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The Ahistoricism of Legal Pluralism in International Criminal Law

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THE AHISTORICISM OF LEGAL PLURALISM IN INTERNATIONAL CRIMINAL LAW

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ABSTRACT

International criminal law ("ICL") is legally plural, not a single unified body of norms. As a whole, trials for international crimes involve a complex dance between international and domestic criminal law, the specificities of which vary markedly from one forum to the next. To date, many excellent scholars have suggested that the resulting doctrinal diversity in ICL should be tolerated and managed under the banner of Legal Pluralism. To our minds, these scholars omit a piece of the puzzle that has major implications for their theory – the law's history. Neglecting the historical context of the international and national criminal laws that inform ICL leads to the uncritical adoption of criminal law doctrine as a proxy for diverse social, cultural and political values. This, we say, is often a false equation that results in important normative distortions, with major implications for the field's self-image, function and legitimacy. In particular, scholars and courts overlook that much criminal law doctrine globally is the result of either a colonial imposition or an "unsuccessful" legal transplant. In this Article, we revisit a cross-section of this missing history to contribute to both Legal Pluralism and ICL. For the former, we demonstrate that there is nothing inherently good about Legal Pluralism,

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and that in some instances, a shift from its descriptive origins into a more normative managerialism risks condoning illegitimate law. For ICL, our historiography shows how partiality is embedded in the very substance of ICL doctrine, beyond just the politics of its enforcement. At one level, this realization opens up the possibility of renegotiating a universal ICL that is actually more plural in terms of values and interests than doctrinal pluralism. At another, it suggests that institutions capable of trying international crimes need to do far more to step away from the ugly legal history they have inherited.

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"[T]here is nothing inherently good, progressive, or emancipatory about legal pluralism."

Boaventura de Sousa Santos[1]

I. INTRODUCTION

International criminal law ("ICL") is legally plural, not a single unified body of norms. Trials for international crimes, like aggression, genocide, crimes against humanity and war crimes, take place in international and domestic courts alike, and frequently involve a complex interplay between international and domestic criminal law. This interplay, which is largely improvised rather than choreographed, takes place on at least five levels: (a) within national courts, trials involving international crimes often employ their own local criminal law standards rather than equivalents from international law;[2] (b) internationally, certain courts openly follow a single national approach to the criminal law in interpreting ICL rules;[3] (c) international courts often survey then synthesize a wide selection of national rules to demonstrate widespread support for their favored approach;[4] (d) at times, international statutes,

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[1] BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 89 (2002).

[2] Prosecutor v. Van Anraat, Judgment, District Court of the Hague, LJN: BA6734, District Court of The Hague, 09/751003-04, §6.5.1–6.6 (Dec. 23, 2005) (Neth.) (intriguingly, applying the standard of complicity in customary international law but that contained in Dutch criminal law for war crimes.) For commentary on the case, see Harmen Van der Wilt, *Genocide v. War Crimes in the Van Anraat Appeal*, 6 J. INT'L CRIM. JUST. 557–567 (2008) Sometimes, of course, the international aspects of ICL operate to preclude the application of national criminal law to war crimes. In particular, see in this regard, the decision of the U.S. Supreme Court in Hamdan to effectively strike down conspiracy as a war crime because it was not adequately recognized in the history of ICL. Hamdan v Rumsfeld, 548 U.S. 577 (2006) (writing for the majority, Justice Stevens concluded that "international sources confirm that the crime charged here is not a recognized violation of the law of war.").

[3] The most conspicuous example of this phenomenon is probably the uptake of German criminal law principles of attribution in the International Criminal Court ("ICC"), in sharp contrast with their explicit rejection at ad hoc tribunals beforehand. For a helpful doctrinal synthesis of ICC case law governing (German) modes of attribution, see WOMEN'S INITIATIVES FOR GENDER JUSTICE EXPERT REPORT, MODES OF LIABILITY: A REVIEW OF THE INTERNATIONAL CRIMINAL COURT'S CURRENT JURISPRUDENCE AND PRACTICE (2013), http://iccwomen.org/documents/Modes-of-Liability.pdf.

[4] Surveys of national criminal law have featured in all international criminal tribunals and courts to ascertain the scope of customary international law and guide hermeneutics. See, for example: the survey of conspiracy standards in France, Germany, The Netherlands,

treaties and national legislation define the same ICL concept differently,[5] and finally, (e) judicial bodies that interpret ICL occasionally openly disagree amongst themselves about the interpretation of the same body of law.[6] In combination, these improvised not choreographed dynamics make

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Japan, and Spain at the Tokyo Tribunal. R. JOHN PRITCHARD & SONIA MAGBANUA ZAIDE, 16 THE TOKYO WAR CRIMES TRIAL: PROCEEDINGS OF THE TRIBUNAL 39,036–39,037 (1981); Prosecutor v. Šainović et al., Case No. IT-05-87-A, Appeal Judgement, ¶ 1644–1645 n.5409–5419 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 23, 2014) (undertaking a very substantial survey of criminal law governing complicity in national law, including Mexico, India, Singapore, Malaysia, Indonesia, Vietnam, Laos, Hong Kong, New Zealand, South Africa, Belgian, the United States, England and others); and, Prosecutor v. Bagosora et al., Case No. ICTR-98-41-A, Appeals Judgement, ¶ 729, n.1680 (Dec. 14, 2011) (drawing on criminal law from a large number of states, including Germany, Kenya, Lithuania, Costa Rica, and New Zealand, in concluding that the desecration of a corpse "constituted a profound assault on human dignity meriting unreserved condemnation under international law."). *See also,* Prosecutor v. Fofana et al., Case No. SCSL-04-14-T, Judgment, ¶ 178 n.222. (Aug. 2, 2007) (surveying the criminal law applicable in France, Italy, Argentina, Egypt, Bolivia and elsewhere in defining the war crime of collective punishments). Interestingly, the ICC has cited other surveys of national law undertaken in other international tribunals. *See*, Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06, Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial, ¶ 29 (Nov. 30, 2007) (stating that "the practice of familiarizing witnesses with the courtroom and the procedures which they will encounter… is documented in many national and international contexts," then citing surveys undertake by the ICTY for support). These comparative law surveys are also a powerful basis for dissent. *See e.g.* Prosecutor v. Thomas Lubanga Dyilo, No. ICC-01/04-01/06, Decision on Victims' Participation, Separate and Dissenting Opinion of Judge René Blattmann, ¶ 26 n.13 (Jan. 18, 2008) (drawing on criminal procedure from Germany, France, Argentina, Peru, Chile, Ireland and Canada to criticize the majority's position on victim participation).

[5] Crimes against humanity and genocide are prime examples. With respect to the former, the Statutes of International Criminal Tribunal for the former Yugoslavia ("ICTY") differs from that pertaining to its sibling the International Criminal Tribunal for Rwanda, which differs again from that enacted in their cousin institution, the International Criminal Court ("ICC"). For a thorough comparison of the development of these principles, see CHRISTINE BYRON, WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2009). As for genocide, national rules criminalizing the offense often extend the ambit of the crime beyond just the form protected groups announced in the Genocide Convention itself. For an excellent survey of examples, *see* WARD FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 23–29 (2006).

[6] Sometimes, international statutes differ. Crimes against humanity, for instance, are defined differently in at least three different international courts. In other circumstances, international courts and tribunals reach contrary conclusions on questions of law their statutes leave unresolved. For example, the famed *Tadić* Judgment concluded that an extended version of a concept called Joint Criminal Enterprise ("JCE") was well-founded in customary international law. Prosecutor v. Tadić, Case No. IT-94-1-A, Appeals Judgment, (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999), ¶ 185–229. Over a decade later, however, the Extraordinary Chambers in the Courts of Cambodia

ICL a doctrinally plural normative inter-penetration between multiple national and international systems of criminal law, not a unified singularity. The question is: is the resulting doctrinal diversity desirable for ICL?

Over the past decade, Legal Pluralism has emerged as a prominent analytical lens that, with caveats, tends to answer in the affirmative.[7] In his remarkable work *Global Legal Pluralism*, for instance, Paul Berman offers a balanced catalogue of the strengths and weaknesses of universalism: the idea that we should fashion a more uniform single set of international standards from the existing variety. Berman concludes that, "there are reasons to question both the desirability and—more importantly—the feasibility of universalism, at least in some contexts."[8] Chief among his objections is that "universalism inevitably erases diversity."[9] Extrapolating this idea onto ICL, Alexander Greenawalt eloquently argues that Legal Pluralism leads to the conclusion that "it is not self-evident that international criminal law must take the form of a uniform, all-encompassing body that trumps contrary domestic laws in every instance".[10] Similarly, others have argued that even international

("ECCC") openly begged to differ. Ieng Sary et al., Case File No. 002-19-2007-ECCC/OCIJ (PTC38), Decision on the Appeals against the Co-Investigative Judges Order on Joint Criminal Enterprise (JCE), (10 May 2010), ¶ 83 (concluding that the Court "does not find that the authorities relied upon in *Tadić*... constitute a sufficiently firm basis to conclude that JCE III formed part of customary international law"). These contrasting interpretations can even involve three ways splits that include other international institutions that apply public international law rather than criminal law per se. The International Court of Justice, for instance, has adopted a definition of pillage that is inconsistent with that announced in the ICC Elements of Crimes, and to compound matters, the ICTY has adopted a third variant. JAMES G. STEWART, CORPORATE WAR CRIMES: PROSECUTING PILLAGE OF NATURAL RESOURCES 19–23 (2010), http://ssrn.com/abstract=1875053.

[7] See, in particular, PAUL SCHIFF BERMAN, GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS (2012); Ralf Michaels, *Global Legal Pluralism*, 5 ANNUAL REVIEW OF LAW AND SOCIAL SCIENCE 243 (2009); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869 (1988); William Burke-White, *International Legal Pluralism*, 25 MICH. J. INT'L L. 963 (2003); Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 305 (2012).

[8] Paul Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1191 (2007). Consequently, Berman continues to offer a set of procedural mechanisms, institutional designs and discursive practices for managing hybridity.

[9] *Id.* at 1191. In fairness to Berman, he cites this as just one factor that might make universalism undesirable, and rightly points to the fact that even if this is not the case in discrete areas, managing hybrid/conflictual systems of law will be essential in periods of transition to a universal standard, if one is feasible at all.

[10] Alexander K. A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1069 (2011).

legal institutions need not pursue uniformity,[11] and ultimately, that for ICL in particular, "[l]egal pluralism can even be regarded as an asset, a strength."[12]

Presumably, the desire to preserve cultural variety plays a key role in this rebuke of universalism. We should let be the variety of criminal laws governing, say, perpetration of international crimes in the many legal systems of the world, not unify them in an objectionable act of legal eugenics. In the oft-cited words of Montesquieu, laws "should be adapted in such a manner to the people for whom they are framed, that it is a great chance if those of one nation suit another."[13] Isaiah Berlin, in turn, warns that "there is no single set of principles, no universal truth for all men and times and places", and universalism represents nothing more than a vain and destructive search for the "ideal society."[14] For leading criminologists too, punishment "is necessarily grounded in wider patterns of knowing, feeling, and acting, and it depends upon the social roots and supports for its continuing legitimacy and operation."[15] As a result, we read these

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[11] Carsten Stahn & Larissa van den Herik, *'Fragmentation', Diversification and '3D' Legal Pluralism: International Criminal Law as the Jack-in-the-Box?, in* THE DIVERSIFICATION AND FRAGMENTATION OF INTERNATIONAL CRIMINAL LAW 21, 51 (Carsten Stahn & Larissa van den Herik, eds., 2012) (arguing that "it might even be acceptable that the ECtHR and the ICTR would come to different results and conclusions in cases that display factual similarity, since both entities operate on the basis of different mandates and legal frameworks").

[12] Elies van Sliedregt, *Pluralism in International Criminal Law*, 25 LEIDEN J. INT'L L. 847, 849 (2012). Admittedly, not all writing about Legal Pluralism in ICL follows this line. We agree, for instance, with Maxime Clarke when she writes that "global legal pluralism...must move beyond legal pluraism to attend to the complexities of power at play and the ways that force and power cut through even pluralist constellations." KAMARI MAXINE CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA (CAMBRIDGE STUDIES IN LAW AND SOCIETY) 118 (2009).

[13] CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 9 (1773).

[14] ISAIAH BERLIN, THE CROOKED TIMBER OF HUMANITY 224 (1992) ("If each culture expresses its own vision and is entitled to do so, and if the goals and values of different societies and ways of life are not commensurable, then it follows that there is no single set of principles, no universal truth for all men and times and places. The values of one civilization will be different from, and perhaps incompatible with, the values of another. If free creation, spontaneous development along one's own natives lines, not inhibited or suppressed by the dogmatic pronouncements of an elite of self-appointed arbiters, insensitive to history, is to be accorded supreme value; if authenticity and variety are not to be sacrificed to authority, organization, centralization, which inexorably tend to uniformity and the destruction of what men hold dearest — their language, their institutions, their habits, their form of life, all that has made them what they are — then the establishment of one world, organized on universally accepted rational principles — the ideal society — is not acceptable.").

[15] DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 21 (2002). *See also* Joachim Vogel, *Why is the harmonisation*

scholars as urging us to embrace the heterogeneity of criminal doctrine that presently couples with international crimes out of respect for cultural diversity.

Having accepted this supposition as a point of departure, our priorities should shift to what private international lawyers would call "choice of law," where comity dictates that legal systems pay due respect to one another's legal doctrine by peaceably resolving conflicts based on preordained second-order rules. Perhaps cases involving international crimes occasioned in the Congo should involve Congolese notions of complicity, whereas international crimes carried out in the United States could draw on rules indigenous to that culture? When Americans are complicit in atrocities in the Congo, we look to a second set of standards at a higher level of abstraction to resolve the doctrinal discord at the lower. All the while, Legal Pluralists tend to dismiss as either culturally intolerant or politically impracticable what early comparativists called *un droit commun de l'humanité*.[16] We cautiously take issue with this reasoning and the extensive body of literature that has emerged around it, using ICL as our subject and history as our methodological foil.

We do this by disputing the underlying assumption that doctrine is necessarily a dependable measure of cultural diversity.[17] To our minds, entertaining this assumption of global criminal law risks confirming Markus Dubber's concern that "the study of comparative criminal law can be oddly ahistorical."[18] What, for instance, of the influence of colonialism on criminal doctrine throughout a large portion of the world?[19] Indeed, the very notion of Legal Pluralism first arose as a means of describing normative interplay between the system of law forcibly imposed by

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of penal law necessary? A Comment, *in* HARMONISATION AND HARMONISING MEASURES IN CRIMINAL LAW 55, 55 (André Klip & Harmen van der Wilt eds., 2002) (it "has national and cultural roots and is part of the identity of a nation, its society and its culture.").

[16] KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 3 (1998). For contemporary comparative work that picks up on this theme, see MIREILLE DELMAS-MARTY, TOWARDS A TRULY COMMON LAW: EUROPE AS A LABORATORY FOR LEGAL PLURALISM (2007).

[17] Others have made the law-culture connection more explicit. *See, e.g.*, Sarah Harding, *Comparative Reasoning and Judicial Review*, 23 YALE J. INT'L L. 409, 411 (2003) ("Legal systems reflect the cultures within which they are situated and thus have unique and highly contingent identities").

[18] Markus Dubber, *Comparative Criminal Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1287, 1291 (Mathias Reimann & Reinhard Zimmermann eds., 2008).

[19] For a detailed history of the relationship between colonialism and law, see LAUREN A. BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400 - 1900 (2010).

colonial masters and the indigenous social order it purported (often unsuccessfully) to displace.[20] Surely the various criminal doctrine imposed during colonial rule would have no automatic claim to reflect societal values in the territories they still apply in; in fact, one might suspect the opposite.[21] Though there may be some places and some histories in which cultural values have come to match these transplanted criminal doctrines, much as some formerly colonized countries have adopted cricket as part of their national identity,[22] it is not the case that this equivalence necessarily follows. In this respect, scholars of ICL should be mindful of Martti Koskenniemi's warning that one of the dangers of reifying doctrinal pluralism is that "it ceases to pose demands on the world."[23]

To substantiate the point using ICL, we pair the history of four doctrines in national criminal law with the history of corresponding international equivalents. We have divided the criminal doctrine we select by type. We focus first on procedure, followed by inchoate crimes, forms of responsibility and criminal offenses. As for national examples, we have attempted to select examples from all major colonial traditions: the Spanish influence over criminal procedure in Argentina, the French influence (via Belgium) over the inchoate offense of *association de malfaiteurs* in the Democratic Republic of Congo, the collective influence of European colonial powers that led Japan to absorb German criminal doctrine governing modes of participating in crime like complicity, and finally, the distorting character of English criminal law governing the crime of blasphemy in Pakistan. For the international counterpart, we seize upon similar doctrine at each historical major interval of ICL: the procedure developed after WWI to try German war criminals at Leipzig, the controversial adoption of conspiracy as an inchoate offense at Nuremberg and Tokyo post-WWII, the rise of Joint Criminal Enterprise (JCE) as a mode of participation at ad hoc tribunals in the 1990s, culminating in the failure to create a crime of colonialism or define apartheid in a way that accorded with its natural meaning in the ICC

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[20] Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 872 (1988) (distinguishing "Classic Legal Pluralism", which involved dual legal systems when European countries superimposed their legal systems, from "New Legal Pluralism" that arises since the 1970s in noncolonized societies).

[21] On this point, discussing so-called 'primitive legal systems', see JEREMY WALDRON, PARTLY LAWS COMMON TO ALL MANKIND 210 (2012) ("Anthropologists and philosophers with a culturalist axe to grind sometimes exaggerate the self-contained purity of these systems").

[22] We are grateful to Antony Anghie for the point.

[23] Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 23 (2007).

Statute, despite concerted attempts. The analysis produces a loose typology of ways in which legal doctrine is not a reliable referent for cultural diversity Legal Pluralism ought to champion.

In Part II, we commence this undertaking by highlighting the exception whereby a criminal doctrine imposed by a colonial master is consciously reconsidered, reformed and reabsorbed into a genuinely autonomous legal system. Drawing on excellent work on the progeny of Argentine criminal procedure, we show how this example may personify Antony Anghie's cricket metaphor—instances where previously colonialized peoples embrace an alien introduction and call it their own. We lead with this Argentine example since it creates something of a null hypothesis for our subsequent case studies: in all the other examples we study, we very much doubt that the cricket metaphor holds. By beginning with the counterexample, however, we emphasize that connections between popular values and criminal doctrine in previously colonialized societies do exist; we simply express great caution about making the assumption categorical, and note that in certain contexts, it is unquestionably false. Moreover, we go on to use the experience at Leipzig post WWI to qualify our null hypothesis from the outset with one additional observation—many international trials will involve political and cultural values that transcend any one community. As we show, the criminal procedure applicable in Leipzig after WWI was a key feature of the trials' alienating characteristics for relevant audiences in France, Belgium and Britain, and competing values led in at least three of these states led them to employ particular criminal law procedures to pursue their hostile agendas towards one another post Versailles. Thus, even if the German criminal procedure used at Leipzig did reflect German values, it is not only these values that matter. Together, our analyses of criminal law doctrine in Argentina and Leipzig set the stage for all of the investigations that follow.

In Part III, we discuss inchoate crimes in the DRC and post-WWII tribunals to illustrate the first variant in our typology of how doctrine is not a safe metric for value pluralism—criminal law is often part and parcel of the violent repression ICL exists to counteract. This unfortunate reality undermines doctrine's credentials as a medium for expressing cultural diversity worth preserving. It was, after all, criminal doctrine in national systems that allowed Joseph Stalin to sign 3,167 judicially-imposed death sentences in a single day,[24] and Adolf Hitler to make being Jewish a

[24] At a rate of more than one every two minutes. RICHARD VOGLER, A WORLD VIEW OF CRIMINAL JUSTICE 74 (2005). According to Vogler's harrowing account, a single court court tried and sentenced 551 individuals to death in October 1928 alone, contributing to over a million judicially imposed executions over the period.

criminal offence.[25] Undoubtedly, most contemporary criminal law is not operating in a political climate remotely comparable to the Red Terror or National Socialism, but like many aspects of extreme violence, these episodes of frightening excess teach lessons that still resonate: relying on a formalistic notion of law as a Polaroid image of cultural values within the surrounding community is unsafe; sometimes law and culture coincide, but the correspondence is hardly guaranteed or dependable. Moreover, regardless of whether law represents widespread local cultural values or not, we may wish to repudiate it in certain circumstances. Our example of the inchoate offense of *association de malfaiteurs* in the DRC evidences this phenomenon very concretely, and although conspiracy's record in post-war tribunals is more ambiguous, it too demonstrates points of continuity with an oppressive style of criminal justice.

In Part IV, we speak to the transmission of European models of blame attribution into Japanese criminal law in the nineteenth century and into ad hoc international criminal tribunals in the twentieth. In our typology's second limb, we observe how, even outside colonial contexts, much criminal doctrine is mass-produced far away, not tailored locally.[26] The literature on legal transplants is voluminous,[27] but somewhat strangely, it tends to focus on private law exclusively, even though the criminal law undeniably ranks among the branches of law most regularly uprooted then re-sown in foreign lands.[28] The point is, for better or worse, scholars tend to agree that legal transplants of these sorts seldom "work." While there are important exceptions – and we argue that criminal procedure in Argentina is one such example[29] – extensive empirical

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[25] *Id.* at 85, (citing a letter from the Reich Minister of Justice stating that "[i]n criminal proceedings against Jews the decisive fact is their Jewishness rather than their culpability.").

[26] For an important exception in criminal procedure, see Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1 (2004).

[27] The locus classicus is ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974). For an extremely impressive earlier work, that treated law less specifically as a component of sociological imitation across cultures generally, see GABRIEL DE TARDE & ELSIE WORTHINGTON CLEWS PARSONS, THE LAWS OF IMITATION (1903), http://archive.org/details/lawsofimitation00tard (last visited Aug. 16, 2013).

