Learning lessons through the prism of legitimacy: What future for International Criminal Courts and Tribunals?

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Ever since the first international criminal tribunal (ICT) opened its doors, they have attracted controversy and their legitimacy has been questioned. This is partly because ICTs are such unique forms of institutions, in that they are courts, criminal courts, and international criminal courts. As courts, they are bound to uphold and apply the law in a way that is different to other types of institutions. Their decisions potentially have consequences reaching far beyond the immediate parties to a case, affecting the interpretation and development of the law. As criminal courts, ICTs’ primary concern is not with dispute settlement or compensation, but with determining individual guilt, dispensing punishment, and ensuring defendants receive a fair trial. That they are international criminal courts distinguishes them from domestic criminal courts, in that they are concerned with acts of extreme violence perpetrated on a massive scale, often involving a significant proportion of a society and often resulting in political change. Defendants appearing before ICTs tend to be high-ranking military or political leaders, including sitting heads of state. Trials can assume political overtones, causing tension between the requirements of politics and those of criminal justice. Due to the unique nature of ICTs and their relative newness on the international stage, they continually have to invest effort in enhancing their legitimacy and evidencing it to the world.

At present, the field of international criminal justice is experiencing a time of change. Several ICTs, including the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), have closed their doors; whereas others, for example the Extraordinary Chambers in the Courts of Cambodia (ECCC) and Special Tribunal for Lebanon (STL), have a limited lifespan. At the same time, a new generation of hybrid courts is emerging. The Kosovo Specialist Chambers (KSC) and the Special Criminal Court in the Central African Republic are taking shape; hybrid courts are proposed for South

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2 Silje Aambo Langvatn and Theresa Squatrito, ‘Conceptualising and measuring the legitimacy of international criminal tribunals’ in Nobuo Hayashi and Cecilia Bailliet (eds), The Legitimacy of International Criminal Tribunals (Cambridge University Press 2017) 51-52.


Sudan and Sri Lanka, as is a new regional court, the African Court of Justice, Human and Peoples Rights (ACJHPR). This provides an important opportunity to reflect and learn lessons from the past. In doing so, this chapter argues that the concept of legitimacy can be used as a prism through which to evaluate and assess the past work of ICTs and shed light upon ways in which they can be proactive in enhancing their legitimacy in future.5

The chapter begins by considering the concept of legitimacy and advocates a three-pronged approach to the discussion of legitimacy in the context of ICTs. Part two focuses upon the first prong of this approach, namely how the creation of a court can contribute to its legitimacy. Part three discusses prong two: how the processes and procedures of an ICT help ensure its legitimacy; whereas part four turns to the third prong, the results and effects of ICTs. The final part of the chapter draws conclusions and asks what lies ahead for the international criminal justice project.

1. Legitimacy and International Criminal Tribunals

A substantial body of literature now exists examining the legitimacy of ICTs from numerous angles,6 yet the term ‘legitimacy’ is frequently used with little or no explanation or reflection as to how it is being understood.7 Legitimacy is an elusive and somewhat delicate thing. It is not fixed, but rather something that has to be continually worked at and enhanced. It is multileveled: it is not down to one element, but rather involves an elusive mixture of many different things, all of which help contribute to the overall legitimacy of an institution. Furthermore, it is a nebulous concept that can mean different things to different people: lawyers, for example, tend to focus upon legal aspects of legitimacy; political scientists upon issues of power and interest; while philosophers concentrate on normative or moral legitimacy.8

One commonly used distinction is between the normative and sociological aspects of legitimacy.9 An institution is described as being legitimate in the normative sense if it has the

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6 For example see Vesselin Popovski, ‘Legality and Legitimacy of International Criminal Tribunals’ in Richard Falk, Mark Juergensmeyer and Vesselin Popovski, (eds), Legality and Legitimacy in Global Affairs (Oxford University Press 2012); Gideon Boas et al (eds), International Criminal Justice: Legitimacy and coherence (Edward Elgar 2012); Hayashi and Baillet (n 2).
7 Daniel Bodansky, ‘The concept of legitimacy in international law’ in R. Wolfrum and V. Röben (eds), Legitimacy in International Law (Springer 2008), 309, 313.
‘right to rule’. Sociological legitimacy, on the other hand, concerns whether an institution is widely believed to have a right to rule. Although these two meanings of legitimacy are distinct, they also overlap to a degree.

