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The Reason Behind the Rules: From Description to Normativity in International Criminal Procedure

Noah Weisbord† and Matthew A. Smith‡‡

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The comparative study of criminal procedure, developed over generations of comparison between national justice systems, has become expert in applying a dichotomy. On one side of this dichotomy, a theorized adversarial tradition privileges principles of individual autonomy; on the other, a theorized inquisitorial model envisions a judicially directed quest for truth. For decades, these paradigms have occupied comparativists with determining whether national systems embody the characteristics and outcomes that the two models of criminal procedure predict.

The emergence of the ad hoc and permanent international criminal tribunals in the past twenty years has challenged the utility of this typology. With the establishment of the permanent International Criminal Court (ICC or the Court), commentators rushed to apply the adversarial/inquisitorial typology to these new institutions.

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2 For a survey of this literature, see id. at 3-20.
subjects. But as the ICC continues to mature in its practices, it
provokes discussion on whether the comfortable framework of
adversarial and inquisitorial systems should be used to evaluate an
institution that exists in a fundamentally different context from
that of national criminal justice systems. The descriptive function
that this typology was generated to serve may have been
superseded in the context of the international criminal tribunals. If
it has, the problem currently facing international criminal justice is
not to describe its institutions in relation to the logic of the
common or civil law, though the common and civil law remain
important repositories of wisdom and experience. Rather, the
project remains at the first-phase question of deciding what rules
of procedure are best suited to the unique context in which an
international criminal tribunal operates.

Unfortunately, just as it is difficult for comparative criminal
law scholars to put aside the familiar adversarial/inquisitorial
classifications, the challenge of confining to their proper place the

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3 See, e.g., Kai Ambos, International Criminal Procedure: “Adversarial,”
Inquisitorial” or Mixed?, 3 INT’L CRIM. L. REV. 1, 5 (2003) (“Today there is general
agreement that the procedure before the International Criminal Tribunal for the former
Yugoslavia (ICTY) and ICC is a mixed one in that it contains structural elements or
building blocks of both the ‘adversarial’ and the ‘inquisitorial’ system.”); Mireille
Delmas-Marty, The Contribution of Comparative Law to a Pluralist Conception of
International Criminal Law, 1 J. INT’L CRIM. JUST. 13, 18 (2003) (arguing that
comparative study is necessary to the process of hybridizing accusatorial and
inquisitorial systems in international criminal procedure); Claus Kress, The Procedural
Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise,
in light of the “famous common law-civil law divide on criminal procedure”). See
generally Alphons Orie, Accusatorial v. Inquisitorial Approach in International
Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings
Before the ICC, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A
(outlining central features of the accusatorial/inquisitorial typology and applying the
typology to the procedures of the International Criminal Tribunal for Rwanda (ICTR),
ICTY, and ICC).

4 Cf. Mirjan R. Damaška, What is the Point of International Criminal Justice?, 83
CHI.-KENT L. REV. 329, 331-39 (2008) (urging a reconsideration of the purposes of
international criminal justice as a whole as opposed to the normative assumptions
underlying its rules of procedure in particular).

5 See SUMMERS, supra note 1, at 5-9 (observing that even authors who
acknowledge the limited utility of the adversarial/inquisitorial typology are nevertheless
unable to avoid using it); see also Chrisje Brants & Stewart Field, Legal Cultures,
normative assumptions underpinning those classifications is harder still. In order to avoid entangling the ICC in rules that are not tailored to fit its specific goals and institutional context, the normative purposes underlying procedural rules derived from domestic institutions should be reexamined. Where these premises do not match the specific situation of international tribunals, they and the rules based upon them should be discarded and replaced with new, deliberately defined premises and rules that owe their origins not to national systems, but to the dynamically evolving context of international criminal tribunals.

To introduce the following articles, this discussion draws out basic principles that may be of use in reexamining the reasoning behind the rules of procedure in international criminal law. It then considers how the articles presented on the subsequent pages reflect or depart from trends in current scholarship that attempt to apply the methods of comparative law to a study of international criminal procedure. Drawing support from several innovative and promising approaches in the recent literature, it concludes by urging comparative scholars to redirect their focus from describing the procedural features of the emerging international system to engaging with the more fundamental question of what those features ought to be.

