

Crimes of Law: Bringing Legal Professionals to Trial for International Crimes

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A great organization is at work which . . . not only employs corrupt wardens, stupid inspectors, and examining magistrates . . . but also has at its disposal a judicial hierarchy of high, indeed of the highest, rank, with an indispensable and numerous retinue of servants, clerks, police and other assistants, perhaps even hangmen.

— Franz Kafka, *The Trial*†

This Article provides the first in-depth analysis of the oversight and misunderstanding by international criminal justice mechanisms of the role that legal professionals and institutions play in the commission of international crimes. The Article first identifies a particular form of international crime rooted in domestic structures and institutions. These “crimes of law” produce systemic violence that extends beyond individual criminal acts. Without a legal conception of institutional crime, accountability mechanisms fail to address crimes of law, treating domestic law instead as context. The Article argues that to ensure crimes of law are addressed, charging specific crimes against humanity, like apartheid and persecution, allows legal institutions themselves to become subjects of trial, engaging with structural crimes rooted in legal institutions. The Article then summarizes cases involving legal professionals, demonstrating they are treated like military or political actors and rarely prosecuted. The unique principles of the legal profession create barriers to accountability, resulting in limited attention to the role of lawyers. The Article argues that legal professionals must be approached as a special class of perpetrator. Efforts to hold them accountable must appreciate the dynamics of the legal system, the particularities of the legal profession within it, and the conduct of the accused in maneuvering those dynamics.

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† FRANZ KAFKA, *THE TRIAL* 54 (Willa & Edwin Muir trans., Penguin Books Ltd. 1953) (1925).

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INTRODUCTION

International crimes are often committed not by deviating from the law but by following it. Behind many atrocities, there is a bill, a memo, or a gavel. When hundreds of thousands of Soviet nationals were executed or sent to the Gulags under Stalin during the Great Purge of 1936–1938, many of these sentences were delivered after trials.¹ When Nazi Germany increasingly repressed the rights of Jews and other minorities, eventually committing unspeakable

1. Stephanie Decker, *The Role of Public Confessions in Show Trials: An Analysis of the Moscow Show Trials*, 32 HIST. SOCIO. 459, 463 (2019).

atrocities, it did so behind a matrix of legal decrees and judicial orders conjoined to the normative German legal system.² When the South African apartheid regime subjugated nearly every aspect of Black or colored South African life, this totalizing system of discrimination, fragmentation, and repression “required administration, application and interpretation by judges, magistrates, prosecutors, officials of the Departments of Justice and Law and Order, and lawyers, both in the academy and the legal profession.”³ Put best by the United States Military Tribunal (“USMT”) in *United States v. Altstoetter* (“the *Justice* case”), at Nuremberg, wherein the United States prosecuted officials from the German Ministry of Justice, judges, and senior prosecutors, “[t]he dagger of the assassin was concealed beneath the robe of the jurist.”⁴

Despite the national legal or normative basis behind many of these international crimes, few legal professionals have been held accountable, criminally or otherwise. Legal professionals seemingly present a special case for exemption from accountability or even removal.⁵ However, in December 1947, when the USMT issued its Judgment in the *Justice* case, it revealed the inner workings and injustices of the Nazi legal system and its relationship to the political wing of the Nazi regime. The USMT shed light on the role of legal professionals in carrying out the crime of persecution on a systemic scale.⁶

Since the *Justice* case, prosecutions of legal professionals, particularly for systemic crimes rooted in the structures of legal institutions, have been strikingly rare. There have been some trials for specific instances involving the war crime of sentencing without due process, but only recently have we seen accountability for more pervasive crimes. For instance, Argentina has initiated proceedings against legal professionals who perpetrated or were complicit in mass human rights abuses during Argentina’s dictatorship from 1976 to 1983.⁷ More recently, the rare opportunity has arisen again—this time at the International Criminal Court (“ICC”). On January 23, 2025, the ICC Prosecutor requested an arrest warrant in the situation of Afghanistan for Abdul Hakim Haqqani, Chief Justice of the Supreme Court of Afghanistan, for the crime against humanity of

2. ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* 3–6 (Edward Shils trans., Oxford University Press 2010) (1941).

3. DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* 27 (1998).

4. *United States v. Altstoetter*, Case No. 3, 3 T.W.C. 984 (1948), Opinion and Judgment, 985 (U.S. Mil. Trib. Dec. 4, 1947).

5. DYZENHAUS, *supra* note 3, at 21.

6. *See generally* *U.S. v. Altstoetter*, 3 T.W.C. at 984.

7. PABLO GABRIEL SALINAS, *THE FEDERAL JUDICIARY IN THE DOCK* 1, 6 (2016) (on file with author); *see also* Cámara Nacional de Casación Penal [CNCP] [National Court of Appeal on Criminal Matters], sala IV, 5/9/2019, “Petra Recabarren, Guillermo Max y otros s/recurso de casación,” No. FMZ 97000076/2012/TO1/4/CFCl (Arg.).

persecution.⁸ The application marks the first attempt at an international court or tribunal to prosecute a sitting judge.

Due to the rarity of these cases, there is a significant gap in the literature and jurisprudence on the crimes of legal professionals, and the ICC therefore faces several preliminary questions. Why have there been so few prosecutions of legal professionals for international crimes? Who exactly is responsible, and for what violence? Is there a difference between ordering a murder with a baton as opposed to a gavel? What are the complexities and challenges in holding legal professionals accountable for international crimes, and how may these complexities and challenges be addressed within the bounds of existing international criminal law mechanisms?

While helpful, the scarce academic work and caselaw on the subject stop short at addressing these questions comprehensively in the field of international criminal law. Existing literature addresses only specific case studies, specific legal actors, or focuses on conceptions within domestic criminal law. David Dyzenhaus's seminal 1998 book, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order*, based on his observations and experiences at the South African Truth and Reconciliation Commission's ("SATRC") Legal Hearing in 1997, was one of the first to dissect the parameters of a specific case of an institutional crime of law and the judges responsible for it. Dyzenhaus theorizes how judges and legal systems can actively enable systemic injustice through ordinary law while also claiming fidelity to law.⁹ He also offers a glimpse into some of the excuses and justifications of South African judges, based in the particularities of the judge's profession, that act as shields to responsibility.¹⁰

Dyzenhaus's book no doubt laid some of the foundation for Claudia Cárdenas et al.'s 2025 edited volume, *Transitional Justice and the Criminal Responsibility of Judges*, with case studies on German, Argentine, Chilean, and other jurisdictions. The various contributing essays within the volume again portray the role of judges in state criminality and briefly address some of the liability issues that have come up in the authors' various jurisdictions when addressing past judicial complicity in both domestic crimes and misconduct, as well as international crimes.¹¹

One of the most comprehensive case studies on the role and responsibility of the judiciary in the crimes and conduct of an authoritarian regime is the 2015

8. See Prosecution's Application Under Article 58 for a Warrant of Arrest Against Abdul Hakim Haqqani, Situation in the Islamic Republic of Afghanistan, Pre-Trial Chamber, ICC-02/17-225-Red (Jan. 23, 2025) [hereinafter HAQQANI APPLICATION].