In their comprehensive assessment of the concept of legitimacy in the context of ICTs, Langvatn and Squatrito advance a ‘political and multidimensional’ conception of legitimacy as being most suitable for evaluating the legitimacy of ICTs. They outline a three-dimensional framework requiring firstly, an assessment of the pedigree of the court, whether it was created by the sufficiently right agents; in a way that is sufficiently in accordance with established and recognised traditions and procedures; and in a way that is sufficiently procedurally just. Secondly, examinations of the processes whereby the court exercises its power and the procedures it follows in doing so, namely, that they are in accordance with the law and recognised traditions and are sufficiently fair or just. Thirdly, an assessment of the results of the ICT, including its effectiveness and an assessment of its wider impact, for example, norm projection, effects on victim communities, and its deterrent effects. This conception of legitimacy for ICTs requires evidence of ‘sufficient adherence to established rules and procedures and a sufficient degree of both procedural and outcome justice’ with regard to all three dimensions, or with regard to the ICT’s pedigree, procedures and results.

The remainder of this chapter will use this three-dimensional conceptualisation of legitimacy as a framework through which to analyse and discuss the legitimacy of ICTs and make suggestions as to future progression.

2. Legitimacy and the Creation of International Criminal Tribunals

If one thing can be said of the field of international criminal justice, it is that it is nothing if not inventive. Since the early 1990s, an impressive number of ICTs have been created to respond to a number of situations of mass atrocity, with each ICT operating according to its own unique institutional framework and legal basis.

10 Buchanan and Keohane define a right to rule as being ‘where ruling includes promulgating rules and attempting to secure compliance with them by attaching costs to noncompliance and/or benefits to compliance’ see ibid 405. For a flavour of the complex discussion surrounding what the right to rule encompasses, see Allen Buchanan, ‘The legitimacy of international law’ and John Tasioulas, ‘The legitimacy of international law’, both in Samantha Besson and John Tasioulas (eds), The Philosophy of International Law (Oxford University Press 2012), 79-96 and 97-116, respectively.

11 Bodansky (n 7) 313.


13 Langvatn and Squatrito (n 2) 52.
Jurisdiction over the prosecution and punishment of individuals for crimes has traditionally been the preserve of states. That an affected state or states consent to the establishment of any court that will have jurisdiction over its territory or citizens will therefore add to the legitimacy of the institution. The ultimate example of this is the ICC, which was created by a multilateral treaty, the ICC Statute. The fact that states consent to become a state party to the Rome Statute gives the court significant legitimacy in terms of its creation. Carter argues that the impressive number of member states is evidence of the acceptance and support for the Court and that ‘the greater the number of states parties the more legitimacy the ICC will have.’ By the same token, that some states have refused to ratify the Statute, particularly powerful states such as the United States, China and India, potentially detracts from the court’s legitimacy.

The ICC's legitimacy can also be affected when States parties withdraw, or threaten to withdraw from the Statute, as occurred when a number of African states took steps to withdraw from the Statute. Although the threatened collective withdrawal has not occurred, the threat of it resulted in some bad publicity for the court. The effect of state withdrawals upon the court’s legitimacy is not necessarily always negative, however. Kersten argues that comments made by Burundian President Pierre Nkurunziza concerning Burundi’s proposed withdrawal from the ICC may have had the unintended consequence of bolstering the institution’s legitimacy, in that Burundi is under investigation by the ICC’s Office of the Prosecutor (OTP), and his remarks could be interpreted as the Burundian leadership running scared from a possible ICC case.