I. Distinguishing Reasoning From Its Premises

Chief among the normative premises that are often used to define rules of procedure is the principle that the rights of the defense must be the starting point in any just procedural system.\(^6\) The scholarly tendency to theorize procedural rules as a bulwark against prosecutorial power flows from the origins of European and Anglo-American criminal procedure in struggles between the

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\(^6\) See, e.g., *Summers,* supra note 1, at 61 ("Defence rights are inevitably associated with 'fairness' and, more often than not, with conceptions of individual responsibility and autonomy.").
individual and the state.\textsuperscript{7} Given that these rules originated in the
balance between governmental interests—represented by the
prosecutor—and the individual interests of the accused, some
jurists regard them as irreducible in domestic justice systems.\textsuperscript{8}
The conscience of the international justice movement is troubled
by the possibility that transplanting domestically developed
procedural norms into international criminal law may frustrate the
prosecution of international crimes.\textsuperscript{9} With the creation of a
permanent forum for prosecuting international crimes in the
International Criminal Court, an opportunity to advance the values
of human rights is mingled with the threat of their betrayal.\textsuperscript{10} To
escape the danger that the Court’s mission will become corrupted
by illegitimate means, supporters of the Court may conclude that
international criminal procedure must concentrate on assuring the

\textsuperscript{7} See generally John H. Langbein, The Origins of Adversary Criminal Trial
106-77 (2003) (describing the evolution of the right to defense counsel in Anglo-
American law in the Treason Trials Act of 1696); John Henry Merryman, The Civil
Law Tradition: An Introduction to the Legal Systems of Western Europe and
Latin America 124-32 (2d ed. 1985) (discussing the impact of the works of Cesare
Beccaria and others on Continental European criminal procedure); Summers, supra note
1, at 61-94 (describing the crystallization of a coherent theory of rights of the defense in
nineteenth-century Continental Europe).

\textsuperscript{8} See, e.g., United States v. Leon, 468 U.S. 897, 928 (1984) (Brennan, J.,
dissenting) (protesting the majority’s construction of the rule excluding unlawfully
obtained evidence as constitutionally dispensable).

\textsuperscript{9} Gary Bass explains this anxiety in his description of what he refers to as “War
Crimes Legalism.” Gary J. Bass, Stay the Hand of Vengeance: The Politics of
War Crimes Tribunals 20-36 (2000). His discussion captures the tension between the
desire to punish the perpetrators of grave crimes and the restraints imposed by liberal
procedural conventions such as “due process.” As a result of this tension, Bass observes,
“[l]iberal diplomats often find themselves squirming at the challenge of exporting their
domestic standards.” Id. at 29; see also Martti Koskenniemi, Between Impunity and
Show Trials, in 6 Max Planck Yearbook of United Nations Law 32-35 (Jochen A.
Frowein & Rudiger Wolfrum eds., 2002), available at
http://www.mpil.de/shared/data/pdf/pdfmpunyb/koskenniemi_6.pdf; Jeremy Peterson,
Unpacking Show Trials: Situating the Trial of Saddam Hussein, 48 Harv. Int’l L.J. 257,
282-84 (2007).

\textsuperscript{10} Concerns about this possibility became acute when the prosecutor was accused
of withholding exculpatory evidence in the ICC’s case against Thomas Lubanga Dyilo. See
generally Alex Whiting, Lead Evidence and Discovery Before the International
Criminal Court: The Lubanga Case, 14 UCLA J. Int’l L. & Foreign Aff. 207, 223-26
(2009) (analyzing the Court’s impasse over the prosecutor’s disclosure obligations).
rights of the accused as its foremost objective.\textsuperscript{11}

Whether the logic that supports this conclusion in the national context applies to international tribunals is hardly immune from doubt.\textsuperscript{12} Strict application of procedural norms developed in national contexts may represent a kind of syllogistic error, leading its proponents to draw flawed conclusions from faulty premises. The articles that appear in the following pages can be viewed as attempts by sophisticated thinkers familiar with the logic of the common and civil law traditions to reckon with this problem. Among the contributing authors, Professor Mirjan Damaška questions whether the project of global justice may prove too heavy a burden for international tribunals if they are hampered by the full range of procedural rules that benefit the defense.\textsuperscript{13} This inquiry encounters the possibility that procedural configurations normally applied in domestic criminal justice systems must be reconfigured to address the differences found in the international environment. Damaška nevertheless insists that a correct conception of the ICC’s mission is not in tension with prioritizing the procedural rights of the accused over other objectives of international criminal procedure.\textsuperscript{14} According to Damaška, the success of the ICC depends upon the extent to which it is perceived as fair, which in turn is measured according to its treatment of defendants.\textsuperscript{15}

Other works in this volume reflect the assumption that

\textsuperscript{11} The protection of the rights of the accused in international proceedings is often equated with strict enforcement of the procedural dimensions of human rights. \textit{E.g.,} CHRISTOPH J. M. Safferling, \textit{Towards an International Criminal Procedure} 46-48 (2001) (“If human rights are to be protected via criminal prosecution, the applied system must itself be strictly compatible with human rights.”).

\textsuperscript{12} In an insightful discussion of the jurisprudence of the European Court of Human Rights, Sarah J. Summers observes a similar failure to consider how the contexts in which prosecutions are undertaken may be relevant to deciding whether procedural rules should be accorded the status of irreducible rights. \textit{Summers, supra} note 1, at 172-78.

