Model(ing) Justice

Perfecting the Promise of International Criminal Law

Kerstin Bree Carlson

CAMBRIDGE

MODEL(ING) JUSTICE

The International Criminal Tribunal for the former Yugoslavia (ICTY) was the first and most celebrated of a wave of international criminal tribunals (ICTs) built in the 1990s and designed to advance liberalism through international criminal law. *Model(ing) Justice* examines the practice and case law of the ICTY to make a novel theoretical analysis of the structural flaws inherent in ICTs as institutions that inhibit their contribution to social peace and prosperity. Kerstin Bree Carlson proposes a seminal analysis of the structural challenges to ICTs as socially constitutive institutions, setting the agenda for future considerations of how international organizations can perform and disseminate the goals articulated by political liberalism.

Kerstin Bree Carlson is an associate professor at the University of Southern Denmark and is affiliated with The American University of Paris and iCourts at the University of Copenhagen. Kerstin's research theorizes structural challenges inherent to international criminal law as a means of considering the potential social impact of international criminal justice. She is the recipient of two Fulbright awards (the first to Croatia and the second to UNESCO in Paris), and several teaching awards.

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PERFECTING THE PROMISE OF INTERNATIONAL CRIMINAL LAW

KERSTIN BREE CARLSON
University of Southern Denmark; The American University of Paris

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Preface and Acknowledgments

This project began nearly twenty years ago, when I traveled to Bosnia as a researcher for the University of California Berkeley International Human Rights Law Clinic. We were three US law students paired with three Bosnian law students, and we spent the summer interviewing local judges and prosecutors from each of the three constituent ethnicities in Bosnia about their impressions of the work of the ICTY.[1] The book you are holding in your hands is in many ways the product of that formative experience, which was in equal parts moving, surprising, and galvanizing. For two months, based in Banja Luka and with weekly trips to Sarajevo to debrief with the rest of the team, the indomitable Tamara Todorović and I drove all over Republika Srpska to interview judges and prosecutors. The war had ended a few years before and its ravages were still fresh: checkpoints between the entities; temporary, rickety metal bridges over ravines; whole towns of skeletal, abandoned houses; lands emptied of people, like the eerie, uneasy quiet of our afternoon in Zvornik, 20 km away from Srebrenica. Yet Bosnia is beautiful, it was summer, and we were two young women (oftentimes three, with our interpreter, Borja) on the road trying to rebuild the world, all of which made the contrasts between the staggering horror of war, the stubborn persistence of destructive nationalist rhetoric and politics, and the warmth, humor, and humanity of the people we met more striking. I wanted to *do* something for those people and that place. And I saw, in the course of that summer, that the assumptions implanted in me as a US law student about the capacity of law and its institutions to direct social change were culturally and contextually specific, and required studied consideration, analysis, and challenge. This, then, is what I did, and this book is the result.

Over twenty years of work, the debts accrued are extensive. The list must begin with the University of California Berkeley International Human Rights Law Clinic,

[1] Our study was published as "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors," 18 (1) *Berkeley Journal of International Law*, 2000, referenced in the Bibliography under Carlson *et al.* (2000).

and extend to professors Steven Bundy and the late David Caron at Boalt Hall, who loaned me books (Damaška's *The Faces of Justice and State Authority*; Shapiro's *Courts*) and opened my mind to the possibilities, ideologies, empowerment, and subjugation that accompany legal processes. Malcolm Feeley guided me to law and society studies, and stuck with me through my long gestation; even today I see how the questions he asked a second-year law student remain the questions at the core of all my inquiries, and shape the guidance I offer my own students. Enormous thanks to my committee, as well: Martin Shapiro, who helped me challenge accepted status quos; Kristin Luker, who taught me to work smarter, not harder; and Ronelle Alexander, for teaching the language once known as Serbo-Croatian "the adult way" and proofing my PhD manuscript with the kind of gimlet eye that changes how you write in the first place.

