

# International Criminal Justice, Legal Pluralism, and the Margin of Appreciation Lessons from the European Convention on Human Rights

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Abstract: This Article explores the potential of the margin of appreciation to conceptualize the pluralism of international criminal justice. A growing debate in international criminal justice concerns the extent to which it can and ought to be conceived pluralistically. That debate has often remained theoretical, however, lacking a broad understanding of how that pluralism could be justified and implemented in international law. This Article argues that the notion of the margin of appreciation, as developed in the jurisprudence of the European Court of Human Rights, makes an important contribution to our understanding of the potential pluralism of international criminal justice. Developed as a tool to reconcile European human rights principles with the diversity of European societies, the margin of appreciation provides arguments to better justify pluralism as both pragmatic and principled. Moreover, the margin of appreciation provides guidance in considering how far domestic criminal justice systems should stray from central norms of international criminal justice. The article concludes with some thoughts on the way forward in forging a pluralistic international criminal justice jurisprudence that does not sacrifice a universalist commitment.

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How pluralistic should international criminal justice—the international effort to repress international crimes—be? When domestic courts enforce international criminal prohibitions, should they adopt the same definitions of international crimes? The same criminal law as international criminal tribunals? The same procedure? The same sentencing? Does too much diversity harm the international criminal justice project? Could it even give rise to situations of impunity? Or is the drive towards universalism sometimes taken too far, at the expense of different national legal traditions and approaches? Is there room within international criminal justice for a variety of approaches, perhaps respecting a common core? These questions go to the heart of the international criminal justice project, and the central tension between centralizing and decentralizing tendencies. They also help problematize the requirements of criminal justice systems in an age of human rights. Yet they are questions that have only received partial responses that do not make the most of some of the more elaborate debates that have occurred in neighboring fields.

To begin with, it is important to note that international criminal justice may seem hard-pressed to be pluralistic. After all, its basic *raison d'être* is that it establishes a certain minimum core of international prohibitions. There would not seem to be much point to international criminal offences except insofar as they are, precisely, international in the strong sense—i.e., universal<sup>2</sup> and cosmopolitan.<sup>3</sup> Nonetheless, as a significant minority of scholars have now been arguing for a decade, there may also be room for international criminal justice to be understood as, and indeed to *be*, much more pluralistic than that which has been typically assumed feasible or even desirable.<sup>4</sup> Pluralism is itself a value, one that defers to the variegated

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2. For a defense of the intrinsic value of the internationalism of international criminal justice, see Alon Harel & Myriam Gur-Arye, *Taking Internationalism Seriously: Why International Criminal Law Matters*, in *THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW* 215 (Frédéric Mégret et al. eds., 2018).

3. See, e.g., Patrick Hayden, *Cosmopolitanism and the Need for Transnational Criminal Justice: The Case of the International Criminal Court*, 51 *THEORIA* 69 (2004) (on Hannah Arendt's criticism of the Eichmann trial as insufficiently focused on the fact that his crimes had been committed against humanity at large).

4. For key early texts on the pluralism of international criminal justice, which form some of the inspiration for this Article, see, e.g., Alexander K. A. Greenawalt, *The Pluralism of International Criminal*

political, social, and cultural environments in which international criminal justice intervenes.<sup>5</sup> But it has to be weighed against international criminal justice's historical and constitutive commitment to the universalism of international criminal prohibitions: the idea that certain crimes are so grave as to be of concern to the international community as such.<sup>6</sup>

The question, then, is how international criminal justice might manage to be both universal and pluralistic. As this Article will endeavor to show, universalism and pluralism in international criminal justice are really only two facets of the same coin.<sup>7</sup> The pluralism of international criminal justice is destined to be a pluralism bound by the limits of a universal commitment to the repression of international crimes. Too much pluralism might put in doubt the very project of international criminal justice. Pluralism as a value is not itself without its claim to a certain universalism. But too much centralizing, universalizing, and homogenizing in international criminal justice might also, as this Article will explore, impose undue constraints on struggling states, neglect the irreducibility of approaches to criminal justice, and fail to take advantage of the world's rich heritage of various criminal law traditions.

This debate on the degree of pluralism that national courts should be allowed to have in relation to international criminal justice is now a lively one, spurred in no small measure by interest in the complementarity regime of the International Criminal Court (ICC).<sup>8</sup> Under that regime, cases are only admissible before the ICC if a state is found "unable or unwilling" to prosecute it.<sup>9</sup> This, in turn, can be seen as raising, prototypically, the broader question of how far states should be allowed to depart from a

*Law*, 86 IND. L.J. 1063 (2011); Elies van Sliedregt & Sergey Vasiliev, *Pluralism: A New Framework for International Criminal Justice*, in PLURALISM IN INTERNATIONAL CRIMINAL LAW 3 (Elies van Sliedregt & Sergey Vasiliev eds., 2014); Elies van Sliedregt, *Pluralism in International Criminal Law*, 25 LEIDEN J. INT'L L. 847 (2012); Jena Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1 (2005).

5. See Frédéric Mégret, *Is There Ever a 'Right to One's Own Law'? An Exploration of Possible Rights Foundations for Legal Pluralism*, 45 ISR. L. REV. 3 (2012) (defending legal pluralism's inherent worth).

6. See Frédéric Mégret, *The Case Against Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: FROM THEORY TO PRACTICE 6 (Carsten Stahn & Mohamed M. El Zeidy eds., 2d ed. 2018) (arguing that there is value in prosecutions for international crimes being at least occasionally carried out on an international basis even if domestic courts may fulfill similar function).

7. For an analogical analysis in the context of European human rights law, see Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation*, 3 UCL HUM. RTS. REV. 1 (2010).

8. The literature on the ICC's complementarity regime is vast. For some of the leading treatments, see JANN K. KLEFFNER, *COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS* (2008); JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY* (2008); NIDAL NABIL JURDI, *THE INTERNATIONAL CRIMINAL COURT AND NATIONAL COURTS: A CONTENTIOUS RELATIONSHIP* (2016); MOHAMED M. EL ZEIDY, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE* (2008); SARAH M. H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* (2013).

9. Rome Statute of the International Criminal Court art. 17.

universal criterion of criminal justice as far as the ICC is concerned. However, the debate on international criminal justice's pluralism has earlier roots, notably in the persistent tensions between a cosmopolitan variant of international criminal justice centered in the Hague and different approaches to transitional justice, notably in the Global South.<sup>10</sup> The persistent legitimacy crisis of the ICC, particularly on the African continent, has rekindled fundamental questions about whether that model is not pushing a single approach too hard, at the expense of a more pluralist understanding of the needs of international criminal justice.<sup>11</sup> Much of the demand for pluralism, therefore, has come from host societies and their varied and irreducible experiences of transitional justice.<sup>12</sup>

The ensuing scholarly debate has long moved away from a purely descriptive approach to legal pluralism (noting the actual plurality of ways in which international criminal justice operates) to gradually blossom into a full-blown normative discussion. One precursor of the debate comes from Jena Iontcheva Turner, who already in 2005 argued for a more decentralized international criminal justice, one that focuses less on the ICC and more on the diverse ways in which domestic criminal justice might be activated in all its diversity.<sup>13</sup> In 2009, Elena Baylis emphasized the need for international criminal law to take the backseat in terms of prosecuting those accused of international crimes, and to instead focus on the reconstruction and reinforcement of domestic courts.<sup>14</sup> These articles foreshadowed "positive complementarity"<sup>15</sup> in the context of the ICC, long before it became fashionable. Both, however, focused on international criminal tribunals rather than international criminal law per se.

This broad sensitivity to pluralism was taken one step further by Sasha Greenawalt, who more radically took issue with the default unifying and universalizing mode of international criminal law (ICL), even when it came to international criminal tribunals' own operations. In a sweeping and foundational article, he argued against the assumption that ICL should have

10. For explorations of this tension, notably in relation to forms of local and traditional justice, see Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999); L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385 (2003); Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1 (2010); Rosemary Nagy, *Centralizing Legal Pluralism? Traditional Justice in Transitional Contexts*, in TRANSITIONAL JUSTICE AND PEACEBUILDING ON THE GROUND: VICTIMS AND EX-COMBATANTS 81 (Chandra Lekha Sriram et al. eds., 2012); Ifeonu Eberечи, *Who Will Save These Endangered Species? Evaluating the Implications of the Principle of Complementarity on the Traditional African Conflict Resolution Mechanisms*, 20 AFR. J. INT'L & COMP. L. 22 (2012).

11. Sarah M. H. Nouwen & Wouter G. Werner, *Monopolizing Global Justice; International Criminal Law as Challenge to Human Diversity*, 13 J. INT'L CRIM. JUST. 157 (2015).

12. See, e.g., Theresa Reinold, *Constitutionalization? Whose Constitutionalization? Africa's Ambivalent Engagement with the International Criminal Court*, 10 INT'L J. CONST. L. 1076 (2012).

13. Turner, *supra* note 4.

14. Elena Baylis, *Reassessing the Role of International Criminal Law: Rebuilding National Courts through Transnational Networks*, 50 B.C. L. REV. 1 (2009).

15. William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice*, 19 CRIM. L.F. 59 (2008).

a single right answer for every question it faces and against the idea of ICL attempting to fill every jurisprudential gap. Greenawalt went as far as to argue that international criminal tribunals should defer to some domestic norms in their trials, particularly when it came to modes of liability and sentencing.<sup>16</sup> In this Article, I will leave aside the question of *which laws* international criminal tribunals should apply, focusing instead on the somewhat broader issue of the extent to which domestic courts enforcing international criminal law should emulate or be allowed to depart from the canon of international criminal justice.

Elies van Sliedregt subsequently reinforced the idea that pluralism was not necessarily inimical to the development of international criminal justice and made a much-needed connection to the global legal pluralism literature.<sup>17</sup> This article hinted at the possibility that the debate on international criminal justice's pluralism might not be that dissimilar from other similar debates about pluralism. In a landmark collection published in 2014, van Sliedregt and Sergey Vasiliev sought to further develop what legal pluralism might mean for international criminal justice, in ways that enriched the typology of pluralism.<sup>18</sup> Several authors that will be further discussed in this Article engaged the question of what is fundamentally negotiable in international criminal justice and what ought to be closely aligned with international norms.<sup>19</sup> Diane Bernard, most notably, linked the argument for pluralism back to complementarity in the ICC context and suggested how the latter might, theoretically speaking, be understood as involving a broad "standard of review" allowing for significant deference to domestic courts.<sup>20</sup> It is worth noting that this 'turn to pluralism' also has its equivalents in the transitional justice literature.<sup>21</sup>

As shown by the remarkable diversity of pluralism literature, there are many ways in which legal pluralism, as applied to international criminal justice, can be understood. For example, it might describe the legal pluralism of different international criminal tribunals ("extrinsic pluralism"<sup>22</sup>) and the way many of such tribunals have operated according to quite different rules; or, it could describe the variety of legal influences

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16. Greenawalt, *supra* note 4, at 1124–26.

17. Van Sliedregt, *supra* note 4.

18. Elies van Sliedregt & Sergey Vasiliev, *PLURALISM IN INTERNATIONAL CRIMINAL LAW* (2014).

19. See, e.g., James Stewart, *Ten Reasons for Adopting a Universal Concept of Participation in Atrocity*, in *PLURALISM IN INTERNATIONAL CRIMINAL LAW* 320 (Elies van Sliedregt & Sergey Vasiliev eds., 2014); Alexander Zahar, *Pluralism and the Rights of the Accused in International Criminal Proceedings*, in *PLURALISM IN INTERNATIONAL CRIMINAL LAW* 225 (Elies van Sliedregt & Sergey Vasiliev eds., 2014).

20. Diane Bernard, *Beyond Hierarchy: Standard of Review and the Complementarity of the International Criminal Court*, in *DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION* 371 (Lukasz Gruszczynski & Wouter Werner eds., 2014).

21. See Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 *MICH. J. INT'L L.* 1 (2010).

22. For a definition and exploration, see van Sliedregt & Vasiliev, *supra* note 4, at 21–29 ("the term means the variance in law and practice across different jurisdictions [and] addresses legal diversity among international/hybrid criminal courts, between such courts and domestic systems, and between

that bear on their development.<sup>23</sup> “Extrinsic pluralism” has both vertical dimensions (between international criminal tribunals and national tribunals) and horizontal dimensions (between various national tribunals applying international criminal law). These various understandings raise the broader question of how the universalizing thrust of international criminal justice might be reconciled with the considerable plurality of criminal justice traditions. For the most part, this Article will only be interested in intrinsic pluralism,<sup>24</sup> and related fundamental dilemmas for international criminal justice,<sup>25</sup> with the caveat that an international criminal tribunal’s own normative production, and the degree to which it is settled, may inform the extent to which the tribunal should impact the work of domestic jurisdictions.

Despite the richness of the literature on pluralism, what often appears to be missing is a normative and legal theory of how far pluralism ought to be grounded in actual international legal practices, as opposed to broad jurisprudential statements that pluralism is generally desirable. Although scholars often argue in favor of pluralism on jurisprudential or policy grounds, they also fail to articulate a comprehensive legal foundation for it, in ways that are bound to lend credence to the ‘universalist’ fear that pluralism is a slippery slope.<sup>26</sup> What is the normative basis for pluralism in international law? How should one go about operationalizing it in ways that are normatively defensible and that simultaneously address the wariness about excessive pluralism? When might pluralism actually compromise the universal aspirations of international criminal justice? And, most importantly, what are the existing models available in international law?

Taking a cue from this earlier literature and some of my own work,<sup>27</sup> this Article seeks to sharpen the argument for legal pluralism in international

domestic systems”). For work in that vein, see William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT’L L. 1 (2002).

23. See Frédéric Mégret, *Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure*, 14 UCLA J. INT’L L. & FOREIGN AFF. 37 (2009).

24. For a definition, see van Sliedregt & Vasiliev, *supra* note 4, 29–34 (“the ‘intrinsic dimension’ of pluralism turns attention to the building blocks that constitute the normative structure of ICL and international criminal procedure”).

25. For a recent exploration of legal pluralism and its relationship to international law and vice-versa, see Frédéric Mégret, *International Law as a System of Legal Pluralism*, in OXFORD RESEARCH HANDBOOK ON GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed., forthcoming 2020).

26. See, e.g., Turkuler Isiksel, *Global Legal Pluralism as Fact and Norm*, 2 GLOBAL CONSTITUTIONALISM 160 (2013) (emphasizing the inability of pluralism on its own to provide much guidance in terms of policy outcomes).

27. The main thrust of which has been to promote a more pluralistic understanding of various aspects of international criminal justice and international human rights law. See Frédéric Mégret & Marika Giles Samson, *Holding the Line on Complementarity in Libya: The Case for Tolerating Flawed Domestic Trials*, 11 J. INT’L CRIM. JUST. 571 (2013); Frédéric Mégret, *International Human Rights and Legal Pluralism: A Research Agenda*, in DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM 69 (René Provost & Colleen Sheppard eds., 2013); Frédéric Mégret, *In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice*, 38 CORNELL INT’L L.J. 725 (2005); Frédéric

criminal justice by drawing on the device of the *margin of appreciation*, particularly as it has emerged in international human rights law, notably in the realm of the European Convention on Human Rights (ECHR) and its application by the European Court on Human Rights (ECtHR).<sup>28</sup> Essentially, the margin of appreciation is a way of thinking about how the commitment to universal norms can nonetheless be compatible with sometimes significant national diversity. As described by the Council of Europe: “the term “margin of appreciation” refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention).”<sup>29</sup> In short, it is a tool of deference to the distinctiveness, sovereignty, and democracy of its states parties. Over time, it has tended to assume an increasingly central role in the operation of the European system of human rights to the point of defining it.<sup>30</sup>

There is some intuitive affinity between, for example, the notion of subsidiarity implicit in the margin of appreciation and the cardinal principle of complementarity in the ICC regime.<sup>31</sup> The question, nonetheless, is whether tools developed in one particular context—a regional human rights system—might yield broader lessons for other forms of international justice. This Article will evidently not argue that the European margin of appreciation itself applies as such in the context of international criminal justice, but that it is particularly productive to synthesize and systematize a variety of debates that have occurred over the last decade or so around its fate. Applying the margin of appreciation could address ongoing concerns that international criminal justice has been too focused on universalism, reflected by its aspiration to offer a single model of substantive and procedural international criminal law.<sup>32</sup> This has arisen at the expense of a finer understanding between the non-negotiable parts of the international criminal law project and those parts that should yield before strongly-expressed and adequately justified national preferences.

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Mégret, *Too Much of a Good Thing? Implementation and the Uses of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT: FROM THEORY TO PRACTICE* 361 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

28. For scholarship on the margin of appreciation in the practice of the ECtHR, see HOWARD C. YOUROW, *THE MARGIN OF APPRECIATION DOCTRINE IN THE DYNAMICS OF EUROPEAN HUMAN RIGHTS JURISPRUDENCE* (1996); Michael R. Hutchinson, *The Margin of Appreciation Doctrine in the European Court of Human Rights*, 48 INT'L & COMP. L.Q. 638 (1999).

29. *The Margin of Appreciation*, COUNCIL OF EUROPE (2008), [https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2\\_en.asp](https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp).

30. NINA-LOUISA AROLD LORENZ ET AL., *THE MARGIN OF APPRECIATION IN STRASBOURG AND LUXEMBOURG* 69 (2013) (“the core of the European human rights culture is arguably founded in the doctrine of the margin of appreciation”).

31. Andreas Follesdal, *Subsidiarity and the Global Order*, in *GLOBAL PERSPECTIVES ON SUBSIDIARITY* 207, 208 (Michelle Evans & Augusto Zimmermann eds., 2014) (noting the basic commonality of inspiration between subsidiarity, margin of appreciation, and complementarity).

32. For a criticism of excessive internationalism, see generally Alvarez, *supra* note 10.

Although affinity with the margin of appreciation is often noted in passing in the international criminal justice literature,<sup>33</sup> very few articles address its potential significance and potential introduction systematically. Moreover, those that do, do so without considerable attention to the details of how such transposition might work in practice.<sup>34</sup> Instead, the degree to which certain aspects of international criminal justice should either be applied in a decentralized way or mimic international best practices is seemingly left to intuition. This Article's main contention, in contrast, is that much can be gained by forging links between some of these more established conversations in international human rights law and the emerging pluralism debate in international criminal justice; indeed, there is room for margin-of-appreciation reasoning *even* in international criminal justice, an area of international justice that one might initially imagine to be resistant to pluralism.

In particular, debates about complementarity, illustrated by the voluminous literature that accompanies it,<sup>35</sup> can help sharpen and refine our intuitions about how pluralism in international criminal justice might be both justified and operationalized. This Article is therefore also a contribution to 'comparative' work on international human rights law and international criminal law that is not content with simply pitting one against the other,<sup>36</sup> or with examining, for example, how specific rights are incorporated into ICL to ensure the fairness of the trial<sup>37</sup> or the definition of

33. See van Sliedregt & Vasiliev, *supra* note 4; Turner, *supra* note 4, at 21; Darryl Robinson, *Three Theories of Complementarity: Charge, Sentence, or Process?*, 53 HARV. INT'L L.J. 85, 180 (2012); Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 854–55 (2005); Greenawalt, *supra* note 4, at 1099–1102, 1125 (while returning to the issue on several occasions, acknowledging that “the aim of this Article is more to provide a framework for analyzing and debating these issues than to achieve clarity on the exact demands of ICL with respect to every application of my model”).

34. See, e.g., Mireille Delmas-Marty, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, 1 J. INT'L CRIM. JUST. 13 (2003).

35. See, e.g., Justine Tillier, *The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?*, 13 INT'L CRIM. L. REV. 507 (2013); Chandra Lekha Sriram & Stephen Brown, *Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact*, 12 INT'L CRIM. L. REV. 219 (2012); Lionel Nichols, *The Strategy of Positive Complementarity, in THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA* 29 (2015); Christopher Keith Hall, *Developing and Implementing an Effective Positive Complementarity Prosecution Strategy, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 219 (Carsten Stahn & Göran Sluiter eds., 2008).

36. A popular theme in the international criminal law literature in recent years has been the notion that the discipline has been led astray as a result of being excessively driven by human rights. See Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008); 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 (2005); George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539 (2005).