\textsuperscript{13} Mirjan Damaška, \textit{The Competing Visions of Fairness: The Basic Choice for International Criminal Tribunals}, 36 N.C. J. INT’L L. & COM. REG. 366 (2011) (“Is it not likely, however, that the heavy burden of their demanding tasks—coupled with their frustrating indigenous weaknesses—places these standards under greater stress than is the case in the environment of domestic criminal prosecutions?”).

\textsuperscript{14} \textit{Id.} at 9-10.

\textsuperscript{15} \textit{Id.} at 10 (rejecting depictions of fairness that embrace parties other than the defense).
international criminal procedure should embody a concept of fairness that largely transposes the premises underlying domestic procedural standards into the international context. Professor Michele Caianiello warns that by combining a party-driven system of discovery with disclosure rules that tailor more closely to an inquisitorial design, the Rome Statute of the International Criminal Court\textsuperscript{16} works a flawed combination that structurally disadvantages the defense.\textsuperscript{17} Going beyond the traditional concept of hearsay rules as a means of ensuring the reliability of evidence,\textsuperscript{18} Professor Caianiello examines how prohibitions on hearsay evidence partially correct what he identifies as an imbalance of arms between defense and prosecution.\textsuperscript{19} Implicit in his criticism is the traditional sensitivity for the impact of procedure on the rights of the defense. This heightened sensitivity creates a proclivity toward scrutinizing procedural rules out of concern for the defendant's interests.\textsuperscript{20}

Professor Mosteller's comparison of the structural determinants of prosecutorial decisions leads him to propose reconfiguring prosecutors' offices to provide what he regards as necessary protections for defendants. Whereas Professor Caianiello reflects on threats embodied in a single phase of an ICC proceeding, Professor Mosteller perceives a pervasive danger in the structure of one of the world's most powerful criminal justice institutions—the office of the American prosecutor.\textsuperscript{21} According to Professor Mosteller, the structural configuration of prosecutors' offices constitutes a structural determinant of prosecutorial decisions that must be reconfigured to provide necessary protections for defendants. This reconfiguration would involve a shift away from the adversarial system and towards a more inquisitorial approach, which aligns with the fairness principles embodied in the Rome Statute of the International Criminal Court.


\textsuperscript{18} See \textit{George Fisher, Evidence} 337 (Robert C. Clark et al. eds., 1st ed. 2002) (explaining that the primary purpose of the hearsay rule is to preserve the reliability of evidence).

\textsuperscript{19} See Caianiello, \textit{supra} note 17, at 294 (arguing that the hearsay rules are "strictly linked to the equality of arms principle").

\textsuperscript{20} \textit{Cf. Damaška, supra} note 13, at 375 (noting that "the strain between the interests of victims and defendants is usually observed from the defendant's perspective").

offices exacerbates cognitive biases that deemphasize the exculpatory value of evidence.\textsuperscript{22} To mitigate this biasing effect, Mosteller suggests borrowing ideas from inquisitorial systems that apportion prosecutorial functions among several judicial officials rather than entrusting a single officer with the authority to select cases for prosecution and prove them at trial. Professor Mosteller concludes that inquisitorial systems offer better means of limiting the harmful biases that otherwise may afflict prosecutors’ decisions. Thus, he registers his analysis as a point in favor of an inquisitorial model on “some figurative scorer’s card.”\textsuperscript{23} Why that scorecard is drawn to measure criminal procedure by how well it preserves the interests of the defense remains to be considered.

Deputy Prosecutor Fatou Bensouda declines to analyze international criminal procedure in terms of its relation to national models, perceiving in the ICC something unique.\textsuperscript{24} Rather than borrowing whole-cloth from any national system, writes Bensouda, the Court has assimilated national examples so completely that its practice is, in effect, \textit{sui generis}. Bensouda’s observations from her vantage point as Deputy Prosecutor portray the maturation of the Court’s practice in the areas of victim participation and witness proofing. These examples depict a Court that is cognizant of the need to adapt its practices to its exceptional context and offer insight into the development of the Court’s procedures. If the process of elaboration and adaptation in the ICC’s rules of procedure continues along the pathway that Bensouda traces, no attempt to explain or justify the Court’s practices will succeed without accounting for the context in which these practices have developed.

