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# The Ahistoricism of Legal Pluralism in International Criminal Law

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LONGER VERSION\*

## THE AHISTORICISM OF LEGAL PLURALISM IN INTERNATIONAL CRIMINAL LAW

*James G. Stewart & Asad Kiyani\*\**

### 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*

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\* This version of the article is longer than the shorter version we have published with the American Journal of Comparative Law. This longer version includes a fourth part focused on criminal law procedure. In this additional part, we set out the eclectic nature of Argentine criminal procedure as a null hypothesis, since it shows evidence of a congruence between criminal law doctrine and surrounding social values that acts as an exception to the trend we identify in our other examples. We then qualify this Argentine counterexample by discussing the history of employing divergent criminal procedure in post-WWI trials to show instances when ICL must adopt a unified standard for functional reasons. In this longer version, we also weave the insights from these two examples of criminal procedure throughout the remainder of the piece.

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*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 (a) the uncritical adoption of criminal law doctrine as a proxy for diverse social, cultural and political values; and (b) in the limited instances where criminal law doctrine does reflect underlying societal values, an overly general assumption that respecting the various embodiments of this law is best for ICL. These oversights result 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, as well as historical examples where respecting pre-existing doctrinal arrangements undermined the value of postwar trials on any semi-defensible measure. 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, and that in some instances, a shift from its descriptive origins into a more prescriptive form risks condoning illegitimate or dysfunctional 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, at least in certain circumstances, is actually more plural in terms of values and interests than doctrinal pluralism although the dangers of power masquerading as universalism are also profound. At another, it suggests that institutions capable of trying international crimes need to do far more to step away from the ugly legal histories they have inherited.*

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

*Boaventura de Sousa Santos*<sup>1</sup>

## 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: (1) within national courts, trials involving international crimes often employ their own local criminal law standards rather than the international law equivalent;<sup>2</sup> (2) international courts sometimes follow a particular national system in interpreting ICL rules;<sup>3</sup> (3) international courts often survey then synthesize a wide selection of national rules to demonstrate widespread support for their favored approach;<sup>4</sup> (4) at times,

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<sup>1</sup> BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 89 (2002).

<sup>2</sup> Rb.’s-Gravenhage 23 december 2005, LJN: AX6406, Docket no. 09/751003-04 (Van Anraat), ¶¶ 6.5.1–6.6 (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 (2008). Sometimes, of course, the international aspects of ICL operate to preclude the application of national criminal law to war crimes. 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, 46 (2006) (concluding that “international sources confirm that the crime charged here is not a recognized violation of the law of war”).

<sup>3</sup> 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>.

<sup>4</sup> 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, Japan, and Spain at the International Military Tribunal for the Far East (Tokyo Tribunal). 16 R. JOHN PRITCHARD & SONIA MAGBANUA ZAIDE, THE TOKYO WAR CRIMES TRIAL: PROCEEDINGS OF THE TRIBUNAL 39,036–37 (1981); Prosecutor v. Šainović et al., Case

international statutes, treaties and national legislation define the same ICL concept differently,<sup>5</sup> and finally, (5) judicial bodies that interpret ICL occasionally disagree amongst themselves about the interpretation of the same body of law.<sup>6</sup> In combination, these improvised rather than

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No. IT-05-87-A, Appeal Judgment, ¶¶ 1644–45 nn.5409–19 (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, Belgium, the United States, England, and others); Prosecutor v. Bagosora et al., Case No. ICTR-98-41-A, Appeals Judgment, ¶ 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, to conclude 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 to define 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, ICC-01/04-01/06-1049, 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 undertaken by the ICTY for support). These comparative law surveys are also a powerful basis for dissent. See, e.g., Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06-1119, Decision on Victims’ Participation Separate and Dissenting Opinion of Judge René Blattmann, ¶ 26 n.13 (Jan. 18, 2008) (drawing on criminal procedure in Germany, France, Argentina, Peru, Chile, Ireland, and Canada to criticize the majority’s position on victim participation).

<sup>5</sup> 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 four 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).

<sup>6</sup> 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 that 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 (“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

choreographed dynamics make ICL a doctrinally plural normative interpenetration between multiple national and international systems of criminal law, and 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.<sup>7</sup> In his ground-breaking 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.”<sup>8</sup> Chief among his objections is that “universalism inevitably erases diversity.”<sup>9</sup> 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.”<sup>10</sup> Similarly, others have argued that even international legal institutions need not pursue uniformity,<sup>11</sup> and ultimately, that for ICL

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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>.

<sup>7</sup> 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).

<sup>8</sup> Paul Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1191 (2007). Consequently, Berman continues and offers a set of procedural mechanisms, institutional designs and discursive practices for managing hybridity.

<sup>9</sup> *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.

<sup>10</sup> Alexander K. A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1069 (2011).

<sup>11</sup> Carsten Stahn & Larissa van den Herik, ‘Fragmentation’, *Diversification and ‘3D’ Legal Pluralism: International Criminal Law as the Jack-in-the-Box?*, in THE

in particular, “[l]egal pluralism can even be regarded as an asset, a strength.”<sup>12</sup> While we believe that these views are valuable and of ongoing importance, we add a perspective grounded in legal history.

Clearly, the desire to preserve cultural variety is a key aspiration for prescriptive accounts of Legal Pluralism. 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. The notion that legal variation reflects cultural variety has a long pedigree. In the oft-cited words of Montesquieu, for example, 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.”<sup>13</sup> Isaiah Berlin, in turn, warns that “there is no single set of principles, no universal truth for all men and times and places”, and that universalism represents nothing more than a vain and destructive search for “the ideal society.”<sup>14</sup> 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

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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”).

<sup>12</sup> Elies van Sliedregt, *Pluralism in International Criminal Law*, 25 LEIDEN J. INT’L L. 847, 849 (2012). Admittedly, not all writings 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 pluralism 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).

<sup>13</sup> CHARLES DE SECONDAT BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 23 (Thomas Nugent (trans), Kitchener, Batoche 2001).

<sup>14</sup> 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.”).

operation.”<sup>15</sup> As a result, we read these scholars as urging us to embrace the heterogeneity of criminal law doctrine that presently couples with and informs international crimes out of respect for cultural diversity.

Thus, 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*.<sup>16</sup> Although universalizing tendencies will often allow power to corrupt regulatory schemes that are genuinely plural too, we cautiously take issue with the supposition that Legal Pluralism is necessarily a better solution in every instance. To do this, we use ICL as our subject and history as our methodological foil.

Most fundamentally, we dispute the underlying assumption that doctrine is necessarily a dependable measure of cultural diversity.<sup>17</sup> This is the assumption that seems to underpin much of the ‘pluralist’ work in ICL, although most scholars who are part of the emerging debate we enter into here are more considered in their pluralism. This is to be contrasted with the ‘pluralism’ of international tribunals, which – as we demonstrate below – repeatedly assert the universality of one particular norm or another on the basis that it reappears in multiple domestic legal systems.

To our minds, entertaining this assumption of global criminal law risks confirming Markus Dubber’s concern that “the study of comparative

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<sup>15</sup> DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 21 (2002). See also Joachim Vogel, *Why is the Harmonization 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.”).

<sup>16</sup> 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).

<sup>17</sup> 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”).

criminal law can be oddly ahistorical.”<sup>18</sup> What, for instance, of the influence of colonialism on criminal doctrine throughout a large portion of the world?<sup>19</sup> Indeed, the very notion of Legal Pluralism first arose as a means of describing the normative interplay between the system of law forcibly imposed by colonial masters and the indigenous social order it purported (often unsuccessfully) to displace.<sup>20</sup> Surely the various criminal law doctrines imposed during colonial rule would have no automatic claim to reflecting societal values in the territories in which they still apply in; in fact, one might suspect the opposite.<sup>21</sup> Though there may be some places and some histories in which cultural values have come to match these transplanted criminal law doctrines—much like some formerly colonized countries have adopted cricket as part of their national identity<sup>22</sup>—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.”<sup>23</sup>

To substantiate the point using ICL, we pair the history of four doctrines in national criminal law with their international equivalents. We divide 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 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

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

<sup>19</sup> 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).

<sup>20</sup> 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 has arisen since the 1970s in noncolonized societies).

<sup>21</sup> 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”).

<sup>22</sup> We are grateful to Antony Anghie for the point.

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

governing the crime of blasphemy in Pakistan. For the international counterpart, we seize upon similar doctrine at each major historical 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, and the failure to create a crime of colonialism or define apartheid in a way that accorded with its natural meaning in the ICC 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 by highlighting the exception to our thesis, then a qualification of this exception. First, 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 colonized peoples embrace an alien introduction, shape it 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 explore, we very much doubt that the cricket metaphor holds: the other examples we consider are not like criminal procedure in Argentina. By beginning with the counterexample, however, we emphasize that connections between popular values and criminal doctrine in previously colonized societies do sometimes exist; we simply express great caution about making the assumption categorical and note that in certain contexts it is unquestionably false. Second, we use the experience with war crimes trials post-WWI to qualify our null hypothesis 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. 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 that follows.

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 law doctrine in national systems that allowed Joseph Stalin to sign 3,167 judicially-

imposed death sentences in a single day,<sup>24</sup> and Adolf Hitler to make being Jewish a criminal offence.<sup>25</sup> 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, the experience post WWI suggests that its adequacy for ICL cannot be assumed. Our example of the inchoate offense of *association de malfaiteurs* in the DRC evidences these realities 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 discuss 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 element, we observe how, even outside colonial contexts, much criminal law doctrine is mass-produced far away rather than tailored locally.<sup>26</sup> The literature on legal transplants is voluminous,<sup>27</sup> 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.<sup>28</sup> The point is, for better

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<sup>24</sup> 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 tried and sentenced 551 individuals to death in October 1928 alone, contributing to over a million judicially imposed executions over the period.

<sup>25</sup> *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.").

<sup>26</sup> 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).

<sup>27</sup> 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, *THE LAWS OF IMITATION* (Elsie Worthington Clews Parsons trans., Henry Holt & Co. 1903) (1895).

<sup>28</sup> 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

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<sup>29</sup>—extensive empirical analyses classify the bulk of legal transplants as “unreceptive,” meaning that the recipient society is “unable to give meaning to the law.”<sup>30</sup> 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 law 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, after which we consider failed attempts at making colonialism and apartheid crimes 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,”<sup>31</sup> 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.”<sup>32</sup> 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 law doctrine that is an outright nuisance locally. Doing so may not only fail to add meaningful diversity, it may also add insult to injury. Second, we highlight how the demands for pluralism in ICL bely the neo-colonial reality of a lawmaking

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feel no need to address, or even acknowledge the existence of, comparative studies in criminal law.”).

<sup>29</sup> See Part II.A, *infra*.

<sup>30</sup> Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 179, 179 (2003).

<sup>31</sup> Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11 (1998).

<sup>32</sup> *Id.* at 12.

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 previously mentioned, Legal Pluralism was initially purely descriptive, attempting to plot the interactions between displaced social orders and formal colonial law.<sup>33</sup> 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.<sup>34</sup> As Brian Tamanaha intimates, this certainly raises thorny questions about what might count as “law”,<sup>35</sup> 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 should really matter to a normative account of Legal Pluralism.

We remain alive to the critique that what we target here is not in real Legal Pluralism, but a simulacrum that focuses on state law alone.<sup>36</sup> Yet we remain wary of the relative absence of historical attention in this doctrinal pluralism, and of its prescriptive standpoint that posits Legal Pluralism as the solution to a variety of ills facing ICL. We are skeptical that Legal Pluralism has the tools to adjudicate between local norms and legal doctrine in a choice-of-law modality or to decipher what norms are optimal in disputes across communities, even if it does appreciate the

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<sup>33</sup> 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* 112, 121 (Brian Z. Tamanaha, Caroline Sage, & Michael Woolcock eds., 2012). Our concern is only with this prescriptive aspect of the discourse.

<sup>34</sup> 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).

<sup>35</sup> *Id.*

<sup>36</sup> As articulated to us variously by Doug Harris, Sarah Nouwen, and Alexander Greenawalt.

socio-historical significance of the norms in any one polity. Moreover, while we agree that doctrinal pluralism is problematic for the reasons we explain, we also recognize the inevitability of the reliance on foreign domestic criminal law by international lawyers and institutions. It is, after all, readily available and clearly law. True, an alternative proposition might be to simply focus on local values and not local laws, but while appealing because of its democratic ethos, it becomes unclear what work *Legal Pluralism* does in this program. Finally, though we posit the possibility of a universalist ICL in certain circumstances, we also recognize the utility of alternative, non-legal responses to international crime. Our desire to pluralize ICL should not be read as excluding what Mark Drumbl identifies as a pluralism of response,<sup>37</sup> especially those that do not rely on the criminal law we explore here.

Thus, 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."<sup>38</sup> 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 law 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*?<sup>39</sup> Why, in other words, limit our gaze to existing laws (even broadly defined) as objects for protection, when a wide variety of scholars accept that diversity of cultural *values* and

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<sup>37</sup> Mark Drumbl, *The Curious Criminality of Mass Atrocity: Diverse Actors, Multiple Truths, and Plural Responses*, in *PLURALISM IN INTERNATIONAL CRIMINAL LAW* 68, 101 – 102 (Elies van Sliedregt & Sergey Vasiliev, eds., 2014).