37. See, e.g., Masha Fedorova, Sten Verhoeven, & Jan Wouters, *Safeguarding the Rights of Suspects and Accused Persons in International Criminal Proceedings* (Katholieke Universiteit Leuven, Working Paper No. 27, 2009), <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/wp137e.pdf>; KRIT ZEEGERS, INTERNATIONAL CRIMINAL TRIBUNALS AND HUMAN RIGHTS LAW (2016); Masha Fedorova & Göran Sluiter, *Human Rights as Minimum Standards in International Criminal Proceedings*, 3 HUM. RTS. & INT'L



certain offences.<sup>38</sup> Instead, the idea is to look at the deeper structural operation of both in the international legal order, and to examine what can be gained from studying them simultaneously. As will be seen, the margin of appreciation may offer a sophisticated way to avoid both the extremes of cosmopolitan centralization and hard legal pluralism,<sup>39</sup> and therefore is part of a much broader conversation on global legal pluralism and the organization of relations between legal systems globally.<sup>40</sup>

Note that this Article will also seek to generalize earlier pluralist intuitions by extending them to international criminal justice *lato sensu* rather than merely substantive international criminal law, as has often been the case.<sup>41</sup> To think about pluralism comprehensively is to think about how both substantive and procedural law, as well as broader jurisdictional arrangements, can be understood through a pluralist lens, and therefore to encourage the separate literatures that address these issues to communicate with each other. For example, the debate on complementarity has understandably served as a lightning rod for debates on pluralism. The issue of pluralism goes far beyond determining how the specific regime of ICC admissibility ought to operate though, as complementarity has become more general to international criminal justice.<sup>42</sup> The issue extends to determining the institutional setup of international criminal justice (for example, the extent to which tribunals should be hybrid);<sup>43</sup> the degree to which international criminal tribunals should draw on various bodies of domestic law<sup>44</sup> or interact with regional courts;<sup>45</sup> how international

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LEGAL DISCOURSE 9 (2009); Gregory S. Gordon, *Toward an International Criminal Procedure: Due Process Aspirations and Limitations*, 45 COLUM. J. TRANSNAT'L L. 635 (2006); Göran Sluiter, *International Criminal Proceedings and the Protection of Human Rights*, 37 NEW ENG. L. REV. 935 (2002); Yvonne McDermott, *The Right to a Fair Trial in International Criminal Law* (July 2013) (unpublished Ph.D. dissertation, National University of Ireland, Galway) (on file with the Library, National University of Ireland, Galway).

38. See, e.g., William A. Schabas, *Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights*, 9 J. INT'L CRIM. JUST. 609 (2011).

39. For an attempt to tackle a similar dilemma in a more global fashion, see Paul Schiff Berman, *Can Global Legal Pluralism Be Both "Global" and "Pluralist"?*, 29 DUKE J. COMP. & INT'L L. 381 (2018).

40. For an attempt to locate legal pluralism within broader debates about international law, see Mégret, *supra* note 25.

41. For examples that examine pluralism within particular procedural and substantive debates about international criminal law, see Greenawalt, *supra* note 4; Göran Sluiter, *The Law of International Criminal Procedure and Domestic War Crimes Trials*, 6 INT'L CRIM. L. REV. 605 (2006).

42. For a similar argument that complementarity must be understood beyond the ICC's specific arrangements, see Lisa J. LaPlante, *The Domestication of International Criminal Law: A Proposal for Expanding the International Criminal Court's Sphere of Influence International Justice in the 21st Century: The Law and Politics of the International Criminal Court*, 43 J. MARSHALL L. REV. 635, 637 (2009); see also KLEFFNER, *supra* note 8, at 99–100 (highlighting the fact that the principle of complementarity in the Rome Statute has "programmatory nature" and makes complementarity "a general goal and a constitutional element on the basis of which the Court is envisaged to function").

43. See Turner, *supra* note 4.

44. See Greenawalt *supra* note 4, at 1078–79.

criminal law should be implemented domestically;<sup>46</sup> the kind of broad complementarity policy that the ICC should engage in;<sup>47</sup> the principles of jurisdictional allocation in the context of universal jurisdiction;<sup>48</sup> the criteria of adequate domestic trials even outside the scrutiny of international tribunals;<sup>49</sup> and other broad law reform issues.<sup>50</sup> All of the above are part of a broader genus of *problematiques* that have, at their heart, tensions of competence and authority between the international and the domestic.

This Article seeks to make the case that drawing on margin-of-appreciation reasoning is useful and enlightening from both a conceptual and practical point of view. The goal of this Article is not to elucidate every detailed way in which the margin of appreciation might apply in the context of international criminal justice, but to highlight what might be the parameters of the margin in international criminal justice<sup>4</sup>, based on the analogy between international human rights law and international criminal justice. The argument occupies a somewhat intermediary status: it does not intend to provide an incontrovertible jurisprudential basis for either pluralism or the margin of appreciation, something which would be far beyond its scope; rather, starting from the understanding that a degree of pluralism is both unavoidable and desirable, it will seek to further develop the argument as to how margin-of-appreciation reasoning might help bring about that result.

The Article is therefore divided into two parts that revisit the debate on pluralism in international criminal justice through the existing and better-developed discussions about the margin of appreciation in the European human rights context. The first part explores the rationales for the margin of appreciation in an attempt to extrapolate a more general theory of its

45. See Tatiana E. Sainati, *Divided We Fall: How the International Criminal Court Can Promote Compliance with International Law by Working with Regional Courts*, 49 VAND. J. TRANSNAT'L L. 191 (2016).

46. Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86 (2003) (detailing the effect of Rome Statute adoption on domestic law).

47. Burke-White, *supra* note 15; LIONEL NICHOLS, *THE INTERNATIONAL CRIMINAL COURT AND THE END OF IMPUNITY IN KENYA* 29 (2015); Tillier, *supra* note 35.

48. Considerable attention, for example, has gone into developing principles to which states' courts should have priority where several assert jurisdiction. Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish This Goal*, 15 TRANSNAT'L LAW. 357 (2002); STEPHEN MACEDO, *The Princeton Principles*, in *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* 18 (2006).

49. Gennady M. Danilenko, *The Statute of the International Criminal Court and Third States*, 21 MICH. J. INT'L L. 445, 475–479 (2000) (examining the potential effect of the Rome Statute on third parties via the operation of the Court's admissibility regime).

50. Sarah Nouwen, *The ICC's Intervention in Uganda: Which Rule of Law Does It Promote?*, UNIVERSITY OF CAMBRIDGE FACULTY OF LAW LEGAL STUDIES RESEARCH PAPER SERIES, paper no. 22/2012, 8-12 (2012); Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya* 14 YALE HUM. RTS. & DEV. L.J. 205 (2011).

appeal, including in the international criminal justice context. It seeks to enhance our understanding of the rationales for such pluralism by developing a sort of meta-theory of the margin of appreciation, one that applies beyond the specificities of international human rights or international criminal justice. The second part is a more action-oriented study of how one might go about operationalizing the margin of appreciation in the context of international criminal justice, despite some obvious differences with the operation of international human rights law. This part will suggest ways in which one might integrate Strasbourg debates with those in the Hague. The article concludes with some thoughts on the way forward and how international criminal tribunals' own activity determines the availability of a pluralist approach.

#### THE CASE FOR PLURALISM: THE VIEW FROM THE MARGIN OF APPRECIATION

International criminal justice is effectively already pluralistic. People are prosecuted for international crimes under a remarkable diversity of jurisdictional and legal regimes: by international tribunals, by hybrid courts, or by diverse domestic jurisdictions. Whilst this legal pluralism can be seen as simply a factual reality, debates surrounding pluralism increasingly frame it as a central normative pillar. Pluralism involves notions about the ideal distribution of responsibilities between international and domestic realms.<sup>51</sup> The question is determining on what basis one would want to defer to domestic jurisdictions on specific issues of international criminal justice.<sup>52</sup> These are exactly the sort of issues that the margin of appreciation has historically sought to address. The margin of appreciation can be understood as a tool to determine the extent to which the ECtHR should defer to domestic determinations of rights, based on certain national and local circumstances.

Understanding the terms by which the margin of appreciation has been justified, and determining the echo such justification might have in the realm of international criminal justice, is a necessary first step. As this section outlines, the justifications for the margin operate on several levels—not all of which are convincing or decisive—that tend to complement each other. To begin with, the margin of appreciation can be defended as a merely pragmatic and functional tool to maintain a complex legal system in the face of resistance from nation-states. As I argue, however, there has always been a much deeper justification to its invocation, linked to the

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51. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2006) (explaining the way in which pluralism can be a way of thinking through hybridity of legal interactions in ways that favor neither sovereignty or universalism).

52. Simon Hentrei, *Generalising the Principle of Complementarity: Framing International Judicial Authority*, 4 TRANSNAT'L LEGAL THEORY 419 (2013).

fundamental values it purports to uphold and to an emphasis on sovereignty, self-determination, democracy, and diversity. Setting out the principled case for the margin can help us evaluate the more conventional legal and policy arguments for it in order to test the plausibility of pluralistic international criminal justice.

### *The Merely Pragmatic Case for Pluralism*

Pluralism can be framed in a reductionist way as a sort of grudging concession to the fact that in practice international judicial institutions need to be careful not to risk antagonizing nation-states. From a pragmatic point of view, it might be argued that the legitimacy of international law and jurisdiction is better safeguarded by the sort of minimization of encroachments on sovereignty that is typical of the margin of appreciation. Indeed, the more intrusive the ECtHR is, the more it exposes itself to backlash from disgruntled states<sup>53</sup> and frustration with “judicial activism.”<sup>54</sup> Although this is no reason to curtail rights, and there is always a danger that international courts might defer too much to domestic whims, nor is it a concern to be dismissed lightly. In contrast, if the ECtHR is intent on buttressing its legitimacy by building “public confidence” in its case law, then it will make sure to only impose a view of rights based on a strong European consensus,<sup>55</sup> or base its interpretation of the margin on a relatively uncontroversial methodology of what falls into it.<sup>56</sup>

There is therefore a plausible case that, *in their own interest*, international jurisdictions should tread lightly where fundamental matters of sovereignty are at stake. In that context, the margin of appreciation can become “the necessary jurisprudential grease in the enforcement mechanisms provided by the Convention.”<sup>57</sup> It has effectively been used to safeguard the Court’s authority against significant pushback by states such as the United King-

53. Lawrence R Helfer, *Consensus, Coherence and the European Convention on Human Rights*, 26 CORNELL INT’L L.J. 133 (1993) (emphasizing the threat to the Court’s authority that arises from its inability to specify the workings of its complementarity reasoning); NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* 139 (2012) (stressing that: “If the Court and Commission wanted to become influential, they needed to establish, on the one hand, their authority as impartial and trustworthy interpreters of the Convention; on the other, they had to take care not to upset national authorities so much as to provoke a backlash”).

54. Marc Bossuyt, *Judicial Activism in Strasbourg*, in *INTERNATIONAL LAW IN SILVER PERSPECTIVE* 31 (Karel Wellens ed., 2015) (asking whether there are any limits to the Court’s judicial creativity).

55. Or Bassok, *The European Consensus Doctrine and the ECtHR Quest for Public Confidence*, in *CONSENSUS ON EUROPEAN CONSENSUS: JUDICIAL INTERPRETATION OF HUMAN RIGHTS IN EUROPE AND BEYOND* (Panos Kapotas & Vassilis P. Tzevelekos eds., Press 2019) (linking the European consensus and the sense of the Court’s legitimacy).

56. Patricia Popelier & Catherine Van De Heyning, *Subsidiarity Post-Brighton: Procedural Rationality as Answer?*, 30 LEIDEN J. INT’L L. 5 (2017). The procedural turn is explained in more detail *infra* but can be seen as less ideologically loaded than basing one’s reasoning on an elusive substantive consensus.

57. Thomas A. O’Donnell, *The margin of appreciation doctrine: standards in the jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474, 496 (1982).

dom.<sup>58</sup> This is manifest in the Brighton Declaration, adopted by the Council of Europe in 2012, which emphasizes the central importance of the margin.<sup>59</sup> For some authors, the margin of appreciation is, in effect, part of a necessary political move to safeguard the sustainability of the European human rights project in the long run.<sup>60</sup> Its role in allowing “strategic self-restraint” has been commended as a potential example for other regional systems.<sup>61</sup>

Note that the case for deferral is strengthened by the relatively shaky foundations of the legitimacy of international courts, notably in the absence of global democratic arrangements and especially compared to well-developed domestic systems.<sup>62</sup> The margin of appreciation stands as a reminder that imposing too unitary rights system, especially when the underlying pluralism is strong, risks exposing international jurisdictions’ legitimacy deficit. The ECtHR has arguably always been sensitive to the precariousness of its position and the risk of undermining its legitimacy if it were to abruptly impose certain views on states.<sup>63</sup> When it comes to issues of morality or national security, it has used an abundance of caution over the last few decades. The ECtHR has done its best to not second guess complex choices made by states, acknowledging that Europe is a broad continent with significant variety, following rather than pioneering big societal developments, and giving states the benefit of the doubt.<sup>64</sup> It has thus set itself up deliberately as an instrument of gradualist convergence on a range of issues.<sup>65</sup>

This is a peculiar argument in that it seems to involve advocacy for deliberate restraint on the part of international justice. But this is effectively part

58. Mikael Rask Madsen, *The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash*, 79 *LAW & CONTEMP. PROBS.* 141, 171 (2016) (outlining the way in which the Court has effectively granted the UK a broader margin of appreciation to fend off the challenge to its authority).

59. *High-Level Conference on the Future of the European Court of Human Rights: ‘Brighton Declaration’*, ECHR, para. 11 (April 19–20, 2019), [https://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf) [<https://perma.cc/5FNZ-MU65>].

60. Tom Zwart, *More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How it Can be Done*, in *THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS* 71 (Spyridon Flogaitis et al. eds., 2013) (highlighting a path for the Court to take seriously the backlash against it based on the margin).

61. Laurence Burgorgue-Larsen, *Interpreting the European Convention: What Can the African Human Rights System Learn from the Case Law of the European Court of Human Rights on the Interpretation of the European Convention*, 5 *INTER-AM. & EUR. HUM. RTS. J.* 90 (2012) (“the Court disposes of an array of tools allowing it to exercise strategic self-restraint to avoid arousing the ire of States intent on making sovereign decisions about their own societal choices”).

62. On the relative legitimacy deficit point, see Greenawalt, *supra* note 4, at 1110.

63. Mikael Rask Madsen, *supra* note 58 (emphasizing the extent to which historically the Court has adapted to changing political circumstances).

64. For an argument in favor of this prudence, see *Stec and Others v. the United Kingdom*, 2006-VI Eur. Ct. H.R. 131 (Borrego Borrego, J., concurring.).

65. On “incrementalism” as a separate device that is nonetheless complementary to the margin, see Janneke Gerards, *Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights*, 18 *HUM. RTS. L. REV.* 495 (2018).

of the ‘subsidiarity’ received wisdom of the international legal discipline. One hears similar arguments in relation to international criminal tribunals and the suggestion that the tribunals should not and will not ‘push their luck’ where fundamental matters of sovereignty arise.<sup>66</sup> International criminal tribunals are surely aware of how their existence may at times unduly encroach on domestic competencies at the risk of a backlash.<sup>67</sup> Indeed the ICC has proceeded cautiously, in general but also specifically in its relations with domestic courts, preferring cases that portend uncontested admissibility.<sup>68</sup> It has thus been suggested that a generous use of the margin of appreciation in evaluating complementarity would safeguard the ICC in its early years,<sup>69</sup> and indeed the ICC has arguably adopted a broad understanding of states’ role in prosecuting international crimes.

In that respect, the subsidiary character of international criminal justice can be seen as a concession to the reality that international tribunals are bound to rely on domestic courts and state cooperation in order to effectively function with impunity.<sup>70</sup> But this is not necessarily a virtue. Complementarity, in particular, is often portrayed as a political “compromise.”<sup>71</sup> It is seen as a price to pay rather than something that has a normative value of its own. The framing of international criminal justice’s overriding goal as the struggle against subsidiarity is arguably one of the factors that has led to an distorted understanding of the role of domestic courts. That role is almost entirely framed in the narrow terms of the effectiveness of international criminal justice, and fails to make a case for the value of domestic criminal justice in and of itself.<sup>72</sup> A strong theory of normative pluralism cannot be one that is content with merely positing

66. Andreas Paulus, *Second Thoughts on the Crime of Aggression*, 20 EUR. J. INT’L L. 1117 (2009) (arguing that the advantages of including the crime of aggression in the Court’s jurisdiction may be offset by the resulting pushback).

67. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 29 (2001) (noting that the key question is “whether the International Criminal Court can erode the principles of state sovereignty without itself being swept away by a backlash of indifference and outright opposition from sovereign states”).

68. William A. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 CRIM. L. REV. 5 (2008) (emphasizing states’ self-referrals as setting a particularly low hurdle for complementarity).

69. Steven R. Ratner, *The International Criminal Court and the Limits of Global Judicialization*, 38 TEX. INT’L L.J. 445, 452 (2003).

70. For a critique of such shallow definitions of pluralism in the context of international criminal tribunals, see Mégret, *supra* note 27.

71. Mohamed M El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869, 881 (2009); JO STIGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY* 87 (2008). Also on the politically expedient nature of complementarity and how it falls short of a true principled case for subsidiarity, see Ronald J. Rychlak & John M. Czarnetzky, *The International Criminal Court and the Question of Subsidiarity*, 16 THIRD WORLD LEGAL STUD. 115 (2000).

72. For a critique, see Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT’L L. 561 (2002).

that pluralism serves some useful purpose, for example, in reducing impunity.<sup>73</sup>

A more ambitious version of the pragmatic argument in that respect is one that highlights the *instrumental* value of local justice for international justice purposes. There are a range of arguments that can be made about how resorting to domestic justice, for example, is conducive to international goals. One might think, for instance, that domestic justice is more beneficial to participants in international judicial processes. The ability to provide meaningful participation for victims, in that respect, has increasingly become an international concern. From a human rights perspective, the accessibility of local justice, the familiarity with local laws, and the ability to frame one's claim in a known language surely enhance the sense that one's rights are vindicated.<sup>74</sup> Thus "domestic remedies" are considered, in the spirit of subsidiarity and assuming that they are adequate, to be preferable to international ones. As the ECtHR put it: "Apart from the fact that the existence of a domestic remedy is in full keeping with the subsidiarity principle embodied in the Convention, such a remedy is closer and more accessible than an application to the Court; it is faster and is processed in the applicant's own language. It thus offers advantages that need to be taken into consideration."<sup>75</sup>

From a criminal justice perspective, local trials maximize the benefits of the principle of legality, as far as defendants are concerned. Local trials and laws are less unexpected than international ones to defendants.<sup>76</sup> In most cases, victims stand to gain from justice being conducted domestically in a language, and corresponding usages, that they are more likely to understand.<sup>77</sup> Perhaps more importantly, domestic trials encourage local appropriation and therefore, even if they may be faulty or somehow wanting from a purely international point of view, are at least part of how local judiciaries find context-specific responses to both rights violations and international crimes.

In that respect, the subsidiarity of both the ECtHR and the ICC are understood not as a second best, but as something that defers to states' primary responsibilities; not just to remedy human rights violations, but to actually guarantee human rights. Within the obligation to guarantee is the notion that states are best-placed to determine how to implement human

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73. Even some of the more sophisticated and nuanced defenses of complementarity tend to mostly see it as a functional anti-impunity device rather than one that potentially expresses a deeper commitment to pluralism. See, eg., Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or a Weakness*, 12 WASH. U. GLOBAL STUD. L. REV. 451 (2013).

74. On the importance of subsidiarity generally, see Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15 HUM. RTS. L. REV. 313 (2015).

75. *Cocchiarella v. Italy*, 2006-V, Eur. Ct. H.R. 209, para. 26.

76. For a critique of the lack of fair notice in the context of international prosecutions of international crimes, see LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* 109 (2005).

77. Richard Dicker & Elise Keppler, *Beyond The Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH WORLD REPORT 207 (Human Rights Watch ed., 2004).

rights, something which they are actively encouraged to do. The ECtHR has notably pointed out that “By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of (the requirements of limitations).”<sup>78</sup> Indeed, the Court has found that states are particularly well-placed to assess what is “necessary in a democratic society” and, notably, whether there is a “pressing social need” justifying an interference in rights.<sup>79</sup> This in turn reflects a deference to states as a locus of sovereignty and self-determination to which international organs should a priori defer.<sup>80</sup>

Very similar arguments may, and to a degree already, ground a broad theory of deferral to domestic courts in international criminal justice. Deferring to domestic courts is not simply a logistical necessity or a way of kowtowing to sovereignty. It encourages domestic courts to think of themselves as part of the solution to the commission of international crimes. It “provides communities with the opportunity to influence, in accordance with their core values, the laws and institutions that govern them.”<sup>81</sup> It is thus an inherent part of the reconstruction of the rule of law that has often-times been one of the first casualties of international crimes, and is one of the first things that needs to be put right in transitional contexts, above and beyond prosecuting individuals.<sup>82</sup> In that respect, it may be less the outcome of criminal prosecutions that matters than how international judicial processes stand to shape our evolving sense of the local and the global.<sup>83</sup> Even if this is done at the cost of a relative effacement of international criminal justice institutions, this is surely a desirable outcome all things considered.<sup>84</sup>

This reinforced defense of domestic justice is important and significant, but it suffers in at least three respects. First, it is still relatively functional

78. *Brannigan and McBride v. the United Kingdom*, 1993-A, Eur. Ct. H.R. 258-B, para. 43, *Ireland v. the United Kingdom*, 1978-A, Eur. Ct. H.R. 25, para. 207.

79. *Brannigan and McBride v. the United Kingdom*, *supra* note 78, at para. 43, *Ireland v. the United Kingdom*, *supra* note 78, at para. 207.

80. Andreas Von Staden, *The Democratic Legitimacy of Judicial Review beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CONST. L. 1023 (2012) (outlining the case for international courts to defer to states' decision making as part of normative subsidiarity).