Professor Damaška, responding to the flexibility of international criminal procedural rules that Fatou Bensouda describes, discerns that the broad aspirations and structural features of international criminal justice threaten the procedural guarantees that are central to liberal notions of a fair trial.\textsuperscript{25} Noting the inherent weakness of a judicial body that is not

\textsuperscript{22} Id. at Section II.C.
\textsuperscript{23} Id. at 354.
\textsuperscript{25} Damaška, \textit{supra} note 13, at Section VII.
integrated with any state apparatus, Professor Damaška recommends that the ICC jettison some of its ambitions in order to maintain domestically derived standards of fair procedure. Concluding that the educative role of the ICC is its most important function and that notions of fair trial derived from domestic traditions are indispensable to fulfill this aspect of the Court’s mission, Professor Damaška provokes an important question: recognizing the ICC’s unique institutional context demands confronting whether notions of fair trial, due process, and procedural rights as they were developed in national contexts are relevant in the same way in the global arena.

II. Reconsidering the Premises

Beyond the technical arguments over disclosure rules, witness preparation, and the appropriate scope of judicial intervention looms the more basic problem of defining a normative basis for international criminal procedure. Although scholarship over several decades has proposed various procedural models as best fitting international tribunals, the establishment of the ICC requires a renewed effort to understand and choose deliberately among the normative assumptions underlying the various models of procedure.

One possible understanding of international criminal procedure would adopt the premises underlying adversarial adjudication. The procedures of the Nuremberg Tribunal, the basis of much of contemporary international criminal law and process, were predominantly adversarial, so this is a natural place from which to begin the analysis. Since standards of criminal procedure have evolved in the fifty years since the Nazi leaders were tried by the Allies, it is inappropriate to compare

26 Id. at Section V.

27 See id. at 377-78 (discussing the importance of “procedural fairness” in international criminal procedure).

contemporary international criminal procedure to the procedures of the International Military Tribunal at Nuremberg. Rather, scholars who choose to adopt the procedural rules of adversarial systems as their model look to the procedures of the *ad hoc* tribunals established by the UN Security Council after the dissolution of the former Yugoslavia and the massacres in Rwanda to determine whether these accorded with the highest standards of due process expected of adversarial systems. The authors employing this methodology are often American, so it is not surprising that the most sophisticated analyses of this type employ the due process framework of the U.S. legal system as a standard.

Other scholars, noting that the rules of the *ad hoc* tribunals were a negotiated compromise between the proponents of common and civil law procedures, seek to evaluate the procedures of the tribunals with the values of both traditions in mind. These authors write of the logic of adversarial and inquisitorial systems, which map the common and civil law traditions respectively. The challenge that arises within this methodology is deriving an evaluative framework that is persuasive to jurists from both traditions. In the context of specific examples from the jurisprudence of the *ad hoc* tribunals or the ICC, one approach is to comment upon the way that the procedures have affected the rights of the accused. The sanctity of the rights of the accused is

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30 See, e.g., Kress, supra note 3, at 605 (noting that the *ad hoc* tribunals were a combination of inquisitorial and adversarial systems).

31 See, e.g., id. (discussing the ways in which ICC judges have borrowed from both systems and discussing why).

32 For an excellent example of this branch of scholarship, see Caianiello’s
a shared element of both liberal traditions, so this is a natural evaluative benchmark.\textsuperscript{33} A key weakness of this methodology is that the protections afforded to the accused in both systems are quite different, so an overarching normative framework (or agreement on the purpose of the specific rules of procedure) is necessary to encompass them both. The challenge these scholars face is to find a persuasive framework.

Some scholars, such as Salvatore Zappala, seek this overarching framework in the universal precepts of human rights law.\textsuperscript{34} According to Zappala, “human rights law is the ideal lens for investigating the structures and functioning of international criminal justice.”\textsuperscript{35} Zappala reasons that human rights law “provides one of the best interpretative tools for the analysis of the procedural mechanisms of international criminal justice, since it helps identify the proper balances between the rights of individuals and the interests of society.”\textsuperscript{36} Frederick Mégret, however, suggests several problems with international human rights as an overarching framework from which to evaluate and shape international criminal procedure. In essence, Mégret argues that “international human rights will in most cases be under-determinative of the issues at stake.”\textsuperscript{37} In short, “international human rights law has no formal status before international criminal tribunals”,\textsuperscript{38} it lacks the technical, ritual, and institutional “thickness” of domestic traditions,\textsuperscript{39} and when contradicting

\textsuperscript{33} See Caianiello, supra note 17; Fairlie, supra note 32, Mosteller, supra note 21.

\textsuperscript{34} SALVATORE ZAPPALA, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS I (Ian Brownlie & Vaughan Lowe eds., 2003).

\textsuperscript{35} Id.

\textsuperscript{36} Id.


\textsuperscript{38} Id. at 52.