In the early years, Paul Frymer, Chris Kendall, Francis Mathew, and Gabriella Zim Kremer all pounded out ideas late at night, around dining room tables, fueled by coffee and cookie dough. Judge David Folsom and Carly Anderson Slack taught me how to think like a lawyer (in a good way!). As I worked to submit the PhD while practicing law, then teaching full-time, and rearing two toddlers, Susan Perry and Kim Murphy made themselves available to read, debate, or kvetch, all of which was simply indispensable. As a post-doc at iCourts, surrounded by like-curious researchers in a singularly exciting, supportive research center, Director Mikael Rask Madsen's intellectual challenges were (irritatingly!) reliably and immensely helpful. Jakob von Holtermann, Mikkel Jarle Christiansen, Solomon Ebobrah, and Marina Aksenova all advanced my considerations of the capacity of international criminal law. My students and colleagues at The American University of Paris kept driving me towards the important questions: Waddick Doyle, Brian Schiff, Charles Talcott, Lissa Lincoln, Michelle Kuo, students in my Transitional Justice and First Bridge classes, thank you. Colleagues in both the law and international politics departments at the University of Southern Denmark redefined how warm a Danish welcome could be, including with cake, and students in our Masters of International Security and Law (MOISL) program have helped me fit specifics into the big picture. Brad Roth invited me to present my research early, and repeatedly, in Dubrovnik, and remains my aspirational intellectual model. Likewise, David Kennedy and the Institute for Global Law and Policy at Harvard Law School offered intellectual growth spaces, as does the Law and Society Association, Berkeley's Jurisprudence and Social Policy Department, the International Studies Association, and the University of Southern Denmark. I received financial support from Columbia, Fulbright, the Foreign Languages and Area Studies fellowships program, UC Berkeley, The American University of Paris, iCourts,[2] and Syddansk Universitet. David Klein at the *Journal of Law and Courts* helped me clarify my arguments, and

[2] Funded by the Danish National Research Foundation grant DNRF105 and conducted under the auspices of iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts.

John Berger and two anonymous reviewers at Cambridge tightened the manuscript. Thanks to *Denver Journal of International Law and Policy*, *Italian Law Review* and the *Journal of Law and Courts* for permission to reuse some previously published material.

My family and friends on both sides of the Atlantic have offered massive support. From chocolate sent to Sarajevo to long weekends babysitting, they have put the kettle on and turned up the duvet at a moment's notice, and called again even when it's my turn to call back. For hospitality and friendship all over the world I thank Adam, Bojana and Jozo, Brad, the VT Carlsons, Cary, the Cornells, the Delais, Heidi, Helen, the Kremers, Nicolas, Nina, the Levys, J3, Jamie, the Lailliers, the MacIntyres, Maeve, the Martins, Peter, the Portland group, the Ragones of NJ and NY, Shivani, Stefan, Tammy, the Todorovićs, and the Torts. On the ground in Copenhagen, I have had tremendous logistical (read: babysitting!) and emotional support from Amalia, Brooke, Clara, Greta and John, Jasna and Raul, Bea, Anna and Lars, Lars and Shira, Mor and Far, Jens and Saane, Jan and Lisbeth, Tom, Juanan, Pola, Jed, Jakob, Shai, Henrik, Zuzanna, Amelia, Carolina, Lene, Ayo, Amy and Bjørn, Martin and Alana, Emma and Steven, Anja and Mads, Jenna and Jin: you are my village, thank you. Even while geographically distant, Brennan, Laura, Kim, Ray-Ray, Carly, Mel, Lisbeth, Gabi, Tamći, Serena, and Jackie always have an ear and a word for the ridiculous, the tragic, or the combination. Finally thanks, plain and simple, to Mom and Dad, for everything; to Brennan, for everything plus; to Claudio, who checks all the equations; and to Sam, Alice, Lolo, and Niamh, who never fail to make it fun or, barring that, memorable.

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INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (ICTY)

Introduction

Using Courts to Heal Countries – Transitional Justice and International Criminal Law

I THE PROBLEM: CONTEMPORARY CHALLENGES TO INTERNATIONAL CRIMINAL LAW

In August of 1992, images of starving men held in Bosnian Serb detention camps raised the specter of genocide in Europe for the first time since World War II. The following year, the United Nations Security Council passed resolution 827, setting up the International Criminal Tribunal for the former Yugoslavia (ICTY), the first of several ad hoc tribunals inaugurated in the 1990s[1] carrying the threat of criminal sanctions for perpetrators of war crimes, and the promise of justice (as well as international recognition) for victims. The International Criminal Tribunal for Rwanda (ICTR) quickly followed, and the permanent International Criminal Court (ICC) came into being less than a decade later.