81. Turner, *supra* note 4, at 22.

82. On the contribution of international criminal justice to the rule of law, see Jane Stromseth, *Justice on the Ground: Can International Criminal Courts Strengthen Domestic Rule of Law in Post-Conflict Societies?* 1 HAGUE J. RULE OF LAW 87 (2009); Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. & DEV. L.J. 205 (2011); Morten Bergsmo et al., *Complementarity After Kampala: Capacity Building and the ICC's Legal Tools*, 2 GOETTINGEN J. INT'L L. 791 (2010).

83. Dustin N. Sharp, *Addressing Dilemmas of the Global and the Local in Transitional Justice*, 29 EMORY INT'L L. REV. 71 (2014) (arguing that the “local” is itself a complicated and contested concept that can help problematize our investment in liberal universalism).

84. William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53 (2008) (making the point that the ICC should actively promote domestic justice by engaging governments).



rather than based on a strong normative theory of international justice's deference to domestic justice. The point is that national justice 'works better' but this fails to take into account, as we will see, the degree to which the margin tends to be defended on principled terms as having inherent, not just instrumental, value. Second, the pragmatic argument tends to adopt an 'external' policy approach on the issue. It suggests reasons why courts might want to embrace local justice but fails to appreciate the extent to which courts need to justify their use of such doctrines 'internally' as a function of the law and not merely politics. Third and perhaps more importantly, such an argument is more 'localist' than it is 'pluralist' in that it defends the importance of domestic justice rather than *the existence of a variety of justice systems per se*. In what follows, I therefore seek to make a more principled case for pluralism, drawing on the ECtHR's own presentation of the rationale for the margin of appreciation and linking to similar themes in international criminal justice.

*A Principled Justification of Pluralism: The Inherent Worth of Domestic Justice and Diversity*

A key step in developing a strong normative theory of pluralism in international criminal justice is establishing that domestic justice has inherent, and not simply instrumental, value. To begin with, domestic justice is a key site of the expression of values of national sovereignty and self-determination. It gives expression to some of states' most cherished assumptions, both substantive and procedural, about how society is supposed to operate. This is evident when it comes to human rights, whose history varies significantly from one state to another and whose protection is based on a diversity of constitutional traditions of rights protection and therefore the need to defer to "self-governance."<sup>85</sup> One consequence in the case of the ECHR is that, as a matter of principle, the ECtHR considers that it is not its "function to substitute for the assessment of the national authorities any other assessment of what might be the best policy" in any given field.<sup>86</sup>

Criminal justice, in this respect, it is not a bland and interchangeable technique of governance, but one that rests on key assumptions—about liberty, responsibility, and punishment—that are highly peculiar to each legal tradition and which are susceptible to political debates of the highest order.<sup>87</sup> Moreover, this is true of virtually every aspect of criminal justice whether substantive, procedural, or institutional. This suggests that there is

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85. Andreas Føllesdal, *Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights—Or Neither*, 79 *LAW & CONTEMP. PROBS.* 147 (2016). Also, on self-determination, see James A. Sweeney, *Margins of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era*, 54 *INT'L & COMP. L. Q.*, 459, 473 (2005).

86. *Ashingdane v. the United Kingdom*, 7 *Eur. H.R. Rep.* 528 (1985).

87. On the diversity of resulting traditions of criminal justice, see PHILIP L. REICHEL, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS: A TOPICAL APPROACH* (2017).

at least presumptive value in allowing criminal justice systems to engage with such specificities to a degree, and that failure to do so would weaken the sheer diversity of approaches to criminal justice. Although international criminal justice is less forthright about the inherent value of that diversity, it is worth noting that many international criminal law treaties demand criminalization only in the broadest of terms. They also often specifically refer to the need for such criminalization to be compatible with states' constitutional and legal traditions.<sup>88</sup> International criminal justice thus recognizes, at least implicitly, that its pluralism is rooted in a normatively oriented respect for sovereignty, self-determination, and, as the case may be, democracy.<sup>89</sup>

Aside from the reality of their sovereignty, states may face distinct circumstances that require significant adaptation, if nothing else. For example, the ECtHR has pointed out that state regulation of rights "may vary in time and place according to the needs and resources of the community and of individuals."<sup>90</sup> More generally, the protection of economic and social rights has long been recognized as resource-dependent, and therefore context-specific, in ways that are naturally conducive to an understanding of pluralism.<sup>91</sup> Pluralism is thus a direct consequence of the recognition that sovereign authorities have a significant normative role in terms of mediating international inputs and that, as the ECtHR puts it, "it falls in the first instance to the national authorities to decide" on limitations to rights, for example.<sup>92</sup>

The criminal justice challenges that sovereign states confront are also highly peculiar and circumstantial, despite some obvious common issues.<sup>93</sup>

88. See, e.g., Single Convention on Narcotic Drugs, art. 35, Mar. 30, 1961, 520 U.N.T.S. 151 ("Having due regard to their constitutional, legal and administrative systems, the Parties shall . . ."); Protocol to Prevent, Suppress and Punish in Persons Especially Women and Children, art. 5-6, Nov. 15, 2000, 2237 U.N.T.S. 319 (indicating that criminalization is "Subject to the basic concepts of its [a country's] legal system"; and mandating the protection of victims "to the extent possible under its domestic law").

89. The tension between obligations under international criminal law and sovereign pluralism is readily apparent in the area of soft drug decriminalization, where authors have increasingly identified a pattern of local or national departure from the international norm. See, e.g., Laura Graham, *Legalizing Marijuana in the Shadows of International Law: The Uruguay, Colorado, and Washington Models Notes and Comments*, 33 WIS. INT'L L.J. 140; Biju Panicker, *Legalization of Marijuana and the Conflict with International Drug Control Treaties*, 16 CHI.-KENT J. INT'L & COMP. L. 1 (2016); David R. Bewley-Taylor, *Challenging the UN Drug Control Conventions: Problems and Possibilities*, 14 INT'L J. DRUG POL'Y 171 (2003).

90. Case "Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium" v. Belgium (Merits), 1968-A, Eur. Ct. H.R. 6, para. 5.

91. David Kinley, *Bendable Rules: The Development Implications of Human Rights Pluralism*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 50 (Brian Z. Tamanaha, Caroline Sage & Michael Woolcock eds., 2012) (making the argument that international human rights law is naturally pluralistic and therefore should very much be examined in the context within which they operate).

92. *Ireland v. the United Kingdom*, Series A no. 15, 78-79, §207.

93. CYNDI BANKS & JAMES BAKER, *COMPARATIVE, INTERNATIONAL, AND GLOBAL JUSTICE: PERSPECTIVES FROM CRIMINOLOGY AND CRIMINAL JUSTICE* (2015).

This is true even of the most universal crimes, which have historically affected different societies differently. No two processes of post-conflict transition are alike, for example, as states confront highly dissimilar contexts. This in turn has created an emphasis on tailoring the intervention of criminal justice to particular contexts, given the reality that “norm generation is an inherently communal and contingent social process.”<sup>94</sup>

There is more than diversity of circumstances, however. On a more fundamental level, pluralism is based on an understanding of the incommensurability of domestic justice traditions,<sup>95</sup> and the difficulty of imposing a cosmopolitan form of justice based on anything beyond a paper-thin consensus. This is a point that has been made persistently in the European laboratory but that is surely, a fortiori, universally true.<sup>96</sup> When it comes to human rights, we simply do not have a universal formula to decide whether freedom of speech extends to hate speech, whether adoption by same sex couples should be allowed, or whether secularism should ban women from wearing the hijab.<sup>97</sup> This, then, is what has traditionally militated for a relatively minimalist system of international human rights law,<sup>98</sup> one that more naturally defers to states in cases of doubt. This is not so much a form of relativism as it is an attempt to harmonize a unitary ideal and diverse legal and political traditions through the development, at most, of “high level principles which can be taken to be applicable across the different legal traditions”.<sup>99</sup>

The European human rights system has frequently acknowledged, as part of margin-of-appreciation reasoning, that each Council of Europe member state is typically embedded in different concepts of morality with at least indirect implications for the law. As the European Court put it in the *Handyside* case:

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94. Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 3 (2010).

95. Paulina Wilson, *Interjural Incommensurability in Criminal Law: Constructing a Framework for Micro-Comparisons for Translation Purposes*, in LANGUAGE AND LAW IN SOCIAL PRACTICE RESEARCH (G Tessuto & R Salvi eds., 2015) (ebook).

96. Angelika Nußberger, *Rebuilding the Tower of Babel—The European Court of Human Rights and the Diversity of Legal Cultures*, in LEGITIMACY, LEGAL DEVELOPMENT AND CHANGE: LAW AND MODERNIZATION RECONSIDERED 403 (David K. Linnan ed., 2012) (emphasizing the lessons learned from the European experience and the difficulty, even within a regional grouping, of achieving consensus on fundamental values).

97. Martti Koskeniemi, *The Effect of Rights on Political Culture*, in THE EU AND HUMAN RIGHTS 99 (Philip Alston ed., 1999) (for a skeptical look on the ability of human rights law to determine normative outcomes).

98. See, e.g., MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 173 (2011) (for a defence of minimalism in international human rights); See also Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity* 14 HUM. RTS. L. REV. 487 (2014) (the ECHR project is often described as minimalistic).

99. Ed Bates, *The Senior Judiciary on ‘Strasbourg’ – More Supportive Than Some Would Have You Believe*, UK CONSTITUTIONAL LAW ASSOCIATION (May 28, 2015), <https://ukconstitutionallaw.org/2015/05/28/ed-bates-the-senior-judiciary-on-strasbourg-more-supportive-than-some-would-have-you-believe/>.

It is not possible to find in the domestic laws of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject.<sup>100</sup>

On occasion, the ECtHR has also alluded to the need to defer to the diverse legal traditions of member states.<sup>101</sup> The diversity of domestic traditions of human rights, then, is precisely what makes it both necessary and difficult to impose a one-size-fits-all model of human rights on a universal level, even as human rights constantly make strong claims to our universal acknowledgement.

A very similar diagnosis can be made in the realm of international criminal law. The debates between different traditions of criminal justice run deep and suggest some intractable dilemmas. We cannot know for sure, for example, whether omissions should incur criminal responsibility, at what age exactly penal majority crystallizes, whether duress should be a defense or a mitigating circumstance, what the nature of intention is, whether it is better to have an investigative magistrate or equality of arms, when alternative sentencing should be used, or what it truly means for a judge to be impartial, etc. These are all contested issues in the societies within which they are deliberated, let alone internationally.

Even general principles of criminal law are susceptible to having different meanings depending on the legal tradition of a given country: clearly the principle of legality in regards to criminal offenses will have different meanings in common law and civil law countries.<sup>102</sup> This is surely one of the lessons of the field of comparative criminal justice, which has proceeded very cautiously when it comes to the possibility of bridging divides between different criminal justice traditions.<sup>103</sup> At a certain level, legal traditions express worldviews whose philosophical underpinnings are open to discussion, but which can never be fully reconciled.

Finally, the point of pluralism is not just that domestic justice has inherent worth, but that the multiplication of distinct systems of justice is in itself desirable. At a more systemic level, the sense may be that fundamental uncertainty as to how best implement human rights highly commends a system that allows diverse forms of national and local experimentation. In

100. *Handyside v. the United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22, §48 (1976).

101. See, e.g., *Le Compte, Van Leuven and De Meyere v. Belgium (Doctors' Case)*, 43 Eur. Ct. H.R. (ser. A), at 23, §51 (1981).

102. See CHRISTINA PERISTERIDOU, *THE PRINCIPLE OF LEGALITY IN EUROPEAN CRIMINAL LAW* 65-128 (2015) (highlighting the differences between common law and continental European countries).

103. The field of comparative criminal justice has contributed much to our understanding of the irreducibility of criminal justice systems, see HARRY R. DAMMER AND JAY S. ALBANESE, *COMPARATIVE CRIMINAL JUSTICE SYSTEMS* (5th ed. 2013); DAVID NELKEN, *COMPARATIVE CRIMINAL JUSTICE: MAKING SENSE OF DIFFERENCE* (2010); FRANCIS PAKES, *COMPARATIVE CRIMINAL JUSTICE* (2012).

such a system, ideas can be developed, assessed, compared, ranked, and generally benefit from each other. Hence the suggestion in human rights is that different traditions of rights stand to gain from each other, and that the opposite of pluralism is human rights provincialism—a plurality where constitutional models ignore each other rather than work in concert, despite tackling very similar challenges.<sup>104</sup> Mary Ann Glendon, for example, has criticized the US human rights culture as insular and expressing a form of strident individualism, whereas the ECtHR’s sensitivity to diverse legal traditions has helped it shape a more nuanced jurisprudence.<sup>105</sup> As Paolo Carozza put it, inter-state comparisons in human rights, as we will see later, are at the heart of the margin of appreciation and:

[. . .] help strengthen common understandings by giving specific content to the scope of broad, undetermined international human rights norms, while at the same time they help to reveal the contingency and particularity of the political and moral choices inherent in the specification and expansion of international human rights norms that are sometimes too facilely assumed to be ‘universal’.<sup>106</sup>

This idea may be a harder sell in international criminal justice, which might be ill-at-ease with processes whose outcomes would “reveal the contingency and particularity of the political and moral choices inherent” to it. The truth, however, is that international criminal justice has effectively gained from the diversity of forms of criminal enforcement on which it rests. Beyond functionally relying on domestic systems, international criminal justice has long drawn generously on the diversity of domestic legal traditions, in relation to its own substantive<sup>107</sup> and procedural<sup>108</sup> law, for example. International criminal justice, therefore, literally feeds on, and owes its development to, the diversity of domestic criminal justice traditions. Thus, it would be ironic if, in return, it were to repay that debt by

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104. See Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2002) (for an effort to highlight the tension between constitutional and human rights that emphasize both their divergence and convergence).

105. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 66–75 (2008).

106. Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1219 (1997).

107. This is particularly true when it comes to general principles and modes of liability which are typically under-specified internationally and where international tribunals have had to draw on domestic legal traditions. See CASSANDRA STEER, TRANSLATING GUILT: IDENTIFYING LEADERSHIP LIABILITY FOR MASS ATROCITY CRIMES (2017); Kai Ambos, *Remarks on the General Part of International Criminal Law*, 4 J. INT’L CRIM. JUST. 660 (2006) (both making a point about the unavoidability of a national detour to ascertain the contours of international criminal law).

108. See, e.g., CHRISTOPH SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE (2003); Mirjan Damaška, *Negotiated Justice in International Criminal Courts*, 2 J. INT’L CRIM. JUST. 1018 (2004) (both arguing that international criminal procedure can only result from a synthesis of legal traditions).

imposing a highly unitary and homogeneous conception of a singular ‘good’ international legal model. In other words, whatever laboratory-like synthesis of international criminal justice is produced in the Hague cannot hide what it itself owes to pluralism.

Indeed, a further reason why domestic justice systems should ‘stick to their guns’ as it were is that there is no reason to think that international tribunals will always develop the best solution to any given issue *merely because they are international*. In fact, it may even be that international bodies will have trouble developing the most effective, and arguably most progressist, not to mention the most authentic, solutions *precisely because they are international*. Regional human rights courts may develop case law that is found wanting domestically,<sup>109</sup> including in matters of criminal justice.<sup>110</sup> This may be a result of the fact that international courts either unduly defer to problematic domestic traditions or, in contrast, impose rules that are ill-fitting for universal application beyond specific traditions.<sup>111</sup> Similarly, it is far from clear that international criminal tribunals have always, if ever, come up with the most effective or enlightened rules of criminal justice, whether in relation to procedural<sup>112</sup> or substantive<sup>113</sup> law. This may be, for example, because they marry ill-fitting procedural elements and end up limiting rights—ironically, the universal aspiration of international criminal law may be at odds with its liberal aspirations.<sup>114</sup> In that context, to align domestic laws with international law may prove detrimental to the former. Rather than the domestic needing to align with the international, it may be that the international occasionally needs to better align with domestic best practices through a renewed engagement with its pluralistic

109. On the failings of international human rights law from the point of view of human rights ideals, see generally Frédéric Mégret, *The Apology of Utopia: Reflections on Some Koskenniemi Themes with Particular Emphasis on Massively Institutionalized Human Rights Law*, 27 TEMP. INT’L & COMP. L.J. 455 (2013); Andrew Williams, *The European Convention on Human Rights, the EU and the UK: Confronting a Heresy*, 24 EUR. J. INT’L L. 1157 (2013).

110. Andrew Ashworth, *The Exclusion of Evidence Obtained by Violating a Fundamental Right: Pragmatism before Principle in the Strasbourg Jurisprudence* in CRIMINAL EVIDENCE AND HUMAN RIGHTS: REIMAGINING COMMON LAW PROCEDURAL TRADITIONS (Paul Roberts & Jill Hunter eds., 2012) (arguing that the ECtHR has moved away from its earlier approach on exclusion of evidence and may, as a result, be undermining common law guarantees).

111. Paul Roberts, *Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?*, 11 HUM. RTS. L. REV. 213 (2011).

112. It has even been argued that the ad hoc tribunals, in particular, occasionally interpreted rights in ways that undercut domestic guarantees, see Megan Fairlie, *The Marriage of Common and Continental Law at the ICTY and Its Progeny, Due Process Deficit*, 4 INT’L CRIM. L. REV. 243 (2004); Vladimir Tochilovsky, *Rules of Procedure for the International Criminal Court: Problems to Address in Light of the Experience of the Ad Hoc Tribunals*, 46 NETHERLANDS INTERNATIONAL LAW REVIEW 343 (1999).

113. The expansion of modes of liability to the point of not requiring *mens rea*, in particular, has been criticized as fundamentally illiberal, see, e.g., Alison Martston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law* 93, CAL. L. REV. 75 (2005).

114. Patrick L. Robinson, *Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY*, 3 J. INT’L CRIM. JUST. 1037 (2005).

sources.<sup>115</sup> In fact, it may be that a real pluralistic approach to honor the promise of human rights provides a safety-valve for occasionally misguided international efforts.

### *Responding to Potential Critiques*

The margin of appreciation may be desirable on both pragmatic and principled grounds, but this does not mean that it is legally applicable or that there are not legitimate policy concerns about its application beyond the European human rights context. First, what is its status globally and what supports its adoption in international criminal justice? As indicated in the introduction, the argument proposed here is not so much in positive law, as it is one based on policy and on “thinking with” scholars interested in making sense of pluralism. Nonetheless, evaluating how representative the margin of appreciation is of the evolution of international law more globally is certainly a piece of the puzzle.

The margin of appreciation has only been adopted formally in the European human rights context. It is important to note, however, that the Council of Europe includes 47 states and more than 800 million persons.<sup>116</sup> Its court system, the ECtHR, is by far the most developed and judicially-oriented system of human rights protection, regional or otherwise,<sup>117</sup> and includes a great variety of states.<sup>118</sup> Moreover, it is worth pointing that there has been increasing interest in the margin of appreciation in human rights contexts other than the European.<sup>119</sup> The failure for the Human Rights Committee (HRC), the United Nations body tasked with supervising the International Covenant on Civil and Political Rights, to adopt margin-of-appreciation reasoning has been criticized as unrealistic and unhelpful.<sup>120</sup> The same is true of the United Nations’ Committee on the Elimination of Racial Discrimination.<sup>121</sup> Indeed, it has been argued that,

115. Zahar, *supra* note 19 (arguing that the international model of adjudication should be more closely aligned with domestic practices).

116. COUNCIL OF EUROPE, *THE COUNCIL OF EUROPE, 800 MILLION EUROPEANS* (2012), [https://www.ecml.at/Portals/1/800\\_millions\\_en.pdf](https://www.ecml.at/Portals/1/800_millions_en.pdf).

117. For a comparison with other regional courts, see Christof Heyns, David Padilla & Leo Zwakk, *A Schematic Comparison of Regional Human Rights Systems: An Update*, 5 *AFR. HUM. RTS. J.* 308 (2005).

118. For an evaluation of that diversity and, notably, the impact of the accession of Central and Eastern European states, see Wojciech Sadurski, *Partnering with Strasbourg: Constitutionalisation of the European Court of Human Rights, the Accession of Central and East European States to the Council of Europe, and the Idea of Pilot Judgments*, 9 *HUM. RTS. L. REV.* 397–453 (2009).

119. See, e.g., Andreas Follesdal & Nino Tsereteli, *The margin of appreciation in Europe and beyond*, 20 *INT’L J. HUM. RTS.* 1055 (2016); Andreas Von Staden, *Subsidiarity in Regional Integration Regimes in Latin America and Africa*, 79 *LAW & CONTEMP. PROBS.* 27 (2016); Bryan Edelman & James T. Richardson, *Imposed Limitations on Freedom of Religion in China and the Margin of Appreciation Doctrine: A Legal Analysis of the Crackdown on the Falun Gong and Other Evil Cults*, 47 *J. CHURCH & ST.* 243 (2005).

120. Dominic McGoldrick, *A Defence of the Margin of Appreciation and an Argument for Its Application by the Human Rights Committee*, 65 *INT’L & COMP. L. Q.* 21 (2016).