\textsuperscript{39} Id. at 53.
procedural imperatives arise, such as the right to a speedy trial and the necessity for rigorous rules of disclosure, human rights law offers "few definitive answers."\footnote{Id. at 55. Furthermore, when it comes to criminal procedure, human rights law is minimalist in that it is meant to prevent the worst abuses rather than constitute an ideal framework. Nor does it adequately mediate between different stakeholders who claim rights, such as the defense and the victims. Finally, human rights law does not satisfactorily specify the breadth of limitation clauses, that allow for derogation from certain rights under particular contingencies, such as emergencies. See \textit{id.} at 53-58.} Citing Colin Warbrick, Mégret demonstrates that, "human rights standards 'provide a mere skeleton of what is required.'"\footnote{Id. at 58 (quoting Colin Warbrick, \textit{International Criminal Courts and Fair Trial}, 3 \textit{J. ARMED CONFLICT L.} 45, 50 (1998)).} Scholars searching for an overarching framework from which to evaluate and shape international criminal procedure, but who are less wedded to human rights as that model, sometimes look to general notions of fairness.\footnote{Mégret equates the scholarship on fairness with the scholarship on the rights of the accused. Mégret, \textit{supra} note 37, at 38.} A number of these scholars, acknowledging that fairness is not just about the defendant, make use of the concept of "equality of arms."\footnote{Airey v. Ireland, App. No. 6289173, 2 Eur. H.R. Rep. 305 (1979); Steel v. United Kingdom, 2005-II Eur. Ct. H.R. 1 (2005); United States v. Tucker, 249 F.R.D. 58 (S.D.N.Y. 2008); Geert-Jan Alexander Knoops, \textit{The Dichotomy between Judicial Economy and Equality of Arms within International and Internationalized Criminal Trials: A Defense Perspective}, 28 \textit{FORDHAM INT'L L.J.} 1566, 1567-70 (2005); Gabrielle McIntyre, \textit{Equality of Arms – Defining Human Rights in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia}, 16 \textit{LEIDEN J. INT'L L.} 269 (2003); Stefania Negri, \textit{The Principle of “Equality of Arms” and the Evolving Law of International Criminal Procedure}, 5 \textit{INT’L CRIM. L. REV.} 513 (2005); Jay Sterling Silver, \textit{Equality of Arms and the Adversarial Process: A New Constitutional Right}, 1990 \textit{WIS. L. REV.} 1007 (1990); Miranda Sissons & Ari S. Bassin, \textit{Was the Dujail Trial Fair?}, 5 \textit{J. INT’L CRIM. JUST.} 272, 280 (2007).} As Caianiello remarks, however, equality of arms is not an independent and objective standard: "[e]quality of arms represents a specific rigid principle of the accusatorial model, which is conceived and shaped mainly as a dispute among two litigants."\footnote{Caianiello, \textit{supra} note 17, at 293.} Other authors, such as Christine Chinkin\footnote{Christine M. Chinkin, \textit{Due Process and Witness Anonymity}, 91 \textit{AM. J. INT’L L.} 75, 75 (1997) ("I would argue that he [Monroe Leigh] has failed to take into account the full details of the chamber’s judgment, which recognized in particular that the accused’s right to know and confront prosecution witnesses is not absolute but may have to be needed to support a view of fairness."ootnote{Ibid.}} and Mercedeh Momeni\footnote{Ibid.} look beyond the
rights of the accused in the discussion of fairness and include additional stakeholders in the calculus, in particular, victims and witnesses. Chinkin, for example, argues for the fairness of the 1995 pretrial ruling of the Tadic Court where the International Criminal Tribunal for the former Yugoslavia held that it was appropriate to indefinitely withhold the identities of certain victims and witnesses from the accused and his counsel.\textsuperscript{47} In this decision, the court opted to balance the rights of the accused with the interests of these other stakeholders.\textsuperscript{48} Damaška, for his part, is skeptical of a concept of procedural fairness that is overly ambitious and, in particular, overly inclusive of stakeholders beyond the defendant. Referring to victims of international crime, he writes: “[i]t is true that their exalted position in international criminal tribunals is now celebrated on ideological grounds as a remarkable achievement, but the pragmatic wisdom of this apotheosis is far from clear.”\textsuperscript{49} Damaška’s logic is that a key function of international criminal tribunals is socio-pedagogic,\textsuperscript{50} that the most significant audience is communities sympathetic to the accused, and therefore, that the best way that the tribunal will serve its function is through meticulous care of his or her procedural rights.\textsuperscript{51}

Another branch of scholarship seeks to discover an evaluative


\textsuperscript{47} See Chinkin, \textit{supra} note 45, at 75-79.


\textsuperscript{49} Damaška, \textit{supra} note 13, at 376.

\textsuperscript{50} \textit{Id.} (“They should aspire first and foremost to be moral teachers, and accord pride of place to the socio-pedagogic function that is so often mentioned among the goals of international criminal justice.”).