9. DYZENHAUS, *supra* note 3, at 13–15.

10. *Id.* at 90, 123, 136–37.

11. See generally TRANSITIONAL JUSTICE AND THE CRIMINAL RESPONSIBILITY OF JUDGES (Claudia Cárdenas et al. eds., 2025) [hereinafter TRANSITIONAL JUSTICE].

Argentine book *¿Usted también, doctor? Complicidad de jueces, fiscales y abogados durante la dictadura* [*You Too, Doctor? The Complicity of Judges, Prosecutors, and Lawyers During the Dictatorship*], edited by Juan Pablo Bohoslavsky. The contributing authors explain at length how legal professionals, not only judges, contributed to, facilitated, or resisted the Argentine dictatorial regime.¹² The book was published before the final appellate decision in *Recabarren et al.*, also known as the “*Megacausa Mendoza*” case, in which an Argentine court convicted former judges Rolando Carrizo and Luis Miret, former official public defender Guillermo Petra Recabarren, and former prosecutor Otilio Romano for crimes against humanity.¹³ In this case, for the first time in decades, the systemic actions of a judiciary were put on trial, and Bohoslavsky’s volume lays such actions out in detail. Other pieces have engaged in further case studies on the role and criminal contributions of certain legal systems, namely with respect to Nazi Germany and its occupied territories.¹⁴

Outside the focus on the judiciary, Lavinia Parsi’s 2024 article on state legal advisors as aiders and abettors of international crimes poses the question: How can state legal advisors who add a seal of legitimacy to international humanitarian law violations be held accountable?¹⁵ She finds that existing international criminal law can, namely through the mode of liability of aiding and abetting, adequately capture the conduct of legal advisors who justify and construct legal narratives to contribute to international crimes committed by military and political actors.¹⁶

However, little attention has been paid to breaking down the basis and nature of individual criminal responsibility and potential defenses of *all* types of legal professionals for *structural* “crimes of law”—that is, international crimes for which the conduct of the individual is criminalized only by virtue of their relationship to a legal structure whose norms or mechanisms are seen as unjust. As argued below, crimes are not always ostensibly committed by military and political actors. Rather, certain types of international crimes can be committed

12. *¿USTED TAMBIÉN, DOCTOR? COMPLICIDAD DE JUECES, FISCALES Y ABOGADOS DURANTE LA DICTADURA [YOU TOO, DOCTOR? THE COMPLICITY OF JUDGES, PROSECUTORS, AND LAWYERS DURING THE DICTATORSHIP]* 33–39 (Juan Pablo Bohoslavsky ed., 2015) [hereinafter *¿USTED TAMBIÉN, DOCTOR?*].

13. See generally Cámara Nacional de Casación Penal [CNCP] [National Court of Appeal on Criminal Matters], sala IV, 5/9/2019, “Petra Recabarren, Guillermo Max y otros s/recurso de casación,” No. FMZ 97000076/2012/TO1/4/CFC1 (Arg.).

14. See, e.g., ALAN STEINWEIS & ROBERT RACHLIN, *THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE* (2013); Leora Bilsky & Rachel Klagsbrun, *The Desk Perpetrator, the Expert Witness, and the Role of Law: The Trial of Arthur Greiser*, 27 J. GENOCIDE RSCH. 1, 1 (2025).

15. Lavinia Parsi, *Fabricated Legality: The Role of Legal Advisors in the Commission of International Crimes*, 22 J. INT’L CRIM. JUST. 19, 20 (2024).

16. *Id.* at 32–39.

by legal actors as principals and stem from the very law the actors maintain. This is a different context from that of Parsi's article. Though not mutually exclusive, there is a difference between legal advisors acting as pawns of military and political actors to skew particular acts or policies that violate international humanitarian law as opposed to other legal professionals who create, maintain, and adjudicate systems of law that engrain structural international crimes like apartheid.

This Article seeks to fill this gap in the literature by answering the above questions and explaining why the roles of legal professionals in international crimes are overlooked and misunderstood. The reasons for this reality stem from two fundamental issues: (1) international criminal law's uncomfortable relationship with judging legal systems and institutional crime; and (2) the principles and particularities of the legal profession that arise when individual legal professionals find themselves on trial.

First, international legal mechanisms problematically treat the law as background or context instead of placing it at the forefront of accountability efforts or trials. Although international criminal law mechanisms often neglect the institutional dimensions of crime in general, criminal legal structures expose this shortcoming with particular clarity and raise unique challenges. Failure to place the law itself at the center of the trial fails to recognize the fundamentally institutional and systemic nature of crimes of law. As argued below, rather than prosecuting only the war crime of sentencing without due process, the systemic injustices of crimes of law committed through legal professionals may be brought out most clearly within the existing limits of international criminal law by charging certain structural crimes against humanity. Certain crimes, such as apartheid and persecution, permit courts to place law at the center of the trial and focus on the legal professional's relationship to it, thus allowing the court to recognize the criminal nature of the law and address the particular dynamics of the legal institution and the legal professional's responsibility in upholding or advancing it.

Second, holding legal professionals accountable for international crimes is highly limited due to the specific issues that arise from the priorities of international criminal law and the realm of the legal profession. Legal professionals involved in international crimes have been lustrated and reprimanded under professional responsibility regimes but are rarely held criminally responsible. When they are held criminally responsible, they are tried like political or military actors rather than legal actors, and their crimes are normally limited to passive and discreet individual acts without appreciating and delineating the various roles and contributions of legal actors in the commission of international crimes. This Article explains why these accountability efforts are limited as such. For legal professionals, just as the law may be wielded as a sword in

committing international crimes, it may also be used as a shield to protect from any kind of criminal responsibility. Accordingly, the issues that arise when it comes to prosecuting legal professionals not only include complexities stemming from orientalist visions of accountability, trying “desk perpetrators,” and individualizing institutional crime, but also from complexities rooted in notions of legal positivism, the duty to resist, judicial independence, the principle of complementarity, the status of legal professionals in society, feasibility, and so on.

The degree of responsibility of legal professionals—whether as civil servants, judges, prosecutors, or private lawyers—can only be determined upon addressing a plethora of legal defenses stemming from these complexities, rendering the importance of placing the legal institution at the center of the trial all the more crucial. International criminal law has differentiated approaches based on the *hierarchy* of actors prosecuted, but it fails to differentiate its frameworks based on the *types* of actors. In this vein, the Article argues that we need a better attuned regime of international criminal law to address the crimes of legal professionals.

Put simply, the Article makes two overarching arguments to rectify the limited accountability of legal professions in both number and scope: First, crimes of law are ultimately rooted in legal institutions, and to overcome international criminal law’s treatment of them as merely context, the charging of particular crimes against humanity is best suited to address institutional criminality and the structural effects of these crimes of law. Second, when individual criminal responsibility is brought into the fold, a variety of legal professionals are shielded by the characteristics and principles of the legal profession. To overcome this, international criminal law tries them as military and political actors when their role and culpability is significantly more nuanced. Accordingly, just as international criminal law adapts to the hierarchy of perpetrators, it must adapt to the particularities of legal professionals as a specific type of perpetrator within a legal institutional framework that must be brought to the forefront of the trial.