The fervor for international criminal justice was animated, at least in some measure, by the promise of law to advance political liberalism (Slaughter 2000) and, therein, peace. In the twentieth century, rule-of-law liberalism[2] underwrote prosperous, democratic, and human-rights-respecting nations (which came to include Germany and Japan, against whom the first international criminal tribunals were constructed) and eventually claimed victory in the Cold War (Fukuyama 1992). It was therefore but a short ideological step to seek to apply law, as operationalized by international courts, to resolve internecine conflict, an experiment that reached its pinnacle with the creation of the ICC in 2002.

[1] A list of such international criminal tribunals from the 1990s and beyond would include the ad hoc tribunals of the ICTY (1993), the International Criminal Tribunal for Rwanda (1994), the Ad Hoc Tribunal for East Timor, Indonesia (2001), the Special Court for Sierra Leone (2002), the Extraordinary Chambers in the Courts of Cambodia (2003), the Special Tribunal for Lebanon (2007), and the permanent International Criminal Court (2002).

[2] Rule-of-law liberalism refers to political liberalism regulated by legalism. In short, it is a commitment to transparent government processes equally applied to all actors in society. The genesis and political work accomplished by these ideas is explored in depth in Chapters 1 and 2.

More than a decade after its creation, the optimism and enthusiasm that accompanied the ICC's creation is now significantly muted even in the most committed quarters, however. At the time of writing, three African countries have declared their intent to exit the statutory regime constructing the ICC.[3] This follows a recent dismissal by the ICC of an indictment against Kenyan Prime Minister Ruto,[4] citing the same reasons that accompanied its dismissal of an indictment against Kenya's President Kenyatta in 2014:[5] whole-scale witness tampering, including untimely deaths[6] and the recanted testimonies of several prosecution witnesses, which destroyed the prosecution's case. Together with the ICC's "hibernation" of its case against Sudan's Al-Bashir[7] due to repeated failures of member states to turn him over to the court, these abandoned prosecutions against leaders charged with violations of humanitarian law challenge the ICC's capacity to make good on its mandate to "end impunity." The situation at the ICTY, as its practice draws to a close, is arguably no less challenging; on March 31, 2016, the ICTY's ten-year prosecution of Serbian far-right politician and paramilitary leader Vojislav Šešelj ended in acquittal,[8] joining several other failed prosecutions against those alleged to be most responsible for the war.[9] Even the ICTY's "successful" prosecutions generate complaint, such as the mixed reception to the Karadžić (2016) and Mladić (2017) verdicts. Both of these defendants were found guilty for crimes including genocide at Srebrenica, but acquitted of genocide across

3 South Africa; Burundi; The Gambia.

4 *The Prosecutor* v. *William Samoei Ruto and Joshua Arap Sang*, Case No. ICC-01/09–01/11 (Int'l Crim. Ct. April 5, 2016).

5 *The Prosecutor* v. *Uhuru Muigai Kenyatta*, Case No. ICC-01/09–02/11, charges withdrawn (Int'l Crim. Ct.).

6 See, for example, "Discovery of witness's mutilated body feeds accusations of state killings" *The Guardian* January 6, 2015, www.theguardian.com/world/2015/jan/06/witness-mutilated-body-kenya-government-killing-meshack-yebei-william-ruto.

7 Cite to Al-Bashir "ICC chief prosecutor shelves Darfur war crimes probe" *The Guardian* December 20, 2014, www.theguardian.com/world/2014/dec/14/icc-darfur-war-crimes-fatou-bensouda-sudan.