\textsuperscript{51} \textit{Id.} at 379 (“Victimized communities don’t need condemnatory judgments to provoke revulsion to international crimes in their midst. It is communities sympathetic to the defendant that need to be stirred toward this sentiment: they should be the target of moral messages. And unless the carriers of these messages are perceived as being fair to the defendant, messages are likely to fall on deaf ears.”).
framework “beyond ‘fairness.’” This scholarship probes the very purposes of international criminal justice for a normative framework that can be used to evaluate and shape the jurisprudence on international criminal procedure. The reasoning behind this methodology is that something more than the pure logic of the adversarial or inquisitorial systems, or even notions of fairness, is necessary as a basis for international criminal procedure. Two authors who stand out for their sophistication employing this methodology are Jens David Ohlin and Frederick Mégrét.

Ohlin, moving past the common law versus civil law framework, proposes a “meta-theory of international criminal procedure” from which to evaluate the jurisprudence of the ICC. According to Ohlin, international criminal procedure should advance certain instrumental goals derived from the very purposes of international criminal justice. In particular, Ohlin acknowledges that international criminal procedure should separate the culpable from the non-culpable, ensure due process protections, help find the historical truth and facilitate structured victim participation. Ohlin’s key contribution, however, is to propose that international criminal procedure is not only about vindicating these instrumental goals, but that international criminal procedure also has an important intrinsic value: vindicating the rule of law in contexts overtaken by anarchy.

It makes intuitive sense that the purposes of international criminal procedure should be derivable from the purposes of international criminal justice. Mégrét, as part of a larger scholarly project to develop what he calls “a global jurisprudence of the specificity of international criminal justice,” begins to search for a distinct “international procedural identity” from which to

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52 Mégrét, supra note 37, at 38-39.
54 Mégrét, supra note 37, at 37.
55 Ohlin, supra note 53, at 82-83.
56 Id. at 83.
57 Id. at 90-99.
58 Id. at 103.
59 Mégrét, supra note 37, at 42, n.12.
evaluate the legitimacy of the emerging international procedural rules. Mégret, like Ohlin, is sympathetic to the agenda of “clearly articulating the goals of international criminal trials and then shaping the methods to fit.” He is ultimately advocating for international criminal procedure “uniquely suited to the reality and the values of the tribunals’ international nature while simultaneously drawing from domestic traditions and seeking to respect the right to a fair trial.” Like Bensouda, Mégret and Ohlin consider the international criminal justice system to be its own tradition, *sui generis.* Mégret’s contribution is to more fully describe the quality of this *sui generis* system and make use of this understanding in concrete ways.

The limitation of Mégret’s method can be found in his critique of the approaches of those scholars using the international human rights framework to evaluate and shape international criminal procedure. Mégret’s criticism of human rights as an evaluative framework is that it will, in most cases, be under-determinative. Until the distinct “international procedural identity” that Mégret seeks becomes more fully crystallized—perhaps through his own efforts—it will, like the human rights framework, “provide a mere skeleton of what is required.”

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60 Id. at 58-59.
61 Dermot M. Groome, Re-Evaluating the Theoretical Basis and Methodology of International Criminal Trials, 25 Penn St. Int’l L. Rev. 791, 798 (2006); see also Damaška, supra note 4, at 330 (urging a reconsideration of the purposes of international criminal justice as a whole as opposed to the normative assumptions underlying its rules of procedure in particular).
62 Mégret, supra note 37, at 59.
63 Bensouda, supra note 24; Mégret, supra note 37, at 40; Ohlin, supra note 53, at 77.
64 Mégret, supra note 37, at 40.
65 Id. at 41-42.
67 Mégret, supra note 37.
indeterminacy, one that Mégret does not mention in his critique, arises when deducing concrete conclusions from general premises, such as the identity of international criminal procedure or its purposes. The basic insight of legal realism is relevant here. A person who is proficient at reasoning can begin from a premise of the sort Mégret proposes—"[t]he legitimacy of international criminal procedure also recommends that the tribunals operate under a system of rules not entirely tilted toward one tradition at the expense of another"—and come to different answers to specific procedural challenges. This is assuming, of course, that one agrees with the international procedural identity as Mégret describes it in the first place. Ohlin's project, of deducing practical consequences from his insight that a key purpose of international criminal procedure, is to vindicate the rule of law in procedural vacuums is vulnerable to a similar critique.69

It is safe to conclude that no dominant paradigm from which to evaluate the procedural jurisprudence of international tribunals has yet emerged. As a result, the question of which procedures are best and why remains a live one for scholars and, even more significantly, for the ICC judges.