<sup>38</sup> *Supra* note 1.

<sup>39</sup> 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 think that 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.

*political interests* are our real concern?<sup>40</sup> For instance, referring to the “universal structure of criminal law” as an “antidote” to the sorts of positivist arguments that reify domestic criminal law doctrine, George Fletcher writes that “resolutions on the surface of the law should not obscure the unity that underlies apparently diverse legal cultures.”<sup>41</sup> Although we do not suggest the aspects of the field where this unity might be meaningful, the content of unified norms or the methods for implementing them,<sup>42</sup> 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. Obviously, universalism poses enormous difficulties for Third World States, but we intend to show how Legal Pluralism is no immediate solution to these difficulties and how, in prescribed circumstances, universal norms have explored potential as vehicles for value pluralism. 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 criminal law in ways that better address Third World interests, as a collective responsibility for the past.

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<sup>40</sup> See Isaiah Berlin, *Two Concepts of Liberty*, in LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY 166, 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).

<sup>41</sup> GEORGE FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 5 (1998).

<sup>42</sup> One of us has suggested that forms of participation might be one site where this universalism is both achievable and appropriate. See James G. Stewart, *Ten Reasons for Adopting a Universal Concept of Participation in Atrocity*, in PLURALISM IN INTERNATIONAL CRIMINAL LAW (Elies Van Sliedregt & Vasiliev eds., 2014), <http://ssrn.com/abstract=2343392>. Several other scholars acknowledge that some degree of harmonization may be desirable in certain areas 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.

## II. PROCEDURE

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 sometimes appear to assume that legal and cultural values 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. Having discussed our paradigm case of local assumption then modification of a (Spanish) colonial inheritance, we immediately problematize even this ideal type as a model for ICL by assessing the role of criminal procedure in war crimes 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.”<sup>43</sup> At times, ICL needs to speak one unified language across polities, suggesting the need for unified standards.

### A. *Procedural Eclecticism in Argentina*

While the bulk of this paper examines legal transplants that are coercive in nature, or legal translations that claim pluralist credentials in spite of the narrow range of sources on which they draw, not all legal translations need be problematic in this manner. The adaptation of Argentine criminal procedure is an example of a deliberate reshaping of colonially-imposed law into one that better reflects the values and priorities of the local population. That system is and was the subjugated recipient of legal rules and norms; a dissatisfied editor of the same; a political instrument for military and democratic rulers alike; a legal

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<sup>43</sup> JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 136 (1st edition ed. 1982).

innovator; and ultimately a normative exporter as well. The deliberate and inclusive ethos that has guided the evolution of criminal procedure in Argentina in a way that hints at the possibilities of a meaningful legal pluralist approach to criminal law.

As a colony, Argentina had Spanish criminal law impressed upon it. Criminal procedure in Argentina originally took the inquisitorial form found throughout the Spanish colonies,<sup>44</sup> which was included in the compendious Spanish code *Las Siete Partidas* (“The Seven Parts”). As with other colonial transpositions, Spanish criminal procedure 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.<sup>45</sup> Spanish criminal law and procedure was, however, in a state of flux. Spain itself moved from a more open, accusatorial-style system in the 12th century to a more private, secret inquisitorial process that was formalized through *Las Siete Partidas* in the 14th century.<sup>46</sup> It was precisely this reformulated inquisitorial model that was later imposed on the Spanish colonies.<sup>47</sup> By this process, Spanish criminal procedure served as the template upon which modern Argentine criminal procedure would be cast.

This Spanish procedural regime persisted in Argentina until independence in 1816 sparked a long series of legal and political shifts.<sup>48</sup> After experimentation with several constitutions, independent Argentina approved a model explicitly based on the United States’ Constitution in 1853,<sup>49</sup> on the basis that, unlike continental European models, the American text offered procedural guarantees and restraints on political excess through the separation of powers. This shift had profound impacts on the redevelopment of procedural criminal law by eventually granting

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<sup>44</sup> OSVALDO BARRENECHE, CRIME AND THE ADMINISTRATION OF JUSTICE IN BUENOS AIRES, 1785 – 1853, 10–11 (2006).

<sup>45</sup> 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 13<sup>th</sup> 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, 488–89 (1912 – 1913).

<sup>46</sup> Barreneche, *supra* note 44.

<sup>47</sup> A Royal Decree in 1530 confirmed the applicability of domestic Spanish law in Spanish colonies. Lobingier, *supra* note 44, at 491–92.

<sup>48</sup> 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 44.

<sup>49</sup> 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”).

Argentine provinces the ability to develop their own procedural codes, which led to a highly influential and drastically different code in one province, and ultimately much of Latin America.

Yet this constitutional shift was far from concrete,<sup>50</sup> and did not automatically lead to a comparably profound shift in criminal procedure. Faced with the option of fully investing in an American-type accusatorial model and jury trials,<sup>51</sup> Argentine élites recommitted to the familiarity of the colonial criminal regime they had inherited in ways vaguely comparable to the adoption of cricket as a national pastime on the Indian subcontinent.<sup>52</sup> As with much of Latin America, Argentina “stayed bound to the pure inquisitorial system in a form almost identical to that which the colonial administrations had employed”,<sup>53</sup> even as the texts of criminal procedure were routinely challenged and revised. When the first code of criminal procedure was adopted in 1887, there were immediate complaints that it was outdated,<sup>54</sup> leading to a half-dozen revisions<sup>55</sup> and ultimately a compromise code in 1921 that drew from all of its predecessors.<sup>56</sup> The tension inscribed in these moves replicated itself through the oscillation of

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<sup>50</sup> Yet, as Robert Barros notes, these guarantees were far from impermeable: “Military dictatorships deconstitutionalized the country, collapsing the separation of powers and centralizing executive and legislative authority within the military leadership”. Robert Barros, *Courts out of Context: Authoritarian Sources of Judicial Failure in Chile (1973 – 1990) and Argentina (1976 – 1983)*, in *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* 156, 164 (Tom Ginsburg, ed., 2008).

<sup>51</sup> Máximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 *AM. J. COMP. L.* 617, 627 (2007).

<sup>52</sup> 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 51, at 628, citing Andres D’Alessio, *The Function of the Prosecution in the Transition to Democracy in Latin America*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* (Irwin P Stotzky, ed., 1993), and James L. Bischoff, *Reforming the Criminal Procedure System in Latin America*, (2003) 9 *TEX. HISP. J. L. & POL’Y* 27, 34 – 35 (that the uneducated classes could not be trusted to make decisions).

<sup>53</sup> Bischoff, *supra* note 52, at 34.

<sup>54</sup> Marcelo Ferrante, *Argentina*, in *THE HANDBOOK OF COMPARATIVE CRIMINAL LAW* 12, 13 (Kevin Jon Heller & Markus Dubber, eds., 2011).

<sup>55</sup> 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 54 (arguing that the most influential code was actually the Italian Criminal Code of 1889).

<sup>56</sup> Ferrante, *supra* note 54.

Argentina's political and legal systems between asserting strong individual due process rights and democratic governance, and military rule and the manipulation of existing legal structures to serve repressive or self-interested ends.<sup>57</sup> Local political debate and contestation animated legal development that, we say, ultimately exhibited a degree of congruence between criminal law doctrine and underlying values.

As this conservative-liberal undulation took place at the macro level of Argentine governance, the local contestation led to modernization at the provincial level. The new constitutional structure may not have guaranteed the due process rights that many reformers wanted, but it led to a national criminal code, a national procedural code for certain cases, and – crucially – allowed each of Argentina's 23 provinces to develop their own procedural code to be applied in respect of the bulk of criminal offences.<sup>58</sup> From this new and eclectic division of powers arose the Córdoba criminal procedure code of 1939, which embodied a more progressive liberal spirit that quickly diffused throughout the country.<sup>59</sup> Drawing heavily from Italian criminal procedure, the Córdoba code began a substantive shift away from the Spanish inquisitorial model through the implementation of due process rights more familiar to common-law systems.<sup>60</sup> Important changes included making criminal trials public and oral, granting more rights to defendants, and expediting the criminal justice process by allowing prosecutors (instead of judges) to lead investigations of less serious offences.<sup>61</sup> These parallel political processes combined to transform Argentina's colonial inheritance: the reframing of the national constitution and a turn towards a new separation of powers, along with the subsequent reimagining of criminal procedure law at the provincial level out of an internally driven restructuring that we argue does not occur frequently elsewhere.

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<sup>57</sup> See Barros, *supra* note 50, at 164 – 165 (military dictatorships concentrated political power, but also employed constitutionally recognized emergency powers as political instruments); GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS: JUDGES, GENERALS AND PRESIDENTS IN ARGENTINA 153 (2012) (arguing that judges under the post-military democracy devoted their lives' work to arguing for the protection of human rights, but then limited the scope of the trials prosecuting former military leaders); and Gastón Gordillo and Silvia Hirsch, "Indigenous Struggles and Contested Identities in Argentina: Histories of Invisibilization and Reemergence" (2003) 8:3 *The Journal of Latin American Anthropology* 4 (that the various post-independence constitutions of Argentina helped erase indigenous peoples from public consciousness in Argentina).

<sup>58</sup> AYA GRUBER, VICENTE DE PALACIOS & PIET HEIN VAN KEMPEN, PRACTICAL GLOBAL CRIMINAL PROCEDURE 22 (2012).

<sup>59</sup> Between 1941 and 1971, 12 (of 23) provinces adopted the Cordoba Code. Langer, *supra* note 51, at 634–36.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 634–35.

The Córdoba Code of 1939 and its successors became the progressive vanguard for Argentina. After the fall of military rule in 1983, legal scholars revised national criminal procedure again.<sup>62</sup> Unsurprisingly, the model was found in Córdoba; Julio Maier, the author of the new national code had studied under Sebastian Soler, the drafter of the Córdoba code. Maier was tasked with reforming the federal Argentine procedural code, and in 1986 produced a draft that drew alternately on both German criminal procedure and the Córdoba code.<sup>63</sup> Extensive public debate in and out of Congress followed, and the new federal code of 1991 eventually drew on many of these concepts.<sup>64</sup> Maier's 1986 draft also became the basis for an updated Córdoba code, completing the normative circle.<sup>65</sup> Local scholars believed that the resulting code was imbued with an important degree of popular assent—one described the new procedural regime as “everything we might ask for in a modern and democratic code of criminal procedure.”<sup>66</sup>

If Córdoba was both a synthesis of Argentine society writ large as well as “a model for the administration of justice”,<sup>67</sup> its influence was not confined to national legal debates. Rather, the Córdoba code became the harbinger for criminal procedure reform throughout much of Latin America. Just as Argentina's initial lurch towards a more progressive constitution did not immediately herald a similar liberal inclination in criminal procedure, so too did Latin American criminal procedure

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<sup>62</sup> See Gregory W. O'Reilly, *Opening Up Argentina's Courts*, 80 JUDICATURE 237, 239 (1997).

<sup>63</sup> This 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 51, at 638—640.

<sup>64</sup> *Id.* at 641.

<sup>65</sup> Córdoba was an ‘early innovator’, implementing oral and public trials, excluding coerced confessions and derivative evidence, and establishing an adversarial system. While the 1994 constitutional reforms are hailed for institutionalizing international due process norms as part of the country's constitutional law, the Córdoba codes had already included a number of those same guarantees in 1987, although the provinces of San Juan and Neuquén had done so earlier. A.M. HERNÁNDEZ, CONSTITUTIONAL LAW IN ARGENTINA 17 (2014).

<sup>66</sup> DANIEL M. BRINKES, THE JUDICIAL RESPONSE TO POLICE KILLINGS IN LATIN AMERICA: INEQUALITY AND THE RULE OF LAW 207 – 208 (2008).

<sup>67</sup> María Inés Bergoglio, *Argentina: The Effects of Democratic Institutionalization*, in LEGAL CULTURE IN THE AGE OF GLOBALIZATION: LATIN AMERICA AND LATIN EUROPE 20, 28 (Lawrence Friedman & Rogelio Perez-Perdomo, eds., 2003).

generally continue “a much more archaic dynamic than that of Europe”,<sup>68</sup> such that many of the worst abuses had continued even after the facial modernization of criminal procedure.<sup>69</sup> Those rule changes required (and continue to demand) an attendant cultural shift in the tradition and behavior of justice system actors,<sup>70</sup> including politicians and judges,<sup>71</sup> as well as public pressure for meaningful reform.<sup>72</sup> Here, the changes in criminal procedure exhibited an important degree of democratic legitimacy that resonated beyond Argentina.

Thus, the adoption of an Argentine accusatorial model that formally offers greater guarantees for individual rights, upended the historical stasis of criminal procedure and led to common reforms throughout Latin America.<sup>73</sup> As Bischoff writes, “[t]he considerable similarity among Latin America's new codes is no coincidence. The region's legislatures have garnered their inspiration from the Model Code of Criminal Procedure for Ibero-America of 1988, itself the modern incarnation of the seminal Córdoba (Argentina) Code of 1939.”<sup>74</sup> In Guatemala,<sup>75</sup> Chile,<sup>76</sup> and

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<sup>68</sup> Bischoff, *supra* note 52, at 34.

<sup>69</sup> See generally Bischoff, *supra* note 52 (identifying the concentration of decision-making in the investigative phase of inquisitorial proceedings and the relegation of the oral trial to a formality as the central problem).