[28] Those authors who do write on comparative criminal law frequently decry the failure to consider criminal law as part of this process. *See* Elisabetta Grande, *Comparative Criminal Justice*, *in* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 191, 191 (Mauro Bussani & Ugo Mattei eds., 2012) (calling comparative criminal law's history "a past of oblivion," because of this lack of engagement within the wider comparative project); Dubber, *supra* note 18, at 1288 (lamenting that "[t]extbooks on comparative law feel no need to address, or even acknowledge the existence of, comparative studies in criminal law.").

[29] *See* Part II.A, *infra*.

analyses classify the bulk of legal transplants as "unreceptive," meaning that the recipient society is "unable to give meaning to the law."[30] If this is true of German notions of complicity forcibly introduced into Japan or of Anglo-American notions of JCE infused into ICL through ad hoc tribunals, it would be bizarre (to say the least) for ICL courts and scholars to ascribe meaning to a maladjusted foreign criminal doctrine, when affected populations in the recipient state cannot.

In Part V, we focus on the criminal offense of blasphemy in Pakistan, which is actually a relic of criminal laws first introduced by the English, and then consider failed attempts at making colonialism a crime in the ICC Statute. These examples present the third variant of our typology. As Günther Teubner has famously argued, legal transplants are often better described as "legal irritants,"[31] given that they are "not transplanted into another organism, rather [they work] as a fundamental irritation which triggers a whole series of new and unexpected events."[32] By extension, we argue that the Islamization of British criminal law in Pakistan, and in particular the crime of blasphemy, is one example of an irritant that spawns unintended and unwelcome downstream consequences. Originally intended to manage inter-religious conflict, blasphemy instead became a tool for cruelly exploiting that tension. We pair Pakistan's experience of blasphemy with attempts to criminalize colonialism and apartheid in the Rome Statute of the ICC. That process largely inverts the Pakistani experience. Whereas the criminalization of blasphemy was fuelled by the colonial domination of the Indian subcontinent, the criminalization of colonialism, apartheid and other conduct was arguably suppressed by Western domination of international lawmaking. As a result, we use blasphemy to caution, first, against ICL bowing to transplanted domestic criminal doctrine that is an outright nuisance locally. Doing so may not only fail to add meaningful diversity, it may add insult to injury. Second, we highlight how the demands for pluralism in ICL bely the neo-colonial reality of a lawmaking system where "legal irritants" are redefined as norms that would expose powerful states representatives to criminal liability.

Finally, although constraints on length have precluded including an illustration of the fifth and final element of our typology, in our view, an unconditional deference to criminal doctrine in Global Legal Pluralism would unjustifiably marginalize alternative systems of social ordering. As

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[30] Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 179, 179 (2003).
[31] Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).
[32] *Id.* at 12.

previously mentioned, Legal Pluralism was initially purely descriptive, attempting to plot the interactions between displaced social orders and formal colonial law.[33] To the extent that it took on a normative bent, this largely grew out of challenges to methodology; i.e. objections to what should figure as "law" within the wider sociological inquiry. Having understandably dispensed with state-sanctioned law's claims to a monopoly over law, early adherents of Pluralism looked to a wider array of social mores.[34] As Brian Tamanaha intimates, this certainly raises thorny questions about what might count as "law",[35] but even if no completely satisfying answer to that question is ever forthcoming, the very existence of the debate delivers a powerful blow to doctrinal pluralism within a global polity: an over-emphasis on domestic criminal doctrine is anathema to true pluralism, whose very program involves looking beyond positivistic state-centered law. Although we do not develop a case study to emphasize the point here, it also militates against equating doctrine with the popular values that would really matter to a normative account of Legal Pluralism.

We view our primary contribution as involving Legal Pluralism itself, but we also conclude by highlighting the great significance of this history for ICL, too. First, our analysis provides a concrete illustration of Boaventura de Sousa Santos's famous (but abstract) statement "there is nothing inherently good, progressive, or emancipatory about Legal Pluralism."[36] Second, we show that ICL's partiality does not just manifest at the level of enforcement, it is more deeply embedded in the very substance of ICL norms themselves. Third, once the false equivalence between criminal doctrine and pluralism is acknowledged and withdrawn, it clears the ground for pluralism by unification. Might it not be possible for a unified system of law governing ICL to promote a genuine plurality of *values*?[37] Why, in other words, limit our gaze to existing laws (even

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[33] William Twining calls this mode of Legal Pluralism "Social Fact Legal Pluralism." We agree with him that "there is a tendency in the literature to slide from the descriptive to the prescriptive." William Twining, *Legal Pluralism 101*, *in* LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE (Brian Z. Tamanaha, Caroline Sage, & Michael Woolcock eds., 2012). Our concern is only with this prescriptive aspect of the discourse.

[34] As Tamanaha puts it, "[l]aw characteristically claims to rule whatever it addresses, but the fact of legal pluralism challenges this claim." Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 375 (2008).

[35] *Id.*

[36] S*upra* note 1.

[37] In the context of women's rights, for instance, Martha Nussbaum has offered a compelling marriage of pluralism within a universal philosophical construct. See MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 60 (1st Edition ed. 2001) ("We have some good reasons already, then, to

broadly defined) as objects for protection, when a wide variety of scholars accept that diversity of cultural *values* and *political interests* are our real concern?[38] For instance, referring to the "universal structure of criminal law" as an "antidote" to the sorts of positivist arguments that reify domestic criminal doctrine, George Fletcher writes that "resolutions on the surface of the law should not obscure the unity that underlies apparently diverse legal cultures."[39] Although we do not suggest the content of this unity here, we do test apparently diverse legal cultures in the hope of opening up greater space for the idea that a single universal norm may enjoy stronger credentials in (value) pluralism than the variety of standards in existing doctrine.[40] Fourth, recognition of the histories of coercion and suppression that are woven throughout our analysis suggests that ICL institutions and practitioners have a real moral obligation to redirect their energies towards enforcing international crimes in ways that better address Third World interests, as a collective responsibility for the past.

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think than universal values are not just acceptable, but badly needed, if we really are to show respect for all citizens in a pluralistic society." For other qualified defenses of universalism, *see also* Ralf Michaels, *"One Size Can Fit All" - On the Mass Production of Legal Transplants*, *in* ORDER FROM TRANSFER: COMPARATIVE CONSTITUTIONAL DESIGN AND LEGAL CULTURE Forthcoming (2013); MIREILLE DELMAS-MARTY, TOWARDS A TRULY COMMON LAW: EUROPE AS A LABORATORY FOR LEGAL PLURALISM (2007). We anticipate the possibility of something similar for ICL, although in which aspects and how is beyond the scope of this research.

[38] *See* Isaiah Berlin, *Liberty, in* LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 216 (Henry Hardy ed., 2002) ("Pluralism, with the measure of 'negative' liberty that it entails, seems to me a truer and more humane ideal…because it does, at least, recognize the fact that human goals are many, not all of them commensurable, and in perpetual rivalry with one another"); ANDREI MARMOR, LAW IN THE AGE OF PLURALISM 49 (2007) (also referring to "value pluralism" as the core objective); JOHN KEKES, THE MORALITY OF PLURALISM 210 (1993) (same); and Emmanuel Melissaris, *The More the Merrier? A New Take on Legal Pluralism*, 13 SOC. & LEG. STUD. 57, 72 (2004) (same).

[39] GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 5 (1998).

[40] As a practical matter, several scholars already acknowledge that some degree of harmonization may be desirable in certain areas of ICL. For instance, some writers who generally favor pluralism have also moved toward universalizing the general part of ICL. *See* Van Sliedregt, *supra* note 12, at 852 ("Accepting pluralism at national level does not disqualify the need for a general part at the *international* level."). While aware of the risks of large-scale standardization (see, e.g. Kevin E. Davis, *Legal Universalism: Persistent Objections*, 60 U. TORONTO L.J. 537, 541 (2010) ("In short, therefore, the main objections to universalistic legal theories are that they cannot accommodate variations across societies in either conceptions of development or the presence of substitutes or complements for the components of the legal system upon which they focus"), some harmonization in certain areas of ICL can offer benefits. See James G. Stewart, *Ten Reasons for a Universal Concept of Participation in Atrocity*, *in* PLURALISM IN INTERNATIONAL CRIMINAL LAW 320 (Elies van Sliedregt & Sergey Vasiliev, eds., 2014).

II. PROCEDURE

Note to reader: We are in the process of finalizing our writing of this part. For the purposes of this draft, we have only included a much shorter skeleton of our larger argument. We have therefore highlighted this Part in grey to emphasize our very preliminary treatment in this version. By contrast, the remaining parts of the Article are complete.

Overall, our thesis is that criminal law doctrine is a poor guarantor of political, cultural and value pluralism globally. It bears repeating, however, that our goal is not to show that legal systems *never* reflect local values. That claim is not necessary for our argument, and indeed, it would be the inverse of the categorical assumption we resist throughout the Article. While the legal pluralist arguments we reference assume that legal and cultural values always parallel one another, our position is that any such correspondence is coincidental and unpredictable, not automatic. In this Part, we develop an example where there does appear to be strong evidence of a national criminal law that is the product of deliberate, voluntary, local design, despite a history of colonial imposition at its founding. In particular, the history of the unique and eclectic brand of criminal procedure developed in Argentina post Spanish colonialism points to an active, ongoing and conscious process of deliberate legal redesign. Thus, Argentine criminal procedure operates as a null hypothesis for the remainder of the article; we argue that almost none of our other examples demonstrate this same degree of independent local consent in the various criminal doctrines we explore. Put differently, Argentine criminal procedure acts as the exception that establishes the rule we point to elsewhere. Having discussed our paradigm case of local assumption then modification of a (Spanish) colonial inheritance, we immediately problematize this as a model for ICL by assessing the role of German criminal procedure in the Leipzig trials post WWI. In this our example from ICL, we show how doctrine that only reflects the political or cultural values of a single polity can often lead to what French statesman Aristide Briand once called " a parody of justice."[41] When multiple polities were so keenly interested in this justice, it proved woefully sufficient that German criminal procedure was native to Germans. We expand on both points in abrogated form below.

[41] *Id.* at 136.

A. Procedural Eclecticism in Argentina

The Spanish criminal procedure imposed on Argentina was the inquisitorial process found throughout Spanish colonies.[42] Promulgated and given force in the 14th century,[43] the code persisted until the swell of Argentine independence in 1816,[44] which sparked a long series of legal and political changes, including the drafting of several constitutions. In 1853, Argentina finally approved a constitution that was explicitly based on the United States Constitution.[45] In fact, the American constitutional model had been preferred to continental options because of its procedural guarantees on the separation of powers.[46] Then, faced with the choice of joining that trend or adapting Spanish law,[47] Argentine élites rejected the liberalism of Europe.[48] The first national criminal procedure code of 1887

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[42] OSVALDO BARRENECHE, CRIME AND THE ADMINISTRATION OF JUSTICE IN BUENOS AIRES, 1785 – 1853, 10 – 11 (2006). As with other colonial transpositions, this Spanish law was formalized in a voluminous code cultivated from numerous regional, religious and cultural sources, including the ecclesiastical laws of the Catholic Church, local custom, regional sources and Spanish kingdoms, previous attempts at codification, Justinian's Roman code, the Moors, the Visigoths, and Italian scholarship. Helen Clagett, *Las Siete Partidas*, 22 Q. J. LIBR. CONGRESS 341, 342 (1965). The codification process was started by King Alfonso X of Spain in the late 13th century; The King was carrying on a project started by his father. Charles Sumner Lobingier, *"Las Sietes Paratidas and its Predecessors"*, 1 CALIF. L. REV. 487, 488 – 489 (1912 − 1913).

[43] Lobingier, *supra* note 42, at 491.

[44] With the addition of special legislation developed to account for the presence of indigenous peoples in the Spanish colonies in the Americas. *See* Clagett, *supra* note 42.

[45] REBECCA BILL CHAVEZ, THE RULE OF LAW IN NASCENT DEMOCRACIES 30 (2004) (According to one delegate at the constitutional convention, "[The Argentine Constitution] is modeled on that of the United States, the only federation in the world which is worthy of being copied").

[46] Yet these guarantees often remained illusory in Argentina as informal practices allowed the executive branch to subordinate the judicial. *Id.* This problem continued into the present day. Carlos Menem's expansion of the Supreme Court from five to nine judges was widely recognized as means of ensuring the court - now stacked with judges who owed their positions and loyalty to Menem - would rubber-stamp instead of contesting the acts of the executive branch. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 865 (2003).

[47] Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 627 (2007).

[48] KRISTIN RUGGERIO, MODERNITY IN THE FLESH: MEDICINE, LAW, AND SOCIETY IN TURN-OF-THE-CENTURY ARGENTINA 189 (2004), ("In spite of the criticism of Argentine judicial practices, congressional opposition to the jury system remained firm. The opposition was mainly based on a lack of confidence in Argentine character and level of civilization"). *See also* Langer, *supra* note 47, at 628, citing Andres D'Alessio, *The Function of the Prosecution in the Transition to Democracy in Latin America, in*

was therefore more conservative, but it was immediately challenged for being outdated.[49] The disagreement led to at least six separate revisions of the code over the ensuing decades,[50] and finally in 1921, a compromise code that drew from all its predecessors.[51] This conservative/liberal oscillation continued for decades later.[52] During WWII, a more liberal procedural code took root in the province of Cordoba and soon spread to half the country.[53] This Cordoba Code drew heavily from Italian criminal law and made important alterations to the relatively sparse set of due process rights that remained from the Spanish inquisitorial regime.[54] These changes did not immediately affirm civil liberties, however, as the country was repeatedly overwhelmed by coups and military juntas that, emboldened by support from the judicial branch,[55] gave little effect to the procedural reforms or simply ignored them.[56] With the end of dictatorship,

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TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (Irwin P Stotzky, ed., 1993).

[49] Ferrante, *supra* note **Error! Bookmark not defined.**, at 13.

[50] Taking place in less than 35 years. JULIA RODRIGUEZ, CIVILIZING ARGENTINA: SCIENCE, MEDICINE, AND THE MODERN STATE 203 (2006). These revisions were based on at least four separate northern European penal codes - Germany, Austria, Sweden, and Switzerland. *See* Edmund H Schwenk, *Criminal Codification and General Principles of Criminal Law in Argentina, Mexico, Chile, and the United States: A Comparative Study*, 4 LA. L. REV. 351, n1 (1941 − 1942). *But see* Ferrante, *supra* note **Error! Bookmark not defined.**, at 13 (arguing that the most influential code was actually the Italian Criminal Code of 1889).

[51] Approved in 1921. Ferrante, *supra* note **Error! Bookmark not defined.**, at 13.

[52] A similar process can be seen in respect of Argentina's transition from military rule. *See* Francesca Lessa, *Transitional Justice in Argentina (1983 – 2012): A Global Protagonist with Its Ups and Downs, in* MEMORY AND TRANSITIONAL JUSTICE IN ARGENTINA AND URUGUAY: AGAINST IMPUNITY 49 (2013) (transitional justice mechanisms shifted from a middle ground approach of truth commissions, to one extreme (amnesties and pardons), then to another (the annulment of those same processes) in the course of two decades).

[53] Between 1941 and 1971, 12 (of 23) provinces adopted the Cordoba Code. Langer, *supra* note 47, at 634 – 636.

[54] *Id*.

[55] *See, e.g.*, Barreneche, *supra* note 42, at 119 ("This resolution [of the Supreme Court] established jurisprudence legitimizing military interruption of the constitutional order, something that became rather frequent in the history of Argentina during the twentieth century.").

[56] Two of the modern military juntas were particularly notorious. *See* THOMAS E SKIDMORE & PETER H SMITH, MODERN LATIN AMERICA 99 (3d ed., 1992) ("[The] Ongania coup began in violence and the victorious military immediately made clear that all normal legal guarantees were suspended"); MERCEDES S HINTON, THE STATE ON THE STREETS: POLICE AND POLITICS IN ARGENTINA AND BRAZIL 18 (2006) (describing the 'dirty war' from 1976 − 1983, in which up to 30,000 persons were killed or disappeared as follows: "The military suspended all civil liberties and, with police collaboration, persecuted and tortured anyone suspected of 'subversion'"). The juntas established

Argentine criminal procedure underwent another set of reforms,[57] culminating in yet another Draft Code, this time based on the Cordoba Code and German law.[58] Most recently, the Argentine government initiated far-reaching reforms to the code of criminal procedure that moved the criminal justice system from a European-style inquisitorial procedure to an American-style adversarial system.[59] We argue that this history comes closest to evidencing a congruence between criminal doctrine and local values. Nonetheless, we argue throughout that it is the exception not the rule, and as the Leipzig trials establish just as importantly, the local values of a single constituency are unlikely to represent the full spectrum of political interests in many ICL trials.

B. Procedural Conflict in the Leipzig Trials After WWI

Between 1921 and 1927, the Reich Court at Leipzig opened some 1,700 investigations into German war crimes carried out during the Great War.[60] The backstory to these trials is a matter of enormous political

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parallel justice systems and also began shifting the regular criminal law system away from its liberal leanings. *See* ANTHONY W PEREIRA, AUTHORITARIANISM AND THE RULE OF LAW IN BRAZIL, CHILE, AND ARGENTINA 119, 121 − 125, and 133 – 134 (2005) (noting that the Ongania coup introduced a National Penal Court, in order to bypass the ordinary judicial system. Legal repression was more extensive during the 'dirty wars' of 1976 − 1983: special military courts practiced secret trials with secret evidence; "civilian courts denied writs of habeas corpus and served as a cover for state terror"; and, the penal code was changed to reintroduce the death penalty (first abolished in 1921), allow indefinite detention of political prisoners without charge, and to increase punishments for public order offences).

[57] *See* Gregory W O'Reilly, *Opening Up Argentina's Courts*, 80 JUDICATURE 237, 239 (1997).

[58] The author of the code, Julio Maier, had studied under Sebastian Soler (the drafter of the Cordoba Code) and in Germany. The 1986 draft introduced five major reforms: open trials in a mixed court of lay people and judges; granting accused the right to know the charges and evidence against them, to have an attorney, to gather evidence, and to seek pre-interrogation legal advice; the elimination of automatic pretrial detention; transferring pre-trial investigation to the prosecutor, not judges; and mechanisms for avoiding the compulsory prosecution of all crimes. Elements of this draft were built into the national criminal procedure code in 1992. Langer, *supra* note 47, at 638 − 640.

[59] Graciela Rodriguez-Ferrand, *Argentina: Reform of Code of Criminal Procedure*, LIBRARY OF CONGRESS GLOBAL LEGAL MONITOR, December 16, 2014, *available at* http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404230_text (last visited 22 January 2015).

[60] GERD HANKEL, THE LEIPZIG TRIALS: GERMAN WAR CRIMES AND THEIR LEGAL CONSEQUENCES AFTER WORLD WAR I 6 (2014). The Reich Court and Prosecutor dealt with hundreds of trials, but only 17 resulted in oral hearings. *Id.* at 65. For a helpful

intrigue,[61] commencing with wartime warnings that paralleled those issued from London during WWII, such as a notice issued by the French government on 5 October 1918 declaring that "acts so contrary to International law, and to the very principles of human civilization, should not go unpunished."[62] Indeed, in contrast with his more famous posture after WWII, where he called for summary executions of Nazis, Winston Churchill was a staunch advocate of criminal prosecutions in the aftermath of WWI.[63] The Allies quickly backed down from their demand that Germany extradite literally thousands of their officers, of low and very high rank alike, to Allied courts (and Kaiser Wilhelm to an international equivalent) when it became apparent that doing so may lead to a mutiny within the army that would topple a very fragile German government,[64] thereby further destabilizing a decimated Europe. Consequently, the Allies permitted German courts to try their own nationals, using German criminal law and procedure for the task.[65] At least part of the problem was

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breakdown of all the allegations by charge, see JOHN HORNE & ALAN KRAMER, GERMAN ATROCITIES 1914: A HISTORY OF DENIAL 342–343 (1st edition ed. 2001).

[61] Several scholars have offered insightful overviews of these politics. See in particular, Jürgen Matthäus, *The Lessons of Leipzig: Punishing German War Criminals after the First World War*, *in* ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES 3–23 (Patricia Heberer & Jürgen Matthäus eds., 2008); GARY BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS (2002); WILLIS, *supra* note 44; HORNE AND KRAMER, *supra* note 2; Gerd Hankel offers by far the most detailed historical account of the politics behind and within the Leipzig trials. See HANKEL, *supra* note 1.

[62] CLAUD MULLINS, THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY 5 (1921). General von Lüttwitz, who controlled Berlin at the time, reported that if the government accepted extradiction, there was an "urgent danger… that the officer corps would mutiny." HORNE AND KRAMER, *supra* note 60 at 337. Evidently, the government was prepared to countenance this possibility by adopting a "policy of catastrophe," whereby its collapse provoked revolution in Allied countries too who had no appetite for a return to war, bringing down the enemy with it to. *Id.* at 335.

[63] Hankel cites Churchill as declaring that "individuals against whom definitive breaches of the laws of war and humanity can be brought, particularly those who have been guilty of cruelty to helpless prisoners, must be brought to trial, and if convicted must be punished as they deserve, no matter how highly placed". *Id.* at 14. citing "Germany Must Pay" in James (ed), Winston D. Churchill, p. 2645.

[64] *Id.* at 337.