8 *Prosecutor* v. *Vojislav Šešelj*, Case No. IT-03–67 (Int'l Crim. Trib. for the former Yugoslavia March 31, 2016). The Office of the Prosecutor appealed, and in April 2018 the appeals chamber sentenced Šešelj to ten years' prison for events related to a 1992 speech; this sentence is the equivalent of time served. *Prosecutor* v. *Vojislav Šešelj*, Case No. MICT-16-99 (Int'l Residual Mechanism for Yugoslav Crim. Trib. April 11, 2018). Šešelj represented himself and beleaguered the institution with motions and demands; his is a stunning example, more stark even than that of Slobodan Milošević, the president of Yugoslavia who famously used the ICTY as a foghorn, of the efficacy of a *defense de rupture* at international criminal law. *Defense de rupture* is discussed further in Chapter 2.

9 See, e.g., *Prosecutor* v. *Ante Gotovina, Ivan Čermak, and Mladen Markač*, Case No. IT-06–90-PT (Int'l Crim. Trib. for the former Yugoslavia November 16, 2012); *Prosecutor* v. *Perišić*, Case No. IT-03–69 (Int'l Crim. Trib. for the former Yugoslavia February 28, 2013); *Prosecutor* v. *Jovica Stanišić and Franko Simatović*, Case No. IT-03–69 (Int'l Crim. Trib. for the former Yugoslavia May 30, 2013); *Prosecutor* v. *Vojislav Šešelj*, Case No. IT-03–67 (Int'l Crim. Trib. for the former Yugoslavia March 31, 2016) and *Prosecutor* v. *Slobodan Milošević*, Case No. IT-02–54 (case uncompleted due to Milošević's death) (the evolving pattern of convicting low-level perpetrators and acquitting leaders is discussed further in Chapter 4).

Bosnia.[10] Writing about the Karadžić verdict in the Guardian,[11] Ed Vulliamy, one of the journalists whose reporting in August 1992 brought the horrors of the war to international attention, spoke of the empty "triumphalism" of a tribunal unable to find Karadžić liable for genocide in rural areas of Bosnia, where official policies of ethnic cleansing disappeared whole villages whose inhabitants are still mostly unaccounted for, likely buried in mass graves still undiscovered.[12]

The political and workaday problems faced by international criminal tribunals (ICTs) such as the ICTY and the ICC serve to illustrate a deeper challenge to their practice. International criminal tribunals have built an impressive institutional legacy: they have produced reams of jurisprudence and hundreds of judgments, and have spawned an industry. Yet as regards the tall order of respect for the rule of law, recognition of "core" rights,[13] and value of transparent governance (i.e., the liberal aims that underwrote the international criminal law project), ICTs' records are, at best, mixed. Although war has not resumed in Bosnia, Rwanda, Sierra Leone, and Lebanon, none of these countries has experienced a concurrent embrace of rule-of-law liberalism. In each of those places, international humanitarian norms are generally celebrated when used against one's enemies, and rejected as means to organize oneself or one's friends. In other words, the experience of post-conflict countries subjected to international criminal justice to date suggests that international criminal law remains a political tool, not an ideological framework, in the regions where it has been applied. Moreover, and perhaps more significantly, as the bold doctrinal pronouncements of early ICT decisions are muted by later jurisprudence, and as ad hoc tribunals close without replacement, it appears that the powers bankrolling the international criminal law experiment may be becoming as unconvinced as the local populations subject to it. This is of course in stark contrast to the

[10] *Prosecutor* v. *Radovan Karadžić*, Case No. IT-95–5/8 TC (Int'l Crim. Trib. for the former Yugoslavia March 26, 2016); *Prosecutor v. Ratko Mladić*, Case No. IT-09–92 TC (Int'l Crim. Trib. for the former Yugoslavia November 22, 2017).

[11] Ed Vulliamy, "I saw Karadžić's camps. I cannot celebrate while many of his victims are denied justice" *The Guardian* March 27, 2016, www.theguardian.com/commentisfree/2016/mar/27/i-saw-radovan-karadzic-camps-cannot-celebrate-verdict-ed-vulliamy.