<sup>70</sup> Alfredo Fuentes-Hernández, *Globalization and Legal Education in Latin America: Issues for Law and Development in the 21<sup>st</sup> Century*, 21 PENN ST. INT'L L. REV 39, 45 (2002-2003) (“Aside from formal rules and written Codes, there are informal restrictions deeply entrenched in traditions, the culture of lawyers, and corporate behavioral patterns, which generate perverse incentives and deter individuals from implementing changes of routine”).

<sup>71</sup> 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). This leads, however, to an incentive for judges to rule against the government that appointed them so that future government keeps judges in their posts.

<sup>72</sup> Mario Di Paolantonio, *Tracking the Transitional Demand for Legal Recall: The Foreclosing and Promise of Law in Argentina*, 13 Soc. & Leg. Stud. 351(2004) (describing the “social demand” for legal reform, including the overturning of national amnesty laws that precluded prosecutions for a wide range of offences committed by military officers during the juntas). HELMKE, *supra* note 58, at 154.

<sup>73</sup> Pablo Ciocchini, *Campaigning to eradicate court delay: power shifts and new governance in criminal justice in Argentina*, 61 CRIME L. & SOC. CHANGE 61, 63.

<sup>74</sup> Bischoff, *supra* note 52, at 42.

<sup>75</sup> Steven E. Hendrix, “Innovation in Criminal Procedure in Latin America: Guatemala’s Conversion to the Adversarial System” (1998) 5 Sw. J. L. & Trade Am. 365, 387 (Guatemala’s far-reaching changes from an inquisitorial to an accusatorial system were

elsewhere,<sup>77</sup> Argentine and by extension Córdoba criminal procedure came to predominate.<sup>78</sup>

This ongoing history of procedural development shows that not only was Argentina a norm exporter in relation to international criminal law and transitional justice solutions, it was and continues to be profoundly influential in the development of a uniquely Argentine brand of criminal procedure that has spread across the continent. This dual history of international and domestic development undermines the assumption “that such diffusion is more likely to flow from wealthier and more powerful countries to less powerful countries.”<sup>79</sup> Finally, while there may never be a perfectly “organic connection of law with the being and character of the people”,<sup>80</sup> the particular history of criminal procedure we have traced suggests this correspondence is difficult but not impossible. The reformers drew on experiences and norms developed externally, but “chose to adapt only those ideas that they felt best met the needs of Latin America’s social and political reality”.<sup>81</sup> In Argentina, these changes were rooted in the

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drafted by Argentine jurists and were based on a new bill of Criminal Procedure awaiting approval in Argentina).

<sup>76</sup> Alberto Binder and Julio Maier, the architect of the Argentine national criminal procedure code, and the student of Sebastian Soler, were key influences of criminal procedure legal reform in Chile. Daniel Palacios Muñoz, *Criminal Procedure Reform in Chile: New Agents and the Restructuring of a Field*, in *LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION* 112, 117 – 119 (Yves Dezalay & Bryant Garth, eds., 2011).

<sup>77</sup> Christian Riego, *The Chilean Criminal Procedure Reform*, 26 *INT’L J. SOC. L.* 437, 438 (1998) (“The model used for the reform and the main ideas come from other Latin American experiences, especially from that of Argentina which has developed much of the Model Code for Iberoamerica, on which most of the above reforms are based”).

<sup>78</sup> The authors of the 1986 draft Argentine federal criminal procedure code collaborated with activists in other countries to create a dynamic regional and international network of reformers revising criminal procedure codes throughout Latin America. A “Southern activist expert network” brought together at least 19 different groups and agencies throughout the Americas as part of the reformist group. See Richard J. Wilson, *Supporting or Thwarting the Revolution? The Inter-American Human Rights System and Criminal Procedure Reform in Latin America*, 14 *SW. J. L. & TRADE IN THE AMERICAS* 287, 290 (2008), and Langer, *supra* note 51, at 652–56.

<sup>79</sup> Kathryn Sikkink, “From Pariah State to Global Protagonist: Argentina and the Struggle for International Human Rights” 50 *LAT. AM. POL. & SOC’Y* 1, 1 – 2, 16 – 17 (2008).

<sup>80</sup> FREDERICK KARL VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 18 (Abraham Hayward, trans., 1999).

<sup>81</sup> See Langer, *supra* note 51, at 668, and Máximo Sozzo, *Cultural travels and crime prevention in Argentina*, in *TRAVELS OF THE CRIMINAL QUESTION: CULTURAL EMBEDDEDNESS AND DIFFUSION* 185, 210 (Dario Melossi, Máximo Sozzo, and Richard Sparks, eds., 2011) (“local actors have made use of the culturally imported devices to face the numerous problems in their local contexts, generating cultural objects ‘here’, through their political and theoretical inventiveness”).

evolving political contexts of the post-colonial state, one where suspicions of the illegitimacy of authority – because of their exclusionary violence – were largely overcome.<sup>82</sup> Here, deliberate and considered local participation and action that continues to this day<sup>83</sup> has reshaped colonial inheritances and legal transplants into a local legal code that exhibits the hallmark of the local assent that is too often missing in analyses of global criminal law.

### B. *Procedural Conflict in War Crimes Trials After WWI*

The history of ICL unjustifiably fixates on Nuremberg as the field's point of origin, but this focus underappreciates earlier periods that laid the foundation for what historian Mark Lewis memorably calls "the new justice."<sup>84</sup> Surprisingly, there were literally thousands of war crimes trials after WWI. Between 1921 and 1927, for instance, the Reich Court at Leipzig opened some 1,700 investigations into German war crimes carried out during the Great War.<sup>85</sup> Likewise, in France and Belgium, "by December 1924 more than twelve hundred Germans had been condemned."<sup>86</sup> Importantly, the criminal law procedure employed in these trials was, like Argentina, native to the national system and highly divergent from surrounding systems, but it was also often alien to foreign audiences, which proved to be a major factor in the abysmal failure of the trials by any normative measure. Thus, we use this history to qualify lessons from our Argentine example, showing how doctrinal pluralism may not be optimal for ICL when criminal doctrine in a single jurisdiction must speak cross-culturally. Even when criminal doctrine is a safe proxy for social and cultural values within the community it governs, as is

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<sup>82</sup> Martin Böhmer, *An Oresteia for Argentina: Between Fraternity and the Rule of Law*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 89, 115 – 117 (H. Jefferson Powell & James Boyd White, eds., 2009).

<sup>83</sup> Graciela Rodriguez-Ferrand, *Argentina: Reform of Code of Criminal Procedure*, LIBRARY OF CONGRESS GLOBAL LEGAL MONITOR, (Dec. 16, 2014), available at [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205404230\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205404230_text).

<sup>84</sup> MARK LEWIS, *THE BIRTH OF THE NEW JUSTICE: THE INTERNATIONALIZATION OF CRIME AND PUNISHMENT, 1919-1950* (OUP Oxford, 1 edition ed. 2014).

<sup>85</sup> 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 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).

<sup>86</sup> JAMES F. WILLIS, *PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR* 142 (Greenwood Pub Group, 1st edition ed. 1982).

evident from our Argentine example, this fact alone is not a sufficient condition for privileging it in a contest between normative orders.

The lead up to trials post-WWI is a matter of enormous intrigue,<sup>87</sup> 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.”<sup>88</sup> 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.<sup>89</sup> In this punitive spirit, the Treaty of Versailles initially included a provision requiring the extradition of German war criminals to their victors. In the words of Clemenceau, “no victory could justify an amnesty for so many crimes.”<sup>90</sup> A month later, the Allies requested the extradition of nine hundred Germans pursuant to this provision and sought to establish an international tribunal to punish Wilhelm II, all “as deterrent to those who might at some time in the future be tempted to follow their example.”<sup>91</sup>

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<sup>87</sup> 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 42; HORNE AND KRAMER, *supra* note 85; Gerd Hankel offers by far the most detailed historical account of the politics behind and within the Leipzig trials. See HANKEL, *supra* note 85. Mark Lewis’ excellent book describes the international politics best. See LEWIS, *supra* note 87, at 1-77.

<sup>88</sup> 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 extradition, there was an “urgent danger... that the officer corps would mutiny.” HORNE AND KRAMER, *supra* note 85 at 329. 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.

<sup>89</sup> 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”. HANKEL, *supra* note 85, at 14, citing “Germany Must Pay” in James (ed), Winston D. Churchill, p. 2645.

<sup>90</sup> HANKEL, *supra* note 85, at 15.

<sup>91</sup> HANKEL, *supra* note 85, at 20. As Lewis explains, however, the aspirations for postwar trials were varied and not always liberal, meaning that unsurprisingly, noble aspirations for deterrence were not the only rationales for the new justice even if they were important. See LEWIS, *supra* note 87, at 28-29.

Politically, the request was a bridge too far. The Allies were forced to back down from their demands for extradition when it became apparent that doing otherwise may lead to a mutiny within the German army that would topple the government,<sup>92</sup> thereby further destabilizing a decimated Europe. The resulting political stand-off over the vexed question of accountability for “war guilt” was extraordinary. As Horne and Kramer observe “it is remarkable that a democratic government of the Republic [of Germany], which was prepared to accept a treaty that imposed severe territorial and economic restrictions, limited the army to 100,000 men, and banned conscription, should run the risk of collapse of the peace and invasion over accusations of criminal acts against the old regime.”<sup>93</sup> Nevertheless, this is exactly what transpired. But with little domestic appetite for a return to what English war poet Siegfried Sassoon called “flickering horror”,<sup>94</sup> the Allies agreed to an obviously fraught compromise: vanquished’s justice.<sup>95</sup> Germany would try her own war criminals.

As a result of this compromise, on 18 December 1919, the German National Assembly adopted legislation incorporating international law on war crimes into German criminal law and conferring a federal court in Leipzig with extraterritorial jurisdiction to prosecute the offenses.<sup>96</sup> The Allies were understandably apprehensive; in a move later emulated by the drafters of the permanent International Criminal Court, they formally reserved to themselves the right to reassert jurisdiction if the trials proposed in light of this legislation proved to be “exclusively aimed at

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<sup>92</sup> For various views about whether the prospect of revolution in Germany was likely if the Allies insisted on extradition, see LEWIS, *supra* note 87, at 47-49.

<sup>93</sup> HORNE AND KRAMER, *supra* note 85 at 329.

<sup>94</sup> *Trench Duty*, in SIEGFRIED SASSOON, COUNTER-ATTACK: AND OTHER POEMS 36 (E.P. Dutton 1918).

<sup>95</sup> The term is, we acknowledge, slightly misleading because without the enormous pressure of the victors, it is clear that there would have been no trials at all. Nevertheless, we imagine that a key characteristic of vanquished’s justice is that it is never fully volitional.

<sup>96</sup> 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 85 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 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 88 at 13.

protecting the guilty from punishment for their offenses.”<sup>97</sup> As we will see momentarily, reasserting this jurisdiction would later pose important problems of criminal procedure. At this juncture, however, the Allied attitude was necessarily realistic. As the British then-Attorney General remarked, “[i]f the trials had taken place in London, the 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.”<sup>98</sup>

Importantly, the Leipzig courts employed German criminal procedure to try cases before it.<sup>99</sup> Claud Mullins, a bilingual Englishman sent to cover the trials for the British, dedicated the better part of an entire chapter of his book for British audiences on the topic to the particularities of German criminal law procedure. There, he encountered legal pluralism, observing that “[t]he system of judicial procedure prevailing on the continent differs in many essential points from that obtaining in England.”<sup>100</sup> In particular, Mullins pointed out that in German criminal procedure: (a) the Court received and examined all the evidence before the trial began as distinct from a more adversarial approach that leaves production of evidence to the discretion of the parties;<sup>101</sup> (b) if the accused decided to testify, the judge and not lawyers examined him first, including on prior convictions;<sup>102</sup> (c) cross examination was not employed in any form approximating to the English equivalent;<sup>103</sup> and (d) there were no strict rules of evidence like those that govern criminal trials in Anglo-American systems.<sup>104</sup>

Mullins was confronted with doctrinal legal pluralism, and he was not impressed. As a harbinger for what would later emerge as a recurrent problem for ICL, he concluded his legal comparison by observing that “[t]his procedure will strike every English lawyer as strange and dangerous.”<sup>105</sup> Evidently, the problem was less his legal parochialism and more that the process and resulting verdicts dispensed pursuant to German criminal procedure would not resonate with his compatriots at home. So, while the German criminal procedure employed at Leipzig mimicked Argentine insofar as, historically speaking, it was a “conglomeration of

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<sup>97</sup> HANKEL, *supra* note 85, at 31.

<sup>98</sup> MULLINS, *supra* note 88 at 13.

<sup>99</sup> For discussion, see HANKEL, *supra* note 85 at 36.

<sup>100</sup> MULLINS, *supra* note 88 at 36.

<sup>101</sup> *Id.*, at 36-37.

<sup>102</sup> *Id.*, at 38.

<sup>103</sup> *Id.*, at 38.

<sup>104</sup> *Id.*, at 38.