[65] On 18 December 1919, the German National Assembly adopted a "Law on Prosecution of War Crimes and War Offenses," which incorporated international law on the subject into German criminal law and extended German jurisdiction extraterritorially. HANKEL, *supra* note 60 at 45 ("The law to be applied by the Reich Court in individual cases was in every case to be German law, including the 'recognized rules of the laws of nations' within the meaning of Article 4 of the Weimar Constitution."). Although this option was probably the only one available, there was also a certain logic to it. As the British Attorney General remarked at the time, "[i]f the trials had taken place in London, the

that this procedure was highly alienating to audiences outside Germany. While German criminal procedure mimicked Argentine insofar as, historically speaking, it was a "conglomeration of various heterogeneous parts,"[66] one of the English lawyers sent to observe the trials remarked that "[t]his procedure will strike every English lawyer as strange and dangerous."[67]

Aside from these basic legal differences, a supplementary law passed in Germany in May 1921 added a novel procedural rule that allowed the prosecutor at Leipzig to bring a case even if there was insufficient evidence to support a conviction.[68] As the leading commentator on these trials has observed, "[t]his new deviation from German criminal procedure made it possible for the Reich Prosecutor, in any case in which he found it desirable for any reason, to go public, knowing full well that a demonstration of German innocence and a 'first rate acquittal' could be expected."[69] After initial cases gave the English moderate satisfaction, important acquittals enraged French and Belgians alike,[70] who resorted to a particular, culturally-specific criminal procedure of their own in retaliation: trials in absentia. As James Willis reports, as a result of trials in absentia in both France and Belgium, "by December 1924 more than twelve hundred Germans has been condemned."[71] The hostile use of these two criminal procedures—a procedure to exonerate in Germany and trials in absentia in France and Belgium—amounted to a continuation of war. German defendants would hear of their convictions in absentia through French and Belgium newspapers, apply to the Reich

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probability is that the Germans would have asserted that the trials were unfair, and built a memorial in Berlin to those who were the subjects of them." MULLINS, *supra* note 62 at 13.

[66] *Id.* at 84.

[67] *Id.* at 39.

[68] According to Mullins, the relevant procedure read: "when the State Attorney is of the opinion that the facts do not justify an indictment, he may request a trial in order that the facts may be ascertained." MULLINS, *supra* note 62 at 36.

[69] *Id.* at 45.

[70] The official report on these proceedings analyses the trials that did go to trial. *See* German War Trials, Report of Proceedings Before the Supreme Court in Leipzig, 16 AM. J. INT. LAW 628–631 (1922). For an excellent new set of commentary on these trials, *see* Joseph Rikhof, *The Istanbul and Leipzig Trials: Myth or Reality?*, 1 *in* HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 259–298 (Morten Bergsmo, Wui Ling CHEAH, & Ping YI eds., 2014); Wolfgang Form, *Law as Farce: On the Miscarriage of Justice at the German Leipzig Trials: The Llandovery Castle Case*, 1 *in* HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 299–332 (Morten Bergsmo, Wui Ling CHEAH, & Ping YI eds., 2014); Matthias Neuner, *When Justice is Left to the Losers: The Leipzig War Crimes Trials*, 1 *in* HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 333–378 (Morten Bergsmo, Wui Ling CHEAH, & Ping YI eds., 2014).

[71] WILLIS, *supra* note 44 at 142.

Court in Leipzig to be tried there pursuant to the supplemental procedure in order to be exonerated, and when the decision exonerating them was forthcoming, it "was publicized in the German, and if possible, international press."[72]

British courts, of course, could not participate in this ongoing conflict because, as a matter of their own local criminal procedure, "British law made no provision for trials in absentia."[73] Although the point was probably made moot by the waning British interest in these trials,[74] it still bears noting that, first, a bitter legal contest was waged with criminal law procedure as instrument between three European nations well after the Peace of Versailles, and second, that a fourth Allied power had to sit out the contest because of the idiosyncrasies of its own criminal law procedure. There is much that one could add about this truly fascinating history,[75] but for present purposes, we seize on these as well as other procedural conflicts in this trials to highlight the shortcomings of just locating congruence between local values and criminal law doctrine in a single jurisdiction. As this section will show (once complete), it is not just the values of those within a prosecuting system that matter for many international criminal trials, undermining the merit of doctrinal pluralism even in the very few instances where law does represent the "patterns of knowing, feeling, and acting"[76] that are particular to the polity that promulgated it. That German criminal procedure at Leipzig reflected

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[72] HORNE AND KRAMER, *supra* note 4 at 353.

[73] HANKEL, *supra* note 1 at 357. The British observer at Leipzig pointed out and lamented that "there were difficulties of procedure, due to the widely differing judicial systems of England and her Allies." MULLINS, *supra* note 62 at 26. Poignantly, he later added that "[a]s soon, therefore, as the problem passed into the hands of lawyers, serious practical difficulties arose. There was no defined body of law to which the War Criminals could be made amendable, and among the Allies there was no uniform criminal procedure." *Id.* at 211.

[74] WILLIS, *supra* note 44 at 140 (citing a statement by one British official to the effect that "everybody concerned--most of all the Attorney-General--is only too anxious to let the whole war criminals question sleep. It only brings us trouble both with the French & with the Germans.").

[75] Such as the arguments that the Allied use of African soldiers amounted to perfidy. As one commentator of the period noted, "the use of wild people, even if they have experienced a temporary taming in the troop unit, [violates] the spirit of international law." *Id.* at 140. Also, Hitler and Goering are said to have first met at a rally outside the Leipzig courthouse protesting these trials.

[76] DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 21 (2002). *See also* Joachim Vogel, *Why is the harmonisation of penal law necessary? A Comment*, *in* HARMONISATION AND HARMONISING MEASURES IN CRIMINAL LAW 55, 55 (André Klip & Harmen van der Wilt eds., 2002) (it "has national and cultural roots and is part of the identity of a nation, its society and its culture.").

German values is thus no reason for Legal Pluralists to celebrate it in ICL. Leipzig, then, presents an important qualification on the ground we cede through the Argentine example.

III. INCHOATE CRIMES

The word "inchoate" means "just begun" or "undeveloped."[77] In most jurisdictions, the concept of "inchoate offenses" criminalizes conduct that is prior to the realization of a consummated offense. As Andrew Ashworth explains:

> [A] principal feature of these crimes is that they are committed even though the substantive offense (i.e. the offense it was intended to bring about) is not completed and no harm results. An attempt fails, conspiracy comes to nothing, words of incitement are ignored – in all these instances, there may be liability for the inchoate crime.[78]

As Ashworth's explanation suggests, there are three general offenses that are usually termed "inchoate" or "preliminary" in common law jurisdictions – attempt, conspiracy, and incitement.[79] Unsurprisingly, foreign jurisdictions understand inchoate crimes differently, in part because punishing unconsummated offences raises the specter of thought crimes: the dangerous intrusion of the criminal law into the realm of purely personal ideation.[80]

If different jurisdictions adopt separate rules governing when criminal plans are adequately ripe to warrant punishment (i.e. great doctrinal plurality), it should come as no surprise that ICL is caught between these competing sensibilities. Yet it would be premature to

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[77] ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 437 (6th ed. 2009) (discussing inchoate offences generally, and the trend in English criminal law to widen the scope of the three traditional inchoate crimes). *See also*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 373 (6th ed. 2012) ("Activity in the middle ranges [between formation of an idea and completed criminal action], i.e., after the formation of the mens rea but short of attainment of the criminal goal, is described as 'inchoate' – imperfect or incomplete – conduct."

[78] ASHWORTH, *supra* note 77, at 373.

[79] *Id*.

[80] Antony Duff, for instance, argues that privacy and autonomy are the primary rationale for why thought crimes are objectionable. See ANTONY DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW (2007). *See also*, DOUGLAS HUSAK, THE PHILOSOPHY OF CRIMINAL LAW: SELECTED ESSAYS 47–51 (2010) (discussing criminal liability for thoughts, including inchoate crimes).

equate doctrinal pluralism, either in the law governing inchoate crimes in ICL or the national law it draws upon, with a diversity of popular values within either constituency. In fact, criminal doctrine may be a vehicle for overt human rights repression, such that we want to deliberately deny legal diversity. To illustrate, we draw on the inchoate crime of *association de malfaiteurs* in the Democratic Republic of the Congo (DRC). We select this example because of the Francophone colonial lineage, because this inchoate offense will be somewhat exotic to Anglophone audiences, and since the DRC is a country international criminal institutions are rightly engaged with at present. Most importantly, however, we choose this initial example because *association de malfaiteurs* is now used to systematically silence Congolese human rights defenders. And strikingly, although there are major discontinuities, the use of conspiracy at Nuremberg and Tokyo, which we discuss further below, reveals more continuity than rupture with its Francophone equivalent.

A. Association de Malfaiteurs as Repression in the Congo

The Democratic Republic of Congo, formerly Zaire, is one of the largest countries in Africa. The country's history is spectacular, starting with Belgian King Leopold annexing the territory as his own personal property,[81] then ruling with astonishing brutality.[82] Later, all the uranium for the Manhattan Project would come from the DRC, Che Guevara would find himself fighting in the country, and Western leaders would assassinate Patrice Lumumba – the first democratically elected President of the newly independent nation – for his Communist leanings. In modern times, the DRC has suffered what Madeline Albright dubbed "Africa's First World War,"[83] leading to in excess of 5 million civilian deaths since

[81] ADAM HOCHSCHILD, KING LEOPOLD'S GHOST : A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (Mariner Books ed. 1998). For a more recent history, see also DAVID VAN REYBROUCK, CONGO: THE EPIC HISTORY OF A PEOPLE (2014).

[82] As Hochschild points out, John Dunlop's discovery of the rubber tire initially sparked a craze for the bicycle, but this paved the way for an even more popular Western fixation: the automobile. As Hochschild observed with no small dose of irony given the hellish implications it would have for the Congolese, "[f]or Leopold, the rubber boom was a godsend." HOCHSCHILD, *supra* note 81 at 158–59.

[83] Secretary of State Madeleine K. Albright, Welcoming Remarks at the UN Security Council Session on the Democratic Republic of the Congo 1 (Jan. 24, 2000) (transcript available at http://1997-2001.state.gov/www/statements/2000/000124.html) ("Because of that nation's location and size, and because of the number of countries involved, the conflict there could be described as Africa's first world war."). Gérard Prunier, arguably the leading historian of the region, has also employed the metaphor. *See* GERARD

just 1998.[84] And as political scientist Kevin Dunn reports, Joseph Conrad's famous novel *Heart of Darkness*[85] has probably proved something of a curse for the Congolese people too, since it set in stone perceptions that "this central African country was a land of violence, chaos, and avarice, perhaps beyond the comprehension of Western audiences."[86]

Inevitably, Congolese criminal law was and remains inextricably caught up in this bleak history. Prior to Belgian colonialism, the mode of social governance was collective and concentric. Governance occurred at various subgroupings of increasing importance, starting with clans, then tribes, and culminating in sovereign ethnicities as the largest political unit.[87] The cosmological commitment to "increasingly vital force" formed the foundation of this system, which was especially significant, since life-force was located in the group's ancestral history.[88] As a result, customary rules were frequently divided in two domains: (a) the Laws of the Sacred and the invisible; and (b) the Laws of the living and the visible.[89] The former entailed a network of obligations that were ascertained through specialists in sacred law; the latter varied from place to place and attached to individuals by dint of being born into a particular normative system.[90] By all accounts, individualized forms of punishment were very much the exception across either system. Local communities, for example, "knew of no prisons."[91] According to one noted commentator, "[f]orms of physical restraint were used, but normally only to detain an offender pending his trial or punishment and even then rarely; certainly detention in itself does

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PRUNIER, AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE (2009).

[84] INTERNATIONAL RESCUE COMMITTEE, MORTALITY IN THE DEMOCRATIC REPUBLIC OF CONGO: AN ONGOING CRISIS 16 (2007) (estimating 5.4 million excess deaths in the first decade of the conflict, from 1998 to 2007).

[85] JOSEPH CONRAD, HEART OF DARKNESS AND OTHER TALES (Cedric Watts ed., 2008). For recurrent references to Conrad's metaphor, see ROBERT EDGERTON, THE TROUBLED HEART OF AFRICA: A HISTORY OF THE CONGO (2002); LOSO KITETI BOYA, D. R. CONGO: THE DARKNESS OF THE HEART: HOW THE CONGOLESE HAVE SURVIVED 500 YEARS OF HISTORY (2010); MICHELA WRONG, IN THE FOOTSTEPS OF MR. KURTZ: LIVING ON THE BRINK OF DISASTER IN MOBUTU'S CONGO (2002).

[86] KEVIN C. DUNN, IMAGINING THE CONGO: THE INTERNATIONAL RELATIONS OF IDENTITY 4 (2003).

[87] E. Lamy, *Le problème de l'intégration du droit congolais: son origine, son évolution, son avenir*, numéro spécial REVUE JURIDIQUE DU CONGO 135–287, 142 (1965). Lamy is also clear that there were occasionally "souverainetés racialement hétérogènes."

[88] *Id.* at 143.

[89] *Id.*

[90] *Id.*

[91] James S. Read, *Kenya, Tanzania and Uganda*, *in* AFRICAN PENAL SYSTEMS 89, 103 (Alan Milner ed., 1969).

not appear to have been regarded as a punishment.[92] Corporal punishment for wrongdoing was known, but had "a very limited application."[93] Instead, collective responsibility of the community as a whole, compensation, and ostracism of individual perpetrators from the collective were all the norm.[94] As Dembour concludes, "Les Africains étaient habitués à un système où ce qui comptaitétait la compensation de la victim et non le châtiment du coupable (sauf pour des faits graves ou répétés où le châtiment était alors impitoyable)."[95] The Belgians, however, saw this as "la barbarie."[96]

By decree dated January 7th, 1886, the Belgian King Leopold promulgated the first Code Pénal du Congo. The new code involved "vocabulary, formulation, and structure that was directly borrowed from Belgian criminal law legislation".[97] Although it was probably seen as an instrument for civilizing backwards or child-like African customs,[98] in truth, the Code served far darker purposes. Writing in 1908, a close friend to King Leopold, Chairman of the Union minière du-Haut-Katanga (one of the most prominent Congolese mining companies) and Dean of the Université Libre de Bruxelles' Law School declared that "[t]he Congo State is not a colonizing state, hardly a state: it is a financial company […] its aim has simply been to procure a maximum of resources for the King

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[92] *Id.* at 103.
[93] *Id.* at 104.
[94] Marie-Benedicte Dembour, *La Peine Durant La Colonisatoin Belge*, LVIII *in* LA PEINE - PUNISHMENT (1991) ("En effet, en Afrique prévalait une conception toute différente, qui faisait reposer la responsabilité sur le groupe auquel appartenait le coupable – sauf dans le cas où le groupe se désolidarisait du dernier en l'excluant."); Read, *supra* note 91, at 105 ("The interdependence of individuals in the close-knit societies of earlier times made ostracism a potent sanction.").
[95] Dembour, *supra* note 94, at 92 ("Africans were used to a system where compensation to the victim was what mattered, not punishment of the guilty individual (except for grave or repeated crimes, where the punishment was without mercy" (Stewart's translation)).
[96] *Id.* at 92. In fairness, one of the practices for dispute resolution the Belgians took particular exception to involved a form of proof that required two parties to a dispute to imbibe toxic drinks called N'Kassa, which were administered by sorcerers. Predictably, the colonial reaction to these practices came with strong civilizing overtones. Writing in 1898, Félicien Cattier, a close friend of King Leopold, Chairman on the Union minière du-Haut-Katanga and Dean of the Université Libre de Bruxelles' Law School claimed "le pouvoir colonial, exerçant son autorité, voulut à tout prix extirper de telles coutumes qualifiée mauvais parce qu'infrieures aux principle généraux de civilization." FÉLICIEN CATTIER, DROIT ET ADMINISTRATION DE L'ETAT INDEPENDANT DU CONGO 442 (1898).
[97] Dembour, *supra* note 94, at 67.
[98] For a full exposition of colonial authorities referring to African populations as child-like, see MAHMOOD MAMDANI, CITIZEN AND SUBJECT: CONTEMPORARY AFRICA AND THE LEGACY OF LATE COLONIALISM 12 (1996).

himself."[99] To do this, the King and his agents had to resort to what Georges Nzongola-Ntalaja calls "primitive accumulation" through "the use of torture, murder and other inhumane methods to compel Congolese to abandon their way of life to produce or do whatever the colonial state required of them."[100] By all accounts, the brutality that ensued was stupendous – a recent historiography estimated that as many as 10 million Congolese were murdered or disappeared under Leopold's reign, placing him alongside the most infamous purveyors of mass violence in known history.[101]

Importantly for present purposes, the criminal law enabled rather than curtailed this violence. In an open letter of protest written by the American anti-slavery campaigner George Washington Williams to King Leopold in 1890 after a period in the Congo, Williams objected that "the Courts of your Majesty's Government [in the Congo] are abortive, unjust, partial and delinquent."[102] The statement is corroborated by both the substance and enforcement of Congolese criminal law. The criminal law enacted for the DRC was considerably harsher than domestic Belgian criminal law of the time: the Belgian distinction between crimes, délits and peines was abrogated in the "vérsion simplifiée" imposed in the Congo,[103] depriving the criminal law of important moral nuance. Attempts were punished the same way as completed crimes;[104] and most significantly, only Africans received the infamous *chicotte*,[105] the

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[99] FÉLICIEN CATTIER, ÉTUDE SUR LA SITUATION DE L'ÉTAT INDÉPENDANT DU CONGO 341 (1906) (Stewart's translation).

[100] GEORGES NZONGOLA-NTALAJA, THE CONGO: FROM LEOPOLD TO KABILA: A PEOPLE'S HISTORY 22 (2002).

[101] WILTZ MARC, IL PLEUT DES MAINS SUR LE CONGO (Magellan et Cie 2015). The number of prominent authors protesting Belgian atrocities in the Congo was striking. *See* SIR ARTHUR CONAN DOYLE, THE CRIME OF THE CONGO 14–15 (1909); *See also* Mark Twain's brilliant satire in MARK TWAIN, KING LEOPOLD'S SOLILOQUY: A DEFENSE OF HIS CONGO RULE (The P. R. Warren Co., 2nd ed. 1905).

[102] George Washington Williams, "An Open Letter to His Serene Majesty Leopold II, King of the Belgians and Sovereign of the Independent State of Congo By Colonel, The Honorable Geo. W. Williams, of the United States of America," 1890 http://www.blackpast.org/george-washington-williams-open-letter-king-leopold-congo-1890

[103] CATTIER, *supra* note 99 at 437 (explaining that "La loi congolaise ne connaît pas la distinction en crimes, délits et peines, qui est à la base du système répressif belge."); Dembour, *supra* note 94, at 86 ("En effet, les testes sont d'inspiration belge, mais vu leur brièveté, ils ne présentent du système belge qu'une version simplifiée."

[104] CATTIER, *supra* note 99 at 440.

[105] Dembour, *supra* note 94, at 86 (observing "la ségrégation qui régnait au sein de la société congolaise [...]. Celle-ci se situait à la fois dans la nature de la peine applicable – seuls les Africains recevaient la chicote – et dans la manière dont la peine était appliquée

notoriously brutal whip made of dried hippopotamus hide. This whip, sanctioned by overtly racist criminal doctrine, was at the heart of an intensely violent system of colonial governance.[106] One Belgian District Commissioner in the Congo remarked as late as 1950, that "I used the punishment very sparingly. But its effect was terrible. We were so proud to be members of the administrative service, we felt so powerful. But all our power had its roots in the chicotte."[107]

We seize on one inchoate crime that featured in the 1886 Code Pénal du Congo, which by no small coincidence, has survived as a means of silencing human rights defenders and pro-democracy movements in modern DRC. The *chicotte* is abandoned but the underlying criminal law lives on.

Association de malfaiteurs literally means association of wrongdoers. Soon after the French Revolution, the French legislature sought about codifying new criminal rules in response to excesses in the preceding period.[108] To deal with marauding groups of organized criminals that had taken advantage of the insecurity that reigned during the revolution, the French Code Pénal of 1810 constructed a new inchoate

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– un régime carcéral différent était prévu [...] l'Africain était en effet puni selon une échelle plus sévère que celle appliquée à l'Européen.").

[106] Roger Casement, a British Consul stationed in Congo returned in 1903 to write a report on the Belgian atrocities in the Congo, in which he provided "detailed documentation and graphic examples of abuses, mainly the use of the chicotte (a type of whip) and the chopping off of hands and other body parts as punishment for failing to procure the required amount of rubber." According to Dunn, "these reports recast the Congolese as victims of Belgian barbarity." DUNN, *supra* note 86 at 52. WRONG, *supra* note 85, at 47 ("The chicotte, the gallows, mass executions were all liberally applied ill a campaign that often seemed to have extermination of races deemed inferior as an incidental aim.").

[107] WRONG, *supra* note 85, at 39–40; REYBROUCK, *supra* note 81, at 216 (explaining that even in the 1950s, "[c]orporal punishment with the chicotte was still applied to all Africans, even those who could distinguish the Latin dative case from the genitive and read De Gaulle's speeches."). Evidently, the chicotte's use was so widespread that it has taken on an important symbolic function within Congolese memory of colonialism. See, critically, Marie-Bénédicte Dembour, *La chicotte comme symbole du colonialisme belge?*, 26 CANADIAN J. AFR. STUD./LA REVUE CANADIENNE DES ÉTUDES AFRICAINES 205 (1992).