121. Matthias Goldmann & Mona Sonnen, *Soft Authority against Hard Cases of Racially Discriminating Speech: Why the CERD Committee Needs a Margin of Appreciation Doctrine*, 7 *GOETTINGEN J. INT’L L.* 131 (2016).

despite its stated opposition, the HRC effectively implements a series of substitutes to the margin that operate along the same lines.<sup>122</sup>

In the Americas, although the Inter-American Court of Human Rights has refrained from endorsing the margin of appreciation for reasons that are quite specific to its history and its caseload (in particular, the prevalence of grave and systematic human rights violations), several scholars have strongly suggested that it should or else risk rendering itself illegitimate.<sup>123</sup> The more the Court moves away from a caseload of massacres and disappearances, the more it has tended to de facto rely on a certain type of margin of appreciation,<sup>124</sup> and to be criticized when it fails to do so.<sup>125</sup> Indeed, some commentators argue that it is already showing signs of considerable deference to national courts.<sup>126</sup> The African Court on Human and Peoples' Rights has also been encouraged to adopt margin-of-appreciation reasoning,<sup>127</sup> although it is still early to know whether it will do so explicitly. Even if sub-regional African courts dealing with human rights have so far not significantly applied margin-of-appreciation reasoning, this may be largely circumstantial, for example, as a result of the fact that many African states are undemocratic.<sup>128</sup> The margin's pertinence in other regional contexts<sup>129</sup> and even in domestic contexts has frequently been explored.<sup>130</sup>

Indeed, the significance of the margin of appreciation for areas of international legal governance other than human rights has been increasingly stressed,<sup>131</sup> so much so that it has been suggested that the margin has devel-

122. Yuval Shany, *All Roads Lead to Strasbourg?: Application of the Margin of Appreciation Doctrine by the European Court of Human Rights and the UN Human Rights Committee*, 9 J. INT'L DIS. SETTLEMENT 180 (2018) (suggesting that the Human Rights Committee *de facto* uses a margin of appreciation reasoning without acknowledging it).

123. See, e.g., Andreas Follesdal, *Exporting the Margin of Appreciation: Lessons for the Inter-American Court of Human Rights*, 15 INT'L J. CONST. L. 359 (2017); Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System Subsidiarity in Global Governance*, 79 L. & CONTEMP. PROBS. 123 (2016).

124. Judith Schönsteiner, Alma Beltrán y Puga & Domingo A. Lovera, *Reflections on the Human Rights Challenges of Consolidating Democracies: Recent Developments in the Inter-American System of Human Rights*, 11 HUM. RTS. L. REV. 362, 377 (2011) (highlighting an instance where the Court has resorted to the margin of appreciation).

125. Thomaz Fiterman Tedesco, *The Inter-American Court of Human Rights and Regional Consensus*, 1 REVISTA ELETRÓNICA SAPERE AUDE 19, 24–25 (2018).

126. See, e.g., Nino Tsereteli, *Emerging Doctrine of Deference of the Inter-American Court of Human Rights?*, 20 INT'L J. OF HUM. RTS. 1097 (2016).

127. Rachel Murray, *A Comparison between the African and European Courts of Human Rights*, 2 Afr. Hum. Rts. L.J. 195, 210–11 (2002).

128. Andreas von Staden, *Subsidiarity, Exhaustion of Domestic Remedies, and the Margin of Appreciation in the Human Rights Jurisprudence of African Sub-Regional Courts*, 20 INT'L J. HUM. RTS. 1113, 1126 (2016).

129. On the notion's possible relevance to a Pacific human rights mechanism, see Petra Butler, *Margin of Appreciation – A Note Towards a Solution for the Pacific*, 39 VICTORIA U. WELLINGTON L. REV. 687 (2008).

130. IM Rautenbach, *Policy and Judicial Review – Political Questions, Margins of Appreciation and the South African Constitution* 2012 J. S. AFR. L. 20 (2012).

131. For examples of references to the margin of appreciation outside the European human rights system, see LUKASZ GRUSZCZYNSKI & WOUTER WERNER, *DEFERENCE IN INTERNATIONAL COURTS AND*



oped into a broader principle of international law.<sup>132</sup> At the same time, the fact that the margin of appreciation is not explicitly anticipated in other legal systems, including international criminal justice, is not decisive: it was not anticipated in the ECHR itself and it has only become a pillar of European human rights jurisprudence as a result of a judicial act. The fundamental premise for those committed to the margin of appreciation seems to be, instead of reliance on mere statutory authority, that no global governance or jurisdictional mechanism today, regardless of its commitment to universalism, can afford to ignore the fundamental normative pluralism of the international legal system.

In fact, if the ECtHR is faulted, it is often for not taking the margin of appreciation far enough, and trying to uphold a single standard despite the considerable variety of European legal traditions.<sup>133</sup> The broader the geographic system over which the law presides, the greater the need for margin-of-appreciation reasoning; a relatively more diverse system, one would think, stands to gain most from the margin of appreciation, whereas a relatively small and homogeneous regional one (e.g., the Inter-American system) has a better claim of enforcing a single standard for all. This means that, whilst it may have been relatively easier for the Inter-American system to maintain at least theoretical commitment to a unitary conception of human rights given the relative homogeneity of its states parties (Latin American states), the fact that “state parties to the ICC vary greatly as far as legal and moral cultures are concerned” is an argument a fortiori why “the ICC may need to consider allowing some diversity in state approaches to justice.”<sup>134</sup>

Nonetheless, there are at least two principal concerns internationally among skeptics when it comes to the operation of the margin of appreciation, that are quite apparent in both human rights and, potentially, international criminal justice. These can be expressed as the fear of dissolution (of

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TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION (2014); SHANY YUVAL, REGULATING JURISDICTIONAL RELATIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS (2007); Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 EUR. L.J. 80 (2011); Nasiruddeen Muhammad, *A Comparative Approach to Margin of Appreciation in International Law*, 7 CHINESE J. COMP. L. 212 (2019); James A. Sweeney, *Margin of Appreciation in the Internal Market: Lessons from the European Court of Human Rights*, 34 LEGAL ISSUES OF ECON. INTEGRATION 27 (2007); Sarah Van Walsum, *Comment on the Sen Case. How Wide Is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification*, 4 EUR. J. MIGRATION & L. 511 (2003).

132. See Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907 (2005).

133. Lord Hoffmann, The Universality of Human Rights Judicial Studies Board Annual Lecture, Judicial Studies Board Annual Lecture (March 19, 2009) (transcript available at <https://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIJ2013/hoffmann.pdf>) at 14, 25–28.

134. Kimberly Hanlon, *Peace or Justice: Now That Peace Is Being Negotiated in Uganda, Will the ICC Still Pursue Justice Comment*, 14 TULSA J. COMP. & INT'L L. 295, 330 (2006).

international standards) and the fear of inequality.<sup>135</sup> Both are related but subtly distinct, and so they will be treated separately.

It is worth attending, first, to the recurrent concern that the margin of appreciation, rather than serving as a tool to modulate rights at the margin, is effectively used for the “cracking open” of fundamental rights.<sup>136</sup> The idea is that the more the ECtHR, in particular, defers to states through the margin of appreciation, the less it protects rights; the margin is thus used as a tool of dissolution than one of adaptation. The ECtHR is, of course, at pains to emphasize that “it goes without saying that such regulation must never injure the substance of the right. . . nor conflict with other rights enshrined in the Convention.”<sup>137</sup> However, there is no reason why we should take the Court’s word for this—it might be doing precisely that, even as it vehemently denies it.

There is no doubt, as I have argued elsewhere, that the margin of appreciation can be a perilous exercise, one that creates openings for instrumental and politically motivated manipulations of rights.<sup>138</sup> At the same time, the converse is also clearly a danger: the insistence on a rigid, one-size-fits-all understanding of rights has the potential to deny national and local specificities that have inherent value. The better question is whether the margin of appreciation is a risk worth taking, or indeed whether it is a risk that a system of international human rights (or international criminal law) can afford not to take.

One way of transcending the tension between local variation and universal standards is to enhance our prevailing understanding of rights. The margin of appreciation is, first and foremost, an exercise in *applying* and, specifically, limiting rights. It refers not to the rights per se but to the diversity of circumstances within which they stand to apply and to be limited on the basis of legitimate social priorities.<sup>139</sup> The point is that we do not know what rights mean in advance of applying them to varying circumstances. Given the variety of real-world circumstances, this sense of the undetermined, flexible, open-textured character of human rights is a common characteristic of the discourse on the margin of appreciation.<sup>140</sup> It expresses a classic pluralist wariness with a single, centralizing discourse.

135. Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine: A Theoretical Analysis of Strasbourg’s Variable Geometry*, in CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 79 (Andreas Føllesdal, Birgit Peters & Geir Ulfstein eds., 2013).

136. Aaron A Ostrovsky, *What’s So Funny about Peace, Love, and Understanding - How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimizes International Human Rights Tribunals International Law*, (2005) 1 HANSE L. REV. 47, 47.

137. *Belgian Linguistics v. Belgium*, App. No. 474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Eur. Ct. H.R. (1968).

138. Mégret, *supra* note 109, at 471–72.

139. Arai-Takahashi, *supra* note 135 (highlighting the diversity of circumstances where the margin of appreciation has been invoked).

140. Douglas Lee Donoho, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights*, 15 EMORY INT’L L. REV. 391(2001)

Moreover, the fears about pluralism seem to be in part based on a misunderstanding about its relation to universalism. Whilst for some pluralism is the slippery slope to radical cultural relativism,<sup>141</sup> always a convenient red herring in international human rights conversations, there is also much to suggest that pluralism can only ever exist as a concept against the background of universalism.<sup>142</sup> The two are much more connected than their frequent opponents would suggest.<sup>143</sup> For one thing, a strong case in favor of pluralism is itself a universalizable proposition, that pluralism is, at least in certain circumstances, always preferable to universalism. This is a point widely underscored in the human rights literature, where the term is always understood as an organized and controlled pluralism, with international processes keeping the upper hand.<sup>144</sup>

Crucially, the margin of appreciation is not merely an exaltation of the virtues of diversity but a simultaneous insistence that this diversity be framed by an overarching and even controlling commitment to a common core of rights. As the Brighton Declaration put it, summing up decades of ECHR case law, “the margin of appreciation goes hand in hand with supervision under the Convention system. In this respect, the role of the Court is to review whether decisions taken by national authorities are compatible with the Convention.”<sup>145</sup>

Unsurprisingly, one also finds echoes of this in the writings of scholars working on the pluralism of international criminal law. For example, according to van Sliedregt, “pluralism does not exclude universality. To the contrary, pluralism implies universality and a certain degree of ‘commonness’.”<sup>146</sup> Indeed, those international criminal lawyers who have advocated for pluralism have been at pains to emphasize, in ways that are very reminiscent of margin-of-appreciation reasoning, that “ICL may. . . tolerate diversity among domestic laws,” but only “within reasonable limits,” and they do not “contemplate ICL extending blanket deference to national law.”<sup>147</sup> Instead, Greenawalt points out, “ICL should operate to establish limits on the acceptable range of domestic discretion,” in particular by conforming to “evolving international human rights standards,”<sup>148</sup>—those

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(arguing that the debate between universalism and relativism is the background to the development of the margin of appreciation).

141. Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 NYU J. INT'L L. & POL. 843 (1998) (criticizing the margin of appreciation as a dissolution of human rights standards).

142. Ostrovsky, *supra* note 165, at 57–58.

143. Paul Mahoney, *Marvellous Richness of Diversity or Invidious Cultural Relativism?*, 1 HUM. RTS. L. J. 1 (1998).

144. John Tasioulas, *Human Rights, Legitimacy, and International Law*, 58 AM. J. OF JURIS. 1, 19 (2013) (“pluralism is a normative thesis about value, one that claims to be objectively true”).

145. Conference, *High Level Conference on the Future of the European Court of Human Rights, Brighton Declaration*, para. 11 (2012).

146. Van Sliedregt, *supra* note 4, at 851.

147. Greenawalt, *supra* note 4, at 1125.

148. *Id.*

very human rights standards which have themselves been susceptible to margin-of-appreciation reasoning.

In turn, for example, it is through their very internationalism that international human rights institutions contribute to domestic values, by “encouraging and supplementing domestic constitutional bills of rights,” “providing back-up for failures of domestic protection of rights,” “enhancing the legitimacy of the state,” and “contributing to better understandings of domestic constitutional rights.”<sup>149</sup> Similarly, it should be the purpose of international criminal justice to encourage “national communities to supplement. . . broad international norms with more concrete rules and interpretations of their own. . . consistent with ideals of autonomy and self-determination.”<sup>150</sup> In that respect, there is therefore no incompatibility between universalism and pluralism, and both can thrive in relation to each other.

The second concern with the margin of appreciation is that it would break down the equal application of the law by creating significant variations between countries. This is sometimes framed as an argument about the potential incoherence of the law,<sup>151</sup> raising the specter of “double standards,”<sup>152</sup> and even of “discrimination between member states.”<sup>153</sup> Pushed to the extreme, a particular human right protected under the ECHR might have different meanings across different state parties. There is therefore a concern in international human rights law that this could compromise the equality between human beings that is at the heart of the project.<sup>154</sup> This is also a concern in international criminal justice, where equality is at least an implicit goal and where the idea that one might be prosecuted for international crimes based on different standards and according to different procedures may create unease.<sup>155</sup> This sort of concern has notably precipitated calls for *de minimis* harmonization between the penal provisions of various jurisdictions relating to international crimes.<sup>156</sup> It arises in a context where

149. Allen Buchanan, *Why International Legal Human Rights?* In *PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 255 (Rowan Cruft, Matthew Liao & Massimo Renzo eds., 2015).

150. Turner, *supra* note 4, at 22.

151. Alessandra Pera, *The ‘Margin of Appreciation’ in ECHR Case-Law As a Boundary Line to Legal Transplants*, in *THE DIFFUSION OF LAW* 125 (Sue Farran, James Gallen & Christa Rautenbach eds. 2016), (examining the coherence of the European human rights case law as a result of the margin of appreciation in the context of reproductive rights).

152. Eyal Benvenisti, *supra* note 141, at 844.

153. Simon Paul, *Governing from the Margins: The European Court of Human Rights’ Margin of Appreciation Doctrine as a Tool of Global Governance*, 12 *CROAT. Y.B. OF EUR. L. & POL’Y.* 81, 83 (2016).

154. See, in particular, Jeffrey A Brauch, *The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law*, 11 *COLUM. J. OF EUR. L.* 113 (2004).

155. Beatrice I. Bonafé, *Coordinating Concurrent Legal Orders in the Prosecution of International Crimes*, 2 *GLOBAL CONSTITUTIONALISM* 316 (2013) (highlighting the problem of gaps between international and domestic prosecutions).

156. Delmas-Marty, *supra* note 34.

the ICC in particular is sometimes suspected of reinforcing global inequality.<sup>157</sup>

From the human rights perspective, this risk also seems somewhat exaggerated. The margin of appreciation, as examined in more detail below, often only applies “at the margin,” and is not an open door to “human rights by the menu.”<sup>158</sup> More importantly, this is the intended and foreseeable consequence of the margin of appreciation. The ECtHR has long acknowledged that what might be a rights violation in one country need not be so in another, because two countries may in some circumstances justifiably differ as to their assessment of what is “necessary” for the purposes of justifying limitation of rights in their particular “democratic societies.”<sup>159</sup> In other words, this is not an accident but part of the reason why the margin of appreciation can be understood both as deferring to the sovereignty of *particular* states and acknowledging the pluralism *between* states in the process. As the Court put it in *Dudgeon*, “the fact that similar measures are not considered necessary in other parts of the United Kingdom or in other member States of the Council of Europe does not mean that they cannot be necessary in Northern Ireland.”<sup>160</sup>

Similarly, an argument could be made that pluralism does not fundamentally rupture the equality between defendants in international criminal justice, or that, if it does, it only does so in ways that are justifiable under a defensible theory of international criminal justice’s pluralism.<sup>161</sup> It might be argued that there is at least a parallel in terms of being judged by one’s “natural judge,”<sup>162</sup> even though the particulars of what this means may differ significantly from one state to the next. Domestic criminal justice comes, all other things being equal, with its own form of intrinsic fairness, notably in relation to the legality principle and greater familiarity for defendants. In other words, whatever passing inequality may exist between defendants across countries may be more than compensated by the benefits of being tried ‘at home.’

Furthermore, whatever relative inequality there is must be weighed against the benefits of local acculturation of norms and any alternatives. It

157. Antonio Franceschet, *The Rule of Law, Inequality, and the International Criminal Court* 29 *ALTERNATIVES* 23, 24 (2004) (introducing the argument that “The promise of individual criminal responsibility and accountability fits in the post-cold war and neoliberal world order, a context in which inequalities are increasing and becoming more pervasive.”).

158. Frédéric Mégret, *International Human Rights and Global Legal Pluralism: A Research Agenda*, in *DIALOGUES ON HUMAN RIGHTS AND LEGAL PLURALISM* (René Provost & Colleen Sheppard eds., 2013).

159. Arai-Takahashi, *supra* note 135, at 75 (emphasizing that “the variable margin as a means to adjust the intensity of its review has much to do with the Court’s struggle to make a hard choice of political morality when it is grappling with a complex balance of values between community goals and individual persons’ rights.”).

160. *Dudgeon v. the United Kingdom*, Judgment of 22 Oct. 1981, Series A no. 45, §56.

161. Greenawalt, *supra* note 4, at 1100–01 (downplaying the importance of “consistency” in international prosecutions as inevitable).

162. On the *jus de non evocando* principle, see ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995.

is worth noting that in the current setup one particular inequality between defendants is already glaring, that which exists between a small elite that is prosecuted internationally and the vast majority that are prosecuted domestically.<sup>163</sup> It is the drive towards universal justice that has in fact created two levels of often dramatically different jurisdiction. The ‘vertical’ problem of equality is arguably more dire, even as it is considered an inevitable by-product of international criminal justice. As Sasha Greenawalt has argued, “the question is not how to eliminate inconsistency, but which form of consistency to privilege”<sup>164</sup> in a context where consistency at one level necessarily creates inconsistency at another. In fact, the extent to which an international model of prosecution is pushed domestically may create ‘dual’ systems of criminal justice within a state, one for ‘ordinary’ crimes and one for ‘international’ crimes, further increasing domestic disparities.<sup>165</sup> There is little doubt that resulting unequal prosecutions within the same country would be a much bigger problem than unequal prosecutions across far-flung jurisdictions.

In short, the arguments of the skeptics about the margin of appreciation are not decisive in that they would always suggest a single, centralizing approach to either human rights or international criminal justice. This would require too great of a sacrifice of deference to the inherent diversity of political and legal systems, and in ways that are not clearly mandated by international law. The pluralism of international justice is nonetheless a pluralism under surveillance, namely one that largely stands to be constrained by its international normative environment. As we will see in the next section, the margin of appreciation has clear limits in the European context, where it is controlled both in terms of the areas and rights it applies to, as well as the ways in which it is implemented.

With that said, cautionary arguments about the margin do deserve to be borne in mind and taken seriously when applying the margin of appreciation. Clearly dissolution and inequality are risks. Whether international human rights or international criminal justice are vulnerable to these risks will depend, to a large extent, on how the margin of appreciation is operationalized in practice.

#### OPERATIONALIZING THE MARGIN OF APPRECIATION IN INTERNATIONAL CRIMINAL JUSTICE

The ECtHR’s margin of appreciation suggests a fundamental economy of the relationship of international to domestic justice. Although the Court

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163. Alvarez, *supra* note 10, at 413.

164. Greenawalt, *supra* note 4, at 1102.

165. *Id.*, at 1129 (pointing out that “So long as national legal systems continue to embrace different views on the nature and consequences of criminality, the introduction of a distinctly international criminal law will inevitably perpetuate or foster unequal treatment of one form or another.”).

defers to state discretion for the reasons explored in the previous section, it is also quite clear that “notwithstanding the margin of appreciation left to the national authorities, *it is for the Court to make the final evaluation as to whether the reason it has found to be relevant were sufficient in the circumstances.*”<sup>166</sup> In other words, the margin of appreciation is embedded in a notion of ultimate “European supervision” allowing the Court to act as the final arbiter of whether the margin of appreciation has been adequately implemented in a particular case. Article 19 of the ECHR, in particular, makes it clear that the Court is duty bound to “ensure the observance of the engagements undertaken by the High Contracting Parties.” This distribution between ultimate European control and states’ margin of appreciation is evocative of the operation of complementarity in the context of the ICC,<sup>167</sup> where deference to states is tempered by ultimate control as to whether states are indeed “able and willing” to prosecute.<sup>168</sup>

In short, the very idea of international justice implies that it must ultimately exert some control; crucially, however, this international control can only be partial and residual, or risk crushing pluralism. International human rights and international criminal justice are both involved in defining a minimum common denominator and, in a sense, the strength of that minimum common denominator depends on it being relatively minimal. Human rights would cease to be if they were a comprehensive formula for an ideal society or even an ideal life;<sup>169</sup> instead, they are better viewed, notably in the European context, as laying certain “minimum standards.”<sup>170</sup> Similarly, international criminal law would be on very weak grounds if it became a law constraining the totality of domestic criminal justice systems—in effect, a global criminal justice blueprint. This suggests that anything that does not fall within that minimum should be subjected to the default regime of the international system, namely that of sovereign and democratic prerogatives. In other words, supervision cannot extend to requiring perfect conformity with the international legal order’s own idiosyncratic preferences or practices, something that is quite visible in both European human rights<sup>171</sup> and international criminal justice.<sup>172</sup>

How, then, might one go about operationalizing the margin of appreciation in the context of international criminal justice? This section explores

166. *Dudgeon v. the United Kingdom*, *supra* note 160 (emphasis added).