<sup>105</sup> *Id.* at 39.

various heterogeneous parts,”<sup>106</sup> it failed to speak to the full cross-cultural spectrum of audiences that took a keen, nay furious, interest in the Leipzig trials.<sup>107</sup>

To compound this initial sense of alienation, the German legislature twice amended its usual criminal law procedure to deliberately abdicate responsibility for “war guilt”. First, a supplementary law passed in Germany in March 1920 prohibited the Chief Reich Prosecutor from ending a trial with a dismissal order pursuant to the then German Code of Criminal Procedure, instead requiring him to submit the file to the Reich Court with an application for a public dismissal of the case.<sup>108</sup> Second, in May 1921, it added a novel procedural rule that allowed the prosecutor at Leipzig to bring his own case *proprio motu* even if there was insufficient evidence to support a conviction.<sup>109</sup> As the leading historian on these trials observes, “[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.”<sup>110</sup>

To illustrate, the case against Lieutenant General Karl Stenger for ordering that no quarter be offered French prisoners of war was dismissed in precisely this fashion. While in Northern France in August 1914, Stenger was alleged to have ordered that “[a]ll the prisoners are to be massacred; the wounded, armed or not, are to be massacred; even men captured in large organised units are to be massacred. No enemy must remain alive behind us.”<sup>111</sup> Because many Frenchmen were killed as a result of this order, the French government had listed Stenger atop its list of “war accused.”<sup>112</sup> At trial, Stenger denied having issued the order despite evidence from his own subordinate to the contrary. Nonetheless, the Chief Reich’s Prosecutor, i.e. Stenger’s formal accuser, declared that

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<sup>106</sup> THOMAS VORMBAUM, A MODERN HISTORY OF GERMAN CRIMINAL LAW 84 (Bohlander, Michael ed., Margaret Hiley tran., 2014 edition ed. 2013).

<sup>107</sup> According to Lewis, “[i]n France and Belgium, there was intense resentment about the German invasion, atrocities against civilians, the devastation of agriculture, and the enemy’s military rule in occupied areas.” Evidently, these sentiments were important political factors motivating the trials. LEWIS, *supra* note 87, at 32.

<sup>108</sup> HANKEL, *supra* note 85, at 101.

<sup>109</sup> *Id.* at 45. 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 88 at 36.

<sup>110</sup> HANKEL, *supra* note 61, at 45.

<sup>111</sup> *Id.* at 45. See also HANKEL, *supra* note 85, at 1.

<sup>112</sup> *Liste des personnes désignées par les Puissances Alliées pour être livrées par l’Allemagne en execution des article 228 à 230 du traité de Versailles et du Protocole du 28 juin 1919*, at 40.

“I believe him, as I said, completely.”<sup>113</sup> The purpose of his trial, therefore, “was merely to confirm this, especially to a foreign audience.”<sup>114</sup> After Stenger’s acquittal, a large crowd assembled outside the courthouse in Leipzig to present him with flowers and spit at the departing French delegation.<sup>115</sup>

In retaliation, the French and Belgians resorted to a particular, culturally-specific criminal procedure of their own. A trial in absentia, or *procès par contumace*, is a trial without the accused present. The practice initially developed in France around the 13<sup>th</sup> Century, at first as a means of disincentivizing a defendant’s flight. In its earliest inception, a trial in absentia led to the banishment of the defendant from the realm and a declaration that he or she was an outlaw. Aside from placing the fugitive outside the law’s protections, outlawry also implied the forfeiture of assets, which effectively deprived the fugitive’s family of their inheritance,<sup>116</sup> thus motivating defendants to appear in court (notwithstanding the brutal forms of proof and punishment that awaited them there). Over the ensuing centuries, the contours of the *procès par contumace* morphed in line with changing perceptions of criminal justice,<sup>117</sup> but a variant of the procedure survived the transition into an inquisitorial model of French criminal procedure, such that it furnished a viable mechanism for at least rhetorically denouncing Leipzig’s grave shortcomings.

In the face of a series of Stenger-like acquittals at Leipzig that deeply enraged the French and Belgian political élite and citizenry,<sup>118</sup> both

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<sup>113</sup> HANKEL, *supra* note 85, at 101.

<sup>114</sup> *Id.* at 91.

<sup>115</sup> WILLIS, *supra* note 86 at 136. Stenger received so many letters congratulating him on his decision to give the order of no quarter that after his acquittal, he took out an advertisement in the press thanking his many correspondents. HORNE AND KRAMER, *supra* note 85 at 350.

<sup>116</sup> YVES JEANCLOS, LA JUSTICE PÉNALE EN FRANCE. DIMENSION HISTORIQUE ET EUROPÉENNE 99 (Dalloz, 1st ed. 2011) (“Il utilise d’ailleurs possiblement la contumace comme moyen de pression exercé sur la famille, pour la convaincre de livrer le coupable, afin de ne pas perdre les biens du lignage.”)

<sup>117</sup> By increasing the time-frame the defendant was provided an opportunity to appear, shifting the result from outlawry to conviction of the crime alleged, then making the conviction provisional in the sense that apprehension of the accused would result in a retrial ab initio. A. ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE: WITH SPECIAL REFERENCE TO FRANCE 161–65 (Little, Brown and Co. 1913).

<sup>118</sup> The official report on these proceedings analyses the cases 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*

governments harnessed this procedural particularity as a form of local redress. By comparison with modern war crimes trials, the resulting *procès par contumaces* staged in France and Belgium after WWI took place in truly spectacular numbers, and at light speed. Up to 764 Germans in occupied territories were already tried by French and Belgian courts by 1920,<sup>119</sup> less than two years after the end of the war. And as we saw earlier, “by December 1924 more than twelve hundred Germans had been condemned.”<sup>120</sup> To the best of our knowledge, the substance of these cases are entirely undocumented in the history of ICL, so we can say little conclusive about them. In all likelihood, though, their number and celerity reveal something of their (un)fairness and the zeal with which they were brought. If it is true that within the Leipzig trials themselves, French and Belgian witnesses “breathed hatred,”<sup>121</sup> this sentiment surely also affected trials in absentia at home.

Instead of reviewing these trials in absentia in detail, our purpose is to highlight how this legally plural procedural arrangement actually undermined the utility of these trials as exercises in post-war justice. The hostile use of these two sets of criminal procedure—a novel procedure to exonerate in already alienating German criminal procedure 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 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 as anticipated, it “was publicized in the German, and if possible, international press.”<sup>122</sup> In all, 861 out of 901 allegations were disposed of

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*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).

<sup>119</sup> HANKEL, *supra* note 1, at 40. It is unclear whether Hankel includes in this figure the number of Germans tried and convicted during the war itself, which certainly took place before they were met with reprisals against French prisoners of war, at which point they came to an abrupt halt. See LEWIS, *supra* note 87, at 32.

<sup>120</sup> WILLIS, *supra* note 44 at 142.

<sup>121</sup> Claud Mullins, “Notes of a Conversation with Herr von Tippelskirch at Leipzig on Belgian & French War Trials,” Hanworth Papers, cited in WILLIS, *supra* note 86, at 134.

<sup>122</sup> HORNE AND KRAMER, *supra* note 85 at 353. In an astonishing illustration, the German government wrote to the Leipzig Court about a Colonel von Giese, who had been sentenced to death in a trial in absentia held in Belgium, explaining that the Colonel “wishes that his case be completed in Leipzig as soon as possible,” and that he “wishes to use the Reich Court decision for his further vindication domestically and abroad.” The letter concludes that “[b]ecause the case is very beneficial to our propaganda purposes, I would be especially grateful if you could accommodate Colonel von Giese’s desire for

in this manner,<sup>123</sup> meaning that the whole debacle was of dubious value on any semi-defensible theory of criminal law and probably counterproductive as a practical matter.<sup>124</sup>

To return to procedural pluralism, it was also striking that British courts could not participate in this ongoing legal conflict. As a matter of their own local criminal procedure, “British law made no provision for trials in absentia.”<sup>125</sup> Although the point was probably made moot by the waning British interest in these trials,<sup>126</sup> 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 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<sup>127</sup> (including that the legal contest was also in part about differing Allied and German interpretations

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rapid conclusion of his case.” Hankel explains that the case was dismissed less than a month later as requested. HANKEL, *supra* note 85, at 360.

<sup>123</sup> WILLIS, *supra* note 86 at 146.

<sup>124</sup> In part because they helped consolidate the rise of right-wing power in Germany; See 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, 16 (Patricia Heberer & Jürgen Matthäus, eds., 2008) (“The disinclination by German courts to prosecute war criminals attests to the same prejudice that dominated the German judiciary’s handling of political violence and that did so much to prepare Hitler’s coming to power.”); Wolfgang Kaleck, “German International Criminal Law in Practice: From Leipzig to Karlsruhe” in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 95, 96 (Wolfgang Kaleck et al, eds., 2007) (on local courts’ failures to prosecute Nazis for their political violence during the Weimar years); GORDON WALLACE BAILEY, DRY RUN FOR THE HANGMAN: THE VERSAILLES-LEIPZIG FIASCO, 1919 – 1921, FEEBLE FORESHADOW OF NUREMBERG (Univ. of Maryland PhD Thesis, 1971) 286 (Leipzig was one of the first “steps along the dark road to the Third Reich”); and, JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 141 (noting that Hermann Goëring and Adolf Hitler met during an anti-trial demonstration).

<sup>125</sup> *Id.* at 357. Presumably, trials in absentia were not available in English criminal law because in an accusatory system of criminal procedure “[t]he necessity for the personal presence of the parties arises, originally, from the very nature of the action, which is a feigned combat.” See ESMEIN, *supra* note 117, at 5.

<sup>126</sup> WILLIS, *supra* note 86 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.”).

<sup>127</sup> 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.” HANKEL, *supra* note 85, at 140.

of the substantive law of war),<sup>128</sup> but for present purposes, we seize on these as well as other procedural shortcomings of local law in these trials to highlight the limitations of just locating congruence between local values and criminal law doctrine *in a single jurisdiction*. That German criminal procedure at Leipzig reflected German societal values is no reason for Legal Pluralists to unquestioningly celebrate it as a standard ICL should embrace, precisely because the Leipzig experience suggests that impartiality and standards that are meaningful to more than one polity are countervailing normative aspirations.

Even at the time, commentators believed that universal standards might have improved matters. As Claud Mullins concluded in reflecting on the whole experiment with post-war criminal accountability, “there were difficulties of procedure, due to the widely differing judicial systems of England and her Allies.”<sup>129</sup> Then, with a distinct air of regret, Mullins openly lamented that “there was no uniform criminal procedure.”<sup>130</sup> Whether or not uniformity was achievable or desirable in ICL procedure at the time, this history presents an important qualification of the ground we cede through the Argentine example: even if there is evidence that criminal law doctrine sometimes embodies the values of the underlying polity as in Argentine criminal procedure, post WWI trials show how establishing this congruence cannot automatically immunize Legal Pluralism from broader normative questions about whether ICL *should* defer to this national doctrine. Thus, in prescriptive form, Legal Pluralism is either overly presumptive (much legal doctrine does not reflect popular local values à la Argentina) or incomplete (venerating pre-existing legal values in each and every society does not address ICL’s aspiration for cross-cultural justice as in Leipzig). In what follows, we explore different variations of these dynamics within the typology we set out by way of introduction.

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<sup>128</sup> As Hankel notes, international law had not crystallised into custom by the time of the trials, giving leeway for Germany to differ from the major Entente Powers on the interpretation of core concepts of the law of war, including the treatment of civilians, military necessity, and liability for superior orders. HANKEL, *supra* note 85, at 167–189. See also Kaleck, *supra* note 124; Alan Kramer, *The First Wave of International War Crimes Trials: Istanbul and Leipzig* 14 EUR. REV. 441 (2006) (that the German view of international law was that it was to be subordinated to the military necessity of swift victory); and, Herbert R. Roginbogin, *Confronting “Crimes Against Humanity” from Leipzig to the Nuremberg Trials*, in THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW 115, 121 (Herbert R. Roginbogin et al, eds., 2006) (“The trials provided a venue for the legitimization of concepts that justified atrocious acts in war...[and] diluted the whole concept of war crimes in the course of the trials as to become meaningless.”).

<sup>129</sup> Mullins, *supra* note 88 at 26.

<sup>130</sup> Mullins, *supra* note 88 at 211.

### III. INCHOATE CRIMES

Armed with our Argentine example of apparent coincidence between criminal law doctrine and social values, plus our illustration from the post-WWI experience of the limitations of even this exemplar, we move to the first illustration of our typology. In this Part, we discuss an inchoate crime in the Democratic Republic of Congo (DRC) and another in post-WWII international tribunals to showcase how doctrine is not a dependable analytical stand-in for social, cultural or political values. Specifically, we show how social value and criminal doctrine come apart where criminal law is part and parcel of the violent repression ICL exists to counteract. In both the DRC and post-WWII tribunals, this unfortunate reality manifests. Because criminal doctrine serves an oppressive function in both contexts, it appears to fall well short of matching the overlap between social value and criminal doctrine evident in our Argentine example, even leaving aside the caveat we take from Leipzig. In other words, where criminal doctrine is an instrument of repression, relying on it as even a partial guarantor of cosmopolitanism in ICL seems sharply ahistorical, undermining the very utility of Legal Pluralism as a prescriptive theory of global normativity.

The word “inchoate” means “just begun” or “undeveloped.”<sup>131</sup> 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.<sup>132</sup>

Thus, as Ashworth’s explanation suggests, there are three general offenses that are usually termed “inchoate” or “preliminary” in common law

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<sup>131</sup> 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.”)