[12] See, for example, continuing grisly discoveries of mass graves in the Prijedor region: "Bosnia Finds 600 Body Parts in Mass Grave" *Balkan Insight* October 29, 2015, available at www.balkaninsight.com/en/article/six-hundred-mortal-remains-found-in-bosnia-grave-10–29-2015. Ed Vuillaimy, "Bringing up the Bodies in Bosnia" *The Guardian* December 6, 2016, available at www.theguardian.com/world/2016/dec/06/bringing-up-the-bodies-bosnia.

[13] "Core" rights are protected by international humanitarian law, and are those rights that "may never be suspended at any time or in any circumstances." They include prohibition of slavery, torture, and cruel, inhumane, or degrading treatment. See the International Red Cross Commentary on the Geneva Conventions and their related protocols, at: www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions. International humanitarian law (the law of war) is operationalized by international criminal law, which recognizes four core crimes: war crimes, crimes against humanity, genocide, and aggression. This is further discussed in Chapters 1 and 2. On the overlaps and distinctions between international humanitarian law and human rights law, see Provost 2003; Teitel 2012, and discussion in Chapters 1 and 2.

central ideological and institutional role that rule-of-law liberalism occupies in these donor nations.

If recognition of core rights is a central achievement of the twentieth century, pushing a global "justice cascade," (Sikkink 2011) and international criminal law is the embodiment of this revolution at a global level, then the question is, what happened? How have ICTs failed to convince their audiences, both local and international? This is the problem animating *Model(ing) Justice*. The book takes as its subject a case study of history's most productive and respected ICT, the ICTY. No ad hoc tribunal has worked longer or produced more jurisprudence than the ICTY, and this makes the ICTY the best test case students of modern international criminal justice have for assessing the field's development. Drawing from emblematic examples of ICTY practice and its evolution, *Model(ing) Justice* demonstrates that the practice of international criminal law does not reflect the ideology of political liberalism driving it.

Model(ing) Justice makes this argument through the development of two theories that describe the paradoxes of illiberal practice in pursuit of rule-of-law liberalism: (1) the international criminal justice template and (2) the problem of non-derogable legal doctrine. Together, these two theories detail the limitations inherent in focusing on liberal outcomes in place of liberal processes, and demonstrate how ICT practice has often consciously and unapologetically departed from liberalism's constraints, a situation the book labels "post-rule of law". Part I of the book constructs and applies the two theories, tracing their emergence from the seminal International Military Tribunal (IMT) at Nuremberg through to the construction of modern ICTs. Part II examines the paradox of "progressive" international criminal law through two detailed case studies, the ICTY's development of procedural law (Chapter 3) and the central substantive legal doctrine developed in ICTY jurisprudence, the "joint criminal enterprise" (JCE) theory of liability (Chapter 4). Part III considers the soft-law elements of ICTY jurisprudence, examining the ICTY's impact in the former Yugoslavia (Chapter 5) and conflicting socio-legal constructions of "reconciliation" between two significant ICTY cases (Chapter 6). In its final chapter, the book argues that a return to process is necessary in order to retain rule-of-law ideas at the center of peace and development in this century.

II THEORIZING LAW AS A TRANSITIONAL JUSTICE MECHANISM

In the more than two decades since the ICTY's creation, a rich field has developed considering the ICTY from a transitional justice perspective (Meernik 2005; McMahon & Forsythe 2008; Orentlicher 2008, 2010, 2013; Subotić 2009; Hodžić 2010; Nettelfield 2010; Hagan & Ivković 2011; Kostić 2012; Nalepa 2012; Clark 2014; Gow, Kerr & Pajić 2014). Transitional justice is a normative and theoretical discourse rooted in law and political science (Israël & Mouralis 2014) that highlights the necessity of acknowledging past events in order to build a secure future (Huyse

1995; Teitel 2000; Elster 2004; Hazan 2004; Kritz 2009; Quinn 2009; Olsen *et al.* 2010b; Rowen 2017). First theorized and identified in the 1980s in relation to the process of identifying and remembering illiberal state practices in South America, transitional justice exploded in the wake of the Cold War.