[108] Marcel Culioli & Pierre Gioanni, *Association de Malfaiteurs*, 80 REVUE PÉNITENTIAIRE ET DE DROIT PÉNAL 1, 22 (2007) (referring to a particularly notorious group of organized criminals called the "Chauffers", who pillaged and killed throughout the countryside during the period); RAPHAËLE PARIZOT, GENEVIÈVE GIUDICELLI-DELAGE & ALESSANDRO BERNARDI, LA RESPONSABILITÉ PÉNALE À L'ÉPREUVE DE LA CRIMINALITÉ ORGANISÉE : LE CAS SYMPTOMATIQUE DE L'ASSOCIATION DE MALFAITEURS ET DU BLANCHIMENT EN FRANCE ET EN ITALIE 131 (2010) (confirming this history).

offense that criminalized criminal associations.[109] The Belgian criminal code of 1867 borrowed the then novel doctrine from its neighbor,[110] just in time for the wholesale transmission of a rough-and-ready form of Belgian criminal law into the DRC a decade later. As a result of this uncomfortable passage, *association de malfaiteurs* became a criminal offense amongst an African people who did not agree to the rule and probably suffered terribly as a result of its very one-sided enforcement. After all, in a technical sense, much of what transpired under Belgian colonial rule satisfied the definition of the offense, vindicating Sir Arthur Conan Doyle's choice of title for his oeuvre on the topic, *The Crime of the Congo*.[111]

As a doctrine, *association de malfaiteurs* has survived unscathed in Congolese criminal law to this day. In 1940, the Belgians again promulgated a Criminal Code for the Congo by decree, which largely re-enacted the earlier law in a slightly more coordinated fashion that, predictably, was again "patterned after the Belgian Criminal Code."[112] Independence in 1960 did not lead to a sharp break with this history, meaning that *association de malfaiteurs* continued in Congolese criminal law without major modification: as leading commentators agreed soon after independence "[w]ith the change to Republican status, the criminal law has scarcely changed."[113] Evidently, the same remains true today. The

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[109] Culioli and Gioanni, *supra* note 108, at 22 (referring to a particularly notorious group of organized criminals called the "Chauffers", who pillaged and killed throughout the countryside during the period); PARIZOT, GIUDICELLI-DELAGE, AND BERNARDI, *supra* note 108, at 131 (confirming this history). The initial language stipulated that "Toute association de malfaiteurs envers les personnes ou les propriétés, est un crime contre la paix publique." CODE DES DÉLITS ET DES PEINES (CODE PÉNAL DE 1810) (Belg.), http://ledroitcriminel.free.fr/la_legislation_criminelle/anciens_textes/code_penal_1810/code_penal_1810_2.htm (last visited Feb 27, 2015).

[110] Frank Verbruggen & Philip Traest, *Belgique*, 73 REVUE INTERNATIONALE DE DROIT PÉNAL 13 (2007).

[111] Interestingly, Sir Arthur Conan Doyle's sense of outrage expressed itself through an appeal to humanity that will be familiar to international criminal justice. In documenting the various atrocities carried out under Leopold's reign, Conan Doyle argued that "[t]he cause I plead is too broad, and also too lofty, to be supported by any narrower appeals than those which may be addressed to all humanity." *See* SIR ARTHUR CONAN DOYLE, THE CRIME OF THE CONGO 14–15 (1909).

[112] ANTON WEKERLE, GUIDE TO THE TEXT OF THE CRIMINAL LAW AND CRIMINAL PROCEDURE CODES OF BURUNDI, RWANDA, AND ZAIRE 25 (1975), http://catalog.hathitrust.org/Record/010452689 (last visited Feb 5, 2015).

[113] Antoine Rubbens, *The Congo Democratic Republic*, *in* AFRICAN PENAL SYSTEMS 14, 16 (1969). Although Rubbens was writing in 1969, only a matter of years after independence, more recent studies conclude similiarly. *See, e.g.,* Marie-Benedicte Dembour, *La peine durant la colonisation belge*, *in* LA PEINE - PUNISHMENT , 69 (De Boeck Université 1991) (1989) PAGE NUMBER NEEDED ("Encore aujourd'hui, le

leading modern textbook on Congolese criminal law – authored by the Dean of the School of Law at the Université de Kinshasa – still draws a direct line between the current criminal code, the decree of 20 January 1940, and that of 7 January 1886.[114] Taking ICL as an inter-penetrating normative system that respects extant doctrine needs to simultaneously grapple with this lineage.

Despite our best efforts, we have not unearthed material suggesting that *association de malfaiteurs* was debated, reconsidered, and enthusiastically retained by anyone over this history, let alone some entity with meaningful democratic credentials capable of vesting a degree of popular acquiescence into a rule derived from a spectacularly brutal history. Thus, *association de malfaiteurs* is only Congolese law by omission; it is "Congolese" only because the Congolese have not repealed it. And to undermine the thesis that this omission somehow evidences popular endorsement of the imposed rule (like Pakistani enthusiasm for cricket), observe also the repressive function this criminal doctrine continues to play *vis-à-vis* the local population in this country. *Association de malfaiteurs* is no friend to everyday Congolese—it still appears to function as a mechanism that maintains a violent social order for the betterment of the few who wield it.

In 2013, twelve Congolese human rights defenders were arrested, tried and convicted of *association de malfaiteurs* for having encouraged people to participate in peaceful demonstrations against an increase in energy and water prices, as well as general mismanagement by the Governor of the province.[115] Likewise, in 2006, a Bishop, Archbishop and orphaned street child were convicted of *association de malfaiteurs*, even though the local population was apparently well aware that this process was a mere pretext for punishing the clergymen's pro-democratic stance in support of a political program called "Sauvon le Congo."[116] Evidently,

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système pénal zaïrois reste fortement imprégné des principes que le colonisateur belge a introduits...").

[114] NYABIRUNGU MWENE SONGA, TRAITÉ DE DROIT PÉNAL GÉNÉRAL CONGOLAIS 49 (2001) ("La loi pénale trouve son siège principal au code pénal. Celui-ci, qui est aujourd'hui porté par le décret du 30 janvier 1940, a eu un début de formulation dans un texte législatif du 7 janvier 1886".).

[115] Evidently, the defendants were not able to present a defense, pressure was placed on judges to enter convictions, and the defendants were prohibited from raising claims about physical abuse in custody. Fédération internationale des droits de l'Homme (FIDH), RÉPUBLIQUE DÉMOCRATIQUE DU CONGO (RDC) : CONDAMNATION EN APPEL DE 12 DÉFENSEURS DES DROITS DE (...), http://www.fidh.org/fr/afrique/republique-democratique-du-congo/republique-democratique-du-congo-rdc-condamnation-en-appel-de-12-13194 (last visited Jul. 31, 2014).

[116] News reporting described the convictions as unjust and gratuitous, in part because the street child has never met the accused, but was brought in to bolster numbers in the

these are not isolated incidents. The misuse of *association de malfaiteurs* is so common that after listing at least five other very recent examples in the Congo, one representative of a human rights organization in the DRC wrote to us that "there are so many of these cases throughout the entire territory that it is difficult for the moment to draw up a decent list."[117] If leading western human rights organizations are up in arms protesting the excessive application of *association de malfaiteurs* in France,[118] it is little surprise that the same doctrine is having much worse consequences in the far periphery.

Hopefully, this history exposes the underbelly of the criminal law in ways that ICL cannot afford to turn a blind eye to. As Jacqueline Costa has argued, "[i]n Africa, criminal law is not the codified expression of the values of an established social order. It is a tool to be used in the very creation of such an order."[119] Her point is more sinister than a quick reading suggests. Frequently, criminal doctrine does not represent popular social values; it often continues a long history of violent repression in the service of authoritarian rule. The criminal law in Nazi Germany and Stalin's Russia are just extreme examples of an unfortunately common trend that flows into an appreciable number of modern states. Although

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association de malfaiteurs. See Mission Mondiale Message de Vie, 3 CONDAMNATIONS INJUSTES ET GRATUITES D'INNOCENTS!, http://www.sauvonslecongo.org/kutino/victime.php (last visited Jul. 31, 2014).

[117] Email correspondence with Congolese human rights representative (name and organization withheld), June 12, 2014. On file with authors. ("Il y a autant des dossiers sur l'ensemble du territoire qu'il est difficile pour le moment de faire une bonne liste") (Stewart's translation).

[118] HUMAN RIGHTS WATCH, PREEMPTING JUSTICE: COUNTERTERRORISM LAWS AND PROCEDURES IN FRANCE 8 (2008) (protesting that "[t]he overly broad formulation of the association de malfaiteurs offense has led, in our view, to convictions based on weak or circumstantial evidence."); HUMAN RIGHTS WATCH, IN THE NAME OF PREVENTION: INSUFFICIENT SAFEGUARDS IN NATIONAL SECURITY REMOVAL 19 (2007) (quoting a French criminal lawyer as reporting that "you are the cousin of the cousin of the cousin of someone who's done something, so you are in an association de malfaiteurs. The concept is very vague. It's the law itself that's dangerous.... [and] the defense becomes impossible'."). Theorists of French criminal law also object that association de malfaiteurs has become "a veritable rupture of the theory of criminal participation's limits." RAPHAËLE PARIZOT, LA RESPONSABILITÉ PÉNALE À L'ÉPREUVE DE LA CRIMINALITÉ ORGANISÉE : LE CAS SYMPTOMATIQUE DE L'ASSOCIATION DE MALFAITEURS ET DU BLANCHIMENT EN FRANCE ET EN ITALIE 129 (2010). *See also*, Culioli & Gioanni, *supra* note 108, at 20 (listing a set of conceptual problems with the application of association de malfaiteurs in France); Evidently, association de malfaiteurs is very extensively used, including the the vast majority of cases involving arrest on suspicion of involvement in terrorist activities. FÉDÉRATION INTERNATIONALE DES DROITS DE L'HOMME, FRANCE PAVING THE WAY FOR ARBITRARY JUSTICE 9 (1999).

[119] Jacqueline Costa, *Penal Policy and Under-Development in French Africa*, *in* AFRICAN PENAL SYSTEMS 365, 393 (1969).

we have not unearthed examples of *association de malfaiteurs* being employed in this fashion during the colonial period, it certainly appears to operate this way in the DRC now. In line with the history of the colonial criminal law that produced it, *association de malfaiteurs* seems to have become a highly one-sided instrument to further governance by force, and *in extremis*, to systematically undermine enjoyment of basic human rights. The parallels with the past are striking.

If this reading is even somewhat accurate, allowing international rules to defer to, absorb, or mirror legal doctrine from countries that find themselves in a similar situation to the DRC in the name of Legal Pluralism is not necessarily the respectful nobility it might seem at first blush—as is the case here, the doctrine in question may actually stem from elsewhere, have been imposed by force as part of a brutal campaign of subjugation and plunder, and may operate to inhibit political participation, freedom of expression, and other fundamental rights. Criminal law is sometimes part of the problem ICL exists to address, such that resistance for reasons of principal and not deference in the name of Legal Pluralism is the appropriate normative response. Moreover, the problem is not just whether the criminal doctrine complies with human rights in an abstract conceptual sense, such that Legal Pluralists can save their position by crafting human rights as a generic exception; it is also whether the doctrine enjoys any democratic legitimacy, whether it represents a terrible past local populations hope to leave well behind them, and whether a facially defensible criminal doctrine operates within a concrete sociological frame to the great detriment of those affected—physically, socially or symbolically.

In all these respects, conceiving of ICL as a diverse normative inter-penetration to be managed, without adding a sophisticated historical critique of the norm(s) in question risks tarring ICL with the same brush as the objectionable national criminal standards it draws upon. In other words, championing a diversity of legal doctrine to preserve doctrinal heterogeneity is, methodologically speaking, dangerous if carried out without first adopting what James Whitman calls a "sociohistorical perspective" on the criminal law.[120] As Franz Kafka was so earnest to remind us, that perspective will sometimes confirm that criminal law

[120] JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 25 (2005) Whitman's study of cultures of punishment in the United States, France and Germany is an exemplar of the work that remains to be done for the Third World legal systems these nations constructed to resemble them.

doctrine is part and parcel of what his fellow novelist Conrad called "the horror".[121]

B. The Repressive Aspects of Conspiracy at the Nuremberg and Tokyo Tribunals

We move, then, from the experience of *association de malfaiteurs* in the Congo, to conspiracy, the Anglo-American equivalent applied at the Nuremberg and Toyko Tribunals. Here too, we observe courts drawing on national legal standards, but standards that, despite appearances, actually stem from a very small number of Western states. Whereas the Congolese experience involved the passage of a French inchoate offense through Belgium, the international experience of conspiracy at both postwar tribunals arose from English criminal law that was imported into ICL via and at the behest of the United States. In both instances, the law was foreign and therefore alien to its ultimate audiences, deeply one-sided in application, operated to expunge basic human rights and, ultimately, was very deliberately deployed to construct a social order by force rather than popular approval. To be sure, there are very significant differences between these two examples, but by and large, one is left with the sense that international criminal doctrine is again no trustworthy guarantor of the value-pluralism that pluralists tacitly seek to uphold once they shift form a descriptive to a normative mode.

Nuremberg was the first great experiment in modern ICL. In the memorable words of the US Secretary of War Henry Stimson, by late 1944, the end of the Third Reich was "approaching on a galloping horse."[122] This looming event raised a pressing set of questions for the Allies: what would become of Hitler and his cronies after their fall? Initially, both Britain and the United States were firmly in favor of mass executions. Indeed, it was only when Henry Morgenthau's plan to execute Nazis en masse and reduce Germany to an agrarian society was leaked to the American public that Allied policy begrudgingly tilted in favor of trials.[123] Public opinion in the United Stated viewed the now infamous

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[121] CONRAD, *supra* note 85, at 118.

[122] BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944-1945 135 (1981).

[123] Telford Taylor indicates that when the plan was leaked to the press, the public reaction to the most punitive features "was sharply adverse." TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 34 (2013). Admittedly, the Morgenthau Plan was also opposed from within government from the outset. Secretary of War Stimson described it as "a Childish folly!" comparable to a "Nazi program!". SMITH, *supra* note 122, at 30–31.

Morgenthau Plan as "inhumane," creating new impetus to try rather than shoot the vanquished enemy.[124] Even then, the British still needed much convincing.[125] By this point, though, the Americans were hard at work determining what law they could possibly use to achieve this tremendous feat. The stakes were high, especially when some were tempted to see these trials as "the Ten Commandments, Magna Carta, and the Gettysburg Address all rolled into one."[126]

In early autumn 1944, a New York securities lawyer named Colonel Murray C. Bernay, then working for the U.S. War Department, hatched a plan to combine the use of conspiracy and membership in criminal organizations to capture a broad swath of Nazi hardliners and sympathizers alike, without going to the trouble of proving who did what.[127] Very quickly, this doctrine of conspiracy would find itself front and center at Nuremberg then Tokyo thereafter (although courts would interpret it restrictively and as applying to only aggression).[128] This notion of conspiracy came with a number of major shortcomings leading up to, at and subsequent to trials at Nuremberg and Tokyo, often revealing the same sorts of difficulties as its cousin *association de malfaiteurs* in the Congo. Consequently, this history again reveals a thick shadow that modern ICL may wish to insulate itself from. This process of distancing may be preferable to permitting all ICL doctrine to simply co-exist alongside other doctrinal arrangements, within a system of legal diversity

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[124] SMITH, *supra* note 122, at 10 ("Attempts to defend Morgenthau were lost in a chorus of American press criticism of what were seen as inhumane and unrealistic measures.").

[125] On the great British reticence, see DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 10 (2003); GERRY SIMPSON, LAW, WAR AND CRIME : WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 62 (2007); PETER MAGUIRE, LAW AND WAR: INTERNATIONAL LAW AND AMERICAN HISTORY 70 (rev. ed. 2010).

[126] Michael Biddiss, *The Nuremberg Trial: Two Exercises in Judgment*, 16 JOURNAL OF CONTEMPORARY HISTORY 597, 611 (1981).

[127] Jonathan Bush explains how this approach was made necessary by the sheer volume of devastation stretching across more than twelve years coupled with the shortage of individualized documentary evidence. J.A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1137 (2009).

[128] According to the Nuremberg Judgment, "the [Nuremberg] Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war." Judgment, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 226 (1948) [hereinafter Nuremberg Judgment]. In this vein, the Tokyo Tribunal also concluded that "We hold … that we have no jurisdiction to deal with charges of conspiracy to commit murder… and decline to entertain these charges." See THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (IMTFE) 29 APRIL 1946–12 NOVEMBER 1948, 48,450 (Bert Röling & Frits Rüter eds., 1977).

to be tolerated and managed.

During the negotiation of the Nuremberg and Tokyo Charters, it quickly emerged that conspiracy risked alienating the trial's closest audiences. Herbert Wechsler, a Professor at Columbia Law School (then acting as U.S. Assistant Deputy General, but of later fame for his role in spearheading the drafting of the U.S. Model Penal Code) wrote a detailed memorandum forewarning that "some confusion may be engendered by the terminology of the War Department proposal which refers to the basic crime as a 'common-law conspiracy,' employing that concept as it is known to American law."[129]

The confusion Wechsler's foresaw came to pass. When the whole conspiracy/criminal organizations scheme was presented to the Russians and French, their representatives were left veritably dumb-founded by the idea of using an inchoate crime like conspiracy to enmesh Nazis high and low for harm that did actually transpire. Momentarily, we reveal retorts that conspiracy was actually part of continental legal systems, but for now, note that if this was formally true as a matter of comparative doctrine, the fact was entirely lost on French and Russian representatives at Nuremberg. In an often-quoted passage, the noted historian of the Nuremberg trials, Bradley F. Smith, reported that:

> [T]he Russians and French seemed unable to grasp all the implications of the concept [conspiracy]; when they finally did grasp it, they were genuinely shocked. The French viewed it entirely as a barbarous legal mechanism unworthy of modern law, while the Soviets seemed to have shaken their head in wonderment—a reaction, some cynics may believe, prompted by envy. But the main point of the Soviet attack on conspiracy was that it was too vague and so unfamiliar to the French and themselves, as well as to the Germans, that it would lead to endless confusion.

Despite the apparent surprise, there was continual disagreement in pleadings before both the Nuremberg and Tokyo Tribunals about whether or not conspiracy was actually alien to civil law systems. In one camp, leading civil lawyers protested the concept's intrusion into ICL. The Dutch Judge at Tokyo, for instance, Bert Röling, described conspiracy as

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[129] Herbert Wechsler, Memorandum for the Attorney-General (Francis Biddle) from the Assistant Attorney General (herbert Wechsler), December 29, 1944, in SMITH, *supra* note 122, at 87.

"one of the ugly aspects of the Anglo-American system,"[130] protesting that "[i]n the continental European countries conspiracy has played only a very limited role."[131] Similarly, August von Knieriem, the lawyer for I.G. Farben who was tried and acquitted at Nuremberg, subsequently wrote a lengthy legal polemic criticizing the concept more forcefully: "[t]o the continental lawyer and to the layman, too, the Anglo-American concepts of conspiracy and of accessory after the fact are hard to understand and their results appear to be unfair."[132] In the competing camp, a number of commentators have and continue to argue that these critics were altogether too coy about the uptake of conspiracy in continental legal systems, including in both German and Japanese criminal law.[133] Instead of taking sides in this contest, we focus on the analytical methodology the Tokyo Tribunal adopted to justify its controversial conclusion that, despite all the foregoing hesitation and critique, conspiracy was a "general principle common to all civilized nations."

When the issue of conspiracy's legitimacy in international law was addressed at the Tokyo Tribunal, the Prosecution argued that all four major powers approved of the two Charters in which this apparently foreign concept appeared, and eighteen of twenty-two other states that also signed the London Agreement were civil law jurisdictions.[134] On closer inspection, however, this argument was not especially compelling in that this assent was subject to the same dynamics that manufactured criminal law throughout the globe: in truth, brute power probably overrode consent as a plausible explanation for conspiracy's entry into the corpus of ICL. In negotiating the Charters, even Allies complained of "an arbitrary and domineering American manner,"[135] so "that in the end the

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[130] ANTONIO CASSESE & B. V. A. ROLING, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER 58 (1994).
[131] *Id.* at 58.
[132] AUGUST VON KNIERIEM, THE NUREMBERG TRIALS 209 (1959).
[133] Even during the negotiations of the Nuremberg charter, some had stressed this point. See the position of Professor Gros, the French delegate at the Nuremberg Charter negotiations. ROBERT JACKSON, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS, 1945 129–133 (1949), www.loc.gov/rr/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf; Bush, *supra* note 127, at 1138 (noting internal correspondence within the US administration about the uptake of conspiracy in judgments from the German Supreme Court.); and, KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 277–278 (2011) (listing various examples of conspiracy for specific offenses in German criminal law). For a nuanced survey of the topic written close to the period, see Wienczyslaw Wagner, *Conspiracy in Civil Law Countries*, 42 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 171 (1951).
[134] PRITCHARD AND ZAIDE, *supra* note 4, at 39,037.
[135] SMITH, *supra* note 122, at 142.

Americans pretty much had their way was surely more of a tribute to their great power… than it was to any skills they showed in diplomacy."[136] In this light, conspiracy's ability to claim any cross-cultural endorsement in ICL today seems poor.

The inchoate offense's right to peaceful co-existence in a plural ICL is even weaker still if we interrogate the concept's history further. In a rousing set of arguments at Tokyo, defense lawyers began by repeating the familiar argument that the doctrine treated as universal that which was highly particular. Counsel for the defense argued that conspiracy's inclusion in the Tokyo Tribunal's Statute was "astonishing!,"[137] asking rhetorically: "[a]re not all comparativist jurists aware that the doctrine of criminal conspiracy is a peculiar product of English legal history."[138] In addressing this history directly, the defense also pointed out that even Adam Smith had shown that conspiracy was initially used in Britain to penalize trade unions, "a social class highly obnoxious to the dominant class in the eighteenth century."[139] Similarly, they cited Harvard Professor Francis Bowes Sayre's conclusion that "a doctrine so vague in its outlines and uncertain in its fundamental nature as conspiracy lends no strength or glory to law, it is a veritable quick-sand of shifting opinion and ill-considered thought."[140] If conspiracy was a vague "weapon of convenience" for the powerful nationally, as Sayre proclaimed, was migrating it into ICL much of a service to the majority of the world? We do not believe that Legal Pluralism can wash its hands of this question now, just because the Tokyo Tribunal once did.