III. Toward New Norms

The procedural pedigree of the ICC is now well established: the norms evolved predominantly out of common and civil law traditions.70 But to what extent these transplanted rules should carry the interpretative principles that give them meaning in the generative national traditions remains at issue. If Bensouda is right that the ICC has developed its rules of procedure to the point where they are better understood as sui generis, commentators should no longer be content with a simple compare-and-contrast of the common and civil law fossils that can be excavated from the ICC's current practices. Instead, the analysis should transition from describing characteristics to choosing among various purposes that procedural rules may serve. The most promising place to start is to recognize, as the contributors to this issue have

68 Id. at 68.
69 See Ohlin, supra note 53, at 111-16 (discussing the practical consequences of the rule of law concept).
70 Id. at 80-82.
begun to do, the unique context in which the ICC operates to fulfill its mandate. This is a reasonable point from which to interrogate familiar assumptions, drawn from national contexts, about the normative purposes of international criminal procedure.

Perhaps the key distinguishing feature between international criminal justice and domestic criminal justice is that power at the global level is disaggregated. A strong common or civil law state aspires toward a monopoly on the legitimate (and effective) use of force within its territory, and most come close. At the global level, however, no such analog exists. States are, at least formally, sovereign and equal under international law, which gives them power and responsibility within an allotted space. No unregulated space remains for the ICC. This has important repercussions on the Court as it labors to fulfill its mandate to end impunity and deter crimes that states are unwilling, or unable, to prevent or punish.\footnote{Rome Statute, \textit{supra} note 16, pml.}

The challenges are even more daunting when political and military leaders themselves have mobilized the state apparatus toward the commission of massive crimes and other states are complicit.\footnote{See generally SAMANTHA POWER, \textit{"A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE} (2002) (discussing the refusal of the U.S. government to recognize and react to incidents of genocide throughout the twentieth century).}

One repercussion is that evidence collection is far more challenging for the ICC than for an American or a French prosecutor.\footnote{Damaška, \textit{supra} note 13, at 367-68.} Damaška is attuned to this difficulty and points it out in his contribution to this publication. His response, however, is to conclude that it will be tempting for international tribunals to relax their rules of evidence in order to secure convictions, and that this risks jeopardizing the rights of the defense.\footnote{\textit{Id.} at 366 ("Does this far from fanciful scenario not suggest that it is harder for international than for domestic criminal judges to reject anonymous testimony, or to exclude the fruits of technically illegal searches? Does it not suggest that international judges might be more tempted than their national counterparts to depart \textit{sub silentio} from the postulated standard of proof sufficiency?").}

However, might it not be sensible, instead of increasing the procedural hurdles for the ICC prosecutor, to craft rules of evidence that take account of his or her compromised position when it comes to evidence collection? These rules can protect the defendant's rights, but
THE REASON BEHIND THE RULES

without overreaching and attempting to protect every individual within ICC jurisdiction from the exercise of arbitrary state power. This may be a central concern of domestic judicial institutions, where the state is powerful within a territory and the police are tempted to overreach, but it is not the ICC’s job to police the police. Procedural rules sensitive to the context, in which the ICC operates, would prioritize the truth-finding function of criminal justice, while excluding evidence obtained in an unconscionable manner, such as by torture or fraud.

Chinkin identifies another repercussion of the ICC’s lack of a monopoly on the legitimate use of force within its territory: “unlike many domestic jurisdictions confronting the issue of witness security, the Tribunal cannot operate an effective protection program that extends across national boundaries to the many places that witnesses are now located.”

Chinkin is referring to the ICTY, established by the U.N. Security Council under its Chapter VII enforcement powers. Antonio Cassese, the Court’s president, famously likened the ICTY to a giant with no arms and no legs. The ICC, however, operating in ongoing conflicts and regularly with no Security Council mandate, is even less equipped to offer credible protection to the vast number of victims and witnesses under its jurisdiction. The Victims and Witnesses Unit does what it can, but expectations of its capacity need to be constantly managed.

The rules of evidence and procedure at the ICC should be tailored to protect the safety of victims and witnesses, while still inviting the defendant to vigorously challenge the case. Technology can help, allowing the defendant to challenge a vulnerable witness without being able to identify that witness. Ultimately, it may be unreasonable to expect

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75 Chinkin, *supra* note 45, at 76.

76 Antonio Cassese, *On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT’L L. 1, 13 (1998) (“[T]he ICTY remains very much like a giant without arms and legs—it needs artificial limbs to walk and work. And these artificial limbs are state authorities. If the cooperation of states is not forthcoming, the ICTY cannot fulfill its functions. It has no means at its disposal to force states to cooperate with it.”).

in the international context that every defendant will have the right to know the identity of every prosecutorial witness.