In most transitional justice-based assessments of the ICTY's impact in the former Yugoslavia, the scholarly debate generally ranges between those who insist that the ICTY should or will contribute meaningfully to the construction of history, progressive legal norms, and reconciliation/social reconstruction, and those who agree with this construct, but who regardless find that the data show that ICTY-generated narratives are not taking root among local populations. These empirical considerations, however, overlook the larger theoretical discussion of whether, or how, the policy and legal-consciousness-building capacities attributed to domestic courts (Scheingold [1964] 2004) might function at a transnational level. International criminal tribunals are structurally distinct from domestic courts in myriad ways, from their often-international staff, location, and procedure, to their discretionary choice of cases and lack of enforcement powers. Yet despite these important differences, proponents of using ICTs to perform transitional justice functions often look past the question of whether ICTs enjoy the same constitutive social capacity that domestic courts arguably do to assert ICTs' potential social impact. Transitional justice itself has developed into a broad and amorphous field.

Recent transitional justice literature has begun charting this boundlessness (Israël & Mouralis 2014; Vinjamuri & Snyder 2015; Ainley 2017; Daly 2017; Gissel 2016; Sharp 2018). *Model(ing) Justice* joins this literature, addressing transitional justice's theoretical indeterminacy through its introduction of (1) the international criminal justice template and its discussion of (2) the problem of non-derogable legal doctrine.

A *The International Criminal Justice Template*

Model(ing) Justice's first theoretical contribution is a tripartite prototype of international criminal justice enumerating ICTs' received benefits, *the international criminal justice template*. This is an ideal type designed to demonstrate the illiberal construct of international criminal law institutions to date. The template identifies the prototype that underlies assumptions about ICT capacity as transitional justice or governance mechanisms. This ideal type holds that ICTs (i) bring progressive international criminal law to bear on individual actors, (ii) establish the facts of crimes committed in the chaos of war or secret chambers of government and (iii) assist in social reconstruction and reconciliation through both the content and the process of their practice.

The book argues that this template emerged from the first ICT prototype, the IMT at Nuremberg; this is the subject of Chapter 1. The prototype's three elements can be divided into *first-order* functions regarding legal doctrine (the articulation of progressive international criminal law jurisprudence) and *second-order* functions regarding social impact (the capacity to articulate history and the ability to shape

discourse and narrative). The first- and second-order functions are related, because it is the received legitimacy of the first that impacts the capacity of the second.

The first element of the international criminal justice template, the development of progressive international criminal law, is the element most directly related to ICTs' institutional design as tribunals tasked with finding the guilt or innocence of individuals through judicial processes. International criminal tribunals require international criminal legal content in order to adjudicate cases, and ICTs must necessarily make interpretations of international criminal law, which is predominantly treaty and customary international law, in order to bring it within ICT ambit. Central to the international criminal justice template's categorization is that such articulation will be "progressive." The injunction that ICTs produce progressive international criminal law is central to the legitimizing narrative for ICTs, the book shows, because ICTs often breach strict legality rules by retroactively articulating law. The principle of legality is the constraint that turns the rules associated with law into "justice" rather than the raw application of force. Retroactive articulations of law breach "the principle of legality." Yet under international criminal law, such retroactive legal pronouncements are legitimized as means of advancing rights, combatting impunity, and achieving social progress. "Progress" is therefore central to international criminal law's legitimacy, and the international criminal justice template teases out the articulation of progress as a response to legality challenges in individual adjudications beginning at the IMT, and continuing through to ICTs today.

The second and third functions of the international criminal justice template – ICTs as (ii) historians (iii) capable of pronouncing an "objective" "official version" of events that may assist a population in reconciliation – are not directly related to ICTs' primary case adjudication mandate but rather are argued to flow from it (Wilson 2011; Rauxloh 2010). These second and third "indirect" functions are the capacities imagined for ICTs that have made them central as transitional justice mechanisms. They are also the amorphous functions that are simultaneously claimed by ICTs in defense of the value of their work and rejected by ICTs as bars against which to assess their accomplishments. This leaves a conflicting situation where the ICTY justifies its value in terms of reconciliation in some circumstances[14] while steadfastly rejecting such a measurement in others.[15]

[14] The ICTY's discussion of its outreach program reads as follows:

> The establishment of Outreach in 1999, six years into the ICTY's existence, was a milestone in the Tribunal's progression to maturity. It was a sign that the court had become deeply aware that its work would resonate far beyond the judicial mandate of deciding the guilt or innocence of individual accused. With the establishment of Outreach, the Tribunal recognized that it had a role to play in the process of dealing with the past in the former Yugoslavia, one of the key challenges for societies emerging from conflict.
>
> www.icty.org/en/outreach/outreach-programme (accessed January 20, 2017).