No matter how one answers this question though, the mechanics of conspiracy's absorption into ICL were highly suspect. At Tokyo, the Chief Prosecutor – an American named Joseph Keenan – tabled a comparative survey of conspiracy-like provisions in several legal systems in an attempt to refute the argument that "conspiracy is not an international crime because… it is a doctrine peculiar to the Anglo-American law."[141] In an ambitious bid to synthesize criminal doctrine applicable in Germany, France, the Netherlands, Spain, China, and Japan, Keenan made a methodological error that concerns us still today about the operation of Legal Pluralism in ICL. In the context of France, Keenan cited the provision of the French Code Pénal governing *association de malfaiteurs* without any apparent appreciation as to its history, within France or

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[136] *Id*.
[137] PRITCHARD AND ZAIDE, *supra* note 4, at 42,136.
[138] *Id.*.
[139] *Id.* at 42,137.
[140] *Id.* at 42,138, citing Francis B. Sayre, *Criminal Conspiracy*, HARV. L. REV. 395 (1922), http://archive.org/details/jstor-1328648 (last visited Feb 22, 2015).
[141] PRITCHARD AND ZAIDE, *supra* note 4, at 39,036–39,037.

beyond.[142] To compound matters, when turning to Spain, he surmised that "Spain, and all the countries which were formerly Spanish colonies, including the Philippines, base their penal codes on the original Code Napoleon of 1810, which is, of course, also the source of the French Penal Code."[143] In all likelihood, this genealogy is quite accurate, but the method should be disquieting to those who care about infusing ICL with a plurality of social, cultural and political values—we know what *association de malfaiteurs* might mean within these recipient communities.

The concerns with conspiracy's entry into ICL also appear at the level of its application, albeit in different guise. Many, like Gerry Simpson, have recognized that conspiracy probably worked well enough at Nuremberg "but it was discredited at Tokyo."[144] Japanese historians express no opinion on the first aspect of the claim, but they agree with the second. Several years ago, a noted Japanese scholar reported that "I doubt that any Japanese historian – and there are many historians present today – still accepts the interpretation of conspiracy, or of an overall common plan, put forward in the Tokyo Trial's view of history."[145] Evidently, there were many smaller conspiracies, rather than one all-encompassing "gigantic" one.[146] The implications of this excessive application for the defendants go without saying, but for now, focus just on the political and sociological implications of this broad standard's application, recalling comparable problems with *association de malfaiteurs* in the Congo. At Tokyo, conspiracy speaks to a repeat of the double standards we witnessed with respect to the *chicotte*—Japanese defendants were charged and convicted of conspiracy to wage war against "French Indochina." The territory's label helps to lay the Allied partiality bare, revealing how the doctrine was one-sided in application as well of origin.

Within the section of the Tokyo Judgment that deals with Japanese aggression in Indo-China, the Tribunal set out how "[i]n June 1940, shortly after the fall of France, she [France] was forced to agree with Japan's demands to permit a military mission into Indo-China".[147] On 25 August, the French Ambassador informed the Japanese "that France had decided to yield to the Japanese demands," and the so-called Matsuoka-

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[142] *Id.* at 39,040.
[143] *Id.* at 39,042.
[144] SIMPSON, *supra* note 122, at 119.
[145] CHIHIRO HOSOYA, THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM 109 (1986).
[146] PRITCHARD AND ZAIDE, *supra* note 4, at 39,035 (refering to the a "gigantic conspiracy" in which the accused were particiants.).
[147] THE TOKYO JUDGMENT, *supra* note 128, at 340.

Henri Agreement was signed.[148] In brushing aside defense arguments that this agreement precluded a finding of aggression, the majority in the Tokyo Tribunal reasoned that "the sovereignty of France in all parts of the Union of Indo-China" was violated by Japanese conduct.[149] This, because the French only signed the agreement "when faced with an actual invasion".[150] Using coercion to vitiate consent was no doubt fair and accurate in the circumstances, but the failure to register that "French" Indochina, indeed Allied authority over much of the Third World, was brought about by legally comparable processes is striking. Again here, ICL operated like the *chicotte* in the Congo: as an openly discriminatory instrument of power to be used in the very construction of a (global) social order.[151]

Other parallels with colonialism emerged throughout WWII trials, sometimes explicitly. For instance, when Allied prosecutors quizzed Hermann Göring about *lebensraum*, the political concept that served as a pretext for Nazi expansionism, Göring snidely remarked: "I fully understand that the four signatory powers [to the Charter] who call three quarters of the world their own explain the idea differently."[152] Likewise, even the U.S. Prosecutor at Nuremberg, Robert Jackson, could not shake off the uncomfortable parallel between his cases against German industrialists for pillaging natural resources like coal, oil, and manganese from Occupied Europe and comparable colonial practices, the likes of which had so horrified Joseph Conrad and others. In a letter to President Truman written during the Nuremberg process, Jackson remarked glibly, "we are prosecuting plunder and our allies are practicing it."[153] And to square the circle, in defending Klaus Barbie before French courts for his wartime participation in Nazi atrocities, the notorious lawyer Jacques Verge's *procès de rupture* entailed a detailed parallel between the allegations against Barbie in wartime Lyon and colonial atrocities in a number of the prosecuting state's former colonies, including "French Indochina."[154]

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[148] *Id.* at 340.
[149] *Id.* .
[150] *Id.* at 341. ("Faced with an actual invasion, the Governor-General was forced to accept the Japanese demands and signed an agreement on 24th September 1940 for military occupation of the Tonkin Province, the establishment of air bases and the grant of military facilities in French Info-China.").
[151] Costa, *supra* note 119.
[152] SIMPSON, *supra* note 144 at 95.
[153] GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 202 (1999).
[154] NICHOLAS ATKIN, THE FIFTH FRENCH REPUBLIC 10 (2004); REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL & CRIMES AGAINST HUMANITY (1992). For full discussions of

We tie the criminal doctrine that currently exists in much of the world to these histories. Without suggesting that the relation is inevitable or constant, even in post-colonial states, these histories warn against a fast assumption that allowing modern ICL to reabsorb extant criminal law doctrine is somehow noble, liberal, or respectful. To be sure, there are important discontinuities between the function of *association de malfaiteurs* in the Congo and conspiracy at Tokyo, most notably, the absence of massive guilt on the part of the Congolese people. Nonetheless, *association de malfaiteurs* in the Congo and conspiracy at post-war tribunals probably overlap more than they diverge. In both instances, these inchoate crimes were foreign and therefore alienating; both crimes were applied in a highly discriminatory fashion to construct a social order by force rather than popular approval, and both were *applied* in such a way that they occasioned important human rights violations. The contexts are entirely different, but certain themes emerge from both. When faced with these commonalities, scholars and practitioners of modern ICL may wish to distance themselves from doctrine born of these ugly histories. To do this, they will have to rethink ICL in ways that better reflect a plurality of political interests and social values, instead of just managing doctrinal diversity once a norm is formally anointed somewhere as binding law.

IV. MODES OF ATTRIBUTION

Modes of attribution – like aiding and abetting, superior responsibility, and joint criminal enterprise – attribute criminal harm to individual agency.[155] In this section, we emphasize the history of modes of

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Verges and the Barbie Trial, see Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L. J. 1321 (1988).

[155] As an example of doctrinal legal pluralism, different legal systems use different labels to describe what we call modes of attribution here. International criminal courts and tribunals tend to call these legal concepts "modes of liability," but practice has also used the terms "forms of attribution" and "modes of participation." *See* Prosecutor v. Charles Taylor, No. SCSL-03-01-T, Trial Judgement, ¶ 455 (18 May 2012) (referring to "modes of liability"); Prosecutor v. Mathieu Ngudjolo Chui, No. ICC-01/04-02/12, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, ¶ 62 (18 Dec, 2012) (discussing "forms of attribution"); and, *Tadić*, *supra* note 6, at ¶ 227 (referring to joint criminal enterprise as a "mode of participation"). National systems tend to adopt different labels again. In German criminal law, the overarching concept is "Beteiligung", which experts translate as "Participation". *See* MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 154 (2008). French criminal theory also refers to criminal participation. *See,* Christine Lazerges, *La participation criminelle*, *in* RÉFLEXIONS SUR LE NOUVEAU CODE PÉNAL 11 (1995). In many Anglo-American jurisdictions, the tendency is to describe modes of liability as

attribution in two inter-connected legal systems, one national the other international. To reiterate our wider method, an analysis at both levels is essential to unpacking the ahistoricism of Legal Pluralism in ICL since power decoupled the relationship between ICL and a genuine plurality of social and cultural values by first distorting the national criminal law ICL often draws on, then by subjecting ICL itself to the same sword. In our national example, we explain how Japan came to adopt German modes of attribution through these dynamics. We show how virtually all of modern Japanese criminal law – not just modes of attribution – was initially imported from the West through varying degrees of coercion. In the second section, we study the modern mode of attribution called Joint Criminal Enterprise (JCE) within ad hoc ICL tribunals. That doctrine claims a history rooted in the Nuremberg and Tokyo tribunals as well as multiple national criminal systems around the world. Yet a deeper historical analysis suggests that JCE is actually the product of a very selective reading of ICL and national criminal law that privileges a minute sample of Western understandings of criminal responsibility. In short, our study of the law of modes of attribution shows yet another means by which criminal doctrine is imposed coercively on states, and another instance where a modern set of ICL institutions ingest this imbalanced history.

A. German Modes of Attribution in Japan

For the uninitiated, there is something very peculiar about modes of attribution in modern Japanese criminal law—they are strikingly German. Leafing through the leading English-language text on Japanese criminal law, Shigemitsu Dando's *The Criminal Law of Japan: The General Part*, one is immediately struck by the enormous influence of German criminal law and theory.[156] The word "German" appears sixty-seven times in the text, and "Germany" appears slightly more frequently. The text is also replete with references to leading theories within German criminal law, from Welzel's theory of action to Roxin's theory of perpetration;[157] the book contains literally hundreds of references to

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those rules that determine parties to crime. *See* WAYNE R. LAFAVE, CRIMINAL LAW 701 (5th ed. 2010) (employing the term "Parties to Crime"); A. SIMESTER & G.R. SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 195 (3d ed. 2007) (discussing modes of participation).

[156] SHIGEMITSU DANDO, THE CRIMINAL LAW OF JAPAN: THE GENERAL PART (B.J. George trans. 1997).

[157] *Id.* at 11, 218. (discussing Hans Welzel's telelogical theory of action and Claus Roxin's theory of perpetration).

German theorists. As the author himself acknowledges in the preface to the English translation, "I have been strongly influenced on a number of points by German penal law theory, which tends to be true of most of the body of criminal law scholars in Japan."[158]

Unsurprisingly then, when one turns to Japanese modes of attribution in particular, the text reveals a variety of features quite alien to Anglo-American systems that mirror German criminal law and theory more or less precisely.[159] Thus, if one looked to Japanese criminal law to determine the scope of complicity in order to interpret the concept in customary ICL (as one international criminal tribunal recently did),[160] or to ascertain the ways in which ICL (applied in national legal systems) constrains the global trade in weaponry, one recognizes the distinctive mark of German criminal law immediately. How could this be so? Accomplice liability is constructed very differently from one legal system to another,[161] and Germany never colonized Japan. Perhaps Japanese scholars and legislators were moved by the undeniable analytical elegance

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[158] *Id.* at xv.

[159] To cite but a few illustrations, Japanese criminal law adopts a German tripartite structure, differentiating the paradigm of the crime, from justifications and excuses, whereas Anglo-American systems amalgamates the latter two of these categories. *Id.* at 3–4. Following their German inspiration, Japanese criminal law also includes *dolus eventualis* as the lowest sub-category of intention, in contrast with Anglo-American criminal law, whose closest equivalent is a stand-alone mental element called recklessness. For the Japanese treatment of *dolus eventualis* as intention, see *ibid,* at 154–55. Normally, recklessness is not assimilated to intention in English-speaking systems as occurs in Germany, and by mimicry now, Japan. Finally, Japanese criminal also rejects the objective theory of perpetration in favor of quintessentially German accounts of the dividing line between perpetration and complicity—while Anglo-American criminal law (unconvincingly) always treats the person doing the killing as the perpetrator, both Japanese and German criminal law do not. *Compare* DANDO, *supra* note 156, at 217–19 and BOHLANDER, *supra* note 155, at 156–66.

[160] Recently, in surveying standards of complicity around the world in help determine the scope of aiding and abetting in customary international law, the ICTY drew heavily on Dando's text to report Japanese standards that were strikingly similar to those applicable in Germany. This, once again, is an example of the normative inter-penetration we identify here. *See Šainović supra* note 4, at ¶ 1645 n.5416 (discussing Japanese law of complicity in the context of its rejection of "specific direction" as an element of complicity in customary international law). Aside from the fact that Japanese criminal law allows *dolus eventualis* as a lowest mental element for complicity, as the ICTY recognizes, Japanese criminal law also involves a differentiated system of participation with limited derivative liability, mandatory mitigation of sentences for accomplices, a distinction between co-perpetration and complicity, and a control theory to delineate between the two. All of these features are consistent with German criminal theory and few comfort with Anglo-American principles.

[161] For a comparative overview of theories of complicity, see James G. Stewart, *Complicity*, *in* OXFORD CRIMINAL LAW HANDBOOK (forthcoming) (Markus Dubber & Tatjana Hörnle eds., 2014).

of German criminal law, or by pure happenstance, German ideas about social order, crime and punishment meshed well with underlying ideological pre-commitments in Japan. While both these hypotheses are probably partially true, history reveals a slightly darker explanation that again unsettles the view that extant doctrine is a necessary repository of social and cultural diversity to be safeguarded and preserved internationally—perhaps German criminal law was forced upon the Japanese?

The uptake of German criminal law in Japan began during the reign of the Emperor Meiji in the late 19th century, when the country reshaped its legal system to mirror Western norms.[162] From the 7th century until the Meiji reforms, Japanese law was based on Chinese thought,[163] and criminal justice was administered through the Shogunate and its officials.[164] The impetus to shift to a more European system came after Western military powers forced the Tokugawa Shogunate to open Japan up to international trade.[165] In this respect, the Japanese experience was consistent with those we identify in the DRC and Pakistan. As Antony Anghie has eloquently explained, "[i]t is hardly controversial that one of the primary driving forces of nineteenth-century colonial expansion was trade."[166] Japan, however, was able to avoid the ignominy of physical occupation by complying with European standards for transnational trade in order to win international recognition and assert itself as a sovereign state on an international stage.[167] In other words, the litmus test for the

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[162] *See* DANDO, *supra* note 156, at 34–35; Sally Engle Merry, *Colonial and Postcolonial Law, in* THE BLACKWELL COMPANION TO LAW AND SOCIETY 569, 570 (Austin Sarat, ed., 2004).

[163] Wilhelm Röhl, *Generalities, in* HISTORY OF LAW IN JAPAN SINCE 1868 1, 23 (Wilhelm Röhl, ed., 2004).

[164] Yoshiro Hiramatsu, *Tokugawa Law*, 14 LAW IN JAP. 1, 48 (1981). Instead of rendering individuals equal, the Shogunate system depended on hierarchies of status and therefore reinforced the role of central administration through the Emperor. *See* Dan Henderson, *Introduction to the Kujikata Osademegaki (1742), in* HO TO KEIBATSU NO REKISHI-TEKI KOSATSU [HISTORICAL CONSIDERATIONS OF LAW AND PUNISHMENT] MEMORIAL ESSAYS IN HONOUR OF DR HIRAMATSU YOSHIRO (1987), quoted in MERYLL DEAN, JAPANESE LEGAL SYSTEM 59 (2d ed. 2002).

[165] After the Opium War, in 1854 and 1855, the United States, followed by Great Britain, Russia, and the Netherlands, all concluded treaties with the Shogunate that granted a number of privileges to the states and their nationals. These initial treaties were quickly supplanted by even more unequal treaties that allowed even more states to have extraterritorial rights and jurisdiction for indefinite periods of time. Ram Prakash Anand, *Family of "Civilized" States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation*, 5 J HIST. INT'L L. 1, 9–14 (2005).

[166] ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 67 (2007).

[167] *Id.* at 91.

type of international recognition that would forestall formal colonial rule, known as standards of civilization, demanded that states like Japan create "idealized European standards in both their external and, more significantly, internal relations."[168]

Initially, Japanese officials resisted this path. Prior to the full-blown assumption of European law, foreign trading companies arrogated more and more influence over local administration to themselves, precisely in order to create an environment most conducive to their economic expansion.[169] These nominally independent companies operated in tandem with colonial governments to press Japan into assuming a raft of unequal treaty obligations, which ceded an important set of powers to the foreign colonial powers and/or companies under the direct threat of military action. The resulting unequal treaties granted foreign states – including the United States, Britain, France, Russia, and the Netherlands – a number of important privileges:[170] Japan was no longer entitled to control its monetary system, regulate tariffs or trade, or determine where foreigners settled within Japanese territory.[171] Moreover, foreign powers established consular jurisdictions with enforcement powers within Japan, displacing the Japanese judiciary.[172]

In 1868, the loss of sovereign control in the consular jurisdictions contributed to a revolution that restored the Emperor Meiji.[173] In order to reassert Japanese jurisdiction and appease the Japanese citizens who saw foreign legal control of Japan as a major affront, the new Meiji government decided to impose "standards of civilization" upon itself as a lesser evil that would at least ward off formal colonial rule.[174] Thus, the Japanese did to their own legal system what colonialism would have

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[168] *Id.* at 84.
[169] *Id.* at 84–85.
[170] MICHAEL R. AUSLIN, NEGOTIATING WITH IMPERIALISM: THE UNEQUAL TREATIES AND THE CULTURE OF JAPANESE DIPLOMACY 1–8 (2006). Auslin notes that while the treaties were unequal, the foreign powers did not engage in the usual form of colonialism that involved territorial dominance and the exclusion of other potential competitor colonial nations. Instead, the treaties served as means of regulating both relations with Japan as well as with each other.
[171] CARL F. GOODMAN, THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 16–17 (2d rev. ed. 2008). Similar treaties were found in other Asian countries as well, including China. *See* GERRIT W. GONG, THE STANDARD OF 'CIVILIZATION' IN INTERNATIONAL SOCIETY 14–35 (1984).
[172] GOODMAN, *supra* note 171, at 21.
[173] SHIGENORI MATSUI, THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS 8 (2011).
[174] TAKII KAZUHIRO, THE MEIJI CONSTITUTION: THE JAPANESE EXPERIENCE OF THE WEST AND THE SHAPING OF THE MODERN STATE 5 (David Noble trans., International House of Japan ed. 2007).

achieved anyway. In this way, the Japanese government developed a legal system that was more amenable to the Western powers, thereby obviating the need for the foreign consular jurisdiction that had proved so deeply offensive that it destabilized the entire political regime.[175] Given the value of criminal law as a vehicle for protecting trade and reinforcing fragile governmental authority, not to mention the desire to appease their colonial interlocutors, the Japanese quickly looked to European criminal codes for inspiration. Thus begins the process that sees Japanese professors of criminal law learning German most earnestly.

Initially, Japan adopted the French Napoleonic Penal Code (1880) and the Code of Criminal Instruction (1880), both of which had proved a favorite export of French colonial rule.[176] The initial adoption of French law in Japan was mostly a matter of expedience—the Japanese needed an existing body of law that was not burdened by case law and quick. As a result, the French codes were translated into Japanese criminal law verbatim.[177] This first experiment with European models was short-lived, however. After only a very brief period in effect, the French-based code came to be perceived as overly liberal, and incapable of legitimating the structure and values of the imperial regime.[178] In looking for European alternatives, the Japanese found that German law was not only viewed as more advanced than French law,[179] the German code appeared especially relevant to the Japanese context: Germany was a relatively new nation, trying to create a federation out of a monarchical system of government while reconciling historical and customary practice with statutory law.[180] And most importantly, the German code still enjoyed the necessary European pedigree.

Therefore, the influence of French law in Japan was soon superseded by a new, German-based Meiji Constitution and criminal code.[181] As a result of this switch in legal affiliations, Japanese law as a

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[175] Karl-Friedrich Lenz, *Penal Law, in* HISTORY OF LAW IN JAPAN SINCE 1868, *supra* note 163, at 607, 609–10. Evidently, the need for internal legal reform within Japan to remove Western jurisdiction quickly became the focal point of Japanese politics during the period. *See* GEORGE BAILEY SANSOM, THE WESTERN WORLD AND JAPAN: A STUDY IN THE INTERACTION OF EUROPEAN AND ASIATIC CULTURES 378–85 (1950).

[176] Röhl, *supra* note 163, at 24.

[177] *Id.* at 23 – 24.

[178] Ronald Frank, *Civil Code, in* HISTORY OF LAW IN JAPAN SINCE 1868, *supra* note 163, at 166, 178 – 179. *See also* MATSUI, *supra* note 173, at 9.

[179] Frank, *supra* note 178, at 183.

[180] *Id.* at 182–86. The other important aspect of German law was the conservative nature of its constitution, which allowed for the establishment of institutions of governance that were subordinate and answerable to the Emperor. The subsequent adoption of Germanic codes was a natural result of adopting this constitution. Anand, *supra* note 165, at 18.

[181] Which concentrated political power with the Emperor. Kenzo Takayanagi, *A Century*

whole is now a mixture of a number of foreign influences: German law was deeply mixed with French practice along with the earlier Chinese influence.[182] The criminal law, however, clearly followed the German path. As we mention earlier, if one even browses leading Japanese criminal law texts or compare the structure of core modes of attribution like complicity, Japanese criminal law is shot through with German thinking.[183] As Markus Dubber has joked in irony, "the sun never sets on German criminal theory."[184] Japan is clearly an important ingredient in making the proposition's true.

While Japan both accepted and felt compelled to adopt German criminal law prior to the Second World War, the process of transplantation contrasted starkly with the force of American legal influences during the postwar occupation. The new American-authored Japanese Constitution was subordinated to the Supreme Commander of the Allied Powers (SCAP), whose orders could not be constitutionally challenged.[185] By this point, the American occupying forces were reforming virtually every aspect of Japanese law, including substantive criminal law and criminal procedure.[186] This episode of reform added another layer of foreign influence onto the long history of supplanting Japanese "patterns of knowing, feeling, and acting" about criminal punishment with foreign alternatives that furthered outside interests. Nonetheless, while Americanization would further dilute the concentration of Japanese cultural norms in national criminal law, the Japanese law governing complicity today suggests that these American changes were insufficient

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of Innovation: The Development of Japanese Law 1868 – 1961, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 6−12 (Arthur Taylor von Mehren, ed., 1963). *See also* MATSUI, *supra* note 173, at 9−13. There had been a momentary hesitation where British parliamentary democracy, the preferred choice of the Japanese academy, had been proposed instead of the German model. The debate ended when the leading proponent of the British model, Okuma Shigenobu, was expelled from Parliament for opposing a suspicious sale of government assets on preferential terms. *See* Joyce Chapman Lebra, *Okuma Shigenobu and the 1881 Political Crisis*, 18 J. OF ASIAN STUD. 475 (1959).