The same might be said of the Philippines President, Rodrigo Duerte, who is withdrawing the

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14 The UN Secretary General noted of the ICTY and ICTR that a 'key lesson learned from those experiences was that the interested State should be associated in the establishment of the tribunal.' Report of the Secretary General pursuant to para. 6 of Resolution 1644 (2005), UN Doc. S/2006/176 (2006), para. 2.
16 The court can also be given jurisdiction over situations involving non state parties, see Rome Statute, Article 13(b) and for further information see Rogier Bartels, ‘Legitimacy and ICC jurisdiction following Security Council referrals: Conduct on the territory of non-party states and the legality principle’ in Hayashi and Bailliet (n 2) 141-178.
state from the ICC Statute following the OTP opening an investigation into possible crimes within the jurisdiction of the court having been committed within the state.\textsuperscript{20}

The ICC stands alone in being the only permanent, multilateral ICT, all other such institutions were created in response to specific events. The picture surrounding state consent to the creation of these courts is variable. In some instances, states consented to the establishment of an ICT and remained cooperative throughout; in others, while a state may initially have consented to the establishment of an ICT, they have withdrawn support at a later stage; while on other occasions, state consent has been lacking throughout.

An example of the first category is the Special Court for Sierra Leone (SCSL). It is frequently pointed to as a success story in terms of its establishment, in that the court was created following a request by the President of Sierra Leone to the UN. Sierra Leonean authorities remained heavily involved throughout the negotiations,\textsuperscript{21} which culminated in a treaty being signed between Sierra Leone and the UN to create the court. Consequently, while the court may have faced other challenges to its legitimacy, few have questioned the legitimacy of its creation.\textsuperscript{22}

That a state supports the creation of an ICT is no guarantee that its establishment will be regarded as legitimate, however. For example, negotiations to form the ECCC began following a request from Cambodia. Over the following six years of discussions, the relationship between the UN and the Cambodian authorities became strained, causing the UN to withdraw from talks at one stage. UN negotiators were unwilling to agree to Cambodia’s demand that it retain strong domestic control of the court, in that there was a fear that this could jeopardise international fair trial standards. Ultimately, the court was created as a domestic institution, established under Cambodian law.\textsuperscript{23} Despite strong state participation in the creation process, the legitimacy of

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\item The legal challenges brought by defendants at the SCSL are discussed below. For a discussion of the legitimacy challenges at the SCSL see Tim Kelsall, ‘Insufficiently hybrid: Assessing the Special Court for Sierra Leone’ 27 Law Context: A Socio-Legal Journal (2009) 132.
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the court suffered because of the circumstances surroundings its establishment and concerns that the court would be open to political manipulation.

Another scenario that can arise is where a state initially consents to the establishment of an ICT, but later withdraws its consent. This occurred with the STL, where the Lebanese authorities initiated discussions with the UN to establish a court and were actively involved in the process of designing it. However, due to a political deadlock within the Lebanese Parliament, the agreement between the UN and Lebanon, which would have created the court, was not ratified. The UNSC subsequently stepped in to create the tribunal using its Chapter VII powers. Some took the view that it was acceptable for the UNSC to override the Lebanese Parliament in this way, as Lebanon had been heavily involved in every aspect of the court’s creation, and the passing of the UNSC Resolution to create the court was merely the final step. For others, the fact that the court was ultimately created by the UNSC raised concerns that it had bypassed Lebanese sovereignty and Lebanese democracy by unilaterally establishing the tribunal, rendering an early blow to the legitimacy of the institution.

While state consent undoubtedly aids the establishment legitimacy of ICTs, it is not vital: both the ICTY and the ICTR began operation with little by way of state consent. Even in situations where state consent is absent, the creation of the court may still be legitimate providing that the threat to international peace and security is sufficiently high. However, an ICT which begins its life with minimal or no state consent faces additional challenges. It must invest more in building its sociological legitimacy and convincing the affected population of its worth and validity. From a practical standpoint too, things are harder, in that it becomes more difficult to obtain evidence and gain access to defendants, witnesses and other evidence without the consent and cooperation of the states concerned.

Which international organisation is involved in creating an ICT can also impact upon its legitimacy. The UN has been involved in establishing several ICTs and plays a role in the operation of the ICC. The power of the UNSC to establish ICTs as a measure to restore or

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27 Williams (n 25) 260-271 and Mégret ibid.
29 Mégret (n 26) 490.
maintain international peace and security under Chapter VII of the UN Charter is well accepted. Other UN bodies have also been involved in creating ICTs. The Special Panels for Serious Crimes (SPSC) in East Timor, for example, were created by the United Nations Transitional Administration, a mission created under Chapter VII authority to assume governmental functions in the region. This court is generally perceived as having been a failure. That the court was created by what was essentially an administrative agency rather than by the power and authority of the UNSC did little to help the legitimacy of the institution.