<sup>132</sup> ASHWORTH, *supra* note 131, at 373.

jurisdictions – attempt, conspiracy, and incitement.<sup>133</sup> Unsurprisingly, foreign jurisdictions understand inchoate crimes differently, in part because punishing un consummated offences raises the specter of thought crimes: the dangerous intrusion of the criminal law into the realm of purely personal ideation.<sup>134</sup>

If different jurisdictions enact diverse 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 equate doctrinal pluralism, either in the law governing inchoate crimes in ICL or in the national law it draws upon, with a diversity of popular values within either constituency. In fact, in this the first element of our typology, we see how criminal law 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 because 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,<sup>135</sup> then ruling with astonishing brutality.<sup>136</sup> Later, all the uranium

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<sup>133</sup> *Id.*

<sup>134</sup> 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).

<sup>135</sup> 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).

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,”<sup>137</sup> leading to in excess of 5 million civilian deaths since just 1998.<sup>138</sup> And as political scientist Kevin Dunn reports, Joseph Conrad’s famous novel *Heart of Darkness*<sup>139</sup> 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.”<sup>140</sup>

Inevitably, Congolese criminal law was and remains inextricably caught up in this bleak history such that it is readily distinguishable from our earlier Argentine example. 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.<sup>141</sup> The cosmological commitment to “increasingly vital force”

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<sup>136</sup> 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 135 at 158–59.

<sup>137</sup> 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 PRUNIER, *AFRICA’S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE* (2009).

<sup>138</sup> 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).

<sup>139</sup> 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).

<sup>140</sup> KEVIN C. DUNN, *IMAGINING THE CONGO: THE INTERNATIONAL RELATIONS OF IDENTITY* 4 (2003).

<sup>141</sup> 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.”

formed the foundation of this system, which was especially significant, since life-force was located in the group's ancestral history.<sup>142</sup> As a result, customary rules were frequently divided into two domains: (a) the Laws of the Sacred and the invisible; and (b) the Laws of the living and the visible.<sup>143</sup> 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.<sup>144</sup>

By all accounts, individualized forms of punishment were very much the exception across either system. Local communities, for example, "knew of no prisons."<sup>145</sup> 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 not appear to have been regarded as a punishment.<sup>146</sup> Corporal punishment for wrongdoing existed, but had "a very limited application."<sup>147</sup> Instead, collective responsibility of the community as a whole, compensation, and ostracism of individual perpetrators from the collective were all the norm.<sup>148</sup> As Dembour concludes, "Les Africains étaient habitués à un système où ce qui comptait était la compensation de la victime et non le châtement du coupable (sauf pour des faits graves ou répétés où le châtement était alors impitoyable)."<sup>149</sup> The Belgians, however, saw this as "la barbarie."<sup>150</sup>

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<sup>142</sup> *Id.* at 143 (translated by first author).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> James S. Read, *Kenya, Tanzania and Uganda*, in *AFRICAN PENAL SYSTEMS* 89, 103 (Alan Milner ed., 1969).

<sup>146</sup> *Id.* at 103.

<sup>147</sup> *Id.* at 104.

<sup>148</sup> Marie-Benedicte Dembour, *La peine durant la colonisation belge*, in *Transactions of the Jean Bodin Society for Comparative Institutional History*, Vol. LVII, *PUNISHMENT* 67, 72 (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 145, at 105 ("The interdependence of individuals in the close-knit societies of earlier times made ostracism a potent sanction.").

<sup>149</sup> Dembour, *supra* note 148, 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)).

<sup>150</sup> *Id.* at 92. In fairness, one of the practices for dispute resolution that 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 of the Union minière

By a decree dated January 7th, 1886, King Leopold promulgated the Congo's first penal code (Code Pénal du Congo). The new code involved "vocabulary, formulation, and structure that was directly borrowed from Belgian criminal law legislation".<sup>151</sup> Although it was probably seen as an instrument for civilizing backwards or child-like African customs,<sup>152</sup> 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 himself."<sup>153</sup> 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."<sup>154</sup> The brutality that ensued was stupendous – a recent historiography estimated that as many as 10 million Congolese were murdered or disappeared under King Leopold's reign, placing him among the most infamous purveyors of mass violence in known history.<sup>155</sup>

Importantly for present purposes, the criminal law enabled rather than curtailed this violence. In an open letter of protest to King Leopold in 1890 after a period in the Congo, American anti-slavery campaigner George Washington Williams objected that "the Courts of your Majesty's Government [in the Congo] are abortive, unjust, partial and delinquent."<sup>156</sup>

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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'inférieures aux principe généraux de civilization." FÉLICIEN CATTIER, DROIT ET ADMINISTRATION DE L'ÉTAT INDÉPENDANT DU CONGO 442 (1898).

<sup>151</sup> Dembour, *supra* note 148, at 67.

<sup>152</sup> 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).

<sup>153</sup> FÉLICIEN CATTIER, ÉTUDE SUR LA SITUATION DE L'ÉTAT INDÉPENDANT DU CONGO 341 (1906) (Stewart's translation).

<sup>154</sup> GEORGES NZONGOLA-NTALAJA, THE CONGO: FROM LEOPOLD TO KABILA: A PEOPLE'S HISTORY 22 (2002).

<sup>155</sup> 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).

<sup>156</sup> 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

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 “*version simplifiée*” imposed in the Congo,<sup>157</sup> depriving the criminal law of important moral nuance. Attempts were punished the same way as completed crimes;<sup>158</sup> and most significantly, only Africans received the infamous *chicotte*,<sup>159</sup> the notoriously brutal whip made of dried hippopotamus hide. This whip, sanctioned by overtly racist criminal law doctrine, was at the heart of an intensely violent system of colonial governance.<sup>160</sup> 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*.”<sup>161</sup>

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

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<http://www.blackpast.org/george-washington-williams-open-letter-king-leopold-congo-1890>

<sup>157</sup> CATTIER, *supra* note 153 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 148, at 86 (“En effet, les testes sont d’inspiration belge, mais vu leur brièveté, ils ne présentent du système belge qu’une version simplifiée.”)

<sup>158</sup> CATTIER, *supra* note 153 at 440.

<sup>159</sup> Dembour, *supra* note 148, 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 chicotte – et dans la manière dont la peine était appliquée – un régime carcéral différent était prévu [...] l’Africain était en effet puni selon une échelle plus sévère que celle appliquée à l’Européen.”).

<sup>160</sup> Roger Casement, a British Consul stationed in Congo returned to Britain 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 140 at 52. WRONG, *supra* note 139, 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.”).

<sup>161</sup> WRONG, *supra* note 139, at 39–40; REYBROUCK, *supra* note 135, 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 the 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).

of silencing human rights defenders and pro-democracy movements in the 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 set about codifying new criminal rules in response to excesses in the preceding period.<sup>162</sup> 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 offense that criminalized criminal associations.<sup>163</sup> The Belgian criminal code of 1867 borrowed the then novel doctrine from its neighbor,<sup>164</sup> 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*.

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."<sup>165</sup> Independence in 1960 did not lead to a sharp break with this history,

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<sup>162</sup> 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).

<sup>163</sup> Culioli and Gioanni, *supra* note 162, 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 162, 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 art. 265 (1810) (Belg.), <http://www.koeblergerhard.de/Fontes/CodePenal1810.htm> (last visited June 1, 2017).

<sup>164</sup> Frank Verbruggen & Philip Traest, *Belgique*, 73 REVUE INTERNATIONALE DE DROIT PÉNAL 13 (2007).

<sup>165</sup> 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).

meaning that *association de malfaiteurs* continued in Congolese criminal law without major modification: as leading commentators agreed soon after independence that “[w]ith the change to Republican status, the criminal law has scarcely changed.”<sup>166</sup> Evidently, the same remains true today. The leading modern textbook on Congolese criminal law – authored by the Dean of the School of Law at the University of Kinshasa – still draws a direct line between the current criminal code, the decree of 20 January 1940, and that of 7 January 1886.<sup>167</sup> Taking ICL as an interpenetrating normative system that respects extant doctrine needs to simultaneously grapple with this lineage. Based on this preliminary historical inquiry, it seems far removed from the example of Argentine criminal procedure (to say nothing of the problems of diversity raised in the study of Leipzig).

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. Whereas Argentine procedure was redesigned in an eclectic fashion based on the needs of a changing society, *association de malfaiteurs* remains largely unchanged. *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 or Argentine retention of some aspects of Spanish criminal procedure), observe also the repressive function this criminal law 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.

To the extent *association de malfaiteurs* can meaningfully be described as ‘Congolese’, it is an instrument of violence for certain elements of the Congolese state. In 2013, twelve Congolese human rights defenders were arrested, tried and convicted of *association de malfaiteurs*

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<sup>166</sup> 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 similarly. See, e.g., Marie-Benedicte Dembour, *supra* note 148 at 69, (“Encore aujourd’hui, le système pénal zaïrois reste fortement imprégné des principes que le colonisateur belge a introduits...”).

<sup>167</sup> 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”).

for having encouraged people to participate in peaceful demonstrations against an increase in energy and water prices, as well as the general mismanagement by the Governor of the province.<sup>168</sup> Likewise, in 2006, a Congolese bishop and two others were convicted of association de malfaiteurs soon after the bishop televised a sermon criticizing the Congolese President, in a trial that Amnesty International called “summary and unfair.”<sup>169</sup> Evidently, 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.”<sup>170</sup> If leading western human rights organizations are up in arms protesting the excessive application of *association de malfaiteurs* in France,<sup>171</sup> it is of little surprise that the same doctrine is having much worse consequences in the far periphery.

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<sup>168</sup> 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).

<sup>169</sup> Amnesty International, *République démocratique du Congo: Persistance de la torture et des homicides par des agents de l’État chargé de la sécurité*, Index AI: AFR 62/012/2007, at 16-17.

<sup>170</sup> 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).

<sup>171</sup> 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) (translated by first author). See also, Culioli & Gioanni, *supra* note 162, at 20 (listing a set of conceptual problems with the application of association de malfaiteurs in France); Evidently, association de malfaiteurs is used extensively, including in 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).

Hopefully, this history exposes the underbelly of the criminal law to which 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.”<sup>172</sup> Her point is more sinister than a quick reading suggests. Frequently, criminal law 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 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 as the DRC in the name of Legal Pluralism is not necessarily the noble act of respect 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 principle and not deference in the name of Legal Pluralism is the appropriate normative response. Moreover, the problem is not just whether the criminal law 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 law 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, conflicting, sometimes inter-penetrating normative system 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 law

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<sup>172</sup> Jacqueline Costa, *Penal Policy and Under-Development in French Africa*, in *AFRICAN PENAL SYSTEMS* 365, 393 (1969).

standards it draws upon. This is quite apart from the difficulty we learn from Leipzig, that drawing on single jurisdictions might underappreciate the need for a brand of criminal justice that speaks neutrally across multiple cultures. 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,<sup>173</sup> then assessing countervailing normative aspirations for the field. As Franz Kafka was so earnest to remind us, that perspective will sometimes confirm that criminal law doctrine is part and parcel of what his fellow novelist Joseph Conrad called “the horror”.<sup>174</sup>

*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 inchoate offense applied at the Nuremberg and Tokyo Tribunals to discuss the international equivalent of our typology’s first element – instances where criminal doctrine is part of the problem ICL exists to counteract. 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 (as in Leipzig), 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 from a descriptive to a normative mode.

Perhaps unsurprisingly, Nuremberg was an almost complete

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<sup>173</sup> 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.

<sup>174</sup> CONRAD, *supra* note 139, at 118.

reversal of Leipzig.<sup>175</sup> 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.”<sup>176</sup> 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.<sup>177</sup> Public opinion in the United States viewed the now infamous Morgenthau Plan as “inhumane,” creating new impetus to try rather than shoot the vanquished enemy.<sup>178</sup> Even then, the British still needed much convincing, probably because their memories of Leipzig were still fresh.<sup>179</sup> 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.”<sup>180</sup>

In early autumn 1944, a New York securities lawyer named Colonel Murray C. Bernay, then working for the U.S. War Department,

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<sup>175</sup> The reversal is evident from many factors, including: (a) that Winston Churchill was for prosecutions after WWI but staunchly opposed to them after WWII; (b) that the United States government defeated attempts at trying Wilhelm II before an international criminal tribunal after WWI as compared with its leadership role creating similar tribunals at Nuremberg and Tokyo post WWII; (c) that the stated basis for the American reluctance to try Wilhelm II was that doing so would violate the principle of *nullum crimen sine lege* absent a basis in international law to do so, an argument Americans forcefully opposed post-WWII; and (d) much of the Nuremberg jurisprudence, particularly on concepts like military necessity, would reach diametrically opposite positions to those adopted at Leipzig. On all these issues, see HANKEL, *supra* note 85.

<sup>176</sup> BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944-1945* 135 (1981).

<sup>177</sup> 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 also faced opposition from within government from the outset. Secretary of War Stimson described it as “a Childish folly!” comparable to a “Nazi program!” SMITH, *supra* note 176, at 30–31.

<sup>178</sup> SMITH, *supra* note 176, at 10 (“Attempts to defend Morgenthau were lost in a chorus of American press criticism of what were seen as inhumane and unrealistic measures.”).