[182] DEAN, *supra* note 164, at 71.

[183] *See, e.g.*, DANDO, *supra* note 156

[184] Dubber, *supra* note 18, at 1298 Dubber points to the strong influence of German criminal law in Spain, Latin America, Japan, South Korea, Taiwan, Greece, Poland and Turkey.

[185] The bulk of the post-war Constitution was drafted in a matter of days primarily by American legal experts, before its rapid acceptance in Japan. *See* Robert E. Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980 (1956); and, ALFRED C OPPLER, LEGAL REFORM IN OCCUPIED JAPAN (1972). *See also*, Lenz, *supra* note 175, at 622–23. As for the higher constitutional status of the SCAP, the Supreme Court of Japan made this ruling. *See* MATSUI, *supra* note 173, at 27.

[186] *See* OPPLER, *supra* note 185, at 136 (describing the reform of criminal procedure law as "the most complicated and time-consuming reform").

to dislodge the prior German influence.

Overall, this set of multiple reforms and revisions led to a system of criminal law whose connection to Japanese societal values was filtered through layers of foreign law. We do not argue that these outside influences necessarily negate the possibility of a correlation between societal values and German-inspired criminal law in contemporary Japan including on the topic of complicity—the Japanese people may have come to adopt these foreign doctrine as their own in much the same way that one has some difficulty walking through the streets of Islamabad without interrupting games of cricket. Indeed, we believe that there is a real likelihood that the Japanese have done just this given the passage of time, the number of legal reforms since and the reality that Japanese forcibly introduced German criminal law to other Asian nation-states, mostly notably, South Korea.[187] Still, we express concern that a prescriptive variant of Legal Pluralism should just assume this relation automatically in light of a history that, on its face, would seem to point in the opposite direction.

Put differently, when the ICTY draws on the Japanese criminal law governing complicity to define the equivalent concept in ICL,[188] their method is undeniably plural as a matter of doctrine, but it does not *necessarily* add the diversity that ICL lacks and which pluralism is supposed to furnish. Consequently, differing to then managing the diversity of extant legal doctrine throughout the world does not lead inexorably to meaningful pluralism, nor the type of diversity that will give effect to *value* pluralism or cosmopolitan aspirations for international criminal justice. Doctrinal pluralism is thus a shaky foundation for global Legal Pluralism in any field, even where colonialism was never formally achieved.

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[187] Markus Dubber, for instance, notes the influence of German criminal law on both South Korea and Japan. See Markus Dirk Dubber, *Theories of Crime and Punishment in German Criminal Law*, 53 AM. J. COMP. L. 679, 679 (2005); The influence is such that Volker Krey's helpful English translation of German criminal law principles is explicitly addressed to "professors and students of Japanese and South Korean law faculties." VOLKER KREY, GERMAN CRIMINAL LAW GENERAL PART vii (2002). From an academic perspective, the influence of German criminal theory and later of American language on South Korea produced one of the first scholars to introduce German criminal law to the United States, prior to George Fletcher. *See* Paul Ryu, *Contemporary Problems of Criminal Attempts*, 32 N.Y.U. L. REV. 1170 (1957); Paul Ryu, *Causation in Criminal Law*, 106 U. PA. L. REV. 773 (1957); Paul Ryu, *Discussion of Structure and Theory*, 24 THE AM. J. OF COMP. L. 602 (1976).

[188] See *infra* note 160.

B. Double-Counting Joint Criminal Enterprise in Ad Hoc International Tribunals

Forms of participation in international crimes are highly doctrinally plural within international courts, but when scrutinized historically, their ability to claim a diversity of values is also weak. The wide array of forms of attribution that might apply to international crimes before ad hoc tribunals in the former-Yugoslavia, Rwanda, Cambodia and Sierra Leone, really reflect the dominant influence of a very few national systems. At every step, these tribunals subjected defendants to standards of responsibility that draw on the history of national criminal law we have pointed to above. In other words, the history of forms of participation in these institutions is largely in step with, not an exception to, the dynamics we point out in global criminal doctrine. Using history as our method and technique, we scratch the surface of one mode of attribution in ad hoc Tribunals, namely Joint Criminal Enterprise ("JCE"), to illuminate this reality.

Before we get to JCE in *ad hoc* tribunals, we pause to briefly observe its absence at Nuremberg or Tokyo. After the St James Declaration, in which the Allies promised punishment for atrocities "of those who ordered them, perpetrated them or participated in them,"[189] the Allies established what was first known as the Inter-Allied Conference on the Punishment of War Crimes.[190] The body, later renamed a Commission, busied itself with issues of law for the international trials it envisioned, including the question of law governing the attribution of criminal responsibility. The Commission even issued a questionnaire to states on the topic, although the project of consolidating responses was soon abandoned. Where discussions did continue, they tended to focus almost obsessively on the issue of superior orders, but forms of attribution were also a frequent agenda item. On this topic, Professor Lauterpacht tabled a report recommending that "every case, as it would arise in war crimes trials, be solved on the basis of general principles of penal law, and that individual responsibility be determined in ascertaining the existence of the mens rea of the accused."[191]

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[189] INTER-ALLIED INFORMATION COMMITTEE, PUNISHMENT FOR WAR CRIMES—THE INTER-ALLIED DECLARATION SIGNED AT ST. JAMES'S PALACE LONDON ON 13TH JANUARY AND RELATIVE DOCUMENTS 15 (1942). For discussion of the significance of the declaration, see TAYLOR, *supra* note 123, at 25 (2013), and MAGUIRE, *supra* note 125, at 67 (rev. ed. 2010).

[190] HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 89 (1948).

[191] *Id.* at 277. Lauterpacht later published his submissions to the UN War Crimes Commission. *See* Hersch Lauterpacht, *The Law of Nations and the Punishment of War*

Curiously, Lauterpacht's idea of general principles appears to have carried the day at Nuremberg and Tokyo. Although the Charters of both tribunals explicitly enumerated different forms of attribution,[192] the Nuremberg Tribunal itself merely considered whether an accused was "concerned in," "connected with", "inculpated in" or "implicated in" international crimes.[193] As many leading commentators now accept, this approach entailed what Europeans call a unitary theory of perpetration,[194] which does not disaggregate forms of attribution into formal legal concepts like aiding and abetting, superior responsibility or JCE. To the modern international criminal lawyer, the refusal to differentiate between forms of attribution like this will appear either fringe or antiquated, but in fact, the abundance of differentiated systems of blame attribution throughout the many systems of criminal law globally largely has colonialism to thank: with the partial exception of Italy, the European states that had adopted a unitary theory like that employed at Nuremberg and Tokyo were never colonial powers.[195] England, France, Spain and

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Crimes, 21 BRIT. Y.B. INT'L L. 58, 73 (1944). In addition, he also argued that general principles of criminal law should form the basis of war crimes, which he argued "may de defined as such offences against the law of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law." *Id.,* at 79.

[192] Art. 6(3) of the *Nuremberg Charter* reads: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 59 Stat. 1544, 82 U.N.T.S. 284, *reprinted in* 39 AM. J. INT'L L. 257 (Supp. 1945) [hereinafter *Nuremberg Charter*].

[193] For an overview of these cases, see 15 THE UNITED NATIONS WAR CRIMES COMMISSION, DIGEST OF THE LAWS AND CASES, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS, 49–58 (1947). Like Hector Olásolo, we conclude that this amounts to a unitary theory of perpetration insofar as it fails to distinguish modes of participation. *See* OLÁSOLO ET AL., THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 21 (2010).

[194] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: VOLUME 1: FOUNDATIONS AND GENERAL PART 105 (2013) ("the IMT and IMTFE Statutes merely require a causal contribution to a certain criminal result, thereby opting for a unitarian concept of perpetration (Einheitstäterschaft). As will be seen below, the jurisprudence adopted this fairly unsophisticated approach."); OLÁSOLO, *supra* note 193, at 21 ("the IMT and IMTFE embraced a unitary model which did not distinguish between the perpetration of a crime... and participation in a crime committed by a third person"); and ALBIN ESER, INDIVIDUAL CRIMINAL RESPONSIBILITY 781 (2002) ("for supranational courts and codes, this somehow `holistic' model of perpetratorship [the unitary theory of perpetration] seemed attractive enough to be followed by the Nuremberg and Tokyo Tribunals").

[195] This countries include Denmark, Norway, Austria, Italy, Poland and Brazil. See generally, James G. Stewart, *The End of "Modes of Liability" for International Crimes*,

Germany, on the other hand, all adopted the differentiated system ICL lawyers know best.

Aside from this brief glimpse into the prehistory of modes of attribution at Nuremberg, it is also important to appreciate that the doctrinal variety of modes of attribution used to prosecute international crimes after WWII was probably massive. Just with respect to zonal trials held by each of the occupying powers in Germany after WWII, the Americans prosecuted 1,885 alleged war crimes;[196] French military tribunals convicted 2,107 individuals (and staged numerous other trials within France and French North Africa);[197] the British tried 1,085 crimes;[198] and the Russians – by then no strangers to the value of the criminal trial as a means of authoritarian control – staged a number in Russian-occupied Germany that historians cannot quantify.[199] Therefore, even leaving these Russian prosecutions out,[200] there were at least 5,077 trials held within the WWII zonal trials, creating a very large class of standards of law to synthesize in the quest for "common principles." Indeed, outside the zones occupied by the victorious Allied nations, the historian István Deak reports "up to 2 to 3 percent of the population formerly under German occupation… was charged by national courts for

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25 LEIDEN. J. INT'L. L. 165, 170 (2012). For a history of the rise of the unitary theory of perpetration, including the Union International de Droit Pénal's endorsement of it in 1902, see James G. Stewart, *The Strangely Familiar History of the Unitary Theory of Perpetration*, in ESSAYS IN HONOUR OF MIRJAN DAMAŚKA, (forthcoming 2015).

[196] David Fraser, *Shadows of Law, Shadows of the Shoah: Towards a Legal History of the Nazi Killing Machine*, 32 OXFORD J. LEG. STUD. 401, 414 (2011).

[197] *Id.*

[198] *Id.*

[199] *Id.* If one considers trials held by East German Courts, then there were 12,766 convictions alone during from 1945 – 1955. Soviet tribunals themselves prosecuted an uncounted number of crimes (including against domestic political opponents), with 776 death penalties imposed. *See* Moritz Vormbaum, *An "Indispensable Component of the Elimination of Fascism": War Crimes Trials and International Criminal Law in the German Democratic Republic, in* 2 HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW 397, at 401, 424 (Morten Bergsmo, CHEAH Wui Ling and YI Ping eds., 2014). *See also* Jonathan Friedman, *The Sachsenhausen Trials: War Crimes Prosecution in the Soviet Occupation Zone and in West and East Germany*, *in* ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES 159 (Patricia Heberer & Jürgen Matthäus eds., 2008).

[200] Presumably, whatever number the Russians did prosecute, it did not include trials of the perpetrators of the 90,000 rapes of German women by Russian forces in the two weeks after Berlin fell. For more details, see Tony Judt, *The Past is Another Country: Myth and Memory in Postwar Europe*, *in* THE POLITICS OF RETRIBUTION IN EUROPE: WORLD WAR II AND ITS AFTERMATH, *supra* note 201, at 293, 294 ("in the weeks following the Soviet army's capture of Berlin some 90,000 women in the city sought medical assistance for rape. In Vienna the Western allies recorded 87,000 rape victims in the three weeks following the arrival of the Red Army.").

what was alternatively, or often simultaneously, termed collaboration with the enemy, treason, and war crimes".[201] In Europe alone, then, state practice on questions of criminal participation in atrocity was gargantuan.[202]

Against this background, we now introduce JCE and critically retrace its passage into the received understandings of customary ICL via ad hoc tribunals. According to these tribunals, JCE has three strands. The "basic" form occurs where "co-defendants, acting pursuant to a common design, possess the same criminal purpose."[203] The second "systematic" form of joint criminal enterprise is a mere subset of the "basic" form, and adds little of great salience for present purposes,[204] mostly because it also requires that the participants in the enterprise harbor the necessary intent to commit the crime. Under the third variant (JCE III), however, all participants in a joint criminal enterprise are responsible for crimes committed beyond those agreed, provided they are "a natural and foreseeable consequence of the common purpose."[205] Thus, the soldier manning the door is also convicted of torturing the victim, even if he

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[201] István Deák, *Introduction*, *in* THE POLITICS OF RETRIBUTION IN EUROPE: WORLD WAR II AND ITS AFTERMATH 3, 4 (István Deák, Jan Tomasz Gross, & Tony Judt eds., 2000).

[202] Outside Europe, trials were certainly less numerous, but they unquestionably added to this number. *See, e.g.*, DAVID FRASER, DAVIBORSHCH'S CART: NARRATING THE HOLOCAUST IN AUSTRALIAN WAR CRIMES TRIALS (2010). *See also,* THE HIDDEN HISTORIES OF WAR CRIMES TRIALS (Kevin Jon Heller & Gerry Simpson eds., Oxford, United Kingdom, Oxford Univ. Press, 1 edition ed. 2013) (including chapters on war crimes trials in Turkey and Ethiopia). *See also* HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW VOL. 2 (Morten Bergsmo et al. eds., FICHL Publication Series, Brussels, Torkel Opsahl Academic EPublisher 2014) (adding histories of war crimes trials in China, Singapore, Australia and the USSR, not to mention the many others that focus on proceedings within Europe).

[203] Prosecutor v. Tadić, *supra* note 6, at ¶ 196. Note that this language is not always consistent. *See* Prosecutor v. Vasiljević, Case No. IT-98-32-A, Judgment, ¶ 97 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 25, 2004) (finding that "[t]he first category is a 'basic' form of joint criminal enterprise. It is represented by cases where all co-perpetrators, acting pursuant to a common purposes, possess the same criminal intention.").

[204] In JCE II, the common plan in JCE I is merely replaced by "an organized criminal system," such as an extermination or concentration camp. There is, therefore, general consensus that this "systematic" category in JCE II is only a subset of the 'basic' form in JCE I. *See, e.g.*, Prosecutor v. Tadić, *supra* note 6, at ¶ 203 ("this category of cases... is really a variant of the first category"); Prosecutor v. Kvočka et al., Case No. IT-98-30/1-A, Judgment, ¶ 82 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (describing JCE II as "a variant of the first form"); and Kai Ambos, *Amicus Curiae Brief in the Matter of the Co-Prosecutors' Appeal of the Closing Order Against Kaing Guek Eav "Duch" Dated 8 August 2008*, 20 CRIM. L.F. 353, 374 (2009) (concluding that JCEII can be viewed as an element of JCE I if interpreted narrowly).

[205] Prosecutor v. Kvočka et al., *supra* note 204, at ¶ 83.

believed he was guarding the entry to prevent enemy soldiers entering and only foresaw that one of his confederates might commit torture.[206]

How did the doctrine infiltrate international law? The Charters of the Nuremberg and Tokyo Tribunals had referenced liability based on a "common plan,"[207] which laid the foundation for JCE in modern ICL, but as we saw a moment ago, the Tribunals did not apply it as such. Likewise, JCE was hardly a common element of all of the very many trials that followed WWII, in Europe or beyond. The negotiating history of the Nuremberg Charter points to a familiar answer to the riddle of its emergence in ICL. In a trans-Atlantic discussion on the topic of criminal responsibility that was held in early 1945,[208] no lesser personality than Justice Robert Jackson opined that international law was "indefinite and weak" in the area of criminal liability.[209] Jackson went on to argue that, as a consequence of this frail foundation, the task of defining these issues within the Charter "fulfills in a sense the function of legislation."[210] As to the content of this new legislation, he concluded that "there is greater liberty in us to declare principles as we see them now".[211] Needless to say, the "we" in his remarks hardly reflected the views of a meaningful cross-section of a global polity.

The notion of "common purpose" the Allies freely injected into the Nuremberg and then Tokyo Charters during this process derived from complicated debates about conspiracy. We have addressed the partial absorption and application of conspiracy earlier,[212] and here add only one point of great salience for JCE in particular. According to well-reviewed historical records,[213] the conspiracy debate involved a seemingly constant oscillation between conspiracy (an inchoate separate crime in its own right as we saw earlier) and common purpose liability (a means of participating

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[206] In fact, there is good authority for the idea that the standard is actually objective foreseeability, lowering the mental element required for JCEIII even further. *See* Elies van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT'L CRIM. JUST. 184 (2007) (arguing that whether members of a JCE must comply with the full mens rea of genocide turns on whether they are perpetrators or participants), and, Antonio Cassese, *The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise*, 5 J. INT'L CRIM. JUST. 109, 121 (2007) (arguing that it is a logical impossibility for someone who does not have the necessary mens rea for genocide to "commit" the crime, but accepting that he or she may aid and abet the crime nonetheless).

[207] *Nuremberg Charter, supra* note 192.

[208] JACKSON, *supra* note 133, at 331.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] See infra section II.B.

[213] *See* Bush, *supra* note 127.

in a consummated offense i.e. a mode of attribution). The slippage between these two very different concepts was nowhere more evident than in the report of American Lieutenant Colonel Murray C. Bernay, whose recommendations to President Roosevelt in September 1944 are widely regarded as the genesis of common purpose liability and, by derivation, the modern notion of JCE.[214]

Once again, the method of absorption would prove revealing. When the famed *Tadić* Appeal Judgment came to decide whether the ICTY Statute (implicitly) included JCE a.k.a common plan liability, it seized upon only portions of this history and a small subset of favorable Anglo-American criminal law.

This choice created three conspicuous problems. First, the ICTY Appeals Chamber made no mention of the unitary theory of perpetration applied at Nuremberg, Tokyo, and in subsequent cases. In other words, aside from pointing to the common plan doctrine that was formally included in the Nuremberg and Tokyo Charters, the Chamber ignored most everything in the judgments. If, as most experts agree, these two prior tribunals had applied a unitary theory of perpetration, the leap to JCE in *Tadić* makes the Nuremberg standards "legal bastard cousins in the family's juridical closet."[215] Yet a system that purports to ground its forms of criminal attribution in a venerable lineage of customary international law within international courts and tribunals is undermined by illegitimate offspring like these.[216]

Second, the sources the *Tadić* Appeals Judgment drew upon in turning away from the unitary theory were obtained from an extremely selective preference for certain Western standards. Faced with a tidal wave of disparate modes of attribution for international crimes that were suddenly pushed to the surface in the immediate post-war, the *Tadić* decision cited just ten cases as supporting JCE. The choice was illuminating, as much for the origins of the cases cited as their meager sample size: six of the cases were drawn from British military courts

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[214] Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 113 (2005) (discussing Bernay's major contribution to the development of JCE); ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 22-30 (2012) (same); and, CIARA DAMGAARD, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES 132 (2008) (same).

[215] The historian David Fraser eloquently criticizes international criminal lawyers for sometimes drawing implausible lines between historical phenomena that may be unconnected, mostly out of a desire to justify that which currently exists. Fraser, *supra* note 196, at 9. In structure, this argument resembles that which Samuel Moyn makes in international human rights law. SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

[216] Fraser, *supra* note 196, at 9.

established after WWII;[217] one stemmed from a Canadian military court in occupied Germany;[218] two from the United States Tribunal convened pursuant to Control Council Law No. 10;[219] and, a small series of national Italian cases. Despite the evident limitations in quantum and representation of these sources, the Appeals Chamber in *Tadić* cited the familiar but false notion, inspired from Lauterpacht, Wechsler and many others in between, that JCE was "[i]n line with recognized principles common to all civilized legal systems."[220] To the (limited) extent that the claim was true of criminal law doctrine, it was only so because of a double-counting of English criminal law: once in the metropole, then several times again within former colonies the parent system had constructed in its own image.

If this sample of case law fell short of establishing the universality claimed, the ICTY Appeals Chamber's subsequent treatment of national legislation only exacerbated the earlier methodological shortcoming. The Appeals Chamber in *Tadić* went on to reason that "international criminal rules on common purpose [i.e. JCE] are substantially rooted in, and to a large extent reflect, a position taken by many States of the world in their

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[217] Trial of Otto Sandrock and three others, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland (Nov. 24–26, 1945), *reprinted in* 1 THE UNITED NATIONS WAR CRIMES COMMISSION, DIGEST OF THE LAWS AND CASES, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 35 (1947); Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany (Aug. 13–23, 1946), Judgement of 24 August 1946; Trial of Franz Schonfeld and others, British Military Court, Essen, June 11th-26th, 1946, *reprinted in* 11 THE UNITED NATIONS WAR CRIMES COMMISSION, DIGEST OF THE LAWS AND CASES, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 68 (1947) (summing up of the Judge Advocate); Trial of Feurstein and others, Proceedings of a War Crimes Trial held at Hamburg, Germany (Aug. 4–24, 1948), Judgement of 24 August 1948; Trial of Erich Heyer and six others, British Military Court for the Trial of War Criminals, Essen, (Dec. 18–19 and 21–22, 1945), *reprinted in* 1 THE UNITED NATIONS WAR CRIMES COMMISSION, DIGEST OF THE LAWS AND CASES, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 88, 91 (1947); Trial of Josef Kramer and 44 others ("Belsen Case"), British Military Court, Luneberg, Sept. 17 – Nov. 17, 1945, *reprinted in* 2 THE UNITED NATIONS WAR CRIMES COMMISSION, DIGEST OF THE LAWS AND CASES, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS,1.

