

International Criminal Justice Case Selection Independence: An ICJ barometer

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According to some observers, increasing prosecution of core international crimes advance a norm that confronts realist state interests. Martha Finnemore and Kathryn Sikkink, for example, view a norm as cascading when enough states adopt it to cause international influence, without domestic pressure, to procure levels of conformity.¹

How do we determine whether such levels of conformity are increasing or decreasing? The number of international crimes prosecution incidents is not sufficient to indicate a strengthening norm. It is necessary to determine the extent to which justice is actually confronting impunity. Sikkink claims that a justice cascade occurs when there is “a dramatic shift in the legitimacy of the norms of individual criminal accountability for human rights violations and an increase in actions (like trials) on behalf of those norms. It doesn’t mean that true justice will be done, just that the norm has new strength and legitimacy as we can see from how common it has become to put state officials on trial”.²

This policy brief rejects this sentiment, commonly reflected by advocacy organisations and justice institutions themselves. It is the quality, not the quantity, I argue, that informs a strengthening or weakening norm of international crimes prosecution.

1. Prioritising Inclusivity and Sustainable Peace

A sound historically-informed analysis enables assessment as to whether a conflict’s conclusion is driven by authentic negotiated political settlement that promotes sustainable peace and inclusivity, diluting discontent that may manifest again in violence.³ In many post-con-

flict situations, patron-client organization of power, often along ethno-regional lines, renders chiefs, office-holders, local and national level politicians, amongst others, accountable to those above them (for employment and rent-seeking power), and not those they ostensibly serve.⁴ The high cost of exclusionary governance for marginalized groups incentivizes violent means to capture control of a ‘gatekeeper state’ – where capturing the gate (government) enables capacity to seek and distribute rents.⁵ Cycles are therefore created, where rival groups employ violence to capture (and retain) control of the state from their oppressors who previously wrested control by force or undemocratic means – a situation in which, as Mamdani describes, victims become killers.⁶

A critical indicator of a settlement’s inclusivity is the efficacy with which subsequent transitional justice processes treat all parties’ conduct – the extent to which they turn away from discriminatory retribution. Independent application of law to fact treats both parties according to their conduct and not their clout or social group. Conversely, a criminal process that disproportionately targets one party or its leadership comparative to another group deepens conflict drivers such as ethno-regional, political, or other societal schisms. The data as to the effect of transitional justice on inclusivity is scarce, as is data on the transitional justice impact on non-repetition. The only systematic consideration of this issue conclud-

negotiated political settlement as the fundamental objective of the organization; Report of the Secretary General, *The future of the United Nations peace operations: implementation of the recommendations of the High-level Independent Panel on Peace Operations*, A/70/357-S/2015/682, 2 September 2015, p. 3.

1 Martha Finnemore and Kathryn Sikkink, “International Norm Dynamics and Political Change”, in *International Organization*, 1998, vol. 52, pp. 887–917.

2 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, W.W. Norton and Company, New York, 2011, p. 8.

3 The UN Secretary General, in response to the HIPPO report, cites

4 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, Princeton University Press, 1996.

5 Frederick Cooper, *Africa Since 1940: The Past of the Present*, Cambridge University Press, 2002, vol. 1.

6 Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton University Press, 2014.

ed that trials and amnesties, or, trials, amnesties and truth commissions, strengthen democracy and reduce human rights violations.⁷ However, the inclusivity and the efficacy of the processes, and therefore the sustainability of reduced violations, particularly in situations emerging from armed conflict, is not considered. Situations of on-going or recent armed conflict constitute the majority of those under investigation or preliminary examination by international criminal courts. Tension exists, therefore, between inclusive and equitable processes and self-interested actors seeking to shape criminal justice case selection away from themselves and towards their adversaries.

Prioritising inclusivity and sustainable peace in line with Sustainable Development Goal 16 holds significant implications for transitional justice programming. It requires prioritising the rule of law objectives of ensuring both law and order, as well as that citizens are equal before the law and equally pursued by the law. These objectives also inform the extent to which governments are subject to the law.

2. A Constraint-Based Assessment of the Quality of Criminal Justice Processes

Determining the integrity of criminal justice processes pursuing international crimes cases requires identification of key contest locations where spoilers may try to undermine inclusivity by enabling approaches that exclude particular group's or actor's responsibility from prosecution. The location surrounds what a process can consider, and its capacity to consider it – a process' constraints in pursuing those of greatest responsibility for crimes. These constraints are made up of jurisdictional and functional elements. Identifying these elements for practitioners enables their identification of process design that risks political interference or discriminatory or inequitable investigations. These features may be highlighted so as to pre-empt designing actors' attempts to shape elements towards their self-interest and potentially away from equitable and transparent consideration of the past.⁸

7 Tricia Olsen, Leigh Payne, and Andrew Reiter, *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, United States Institute of Peace, Washington, D.C., 2010, p. 159.