To that end, this Article proceeds in three parts. Part I develops the first overarching argument by identifying international criminal law’s difficult relationship with institutional crime and the notion of judging law itself. This Part furthers the argument of placing law at the center of the trial within existing international criminal law rules and mechanisms. Part II develops the second overarching argument by identifying the limited number and scope of accountability efforts for legal professionals. It identifies that a broad range of legal professionals may be perpetrators of atrocity crimes but are normally only ever held accountable as military or political actors. This Part then reveals the above-mentioned nuances of the legal profession that arise when we bring

the prospect of international criminal accountability into the fold. It addresses whether we should constrain these legal defenses and how we must better attune international criminal law to the unique dynamics of crimes of law. Finally, Part III takes a step back to situate the importance of this analysis. It asks: Why should it matter to hold legal professionals accountable for international crimes? The goals of international criminal law and transitional justice provide several justifications.

I. PUTTING LEGAL SYSTEMS ON TRIAL

What normally constitutes the conduct of a crime of law is not the actions of a lawyer gone rogue but of a lawyer doing what they are meant to do under the rules of a legal system. Their conduct is criminalized only by virtue of their connection to a collective legal institution. This reality sits uncomfortably in international criminal law, which tends to treat legal institutions as mere context, if at all. This Part first identifies and elaborates on the institutional nature of crimes of law as distinct “state crimes.” Second, it explains the issues that arise in respect of international criminal law’s systemic neglect of both recognizing the importance of law in the commission of atrocities and bringing the law itself on trial as an institution. Finally, it suggests a way to bring out the institutional criminality of law itself within the limits of existing international criminal law mechanisms and rules. Namely, systemic crimes of law can be brought out more accurately by charging particular crimes against humanity that may address the root structures of mass human rights abuses.

A. *The Issue: Crimes of Law as Institutional Crimes*

What renders the legal professional’s actions criminal is their connection to a legal order whose very functions and purposes are unjust. In this vein, while institutional or state criminality is unrecognized in international criminal law, various commissions and some trials have directly or indirectly *expressed* the criminality of the legal order as an institution. For example, Peru’s Truth and Reconciliation Commission concluded that the judicial system as a whole was co-responsible for the mass human rights violations during Peru’s two decades of armed conflict in the 1980s and 1990s.¹⁷ Likewise, in South Africa, while no criminal trials were conducted against legal professionals, the SATRC held a “Legal Hearing” in 1997, wherein the SATRC sought to identify the role of the judiciary and legal professionals in establishing and maintaining the legal order

17. Truth and Reconciliation Commission of Perú, *Final Report*, Vol. III, at 279–82 (Aug. 2003).

throughout apartheid rule in South Africa. In the Legal Hearing, “law found itself before a tribunal.”¹⁸

These crimes of legal institutions vary widely in terms of their structure and purposes. The employment of legal systems as part of an institutional matrix allows states and non-state actors to bolster efficiency and legitimacy, making it easier to commit international crimes while maintaining a level of support internally or externally. Most legal systems that regularly commit international crimes operate somewhere between pure arbitrary political will and a functioning and independent legal system. One reason for this may be to appear like a democracy and retain a veneer of external legitimacy, as has been argued with respect to Israeli and South African apartheid.¹⁹

Alternatively, making significant use of the legal institutions may be to retain the support of a state’s own nationals or to provide some form of ostensive legitimacy to state actions. Upholding a system of law, however superficially, was crucial in the Argentine dictatorship’s strategy to bolster its public image during the Dirty War, for instance.²⁰ Courts are also particularly useful in presenting some veneer of procedure in the fascist suppression of dissent. The United Nations (“U.N.”) Group of Independent Experts on Belarus have described how the “[w]idespread use of vague legal definitions and unpredictable, often abusive, interpretations, as well as closed trials, have allowed Belarusian authorities to misuse and instrumentalize counter-extremism and national security legislation not only to stifle critics but also to punish and endanger their defense lawyers.”²¹ In the United States, similar developments in the instrumentalization of so-called counter-extremism laws have allowed the Trump Administration to suppress dissent under the façade of law while bolstering support from those on the far-right.²²

Hiding behind the law may also be for the purpose of appearing like a functioning state. Laws and courts, as such, are considered a crucial component of any state’s government. The development of courts and institutions of law in transitional circumstances may be seen as a state-building function, as the

18. DYZENHAUS, *supra* note 3, at 182.

19. JOHN DUGARD, HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER 279 (1978). See generally MICHAEL SFARD, THE WALL AND THE GATE, ISRAEL, PALESTINE, AND THE LEGAL BATTLE FOR HUMAN RIGHTS (2018).

20. Juan Pablo Bohoslavsky, *Entre complicidad militante, complacencia banal y valiente independencia* [Between Militant Complicity, Banal Complacency, and Courageous Independence], in ¿USTED TAMBIÉN, DOCTOR?, *supra* note 12, at 21, 25.

21. U.N. Human Rights Council, *Closing the Accountability Gap for Human Rights Violations and Related Crimes in Belarus: Report of the Group of Independent Experts on the Situation of Human Rights in Belarus*, ¶ 55, U.N. Doc. A/HRC/60/CRP.1 (Sept. 4, 2025).

22. *President Trump’s First 100 Days: Attacks on Human Rights, Cruelty and Chaos*, AMNESTY INT’L (Apr. 30, 2025), <https://www.amnesty.org/en/latest/news/2025/04/president-trumps-first-100-days-attacks-on-human-rights/> [https://perma.cc/PVW3-CUF3].

ICC's Office of the Prosecutor ("OTP") argued in respect of Afghanistan, where the "ministries at least partly functioned as a device to present the Taliban like other national governments."²³ In doing so, the Taliban regime attempts to maintain the image of both a functioning state and a legitimate legal system.

Alternatively, groups that regularly commit international crimes may also use legal and quasi-legal structures to fill a gap in governance or offer an alternative to a former or concurrent regime. The widespread use of people's courts by revolutionary movements may demonstrate this rationale. It has also been illustrated by extremist religious armed groups when gaining control of territory within a state. For example, Ansar Dine engaged in state building in Mali, offering an alternative legal system to that of the state government.²⁴

The use of law to commit state crimes may also be part of an effort to operate more efficiently, demonstrated particularly by the usage of military tribunals in occupations and armed conflicts. The unjust execution of prisoners of war following faulty trials and rulings commissioned by Japanese judges demonstrates the widespread use of unjust military legal systems in World War II ("WWII").²⁵ The employment of mass trials without any real judicial guarantees has also served as a procedure for efficient executions or forced disappearances under some kind of legal cover. For example, the mass Moscow trials in the 1930s of Trotskyists led to numerous executions following proceedings in which public confessions were used to demonstrate guilt, even though these confessions were coerced.²⁶

A frequent and crucial product of institutional crimes committed through a legal system is the all-encompassing effect of the law in the form of extraordinary and ordinary violence. To date, the few trials against legal professionals for international crimes have mostly concerned sentencing without judicial guarantees in a criminal process that leads to extraordinary violence, namely visible and concisely defined violence such as torture and executions.²⁷ This is a highly limited understanding of the role of legal professionals in the state violence that exists as part of the fabric of daily existence: "ordinary" violence. Law may subjugate populations in virtually every aspect of life, from zoning and property laws to family law and education frameworks. In Apartheid South Africa, "humiliation . . . was enshrined in the law of the land," with less visible and fundamental policies directed at separate development and racial

23. Haqqani Application, *supra* note 8, ¶ 25.

24. Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Trial Judgment, ¶ 596 (June 26, 2024).