Organisations other than the UN have also been involved in creating ICTs. The KSC, an organ of the Kosovo court system situated in The Hague, was created with the support of the European Union. This gives the court a strong international connection, which may help bolster perceptions that it is an independent and unbiased institution that complies with international fair trial standards. Another court, which at present exists only on paper, is the ACJHPR, created under the auspices of the African Union. The fact that this is an ‘African court created for African peoples’ has the potential to give the court more sociological legitimacy in terms of its establishment, particularly in light of the soured relationship between several African states and the ICC.

Defendants have frequently challenged the legality of the establishment of ICTs. The first and most famous example is the Tadić case in the ICTY, but there have been other notable cases before other ICTs. The main thrust of the legal argument has been that the creation of the

30 Williams (n 25), 258. Even when the UNSC first relied on this power to create the ICTY and the ICTR, there was near unanimous international acceptance of the legitimacy of the process. At the UNSC meeting to establish the ICTY, China argued that the ICTY should be established by treaty, but ultimately voted in favour of the resolution, see UNSC, Provisional Verbatim Record of the Three thousand two hundred and seventeenth meeting, S/PV.3217, 25 May 1993.
31 The mission had a wide mandate, which imparted it with ‘all legislative and executive authority, including the administration of justice.’ UNSC Resolution 1272 UN Doc. S/RES/1271 (1999) 2.
34 Wayne Sandholtz, ‘Creating authority by the Council: The international criminal tribunals’ in Bruce Cronin and Ian Hurd (eds), The UN Security Council and the politics of international authority (Routledge 2008) 138. For a discussion of the creation of the court, see Williams (n 25) 282-287.
35 Assembly of Republic of Kosovo, Law on Specialist Chambers and Specialist Prosecutor’s Office, Law No. 05/L-053, 3 August 2015.
36 For a discussion of the court see Dorothy Makaza, ‘African Supranational Criminal Jurisdiction: One-step towards ending impunity or two steps backwards for international criminal justice?’ in Hayashi and Bailliet (n 2) 272-296.
37 Prosecutor v Tadić, case no. IT-94-1-T Decision on the Defence Motion on Jurisdiction (10 August 1995) and Prosecutor v. Tadić, case no. ICTY-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995).
38 For example, for the ICTY see Prosecutor v Milosević, case no. IT-02-54, Decision on Preliminary Motions (8 November 2001). For the ICTR see Prosecutor v Kanyabashi, case no. ICTR-96-15-T, Decision on the Defence
respective institution violates the sovereignty of the concerned state and is not established by law as required by human rights law. Almost invariably, however, these legal challenges have failed.

The ICC aside, the legitimacy of the process of creating ICTs has sometimes been far from ideal. These courts are often established following or during times of extreme political and social unrest, where societies are divided and the rule of law has been absent for some time, it is almost inevitable that there will be challenges concerning their establishment that will impact upon their legitimacy. That most ICTs are created at all is a miracle in itself. If the legitimacy of these institutions depended solely upon the legitimacy of their creation, they would be poor institutions indeed. However, as Luban explains, ‘the legitimacy of international tribunals comes not from the shaky political authority that creates them, but from the manifested fairness of their procedures and punishments’. 39 How well a court operates once it is up and running may ultimately be more decisive in building its legitimacy than the manner of its creation.

3. Legitimacy and the Processes of International Criminal Tribunals

Many processes and procedures of a court can contribute to or detract from its legitimacy. Three key areas will be addressed here: the location and structure of the court; the exercise of prosecutorial discretion; and the accused’s right to a fair trial.