Another repercussion of the ICC’s lack of a monopoly on legitimate force is that it is, at this point, devilishly hard to arrest suspects.\textsuperscript{78} The outstanding arrest warrant for Sudanese President Omar al Bashir is the most conspicuous example, but even the leaders of the Lord’s Resistance Army, depleted and marginalized, are still at large.\textsuperscript{79} Because the ICC has no police force, it relies on the cooperation of states to enforce its warrants. States, for their part, are historically reticent to risk their soldiers to arrest perpetrators of mass violence abroad.\textsuperscript{80} This is an area where the ICC’s rules of procedure could be tailored to the global context as well. The abduction of Adolf Eichmann from Argentina by the Israeli government may not have been a model of international cooperation and rule of law, but there are other ways to facilitate arrests.\textsuperscript{81} One way is through cooperation agreements where states parties invite the assistance of other states parties to arrest suspects within their territory. Another is for states to invite non-state volunteers to assist, so long as they follow certain procedural standards that safeguard the rights of the accused. This is akin to a citizen’s arrest, but could be more circumscribed in various ways. For instance, this could be circumscribed by requiring the permission and oversight of domestic law enforcement officials, if not their direct participation. The larger point is that in a criminal justice system lacking a state with a monopoly on the legitimate use of force, the procedural rules should be tailored to the context rather than unremittingly ratcheted up.

Another contextual element that should be considered when shaping procedural rules is that it is often state authorities committing the crimes. Not only are political, judicial, and


\textsuperscript{80} BASS, \textit{supra} note 9, at 29-30.

\textsuperscript{81} NEAL BASCOMB, \textit{HUNTING EICHMANN: HOW A BAND OF SURVIVORS AND A YOUNG SPY AGENCY CHASED DOWN THE WORLD’S MOST NOTORIOUS NAZI} 225-29 (2009).
military officials unwilling or unable to prevent the crimes or punish the perpetrators, they are actively involved in orchestrating atrocities or covering them up. Here, domestic procedural rules meant to prevent the arbitrary exercise of state power against marginalized individuals in strong common or civil law states are beside the point. The priority should be to encourage diplomatic cooperation to stop the crimes and arrest the perpetrators so that the atrocities do not resume. Reliable evidence provided by cooperative intelligence services or international organizations should be admissible, even if it would not necessarily be in the domestic court of a properly functioning common or civil law state.82

IV. Conclusion

Based on these observations, it is possible to conclude that a new normative theory of international criminal procedure should focus on the absence of a state apparatus accompanying international tribunals. This threshold observation would distinguish the foundational premise of the domestic procedural configurations from which international procedure is derived, namely, that procedure must act as an expression of and a restraint upon the power of a state.83 When the relevance of this premise is appropriately qualified in light of the unique features of the international context, the opportunity emerges to replace it with a normative principle that more accurately reflects that context and, therefore, contributes more effectively to the success of the institutions operating within it.

One such normative approach would seek to maximize the capacity of the ICC to punish the crimes within its jurisdiction, while minimizing the extent to which the Court’s procedural rules create doubts about the factual accuracy of the evidence used to obtain convictions. This approach would ground efforts to determine the elements of a just and functional procedural regime

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82 As long as that evidence was not obtained by unscrupulous means such as torture.

by rejecting appeals to indeterminate conceptions of fairness in favor of an analysis that prioritizes the integrity of the facts introduced at trial.

With this normative precept in mind, certain principles for developing a new hierarchy of procedural rights begin to emerge. Whereas domestic procedure is freighted with the task of enabling judicial institutions to act as a check on a state apparatus, the ICC need observe only those rules of procedure that mitigate the possibility that the evidence used to obtain a conviction is actually insufficient to establish the defendant's guilt and that evidence collected in particularly egregious ways, like torture or fraud, is excluded. Procedural rules that are oriented toward ensuring the reliability of the evidence adduced at trial, therefore, would remain integral, but those that function primarily to limit police power could be interpreted to reflect the context in which the ICC operates. Conceived differently, procedural rules created to safeguard the liberty of the individual as a defendant must be maintained, but those created to protect the liberty of the community in general might be interpreted more flexibly by the Court in light of its unique position and mandate. The ICC governs no community of free individuals that it has the power to oppress.

Any attempt to articulate the normative foundations of the procedural rules applied by international tribunals will require elaboration, and the lack of settled premises place even the most promising efforts on thin ice. For the project of theorizing international criminal procedure to keep pace with the increasingly rapid evolution of its subject, it must investigate whether the premises on which the prevailing methodologies of comparative scholarship are based serve the goals of the analysis. The moment may have arrived for the study of international criminal law to try to discover the unifying purposes served by rules that, in the past, it was content with merely describing. Failure to do so would undervalue the extent to which the context of international criminal tribunals differs from that of domestic institutions. A key starting point is to evaluate the implications of the absence of a state apparatus in the context of international criminal tribunals. Once the implications of this difference from domestic institutions are better understood, it is possible to construct a procedural system that advances the unique goals of international justice by
drawing on the wisdom of the common and civil law without becoming mired in it. The contributions to this issue are an important start.