[218] *Hoelzer et al.,* Canadian Military Court, Aurich, Germany, 1 RECORD OF PROCEEDINGS 25 MAR-6 APRIL 1946, 341, 347, 349 (RCAF Binder 181.009 (D2474)).

[219] The United States of America v. Otto Ohlenforf et al., *reprinted in* 4 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 3 (1951); and, Trial of Martin Gottfried Weiss and thirty-nine others, General Military Government Court of the United States Zone, Dachau, Germany, (Nov. 15– Dec. 13, 1945), *reprinted in* 11 THE UNITED NATIONS WAR CRIMES COMMISSION, DIGEST OF THE LAWS AND CASES, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 5 (1947).

[220] *Tadić*, *supra* note 6, at ¶ 200.

national legal systems."[221] But here too, the countries the Appeals Chamber pointed to as substantiating their thesis included just "England and Wales, Canada, the United States, Australia and Zambia."[222] In conjunction with the difficulties with the selection of case law, this limited legislative survey renders this aspect of ICL in ad hoc tribunals almost inseparable from criminal law developed for the British Commonwealth.[223] The two histories come apart, but only just, and certainly not enough to sooth worries that Legal Pluralism risks sanctifying principles conceived in British imperialism.

Ironically, the same dangers are evident within judicial opposition to JCE. If the Appeals Chamber had included laws governing criminal attribution from non-British colonial powers, it might have come to a very different conclusion about JCE's existence in customary ICL. French law, for example, did not contemplate the doctrine, and given the histories we have gestured to, this reality suggests that numerically speaking, many other modern criminal law systems throughout the world will not contain it either. In an eerie reminder of this point, a decision of the Extraordinary Criminal Chambers of Cambodia (ECCC) rejecting one component of JCE pointed to the fact that the doctrine did not exist in Cambodian criminal law. As authority for this proposition, the ECCC cited a French text on the Cambodian *Projet de Nouveau Code Pénal*, which explained Cambodian modes of attribution in terms that reflected French concepts *par excellence.* Historically speaking, this was entirely unremarkable—French criminal law was introduced into Cambodia as early as 1929 and remains the dominant influence to this day.[224] To revisit a recurring uncomfortable parallel, however, modern Cambodia was then subsumed within "French Indo-China."[225]

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[221] *Tadić*, *supra* note 6, at ¶ 193.

[222] *Id.,* at ¶ 224.

[223] *See* Martin Friedland, *Codification in the Commonwealth: Earlier Efforts*, 2 CRIM . L.F. 145, 150 (1990); Simon Coldham, *Criminal Justice Policies in Commonwealth Africa: Trends and Prospects* (2000) 44 J. AFR. L. 218, 223–28, 230–35.

[224] Phann Vanrath, *The Basics of Substantial Cambodian Criminal Law*, *in* INTRODUCTION TO CAMBODIAN LAW 198, 201 (Hor Peng, Kong Phallack, & Jörg Menzel, eds., 2010) (noting as well that French criminal law was in force in Cambodia since 1929 and that the 2009 code was drafted jointly by Cambodian officials and French experts).

[225] To take the parallel a step deeper, Jörg Menzel reports that the post-Khmer Rouge reconstruction of Cambodia's legal system resulted in a 'mixed civil law' system, where much of the kingdom's civil law is now Japanese in nature, but its criminal law remains French. Jörg Menzel, *Cambodian Law: Some Comparative and International Perspectives*, *in* INTRODUCTION TO CAMBODIAN LAW, *ibid at* 477, 482. We know how the French influence came about, and can only hazard a guess at how the Japanese civil law still accompanies it.

So even if the ICTY Appeals Chamber in *Tadić* took the absence of JCE in Cambodian criminal law into consideration as Legal Pluralists would implore, doing so could just engender a double-counting contest between colonial influences without necessarily honoring anything particular about Cambodians' "patterns of knowing, feeling, and acting."[226] In other words, managing conflicts between global criminal law risks adjudicating contests between competing colonial artifacts, taking us further away from the plurality of social, cultural and political values Legal Pluralism should seek to promote (if it is to shift away from its purely descriptive roots). With respect to JCE, it is hard to view the catalogue of sources relied upon by the Appeals Chamber in adopting the doctrine as reflecting any real degree of inclusive, plural, cosmopolitan values, but the same is true (to a lesser extent) of the ECCC decision rejecting it. Thus, to claim that modes of attribution for ICL crimes are doctrinally plural within an inter-penetrating system of criminal law is empirically undeniable, what William Twining calls "Social Fact Legal Pluralism,"[227] but to take a normative position about the desirability of that diversity in the name of Legal Pluralism or any other theoretical system risks turning a blind eye to the troubling history that generated the doctrinal diversity, and ultimately, begs the question about what the standard should be.

V. CRIMINAL OFFENSES

In this section, we turn to in the special part of ICL and question whether it can safely be said that crimes necessarily correspond to popular values. We have chosen two laws whose criminalization would seem inevitable given the respective social contexts. In the first section, we look at the process by which blasphemy became a crime in the 'Islamized' law of Muslim-majority Pakistan. While the inclusion of this crime would seem almost unavoidable, it was in fact a British colonial-era crime that soon became what Gunther Teubner calls a "legal irritant." In the international context, we study colonialism and apartheid. Apartheid would seem to be one of the most obvious international crimes, given its sordid and tragic history in South Africa. Yet the process by which it was eventually criminalized in the ICC Statute was littered with obstruction, mainly from Western states, and even now the status and definition of the norm is unclear. This would seem to represent another scenario where the norm bears little connection to social values, and instead communicates

[226] GARLAND, *supra* note 15.
[227] Twining, *supra* note 33.

the preferences of a small number of influential states. Again, these histories suggest that formal laws are not water-tight vessels capable of carrying the full diversity a prescriptive account of pluralism ought to value.

A. Blasphemy as a "Legal Irritant" in Pakistan

International courts and tribunals occasionally draw on the Pakistani criminal law governing crimes as part of the surveys of national criminal law they undertake to ground their readings of ICL norms. In the *Čelebići* Trial Judgment, for instance, an ICTY Trial Chamber analyzed various national laws governing the mental element required for murder, concluding that "[u]nder Canadian law, the accused is required to have a simultaneous awareness of the probability of death and the intention to inflict some form of serious harm, and this is also the position in Pakistan."[228] Pakistani criminal law also features in other international courts and tribunals,[229] in one instance, when an international court cited to the Indian Penal Code (IPC) of 1860.[230] In fact, the British used the IPC as a template for most all their colonial territories; it was implemented verbatim in countries as diverse as Uganda, Singapore and Australia, without calibration to local circumstances.[231] Citing the IPC as Pakistani criminal law is only one of the ways that ICL and national criminal law interface, but it invites a deeper inquiry into the quality of the national law harnessed to demonstrate ICL's inclusive, pluralistic, or cosmopolitan credentials.

Once again, the effect of colonialism on Pakistani criminal offences undermines the assumption that legal doctrine necessarily reflects diverse cultural value; unfortunately, Pakistani criminal law fares no better against British colonialism than our earlier examples of Franco-Belgian influence

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[228] Prosecutor v Delalić et al, No. IT-96-21-T, Trial Judgement, ¶ 434 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)..

[229] *Bagosora* , *supra* note 4, at n.1680. *See also,* Prosecutor v. Kunarac et al, Case No. IT-96-23-T& IT-96-23/1-T, Judgement, ¶ 454 n.1160 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (drawing on Pakistani criminal law, and many other national definitions, to interpret the scope of rape).

[230] *Ibid.*

[231] Uganda received the Indian Penal Code (IPC) and Criminal Procedure Code in 1897 and 1902 respectively. *See* Henry Francis Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876 − 1935" (1974) 18 J. Afr. L. 6, 6 – 7. For discussion of the IPC's transmission to Singapore, see BARRY WRIGHT, STANLEY YEO & WING-CHEONG CHAN, CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE: THE LEGACIES AND MODERN CHALLENGES OF CRIMINAL LAW REFORM 2 (2013).

on Congolese notions of inchoate crime or German criminal law on Japanese concepts of blame attribution. Nevertheless, the Pakistani experience does produce a particular variation worth stressing—Pakistan is distinguished from many of its post-colonial counterparts in that, after independence, it underwent a heartfelt attempt to radically restructure its legal system in order to create an Islamic instead of British system. Unlike the DRC, which maintained its colonial criminal law inheritance at various points of recodification, Pakistan actively sought to reconstruct colonial law from the inside out in order to create an identifiably Pakistani and Islamic legal state.[232]

The Pakistani Penal Code would therefore appear to give effect to a criminological policy that is at once markedly distinct from its British predecessor, and truly representative of an Islamic perspective. Yet, a closer study of Pakistani criminal offenses confirms a pattern of grafting Islamic cloaks onto colonial-era laws in ways that likely prove "unreceptive" for local populations, and more distinctly, end up infecting other contiguous aspects of the legal system. In this section, we consider the history of the crime of blasphemy in Pakistan to illustrate this dynamic. We choose blasphemy because, although it is not an international crime itself, it personifies attempts to Islamize an originally colonial doctrine that ultimately results in an inconsistent mix of colonial and Islamic legal concepts that do not co-exist amicably,[233] substantiating Günter Teubner's claim that some legal transplants act as "irritants". As a result, the history of blasphemy in Pakistan offers a new reason for reticence at the idea of treating criminal doctrine as a proxy for cultural variation.

On its surface, blasphemy involves provisions that seem to conform to common understandings of Shari'a punishment, and reflect Pakistan's status as an Islamic state with Islamic laws—surely, blasphemy is the quintessential Islamic offence? Yet the crime is in fact a colonial artifact that was not a part of Pakistani (or Indian) law until the British colonial regime imposed the IPC in 1860.[234] In 1947, Pakistan was granted

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[232] General Zia, the military dictator who suspended the 1973 Constitution of Pakistan in order to properly 'Islamize' Pakistan, stated that: "Pakistan, which was created in the name of Islam, will continue to survive only if it sticks to Islam. That is why I consider the introduction of [an] Islamic system as an essential pre-requisite for the country." *See* ANWAR HUSSAIN SYED, PAKISTAN: ISLAM, POLITICS, AND NATIONAL SOLIDARITY 144 (1982).

[233] Described as a "disconnect between the principles of Islamic law and statutory law." Moeen H. Cheema, *Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law* 60 AM. J. COMP. L. 875, 892 (2012).

[234] David F. Forte, *Apostasy and Blasphemy in Pakistan*, 10 CONN. J. INT'L L. 27, 27–28 (1994) (stating that apostasy was never specifically included in the law of Pakistan/India

autonomy from both India and its erstwhile colonial master, but no substantial connection was made between the Islamic identity the new nation adopted soon thereafter and its legal system until the period of 'Islamization' that began in the early 1970s.[235] Before and since, the British law of blasphemy has remained the most potent causal force in the development and maintenance of a crime that has, for worse not better, become synonymous with Pakistani criminal justice.[236]

When Pakistani criminal law was finally "Islamized" a generation after independence,[237] this process of internal reform was so haphazard that, faced with four different Shari'a bills, General Zia-ul Haq simply dismissed the government and introduced his own bill.[238] The irregularity of this extra-constitutional legislatoin was exacerbated by the establishment of an additional Islamic judicial system that ran in parallel to the pre-existing one.[239] The inevitable result was a lack of jurisdictional

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prior to colonial intervention). Although the IPC was drafted in 1860, it did not come into force until 1862.

[235] While General Zia ul-Huq receives much of the attention for his 'Islamization' program, the man he executed and then replaced oversaw the implementation of a new constitution first gave Islam its pre-eminent place in modern-day Pakistan. The 1973 Constitution passed by Prime Minister Zulfikar Ali Bhutto explicitly defined Islam as the national religion (Art. 2); introduced requirements that most national politicians be Muslim or be compliant with and conversant in Islamic practices (Art. 62); adopted provisions on following an Islamic Way of Life (Art. 31); and, established a theological council to advise "on the 'Islamic' credentials of existing and proposed law". *See Jeffrey A. Redding, Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 768–70 (2004). Bhutto also changed the day of rest from Sunday to Friday, banned alcohol, took Christian schools out of the control of churches, and 'acquiesced' to persecution of the Ahmadi sect. *See* Forte, *supra* note 234, at 36.

[236] A particularly low point was the mimicry of colonial-era laws that restrained the ability of non-Muslims to participate in public life. The Bhutto constitution managed to offer a definition of "Muslim" through its outlawing of the Ahmadi sect (Art. 260). This criminalization of the Ahmadis paralleled another British colonial artifact, the Criminal Tribes Act (No. XXVII of 1871), which required all members of certain communities to register with the authorities, who then restricted their movements and imprisoned those who left authorized areas.

[237] The quality of this reform was dubious given the lack of competence at both the judicial and legislative levels. *See* Abdul Ghafur Muslim, *Islamization of Laws in Pakistan: Problems and Prospects*, 26 ISLAMIC STUD. 265, 265–66 (1987). This incompetence combined with the haste with which the process was undertaken led to "jurisdictional and doctrinal incoherence" throughout the legal system. Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT'L L. 303, 319 (2008).

[238] Charles Kennedy, *Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan*, 41 INT'L & COMP. L.Q. 769, 776–77 (1992).

[239] This parallel Federal Shariat Court (FSC) was established through Article 203 of the Constitution. Kennedy notes that in five years, operational provisions of the FSC "were

clarity throughout the judicial system,[240] as the High Court and Shariat courts sought to undermine one another through competition over cases and by professing different interpretations of Islamized laws.[241] This contest over religious fidelity was part of a broader confusion over what it meant to even have an "Islamic" law. As one expert has argued, "the partisans of the Shari'a…are arguing for the dominance of a particular version of Islam, a version that never existed".[242]

In the absence of a clear consensus on the content or propriety of Islamization, the process has slowed. While some religious parties have managed to implement particular visions of Shari'a at the local level, they have found it difficult to impose their vision of Islam on the national Pakistani legal system.[243] Secular parties have resisted further Islamization, and even post-Zia dictators have countered some of the excesses of Islamization through separate legislation.[244] The net effect is that, at best, the Islamized blasphemy laws merely painted a veneer of Islam over the pre-existing colonial system,[245] thereby creating a legal regime governing criminal law that is marked by important internal

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modified 28 times, through the mechanism of 12 separate presidential ordinances, and were incorporated into the constitution in 14 subsections covering 11 pages of text." *See* Charles Kennedy, *Islamization and Legal Reform in Pakistan, 1979-1989*, 63 PAC. AFF. 62, 64 (1990).

[240] Redding, *supra* note 235, at 772−73.

[241] Cheema, *supra* note 233, at 881–82.

[242] Forte, *supra* note 234, at 66.

[243] *See* Juris Pupcenoks, *Democratic Islamization in Pakistan and Turkey: Lessons for the Post-Arab Spring Muslim World*, 66 THE MIDDLE EAST J. 273, 278–81 (2012) (discussing the inability of the religious MMA coalition to pass all of its Islamization agenda).

[244] *See* Cheema, *supra* note 233, at 885 (noting the passage of bills that sought to 'de-Islamize' Pakistani criminal law).

[245] RUBYA MEHDI, THE ISLAMIZATION OF THE LAW IN PAKISTAN 33 (Routledge 2013) (1994) ("However, Islamization has not made any qualitative change; all the features of Anglo-Muhammadan law are still there"). With respect to the penal code in general, the Federal Sharia Court noted that British law and Pakistani-Islamic law were largely compatible: In one of its first decisions, the Federal Shariat Court explained the basic concept of Islamization: "Our statute laws whether inherited from the British Government or enacted after Independence are based upon the principle of common good and justice, equity and good conscience which is the same as ... [the] principle of Istihsan of Imam Abu Hanifa. A fortiori these laws must be more in harmony with Shariah. In some respects the statute law may not fulfill the standard of the law of the Qur'an and may also be repugnant to it but such instances are few." PLD 1980 FSC at 16, quoted in Daniel P. Collins, *Islamization of Pakistani Law: A Historical Perspective*, 24 STAN. J. INT'L L. 511, 572 (1988).

contradictions; Pakistani criminal law remains deeply incoherent when viewed alternatively as either a body of criminal or Islamic law.[246]

With respect to pre-existing colonial-era blasphemy laws in particular, these were neither abandoned nor rewritten with either system in mind. Instead, they were simply supplemented by additional prohibitions. Crucially, these supplementary prohibitions undermined what appeared to be otherwise unbiased colonial law. The British included blasphemy as an offence in order to reduce inter-religious tension in pre-Partition India, and preserve a religiously pluralist society that included Hindus, Muslims, Jains, Sikhs, Parsis and Buddhists, whereas the 'Islamization' of those laws instrumentalized them as tools to elevate and protect Muslim sensibilities alone.[247] Now, these laws are used to incite discrimination and attacks against minorities, or to settle private disputes between individuals.[248]

This is not to say that the Indian Penal Code was preferable. Just as colonial administrators imposed the IPC throughout the world without local consultation, the post-independence imposition of such strict provisions bypassed an important and ongoing debate about the nature of Islam in Pakistan. As a result, the revised blasphemy laws are "not the product of a pluralistic and participatory democratic discourse", leaving their "genesis and ethos… highly tainted."[249] In short, while the military dictatorship of Zia gave the modern Pakistani crime of blasphemy its current form, it employed colonial-era laws and anti-populist modes of implementing Islamization. Consequently, the resulting doctrine offers only a distorted image of cultural values that cannot be linked to widespread or uniform societal attitudes with any degree of confidence. Unfortunately, all of this flies beneath the radar where international courts use Pakistani law to bolster ICL's depiction of itself as truly universal/cosmopolitan, or when Legal Pluralists call for legal managerialism without engaging the misalignment between criminal law doctrine and social, cultural, or political values throughout much of the modern world.

Instead of reflecting a transformational shift towards a

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[246] Tahir Wasti writes that the introduction of Shari'a law in Pakistan led to "numerous contradictions"; that Islamization was motivated by "political expediency"; and that "the new law has encouraged criminal homicide and murder." TAHIR WASTI, THE APPLICATION OF ISLAMIC CRIMINAL LAW IN PAKISTAN: SHARIA IN PRACTICE 283 (2009). *See also* Butti Sultan Butt Ali Al-Muhairi, *The Islamisation of Laws in the UAE: The Case of the Penal Code*, 11 ARAB L.Q. 350, 351 (1996) (that Islamization programmes create internal contradictions in Shari'a jurisprudence).

[247] Siddique & Hayat, *supra* note 237, 337–39.

[248] HUMAN RIGHTS WATCH, WORLD REPORT 2014 367–68 (2014).

[249] Siddique & Hayat, *supra* note 237, at 322.

fundamentally new legal system, the Islamized penal laws of Pakistan are distressingly familiar: "The rhetoric is all Islamic, but the reality is not very different from prior practice."[250] The new blasphemy laws used religious piety to mask antiquated forms of colonial governance;[251] rather than representing a departure from colonialism, they arguably distorted then entrenched a variety of unwelcome foreign imports.[252] The nature of these refined colonial-era laws—internally inconsistent, and of contested provenance or value to the local population—undermine any claim to pluralism beyond the superficial. Absent wholesale reform, even the

[250] Collins, *supra* note 245, at 581. Other aspects of Pakistani criminal law are similarly tainted. Rules of evidence in Pakistan are also a colonial artifact, originally imposed by the British in 1872 through the Indian Evidence Act (Act I of 1872), which remains in force in both Bangladesh (formerly East Pakistan) and India. Four entirely new Islamic codes of evidence were proposed in Pakistan 1982, but ultimately rejected. Instead, in 1984, the government essentially promulgated the same 1872 colonial law. *See* Kennedy, *Islamization supra* note 239, at 69 (stating that this "much heralded and contested Islamic Qanoon-i-Shahadat is in substance merely a reaffirmation of the 1872 Law of Evidence"). Even the introduction of *hudood* and *t'azir* crimes, for which corporal punishments may be delivered, made little change to law and procedure dating from 1860 *See* Charles Kennedy, *Islamization in Pakistan: Implementation of the Hudood Ordinances*, 28 ASIAN SURV. 307, 315 – 316 (1988).

[251] *See, e.g.*, Forte, *supra* note 234, at 49–50, 53–59 and 63–65 (describing how blasphemy laws have been used primarily to repress minorities); OMAR NOMAN, THE POLITICAL ECONOMY OF PAKISTAN: 1947-85, 143–44 (1988) (arguing that Zia was a dictator who claimed religious legitimacy by drawing parallels between himself and the Prophet Muhammad). It has been further argued that the Islamization process itself was not undertaken to add any doctrinal clarity but to consolidate Zia's power. *See* AYESHA JALAL, THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN'S POLITICAL ECONOMY OF DEFENCE 324 (1990) ("Quite clearly, Zia's state sponsored 'Islamisation' programme cannot be seen as anything more than a token effort, and a highly spurious one at that, to establish his own legitimacy without having to court mass popular support"); ASMA JAHANGIR & HINA JILANI, THE HUDOOD ORDINANCES: A DIVINE SANCTION? 21 (2003) ("It is widely accepted that President Ziaul Haq had used Islam as an instrument to consolidate his power. It was not a matter of genuine concern with him"); and, Kennedy, *supra* note 238, at 776 (1992) (noting that opposition claimed Sharia legislation was designed "to bolster the fading legitimacy of an unpopular regime").

[252] Three particular cultural imports stand out: (1) British imperialism; (2) a Hindu-derived caste system (which prioritizes private enforcement of the law; see Forte, *supra* note 234, at 56); and, (3) a particularly fundamentalist interpretation of Islam exported by wealthy Arab oil states. *See* KHALED M. ABOU EL FADL, THE GREAT THEFT – WRESTLING ISLAM FROM THE EXTREMISTS 79–81 (2005) (in discussing the influence of Arab Wahhabism in Pakistan, he argues that "Ultimately, Mawdudi and his followers, as well as the Wahhabis, shared in the belief in a dictatorial theocratic state that forces people to comply with their puritanical version of Islamic law"); IRA LAPIDUS, A HISTORY OF ISLAMIC SOCIETIES, 646 (2d ed. 2002) ("As Pakistan became increasingly dependent on oil-rich Arab states for loans, commerce, and employment of labor, Bhutto made further concessions to Islamic morality such as prohibiting alcohol and gambling").

injection of a system as apparently distinct as Islamic law could not provide a way out from the impositions of colonial criminal law in Pakistan. Thus, in this and analogous situations, doctrinal pluralism appears to offer little guaranteed diversity international criminal lawyers can bank on.