Firstly, the location and structure of a court can fundamentally impact its legitimacy, particularly from a sociological perspective. Both the ICTY and ICC, for example, have been criticised in the past for being too remote from affected populations. 40 Hybrid or mixed tribunals, combining national and international elements, were partly created to counter such critiques. Courts that are located locally and incorporate national law, judges, and staff, in theory allow for national ‘ownership’ of the court; for greater public connection and understanding of the court; and encourage domestic capacity and knowledge to be built. The extent to which localism aids legitimacy is highly dependant upon the particular circumstances


40 Both courts have endeavoured to engage with affected communities through outreach programs. For the ICC see <www.icc-cpi.int/about/interacting-with-communities>
For the ICTY see <www.icty.org/en/outreach/outreach-programme>
within the concerned state, however. If one considers the composition of the bench, for example, a preponderance of international judges might generate criticisms of imperialism; while having a majority of national judges in societies whose legal institutions have been devastated can generate fears of judicial bias and judges who are open to political interference. Achieving the right mix of national and international judges and staff can greatly contribute to the legitimacy of a court, but finding the right balance is rarely easy.

Secondly, the selection of which situations to investigate and whom to prosecute can be critical to a court’s sociological legitimacy. One of the most potent criticisms of the ICC has been that its OTP has placed undue focus upon investigating alleged crimes committed in African states. While some would contest the continuing merits of this argument, it has had an important and enduring impact upon the legitimacy of the court that is proving hard to shift.

The use of prosecutorial discretion in selecting which individuals to prosecute has frequently been a matter of contention at ICTs. Prosecutors have been criticised for pursuing potential perpetrators from one side of a conflict while largely ignoring perpetrators on the other side. The ICTR prosecutor, for example, was criticised for agreeing to temporarily put on hold investigations into crimes committed by Rwanda Patriotic Front soldiers following assurances being given by the Rwandan Prosecutor General that the cases were being investigated and would be prosecuted domestically. The ICC OTP too has faced criticism for prosecuting members of rebel groups while ignoring potential crimes committed by government

42 Kelsall (n 22).
43 Stensrud (n 41).
45 The OTP is investigating situations in other parts of the world, including Georgia and is carrying out preliminary examinations in several non-African states. Also see Alette Smeulers et al, ‘The selection of cases by the ICC: An empirically based evaluation of the OTP’s performance’ 15 International Criminal Law Review (2015) 1.
perpetrators in Uganda and the Democratic Republic of Congo. Prosecutors have also been criticised for indicting persons who are regarded as heroes by a certain section of a society. The legitimacy of the SCSL was damaged in the eyes of a significant number of Sierra Leoneans when members of the Civil Defence Forces were indicted, as they regarded them as war heroes who had been involved in defending the country. The level of importance of indictees can also be critical. A successful capture and trial of a senior figure can help strengthen an ICT’s legitimacy (the trials of Charles Taylor at the SCSL and Ratko Mladić at the ICTY are good examples of this); whereas the unsuccessful pursuit of senior figures comes at a cost: the ICC’s reputation has suffered for failing to apprehend Sudanese President, Omar al Bashir and leader of the Lord’s Resistance Army, Joseph Kony.

Successfully juggling the political, legal and practical implications involved when selecting whom to indict is difficult, and it will rarely be possible to satisfy everyone. In order to boost the legitimacy of their decision-making, prosecutors should be aware of the effects their selection of whom to prosecute can have upon the legitimacy of the court. They should endeavour to operate as transparently as possible in order to demonstrate that they are adhering to good process and that their decision-making is principled, reasoned, and impartial.

A third key area of importance concerns the degree to which a court protects, and is seen to protect, the accused’s right to a fair trial. Indeed, this is arguably one of the areas that are most vital to a court’s legitimacy, in that while a fair trial may not be sufficient in itself to legitimise a court, an unfair trial will almost always do so. ICTs have been keen to emphasise their adherence to international fair trial standards. The ICTR has described itself as providing a ‘model of fairness’ for other legal systems to follow.

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49 Thierry Cruvellier, ‘From the Taylor trial to a lasting legacy: Putting the Special Court model to the test’, International Center for Transitional Justice and the Sierra Leone Court Monitoring Programme (2009), 24-25
51 See for example, ICC, Office of the Prosecutor, ‘Policy paper on case selection and prioritisation’ (15 September 2016) <www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf>
52 Kiyani (n 5) 27. In the Šešelj case, the ICTY noted that the right to a fair trial was not just a fundamental right of the accused but also ‘a fundamental interest of the Tribunal related to its own legitimacy.’ Prosecutor v Šešelj, case no. IT-03-67-PT, Decision on Prosecutor Motion for Order Appointing Counsel to Assist Vojislav Šešelj with his Defence (9 May 2003) [21].
and the ICTY has claimed to set the highest standards of justice\textsuperscript{54} in this regard. McDermott agrees that ICTs have an obligation to set the highest standards of fairness, both for reasons of their own legitimacy and in order to spread respect for the rule of law.\textsuperscript{55} However, she finds that in practice, the application of fair trial standards by ICTs has been inconsistent, both across the different ICTs and within different chambers of the same tribunals.\textsuperscript{56}