25. See generally United States v. Isayama, 5 T.W.C. 60 (U.S. Mil. Comm'n, Shanghai, July 25, 1946).

26. Decker, *supra* note 1, at 460.

27. DYZENHAUS, *supra* note 3, at 6.

domination as an end goal.²⁸ However, apartheid's "Grand Design,"²⁹ directed at this separate development and racial domination, was largely overshadowed by these more visible crimes (or "petty apartheid") from the international community's perspective.³⁰ To address the role and effect of such crimes committed through a vast matrix of legal institutions and norms, we must understand that its violence takes many forms, extended through systemic violence and both extraordinary and ordinary crimes.

Institutional criminality may sometimes be referred to, extra-legally, as state or institutional crime. These are systemic actions ostensibly committed by a state or a non-state political entity, and simultaneously, in the name of the state or non-state political entity.³¹ These crimes are understood more as a structure than an event and are committed, as it is perceived, by programs or institutions rather than individuals.³² What makes these crimes distinct is not the number of perpetrators but their place in relation to institutions.

There are several characteristics particular to institutional crime that separate it from other crimes. First, the use of state resources, such as court systems and law enforcement institutions, enables human rights abuses on a massive, systemic scale.³³ Illustrating this, the *Justice* case at Nuremberg expressed the state criminality of the Nazi legal order and its far-reaching system of subjugation through the use of laws, decrees, judges, enforcers, and so on.³⁴ Second, these crimes are committed in the name of the state or in the pursuit of nation-building,³⁵ often as a forced redefining of the nation itself. For instance, Ansar Dine and Al-Qaeda in the Islamic Maghreb ("AQIM"), a former extremist religious group in Mali, sought to set up a far-reaching Islamic Court system in Timbuktu to impose their own re-defined regime and system in Mali.³⁶ Finally, state crime is committed through the state's institutions pursuant to a state policy.³⁷ It is perpetrated across the judiciary, the legislature, and the executive, as well as through religious and corporate collaborators of non-state origins. Such a reality can be found in colonial governance throughout history.

28. *Id.* at 26; ERIC LOUW, THE RISE, FALL, AND LEGACY OF APARTHEID 82 (2004).

29. DUGARD, *supra* note 19, at 97.

30. LOUW, *supra* note 28, at 82.

31. JENNIFER BALINT, GENOCIDE, STATE CRIME AND THE LAW: IN THE NAME OF THE STATE 14 (2011).

32. *Id.* at 14.

33. *Id.* at 15.

34. United States v. Altstoetter, Case No. 3, 3 T.W.C. 984 (1948), Opinion and Judgment, 1062 (U.S. Mil. Trib. Dec. 4, 1947).

35. BALINT, *supra* note 31, at 15.

36. Prosecutor v. Al Hassani Ag Abdoul Aziz, ICC-01/12-01/18, Trial Judgment, ¶ 596 (June 26, 2024).

37. BALINT, *supra* note 31, at 26.

With these features, state crime may take different forms, although they are all rooted in an entity's structures and institutions.³⁸

Although institutional crime differs in motive and design, it incurs a broad spectrum of institutional responsibility not usually found within the mechanisms of criminal trials and commissions focused on individualized agency-based responsibility.³⁹

B. *The Reasons: Neglecting Crimes of Law and Legal Institutions*

To directly address the role and criminality of law and its institutions as a state crime, international criminal law faces two overarching conceptual and institutional barriers. First, international criminal law mechanisms tend to neglect the very existence of law, let alone its role, in the commission of international crimes. Second, international criminal law hyper-individualizes responsibility, focusing on individual agency rather than the institutionalized commission of crimes. These two overarching barriers work in tandem to both prevent and limit the recognition and accountability of legal institutions for the commission of international crimes. As a result, the few prosecutions of legal professionals for international crimes have predominantly been limited to immediate extraordinary crimes.

1. *Law and Lawlessness*

Often, in situations where international crimes are committed, there is a narrative that the criminal conduct was committed in a situation of perverted law or outside the bounds of a legal institution. Scholars and international legal institutions have long envisaged the commission of international crimes in a state of "lawlessness" in its different manifestations. The former prosecutor of the Special Court for Sierra Leone opined that "[t]he real threat to humanity on several levels is bred in the fields of lawlessness in the third world."⁴⁰ Similar assumptions have been made regarding the hallmark of the legal system in Nazi Germany.⁴¹ However, law indeed exists in the Global South, in war and revolution, and in colonial rule and severe repression. If the existence of legal institutions is denied, however heinous they may be, their central role is ignored; the rules-based system that facilitates and enables atrocities is overlooked, thereby yielding only an isolated and incomplete justice.

38. *Id.* at 27.

39. See HANNAH ARENDT, *Understanding and Politics (The Difficulties of Understanding)*, in *ESSAYS IN UNDERSTANDING 1930–1954*, at 307, 310 (Jerome Kohn ed., 1994).

40. David Crane, *Dancing with the Devil: Prosecuting West Africa's Warlords: Building Initial Prosecutorial Strategy for an International Tribunal After Third World Armed Conflicts*, 37 *CASE W. RESERVE J. INT'L. L.* 1, 4 (2005).

41. STEINWEIS & RACHLIN, *supra* note 14, at 1–2.

a. Law in the Global South and Colonial Zones

International legal mechanisms have followed a vision of selective recognition of law. Where there are atrocities in the Global North, the law is often seen as a perverted or corrupted context.⁴² In the Global South, where international criminal law is predominantly applied, the presence of law may be ignored altogether by accountability mechanisms.⁴³ As coined by Boaventura de Sousa Santos, this may reflect the “abyssal thinking” of the colonial divide that places certain populations and legal orders beyond the realm of law and reason.⁴⁴ In other words, the structures of Western legal systems embedded within international criminal law institutions are heavily informed by orientalist and abyssal thinking, whereby there exists a line between the land of law, where there is reason and humanity, and the land of the lawlessness, where wrongs are inevitable and outside the realm of rational concern.⁴⁵

Yet, depending on one’s conception of it, law is not a placeless principle, and it may exist wherever there is society.⁴⁶ The Western conception of a legal order,⁴⁷ which dominates international criminal law mechanisms, sits uncomfortably with alternative procedures and substantive law. For instance, in some legal orders, where there is no civil code and law is transmitted orally through stories or otherwise, law is presumed absent because it is unwritten.⁴⁸ It is erased by the principle of legality, and the relevance of unwritten customary law is downplayed altogether.⁴⁹ Western legal institutions place particular focus on procedural rights, and any legal institution that follows alternative procedures is again treated irregularly.