B. Colonialism and Apartheid in the ICC Statute

On its face, a treaty all states helped negotiate offers a cure for the one-sidedness of previous stages in the development of ICL. And yet, appearances often deceive—while the ICC Statute did mark a break from earlier methodologies, several aspects of the international crimes the Statute adopts are still disquieting for the pluralist prepared to look behind doctrine. Some of these culturally biased international crimes are highly conspicuous from the language in the ICC Statute itself, like the decision to define the war crime of pillage as "pillaging a town or place even when taken by assault,"[253] which differed to European histories of siege warfare over the widespread experience of plunder in the Global South.[254] In this section, however, we review the pivotal work of the International Law Commission ("ILC") in the development of substantive ICL crimes for the ICC Statute, focusing particularly on the moment when a broader understanding of international crimes seemed possible, only to be discarded soon after in favor of the *status quo ante*. Though we might have hoped that the process of developing a global court would affirm the importance of value pluralism, we again point to greater historical continuity than rupture with all that came before. In the end, the work of the ILC on the identification and definition of international crimes represents a continuation of the sorts of historical pressures that so

[253] ICC Statute, Arts 8(2)(b)(xvi) and 8(2)(b)(e)(v).

[254] The term 'pillaging a town and place even when taken by assault' derives verbatim from Art. 28 of the Hague Regulations of 1907. The reference to "even when taken by assault," is reflective of a period of European history when it was lawful to pillage a town as retribution for local resistance to siege. See N. BENTWORTH, THE LAW OF PRIVATE PROPERTY IN WAR 8 (London: Sweet & Maxwell, 1907. The Brussels Declaration of 1864 elected to do away with even the exception by prohibiting pillage categorically, hence the language "even when taken by assault." The Hague Regulations of 1907 then adopted this same language from the Brussels Declaration. That the ICC Statute chose to adopt it too speaks to a failure to consider the substance of war crimes or the realities of modern warfare outside a European mindset, which is particularly disappointing when Art. 47 of the same Hague Regulations also stipulates that 'pillage is formally forbidden'. As things stand, the reference to town, place and assault within the definition is legally redundant, and historically passé, serving to only obfuscate the legal relevance of pillage to Third World contexts. Here, and elsewhere, the drafters of the ICC Statute privileged (European) history over normative coherence and value pluralism.

seriously upset the relationship between criminal doctrine and ideas of social justice almost everywhere. Indeed, whereas the Islamization of blasphemy became a legal irritant in Pakistan, it may be reasonable to think that colonialism and apartheid were rejected during the ICC negotiations because they threatened to become so for Western powers.

In 1947, the United Nations General Assembly passed a resolution requesting the then nascent ILC to "(a) formulate the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal; (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in (a)."[255] Over what many lament as a "tortuous" several decades,[256] the ILC's work was divided and then divided again, with the effect of forestalling the arrival of the ICL announced at Nuremberg and Tokyo on the doorsteps of Great Powers. Apparently, it was a surprise to no one that despite an encouraging U.N. General Assembly resolution and the flurry of activity it generated, the ILC produced little output in even the medium-term. As Cherif Bassiouni has argued, the ILC process was chiefly born of the desire to avoid the charge of hypocrisy: "the powers that had established the Nuremberg and Tokyo Tribunals only a few years earlier could not make a complete about-face [on ICL] in such a short period of time without losing face and credibility." [257]

As it happened, the work of the ILC was inhibited from within and obstructed from without. By 1953, the ILC had delivered the Nuremberg Principles and a Draft Code, but as Bassiouni explains, their time "was not yet ripe."[258] In response, the United Nations established two further parallel processes that ground these initiatives to a virtual standstill for several decades. First, the United Nations appointed different Special Rapporteurs charged with creating a Draft Statute for the Establishment of an International Criminal Court.[259] This parallel process was more counterproductive than facilitative when the work on a Draft Code of Offences Against the Peace and Security of Mankind was ongoing, contentious and overlapping in key substantive areas.[260] Second, both of these ill-coordinated, under-resourced and politically duplicitous

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[255] G.A. res 177 (II), 21 November 1947.
[256] Rosemary Rayfuse, *The Draft Code of Crimes Against the Peace and Security of Mankind: Eating Disorders at the International Law Commission*, 8 CRIM. L.F. 43, 43 (1997).
[257] M. Cherif Bassiouni, *The History of the Draft Code of Crimes against the Peace and Security of Mankind*, 27 ISR. L. REV. 247, 251 (1993).
[258] *Id*.
[259] *Id*. at 250–251.
[260] *Id.*

initiatives were placed on ice when a separate working group was established to define the international crime of aggression. This third process only reached a conclusion in 1974, by which time the delay sought was well achieved.

In 1981, a full seven years after the aggression impasse was resolved in the General Assembly, the U.N. General Assembly invited the ILC to reignite the process of creating a Draft Code of Offences Against the Peace and Security of Mankind. In a rare opening for voices from the Global South, the ILC appointed Senegalese diplomat and international lawyer Doudou Thiam as the Special Rapporteur to lead the new drafting process. Under his direction, the ILC went from very lean times to something of a "binge";[261] Thiam produced an enormous body of work on a wide range of topics, including ICL crimes. It is within this work that we see the sorts of partial political agendas that make doctrinal pluralism unsafe as a measure of diverse values and interests in the international community seep into treaty-making. In this instance, they present within the prehistory to the ICC Statute rather than the criminal law governing *association de malfaiteurs* in the DRC, conspiracy in the Tokyo Tribunal, the Japanese law of complicity, the doctrine of JCE announced by ad hoc tribunals or the British/Pakistani crime of blasphemy.

At first, Thiam's advice very much reflected a plural perspective on ICL. In 1991, the first draft code he tabled included the familiar crimes derived from Nuremberg, like aggression, genocide, "systematic or mass violations of human rights" (read crimes against humanity), and "exceptionally serious war crimes." At the same time, this first draft also included a supplemental set of crimes that were more sensitive to the histories we have reviewed. These brand new, supplementary offences included "colonial domination and other forms of alien domination"; "apartheid"; and "recruitment, use, financing, and training of mercenaries."[262] Clearly, this revised set of crimes flowed from Thiam's

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[261] The term is attributed to an ILC member, but Rayfuse employs the eating disorder metaphor to describe the initial under-consumption then over-consumption of the ILC on this topic. *See* Rayfuse, *supra* note 256, at 47.

[262] From his very first report on the draft code, Thiam gestured at the emergence and importance of new crimes like colonial domination. Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *First Rep. on the draft Code of Offences against the Peace and Security of Mankind*, 145, UN Doc. A/CN.4/364 (Mar. 18, 1983) (by Doudou Thiam), *reprinted in* [1983] 2 Y.B. INT'L L. COMM'N 137, UN Doc. A/CN.4/SER.A/1983/Add.1 (Part 1) [hereinafter *First Report*] (drawing inspiration from the ILC's work on state responsibility at the time, which had included similar notions). It was not until his third report, released in April 1985, that Thiam explicitly listed colonial domination and other colonialism-type offenses within his code. *See* Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Third Rep. on the draft Code of Offences against the Peace and Security of*

pluralist appreciation of global values. Rather than accept as a *fait accompli* that the only crimes to be considered international crimes were those that had been prosecuted nearly fifty years prior at the IMTs, Thiam saw value in attempting to develop a more representative understanding of what constituted an international crime. Unconvinced that the list of international crimes was closed post-Nuremberg, and unsatisfied by the tautologies of existing approaches that did not specify what made an international crime an international crime,[263] Thiam and the ILC he lead set about developing a coherent theory of international criminalization. In particular, the ILC began considering the criteria that international crimes shared, instead of simply adopting the closed list of existing crimes that deferred to history over principle. Ultimately, the ILC proposed a standard of 'extreme seriousness' to define the international crimes it espoused.[264] While not crystal clear, this touchstone did act as a decent platform for criminalizing additional conduct without abandoning any crimes from the existing corpus.

Whether coherent or not, Thiam's reengineering met with staunch resistance from the outset. Some states preferred the list approach that remained true to Nuremberg; still others tried to identify international crimes in relation to what they believed to be the appropriate penalty for their commission.[265] Despite these different resistant strategies, the ILC pushed forward with its progressive position, assessing every possible international crime that it could find using its threshold test. The sources it looked to included the Nuremberg Charter, the 1954 Draft Code, and every international agreement that might have suggested an international crime thereafter.[266] Over time, 'extreme seriousness' was refined,[267] but it

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Mankind, 80–82, UN Doc. A/CN.4/387 (Apr. 8, 1985) (by Doudou Thiam), *reprinted in* [1985] 2 Y.B. INT'L L. COMM'N 63, UN Doc. A/CN.4/SER.A/1985/Add.1 (Part 1) [hereinafter *Third Report*]. Note that this list also included "Economic Aggression."

[263] *First Report*, *supra* note 262, at ¶ 55 ("[M]erely listing criminal acts without relating them to a common principle does not appear to be satisfactory.")

[264] Martin Ortega, *The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind*, 1 MAX PLANCK Y.B. UN L. 283, 296–97 (1997).

[265] Rep. of the Int'l Law Comm'n, 37th Sess., May 6–July 26, 1985, para. 65–67, UN Doc. A/40/10; U.N. GAOR 40th Sess., Supp. No. 10 (1985)

[266] Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Second Rep. on the draft Code of Offences against the Peace and Security of Mankind*, ¶ 13, UN Doc. A/CN.4/377, (Feb. 1, 1984) (by Doudou Thiam), *reprinted in* [1984] II(1) Y.B. INT'L L. COMM'N 89, UN Doc. A/CN.4/SER.A/1984/Add.1 (Part 1). [hereinafter *Second Report*].

[267] *Id*. at ¶ 8; *Third Report, supra* note 263, at ¶ 49; Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Fifth Rep. on the draft Code of Offences against the Peace and Security of Mankind*, at 2, UN Doc. A/CN.4/404 (Mar. 17, 1987) (by Doudou Thiam), *reprinted in* [1987] 2 Y.B. INT'L L. COMM'N 1, UN Doc.

still allowed the ILC to expand beyond the Nuremberg list and identify a total of twelve international crimes.[268]

This expansive approach to ICL crimes was quickly shut down in the face of objections from Western states. The states concerned – including the United States, United Kingdom, Australia, Belgium and the Netherlands – offered only flimsy rationales for their political stances.[269] Apartheid and colonialism, for example, were not crimes but political novelties that had ceased to exist by that point, so there was no reason to criminalize them now.[270] Consequently, instead of arguing for revisions, clarifications or contesting whether the crimes actually satisfied the seriousness criteria developed by the ILC, Western states simply wanted them deleted.[271] To no avail, Thiam argued very reasonably that the present absence of certain conduct did not foreclose the possibility of future conduct, which would then demand criminal punishment.[272] Yet his arguments fell on deaf ears; Thiam was sent back to trim the unwelcome additions from his overly ambitious draft. When he later reflected on the slimmer version Western states found more tolerable, Thiam regretted the "mutilated draft" that was forced upon him but acknowledged that without bowing to the (Western) political agenda, he risked "reducing the draft

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A/CN.4/SER.A/1987/Add.1 (Part 1);.Rep. of the Int'l Law Commission, *supra* note 265, at ¶ 69.

[268] Including: Aggression; the threat of aggression; interference; terrorism; violation of treaties concerning the maintenance of peace; violation of treaties prohibiting the deployment or testing of weapons; colonial domination; mercenarism; genocide; apartheid; inhuman acts; and, breaches of serious obligations to preserve the human environment. *See* Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Fourth Rep. on the draft Code of Offences against the Peace and Security of Mankind*, at 83–86, UN Doc. A/CN.4/398 (Mar. 11, 1986) (by Doudou Thiam), *reprinted in* [1986] 2 Y.B. INT'L L. COMM'N 1, UN Doc. A/CN.4/SER.A/1987/Add.1 (Part 1).

[269] Ortega, *supra* note 264, at 302 (stating that the non-Nuremberg crimes were abandoned "without convincing justification").

[270] In its comment on apartheid, the United Kingdom, for example, claimed that the ILC needed to "fundamentally reconsider this article in the light of changed international circumstances." The crime of colonialism was described as "of another era". *Comments and observations received from Governments,* UN Doc. A/CN.4/448 and Add. 1 (1 March 1993), Y.B. INT'L L. COMMISSION, Vol. II, Pt. 1, at 101.

[271] *Id. at* 59ff.

[272] Special Rapporteur on the draft Code of Offences against the Peace and Security of Mankind, *Thirteenth Report on the draft Code of Offences against the Peace and Security of Mankind*, ¶ 13 – 15 UN Doc. A/CN.4/466 (Mar. 24, 1995) (by Doudou Thiam), *reprinted in* [1995] 2 Y.B. INT'L L. COMM'N 33, UN Doc. A/CN.4/SER.A/1995/Add.1 (Part 1) [hereinafter *Thirteenth Report*].

Code to a mere exercise in style, with no chance of becoming an applicable instrument."[273]

This, perhaps more than any other moment, reveals one-sidedness at the ICC's point of design, where political power operated to extinguish alternative agendas, interests and priorities rather than embracing an inclusive Statute that allowed for some real diversity. After all, if the ICC Statute is only to be prospective in application, then describing colonialism as an international crime in the late 1990s is hardly a radical reordering of global society. Similarly, on what principle could states refuse to identify apartheid as an international crime? That these Western states had refused to ratify the Apartheid Convention in 1976 was surprising; that they refused to criminalize apartheid even after the fall of the South African regime is outright perplexing.[274] Claiming that South African apartheid was singularly horrific hardly seems a position from which one would want to argue that apartheid should *not* be criminalized; if anything, the opposite would be true.

Lacking the support of powerful Western states, Thiam was compelled to submit the 'mutilated' draft to the United Nations General Assembly. In 1996, this draft contained "institutionalized racial discrimination", and while Thiam described it as "the crime of apartheid in a more general denomination",[275] it had little effect since preparations for the ICC Statute had already started on the basis of an earlier ILC draft Code that did not include any apartheid-type crime. That apartheid eventually made it into the final ICC Statute was the result of lobbying by Mexico, Ireland, and a group of African states including South Africa.[276] Yet the Rome Statute definition of apartheid as a crime is both ambiguous and contains an important dissonance with both the Apartheid Convention and the Draft Code Thiam had originally favored. Unlike its predecessors,

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[273] *Summary Record of the 2382d Meeting*, [1995] 1 Y.B. INT'L L. COMM'N 19, UN Doc. A/CN.4/SER.A/1995.

[274] To this day, a number of major Western states – including the United States, Canada, the United Kingdom, Germany, the Netherlands, France and Italy – have yet to ratify the *Apartheid Convention*.

[275] Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996*,* p. 49, UN Doc. A/51/10; U.N. GAOR 51st Sess., Supp. No. 10 (1996).

[276] Mexico and Ireland first raised the issue during the Rome Conference. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15 – July 17, 1998, *Third Meeting of the Committee of the Whole*, UN Doc. A/CONF.183/C.1/SR3 (June 17, 1998), *reprinted in Summary records of the plenary meetings and of the meetings of the Committee of the Whole*, II OFFICIAL RECORDS 152–53. This was later supplemented by an appeal from South Africa and a group of sub-Saharan states. Timothy L.H. McCormack, *Crimes Against Humanity*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 179, 198–99 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds., 2004).

the Rome Statute requires that apartheid take place in the context of a widespread and systematic attack against the civilian population.[277] According to Paul Eden, the scope of apartheid is even narrower than those documents, "limited to a residual category of acts not falling within the ambit of persecution"[278] and thus excluding a range of conduct characteristic of apartheid.[279] Similarly, Tim McCormack notes that the intent requirement for apartheid in the Rome Statute was included at the insistence of the United States, which was fearful that it would criminalize domestic white supremacist organizations.[280] So, if Mahmood Mamdani is correct that in history "apartheid, usually considered unique to South Africa, is actually the generic form of the colonial state in Africa,"[281] ICC negotiations dropped colonialism as a crime and defined apartheid to disprove his thesis.

When coupled with the continuing absence of the crime of colonialism, Eden's description of apartheid as 'progressive development'[282] suggests that the obstructionism of the 1990s was partially overcome at the Rome Conference. While this is obviously true in part in that the negotiations produced some criminal doctrine where there was none before, it is difficult not to come away from this negotiation with the sense that the same dynamics that so colored criminal law throughout the world are live and well in the ICC too. It may even be fair to surmise that colonialism and a farther-reaching concept of apartheid were not enshrined as international law because they risked becoming "legal irritants" for Western states, replicating blasphemy in Pakistan in reverse. Whatever the case, the ILCs definitions of ICL crimes point to the

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[277] This is the so-called chapeau element in the definition of crimes against humanity. *See Rome Statute of the International Criminal Court*, art. 7(1), July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998).

[278] Paul Eden, *The Role of the Rome Statute in the Criminalization of Apartheid*, 12 J. INT'L CRIM. JUST. 171, 185 (2014). *But see* Machteld Boot and Christopher K Hall, "Article 7" in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 263–66 (arguing for a broad interpretation of the definition, although one still restricted by the requirement of a widespread and systematic attack against the civilian population).

[279] *See, e.g.*, International Convention on the Suppression and Punishment of the Crime of *Apartheid*, GA Res 3068 (XXVIII), Nov. 30, 1973, 28 UN GAOR Supp. No. 30 at 75, 1015 U.N.T.S. 243 (criminalizing, *inter alia*, "any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country").

[280] McCormack, *supra* note 276, at 199–200. The intention requirement demands that the constituent criminal acts be committed for the purpose of maintaining an apartheid regime. Rome Statute of the International Criminal Court, art. 7(2)(h), *supra* note 277. This is not the case with white supremacist movements that do not control government.

[281] Mamdani, *supra* note 98, at 8.

[282] Eden, *supra* note 277, at 186.

privileging of Western preferences. Thus, this scenario signifies another instance where the forces that skewed the relationship between criminal doctrine and local values in much of the world, also shaped criminal law at the international level. So to the extent that Legal Pluralism accepts the constellation of diverse global law that arose through this history, we worry that this approach cedes too much ground too quickly if a plurality of values and interest are our core normative aspirations.

VI. CONCLUSION

In this Article, we have sought to contribute to a discourse on Global Legal Pluralism, using ICL as an illustration. The implications of the histories we revisit here are significant for both fields.

For Global Legal Pluralism, the foregoing substantiates de Sousa Santos' argument, set out in the epigraph to this Article, that "there is nothing inherently good, progressive, or emancipatory about legal pluralism."[283] With de Sousa Santos, we insist on the word "inherently." No doubt, criminal doctrine frequently reflects diverse social and cultural values a cosmopolitan vision of global law will rightly venerate, but we have drawn on a range of different components of the criminal law, histories of colonialism by various European powers, and a variegated set of distortions in situ to demonstrate that the relation between doctrine and social value is far from invariable. Consequently, once Legal Pluralism moves away from its purely descriptive origins to make any normative claim about how to respond to the diversity of legal standards on offer internationally, it risks honoring laws that are born of force, that may not enjoy any meaningful degree of popular support, or that symbolize a painful history of subjugation to be overcome. Universalism may therefore prove a superior guarantor of (value) pluralism than respect for existing doctrinal arrangements. Moreover, ICL is but a metaphor for a dynamic that will undoubtedly permeate other areas of law. On a level, then, the histories we point to are a challenge to the new prescriptive style of legal pluralism writ large.

For ICL, the foregoing suggests that the field is biased in legal method and substance, not just in application as many have assumed before now. By declining to engage with this reality, Legal Pluralism risks tacitly condoning this normative partiality, thereby making too few demands on a global system of criminal law (national and international law in dynamic interface) that remains tainted in the various ways we point to: criminal doctrine is sometimes part of the problem ICL exists to

[283] S*upra* note 1.

counteract, can operate as a legal irritant that contaminates adjacent concepts, and may be transplanted from afar in ways that prove "unreceptive" in the recipient society. Even the exception we point to is under threat from a new form of external legal pressures.[284] Once these histories are laid bear, they open up space for the idea of pluralism by unification; it is at least conceivable that, in certain areas at least, a universal concept of ICL might better guarantee (value) pluralism than managing the set of laws governing criminal law at international or national levels presently. Conceivably, George Fletcher may just be right that "resolutions on the surface of the law should not obscure the unity that underlies apparently diverse legal cultures."[285] At the level of enforcement, these sordid stories also reveal that the people who populate institutions capable of enforcing ICL norms are compelled to redirect their energies towards ways of at least partially correcting for these flaws.

Moving forward, one cannot be too politically naïve about the possibility of a truly (value) plural system of ICL,[286] but the challenge lies in insisting that our future will not be like our past.

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[284] *Supra* notes **Error! Bookmark not defined.** and 59, on external pressure to further revise Argentine and Latin American criminal laws to better resemble American laws.

[285] GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 5 (1998).

[286] For an exceptional articulation of the shutting down of emanicipatory initiatives by Third World states in public international law, see SUNDHYA PAHUJA, DECOLONISING INTERNATIONAL LAW (2012). Pahuja further argues that national and international law are mutually constitutive, and that legal positivism is an inadequate frame for understanding law. *Id.* at 193. We see our ICL narrative – which suggests that national criminal law is as much in need of decolonizing as international criminal law – as indirectly confirming both of Pahuja's points. For a different discussion of power politics in the ICC in particular, see DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS (2013) (discussing the politics of the ICC with respect to major powers).