those who are not yet victims—are ignored.<sup>177</sup> By identifying the crimes which are of concern, the paradigm of international criminal law also implicitly identifies which crimes are not of concern, and may exclude matters which should merit our attention.<sup>178</sup> Furthermore, the pursuit of international criminal law may blind us to more effective alternatives for realizing the cosmopolitan ideal.<sup>179</sup> By focusing on punishment as the solution, we may lose sight of vari-

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175. See WALZER, *supra* note 115, at 85.

176. See Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518, 528-530 (1986).

177. Kennedy, *The International Human Rights Movement: Part of the Problem?*, *supra* note 150, at 111.

178. See *supra* notes 111-116 and accompanying text.

179. See Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156 (2001); Kennedy, *When Renewal Repeats*, *supra* note 88, at 420-24; see also KUHN, *supra* note 42, at 18-19.

ous other means of prevention.<sup>180</sup> In addition, by focusing on individual responsibility for massive atrocities, international criminal law may ignore many of the structural factors which contribute to the perpetration of massive atrocities.<sup>181</sup> If this is true, international criminal law may hinder the structural revolution necessary to bring the cosmopolitan community into effect. These, however, are not necessarily objections to international criminal law as such, but rather items to consider in the appropriate design of international criminal justice mechanisms.

## VI. CONCLUSION

International criminal law offers a vehicle for realizing a cosmopolitan community in which each individual human being is truly valued as a unit of moral concern. At the same time, pursuit of this project is fraught with hidden dangers and vices. The emergence of international criminal law raises important questions about the power imparted to the punishers. The underlying benefits and dangers cannot be evaluated with precision. We should, however, weigh the challenges against the possible benefits and determine if and how a true cosmopolitan community can be realized through harnessing the power of international criminal law while minimizing the negative consequences. What is clear is that, if the identity-forming project of international criminal law is to be successful, it must expand its boundaries to minimize exclusion. As Koskeniemi has warned, without attention to its exclusionary impacts, idealistic cosmopolitanism runs the risk of becoming messianic imperialism.<sup>182</sup>

Identity formation through law is felt most immediately by those directly involved in the process—namely, the international criminal lawyers themselves. Lawyers, however, by their very choice of profession, are those most likely predisposed to share a strong predilection towards the values that international criminal law seeks to cultivate. It is for this reason in part that many in the field of international criminal justice

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180. Gerhard O.W. Mueller & Douglas J. Besharov, *Evolution and Enforcement of International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 261 (M. Cherif Bassiouni ed., 2d ed. 1999).

181. Cf. Kennedy, *When Renewal Repeats*, *supra* note 88, at 416-20.

182. KOSKENIEMI, GENTLE CIVILIZER, *supra* note 120, at 500.

have sought to expand the outreach efforts of international courts and tribunals.<sup>183</sup> To the extent that international criminal law may bring about this change of identity, it will likely have the indirect effect of prevention questioned at the outset of this article.

This inquiry into the faith behind international criminal law has helped to draw out some of the underlying concerns. More empirical study will help to demonstrate the benefits and disadvantages of international criminal law. In the absence of such knowledge, we could refuse to act, insisting that our actions must be fully justified. In a world in which knowledge is never certain, however, this would lead to paralysis. At the other extreme, we could have full, unquestioning faith in the value of international criminal law. In the absence of alternative solutions for addressing the underlying problems such as genocide, crimes against humanity, and war crimes, maintaining faith in international criminal law is not unreasonable.<sup>184</sup> Yet the immense power of international criminal law to inflict harm upon, at a minimum, those accused or convicted of crimes suggests the serious danger in accepting international criminal law without question. What is needed is a combination of faith with a certain amount of agnosticism. At the end of the day, international criminal law is, more than anything, a practical concern dedicated to solving real problems.<sup>185</sup> Focusing on the development of law and legal identity in a theoretical sense may eclipse the immediate needs of those whom the law is supposed to help.<sup>186</sup> As a matter of our day-to-day life in and through the law, even the most skeptical critics are much better accepting the reality of interna-

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183. For example, Mark Osiel has argued that if we are to prevent violations of international humanitarian law, simply instructing soldiers in the law will not be effective; what is needed is to shape the identity of the individual soldier and the communal identity of soldiers. MARK J. OSIEL, *OBEYING ORDERS: ATROCITY, MILITARY DISCIPLINE & THE LAW OF WAR* 21-26 (1999).

184. Cf. KUHN, *supra* note 42, at 23-24, 77-83 (noting that until a successor paradigm comes along which better solves identified problems, the existing paradigm will remain dominant).

185. Kennedy, *When Renewal Repeats*, *supra* note 88.

186. See, e.g., Gabrielle Kirk McDonald, *Assessing the Impact of the International Criminal Tribunal for the Former Yugoslavia*, in *INTERNATIONAL WAR CRIMES TRIALS: MAKING A DIFFERENCE?*, *supra* note 120, at 15; Alison Des Forges & Timothy Longman, *Legal Responses to Genocide in Rwanda*, in *MY NEIGHBOR, MY ENEMY*, *supra* note 9, at 49, 55-57.

tional criminal law as something which can be shaped than fighting against it—or worse, ignoring it.

Rather than endlessly arguing questions of ultimate theological significance, we should adopt a much more modest goal of directing international criminal law in our preferred direction. A moderate, semi-agnostic commitment allows us to use the means of international criminal law while remaining conscious that through our actions we are also contributing to the law's exclusionary force.