An example of a fair trial right which can affect the legitimacy of ICTs is the principle of legality. Legality, or \textit{nullum crimen sine lege, nulla poena sine lege}, requires that criminal liability and punishment be based upon prior legislative enactment of a prohibition that is expressed with adequate precision and clarity.\textsuperscript{57} It has been described as a ‘cornerstone’ of ICL and found to be a \textit{jus cogens} norm.\textsuperscript{58} In practice, however, ICTs have adopted a soft approach to the principle. Judgments of ICTs have been criticised for imposing retroactive law,\textsuperscript{59} for lacking foreseeability,\textsuperscript{60} and for being insufficiently specific.\textsuperscript{61}

This relaxed approach to legality has likely been tolerated in favour of the aim of progressing the field of international criminal law. Early ICTs, such as the ICTY and the ICTR, had little to guide them, barring their Statutes, which lacked detail, and a limited number of cases from the post war period. If international criminal law was to become a viable and effective field of law, ICTs needed to add some flesh to the bones of the law they had been given. Thus, for example, if ICL were to remain relevant in modern warfare, it was necessary for the ICTY to find in \textit{Tadić} that breaches of international humanitarian law in non-international armed conflicts constitute war crimes.\textsuperscript{62}

The field of substantive ICL is now well developed, and there are a

\textsuperscript{54} Prosecutor \textit{v} Blaškić, case no. IT-95-14-T, Decision on the objection of the Republic of Croatia to the Issuance of \textit{Subpoena Duces Tecum} (18 July 1997) [61]. Also see Yvonne McDermott, \textit{Fairness in International Criminal Trials}, (Oxford University Press 2016), 131-133.  
\textsuperscript{55} McDermott, ibid, 147 and see 125-147.  
\textsuperscript{56} ibid.  
\textsuperscript{60} For an example where judicial law making was alleged, see \textit{Prosecutor \textit{v. Tadić}}, (n 37) [87-136] and for a critique see Christopher Greenwood, ‘International Law and the \textit{Tadić Case}', 7 European Journal of International Law (1998) 265; van Schauk, ibid, 150-152 and Joanna Nicholson, ‘Strengthening the effectiveness of international criminal law through the principle of legality’ 17(4) International Criminal Law Review (2017) 656.  
\textsuperscript{61} Nicholson ibid 113-117.  
\textsuperscript{62} \textit{Tadić} (n 37) [128-134].
significant number of cases interpreting international crimes. It is unlikely that another Tadić is necessary, or would be tolerated, today. In order to strengthen the legitimacy of their decision-making in future, ICTs should enforce a stronger version of the principle of legality, thereby placing the rights of the accused centre stage.

4. **Legitimacy and the Results of International Criminal Tribunals**

The final dimension of the legitimacy framework involves a consideration of the wider impact of ICTs, including their results and their effectiveness. It is not sufficient to judge the effectiveness of ICTs merely upon the product of their trials. As Stahn explains, ‘It does injustice to international courts to judge effectiveness merely by a number of visible and quantitative outcomes, such as the number of cases or decisions that they render…Some of the most important effects…are actually largely independent of the record of cases.’ However, the precise goals of ICTs are a matter of some debate. They include those of national criminal law: retribution for wrongdoing, deterrence, incapacitation and rehabilitation, but also include a number of other aims, such as bringing to justice those responsible for serious violations of human rights and international humanitarian law; putting an end to such violations and preventing their recurrence; securing justice and dignity for the victims; establishing a record of what occurred; promoting national reconciliation, re-establishing the rule of law and contributing to the restoration of peace. This is an impressive list, as Damaška notes: ‘Even national systems of criminal justice, with their far greater enforcement powers and institutional support, would stagger under this load’. Somewhat understandably, ICTs have struggled to meet many of these goals and to reconcile the tensions between them.