[15] "Where did you hear that, that the ICTY does reconciliation? Where, on what website? I'd like to see it, we'll find it right now! There is only one website [that matters] and there is no mandate for reconciliation. Look in the Security Council documents, the court documents, it's not there. This

Model(ing) Justice shows that the structure of international criminal law to date works directly to undermine ICT capacity in the spheres of value defined by the international criminal justice template. Drawing from criminal law theory and criminology studies, the book argues that ICTs as currently constructed cannot produce progressive law – the very task that animates and legitimizes them – due to their illiberal structure and function. This illiberal function, in turn, impacts ICTs' potential as socially constitutive organs, either in terms of producing official histories/narratives or in advancing reconciliation.

The international criminal justice template defines an ideal-type, notional value of ICT capacity to further transitional justice ideals. Few observers would argue that ICTs are certain to produce these outcomes; even the most idealistic, early proponents of ICTs as transitional justice mechanisms spoke of ICT *potential* to produce progressive international criminal law, establish historical fact, and effect social reconstruction (Akhavan 1998). Rather, as with Weber's ideal types (Weber 1904/1949; Swedberg 2017), or Shapiro's (1986) prototype of courts, the template's value lies in identifying the imagined, aspirational capacities surrounding ICTs as transitional justice mechanisms. *Model(ing) Justice* argues that these ideological elements of ICT capacity continue to define our expectations of ICTs, in spite of the empirical, theoretical, and historical evidence challenging ICT capacity in these areas. We know that ICTs often fail to produce progressive law, write official histories, or reconcile bitter foes. Yet these tasks, in the aggregate, continue to describe the entirety of ICTs' purpose, providing the terms and ideals against which even the most sophisticated recent assessments of international criminal law institutions measure ICTs (Subotić 2009; Nettelfield 2010; Wilson 2011; Clark 2014).

B The Problem of Non-Derogable Legal Doctrine

The book's second theoretical contribution lies in showing how the elements of the international criminal justice template, though routinely articulated or assumed as legitimizing arguments for international criminal law, are in fact structurally unachievable for ICTs. This is due to the paradoxical standard at the center of international criminal law: the *problem of non-derogation*. The scope and power of international humanitarian law lies in its protection of rights presented as "non-derogable": such rights, emerging from natural-law constructions (Sohn 1982) are immutable, inalienable, universal, and absolute, admitting no contingency or context. The absolute and universal status of core rights secures the legitimacy of those institutions of international criminal law that would try violations of these rights

idea of reconciliation has been projected on to the ICTY by diplomats. But it's ridiculous to charge the court with reconciliation . . . It is true that senior ICTY officials sometimes mention reconciliation. Goldstone, Cassese, etc. But just because some senior officials say it doesn't make it our mandate." Interview, Senior ICTY official, The Hague, May 5, 2005, notes on file with author.

through processes approximating domestic criminal law trials, trumping positive law particulars that might prevent protection of non-derogable rights through law.

It is the use of individual criminal trials at international criminal law that triggers the problem of non-derogation. Domestic criminal law is rife with mitigating circumstances and affirmative defenses, many of which can completely protect an individual from punishment (beyond the punishment incurred by being subjected to the intrusion of the state [Feeley 1979]). Almost any definition of crime is subject to forms of derogation, alienation, and/or challenges to universality at domestic criminal law: only those crimes that fall under "absolute" or "strict" liability escape such derogation. Domestic criminal processes resist absolute liability: justice and fairness concerns advocate on behalf of the importance of context and/or intent in the adjudication of criminal culpability (Hart 1968). Absolute liability at criminal law makes for unpopular domestic policy for precisely this reason (de Than & Heaton 2013: 432–433).