167. Simon Hentrei, *Generalising the Principle of Complementarity: Framing International Judicial Authority*, 4 *TRANSNAT’L L. THEORY* 419, 420 (2013).

168. Rome Statute of the International Criminal Court art. 17.

169. Instead, the cosmopolitan argument is that it acts as a sort of arbiter of various formulas of the good life. See Anthony J Langlois, *Human Rights and Cosmopolitan Liberalism*, 10 *CRITICAL R. OF INT’L SOC. AND POL. PHIL.* 29, 30 (2007).

170. Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 *HUM. RTS. L. REV.* 487, 493 (2014).

171. RONALD ST J MACDONALD, FRANZ MATSCHER & HERBERT PETZOLD, *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 41 (1993).

172. Mégret & Samson, *supra* note 27, at 588.

how the notion may help us balance the concern for international scrutiny and the local variability of pluralism. The margin of appreciation is evidently not primarily or solely a theory of pluralism, it is also a technique of reconciling the universal and the particular in pluralistic ways. It is, moreover, an evolving practice, and one that restates some of the foundational questions that gave rise to it. Clearly, indicated in the introduction, there is currently no formalized or binding margin of appreciation mechanism in international criminal justice. The question is how, by analogy and as a matter of policy, the margin of appreciation might help conceptualize the implementation of pluralism in international criminal justice.

This section begins by comparing the international human rights and international criminal justice environments in an effort to uncover how their similarities and differences might condition the *applicability* of the margin of appreciation. It then suggests that one of the key imports of the margin of appreciation is how it helps us understand a problem of *scope*, namely what is relatively susceptible to it and what is not. Finally, the section looks more concretely at the question of *method* and how the application of the margin in the context of international criminal justice might proceed by drawing on the European model.

#### *Applicability: Some Similarities and Differences*

Before examining the applicability of the margin of appreciation, it will be helpful to highlight some similarities and differences between the operation of international human rights and international criminal law. This will illuminate the potential and limits of the analogy, at least when it comes to its application. Clearly, there is a broad affinity between international human rights and international criminal justice, both of which are sometimes considered as broadly oriented towards the protection of basic human values, despite their different techniques.<sup>173</sup> It has been suggested that the ECtHR and the ICC are two fundamental pillars of an international legal order devoted to simultaneously providing redress to victims of rights violations and punishment for individual offenders of certain crimes.<sup>174</sup> In addition, both international human rights law and international criminal law impose a series of obligations on states: in the former case to guarantee certain rights, in the latter case to repress certain crimes. What the regimes of the ECtHR and the ICC do have partly in common is the fact that both

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173. For example, the leading casebook on human rights includes several chapters that focus on international criminal justice. See HENRY J STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS: TEXT AND MATERIALS* (2008). Note that the reverse is not true, and that international criminal justice textbooks and casebooks typically do not devote significant passages to human rights, although they may hint at the proximity. The reason is probably that international criminal justice is much narrower than human rights and therefore at best a part of the latter.

174. Emmanuel Decaux, *The Place of Human Rights Courts and International Criminal Courts in the International System*, 9 J. OF INT'L CRIM. JUST. 597, 608 (2011).



rely on a somewhat analogous principle of subsidiarity which forms the basis of the margin of appreciation and which suggests an obligation to defer to domestic justice systems. Explaining this as a jurisdictional regime, the ECtHR has noted that:

The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted.<sup>175</sup>

This general point has then been reinforced specifically in the context of Article 6 and criminal justice:

It is not the Court's task to standardise (European legal systems). A State's choice of a particular criminal justice system is in principle outside the scope of the supervision carried out by the Court at European level, provided that the system chosen does not contravene the principles set forth in the Convention. . . . The Contracting States enjoy considerable freedom in the choice of the means calculated to ensure that their judicial systems are in compliance with the requirements of Article 6.<sup>176</sup>

The importance of subsidiarity in the ICC context is perhaps best illustrated by the related principle of complementarity, which similarly gives pride of place to domestic courts, at least for admissibility purposes.<sup>177</sup> Complementarity, it has been argued, is “indicative of the low premium placed on uniformity in international criminal law matters.”<sup>178</sup> It may be argued, in fact, that complementarity is only the tip of an iceberg that includes much broader deference by various international criminal tribunals to domestic courts. Indeed, it has been suggested that even the ad hoc international criminal tribunals which operate nominally under a primacy regime—which gives the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) the ability to ‘preempt’ cases being heard by domestic courts—also embody an element of complementarity.<sup>179</sup> The tendency by international criminal tribunals to defer not only to domestic courts but also to domestic law, by occasionally emphasizing the domestic law of the accused even

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175. *Handyside v. the United Kingdom*, Judgment of 7 Dec. 1976, Series A no.24, p.17, §48.

176. *Taxquet v. Belgium* [GC], no. 926/05, §§83-84, [2010] ECHR 1806.

177. El Zeidy, *supra* note 71, at 870.

178. Shany, *supra* note 132, at 931.

179. Mohamed El Zeidy, *From Primacy to Complementarity and Backwards:(Re)-Visiting Rule 11 Bis of the Ad Hoc Tribunals*, 57 INT'L & COMP. L. Q. 403, 404-06 (2008).

though this is not strictly required, also suggests that subsidiarity and pluralism have a substantive dimension.<sup>180</sup>

Nonetheless, the differences are also quite obvious, and they may complicate the application of the margin of appreciation to international criminal justice. First, there is a fundamental asymmetry between the ways in which international human rights and international criminal law norms operate. International human rights law is traditionally founded on a culture of restraint of the state that expresses itself perhaps most notably in a range of rights available to the accused. Human rights seek to empower individuals against the state, holding the latter back from what it might otherwise be free to do. By contrast international criminal law is part of a culture of punishment and is most associated with an obligation to punish<sup>181</sup> that validates a key state power, albeit for an international good. It is worth noting, for example, that there is considerable controversy as to whether the ICC specifically, as an anti-impunity court, should even have any role in monitoring compliance with due process standards.<sup>182</sup>

Human rights involve a much broader range of claims about conceivably every aspect of social organization. They therefore potentially clash with a wide variety of domestic societal interests, including morality and public order, in ways that require subtle reconciliation. This increases the risk of push back from both the state and society. The question in human rights is often framed as whether, when, why, and how certain limitations should ‘interfere’ with rights.<sup>183</sup> By comparison, the argument in international criminal law might be to punish only the most atrocious behavior, behavior for which it is crucial to maintain a hard line for deterrence purposes. In particular, international crimes cannot be balanced against broader social goals (public morality, health, public order) because they, in effect, violate the morality and public order protected by law, and because they are simply a particularly firm and non-negotiable kind of law.

Second, human rights violations might be deemed to be more indeterminate than international criminal offences. They involve tensions, for example, between the existence of “inherent” rights on the one hand and

180. Harmen van der Wilt, *National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals*, 10 INT'L CRIM. L. REV. 209, 212 (2010).

181. Michael P Scharf, *Aut Dedere Aut Judicare*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2008); Colleen Enache-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L. J. 613(1997); M. CHERIF BASSIOUNI & EDWARD MARTIN WISE, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).

182. On that controversy, which is beyond the scope of this Article, see Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L. F. 255 (2006); Mégret & Samson, *supra* note 27; Nidal Nabil Jurdi, *The Complementarity Regime of the International Criminal Court in Practice: Is It Truly Serving the Purpose? Some Lessons from Libya*, 30 LEIDEN J. OF INT'L L. 199 (2017).

183. See, for example, Symposium, Brett G Scharffs, *Introduction: The Freedom of Religion and Belief Jurisprudence of the European Court of Human Rights: Legal, Moral, Political and Religious Perspectives*, 26 J. OF L. AND RELIGION 249, 258 (2010).

particular rights outcomes, as well as a culture produced by deliberative democracy and the sensitivities of society, on the other hand. As already hinted, this can then raise complex questions about the extent to which one should prioritize rights over democracy, or the individual over the collective, in a context where both have been strenuously justified in regards to human rights.<sup>184</sup> This might then suggest a relatively greater use of the margin of appreciation given the underlying uncertainty over values. In contrast, it would seem that international crimes, while never wholly determinate, are certainly framed in more painstaking details than broader human rights. If nothing else, the legality principle and the related requirement of fair notice mean that international criminal conduct is spelled out more rigorously. This suggests that international criminal law is not and should not be elastic to sovereign or democratic will in the way that human rights conceivably are. Notably, however, there is no suggestion of reducing the protections afforded by the Genocide Convention, for example, on account of some ill-defined ‘public morality’.

Third, the point of jurisdictional arrangements protecting human rights internationally is that they involve engaging the responsibility of the state for violations of said rights<sup>185</sup> and may thus imply a greater degree of deference to sovereign decisions. International human rights bodies, in turn, have a broad supervisory role and perform a function distinct from that of domestic courts. They determine whether a state has violated its international law obligations and typically leave it to that state to remedy any violations.<sup>186</sup> The ECtHR, in particular, is not a “fourth instance” nor an appellate court,<sup>187</sup> but one that operates in relation to states’ obligations under an international treaty. International criminal justice, by contrast, is concerned directly with the criminal responsibility of individuals who are not a priori invested with any sovereignty, and thus not entitled to any particular deference about how they have assessed priorities in a context where what is asked of them, simply put, is that they desist from committing crimes.<sup>188</sup> International criminal tribunals, in turn, although they are clearly not part of the legal order of states, ultimately perform the same function as the domestic courts they supplement.

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184. Frédéric Mégret, *Having It Both Ways: International Human Rights Law Cannot Both Be in Decline and Be (That) Problematic for International Law*, 96 *TEX. L. REV. ONLINE* 114, 142 (2018).

185. On the intersection of principles of state responsibility and human rights, see, for example, Jo Pasqualucci, *The Application of International Principles of State Responsibility by the Inter-American Court of Human Rights*, *LIBER AMICORUM HÉCTOR FIX-ZAMUDIO* 1213 (1998).

186. On the “supervisory jurisdiction” of the ECtHR, see Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol No. 15, Article 1.

187. *Karpenko v. Russia*, no. 5605/04, §80, 13 Mar. 2012, ECHR 436. See also Dean Spielmann, Speech to the British Institute of International and Comparative Law, *The European Court of Human Rights: Master of the Law but Not of the Facts?* (2014).

188. For a similar point, see Shany, *supra* note 132, at 930. (“since courts sitting in criminal cases exercise judicial supervision over individual conduct, considerations of deference which might be appropriate vis-à-vis state conduct might be irrelevant.”).

While there is some truth to these contentions, they can be exaggerated and do not fundamentally compromise the notion that the margin of appreciation might have a role to play in international criminal justice. First, human rights and international criminal justice are less different than they may appear. For better or worse, there has been a significant amalgamation between the two, brought about in part by international human rights bodies themselves, notably the Inter-American Court.<sup>189</sup> In fact, in a stark reversal of the traditional outlook, it has been argued that criminal justice is increasingly one of the human rights movement's preferred modes of intervention.<sup>190</sup> It has also been said that the ICC in particular could gain much by importing concepts from the ECtHR's reasoning.<sup>191</sup>

That fusion, however, remains imperfect. On the one hand, some human rights violations such as torture or extra-judicial executions are significantly graver than other violations and, in certain circumstances, akin to international crimes. As we will see in more detail in the next sub-section, there are also areas of dense overlap between the two, notably in the form of rights to a fair trial. On the other hand, many aspects of international criminal justice have nothing to do with the gravity of the crimes themselves. Instead, they involve complex issues about how to best organize a prosecution that are not in and of themselves crucial to public order, domestic or international, and involve a daily muddling through complex issues of legal policy. Even fair trial rights remain susceptible to local interpretation.<sup>192</sup> This means that the neat distinction between an international criminal justice that is solely core prohibitions and an international human rights justice that is solely flexible standards is highly misleading. The better distinction is made between the aspects of each that are susceptible to the margin of appreciation and those that are not.

Second, the idea that human rights are inherently more indeterminate than international criminal law, and are therefore worthy of a special degree of margin of appreciation, is misleading. Much of international criminal justice is as indeterminate as human rights. This is, if nothing else, because much of international criminal justice, notably international criminal procedure, is itself premised on rights, and must tackle the same open-endedness and indeterminacy that is characteristic in the human rights field. The creation of international criminal tribunals itself has been an ad hoc exercise involving a very strong element of political choice. Even the core interna-

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189. Jean-Paul Saucier Calderón & Frédéric Mégret, ¿“Penalización” de los derechos humanos?: Giros y paradojas en la jurisprudencia de la Corte Interamericana de Derechos Humanos, 1 DERECHO & SOCIEDAD 15, 22 (2016).

190. Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 CORNELL L. REV. 1069 (2014); Françoise Tulkens, *The Paradoxical Relationship between Criminal Law and Human Rights*, 9 J. OF INT'L CRIM. JUST. 577, 582 (2011).

191. William A Schabas, *Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights*, 9 J. OF INT'L CRIM. JUST. 609, 632 (2011).

192. Sluiter, *supra* note 41, at 631.

tional crimes have considerable indeterminacy to them and rely on notions (“racial groups,” “special intent,” “persecution,” and “disproportional attack”) that are highly complex and contentious.<sup>193</sup>

Third, the distinction between international human rights courts exercising a supervisory role focused on state responsibility and international criminal tribunals focusing on actually engaging individual responsibility is either overstated or misleading. Behind many human rights violations lie the actions of state agents whose behavior will be at least indirectly subject to human rights litigation and domestic remedial action. Indeed, international human rights law, most notably the Inter-American system, has contributed greatly to the notion, so central to international criminal justice, that certain individuals ought to be prosecuted under human rights law for grave human rights abuses such as torture.<sup>194</sup>

In contrast, although international criminal justice is on the one hand about prosecuting individuals for international crimes, it is also much more importantly about ensuring that states honor their broad anti-impunity commitments as well as their cooperation obligations.<sup>195</sup> As such, international criminal justice can be understood as occupying its own broad supervisory function. For example, although it is framed merely as an admissibility challenge, a finding that a state is “unwilling or unable” under the Rome Statute comes very close, in terms of subject matter, to the sort of substantive finding that a human rights court might make in a “failure to provide a remedy” case. The ICC is as much about prosecuting international crimes as it is about encouraging states to do the same, under both international criminal law and general human rights obligations.<sup>196</sup>

Over time the broad structure of enforcement of both international human rights bodies and international criminal tribunals has converged significantly. In both cases, international-level jurisdiction is essentially complementary to that of domestic courts. Petitioners before international human rights bodies are required to exhaust domestic remedies before they can present their case internationally. Similarly, the ICC Prosecutor is required to defer to domestic courts unless she can prove that a state has been “unable or unwilling” to prosecute, in ways that lend themselves to the import of the experience of international human rights adjudication.<sup>197</sup> The

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193. For explorations of the contested character of some international offences, see Matthias Schuster, *The Rome Statute and the Crime of Aggression: A Gordian Knot in Search of a Sword*, 14 CRIM. L. F. 1 (2003); Claus Krefß, *The Crime of Genocide under International Law*, 6 INT'L CRIM. L. REV. 461 (2006).

194. Calderón & Mégret, *supra* note 189, at 20.

195. Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, 59 L. & CONTEMP. PROBS. 93, 98 (1996).

196. On that trend in international criminal justice, see Fannie Lafontaine & Sophie Gagné, *Complementarity Revisited: National Prosecutions of International Crimes and the Gaps in International Law*, in *INTERNATIONAL CRIMINAL LAW IN CONTEXT* (Philipp Kastner ed., 2017) 263.

197. On how the unwilling or unable standard is part of a broader genealogy of international human rights protection and how it can learn from it, see Frédéric Mégret, *Qu'est-Ce Qu'une Juridiction Incapable Ou Manquant de Volonté Au Sens de l'article 17 Du Traité de Rome - Quelques Enseignements Tirés Des*

end result is to give pride of place to sovereignty and domestic courts, while providing a significant supervisory, but fundamentally subsidiary, role for international bodies. All in all, there is a strong basis for an analogy between the European human rights system—where the margin of appreciation has a central role—and international criminal justice, where it has thus far occupied no explicit role.

*Scope: What is Susceptible to the Margin of Appreciation and What is Not*

One of the critiques of pluralism, beyond the recognition that some pluralism reflecting the diversity of domestic legal systems is desirable, is that it is relatively difficult to determine where domestic jurisdictions should end and where universal justice should begin. At the heart of the margin of appreciation however is, precisely, an attempt to determine what lies at the core and what lies at the periphery of international legal concerns.<sup>198</sup> At the European human rights level, this has translated into a fairly sophisticated regime to determine which areas are at least susceptible to the margin and which are not. Such a regime can help us think through how the margin of appreciation might be applied in the context of international criminal justice.

To begin, let us highlight what the margin of appreciation does not apply to in the European human rights context. There is no discretion when it comes to which rights states are bound to apply. The often and highly dubious use of reservations does not fall within the purview of margin-of-appreciation reasoning.<sup>199</sup> The equivalent in international criminal justice could be that there cannot be a margin of appreciation regarding which international crimes are indeed criminal. Clearly, states parties to the ECHR are bound by all its provisions, and states parties to the Rome Statute are obliged to prosecute all the core crimes. The margin of appreciation changes nothing to the basic intensity of the *pacta sunt servanda* principle and the notion that states are bound by their international legal commitments.

Nonetheless, it is possible to think of areas that may be more or less susceptible to the margin of appreciation even within a common set of obligations. What the ECtHR has occasionally referred to as “fundamental guarantees”<sup>200</sup> are a good example of rights that are not good candidates for the margin of appreciation. All rights protecting fundamental dignity and

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*Théories Du Déni de Justice En Droit International*, 17 REV. QUEBECOISE DE DROIT INT'L 185 (2004); Sandra Lyngdorf & Harmen van der Wilt, *Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of “Unwillingness” and “Inability” in the Context of the Complementarity Principle*, 9 INT'L CRIM. L. REV. 39 (2009).

198. Donoho, *supra* note 140, at 421.

199. On limitations to the sort of reservations that can be made to human rights treaties, see Catherine J Redgwell, *Reservations to Treaties and Human Rights Committee General Comment No. 24(52)*, 46 INT'L & COMP. L. Q. 390 (1997).

200. *Delcourt v. Belgium*, Judgment of 17 Jan. 1970, Series A no.11, §25.

integrity, for example, may seem as if they should not be susceptible to this sort of weighing.<sup>201</sup> There has been no discussion by the ECtHR or in scholarship, for example, of the margin of appreciation having any relevance in relation to articles 2 (right to life) or 3 (freedom from torture). Key freedoms by contrast may appear to be the most susceptible to restrictions as a result of other priorities, especially since they explicitly incorporate limitations.<sup>202</sup> Articles 5 and 6 on freedom from detention and the right to fair trial fall somewhere in between, although probably more on the side of rights that cannot be limited.<sup>203</sup> Interestingly, certain parts of the right to a fair trial are clearly more prone to discretion than others. So, for example, the ECtHR has found that there is considerable margin of appreciation when it comes to military discipline<sup>204</sup> but much less so when it comes to protecting “judicial authority.”<sup>205</sup>

This approach could inspire ways of thinking about the margin of appreciation in international criminal justice. There has long been a concern that pluralist definitions of international crimes themselves—as the rough analytical equivalent of non-derogable or absolute human rights—run against the very idea of their universality,<sup>206</sup> and therefore defeat the purpose of international criminal justice. Indeed, it is often suggested that tinkering with international definitions has ulterior domestic political motives that are not consonant with the goals of international criminal justice.<sup>207</sup> At least, therefore, one could submit that the very definition of international crimes should not itself be curtailed by allowing particular states to lean towards idiosyncratic definitions.

When it comes to international crimes, absolute agreement cannot be taken for granted, especially the more one descends into the intricacies of interpretation. Consider genocide, for example. There is considerable dissonance between lawyers and historians, but also between legal scholars about

201. Johan Callewaert, *Is there a Margin of Appreciation in the Application of Articles 2, 3 and 4 of the Convention?*, HUM. RTS. L. J. 6 (1998).

202. Specifically, articles 8 (private and family life), 9 (freedom of religion), 10 (freedom of expression), and 11 (freedom of assembly and association).

203. Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation*, 3 U. C. LONDON HUM. RTS. REV. 1, 4 (2010).

204. *Engels and Others v. Netherlands*, Judgment of 8 Jun. 1976, Series A no.22, §72.

205. *Sunday Times v. the United Kingdom*, Judgment of 26 Apr. 1979, Series A no.30, §59.

206. MIREILLE DELMAS-MARTY, ISABELLE FOUCHARD, EMANUELA FRONZA & LAURENT NEYRET, *LA RÉCEPTION DES CRIMES CONTRE L'HUMANITÉ EN FROIT INTERNE* (2013) (pointing out the distortions induced by such implementation).