8 I examine these elements in the context of criminal justice processes more deeply in: Chris Mahony, "A Case Selection Independence Framework for Tracing Historical Interests' Manifestation in International Criminal Justice", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2015. I examine these elements in non-punitive truth-seeking processes in variant contexts more deeply in: Chris Mahony, "Witness Sensitive Practices in International Fact-Finding Outside Criminal Justice: Lessons for Nepal", in Morten Bergsmo (editor), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013.

2.1. Jurisdictional Constraints

We can divide jurisdiction into seven elements. The first element is the efficacy of the subject matter. Post-Cold War criminal processes have focused exclusively on violations of international humanitarian law, unlike their post-WWII predecessors that prioritised the crime of aggression. In a process of efficacy seeking to advance non-repetition, prosecution of the crime of aggression, including indirect aggression – financial, military or other material support of actors waging war against a sovereign territory – would be included.⁹ Non-punitive processes may consider other drivers of conflict and its conduct.

The second element is that of jurisdiction over persons and groups, which includes nationality of persons, institutional affiliation and primacy of jurisdiction. An independent investigation will be free to consider the role of all persons and groups connected with a situation.

The third element is jurisdiction over, and what may be considered criminal conduct, including conduct's nature, elements (intent and acts¹⁰), and modes of group or individual liability.

The fourth element is the territory over which a process wields jurisdiction, while the fifth element is the process's temporal jurisdiction (the period of time the process may cover).

The sixth element is the access to the process, instructing who can prompt an investigation of particular conduct to occur.

A final jurisdictional element, case selection criteria, takes on variant form, dependent on whether a process is punitive or purely truth seeking. Case selection criteria, in punitive processes, should proportionately employ the gravity of offending to select and prioritise for prosecution those persons of greatest responsibility for the most numerically grave crimes (in conformity with emerging norms). Other considerations for prioritization should not be considered, particularly where to do so would include or exclude actors from consideration disproportionate to the gravity of offending and responsibility.

9 Mark Drumbl, "The push to criminalize aggression: Something lost amid the gains?," in *Case Western Reserve Journal of International Law*, 2009, vol. 41, pp. 291–319.

10 Commonly described in law respectively as 'mens rea' and 'actus reus'.

	High independence:	The many in-betweens:	Low independence:
1. Subject matter efficacy	All conflict causes and consequences (international crimes)	Variant levels of independence	Specific crimes committed by some parties but not others
2. Jurisdiction over persons/groups/primacy	All nationality, groups without caveat		Exclusion of nationals/ members of particular organisations
3. Precision of criminal conduct	Precise, precedent-informed <i>actus reus</i> and <i>mens rea</i>		Ambiguously defined conduct
4. Jurisdiction over territory	All territory of alleged crimes in broader conflict		Limited to specific territory despite related conflict elsewhere
5. Temporal Jurisdiction	Including entirety of broader conflict		Constrained to specific years within a conflict
6. Process access	Civilians, NGOs governments, and process investigators may trigger investigations		Only political actors may trigger investigation
7. Case selection criteria	Proportionality informed by numeric gravity (number of incidents of murders, torture etc.)		No criteria, total discretion with investigation/prosecution

Figure 1. Jurisdictional elements.

Truth seeking processes may draw upon broader consideration of group, individual and structural responsibility for instability, armed conflict, and its conduct. Risk to inclusivity via discriminatory process, direction and application manifests where self-interested actors seek to shape jurisdictional or functional elements to exclude themselves or their allies from scrutiny. These distinctions are important also for criminal justice processes that truth seeking might trigger.

2.2. Functional Constraints

The functional elements include court capacity to compel co-operation from state and non-state actors, groups, and organizations on issues such as investigative access to territory, access to and protection of witnesses, and provision of information and evidence. They also include a process' fiscal independence, provision and appointment of personnel, process location and the apprehension and surrender of accused. Influence over court finances may be used to threaten total crippling of a court in order

to procure specific case selection,¹¹ or may be used to constrain a court's capacity to engage in politically sensitive investigations.

	High independence:	The many in-betweens:	Low independence:
1. Capacity to compel co-operation	Capacity to enforce via domestic courts	Variant levels of independence	No legal or normative means of enforcement
2. Investigative access to territory	Full, un-monitored, without caveat.		Total control without obligation by party(s) to conflict
3. Access to and protection of witnesses	Full confidential witness access and protection		
4. Provision of information and evidence	Full, immediate access to originals and substantiating data		Total control by party to conflict
5. Fiscal independence	Guaranteed assessed budgets		
6. Personnel provision and appointment	Election by global peers, total security of tenure		Selection by leader of party to conflict
7. Process location	External location without historical interest in situation		On territory of party to conflict
8. Apprehension and surrender of accused	Full immediate cooperation and security deference (without caveat)		Total control of a party to conflict

Figure 2. Functional elements.