Illustrating a form of this abyssal thinking is the ICC Trial Chamber’s commentary and treatment of the legal system of Ansar Dine and AQIM-controlled Timbuktu in the 2010s. In *Al Hassan*, the facts and issues largely concerned the contributions of Al Hassan to the conduct and objectives of the Islamic Court system in Timbuktu imposed by and under the interpretation of Ansar

42. *Id.*

43. John Reynolds & Sujith Xavier, “*The Dark Corners of the World: TWAIL and International Criminal Justice*,” 14 J. INT’L CRIM. JUST. 959, 961 (2016).

44. Boaventura de Sousa Santos, *Beyond Abyssal Thinking, From Global Lines to Ecologies of Knowledges*, 30 REV. (FERNAND BRAUDEL CTR.) 45, 51 (2007).

45. *Id.* at 51.

46. CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 218 (1983).

47. See René David, *Existe-t-il un droit occidental? [Does Western Law Exist?]*, in TWENTIETH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA (Kurt Nadelmann et al. eds., 1961).

48. VAL NAPOLEON, NATIONAL CENTRE FOR FIRST NATIONS GOVERNANCE, THINKING ABOUT INDIGENOUS LEGAL ORDERS 5–8 (2007).

49. Lon Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 1–2 (1969).

Dine and AQIM.⁵⁰ In its Judgment, the ICC Trial Chamber explicitly avoided engaging with Islamic law as a diverse and contested legal order, neglected how its all-encompassing religious characteristic renders it unique, and did not seriously engage with or consider the views of experts and community members on interpretations of Islamic law.⁵¹ Instead, in determining whether the Islamic Court was a “regularly constituted court” for the purposes of the war crime of sentencing or execution without due process, the Chamber focused merely on the absence of Western-defined conceptions of independence and impartiality.⁵² The Court ignored the legal pluralist approach to the Islamic Court as advocated by the defense and commentators.⁵³ While the crimes of Ansar Dine were heinous, the Chamber’s failure to engage with the dynamic system of law that made these crimes possible from a legal pluralist approach reflects the abyssal thinking of international criminal law: Law exists only where Western norms do.

b. Law in War, Revolution, and Severe Repression

International crimes are normally thought to be committed at the peripheries of legal institutions, often in times of upheaval and severe repression, where legal norms cannot reach. Yet, what the legal orders of, for instance, Nazi Germany have taught us is that atrocities can be committed in furtherance of law and order within war, revolution, and severe repression. Again, ignoring this fact neglects the role that legal institutions play.

In the context of armed conflicts, the provision and implementation of legal institutions that facilitate grave breaches of international humanitarian law takes several forms. First, state and non-state militaries often produce manuals regulating their own rules of engagement, disciplinary action, and their own approach to the adherence of international humanitarian law.⁵⁴ Such rules and policies, whether produced in a manual or otherwise, may just as easily facilitate the violation of international humanitarian law as they may facilitate compliance.⁵⁵ For instance, the *Forces Patriotiques pour la Libération du Congo*

50. See generally Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Trial Judgment, ¶ 596 (June 26, 2024).

51. *Id.* at ¶ 1500.

52. *Id.* at ¶¶ 1176–1178, 1500–1515.

53. Third Corrigendum to Final Defence Brief, Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, ¶¶ 355, 362 (Aug. 4, 2023); Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Separate and Partly Dissenting Opinion of Judge Tomoko Akane, ¶ 77 (June 26, 2024); see also Mohamed Badar, *Legal Pluralism, Cultural Defenses, and the Islamic Legal Tradition*, 59 TEX. INT’L L. J. 245, 274 (2024).

54. For an example of such manuals, see generally CANADIAN DEPARTMENT OF NATIONAL DEFENCE, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS (2001).

55. See, e.g., Parsi, *supra* note 15, at 23, 27–28.

[Patriotic Forces for the Liberation of Congo] were found to have employed an “enlistment policy” to accept child soldiers who “voluntarily” entered its ranks, thus paving the way for allegations of violating the prohibition against recruiting child soldiers.⁵⁶ Moreover, armed forces also employ the law in proceedings against prisoners and detainees in a way that may constitute grave breaches of the 1949 Geneva Conventions or violations of the laws of war.⁵⁷ In 1942, the Supreme Commander of the Japanese Forces in China issued Military Order No. 4, which essentially facilitated capital punishment for enemy airmen who bombed, strafed, or otherwise attacked non-military targets.⁵⁸ Under this law, many attacks, regardless of targeting civilians or not, were interpreted as criminal, and at least 132 Allied airmen were executed following trials.⁵⁹ Finally, state actors may commit crimes through the laws and policies that they enact to administer occupations. For instance, Israel’s legislation and enforcement of a system of rules in its occupation of the West Bank has been widely alleged to constitute the crime of apartheid, including by facilitating inhumane acts such as the restriction of movement, land expropriation, forcible transfer of populations, denials of residency and nationality, and mass deprivation of civil and due process rights.⁶⁰ In such forms, military legal institutions play a crucial role in facilitating the commission of international crimes in armed conflict.

Law also plays a crucial role in both repressing and progressing revolutions in a way that may constitute or facilitate international crimes. To suppress revolution, states use the law, often pursuant to declarations of states of emergency, to justify violence. They adopt legislation to insert law into a vast system combining judicial repression by the courts and administrative repression by security forces. For example, the judicial repression of Algerian nationalists under French control in the 1950s and 1960s has been largely characterized as a marriage between the political administrators and military to make justice an instrument of repression.⁶¹ Executions and torture following trials became

56. Prosecutor v. Lubanga Dyilo, ICC 01/04-01/06, Decision on Confirmation of Charges, ¶¶ 251–252 (Jan. 29, 2007).

57. See, e.g., SYLVIE THÉNAULT, *UNE DRÔLE DE JUSTICE : LES MAGISTRATS DANS LA GUERRE D’ALGÉRIE* [A STRANGE JUSTICE: JUDGES IN THE ALGERIAN WAR] 61 (2001).

58. United States v. Sawada, Case No. 25, 5 T.W.C. 1, 3, 7–8 (U.S. Mil. Comm’n, Shanghai, Apr. 15, 1946).

59. John Haymond, *During WWII the Japanese Created a Law to Commit War Crimes*, HISTORYNET (Mar. 22, 2023), <https://historynet.com/japanese-airmen-act-wwii/> [https://perma.cc/59T7-DXXU].

60. See generally Human Rights Watch, *A Threshold Crossed: Israeli Authorities and the Crimes of Apartheid and Persecution* (April 2021); see also Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem, Advisory Opinion, 2024 I.C.J. 753, ¶ 229 (July 19, 2024).