<sup>179</sup> 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).

<sup>180</sup> Michael Biddiss, *The Nuremberg Trial: Two Exercises in Judgment*, 16 *JOURNAL OF CONTEMPORARY HISTORY* 597, 611 (1981).

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.<sup>181</sup> Very quickly, this doctrine of conspiracy would find itself front and center at Nuremberg and Tokyo thereafter (although courts would interpret it restrictively and as applying only to aggression).<sup>182</sup> This notion of conspiracy came with a number of major shortcomings leading up to, at and subsequent to the 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 dark shadow from which modern ICL may wish to distance itself. 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 to be tolerated and managed.

During the negotiation of the Nuremberg and Tokyo Charters, it quickly emerged that—as with the use of German criminal procedure at Leipzig—defining and using 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 famous for his later 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.”<sup>183</sup>

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

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<sup>181</sup> 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).

<sup>182</sup> 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).

<sup>183</sup> Memorandum from the Assistant Attorney General Herbert Wechsler to Attorney General Francis Biddle (Dec. 29, 1944), in SMITH, *supra* note 176, at 87.

low for harm that did actually transpire. Momentarily, we will discuss 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 law 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.<sup>184</sup>

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. Bert Röling, the Dutch Judge at Tokyo, for instance, described conspiracy as “one of the ugly aspects of the Anglo-American system,”<sup>185</sup> protesting that “[i]n the continental European countries conspiracy has played only a very limited role.”<sup>186</sup> 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.”<sup>187</sup> In the competing camp, a number of commentators have argued that these critics were altogether too coy about

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<sup>184</sup> BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG* 51 (1977). Kirsten Sellars has convincingly shown how, despite the widespread repetition of this quote in much of the literature, civil law countries including Russia and France actively supported the inclusion of conspiracy in the Nuremberg charters. KIRSTEN SELLARS, *'CRIMES AGAINST PEACE' AND INTERNATIONAL LAW* 106 (Cambridge University Press 2015). In fact, Sellars suggests that the true inspiration for conspiracy at Nuremberg was Russian not American.

<sup>185</sup> ANTONIO CASSESE & B. V. A. ROLING, *THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER* 58 (1994).

<sup>186</sup> *Id.* at 58.

<sup>187</sup> AUGUST VON KNIERIEM, *THE NUREMBERG TRIALS* 209 (1959).

the uptake of conspiracy in continental legal systems, including in both German and Japanese criminal law.<sup>188</sup> 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 nations.<sup>189</sup>

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.<sup>190</sup> 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 the Allies complained of "an arbitrary and domineering American manner,"<sup>191</sup> so "that in the end the 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."<sup>192</sup> 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 its 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

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<sup>188</sup> 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/frd/Military\\_Law/pdf/jackson-rpt-military-trials.pdf](http://www.loc.gov/frd/Military_Law/pdf/jackson-rpt-military-trials.pdf); Bush, *supra* note 181, 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).

<sup>189</sup> In discussing conspiracy, President Webb intimated that "International Law may be supplemented by rules of justice and general principles of law: rigid positivism is no longer in accordance with International Law." Tokyo Judgment, *supra* note 182, at 476.

<sup>190</sup> PRITCHARD AND ZAIDE, *supra* note 4, at 39,037.

<sup>191</sup> SMITH, *supra* note 176, at 142.

<sup>192</sup> *Id.*

inclusion in the Tokyo Tribunal's Statute was "astonishing!"<sup>193</sup> and asked rhetorically: "Are not all comparativist jurists aware that the doctrine of criminal conspiracy is a peculiar product of English legal history?"<sup>194</sup> 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."<sup>195</sup> 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."<sup>196</sup> If conspiracy was a vague "weapon of convenience" for the powerful nationally, as Sayre suggested, was migrating it into ICL doing 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."<sup>197</sup> 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 beyond.<sup>198</sup> 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."<sup>199</sup> 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

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<sup>193</sup> PRITCHARD AND ZAIDE, *supra* note 4, at 42,136.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 42,137.

<sup>196</sup> *Id.* at 42,138, (citing Francis B. Sayre, *Criminal Conspiracy*, HARV. L. REV. 395 (1922)).

<sup>197</sup> PRITCHARD AND ZAIDE, *supra* note 4, at 39,036–39,037.

<sup>198</sup> *Id.* at 39,040.

<sup>199</sup> *Id.* at 39,042.

communities.

The concerns with respect to conspiracy's entry into ICL also appear at the level of its application, albeit in a different guise. Many, like Gerry Simpson, have recognized that conspiracy probably worked well enough at Nuremberg "but it was discredited at Tokyo."<sup>200</sup> 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."<sup>201</sup> Evidently, there were many smaller conspiracies, rather than one all-encompassing "gigantic" one.<sup>202</sup> The implications of this excessive application for the defendants go without saying, but for now, we 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." 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."<sup>203</sup> On 25 August, the French Ambassador informed the Japanese "that France had decided to yield to the Japanese demands," and the so-called Matsuoka-Henri Agreement was signed.<sup>204</sup> 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.<sup>205</sup> This was because the French only signed the agreement "when faced with an actual invasion."<sup>206</sup> Using coercion to vitiate consent was no doubt fair

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<sup>200</sup> SIMPSON, *supra* note 176, at 119.

<sup>201</sup> CHIHIRO HOSOYA, THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM 109 (1986).

<sup>202</sup> PRITCHARD AND ZAIDE, *supra* note 4, at 39,035 (referring to the a "gigantic conspiracy" in which the accused were participants.).

<sup>203</sup> THE TOKYO JUDGMENT, *supra* note 182, at 340.

<sup>204</sup> *Id.* at 340.

<sup>205</sup> *Id.* .

<sup>206</sup> *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 Indo-China.").

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.<sup>207</sup>

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.”<sup>208</sup> 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.”<sup>209</sup> And to square the circle, in defending Klaus Barbie before French courts for his wartime participation in Nazi atrocities, the notorious lawyer Jacques Vergès’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.”<sup>210</sup>

We tie the criminal law doctrine that currently exists in much of the world to these histories of parochialism, imposition by power, and hypocrisy in application. 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, respectful or functionally optimal. To be sure, there are important discontinuities between the operation 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.

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<sup>207</sup> Costa, *supra* note 172.

<sup>208</sup> SIMPSON, *supra* note 200 at 95.

<sup>209</sup> GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE 202 (1999).

<sup>210</sup> NICHOLAS ATKIN, THE FIFTH FRENCH REPUBLIC 10 (2004); ALAIN FINKIELKRAUT, REMEMBERING IN VAIN: THE KLAUS BARBIE TRIAL & CRIMES AGAINST HUMANITY (1992). For full discussions of Vergès and the Barbie Trial, see Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321 (1988).

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 (replicating Leipzig); 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, perhaps in a way that solves the sorts of dilemmas that arose with procedure post WWI, instead of just managing doctrinal diversity once a norm is formally anointed somewhere as binding law.

#### IV. MODES OF ATTRIBUTION

In our typology's second element, we ask whether criminal law doctrine transplanted into recipient legal systems outside formal colonialism might also upset criminal law doctrine's capacity to act as a marker for underlying social values within the polity it serves, again making doctrine an unreliable proxy for value diversity. As we pointed out by way of introduction, the literature on legal transplants is voluminous,<sup>211</sup> and suggests that legal transplants of these sorts seldom "work." If Argentina was our illustration of an instance where it did work, and WWI a qualification of what it means to "work" for ICL, we are still concerned that in a number of instances, local communities will prove "unreceptive" to transposed criminal law doctrine, meaning that the recipient society is "unable to give meaning to the law."<sup>212</sup> In this Part, we seize on modes of attribution within national and international law to highlight these concerns, again cautioning against a fast shift from a descriptive version of Legal Pluralism that plots interacting normativity to a prescriptive alternative that uses existing laws as the building blocks of a defensible system of global governance.

Modes of attribution – like aiding and abetting, superior

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<sup>211</sup> 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, *THE LAWS OF IMITATION* (Elsie Worthington Clews Parsons trans., Henry Holt & Co. 1903) (1895).

<sup>212</sup> Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 *AM. J. COMP. L.* 179, 179 (2003).

responsibility, and joint criminal enterprise – attribute criminal harm to individual agency.<sup>213</sup> In this section, we emphasize the history of modes of 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. Moreover, to reiterate lessons learned from attempts at accountability after WWI, unconditional surrender to the diversity of doctrine may undermine the probability of meaningful justice. In our national example of these dynamics, we explain how Japan came to adopt German modes of attribution through these dynamics. We show how virtually all of modern Japanese criminal law doctrine – 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.

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<sup>213</sup> 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”). Again, national systems tend to adopt different labels. 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 law 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 those rules that determine parties to a 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).

### 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.<sup>214</sup> 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;<sup>215</sup> the book contains literally hundreds of references to 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.”<sup>216</sup>

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.<sup>217</sup> 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),<sup>218</sup> or

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<sup>214</sup> SHIGEMITSU DANDO, *THE CRIMINAL LAW OF JAPAN: THE GENERAL PART* (B.J. George trans. 1997) (1957).

<sup>215</sup> *Id.* at 11, 218. (discussing Hans Welzel's teleological theory of action and Claus Roxin's theory of perpetration).

<sup>216</sup> *Id.* at xv.

<sup>217</sup> 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 its German inspiration, Japanese criminal law also includes *dolus eventualis* as the lowest subcategory 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 *id.* at 154–55. Normally, recklessness is not assimilated into intention in English-speaking systems as it is in Germany, and by mimicry now, in Japan. Finally, Japanese criminal law 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 DANDŌ, *supra* note 214, at 217–19, with BOHLANDER, *supra* note 213, at 156–66.

<sup>218</sup> Recently, in surveying standards of complicity around the world to help determine the scope of aiding and abetting in customary international law, the ICTY drew heavily on

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,<sup>219</sup> and Germany never colonized Japan. Perhaps Japanese scholars and legislators were moved by the undeniable analytical elegance 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 19<sup>th</sup> century, when the country reshaped its legal system to mirror Western norms.<sup>220</sup> From the seventh century until the Meiji reforms, Japanese law was based on Chinese thought,<sup>221</sup> and criminal justice was administered through the Shogunate and its officials.<sup>222</sup> The impetus to shift to a more European system came

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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 the 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 law theory and few conform with Anglo-American principles.

<sup>219</sup> 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).

<sup>220</sup> See DANDO, *supra* note 214, at 34–35; Sally Engle Merry, *Colonial and Postcolonial Law*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 569, 570 (Austin Sarat, ed., 2004).

<sup>221</sup> Wilhelm Röhl, *Generalities*, in HISTORY OF LAW IN JAPAN SINCE 1868 1, 23 (Wilhelm Röhl, ed., 2004).

<sup>222</sup> 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).

after Western military powers forced the Tokugawa Shogunate to open Japan up to international trade.<sup>223</sup> 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.”<sup>224</sup> 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.<sup>225</sup> In other words, the litmus test for the 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.”<sup>226</sup>

Initially, Japanese officials resisted this path. Prior to the full-blown assumption of European law, foreign trading companies arrogated to themselves more and more influence over local administration, precisely in order to create an environment most conducive to their economic expansion.<sup>227</sup> 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:<sup>228</sup> Japan was no longer entitled to control its monetary system, regulate tariffs or trade, or determine where

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<sup>223</sup> 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 additional 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).

<sup>224</sup> ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 67 (2007).

<sup>225</sup> *Id.* at 91.

<sup>226</sup> *Id.* at 84.

<sup>227</sup> *Id.* at 84–85.

<sup>228</sup> 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.

foreigners settled within Japanese territory.<sup>229</sup> Moreover, foreign powers established consular jurisdictions with enforcement powers within Japan, displacing the Japanese judiciary.<sup>230</sup>

In 1868, the loss of sovereign control in the consular jurisdictions contributed to a revolution that restored the Emperor Meiji.<sup>231</sup> 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.<sup>232</sup> Thus, the Japanese did to their own legal system what colonialism would have 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.<sup>233</sup> 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 began the process that saw Japanese professors of criminal law learning German most earnestly.

Initially, Japan adopted both 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.<sup>234</sup> 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 they needed it quickly. As a result, the French codes were translated into Japanese criminal law verbatim.<sup>235</sup> This first experiment with European models was short-lived, however. After only a very brief period in effect,

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<sup>229</sup> 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).

<sup>230</sup> GOODMAN, *supra* note 229, at 21.

<sup>231</sup> SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS* 8 (2011).

<sup>232</sup> 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) (2003).

<sup>233</sup> Karl-Friedrich Lenz, *Penal Law*, in *HISTORY OF LAW IN JAPAN SINCE 1868*, *supra* note 221, 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).

<sup>234</sup> Röhl, *supra* note 221, at 24.

<sup>235</sup> *Id.* at 23 – 24.

the French-based code came to be perceived as overly liberal, and incapable of legitimating the structure and values of the imperial regime.<sup>236</sup> In looking for European alternatives, the Japanese found that German law was not only viewed as more advanced than French law,<sup>237</sup> but 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.<sup>238</sup> 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.<sup>239</sup> As a result of this switch in legal affiliations, Japanese law as a 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.<sup>240</sup> 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.<sup>241</sup> As Markus Dubber has joked in irony, “the sun never sets on German criminal theory.”<sup>242</sup> Japan is clearly an important ingredient in making this proposition 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

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<sup>236</sup> Ronald Frank, *Civil Code*, in HISTORY OF LAW IN JAPAN SINCE 1868, *supra* note 221, at 166, 178 – 179. See also MATSUI, *supra* note 231, at 9.