207. For early concerns with the implementation of the definition of crimes against humanity, see Leila Sadat Wexler, *Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes Against Humanity in France*, 20 L. & SOC. INQUIRY 191 (1995); Leila Sadat Wexler, *Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289 (1994); Vladimir Tochilovsky, *Crimes Against “Humaneness”? The Russian Interpretation of Crimes Against Humanity*, J. OF INT'L CRIM. JUST. For a more recent concern with a domestic definition of genocidal intent, see Tae Hyun Choi & Sangkul Kim, *Nationalized International Criminal Law: Genocidal Intent, Command Responsibility, and an Overview of the South Korean Implementing Legislation of the ICC Statute*, 19 MICH. ST. U. C. OF L. J. OF INT'L L. 589 (2010).

what constitutes genocide both in the abstract and in particular cases (for example, how much of a group needs to have been targeted, what defines an ethnic group, etc.).<sup>208</sup> Moreover, it is conceivable that domestic justice systems might provide better interpretations of international crimes in some instances. What if, for example, a state added protected groups to the definition of genocide? The international definition of genocide is understood to force states to protect at least certain groups, but it is only a baseline and arguably does not prohibit states from extending protections to other groups. Although this might seem to change the nature of genocide, it could also be seen as reinforcing the prohibition. When it comes to war crimes, some authors have argued for a certain deference to national courts' understanding of them. For example, Ruth Wedgwood once suggested that:

The idea of a 'margin of appreciation' in the detailed application of the law of war may be appropriate. The states parties should make clear that policy decisions on employment of force are not war crimes unless they are manifestly unlawful – i.e., a disagreement on the limits of proportionality would not be criminally actionable, even where the Court thinks a state got it wrong, unless the action lies outside the bounds of any conceivable judgment.<sup>209</sup>

Yuval Shany subsequently took up that idea by suggesting the Yugoslavia tribunal had itself implicitly incorporated margin-of-appreciation reasoning when it evaluated allegations of war crimes by NATO troops.<sup>210</sup>

At any rate, one might think that the counterpart to a hard stance on the definition of the core offenses ought to be a much greater opening to the margin of appreciation in virtually every other conceivable area of criminal justice. It is true that NGOs and some scholars,<sup>211</sup> in arguing for the adoption of certain best practices and standards domestically based on the Rome Statute, will often point to developments in the Hague as guiding and urge states to adopt them to clear the complementarity hurdle easily.<sup>212</sup> There is nothing wrong per se about encouraging states to adopt certain international standards. But such nudging, as I have argued elsewhere, is often opportunistic and excessive—essentially adding concerns to the 'implementation package' (e.g., about the need to abolish capital punishment) that

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208. PAYAM AKHAVAN, REDUCING GENOCIDE TO LAW BY PAYAM AKHAVAN (2012) 141–68.

209. Ruth Wedgwood, *The International Criminal Court: An American View*, 10 EUR. J. OF INT'L L. 93, 103 (1999).

210. Shany, *supra* note 132, at 930.

211. Mark Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLOR. J. OF INT'L L. 215, 223 (2002).

212. Ovo Catherine Imoedemhe, *National Implementation of the Rome Statute of the International Criminal Court: Obligations and Challenges for States Parties*, in THE COMPLEMENTARITY REGIME OF THE INTERNATIONAL CRIMINAL COURT: NATIONAL IMPLEMENTATION IN AFRICA (Ovo Catherine Imoedemhe ed., 2017) 63.



have nothing to do strictly speaking with international criminal justice and are not necessarily required by international criminal law.<sup>213</sup>

The better view is that states have considerable latitude in how they implement international criminal law on a range of matters, which has little to say on how they organize their criminal justice systems within certain broad parameters. For example, certain general principles of the criminal law are susceptible to having different meanings depending on the legal tradition of various countries: clearly the principle of legality in regards to criminal offenses will have a different understanding in common law and civil law countries.<sup>214</sup> Similarly, when it comes to the manifold ways in which one can be found individually liable for an international crime (i.e., through different modes of responsibility), it may well be that particular domestic systems have better solutions to international conundrums.<sup>215</sup> An excessively unifying thrust might deplete the rich reservoir of criminal law traditions from which, after all, international criminal law has emerged.<sup>216</sup>

In fact, as Elies Van Sliedregt put it, “while complementarity and universal jurisdiction may prompt national jurisdictions to align to, or even incorporate, the (exact) definitions of international crimes, the general part of criminal law and sentencing is generally regarded as belonging to the domestic domain.”<sup>217</sup> As a rough dividing line this is helpful, and the general sentiment among international lawyers is that, in particular, international criminal procedure, sentencing, and international criminal law in general are either not binding domestically or susceptible to a significant margin. Whatever practices may be developed by international criminal tribunals, in particular, are at best a matter of guidance and a considerable margin of appreciation is available.<sup>218</sup> For example, Volker Nerlich has reminded us that “procedural diversity across jurisdictions is the norm rather than the exception, even in cases with an international dimension” and that:

While domestic laws implementing substantive international criminal law should mirror, to the extent possible, the underlying international norms, it has never been suggested that in the adjudication of such cases, domestic courts should follow a set of common procedural rules. Such an approach would be highly problematic, given that the differences in procedural traditions are often expressions of cultural differences more generally. It

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213. Mégret, *supra* note 27.

214. CHRISTINA PERISTERIDOU, PRINCIPLE OF LEGALITY IN EUROPEAN CRIMINAL LAW (2014).

215. See, for example, Kai Ambos, Joint Criminal Enterprise and Command Responsibility, 5 J. OF INT'L CRIM. JUST. 159, 183 (2007).

216. Frédéric Mégret, *Beyond “Fairness”: Understanding the Determinants of International Criminal Procedure*, UCLA J. OF INT'L L. AND FOREIGN AFF., 1, 6–7 (2009).

217. Van Sliedregt, *supra* note 4, at 849.

218. Jann K Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. OF INT'L CRIM. JUST. 86, 98 (2003).

would be difficult, if not impossible, to find a set of procedural rules that fits all domestic jurisdictions.<sup>219</sup>

Of course, this rough analysis may require refining and may evolve dynamically. For example, in terms of substantive ICL, while the general law of modes of liability may ordinarily be best left to various domestic criminal law traditions, command responsibility may stand apart as a mechanism that has assumed central importance and ought to be reflected in national jurisprudence in its best international form.<sup>220</sup> This applies even where it does not otherwise exist in domestic law and remains inapplicable (possibly justifiably) to other crimes, because command responsibility is central to the purpose of international criminal justice to prosecute the worst offenders. There will be cases where international criminal law should indeed require domestic law to conform to its standards because international law increasingly defines the basic demands of international prosecutions.

Those aspects of international criminal law that most intersect with strong rights protections may seem to raise the most delicate questions for the margin. In this area of overlap, it may not always be clear whether the interest in rigid domestic conformity is one that emanates from international human rights law or international criminal law in a context where the two have become at least partly amalgamated. Fair trial standards—those aspects of criminal procedure that raise human rights issues—are a case in point. Both international and domestic criminal procedures stand to be constrained by human rights. International criminal procedure's strong focus on due process, itself tellingly partly inspired by the ECtHR,<sup>221</sup> suggests that it has achieved an exemplary status, one that is considered by some to have inherent value.<sup>222</sup>

Even there, however, the fact that international criminal procedure embodying fair trial standards has a somewhat authoritative value does not mean that it is not susceptible to the margin of appreciation domestically. To begin with, it is not clear that the international fair standards to which international criminal tribunals are bound by virtue of international human rights law have become so embedded into the core of international criminal law and practice that they, in turn, exert their binding force on states via international criminal law itself. The fact that the ICC's role in monitoring due process rights is highly contested<sup>223</sup> in itself suggests that this is a

219. Volker Nerlich, *Daring Diversity – Why There Is Nothing Wrong with “Fragmentation” in International Criminal Procedures*, 26 LEIDEN J. OF INT'L L. 777, 779 (2013).

220. See, as an example of command responsibility standing out as in need of domestic implementation as a result of ratification of the Rome Statute, Choi & Kim, *supra* note 207.

221. Nicolas Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?*, 11 HUM. RTS. L. REV. 91 (2011).

222. Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14 UCLA J. OF INT'L L. AND FOREIGN AFF. 77, 83 (2009).

223. Kleffner, *supra* note 218.

dubious proposition, except perhaps in the case of the most blatant violations.

More importantly, even if international criminal law incorporates its own binding fair trial standards, what determines whether a trial is fair will continue to be a highly contextual and culture-specific, for which the practice of particular international criminal tribunals, let alone domestic courts, provide relatively little definitive guidance. According to Paul Roberts:

Understandings of the fairness of the trial are embedded in the specificities of a particular procedure. The shape and content of the ‘right to a fair trial’ in criminal proceedings reflect the meaning one ascribes to the concept of a ‘fair’ criminal trial, which in its turn must be infused by a normative moral, political and juridical conception of criminal adjudication. The criminal justice systems of states parties to the ECHR develop local conceptions of trial fairness at considerable length.<sup>224</sup>

For example, systems may legitimately differ as to what the presumption of innocence actually means, how early one is entitled to a lawyer, in what form charges should be communicated, or what it means for a tribunal to be independent and impartial. The ECtHR has certainly resisted systematizing European-wide principles on the law of evidence. It has instead deferred to the reality of national specificities, except in matters that implicate the most serious issues such as the right to be free from torture.<sup>225</sup> Practices that are considered key in adversarial systems, such as cross-examination, cannot have the same status in inquisitorial systems where they are not considered particularly necessary. This has led the ECtHR to develop more all-encompassing meta-standards.<sup>226</sup> In short, what counts as “fair” in one system may not count as such in another, and different systems must be evaluated contextually and holistically.<sup>227</sup> Indeed, many systems have been tempted to borrow aspects from others to compensate for some of their own shortcomings, suggesting that what counts as a fair trial internationally is broadly a work in progress.<sup>228</sup>

When it comes to the aspects of domestic criminal procedure that do not affect human rights, the influence of international criminal justice is bound

224. Roberts, *supra* note 111, at 214.

225. *Al-Khawaja and Tahery v. the United Kingdom*, nos.26766/05 and 2228/06, 15 Dec. 2011, [2011] ECHR 2127.

226. Marianna Biral, *The Right to Examine or Have Examined Witnesses as a Minimum Right for a Fair Trial: Pitfalls and Trends*, 22 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 331 (2014).

227. James Q. Whitman, *Presumption of Innocence or Presumption of Mercy: Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933, 968 (2015).

228. Keith A. Findley, *Adversarial Inquisitions: Rethinking the Search for the Truth I. Exonerating the Innocent: Pretrial Innocence Procedures*, 56 N.Y.L. SCH. L. REV. 911 (2011); Michael Bonniou, *The Presumption of Innocence and the Cour d’assises: Is France Ready for Adversarial Procedure?*, 72 REVUE INTERNATIONALE DE DROIT PENAL 559 (2001).

to remain indirect and influential at best.<sup>229</sup> This includes a range of organizational and evidentiary issues which are relatively neutral in and of themselves from a rights perspective. In effect, this should allow for a broader margin of appreciation—or even a degree of choice operating entirely beyond international scrutiny. This may come as welcome news to many states who will see it as a way of safeguarding national specificities against the joint forays of international human rights law and international criminal justice. In the European human rights system, there are clearly issues involving criminal justice on which the system is neutral, or at least quite willing to defer to the margin of appreciation because it is not easily or immediately discernable what the impact of a given procedure on rights are. The variety of shapes and forms of domestic criminal justice systems suggests a need for the European Convention to grant reasonable leeway to states. As Paul Roberts, again, noted:

It must have been patently obvious to the Strasbourg judges from a very early stage that it would be neither practically feasible nor constitutionally appropriate for them to attempt to pronounce on the Convention-compatibility of every prosaic detail of the criminal trial procedure of each and every state party. Much of this painstaking doctrinal donkeywork must necessarily be left in the hands of national legal experts and courts who are best qualified to undertake it and with whom, in any event, the primary responsibility for ensuring compliance with the ECHR rests.<sup>230</sup>

There is therefore considerable, albeit not unlimited,<sup>231</sup> deference to national and tradition-specific idiosyncrasies, such as the absence of reasoned verdicts in jury trials in the common law.<sup>232</sup> In short, the incidence of the margin of appreciation will vary depending on whether rights considerations are raised or not, but even in the former case there has always been room to adapt in light of local circumstances. This deserves emphasis, given the considerably disruptive effects of tweaking domestic criminal justice procedures for the sole purpose of trying international crimes.

On the more repressive side of the equation, one crucial question is whether the obligation to prosecute is itself one that is susceptible to the margin of appreciation. Whereas due process rights arguably only tangentially implicate international criminal law, the obligation to prosecute is key to international criminal justice. This has been one of the most vexed

229. Sluiter, *supra* note 41, at 634; see also Guido Acquaviva, *New Paths in International Criminal Justice? The Internal Rules of the Cambodian Extraordinary Chambers*, 6 J. INT'L CRIM. JUST. 129 (2008).

230. See Roberts, *supra* note 111, at 214.

231. Margin of appreciation remains of course susceptible to European control, as examined in the next section. In particular, the fact that a particular procedural or substantive approach is well ingrained in a domestic tradition hardly makes it automatically conform with the European Convention. See *Borgers v. Belgium*, App No. 12005/86, Eur. Ct. H.R. (1991).

232. Roberts, *supra* note 111

issues in international criminal law,<sup>233</sup> one that pits those tempted by an absolutist reading of that obligation against those tempted to temper it through attention to domestic variations and exigencies. There is seemingly no end to this debate from a theoretical and policy point of view when it comes to the ICC,<sup>234</sup> but what is interesting is precisely its susceptibility to the margin of appreciation.

At the intersection of human rights and criminal justice, the Inter-American Court has taken the lead of the more repressive camp, adopting a strong stance over the years that amnesties, especially following episodes of mass political violence, frustrate the very essence of the Inter-American Convention's guarantees.<sup>235</sup> Yet even in an area that seems naturally inauspicious to margin-of-appreciation reasoning, commentators have urged the European Court to apply its margin of appreciation<sup>236</sup> and the Inter-American Court to reconsider its traditional skepticism towards it, given how the local circumstances in post-conflict societies impact the rights of victims.<sup>237</sup>

In effect, the ICC prosecutor's own practice, particularly in relation to Colombia,<sup>238</sup> already suggests an attitude that is mindful of local circumstances and willing to defer to reasonable, democratic decisions regarding

233. Notably in the context of amnesty laws and the broader need to 'move on' as part of transitional justice. H. Abigail Moy, *The International Criminal Court's Arrest Warrants and Uganda's Lord's Resistance Army: Renewing the Debate over Amnesty and Complementarity*, 19 HARV. HUM. RTS. J. 267 (2006); KAI AMBOS, *The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC*, in *Building a Future on Peace and Justice* 19 (Springer ed., 2009); MAHNOUSH H ARSANJANI, *The International Criminal Court and National Amnesty Laws*, in 93 PROCEEDINGS OF THE ASIL ANNUAL MEETING 65 (Cambridge Univ. Press 1999).

234. Anja Seibert-Fohr, *The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions*, 7 MAX PLANCK Y.B. U.N. L. ONLINE 553 (2003); Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507 (1999); Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L. L. 481 (2003); Helmut Gropengießer & Jörg Meißner, *Amnesties and the Rome Statute of the International Criminal Court*, 5 INT'L CRIM. L. REV. 267 (2005); Thomas H. Clark, *The Prosecutor of International Criminal Court, Amnesties, and the Interests of Justice: Striking a Delicate Balance*, 4 WASH. U. GLOBAL STUD. L. REV. 389 (2005).

235. Fannie Lafontaine, *No Amnesty or Statute of Limitation for Enforced Disappearances: The Sandoval Case before the Supreme Court of Chile*, 3 J. INT'L CRIM. JUST. 469 (2005); CHRISTINA BINDER, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, in *INTERNATIONAL JUDICIAL LAWMAKING* (Springer ed., 2012); Christine A.E. Bakker, *A Full Stop to Amnesty in Argentina: The Simon Case*, 3 J. INT'L CRIM. JUST. 1106 (2005).

236. Miles Jackson, *Amnesties in Strasbourg*, 38 OXFORD J. LEGAL STUD. 451 (2018).

237. Juana Inés Acosta-López, *The Inter-American Human Rights System and the Colombian Peace: Redefining the Fight Against Impunity*, 110 AM. J. INT'L L. UNBOUND 178, 181–82 (2016); Gustavo Alvira, *Toward a New Amnesty: The Colombian Peace Process and the Inter-American Court of Human Rights Comment*, 22 TUL. J. INT'L & COMP. L. 119, 141 (2013).

238. Fatou Bensouda, ICC Prosecutor, *Statement of the Prosecutor on the Conclusion of the Peace Negotiations Between the Government of Colombia and the Revolutionary Armed Forces of Colombia—People's Army, ICC* (Sept. 1, 2016) (emphasizing the fact that amnesties are excluded in ways that seem to focus on a singular international obligation, the reality is that the Colombian 2016 Final Accord (which as eventually rejected via referendum) included a significant "alternative sentencing" scheme which would, under certain conditions, have allowed those convicted to avoid custodial sentences.); See also Mark Kersten, *Meeting International Standards: Amnesty in the Colombian Peace Deal*, JUSTICE IN CONFLICT (October 14, 2016), <https://justiceinconflict.org/2016/10/14/meeting-international-standards-amnesty-in-the-colombian-peace-deal/> [https://perma.cc/2BEM-2GY8].

amnesty. Many scholars have sought to moderate the international criminal law obligation to prosecute, in the name of human rights, by paying close attention to *which* amnesties might be acceptable, rather than rejecting them all outright.<sup>239</sup> It would be quite remarkable, in those circumstances, if international human rights courts were “more royalist than the King” and insist that all core crimes must be prosecuted to the full extent of the law, regardless of circumstances. Nonetheless, how one argues the extent and degree of the margin of appreciation in any given circumstance is a complex question that requires more attention to particular methodological issues underlying the margin.

*Method: Applying the Margin*

The ECtHR’s margin-of-appreciation reasoning is an interesting paradigm with which to broadly consider ‘departures’ from what might appear to be a common canon in international criminal justice. The question is how one might go about justifying and evaluating such departures, aside from the question of which areas such departures might conceivably apply to. One way of thinking about how the margin of appreciation might operate was mentioned by the European Commission on Human Rights and subsequently endorsed by the ECtHR in relation to situations of emergency. The Commission suggested, in a case involving the United Kingdom and Cyprus, that the margin of appreciation related to whether a measure was strictly proportional to that situation of emergency.<sup>240</sup> Subsequently, the Commission indicated that a certain discretion would be recognized in determining whether a situation of emergency had arisen. As the European Commission put it before the ECtHR in the *Lawless* case:

The concept of the margin of appreciation is that a Government’s discharge of [its] responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government’s appreciation is at least on the margin of [its] powers. . . , then the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government’s appreciation.<sup>241</sup>

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239. Diba Majzub, *Peace or Justice — Amnesties and the International Criminal Court*, 3 MELB. J. INT’L L. 247 (2002); Robin Murphy, *Establishing a Precedent in Uganda: The Legitimacy of National Amnesties under the ICC Notes* (2006) 3 EYES ON THE ICC 33; Kimberly Hanlon, *Peace or Justice: Now That Peace Is Being Negotiated in Uganda, Will the ICC Still Pursue Justice Comment*, 14 TULSA J. COMP. & INT’L L. 295 (2006); Louise Mallinder, *Can Amnesties and International Justice Be Reconciled?*, 1 INT’L J. TRANSIT’L JUST. 208 (2007); Kate Allan, *Prosecution and Peace: A Role for Amnesty before the ICC*, 39 DENV. J. INT’L L. & POL’Y 239 (2010).

240. *Greece v. the United Kingdom*, App No. 176/56, 1958-59 Y.B. Eur. Conv. On H.R. 174,176 (Eur. Comm’n on H.R.).

241. *Lawless v. Ireland*, App. No. 332/57, 1 Eur. Ct. H.R. 15 (1960-61).

The Court, in *Ireland v. United Kingdom*, explicitly confirmed the significance of the margin of appreciation both in declaring a state of emergency and in adopting certain measures under one.<sup>242</sup>

There is no obvious equivalent to a national emergency in international criminal justice. However, one might consider that certain extreme situations, often characteristic of the contexts within which international crimes are committed, could make it difficult for states to honor their anti-impunity commitments and require at least a deferral of proceedings. As is well known, such a debate has long arisen in the international criminal justice context in relation to amnesties and their use, notably as a peacebuilding instrument in times of war.<sup>243</sup> This could be an area that would be a good first contender for margin-of-appreciation reasoning. Certainly, the ICC would be relatively hard-pressed to find an “unable or unwilling” state and therefore an admissible case, for example, in conditions where that state decided to defer prosecutions as a result of an ongoing armed conflict.

Outside national emergencies and questions of amnesty, a more general way of understanding the margin is as a modal obligation that is quite strict on the ends but flexible on the means. In the human rights context, it is largely understood that, when it comes to the implementation of international economic, social, and cultural rights in particular, considerable discretion is involved. Universal human rights bodies will not try to second-guess complex matters of policy unless they fall below a standard where the good faith of the relevant state is at issue.<sup>244</sup> This is true even in more tight-knit regional systems where the ECtHR has indicated that regulation of, for example, the right to education “may vary in time and place according to the needs and resources of the community and of individuals.”<sup>245</sup> Similarly, the Inter-American Court has recognized national resource constraints as a factor in assessing the discharge of economic and social obligations.<sup>246</sup>

242. *Ireland v. the United Kingdom*, App No. 5310/71, Eur. Ct. H.R. (1978).