Turning for example, to deterrence, there is a growing body of empirical research investigating the extent to which ICTs can generally deter atrocity crimes. Most studies concentrate on the ICC, and the indications are that the court has a modest deterrent effect. Jo and Simmons, for example, have assessed the ICC’s deterrent effect upon state and non-state actors concerning

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63 For a discussion of the legitimacy of ICTs relying on case law from other courts, see Joanna Nicholson, ‘The role played by external case law in promoting the legitimacy of International Criminal Court decisions’ 87(2) Nordic Journal of International Law, 189.
65 ibid 254.
civilian killing, and have found that states which have ratified the ICC Statute are more likely then states which have not ratified it to reduce, detect and prosecute such crimes domestically. Furthermore, non-state actors reduce intentional civilian killing when the ICC signals its intention to prosecute. However, the deterrent effects of ICC interventions should not be overemphasised. Dancy cautions that the court is but one factor among many that can influence the behaviour of state and non-state actors. He argues that the court has been ‘more influential for what it is than what it does’ and suggests that the court acts as a stigmatiser. Jo and Simmons also evince caution, explaining that ICC interventions are powerful because ‘they are part of a package of efforts to rally support for ending impunity.’

A second goal attributed to ICTs is that they have a positive impact upon the legal systems in the states in which they are involved, by encouraging domestic prosecutions; strengthening existing structures; and building capacity to try cases at a national level. There have been some notable achievements in this regard: The ICTY helped contribute to the establishment of specialised war crimes chambers in the Balkans region, including the Section for War Crimes within the State Court of Bosnia and Herzegovina and the War Crimes Chamber of the Belgrade District Court. National prosecutions have taken also place in Rwanda, both within national courts and through the Gacaca lay court system.

Research is only beginning to uncover what effects an ICC intervention can have upon the domestic legal system of the concerned state. Nouwen has found that ICC interventions in Uganda and South Sudan have had several catalysing effects, and Dancy and Montal find systematic evidence that ICC involvement in a state can increase domestic prosecutions and

68 Hyeran Jo and Beth A. Simmons, ‘Can the International Criminal Court deter atrocity?’, 70 International Organisation (2016) 443, 469-470.
71 Jo and Simmons (n 68) 470.
72 For example, the UNSC Resolution establishing the ICTR listed the goal of strengthening the Rwandan courts and judicial system, UNSC Res 955 (1994) UN Doc. S/RES/955.
convictions of human rights violators. Notably however, both studies conclude that the observed complementarity effects were not caused directly by the intervention of the ICC within the states concerned, but rather for other reasons, including political pressure from the Security Council; economy of donor intervention; or through reformer coalitions using the opportunities created by the ICC’s involvement in the state to demand legal reforms, build local capacity and litigate human rights cases. Expectations that ICTs could help strengthen and reform national justice systems have also not been as forthcoming as some had anticipated. For example, hopes of building domestic legal capacity and a rule of law culture in Sierra Leone have not been met, and a similar picture is emerging in Cambodia. However, as Sperfeldt observes, ‘Hybrid courts were never designed to transform entire judiciaries and succeed in building a rule-of-law culture within a few years’. Perhaps too much is being expected from these courts in this regard.

The potential of ICTs to establish some sort of record of what occurred is another oft-cited goal. Indeed, ICTs’ truth-telling capacity has been found to be one of the most important to victims: In a recent survey in Cambodia, university students named the ability of the ECCC to educate their generation as to what happened as being the court’s most important contribution. However, the ability of these institutions to provide a historical record or to narrate the truth of what happened is limited by the restraints imposed by the requirements of the legal process. Holtermann, for example, argues that while it is a possible function of ICTs to tell the truth of what occurred, ‘International criminal tribunals should not look for the full story (whatever that is) of past atrocities, but only to those facts relevant for the case in hand’. He cautions that truth is only one, possibly even subordinate, among other desideratum, including a fair trial, prevention, reconciliation and peace.