<sup>237</sup> Frank, *supra* note 236, at 183.

<sup>238</sup> *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 223, at 18.

<sup>239</sup> Which concentrated political power in the Emperor. Kenzo Takayanagi, *A Century 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 231, at 9–13. There had been a momentary hesitation when British parliamentary democracy 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).

<sup>240</sup> DEAN, *supra* note 222, at 71.

<sup>241</sup> See, e.g., DANDO, *supra* note 214

<sup>242</sup> 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.

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.<sup>243</sup> By this point, the American occupying forces were reforming virtually every aspect of Japanese law, including substantive criminal law and criminal procedure.<sup>244</sup> This episode of reform added another layer of foreign influence onto the long history of supplanting Japanese “patterns of knowing, feeling, and acting”<sup>245</sup> 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 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. German criminal law may well be in Japan what Spanish criminal procedure is in Argentina. Indeed, we believe that there is every possibility that this is true 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.<sup>246</sup> Still, we express concern that a prescriptive

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<sup>243</sup> 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 233, at 622–23. As for the higher constitutional status of the SCAP, the Supreme Court of Japan made this ruling. See MATSUI, *supra* note 231, at 27.

<sup>244</sup> See OPPLER, *supra* note 243, at 136 (describing the reform of criminal procedure law as “the most complicated and time-consuming reform”).

<sup>245</sup> GARLAND, *supra* note 15.

<sup>246</sup> 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

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. And even if this apprehension proves unfounded, what of Leipzig?

Put differently, when the ICTY draws on the Japanese criminal law governing complicity to define the equivalent concept in ICL,<sup>247</sup> 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. Nor is respecting all doctrinal arrangements because they reflect underlying social values inevitably functionally desirable for ICL. Consequently, deferring to and 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.

#### 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 law 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.

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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).

<sup>247</sup> See *infra* note 218.

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,”<sup>248</sup> the Allies established what was first known as the Inter-Allied Conference on the Punishment of War Crimes.<sup>249</sup> 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.”<sup>250</sup>

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,<sup>251</sup> the Nuremberg Tribunal itself merely considered whether an accused was “concerned in,” “connected with,” “inculcated in” or “implicated in”

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<sup>248</sup> INTER-ALLIED INFORMATION COMMITTEE, PUNISHMENT FOR WAR CRIMES—THE INTER-ALLIED DECLARATION SIGNED AT ST. JAMES’S PALACE LONDON ON 13<sup>TH</sup> JANUARY AND RELATIVE DOCUMENTS 15 (1942). For discussion of the significance of the declaration, see TAYLOR, *supra* note 177, at 25 (2013), and MAGUIRE, *supra* note 179, at 67 (rev. ed. 2010).

<sup>249</sup> HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 89 (1948).

<sup>250</sup> *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 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 be 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.

<sup>251</sup> 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*].

international crimes.<sup>252</sup> As many leading commentators now accept, this approach entailed what Europeans call a unitary theory of perpetration,<sup>253</sup> 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 around the globe 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.<sup>254</sup> England, France, Spain and 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;<sup>255</sup> French military tribunals convicted 2,107 individuals (and staged numerous other trials

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<sup>252</sup> 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 OLÁSULO ET AL., THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES 21 (2010).

<sup>253</sup> 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.”); OLÁSULO, *supra* note 252, 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”).

<sup>254</sup> This countries include Denmark, Norway, Austria, Italy, Poland and Brazil. See generally, James G. Stewart, *The End of “Modes of Liability” for International Crimes*, 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 DAMAŠKA, (forthcoming 2015).

<sup>255</sup> 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).

within France and French North Africa);<sup>256</sup> the British tried 1,085 crimes;<sup>257</sup> 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.<sup>258</sup> Therefore, even leaving aside these Russian prosecutions,<sup>259</sup> 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 Deák reports “up to 2 to 3 percent of the population formerly under German occupation... was charged by national courts for what was alternatively, or often simultaneously, termed collaboration with the enemy, treason, and war crimes”.<sup>260</sup> In Europe alone, then, state practice on questions of criminal participation in atrocity was gargantuan.<sup>261</sup>

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *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).

<sup>259</sup> 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 260, 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.”).

<sup>260</sup> 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).

<sup>261</sup> 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).

Against this background, we now introduce JCE and critically retrace its passage into 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.”<sup>262</sup> 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,<sup>263</sup> 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.”<sup>264</sup> Thus, the soldier manning the door is also convicted of torturing the victim, even if he believed he was guarding the entry to prevent enemy soldiers from entering and only foresaw that one of his confederates might commit torture.<sup>265</sup>

How did the doctrine infiltrate international law? The Charters of the Nuremberg and Tokyo Tribunals had referenced liability based on a

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<sup>262</sup> 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.”).

<sup>263</sup> 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).

<sup>264</sup> Prosecutor v. Kvočka et al., *supra* note 263, at ¶ 83.

<sup>265</sup> 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).

“common plan,”<sup>266</sup> 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,<sup>267</sup> no lesser personality than Justice Robert Jackson opined that international law was “indefinite and weak” in the area of criminal liability.<sup>268</sup> 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.”<sup>269</sup> 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.”<sup>270</sup> 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” that 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,<sup>271</sup> and here we add only one point of great salience for JCE in particular. According to well-reviewed historical records,<sup>272</sup> 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 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.<sup>273</sup>

Once again, the method of absorption would prove revealing. When the famed *Tadić* appeal judgment decided whether the ICTY Statute

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<sup>266</sup> *Nuremberg Charter*, *supra* note 251.

<sup>267</sup> JACKSON, *supra* note 188, at 331.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> See *infra* section II.B.

<sup>272</sup> See Bush, *supra* note 181.

<sup>273</sup> 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).

(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.”<sup>274</sup> 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.<sup>275</sup>

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 context, 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 established after WWII;<sup>276</sup> one stemmed from a Canadian military court in

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<sup>274</sup> 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 255, 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).

<sup>275</sup> Fraser, *supra* note 255, at 9.

<sup>276</sup> 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

occupied Germany;<sup>277</sup> two from the United States Tribunal convened pursuant to Control Council Law No. 10;<sup>278</sup> 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.”<sup>279</sup> 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 national legal systems.”<sup>280</sup> 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.”<sup>281</sup> 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.<sup>282</sup> The two histories come apart slightly, and certainly not enough to sooth worries that legal pluralism risks sanctifying principles conceived in British imperialism.

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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.

<sup>277</sup> *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)).

<sup>278</sup> *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).

<sup>279</sup> *Tadić*, *supra* note 6, at ¶ 200.

<sup>280</sup> *Tadić*, *supra* note 6, at ¶ 193.

<sup>281</sup> *Id.*, at ¶ 224.

<sup>282</sup> 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.

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 do 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.<sup>283</sup> To revisit a recurring uncomfortable parallel, however, modern Cambodia was then subsumed within “French Indo-China.”<sup>284</sup>

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.”<sup>285</sup> Even if it did, the question would still remain whether honoring this incarnation of criminal doctrine makes sense for ICL in its attempts to speak to a wider constituency. In other words, in the first instance, 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). In

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<sup>283</sup> 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).

<sup>284</sup> 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.

<sup>285</sup> GARLAND, *supra* note 15.

the second, it presumes that genuflecting to extant standards is best, which Leipzig tells us may or may not be the case.

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 a diverse, conflicting, sometimes inter-penetrating system of criminal law is empirically undeniable, what William Twining calls “Social Fact Legal Pluralism,”<sup>286</sup> 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 Part, we turn to in the special part of ICL to illustrate the third element of our typology: instances where societies are not only “unreceptive” to transposed criminal law doctrine but when a foreign imposition contaminates surrounding law too. In this third element, we again question whether it can safely be said that the definition of 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.”<sup>287</sup> 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 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.

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<sup>286</sup> Twining, *supra* note 33.

<sup>287</sup> Teubner, *supra* note 31.

A. *Blasphemy as a “Legal Irritant” in Pakistan*

International courts and tribunals occasionally draw on Pakistani criminal law as part of the surveys of national criminal law they undertake to ground their readings of ICL norms. In the *Čelebići* 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.”<sup>288</sup> Pakistani criminal law also features in other international courts and tribunals,<sup>289</sup> in one instance, when an international court cited to the Indian Penal Code (IPC) of 1860 to substantiate its position.<sup>290</sup> 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.<sup>291</sup> 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 the Franco-Belgian influence on Congolese notions of inchoate crime or the influence of German criminal law on Japanese concepts of blame attribution. In all these instances, we seem far from the Argentine experience with criminal

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<sup>288</sup> Prosecutor v Delalić et al, No. IT-96-21-T, Trial Judgement, ¶ 434 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

<sup>289</sup> *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).

<sup>290</sup> Prosecutor v. Kunarac et al., Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 454 n.1160 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001).

<sup>291</sup> 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).

procedure. 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.<sup>292</sup>

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 chose 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,<sup>293</sup> 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 toward the idea of treating criminal law 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.<sup>294</sup> In 1947, Pakistan was granted

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<sup>292</sup> 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).

<sup>293</sup> 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).

<sup>294</sup> 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 prior to colonial intervention). Although the IPC was drafted in 1860, it did not come into force until 1862.

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.<sup>295</sup> 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.<sup>296</sup>

When Pakistani criminal law was finally “Islamized” a generation after independence,<sup>297</sup> this process of internal reform was so haphazard that, faced with four different Shari’a bills, General Zia ul-Haq simply

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<sup>295</sup> While General Zia ul-Haq 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 294, at 36.

<sup>296</sup> A particularly low point was the mimicry of colonial-era laws that restrained the ability of non-Muslims to participate in public life. Article 260 of the Bhutto constitution managed to offer a definition of “Muslim” through its outlawing of the Ahmadi sect. *Id.* at 769. This was in keeping with pre-existing repression of Ahmadis – including forcing them to declare themselves not as Muslims, but to register as Ahmadis on all official documents – and supplemented by non-state killings of Ahmadis, as well as the state’s prosecution of Ahmadis for blasphemy violations. See Rasul Bakhsh Rais, *Identity Politics and Minorities in Pakistan* (2007) 30:1 SOUTH ASIA: JOURNAL OF SOUTH ASIAN STUDIES 111. Besides the application of the blasphemy laws, 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. See K.M. Kapadia, *The Criminal Tribes of India* (1952) 1:2 SOCIOLOGICAL BULLETIN 99, 99–100. On the inherent Orientalism of the Criminal Tribes Act, and the colonial attempt to impose a particular moral order, see Sanjay Nigam, *Disciplining and policing the ‘criminals by birth’, Part 1: The making of a colonial stereotype—The criminal tribes and castes of North India*, (1990) 27:2 THE INDIAN ECON. AND SOCIAL HIST. REV. 131, 132–134.

<sup>297</sup> 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).

dismissed the government and introduced his own bill.<sup>298</sup> The irregularity of this extra-constitutional legislation was exacerbated by the establishment of an additional Islamic judicial system that ran in parallel to the preexisting one.<sup>299</sup> The inevitable result was a lack of jurisdictional clarity throughout the judicial system,<sup>300</sup> as the High Court and Shariat courts sought to undermine one another through competition over cases and by professing different interpretations of Islamized laws.<sup>301</sup> 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".<sup>302</sup>

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.<sup>303</sup> Secular parties have resisted further Islamization, and even post-Zia dictators have countered some of the excesses of Islamization through separate legislation.<sup>304</sup> The net effect is that, at best, the Islamized blasphemy laws merely painted a veneer of Islam over the pre-existing colonial system,<sup>305</sup> thereby creating a legal

<sup>298</sup> Charles Kennedy, *Repugnancy to Islam: Who Decides? Islam and Legal Reform in Pakistan*, 41 INT'L & COMP. L.Q. 769, 776–77 (1992).

<sup>299</sup> 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 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).

<sup>300</sup> Redding, *supra* note 295, at 772–73.

<sup>301</sup> Cheema, *supra* note 293, at 881–82.

<sup>302</sup> Forte, *supra* note 294, at 66.

<sup>303</sup> 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 Muttahidda Majlis-e-Amal (MMA) coalition to pass all of its Islamization agenda).

<sup>304</sup> See Cheema, *supra* note 293, at 885 (noting the passage of bills that sought to 'de-Islamize' Pakistani criminal law).

<sup>305</sup> 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

regime governing criminal law that is marked by important internal contradictions; Pakistani criminal law remains deeply incoherent when viewed alternatively as either a body of criminal or Islamic law.<sup>306</sup>

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 supplemental 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.<sup>307</sup> Now, these laws are used to incite discrimination and attacks against minorities, or to settle private disputes between individuals.<sup>308</sup>

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.”<sup>309</sup> 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

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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.

Muhammed Riaz v. Federal Government, 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).

<sup>306</sup> 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) (noting that Islamization programmes create internal contradictions in Shari'a jurisprudence).

<sup>307</sup> Siddique & Hayat, *supra* note 297, 337–39.

<sup>308</sup> HUMAN RIGHTS WATCH, *WORLD REPORT 2014* 367–68 (2014).