243. Majzub, *supra* note 239, at 247; Mallinder, *supra* note 239, at 208; Moy, *supra* note 233, at 267; Scharf, *supra* note 234.

244. Economic and Social Council Statement 12/2007/1, ¶ 11 (May 10, 2007) (“In its assessment of whether a State party has taken reasonable steps to the maximum of its available resources to achieve progressively the realization of the provisions of the Covenant, [ . . . ] and in accordance with the practice of judicial and other quasi-judicial human rights treaty bodies, the Committee always respects the margin of appreciation of States to take steps and adopt measures most suited to their specific circumstances.”). It is true that the final version of the Optional Protocol to the ICESCR excluded a reference to the “margin of discretion” as a standard of review and replaced it by a standard of “reasonableness”, but the two remain close and suggest a degree of leeway. *See also* UN COMMISSION ON HUMAN RIGHTS, NOTE VERBALE DATED 5 DECEMBER 1986 FROM THE PERMANENT MISSION OF THE NETHERLANDS TO THE UNITED NATIONS OFFICE AT GENEVA ADDRESSED TO THE CENTRE FOR HUMAN RIGHTS (“LIMBURG PRINCIPLES”) (1987), p.8, §71. (“In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.”).

245. *Belgian Linguistics v. Belgium*, *supra* note 137.

246. *Acevedo-Buendía et al. (“Discharged and Retired Employees of the Office of the Comptroller”) v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 198, ¶ 102,105 (Jul. 6, 2009).

Even for the most central rights concerning physical integrity, there are a range of measures that states *could* adopt, without clearly specifying the full range of measures that *should* be adopted.<sup>247</sup> These measures will inevitably be constrained by imperfect information and the sheer uncertainty of politics, such that it is simply not in the power of international human rights law to prescribe them *ex ante*.<sup>248</sup> Moreover, certain rights may need to be weighed against others, or the rights of some persons against the rights of other persons, creating significant indeterminacy and room for a variety of approaches.<sup>249</sup> Although human rights may be universal on an abstract level, the general idea, as Lord Hoffmann put it, is that:

At the level of application, however, the messy detail of concrete problems, the human rights which these abstractions have generated are national. Their application requires trade-offs and compromises, exercises of judgment which can be made only in the context of a given society and its legal system.<sup>250</sup>

This, then, is what militates for a significantly contextual interpretation of rights, including in the criminal justice realm. As the ECtHR itself put it, after noting the thorough diversity of European criminal justice systems:

The Court's task is to consider whether the method adopted to that end has led in a given case to results which are compatible with the Convention. . . compliance with the requirements of a fair trial must be assessed on the basis of the proceedings as a whole and in the specific context of the legal system concerned.<sup>251</sup>

There is surely some affinity between the open-ended character of human rights implementation and international criminal justice's broad goal of fighting impunity. Historically, international criminal justice has been primarily focused on goals;<sup>252</sup> it has been relatively less punctilious about form and process, except through the already examined lens of fair trial rights. This is reflected in the fact that even the ICC, for example, has arguably not received a mandate under its complementarity regime to check domestic

247. *A, B and C v. Ireland* [GC], 2010–VI Eur. Ct. H.R. 185; *Pretty v. the United Kingdom*, 2002–III Eur. Ct. H.R. 155; *Haas v. Switzerland*, 2011–I Eur. Ct. H.R. 69.

248. Although this has been described as a weakness of international human rights adjudication leading to poor enforcement, it also seems inevitable to a degree. See Jeffrey K. Staton & Alexia Romero, *Rational Remedies: The Role of Opinion Clarity in the Inter-American Human Rights System*, 63 INT'L STUD. Q. 477 (2019).

249. PIETER VAN DIJK ET AL., *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 85 (Martinus Nijhoff ed. 1998).

250. Lord Hoffmann, *Universality of Human Rights*, Lecture at Judicial Studies Board (Mar. 19, 2009).

251. *Taxquet v. Belgium* [GC], 2010–VI Eur. Ct. H.R. 105.

252. For an example of such framing, see Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward Accountability for International Crime and Serious Violations of Fundamental Human Rights*, 59 LAW & CONTEMP. PROBS. 93 (1996).



prosecutions for compatibility for fair trial standards.<sup>253</sup> Most international criminal law treaties emphasize the need to repress crimes, and do not particularly specify how this should be done, further suggesting that implementation of that obligation may vary depending on time and place.<sup>254</sup>

As has been pointed out:

Although it is clear that States have the duty to investigate and prosecute these (international) crimes, international law does not—and cannot—provide bright line rules about how this obligation must be discharged. States have a margin of appreciation to adopt the measures that, in their particular situation, better satisfy the international obligation.<sup>255</sup>

At the same time, one might argue that international criminal law, particularly under the influence of human rights, is not entirely indifferent to the means used in prosecuting those suspected of international crimes. Below a certain standard, international criminal law stands to intervene because of fears that the goals of international criminal justice will be frustrated. For example, there is a difference between interpreting fair trial standards in local ways, and not respecting any fair trial standards.<sup>256</sup> This pattern of simultaneously deferring to states whilst exercising some residual control is characteristic of margin-of-appreciation reasoning at the ECtHR.

Looking more closely at the actual practice of the ECtHR, it is in the context of limitations reasoning that margin-of-appreciation reasoning has most matured.<sup>257</sup> Limitations are also a key feature of the Inter-American system,<sup>258</sup> and an entry point for judicial practices that come close to the margin of appreciation. An analysis of when and how states can limit certain rights can provide a rough map of how similar reasoning might operate in the context of international criminal justice. Again, one must ascertain whether it makes sense to even speak in terms of ‘limitations’ when it comes to international criminal justice. It is somewhat contradictory to suggest that states conducting international crime trials on their own national terms should strictly ‘limit’ their obligations under international criminal

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253. Mégret & Samson, *supra* note 27.

254. This is true of even some of the international treaties that are otherwise thought of as most binding. *See, e.g.*, the case of drug offences, Krzysztof Krajewski, *How Flexible Are the United Nations Drug Conventions?*, 10 INT'L J. DRUG POL'Y 329, 331 (1999); Chloé Carpentier, Kamran Niaz & Justice Tettey, *The International Drug Conventions Continue to Provide a Flexible Framework to Address the Drug Problem*, 113 ADDICTION 1228 (2018).

255. Mariano Gaitan, *Prosecutorial Discretion in the Investigation and Prosecution of Massive Human Rights Violations: Lessons from the Argentine Experience* *Academy on Human Rights and Humanitarian Law: Articles and Essays on Transitional Justice, International Human Rights, and Humanitarian Law*, 32 AM. U. INT'L L. REV. 539, 566 (2016).

256. Mégret & Samson, *supra* note 27.

257. YUTAKA ARAI-TAKAHASHI & YUTAKA ARAI, *THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR* 9–11 (1st ed. 2002).

258. Organization of American States, *American Convention on Human Rights*, art. 30, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

law. But the margin of appreciation does provide a basic blueprint to imagine how far a state might depart from an otherwise strongly held norm. It can be understood as a series of techniques to manage the tension between universalism and pluralism.

In that respect, even fair trial rights, for example, need to be weighed against various domestic priorities and circumstances. Although the Court does not speak of limitations to Article 6, it has tended to give significant weight to the issue of the “public interest” in relation to admissibility of evidence, for example.<sup>259</sup> The ECtHR has also found that the margin of appreciation applies to limitations to the right to access a court,<sup>260</sup> and has left no doubt that it either applies to the interpretation of other rights or that such rights need to be understood in context.<sup>261</sup> In fact, limitations are inherent to certain Article 6 rights,<sup>262</sup> such as the right to have a counsel of one’s choosing even when one is indigent,<sup>263</sup> the right to be free on bail,<sup>264</sup> or the right to have time to prepare one’s defense.<sup>265</sup> It is even more clear that states can and have historically limited victims’ rights, if nothing else, in order to protect those of the accused.

When it comes to limitations, The ECtHR has insisted it is not its function “to elaborate a general theory of . . . limitations” but, “seized of case,” to “pronounce itself only on the point whether or not” the convention was violated.<sup>266</sup> Having said that, the Court has devised a well-known three-prong test that must be applied on a case by case basis. The test is that any interference with a right must be “prescribed by law”; pursue one of the aims enumerated by the relevant limitation clause; and most importantly “be considered necessary in a democratic society.”<sup>267</sup> Again, although it is not anticipated that the margin would work in exactly the same way in international criminal justice, its operation in the European context provides some interesting pointers for further reflection.

‘Prescribed by law’ has been understood by the ECtHR as meaning prescribed “by *the* law” rather than “by *a* law.”<sup>268</sup> This includes judge-made law, in an implicit nod to the common law. The emphasis from a human rights point of view is on the such laws being available to the public. In international criminal law, the legality principle is of supreme importance

259. See Ashworth, *supra* note 110, at 152.

260. Arai-Takahashi & Arai, *supra* note 257, at 57.

261. STEPHANOS STAVROS, THE GUARANTEES FOR ACCUSED PERSONS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: AN ANALYSIS OF THE APPLICATION OF THE CONVENTION AND A COMPARISON WITH OTHER INSTRUMENTS 354 (Brill Nijhoff ed. 1993).

262. David Harris, *The Right to a Fair Trial in Criminal Proceedings as a Human Right*, 16 INT’L & COMP. L.Q. 352, 368–378 (1967).

263. *Erdem v. Germany*, App. No. 38321/97, Eur. Ct. H.R. (1999).

264. *I.A. v. France*, App. No. 28213/95, Eur. Ct. H.R. (1988) (finding a violation, but acknowledging the state’s right to deny bail).

265. *Albert & Le Compte v. Belgium*, App. No. 7299/75; 7496/76, 5 Eur. H.R. Rep. 533 (1983).

266. *Golder v. the United Kingdom*, App. No. 4451/70, 1 Eur. H.R. Rep. 524 (1979-1980).

267. *Sunday Times v. the United Kingdom*, App. No. 6538/74, 2 Eur. H.R. Rep. 245 (1979).

268. *Id.*, at 24.

both domestically and internationally.<sup>269</sup> This would presumably be a relatively easy test to meet, as most domestic criminal law, whether substantive or procedural, is prescribed by law, albeit possibly of judicial origin. It would, however, hypothetically exclude limitations to states' duties under international criminal law that were stipulated by executive fiat.

The idea that limitations must pursue a legitimate aim such as "national security or public safety, . . . the prevention of disorder or crime, . . . the protection of health or morals[, or] the protection of the rights and freedoms of others"<sup>270</sup> may also help justify certain departures from a hypothetical unitary norm of the ideal prosecution of international crimes. The focus on "national security or public safety" or "the prevention of disorder" would seem to have a role to play in the context of a pluralistic understanding of international criminal justice. For example, local compromises leading to more unusual transitional justice formulas might be considered to fall within the margin of appreciation if a convincing case can be made that they are indeed reached as part of complex peace negotiations.<sup>271</sup> For example, the Truth and Reconciliation Commission was justified by the South African Supreme Court as a historical compromise, necessary to avoid hostilities and encourage a peaceful transition.<sup>272</sup> The Rome Statute's stipulation that the Prosecutor may decide to abandon investigations if they are not "in the interests of justice"<sup>273</sup> suggests that a weighing of priorities is even inherent to the decision to prosecute.

The idea that limitations must be "necessary in a democratic society"<sup>274</sup> has led to the adoption of relatively high standards for their evaluation. Limitations must be in response to a "pressing social need" and the specific measures adopted must be proportional to that goal. Many facets of states' criminal justice policy, in that context, will satisfy the necessity and proportionality tests in that they express significant cultural specificities. If human rights are involved, limitations—as opposed to merely culturally-specific and contextual understandings of certain rights—may be more problematic, though not inconceivable. More dramatic departures, particu-

269. Beth van Schaack, Professor at Santa Clara Law School, *The Principle of Legality in International Criminal Law*, Remarks at Panel in Proceeding of the ASIL Annual Meeting (2009).

270. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, art. 8–11, Nov. 4, 1950, E.T.S 5; Organization of American States, *American Convention on Human Rights*, art. 13, 15, 16, 22, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 12.; U.N. General Assembly, *Universal Declaration of Human Rights*, art. 29.2, Dec. 10, 1948; Organization of African Unity, *African Charter on Human and Peoples' Rights*, art. 27.2, Jun. 27, 1981 (These treaties have more general limitation clauses which can be understood as theoretically applying to all rights.).

271. John Dugard, *Dealing with Crimes of a Past Regime: Is Amnesty Still an Option? Hague International Tribunals: International Criminal Court*, 12 LEIDEN J. OF INT'L L. 1001 (1999).

272. *Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others* 1996 (4) SA 672 (CC), 21–22.

273. Rome Statute of the International Criminal Court, article 53.

274. For a broad discussion, see Susan Marks, *The European Convention on Human Rights and its Democratic Society*, 66 BRITISH Y.B. OF INT'L L. 209 (1996).

larly from the obligation to punish international crimes, would seem quite suited to “necessity” analysis. For example, while it has been argued that prosecutorial discretion ought to be seen as a necessary component of any transitional justice strategy,<sup>275</sup> amnesty laws (notably blanket amnesties) are not likely to be found as “necessary” in that specific sense.

Indeed, the standard referent of a “democratic society” is a relevant one that should not be inimical to the ethos of international criminal justice, which is premised on notions of accountability by rulers and responsiveness to the needs of societies in transition.<sup>276</sup> Some of the challenges faced by international criminal justice seem to be susceptible to analysis precisely under the “necessary in a democratic society” framework, notably the entire question of amnesties.<sup>277</sup> Hence, there has long been significantly more understanding for amnesties which have democratic legitimacy, such as in the case of the Uruguayan referendum.<sup>278</sup> The Inter-American Court’s stance on that particular law has since hardened, but it has been criticized precisely as lacking nuance in its treatment of democratic legitimacy and domestic variation.<sup>279</sup> When the South African Constitutional Court was confronted with a challenge to the constitutionality of the Truth and Reconciliation Commission, it essentially invoked the democratic legitimacy of the choice to create the Commission to justify what might be understood as limitation to victims’ right to justice.<sup>280</sup> Democratic considerations should feature prominently in the justification of any departure from a norm of international criminal law.

This still leaves open, however, the question of how one assesses what falls within the minimum common denominator of strong supranational control and what falls within the margin of appreciation, especially when it comes to highly politically-loaded issues. It is here that the European Court

275. Mariano Gaitan, *Prosecutorial Discretion in the Investigation and Prosecution of Massive Human Rights Violations: Lessons from the Argentine Experience* *Academy on Human Rights and Humanitarian Law*, 32 AM. U. INT’L L. REV. 539, 556 (2016).

276. Aaron Fichtelberg, *Democratic Legitimacy and the International Criminal Court A Liberal Defence*, 4 J. OF INT’L CRIM. JUST. 765 (2006); Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. OF INT’L L. 43 (2012).

277. Symposium, Michael P Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, THE INTERNATIONAL CRIMINAL COURT: CONSENSUS AND DEBATE ON THE INTERNATIONAL ADJUDICATION OF GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES, AND AGGRESSION, 32 CORNELL INT’L L. J. 507, 526 (1999) (although Scharf does not use European human rights jargon, he repeatedly emphasizes that amnesties may be a “necessary bargaining chip in negotiations for the peaceful transfer of political power”).

278. Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 L. AND CONTEMP. PROBS. 197, 211 (1996).

279. Roberto Gargarella, *Democracy and Rights in Gelman v. Uruguay*, 109 AM. J. OF INT’L L. UNBOUND 115 (2015).

280. Azanian Peoples Organisation (AZAPO) and Others v. President of the Republic of South Africa and Others, *supra* note 272, at para. 24 (highlighting that the South African amnesty process “it is not a question of the governmental agents responsible for the violations indemnifying themselves, but rather, one of a constitutional compact being entered into by all sides, with former victims being well-represented, as part of an ongoing process to develop constitutional democracy and prevent a repetition of the abuses”).

has historically provided a range of tools that have passed the test of time, proved their adaptability, and have the merit of being administered transparently and in ways that open them up to significant external and internal criticism.

The first, and perhaps most controversial but also most useful, stratagem to determine how to reconcile international supervision with domestic margin of appreciation involves an evaluation of how isolated or representative a departure is from the norm in question. The more widely shared an understanding of a human right, the more likely it is to be found to limit the margin of appreciation, and vice versa.<sup>281</sup> Here there is an inevitable but complex communitarian element to the margin of appreciation where the community (here, member states of the Council of Europe) serve as the referent. On some issues the consensus will inevitably appear very strong. For example, all states will agree that pulling nails out to extract information is a form of torture. The existence of a “European consensus” on a given issue conflicts with those states that do not subscribe to it. Thus, the European system is not just a communitarian but also a very rough majoritarian one.<sup>282</sup>

Similarly, certain areas of international criminal justice, beyond simply the definitions of international offenses, may have firmed up across different jurisdictions such that departures from them will be considered violations of an international criminal justice requirement, either substantive or procedural. As Sasha Greenawalt put it, unitary rules that are very good candidates for downward imposition will “work. . . best in cases where the normative pull of ICL’s chosen approach is strong, and there is sufficient state consensus on the issue that ICL may commit itself to a single position without excessive controversy or damage to its perceived legitimacy.”<sup>283</sup> Over time, certain areas, especially those that relate to the definitions of offenses or the fairness of the trial, may become part of such an ‘acquis’ of international criminal justice. A fortiori, the very decision to prosecute grave international crimes would seem to have gradually fallen outside states’ discretion, given the opposition to amnesties. It may be that other areas will join the core of international criminal justice by accretion, as the practice of international criminal justice itself creates expectations about essential norms.

For the most part, however, both the implementation of international human rights law and international criminal law (and therefore their areas of overlap) is likely to highlight major differences between countries and consequently justify a greater margin of appreciation. The very reason for

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281. KANSTANTIN DZEHTSIAROU, *EUROPEAN CONSENSUS AND THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2015) 136–37.

282. Alec Stone Sweet & Thomas L Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J. OF L. AND CTS. 61, 81 (2013).

283. Greenawalt, *supra* note 4, at 1110.

having a margin of appreciation (i.e., a general commitment to pluralism) will influence its extensive range (i.e., actual pluralism on a given issue). As the ECtHR put it in the famous *Handyside* case, to better justify limitations of freedom of expression based on the particular circumstances of a given country:

It is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject.<sup>284</sup>

In other words, it is the very divergence of states on the issue that suggests the undesirability of asserting a one-size-fits-all model. In human rights, this is particularly evident in relation to considerations of public morality, where approaches vary considerably from one country to the next. This reflects the fact that international human rights law may be “in transition” on a range of issues as reflected in the European context by the notion that the Convention is a “living instrument.”<sup>285</sup> Supplementing the reference to morality with the idea of legal tradition, international criminal justice is precisely one of those areas where, by analogy with the ECtHR’s reasoning, one might argue that it is not possible to find in the domestic law of the various states parties a uniform, international conception of criminal justice. As has already been indicated, the world’s criminal justice systems remain, both substantively and procedurally, often far apart, even in regards to the commitment to human rights and international criminal law. Thus, this suggests a generous practice of the margin of appreciation.

A good illustration would be the role of victims in the criminal trial process. As is well known, the inquisitorial system grants fairly wide participation rights to victims as *parties civiles*; the common law, by contrast, traditionally did not allow victims to appear in court except, for example, in the context of victim impact statements. Therefore, this is an area where the legal traditions of various countries differ quite significantly and, for good reasons, are connected to their general economy—direct victim participation in a common law trial would rupture the equality of arms that is crucial to adversarial systems, a concern that is much attenuated in inquisitorial systems).<sup>286</sup> It would be very difficult to claim that one position is

284. *Handyside v. the United Kingdom*, *supra* note 175.

285. George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in *CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT* (Geir Ulfstein, Andreas Føllesdal & Birgit Peters eds., 2013) 106.

286. William Pizzi, *Victims’ Rights: Rethinking Our Adversary System*, *UTAH L. REV.* 349 (1999); Jonathan Doak, *Victims’ Rights in Criminal Trials: Prospects for Participation*, 32 *J. OF L. AND SOC’Y* 294, 297 (2005); William Pizzi & Walter Perron, *Crime Victims in German Courtrooms: A Comparative Perspective on American Problems*, 32 *STAN. J. INT’L L.* 37 (1996).

more aligned with the goals of international criminal justice and human rights and to argue that this justified the less optimal position aligning itself with the superior one.

In this context, the ICC itself has come up with an intermediary position in which victims are represented and can have their voice heard, albeit not much more.<sup>287</sup> A similar solution exists before the Extraordinary Chambers in Cambodia.<sup>288</sup> There is occasional support for domestic courts emulating ICC arrangements and it has been argued that, following the Court's example, states should "provide for victim participation, protection, and access to information and to claim reparations", or risk falling afoul of the Court's complementarity regime.<sup>289</sup> The better view, however, seems to be that "States would have discretion in how to implement provisions for victims within their own legal systems and would not have to follow the scheme under the Rome Statute."<sup>290</sup>

It is doubtful that international criminal justice's own *sui generis*, idiosyncratic, and somewhat tepid response (stronger than some states, but weaker than others) emerges with enough force to trump any given legal tradition. The international criminal response is a *via media* between some of the main criminal justice traditions of the world, yet one which does not markedly prejudice how these traditions should go about dealing with the issue. This could conceivably change if significantly more legal systems, perhaps in part as a result of international criminal justice initiatives, were to orient themselves in a similar direction of enhancing victim participation<sup>291</sup> and particularly if they made it clear that they did so as a recognition that such an outcome is mandated by international human rights law. Such universal consensus does not, however, seem to have materialized at present, and the participation of victims seems to be largely dependent on the specificities of each legal system.<sup>292</sup> This supports a significant margin of appreciation, despite being an area that is sensitive for human rights and criminal justice.