International criminal law practice is challenged by the confrontation between the non-derogable norms accompanying violations of core rights with the justice and fairness demands present in criminal law. This is because natural-law-based rights face predictable structural obstacles when operationalized as sovereign-based criminal justice. At international criminal law, violations of international humanitarian law are always criminal, regardless of context. Moreover, this doctrinal insistence is central to the "progress" imagined for international criminal law, and a key element legitimizing international criminal law practice, *Model(ing) Justice* shows. In contrast to human rights legal practice, which recognizes a "margin of appreciation" that imagines the possibility of different standards for different acts in different contexts, international criminal law explicitly forbids such recognition. The catch is that, in order to legitimize itself, international criminal law forbids such recognition in the name of universally recognized human rights. In this way, human rights (though not its doctrinal tradition, specifically its recognition of context) are put in service to international criminal law. The problem of non-derogation describes the phenomenon of international criminal law that renders it closer to "strict" or "absolute" liability than to the communicative purpose (Ashworth 2009; Duff 2009) animating liberal domestic criminal legal orders.

Finally, the problem of non-derogation is made possible by the conflict of interest faced by ICTs in terms of their own accountability. International criminal tribunals generally answer to the UN or donor nations, while often serving a population distinct from the UN and donor nations, resulting in what Jan Klabbers (2015) has identified as a generalized problem of accountability characteristic of international organizations. For ICTs, accountability issues assume particular significance because the perceptions of third-party observers (the tribunals' audiences) are central to institutional legitimacy. Thus while all international organizations suffer accountability challenges, these are particularly acute for ICTs because they implicate their legitimacy and thus their efficiency.

III STRUCTURE AND CONTENT OF THE BOOK

The book is divided into three parts of two chapters each. The book's first two chapters articulate and explore its two theoretical contributions, the structural impossibility of the prototype that governs aspirational, imagined capacity for ICTs, the international criminal justice template and the conflict between international criminal law's universalist, natural-law foundations and its application as criminal law, the problem of non-derogation. Its final four chapters apply those ideas to examples culled from ICTY practice and impact, using the work and reception of the ICTY as a paradigmatic argument for the challenges facing ICTs and international criminal law more generally. While much of *Model(ing) Justice* is rooted in the particulars of ICTY practice, procedure, and experience, its arguments are not case or circumstance specific, but rather generalizable across ICTs.

Part I, consisting of Chapters 1 and 2, develops the book's two central theories. Chapter 1 shows how the IMT at Nuremberg, the progenitor of ICTs and the immediate ancestor of the ICTY, defined an ideal type of what ICTs might accomplish, setting up the future development of transitional justice; Chapter 2 discusses theoretical, structural challenges to international criminal law's practice. Part II maps those central theories onto ICTY practice, considering ICTY procedure (Chapter 3) and the ICTY's most notorious contribution to substantive law (Chapter 4). Part III examines the second-order functions of the ICTY identified by the international criminal justice template, as historian and reconciler, to connect the theoretical shortcomings evidenced by the international criminal justice template and the problem of non-derogation to the ICTY's social "legacy" project. Each part is preceded by a short introduction to situate the reader, and readers most interested in, for example, legal constructions of reconciliation in the former Yugoslavia can skip directly to Part III, aided by the short introduction summarizing the theoretical work of Chapters 1 and 2. The comprehensive Appendix A, summarizing all ICTY decisions at the time of writing (a nearly complete record of the institution's work) is available to assist the reader in making sense of ICTY jurisprudence.

Chapter 1 demonstrates how the international criminal justice template emerges from the legacy of the IMT at Nuremberg, history's seminal ICT. The legacy of the IMT at Nuremberg credits it with several achievements beyond the adjudication of the individual cases that came before it, including recognition of the Holocaust and the construction of democratic Germany. Modern ICTs operate in its shadow. The bulk of the chapter demonstrates the emergence of an IMT legacy, where "Nuremberg" has become synonymous with social reconstruction along democratic and human rights-recognizing axes, as the basis for the international criminal justice template. The mixed reception and tangled legacy of the International Military Tribunal for the Far East at Tokyo is briefly considered, as a counter-demonstration