2.3. Element Interaction and Vulnerability to Co-ordinated Engagement by Self-Interested Actors

The efficacy of personnel appointment, particularly prosecution and adjudicatory personnel opens the door to corruption of personnel independence. Self-interested actors may seek to effect independence by engaging multiple co-operation and jurisdictional elements in co-ordination. Co-operative elements, such as fiscal independence, may wield "undue influence on an officeholder's judgment"¹² (personnel independence) in relation to determining, for example, what constitutes criminal conduct (a jurisdictional element).

11 The United States Government used the threat of withdrawing financial support to compel the Special Court for Sierra Leone prosecutor to refrain from pursuing Muammar Gaddafi or Blaise Compaore. See: Chris Mahony, "A Political Tool? The Politics of Case Selection at the Special Court for Sierra Leone", in Kirsten Ainley, Rebekka Friedman and Chris Mahony (editors), *Evaluating Transitional Justice: Accountability and Peacebuilding in Post-Conflict Sierra Leone*, Palgrave Macmillan, London, 2015.

12 *McConnell v. Federal Election Commission*, No. 540 U.S. 93 (2003).

In their policy briefs in this Series, Frederik Harhoff and Julija Bogoeva query whether the independence of Theodor Meron, a judge at the ICTY, was compromised in regard to the issue of a *mens rea* element of the mode of liability of aiding and abetting.¹³ Harhoff cites the interest of powerful states in attempting to undermine the emergence of aiding and abetting as a mode of liability.¹⁴ Aiding and abetting, *de facto*, criminalizes the very conduct (where atrocity crimes occur) that powerful states wield an interest in legalizing: waging war by proxy. The United States, which wielded predominant influence over the establishment of the ICTY and ICTR, introduced this mode of liability at a time when its influence over jurisdiction and co-operation variables was very high.¹⁵ This scenario lent confidence that US influence would preclude consideration of the conduct of US nationals. As global power dynamics change, and US influence over international criminal justice declines, alleged US conduct of aiding and abetting international crimes, in situations such as Colombia, becomes more vulnerable to case selection.¹⁶ A heightened US interest in constraining the definition of aiding and abetting is therefore increasingly apparent.

3. Towards a Case Selection Independence Approach

Each one of the jurisdictional and functional variables may be employed by designing and co-operating actors to shape what and whom a process investigates. Understanding how varied design and co-operation enables actors to shape investigations towards and away from themselves and their allies enables determinations as to the independence of one process comparative to another.

A case selection independence approach illuminates

13 Frederik Harhoff, *Mystery Lane: A Note on Independence and Impartiality in International Criminal Trials*, FICHL Policy Brief Series No. 47 (2016), Torkel Opsahl Academic EPublisher, Brussels, 2016; Julija Bogoeva, *International Judges and Government Interests: The Case of President Meron*, FICHL Policy Brief Series No. 48, Torkel Opsahl Academic EPublisher, Brussels, 2016.

14 *Ibid.*

15 Chris Mahony, “The Justice Pivot: U.S. International Criminal Law Influence from outside the Rome Statute” in *Georgetown Journal of International Law*, 2015, vol. 46, no. 4.

16 *Ibid.*; Chris Mahony, “If You’re Not at the Table, You’re on the Menu: Complementarity and Self-Interest in Domestic Processes for Core International Crimes”, in Morten Bergsmo and SONG Tianying (editors), *Military Self-Interest in Accountability for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 229–259.

how variant understandings of context and variant context-specificity (of process selection, design and function) produces *variant* levels of independence in prosecution of core international crimes cases. To identify context-specific approaches we must first identify context, including the parties to a conflict, a conflict’s drivers, alleged crimes and warring parties political and military leaders and supporters. We can then, based on the numeric gravity of criminality by alleged perpetrator groups identified via human rights reporting, determine what a proportionate prosecutorial approach would constitute.

A prerequisite to the selection, design and implementation of a transitional justice approach, is a rigorous analysis of context that considers the organization of power, its historical antecedents, and its relationship to the situation’s security, economy, demography, geography, culture, and environment. Only then can a picture be formed of who holds power, their interests, their capacity to impede a process, via force, the threat of force or other social and political leverage, and their willingness to use such influence against a criminal process that threatens themselves or their allies. This determination may then inform a determination as to the scope for an independent criminal process in a given situation.

Where more aggressive and punitive (or potentially punitive) processes may only be adopted by enabling one party the power to direct prosecutions (during design or function) disproportionately against its adversaries, the process should be avoided. This approach prioritizes the avoidance of recurrence of violence over politically calculated international criminal law enforcement commonly referred to as ‘victor’s justice’. Identifying victims, ensuring their proportionate and equitable representation during process selection and design, sensitizes elites to the need to direct investigatory resources equitably, and select cases for prosecution proportionately and independently. ‘Case selection independence’ is the framework for measuring process proportionality and efficacy.

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