<sup>309</sup> Siddique & Hayat, *supra* note 297, at 322.

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 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."<sup>310</sup> The new blasphemy laws used religious piety to mask antiquated forms of colonial governance;<sup>311</sup> rather than representing a departure from colonialism, they arguably distorted and then entrenched a variety of unwelcome foreign imports.<sup>312</sup> The

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<sup>310</sup> Collins, *supra* note 305, 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 in 1982, but ultimately rejected. Instead, in 1984, the government essentially promulgated the same 1872 colonial law. See Kennedy, *Islamization supra* note 299, 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).

<sup>311</sup> See, e.g., Forte, *supra* note 294, 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 298, at 776 (1992) (noting that opposition claimed Sharia legislation was designed "to bolster the fading legitimacy of an unpopular regime").

<sup>312</sup> 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 294, 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

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 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 that international criminal lawyers can bank on.

### *B. Colonialism and Apartheid in the ICC Statute*

On its face, a treaty that all states helped negotiate offers a potential 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 legal 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,”<sup>313</sup> which deferred to European histories of siege warfare over the widespread experience of plunder in the Global South.<sup>314</sup> In this section, however, we review the

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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”).

<sup>313</sup> ICC Statute, Arts 8(2)(b)(xvi) and 8(2)(b)(e)(v).

<sup>314</sup> 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’. Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Hague Convention (IV) of 1907]. 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. For literatures on this phenomenon, see EDUARDO GALEANO, *OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT* (25 Anv edition ed. 1997); PIERRE JALÉE, *THE PILLAGE OF THE THIRD WORLD* (1968). Here,

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 seriously upset the relationship between criminal law 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 irritants 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).”<sup>315</sup> Over what many lament as several “tortuous” decades,<sup>316</sup> the ILC’s work was divided and then divided again, with the effect of forestalling the arrival of the ICL announced at Leipzig, Nuremberg and Tokyo on the doorsteps of Great Powers. Apparently, it was a surprise to no one that despite encouraging U.N. General Assembly resolutions and the flurry of activity it generated, the ILC produced little output over 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.”<sup>317</sup>

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 of Offences Against the Peace and Security of

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and elsewhere, the drafters of the ICC Statute privileged (European) history over normative coherence and value pluralism.

<sup>315</sup> G.A. res 177 (II), 21 November 1947.

<sup>316</sup> 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).

<sup>317</sup> 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).

Mankind, but as Bassiouni explains, their time “was not yet ripe.”<sup>318</sup> 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.<sup>319</sup> This parallel process was more counterproductive than facilitative when the work on the Draft Code was ongoing, contentious and overlapping in key substantive areas.<sup>320</sup> Second, both of these ill-coordinated, under-resourced and politically duplicitous 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”;<sup>321</sup> 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 themselves 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. Rather than defining cross-cultural standards of the sort Mullins had called for at Leipzig, the norms developed at the ICC would not escape the power dynamics that infuse criminal law everywhere.

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 Leipzig then 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

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<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 250–251.

<sup>320</sup> *Id.*

<sup>321</sup> 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 316, at 47.

first draft also included a supplemental set of crimes that were more sensitive to the histories we have reviewed. These brand new, supplemental offences included “colonial domination and other forms of alien domination”; “apartheid”; and “recruitment, use, financing, and training of mercenaries.”<sup>322</sup> Clearly, this revised set of crimes flowed from Thiam’s 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 over the past century, Thiam saw value in attempting to develop a more representative understanding of what constituted an international crime. Thus, 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,<sup>323</sup> Thiam and the ILC he led 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.<sup>324</sup> 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

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<sup>322</sup> From his very first report on the draft code, Thiam gestured at the emergence and importance of new crimes like colonial domination. Doudou Thiam (Special Rapporteur), First Report on the Draft Code of Offences Against the Peace and Security of Mankind, ¶ 44, U.N. Doc. A/CN.4/364 (Mar. 18, 1983), *reprinted in* [1983] 2 Y.B. Int’l L. Comm’n, 137 U.N. Doc. A/CN.4/SER.A/1983/Add.1 (Part 1) [hereinafter Thiam, 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* Doudou Thiam (Special Rapporteur), Third Report on the Draft Code of Offences Against the Peace and Security of Mankind, ¶¶ 157–162, U.N. Doc. A/CN.4/387 (Apr. 8, 1985, *reprinted in* [1985] 2 Y.B. Int’l L. Comm’n 63, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (Part 1) [hereinafter Thiam, Third Report]. Note that this list also included “Economic Aggression.”

<sup>323</sup> *First Report*, *supra* note 322, at ¶ 55 (“[M]erely listing criminal acts without relating them to a common principle does not appear to be satisfactory.”)

<sup>324</sup> 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).

their commission.<sup>325</sup> 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.<sup>326</sup> Over time, ‘extreme seriousness’ was refined,<sup>327</sup> but it still allowed the ILC to expand beyond the Nuremberg list and identify a total of twelve international crimes.<sup>328</sup> On paper, the new draft was an attempt to reconcile criminal law doctrine with the diversity of social values throughout the world, in part by criminalizing the political practice that had produced such a deep schism between them throughout global law.

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.<sup>329</sup> 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.<sup>330</sup> These Western states did not want to consider

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<sup>325</sup> Int’l Law Comm’n, Rep. on the Work of Its Thirty-Seventh Session, U.N. Doc. A/40/10, ¶¶ 65–67; 40 U.N. GAOR Supp. No. 10 (1985), reprinted in [1985] 2 Y.B. Int’l L. Comm’n, 1, U.N. Doc. A/CN.4/SER.A/1985/Add.1 (Part 2).

<sup>326</sup> 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*].

<sup>327</sup> *Id.* ¶ 8; Thiam, Third Report, *supra* note 322, ¶ 49; Doudou Thiam (Special Rapporteur), Fifth Report on the Draft Code of Offences Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/404 (Mar. 17, 1987), reprinted in [1987] 2 Y.B. Int’l L. Comm’n 1, 2, U.N. Doc. A/CN.4/SER.A/1987/Add.1 (Part 1); Int’l Law Comm’n, *supra* note 325, ¶ 69.

<sup>328</sup> 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 Doudou Thiam (Special Rapporteur), Fourth Report on the Draft Code of Offences Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/398 (Mar. 11, 1986), reprinted in [1986] 2 Y.B. Int’l L. Comm’n 1, 83–86, U.N. Doc. A/CN.4/SER.A/1987/Add.1 (Part 1).

<sup>329</sup> Ortega, *supra* note 324, at 302 (stating that the non-Nuremberg crimes were abandoned “without convincing justification”).

<sup>330</sup> 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*

whether the prohibited conduct actually satisfied the seriousness criteria developed by the ILC – they simply wanted them deleted.<sup>331</sup> 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.<sup>332</sup> 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 Code to a mere exercise in style, with no chance of becoming an applicable instrument.”<sup>333</sup>

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 recognized the multiple ways in which serious international crimes could be inflicted. In particular, it excised criminal offenses European states had inflicted but not suffered.<sup>334</sup> Analytically, the failure created a deep anomaly. The only radical consequence of describing colonialism as an international crime in the late 1990s is that it might implicate a number of states in ongoing crimes; but that would be a principled argument in favour of defining colonialism as a crime, rather than not defining it as such. 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.<sup>335</sup> Claiming that South African apartheid was singularly horrific hardly seems a position from

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*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.

<sup>331</sup> *Id.* at 59ff.

<sup>332</sup> 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*].

<sup>333</sup> *Id.* at ¶ 3.

<sup>334</sup> Aimé Césaire, among others, has suggested that Nazi crimes in WWII often amounted to colonial crimes, while also pointing out the discrepancy with the non-prosecution of prior Western colonial crimes. AIMÉ CÉSAIRE, DISCOURSE ON COLONIALISM 36 (Joan Pinkham trans., Monthly Review Press, 2000) (1955). This is not to say that *only* Western states were capable of colonial crimes.

<sup>335</sup> 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*.

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”,<sup>336</sup> it had little effect since preparations for the ICC Statute had already started based on 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.<sup>337</sup> 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, the Rome Statute requires that apartheid take place in the context of a widespread and systematic attack against the civilian population.<sup>338</sup> According to Paul Eden, the scope of apartheid is even narrower than in those documents, being “limited to a residual category of acts not falling within the ambit of persecution”<sup>339</sup> and thus excluding a range of conduct characteristic of apartheid.<sup>340</sup> Similarly, Tim McCormack notes that the

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<sup>336</sup> 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).

<sup>337</sup> 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, Third Meeting of the Committee of the Whole, Rome, It., June 15–July 17, 1998, Summary records of the meetings of the Committee of the Whole, UN Doc. A/CONF.183/C.1/SR3 (Vol. II), at 152–53 (June 17, 1998). 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).

<sup>338</sup> 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).

<sup>339</sup> 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).

<sup>340</sup> 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”).

intent requirement for apartheid in the Rome Statute was included at the insistence of the United States, who was fearful that it would criminalize domestic white supremacist organizations.<sup>341</sup> 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,”<sup>342</sup> ICC negotiations dropped colonialism as a crime and defined apartheid to disprove his thesis.

When coupled with the continued absence of the crime of colonialism, Eden’s description of apartheid as ‘progressive development’<sup>343</sup> 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 law 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 also alive 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 privileging of Western preferences. Thus, this scenario signifies another instance where the forces that skewed the relationship between criminal law 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 interests 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

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<sup>341</sup> McCormack, *supra* note 337, 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 338. This is not the case with white supremacist movements that do not control government.

<sup>342</sup> Mamdani, *supra* note 152, at 8.

<sup>343</sup> Eden, *supra* note 338, at 186.

nothing inherently good, progressive, or emancipatory about legal pluralism.”<sup>344</sup> With de Sousa Santos, we insist on the word “inherently.” No doubt, criminal law doctrine frequently reflects diverse social and cultural values, which 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 available 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 in certain circumstances, although this will be case-sensitive since as the ICC experience suggests, this too may not escape the dynamics we point to. Overall, ICL is but a metaphor for a dynamic that will undoubtedly permeate other areas of law. On a certain 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 methodology and substance, not just in application. 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 interaction) that remains tainted in the various ways we point to: criminal doctrine is sometimes part of the problem ICL exists to counteract, may be transplanted from afar in ways that prove “unreceptive” in the recipient society, and can operate as a legal irritant that contaminates adjacent concepts. Thus even though legal pluralists might argue that we have unfairly targeted a particularly shallow vision of pluralism in ICL, our underlying concern remains that even a more rigorous legal pluralism is still unable to: (a) excise these deeply problematic legacies from the law it embraces; (b) determine the proper role for norms born of these ugly histories in a plural account of ICL; (c) adjudicate between legal and non-legal norms the field should draw on; or (d) defend a prescriptive version of legal pluralism in absolute terms. Consequently, once laid bare, the histories we have unveiled open up space for the idea of pluralism by unification; it is at least conceivable that in certain areas, a universal concept of ICL might better guarantee (value) pluralism than managing

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<sup>344</sup> *Supra* note 1.

the set of laws governing criminal law at international or national levels presently.<sup>345</sup> Conceivably, George Fletcher may be right that “resolutions on the surface of the law should not obscure the unity that underlies apparently diverse legal cultures.”<sup>346</sup> As these histories show, however, one would have to tread carefully in assessing whether any given norm meets this mark to avoid power again masquerading as unity.

At the level of enforcement, these stories also reveal that the institutions capable of enforcing ICL norms should explore ways of at least partially correcting for these flaws, provided recipient societies see this as a desirable course of action. In fact, doing so may amount to a collective responsibility; a concept we scholars of ICL often impose on others. In her remarkable study of the effects of the Tokyo Trials in Japan, Madoka Futamura interviewed a Japanese man in his late thirties, who pointed out that he still felt a sense of responsibility for Japanese wartime atrocities even though he was not yet born when they transpired: “I as a Japanese person shoulder an historical responsibility... I do not want to shoulder such a thing. But I cannot help it because I cannot stop being Japanese, and I should shoulder it. But it is unpleasant. What have our ancestors done!”<sup>347</sup> The Europeans who populate courts and tribunals (international and domestic) shoulder a different burden for colonialism, but it should register with a similar intensity. Although one cannot be too politically naïve about the possibility of counteracting this past,<sup>348</sup> the challenge lies in asserting, jointly, that our futures will not be like our pasts.

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<sup>345</sup> As we mention earlier, one of us has suggested that forms of participation might be one site where this universalism is both achievable and appropriate. See James G. Stewart, *Ten Reasons for Adopting a Universal Concept of Participation in Atrocity*, in *PLURALISM IN INTERNATIONAL CRIMINAL LAW* (Elies Van Sliedregt & Vasiliev eds., 2014), <http://ssrn.com/abstract=2343392>.

<sup>346</sup> GEORGE FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 5 (1998).

<sup>347</sup> MADOKA FUTAMURA, *WAR CRIMES TRIBUNALS AND TRANSITIONAL JUSTICE: THE TOKYO TRIAL AND THE NUREMBURG LEGACY* 136 (2007).

<sup>348</sup> For two excellent warnings against the ability of ICL to extricate it from the power dynamic that created it, which come at the question from very different vantage points, see SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH, AND THE POLITICS OF UNIVERSALITY* (2011) (discussing failed Third World attempts at redirecting international law in various other domains); 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).