61. THÉNAULT, *supra* note 57, at 9.

routine, and “the judge emerges beyond criticism because he is imbued with legality.”⁶²

In response, revolution is an “exit from the social order that power has enshrined in the name of law, stability, public interest, and the greater good”⁶³ and an entrance into a new order of law. Yet, these new orders too may become instilled with cruelty in attempts to ensure the control of new power over territory and populations. There is a growing plethora of non-state armed groups that seek to provide alternative legal institutions to those provided by the state, yet ultimately use the new order to repress its own members and populations.⁶⁴ For example, as indicated in the universal jurisdiction prosecution against Haisam Sakhanh in Sweden, several courts were established by rebel groups during the Syrian Civil War to consolidate control and fill the vacuum of law left by the former Syrian legal system.⁶⁵ However, in these processes, opponents were punished with death for merely participating in hostilities.⁶⁶

Finally, analyzing legal institutions is even crucial in those jurisdictions where power is so centralized in political authority that they appear irrelevant. Indeed, scholars, if not justice, “may have suffered from the erroneous perception that the law did not matter in Germany during the Nazi period.”⁶⁷ In Ernst Fraenkel’s 1941 book on the “dual state,” he depicted two parallel spheres of authority in Nazi Germany, the normative and prerogative state.⁶⁸ The former was governed by law, legal norms, and regular administrative procedures while the latter was governed by arbitrary power vested in the Nazi regime. Fraenkel argued that these spheres co-existed with and depended upon each other to preserve a social order based on the appearance of some vestige of legitimacy while allowing for totalitarian control.⁶⁹ The theory illustrates the basis for how regimes retain formal legal structures while simultaneously wielding despotic power. It is within this synthesis of law and arbitrary power in Germany that violations of race and political dissent laws “did not automatically lead to a concentration camp.”⁷⁰ Rather, at first, transgressors were indicted in courts. Only

62. *Id.* at 62.

63. Basel al-Araj, *Exiting Law and Entering Revolution*, in *THE BAD SIDE* (Bassem Saad trans., 2024).

64. FRANK LEDWIDGE, *REBEL LAW: INSURGENTS, COURTS AND JUSTICE IN MODERN CONFLICT* 56–61 (2017).

65. Prosecutor v. Haisam Sakhanh, Stockholms Tingsrätt [TR] [Stockholm District Court] 2017-02-16 B 3786-16, ¶ 50 (Swed.), <https://www.ejiltalk.org/wp-content/uploads/2017/03/Stockholms-TR-B-3787-16-Dom-2017-02-16.pdf> [https://perma.cc/5WDE-9RDC].

66. *Id.*

67. STEINWEIS & RACHLIN, *supra* note 14, at 1; *see also* RONALD DWORKIN, *LAW’S EMPIRE* 101–02 (1986).

68. FRAENKEL, *supra* note 2, at 72–74.

69. *Id.* at 73.

70. STEINWEIS & RACHLIN, *supra* note 14, at 4, 74.

over time did the Gestapo bypass the regular courts in favor of administrative “preventive detention.”⁷¹ Accordingly, even in the most repressive regimes, law exists—it is not for international criminal law to preclude its relevance.

2. *Institutional Crime in International Criminal Law*

The second overarching barrier to putting the legal institution at the center of the trial stems from a much broader issue in international criminal law: State or institutional crime is a concept unrecognized in existing international criminal law mechanisms. This issue prevents the full recognition of both the role of legal institutions in the commission of international crimes as well as the far-reaching systemic violence that unjust legal institutions facilitate.

a. *Limited Recognition of the Role and Responsibility of Institutions*

One of the most basic founding principles of modern international criminal law is that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁷² Indeed, international criminal law has in many ways been built to counter notions of guilt by association and collective punishment, which has also ensured that individuals cannot hide behind a collective to enjoy impunity. Since the Nuremberg and Tokyo trials, international criminal tribunals have cemented this principle of individualization, helping to ensure that state criminality remains a criminological concept and no more.⁷³ In doing so, international criminal mechanisms have treated the law as context rather than criminal.

The individualization of international criminal law often undermines expressing the collective nature of international crimes and risks apportioning blame inadequately or unfairly. First, international criminal law mechanisms have been criticized as being overambitious in delineating mass systems of crime into individual guilt and responsibility. In doing so, international criminal law fails to appreciate the real collective and institutional dynamics of crimes, cosmetically breaking down complex institutional relationships based on norms and behavior into the language of guilt and innocence.⁷⁴ In doing so, international criminal law often makes the collective a background character rather than bringing it to the forefront and analyzing its complexity, role, and

71. *Id.* at 4.

72. *United States v. Hermann Goring*, 22 I.M.T. 411, 447 (Int'l Mil. Trib., Oct. 1, 1946).

73. CARSTEN STAHN, *A CRITICAL INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 117, 120 (2019).

74. *Id.* at 124–25.

responsibility.⁷⁵ This tension brings to light a broader challenge within international criminal law: the effort to translate complex, collective, and multi-dimensional atrocities into the legal frameworks of criminal law systems that generally focus on individual guilt.⁷⁶ The misrepresentation of state crime has effects much beyond that of the trial itself, particularly when decisions are relied on for their historical accounting and truth-telling purposes.⁷⁷

Second, by portraying the individual in overly simplistic terms, international criminal law raises issues of fairness, fair labeling, and proportionality with respect to the individual's relationship to the collective. It risks holding individuals accountable for violations of the collective that transcend their personal contributions or actions.⁷⁸ For example, for crimes against humanity, it is irrelevant whether the accused specifically intended to target the civilian population or their immediate victim.⁷⁹ Yet, they are held responsible for their acts as part of a broader attack. While such crimes can only be fully understood within the collective context in which they occur, their responsibility is individualized. In effect, the boundary between liability for a specific act and for participation in an entire campaign of criminality becomes blurred. This is a criticism raised in respect of the trial of Al Hassan, who, as a police officer, was made the poster boy of the Islamic Court system. In her Separate Opinion, Judge Akane departed with the Majority in respect of Al Hassan's convictions under certain crimes and criticized the Majority because "the reasoning adopted implies that Mr Al Hassan is responsible for all acts committed by Ansar Dine/AQIM in Timbuktu."⁸⁰

Conversely, the other issue that arises from individualizing the criminality of a collective is that it may implicitly attribute a collective innocence to the rest of society. Analyzing, within the context of a successful prosecution, the acts and decisions of individuals accused of international crimes, will normally produce a narrative that such decisions and acts are tremendously divergent from that of wider society. They do, after all, amount to international crimes. However, are they truly so tremendously deviant from those acts and decisions of their associates and the larger machinery of the institutions to which they

75. Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 593–94 (2002).

76. See generally PAYAM AKHAVAN, *REDUCING GENOCIDE TO LAW: DEFINITION, MEANING, AND THE ULTIMATE CRIME* (2012).

77. Natalie Hodgson, *Resisting the State Crimes of the Global North: Exploring the Potential of International Criminal Law*, 22 J. INT'L CRIM. JUST. 151, 157 (2024).

78. Alette Smeulers & Barbora Holá, *ICTY and the Culpability of Different Types of Perpetrators of International Crimes*, in COLLECTIVE VIOLENCE AND INTERNATIONAL CRIMINAL JUSTICE 175, 177 (Alette Smeulers ed., 2010).