It should be noted, however, that this communitarian strand of the margin of appreciation has increasingly been put in question in the last decade within the European human rights system itself.<sup>293</sup> The search for a "European consensus" has been attacked by both those who see it as insufficiently deferring to states and those who contend that it concedes too much to its

287. LUKE MOFFETT, *JUSTICE FOR VICTIMS BEFORE THE INTERNATIONAL CRIMINAL COURT* (2014) 128.

288. Andrew Diamond, *Victims Once Again: Civil Party Participation before the Extraordinary Chambers in the Courts of Cambodia*, 38 RUTGERS L. REC. 34–48 (2010)

289. Luke Moffett, *Elaborating Justice for Victims at the International Criminal Court: Beyond Rhetoric and The Hague*, 13 J. OF INT'L CRIM. JUST. 281, 303 (2015).

290. *Id.*, at 300.

291. Doak, *supra* note 286, at 302.

292. Pizzi & Perron, *supra* note 286.

293. GEORGE LETSAS, *A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2007) 75–79; Benvenisti, *supra* note 141, at 852–853.

states parties.<sup>294</sup> The normative basis for deferring to majoritarian developments, or to strong attachments to certain domestic features of rights and criminal justice, remains forever contested and would be even more so in the context of international criminal justice. This is really a pluralism test-case for the degree to which international bodies ultimately cede ground to strongly held national specificities or, on the contrary, impose an international consensus to states that are considered outside the majority consensus. International criminal justice has witnessed, and will continue to witness, a similar sort of resistance from a variety of constituencies concerned that it is broadly hegemonic in its efforts to promote a single model<sup>295</sup> and occasionally at risk of exceeding the boundaries of its review of domestic criminal justice efforts.<sup>296</sup>

It has been argued that the European Court of Human Rights has, since the early 2000s, taken a “procedural turn” in evaluating whether to allow a state’s use of the margin.<sup>297</sup> Rather than assessing states’ policies from a comparative perspective to see whether there is a European-wide consensus, the Court has turned to looking, essentially, at the quality of the decision-making that led to the impugned measure, both legislative and judicial.<sup>298</sup> The main thrust of the cases adopting that approach is that the Court will review the seriousness with which the measure was adopted, including the extent to which rights concerns were raised and efforts were made to reasonably limit any negative incidence on rights. Of particular significance in that context will be scrutiny of parliamentary debates, including the degree to which public consultations were held and whether there was broad and cross-party consensus.<sup>299</sup> This, then, further reinforces the emphasis on democracy, making it not only the standard by which to adopt limitations but, in a sense, the yardstick by which to measure the margin itself.

This evaluation extends to domestic courts’ efforts at redressing human rights violations. Hence, the ECtHR assesses the degree to which such courts have taken into account European human rights law and jurisprudence, even in the process of asserting domestic specificities.<sup>300</sup> To the extent that they have not, domestic courts can be suspected of merely having

294. Daniel Regan, *European Consensus: A Worthy Endeavour for the European Court of Human Rights*, 14 TRINITY C. L. REV. 51, 60–62 (2011).

295. KAMARI MAXINE CLARKE, *FICCTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGES OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA* (2009).

296. Mégret and Samson, *supra* note 27.

297. JANNEKE GERARDS & EVA BREMS, *PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES* (2017) 2; Oddný Mjöll Arnardóttir, *The “Procedural Turn” under the European Convention on Human Rights and Presumptions of Convention Compliance*, 15 INT’L J. OF CONST. L. 9, 15 (2017).

298. Oddný Mjöll Arnardóttir, *Organised Retreat? The Move from “Substantive” to “Procedural” Review in the ECtHR’s Case Law on the Margin of Appreciation*, SOCIAL SCIENCE RESEARCH NETWORK SCHOLARLY PAPER, 6 (2015); Popelier & Van De Heyning, *supra* note 56, at 10.

299. Popelier & Van De Heyning, *supra* note 56, at 10.

300. *See, for example, von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, §§ 114–115 and 125, (2012), ECHR 228; *von Hannover v. Germany* (no. 3), no. 8772/10, § 47, (2013) ECHR 835.



engaged in a form of parochialism that the European human rights system will be wary of. To the extent that they have, domestic courts at least stand a better chance of being seen to have strenuously sought to reconcile the European imperative with domestic specificities.<sup>301</sup> In addition, although it broadly defers to their factual conclusions, the Court has increasingly sought to evaluate the quality of the human rights fact-finding engaged in by domestic courts.<sup>302</sup>

Although its exact place in the jurisprudence of the ECtHR remains contested,<sup>303</sup> this procedural approach has been defended as emphasizing the importance of procedure to victims of rights violations<sup>304</sup> and as a useful complement to the European consensus approach, justifying departures from it by particular states on account of the quality of their compatibility with the European Convention.<sup>305</sup> Thus, subsidiarity is arguably increasingly moving towards an understanding where it combines some dimensions of the majoritarian substantive emphasis of the European consensus and the deliberative procedural attention to parliamentary and judicial processes.<sup>306</sup> In that respect, it also signals a better reconciliation of conceptions of individual rights with ideals of collective self-determination.

The lessons for international criminal justice's own sense of pluralism are instructive. One possible scenario is that international criminal justice more broadly will adopt a similar understanding of subsidiarity as the ECtHR has over time, moving from a substantive to a primarily procedural vision of how domestic courts should function. Here, the central idea would be that international criminal justice should defer to domestic criminal justice processes that reflect a good-faith, extensive, and methodical consideration of the demands made upon them by international law. Of course, this does not exactly tackle the question of what these demands are, but it does frame the relationship of international criminal justice to domestic criminal justice under a much more procedural and less substantive angle.

The consequences are potentially significant. Whereas a more communitarian standard of review of the performance of domestic criminal justice systems would look at where states substantively fit in relation to other states, a procedural standard would review the domestic processes by which

301. Paul McDermott & Mark Murphy, *No Revolution: The Impact of the ECHR Act 2003 on Irish Criminal Law*, 30 DUBLIN U. L. J. 1, 3 (2008) (“... if faced with a reasoned decision of a domestic court that has taken Convention jurisprudence into account, the European Court may be less inclined to overturn that decision as incompatible with the Convention”).

302. *El-Masri v. The Former Yugoslav Republic of Macedonia* [GC], no.39630/09, §155, (2010) ECHR 2067.

303. Matthew Saul, *Structuring Evaluations of Parliamentary Processes by the European Court of Human Rights*, 20 INT'L J. OF HUM. RTS. 1077, 1089 (2016).

304. Eva Brems & Laurens Lavrysen, *Procedural Justice in Human Rights Adjudication: The European Court of Human Rights*, 35 HUM. RTS. Q. 176 (2013).

305. Thomas Kleinlein, *Consensus and Contestability: The ECtHR and the Combined Potential of European Consensus and Procedural Rationality Control*, 28 EUR. J. OF INT'L L. 871, 891 (2017).

306. *Id.*, at 889.

the result was arrived at. This could help problematize certain aspects of local responses to international crimes, including in their most idiosyncratic form, but also potentially validate them. The nature of the domestic legal system or legal tradition involved, for example, might be deferred to because it has been legitimized through arduous democratic deliberation domestically, rather than for the sake of deferral alone.

This would help addressing perennially vexing issues, such as whether truth and reconciliation commissions like South African commission would pass the complementarity test of the ICC today. A substantive approach, while inevitably complex and contradictory, would probably find that seeking “truth and reconciliation” through amnesty fails to abide by a state’s obligation to prosecute. A procedural approach by contrast, would at least take seriously the South African legislature and polity’s attempts to grapple with the complex demands made in such a moment of transition. It would look not at whether South Africa departed from an absolute standard, but whether it engaged in a good faith and diligent attempt to reconcile international standards with domestic demands. The same would apply to recourse and other traditional justice mechanisms,<sup>307</sup> or indeed any range of domestic criminal justice initiatives, which might be conceived to depart from the international canon, but which could be rescued by virtue of precisely having taken that canon seriously and justified a departure from it.

#### CONCLUSION

This Article has sought to contribute to our understanding of the potential application of pluralism in international criminal justice through an analysis of the margin of appreciation, particularly as it has emerged in the European human rights context. Although the margin of appreciation is not the only way to think of the operation of pluralism and human rights, it has attracted considerable support and seems broadly emblematic of a shift towards pluralism in international law. One of the main consequences of mainstreaming margin-of-appreciation reasoning throughout different areas of international criminal justice may be a more charitable and generous understanding of domestic idiosyncrasies in the pursuit of international criminal justice that is inspired by the analogous pluralism in human rights law.

There is a functional dimension to the margin of appreciation. If what one wants is to maximize the repression of international crimes, the more demanding we are of domestic justice systems in terms of conforming to a

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307. See PAUL CHRISTOPH BORNKAMM, RWANDA’S GACACA COURTS: BETWEEN RETRIBUTION AND REPARATION (2012) 36; Timothy Longman, *Justice at the Grassroots? Gacaca Trials in Rwanda*, in TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006) 209. See also Tim Allen, *The International Criminal Court and the Invention of Traditional Justice in Northern Uganda*, 107 POLITIQUE AFRICAINE 147, 149 (2007).

universal canon, the more we are likely to be disappointed in their performance. In demanding too universal a practice of criminal justice, we may set up domestic prosecutions for failure, or at least endless frustration, which may affect the struggle against impunity by provoking backlashes from states and populations. Ultimately, requiring every international crime prosecution to conform to a rigid international standard is simply not a possibility. This is surely one of the lessons of the European human rights system, a system that has prospered largely because it has recognized that its ability to control states' performance is based on a degree of strategic judicial self-restraint when it comes to national politics and traditions.

However, this pluralism also has a more principled dimension. Deferring to domestic criminal justice systems is not simply a concession to a political reality, it is a recognition that domestic systems are often well-situated to deal with the consequences of crime on their own terms. At the same time, their irreducible views about justice are part of a rich global heritage that needs preserving. The disruption of imposing a single global model may outweigh its benefits. International criminal justice stands to gain from the decentralization of its modes of intervention. In exchange for this basic recognition of plurality, international criminal justice may be reimagined as the arbiter of various domestic modalities of criminal justice and their ability to comply with an evolving yet imperfect and itself plural international ideal.

The margin of appreciation can be a key tool of this process, one standing at the intersection of domestic and international demands, decentralization and centralization, and particularism and universalism. The spirit of jurisdictional complementarity in the context of the ICC ought to be understood as a part of a more thorough complementarity between international and domestic legal orders, as well as substantive and procedural, forms of criminal justice. Complementarity should not, in other words, be merely the specific name given to the ICC's admissibility threshold but a way of conceptualizing international criminal law as significantly deferring to domestic criminal law, while ultimately controlling for excessive departures from the norm. The margin of appreciation can be seen as providing at least a metaphor for the development and refinement of complementarity within this variety of contexts.

The implications of this global understanding of complementarity are numerous. Faced with cases where domestic criminal justice may depart, even significantly, from what would be the practice at the ICC, the Court should resist temptation to find them unwilling or unable merely on such grounds.<sup>308</sup> When it comes to implementing international criminal law domestically, non-government organizations advising governments should be

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308. For an argument along those lines, see Kevin Jon Heller, *Radical Complementarity*, 14 J. OF INT'L CRIM. JUST. 637, 664 (2016). See also Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L. J. 85, 114 (2012).

mindful of domestic specificities and not use such implementation as a Trojan horse for domestic law reform, importing ideals that are not mandated by international criminal justice.<sup>309</sup> The international community should feel emboldened to create hybrid tribunals that represent a complex mix of core international criminal law principles and domestic adaptations and further enrich the diversity of models available to societies in transition.<sup>310</sup> In short, reasonable departures from what might be seen as international best practice should be welcomed, nurtured, and discussed, not immediately dismissed as incompatible with international criminal justice.

Although I have deliberately set aside the question of pluralism between international tribunals (horizontal pluralism), I would like to briefly reconnect to it here. The significant differences between regional human rights courts, or between regional human rights courts and domestic courts, serve as a warning against a conclusion that either has found the 'best' answer to the human rights riddle to be imposed universally.<sup>311</sup> In that respect, the argument for pluralism needs to be read in light of international criminal justice's own very uncertain success in forging a holistic and comprehensive jurisprudence, both procedural and substantive. The existence of instability in the internal practices of international tribunals, or of a strong horizontal pluralism between them, suggests that international criminal law is not on particularly strong grounds to impose a consensus view on domestic judiciaries. If the ICTY constantly changes its procedures or the ICC seems at a loss about how to best protect fair trial rights, for example, they will find it harder to impose a unitary conception of either international human rights or international criminal law on states.<sup>312</sup> The instability of international criminal justice is endemic and should be seen as part of a productive process of adaptation rather than a flaw to be corrected. In that respect, They caution against imposing a single blueprint, given how hard the tribunals themselves have found the task of producing one.

It is also worth noting that international criminal tribunals have no monopoly on international justice and may even require domestic justice systems to serve as reservoirs of embedded ideas and practice, as well as occasionally better guarantors of justice.<sup>313</sup> In contrast, the stabilization and harmonization of supranational bodies' approach to certain matters<sup>314</sup> may gradually make it easier to argue that a certain issue no longer falls within

309. Mégret, *Too Much of a Good Thing?*, *supra* note 27, at 6, 12.

310. Mégret, *In Defense of Hybridity*, *supra* note 27, at 746.

311. Antony Barone Kolenc, *Putting Faith in Europe: Should the U.S. Supreme Court Learn from the European Court of Human Rights*, 45 GA. J. OF INT'L AND COMP. L. 1, 24 (2016).

312. See Vasiliev & Van Sliedregt, *Pluralism*, *supra* note 4, at 109 ("the main lesson the states may learn from the tribunals' own effort to ameliorate procedure is that international procedural models are not failproof blueprints from which ready-made solutions can be drawn").

313. Zahar, *supra* note 19.

314. The aspiration to produce such a universal approach, of course, remains quite alive. Elijah Oluwatoyin Okebukola, *A Universal Procedural Framework for War Crimes Tribunals*, 14 INT'L COMMUNITY L. REV. 85 (2012).

the margin of appreciation. The movement may potentially work in circular fashion: the more the ECtHR holds states parties to a duty of procedural conformity to the Convention, the more calls may emerge requiring that the Court itself get a taste of its own medicine and adopt similar procedural good practices,<sup>315</sup> which will in turn reinforce its ability to require domestic good practices, and so on. If the ICC were to make demands for domestic courts to adopt some of its modes of liability, victim arrangements, or sentencing practices, it would come under considerable pressure to, at the very least, produce consistent versions of all of the above.

The conclusions of this Article impact a more central debate, namely whether international criminal justice is potentially a prototype for the convergence of legal cultures and the constitution of a global model of criminal justice that can then be adopted domestically; or whether it is a relatively idiosyncratic, *sui generis* system that is only applicable to the international sphere and its erstwhile efforts to prosecute certain individuals. Margin-of-appreciation reasoning hardly resolves this debate, but it does help to frame it. Just as international human rights law does not aspire to entirely replace domestic rights systems and protections (notably those of a constitutional nature), or to prescribe every human rights policy and outcome in detail,<sup>316</sup> international criminal justice seems ill placed to provide a comprehensive formula of how anyone should be prosecuted for international crimes—except in the very broad sense that those suspected of such crimes should indeed be prosecuted, and prosecuted in ways that are committed to certain fundamental protections.

The inevitable inference is that while some elements of international criminal justice belong to its core and therefore ought to lead to an alignment between international and domestic forms, others simply involve too many differing assumptions, traditions, and circumstances to justify the imposition of a single model. This suggests intriguing avenues for the very definition of international criminal justice *lato sensu*, along the lines of Sasha Greenawalt's notion of "tiered" international criminal law.<sup>317</sup> International criminal justice is not a compact and consistent bloc, at least for the purposes of global diffusion, and only certain parts of it are destined to trickle down, let alone be imposed domestically. Beyond the relatively narrow core (which likely includes an obligation to prosecute, certain fundamental legal principles, and a commitment to the general idea of a fair trial), the balance of influence in criminal justice tilts towards domestic criminal justice systems.

Having said that, the margin of appreciation may be both part of the solution and part of the problem; a tool that potentially caters to the need

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315. Brems & Lavrysen, *supra* note 304, at 185.

316. John Jackson, *The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?*, 68 *MOD. L. REV.* 737, 750 (2005).

317. Greenawalt, *supra* note 4, at 1122.

for pluralism in international criminal justice, but that is not always sufficiently understood as a tool of pluralism and that creates difficulties of its own. For one thing, the margin of appreciation in the European context has long elicited strong reservations from human rights lawyers on a variety of grounds, including its relativism, its slipperiness, and its lack of methodological grounding.<sup>318</sup> Ultimately, the ECtHR has been faulted by some for unduly deferring to domestic criminal justice traditions, at the expense of its role in upholding a strong concept of European human rights.<sup>319</sup> In contrast, for others the risk is that the margin of appreciation will be used too sparingly and that the “European consensus” will run roughshod against the sheer diversity of European legal systems.<sup>320</sup> One danger is that the ECtHR will needlessly generalize certain preferences and fail to understand the highly specific ways in which certain features of domestic criminal justice systems protect rights.<sup>321</sup> Another is that the increased variability of margin-of-appreciation reasoning will function to the detriment of relatively weaker states (against whom the consensus is repeatedly invoked) and to the benefit of stronger ones (whose every decision will be deferred to).<sup>322</sup>

These are potent reservations. However, it may simply be unavoidable that resorting to the margin of appreciation will raise such fears, even as its proponents provide vocabulary to address them. The fact that criticism voiced at the ECtHR comes from both sides and with almost symmetrical vigor may suggest that it is doing something right. No doubt similar debates in the context of international criminal justice already exist and would be reignited if the margin of appreciation were more explicitly relied upon. Note also that the debates on the fundamentally subsidiary character of domestic and international justice have a strong historical character and tend to reflect possibly cyclical evolutions towards more centripetal or centrifugal models.<sup>323</sup>

For example, both the ECtHR and the ICC have tended to move from more universalising modes to more decentralizing ones. For the Strasbourg Court, this is exemplified by the Interlaken Process and the Brighton Declaration,<sup>324</sup> a renewed emphasis on subsidiarity, and a particularly deferen-

318. See, for example, Oren Gross & Fionnuala Ní Aoláin, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, 23 HUM. RTS. Q. 625 (2001).

319. Mark Coen, “*With Cat-Like Tread*”: *Jury Trial and the European Court of Human Rights*, 14 HUM. RTS. L. REV. 107 (2014).

320. Lord Hoffmann, *The Universality of Human Rights*, JUDICIAL STUDIES BOARD ANNUAL LECTURE, 19 Mar. 2009, at 25.

321. Roberts, *supra* note 111, at 214.

322. Mégret, *supra* note 109, at 490.

323. Ed Bates, *Activism and Self-Restraint: The Margin of Appreciation's Strasbourg Career. . . Its 'Coming of Age'?*, 36 HUM. RTS. L. J. 261, 263 (2016).

324. Jon Petter Rui, *The Interlaken, Izmir and Brighton Declarations*, 31 NORDIC J. OF HUM. RTS. 28 (2013).

tial understanding of the margin.<sup>325</sup> For the Hague Court, it is manifested in a conception of complementarity as merely an admissibility hurdle on the path to international prosecutions and more generally as a way of using the court's leverage to encourage domestic jurisdictions to acquit themselves of their tasks.<sup>326</sup> It is too early to anticipate, although certainly plausible, that the pendulum will eventually swing back in the opposite direction.<sup>327</sup> The point, however, is that international justice can ill afford to not locate itself between universalism and relativism, and that some form of pluralism may contain the secret to its sustainability.

At any rate, margin-of-appreciation reasoning should not be seen as a panacea as much as a way of posing the problem and highlighting some clear polarities. In particular, it emphasises the challenge of developing forms of international justice that are both universally validated and nationally (and perhaps even locally) grounded. This Article has steered clear of suggesting that a 'hard pluralism' in responses to international crimes is desirable, as it would lead different states to go about their business of prosecution without paying heed to what others, and particularly what the international community, is doing. Inherent in the sort of harmonization of law promoted by margin-of-appreciation reasoning, however, is a form of overarching international consistency. Otherwise there would seem to be little point in international justice.

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325. Spano, *supra* note 170, at 491.

326. Nichols, *supra* note 35.

327. Laurence Burgorgue-Larsen, *Interpreting the European Convention: What Can the African Human Rights System Learn from the Case Law of the European Court of Human Rights on the Interpretation of the European Convention*, 5 INTER-AMERICAN AND EUR. HUM. RTS. J. 90, 118 (2012).