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76 Nouwen (n 74) 406.
77 Dancy and Montal (n 75).
79 Kelsall (n 22) 142-143.
80 Stensrud (n 41).
82 Jakob v. H. Holtermann, “One of the challenges that can plausibly be raised against them”? On the role of truth in debates about the legitimacy of international criminal tribunals’ in Hayashi and Bailliet (n 2) 226.
Reconciliation is another stated goal of ICTs, but it is still open to question whether and to what extent they can contribute to this. Recent research concerning the ICTY has shown that despite the work of the ICTY ‘each ethnic group in the former Yugoslavia is still firmly attached to its own version of reality.’

One of the notable successes of ICTs has been their work in clarifying the law concerning international crimes and producing a strong body of jurisprudence that can serve as an important resource for international, regional and national jurisdictions in future. ICTs have also made substantial contributions to the development of international humanitarian law. Indeed, it might be that this has been the most significant impact of ICTs. Luban states that the most important aim of ICTs is their potential to project norms through trials, punishments and jurisprudence. He argues that ‘International criminal law uses trials, punishments and forms of law to project a radically different set of norms, one that reclassifies political violence from the domain of the sacred to the domain of ordinary thuggery.’ Rather than viewing political violence as being the prerogative of states, it is now regarded as a crime. Today, when mass atrocities occur, as in Syria, Yemen, Myanmar or the Philippines, they are quickly labelled as such by international organisations, NGOs and others and demands for accountability are made. Although accountability may be slow in coming, the threat of it hangs there in a way which it did not before, and it might cause the senior leaders involved to sleep less easily in their beds.

5. Conclusion

Analysing ICTs through the prism of legitimacy shows that they are imperfect institutions. There are concerns surrounding the legitimacy of the creation of these courts; how they operate; and their wider effects. However, the exercise is also useful in indicating areas where ICTs can work to improve their legitimacy in future.

Ideally, when creating an ICT, the concerned state should consent to the establishment of the court and should remain actively engaged in the process. Realistically however, this will not always be possible and it will often be the case that states will merely acquiesce to the court’s

84 See for example the numerous references to the case law of ICTs in the International Committee for the Red Cross’ customary international law study: ICRC, Customary IHL Database <www.ihl-databases.icrc.org/customary-ihl/eng/docs/home>
85 Luban (n 4) 510.
86 Ibid 509.
creation or even evince active dissent. Clearly, the more that a state can be involved in the process the better, but, even a complete lack of state consent or participation may not necessarily render a death-blow to an ICT’s legitimacy, providing that the situation is grave enough and sufficiently threatens international peace and security. Perhaps we simply have to accept that, given the difficult political and social circumstances in which many ICTs are created, the manner of the establishment of ICTs will often be less than ideal and will impact upon the institution’s legitimacy. Rather, the legitimacy of the court has to be built in other ways.

How a court operates once it is up and running is vital in this respect. The chapter discussed only three aspects of this, namely, the structure of the court, the use of prosecutorial discretion and the protection of the rights of the accused. Other elements are also crucial: fact-finding procedures; the treatment of victims the appeals process; sentencing processes; and restitution procedures. That these processes are normatively legitimate is important, but it is also important that the court takes active steps to build its sociological legitimacy while carrying out its work, by evidencing transparency and demonstrating to interested observers that its procedures are fair and just.

Finally, concerning the third aspect of the legitimacy framework, namely the results of ICTs, there is a need for a readjustment of expectations as to what ICTs can realistically achieve. At present, the lack of agreement surrounding what the goals of ICTs are damages the credibility of ICTs. Ultimately, ICTs are courts, and, as such, there are limits to what they can accomplish. There must be a greater degree of modesty as to what ICTs can do. There are signs that a reassessment is underway. The ICTY Dialogues Conference found, for example, that for future ICTs ‘expectations should be managed from the outset to avoid disappointing victims and affected communities, and the wider international community.’ 87 Adjusting expectations as to the potential wider impact of ICTs; acknowledging their limitations and explaining this clearly to the public will greatly assist in enhancing the legitimacy of these institutions.

ICTs have legitimacy challenges, but this does not mean that they are illegitimate as such, or that they are not worth supporting. Rather, as we enter this new stage in international criminal justice and new ICTs open their doors, those involved should do so with their eyes open both to the possibilities of ICTs and to their limitations.