79. Prosecutor v. Kunarac, Case Nos. IT-96-23, IT-96-23/1-A, Appeals Judgment, ¶¶ 102–103 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

80. Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Separate and Partly Dissenting Opinion of Judge Tomoko Akane, ¶¶ 57–60 (June 26, 2024).

belonged?⁸¹ Criminal trials, focusing on the individual, normally stop inquests into such a question when there exists enough evidence to convict, even if a co-perpetration mode of liability is advanced. Further inquest may reveal that such acts would not have been considered criminal at all, but rather normal, in certain situations of systemic institutional crime (for example, apartheid South Africa).⁸² We are then left without a narrative of the structures of the institution that bore the convicted individual. From a transitional justice perspective, the process unduly focuses on the punishment of individuals rather than looking into the causes and structures of a system of crime.⁸³

As a result, some may argue that the best way to respond to state criminality is to look outside of international criminal law. Indeed, international criminal law may even divert attention away from other avenues to address mass human rights abuses.⁸⁴ Other avenues that may work in tandem with international criminal law processes or separately could include truth commissions, public inquiries, or mechanisms to apportion state responsibility, among others.⁸⁵

To respond to the collective nature of international crimes, tribunals provide for a wide variety of secondary and participatory liabilities in addition to using forms of liability that attribute responsibility to military and civilian commanders for the crimes committed by subordinates.⁸⁶ Often, the degree of culpability depends on the structural or hierarchical relationship to the crime rather than the physical proximity or perpetration of it.⁸⁷ However, while the mode of liability may accept the existence of a collective body in the background, it does not find it criminal per se; rather, it may at most indirectly express it. Given these limitations of international criminal law in respect of recognizing state crime, one of the most important strengths of trials has become the legal expressivism—that is, the function of international criminal law that transmits didactic messages regarding moral culpability, stigmatization, condemnation of certain behaviors, and the establishment of narratives in decisions⁸⁸—used to label conduct and organizational structures as morally wrong in one way or another.⁸⁹

81. Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. ONLINE 1, 16–17 (2002).

82. *Id.* at 16.

83. STAHN, *supra* note 73, at 125–26.

84. Hodgson, *supra* note 77, at 157. See generally Philip Alston, *Criminalizing Human Rights*, 15 J. HUM. RTS. PRAC. 660 (2023).

85. See BEATRICE BONAFÈ, *THE RELATIONSHIP BETWEEN STATE AND INDIVIDUAL RESPONSIBILITY FOR INTERNATIONAL CRIMES* 3 (2009).

86. David Nersessian, *Whoops, I Committed Genocide: The Anomaly of Constructive Liability for Serious International Crimes*, 30 FLETCHER F. WORLD AFF. 81, 82 (2006).

87. STAHN, *supra* note 73, at 128.

88. Vasiliki Festa, *Erasing the “Victim” from the “Victim–Perpetrator”*: Expressivist Messages in the *Ongwen Trial Judgment*, 22 J. INT’L CRIM. JUST. 1, 3 (2024).

89. Hodgson, *supra* note 77, at 158.

In practice, this labeling has been only rarely expressed in trials where legal institutions have played a prevalent role. The prosecutor in the 1946 trial of Arthur Greiser before the Polish Supreme National Tribunal for genocide reconciled with Greiser's control of the legislation, judicialization, and enforcement of genocidal law in Poland, indicating that the "[t]he subject of this trial is the criminal system of governance."⁹⁰ Prosecutor Dante Vega said in respect of the Argentine *Recabarren et al.* case:

After having heard so much pain, and having analyzed the statements of the accused and their defenses, I am satisfied that . . . state terror was not only the work of uniformed officers, but that it could only have been possible with a justice system that facilitated the repressive and illegal task.⁹¹

Finally, the *Justice* case presents an interesting example of expressing the institutional criminality of Nazi Germany's legal system, in part. In many ways, the defendants were charged for their participation in the crimes of the legal system as a whole rather than for discreet individual criminal crimes. Institutional criminality of the legal system was expressed through the crime of membership, prosecuting individuals based on their membership in an organization that was declared criminal by the International Military Tribunal.⁹² Moreover, like other Nuremberg era trials, the *Justice* case was a mass trial of the upper echelon of members of the legal profession, thus also symbolically recognizing the institutional dynamic of the crimes.⁹³ The language of the judgment itself further expressed the systemic nature of the crimes, finding that "the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity."⁹⁴ Although highly imperfect, these trials demonstrate the expressive function of trials of those involved in legal orders.

Despite these descriptive expressions of institutional criminality, there still exists a pattern of treating legal frameworks as context. In the handful of convictions concerning sentencing without judicial guarantees, the law is secondary to the immediate and direct conduct of the individuals. In the post-WWII case of *Wagner et al.*, the French Permanent Military Tribunal at Strasbourg largely focused on the actions of Robert Wagner, ex-Gauleiter and Reich Governor of

90. BOGUMIŁ RUDAWSKI, PROCES ARTURA GREISERA PRZED NAJWYŻSZYM TRYBUNAŁEM NARODOWYM [THE TRIAL OF ARTUR GREISER BEFORE THE SUPREME NATIONAL TRIBUNAL] 322 (1946).

91. *Los exjueces mendocinos, condenados a prisión perpetua* [Former Judges from Mendoza Sentenced to Life Imprisonment], MENDOZA POST (July 26, 2017) <https://www.mendozapost.com/nota/67963-los-exjueces-mendocinos-condenados-a-prision-perpetua/> [https://perma.cc/SX9W-HS6C].

92. United States v. Altstoetter, Case No. 3, 3 T.W.C. 984 (1948), Opinion and Judgment, 1029 (U.S. Mil. Trib. Dec. 4, 1947).

93. BALINT, *supra* note 31, at 141.

94. United States v. Altstoetter, 3 T.W.C. at 1062.

Alsace, and only addressed the role of legal professionals as supporting him in specific acts without addressing the functions of the legal system at large.⁹⁵ As previously mentioned, in *Al Hassan*, the ICC failed to engage with the Islamic legal system, looking only at the actions of Al Hassan within the context of an unaddressed system of law.⁹⁶ Tribunals have even neglected the relevance of addressing any connection between institutions and the crimes at hand. In *Kayishema*, the International Criminal Tribunal for Rwanda Trial Chamber explicitly stated that the Court would avoid addressing the political histories and structures of Rwanda, which would presumably also include its laws.⁹⁷ It explained that international criminal law is not concerned with the causal links between such structures and the crimes that took place, treating them only as background context.⁹⁸

b. Limited Scope of the Violence Examined and Desk Perpetration

International criminal law's persistent struggle to bring the law out of the background also limits the scope of what conduct may be addressed at trial. However, the expressivist language of the *Justice* case offered a rare insight into addressing more pervasive crimes committed through the Nazi legal system. It noted that the

[d]efendants are charged with crimes of such immensity that mere specific instances of criminality appear insignificant by comparison. The charge, in brief, is that of conscious participation in a nationwide government-organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law by the authority of the Ministry of Justice, and through the instrumentality of the courts.⁹⁹ In addressing the persecution of Jews and Poles, the *Justice* case emphasized that it was inappropriate to individualize acts of persecution as isolated instances. The Tribunal emphasized that the persecution was part of a grand legal institution and the “discriminatory laws themselves formed the subject matter” of the crime.¹⁰⁰

Conversely, by framing legal institutions in the background, the few other trials involving legal professionals have been limited and restricted to focusing

95. *See generally* France v. Wagner, Case No. 13, 3 T.W.C. 23 (Fr. Permanent Mil. Trib., Strasbourg & Ct. App. July 24, 1946).

96. Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Trial Judgment, ¶ 1500 (June 26, 2024).

97. Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Trial Judgment, ¶¶ 31–32 (Int'l Crim. Trib. for Rwanda May 21, 1999).

98. *Id.*

99. United States v. Altstoetter, Case No. 3, 3 T.W.C. 984 (1948), Opinion and Judgment, 984–85 (U.S. Mil. Trib. Dec. 4, 1947).

100. *Id.* at 1063.

on procedure rather than substance. Of the small handful of post-WWII criminal trials against judges, responsibility was mainly determined in respect of three types of judicial actions: admitting tainted evidence in criminal trials, failing to provide basic judicial guarantees in criminal trials, or imposing clearly excessive sentences in criminal trials.¹⁰¹ Addressing the role of legal professionals in these crimes is indeed important, but there is an over-focus on the immediate effects of legal professionals' conduct in criminal courts and the violation of due process rights. In focusing on forming the connection between the impugned violence and the desk perpetrators—that is, individuals involved in international crimes from positions of bureaucratic or other types of power far from the physical underlying acts of a crime—international criminal law seems unable to see far beyond the courtroom doors.

This individualization is all the more problematic in the context of crimes of law because of the increasing tendency of “autocratic legalism” or “abusive constitutionalism,” whereby states manipulate legal frameworks to entrench power under a veneer of legality.¹⁰² Some states attempt to maintain all appearances of having judicial guarantees, access to justice, and administrative procedures, yet they simultaneously carry out, through that law, a system of mass subjugation. For example, Israel has undertaken significant efforts to frame and legitimize its actions through legal institutions, legal reasoning, and legal professionals. Its “legalism” attempts to maintain the appearance of all the features of a Western legal system.¹⁰³ Even in the Israeli military's strategy document made public in 2015, the legalism of Israel is designed to ensure domestic and international support. Yet, its complex legal framework, including its mass incarceration and military legal system, is a crucial tool in the state's racial subjugation of Palestinians.¹⁰⁴ With a greater focus on the structural violence stemming from law, international criminal justice may become better suited to address less visible and structural crimes.

While not possible in every situation, subjecting the law and its frameworks to institutional responsibility allows us to look at the structural and long-term violence that such laws cause. In this respect, it is also helpful in confronting colonial injustices.¹⁰⁵ As scholars within the Third World approaches to international law (“TMAIL”) discipline often argue, international criminal law fails

101. Joseph Rikhof, *Analysis: Judges as Perpetrators of War Crimes and Crimes Against Humanity*, PHILLIPE KIRSCH INST. GLOB. JUST. J. (Sept. 1, 2017), <https://globaljustice.queenslaw.ca/news/analysis-judges-as-perpetrators-of-war-crimes-and-crimes-against-humanity> [https://perma.cc/G8CP-2LWF].

102. Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 547–48 (2018); David Landau, *Abusive Constitutionalism*, 47 U.C. DAVIS L. REV. 189, 195–97 (2013).

103. HEDI VITERBO, *PROBLEMATIZING LAW, RIGHTS, AND CHILDHOOD IN ISRAEL/PALESTINE* 74 (2021).

104. *Id.* at 75.

105. Carsten Stahn, *Confronting Colonial Amnesia: Towards New Relational Engagement with Colonial Injustice and Cultural Colonial Objects*, 18 J. INT'L CRIM. JUST. 793, 795 (2020).

to address contemporary crimes of colonization and some forms of structural violence like enforced impoverishment or resource extraction.¹⁰⁶ This is often the type of structural violence only made possible through entrenched legal regimes and institutions based in or developed from colonial governance. Yet these forms of violence are not recognized as enumerated crimes under international criminal law. Efforts to hold actors accountable for them must therefore contend with the narrow scope of the core crimes and the constraints imposed by the principle of legality. While these limitations risk excluding colonial legal structures from scrutiny within criminal proceedings, engaging with the structural legal institutions nonetheless offers tribunals the possibility of providing more complete accounts of structural colonial violence. Recent commissions and non-judicial bodies have already begun to do so, producing extensive analyses of these legal regimes, including the legal dimensions of the slave trade.¹⁰⁷

In this vein, by failing to address less overt structural violence and unjust societal arrangements maintained by a system of law, international criminal law fails to support one of the crucial elements in transitional justice processes, namely addressing and contributing to system change.¹⁰⁸ As further addressed in Part III, “[a]ny historical narrative is a particular bundle of silences,”¹⁰⁹ but by bringing those silences to the forefront and signaling the criminality of a system of law, transitional justice actors will be better informed in their advocacy and decision-making with respect to how to provide remedies to those who suffered from structural and colonial violence and how to move forward with a more just system.

C. *Moving Forward: Bringing the Law to the Forefront*

Upon appreciating both the neglect of the role of domestic legal orders themselves in the commission of international crimes and the absence of a concept of state crime in international criminal law, the responsibility of the individual legal professional is hidden behind three conceptual walls. First, in depicting international crimes as committed only in situations of lawlessness or “*une drôle de justice*,”¹¹⁰ the actual role of the legal professional is overlooked

106. See generally John Reynolds & Sujith Xavier, ‘*The Dark Corners of the World*’: TWAIL and International Criminal Justice, 14 J. INT’L CRIM. JUST. 959 (2016).

107. See, e.g., KARINE RAMONDY ET AL., COMMISSION FRANCO-CAMEROUNAISE [FRANCO-CAMEROONIAN COMM’N], LA FRANCE AU CAMEROUN 1945–1971 [FRANCE IN CAMEROON 1945–1971] 30 (2025); TRUTH AND JUST. COMM’N OF MAURITIUS, REPORT OF THE TRUTH AND JUSTICE COMMISSION 57–142 (2011). See generally THÉNAULT, *supra* note 57.

108. Pablo de Greiff (Special Rapporteur), *Rep. on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence*, 52–61, U.N. Doc. A/HRC/30/42 (July 21, 2015).

109. MICHEL-ROLPH TROUILLOT, SILENCING THE PAST: POWER AND THE PRODUCTION OF HISTORY 27 (1995).

110. See THÉNAULT, *supra* note 57.

by virtue of ignoring the importance of legal frameworks and institutions, no matter how just or unjust. Second, with no conception of state or institutional crime in international criminal law, the legal professional, whose responsibility can normally only be defined by virtue of their relationship to the legal institution, is disregarded in favor of those who play a more overt enforcement role. Third, neglecting the function and resources of an all-encompassing institutional framework that commits international crimes ignores the laws that facilitate systemic and ordinary crimes affecting everyday life, a process for which legal professionals may bear some form of responsibility.

By shifting the focus back on the legal institution as the foundation of the crimes, and the legal professional's interaction with that legal institution, we can address the responsibility of legal professionals for their role in more structural forms of violence caused by the law and not only the immediate violence resultant from enforcement. However, are modes of liability and descriptive labeling sufficient to address the crimes of legal professionals within a legal system? Modern approaches to addressing institutional and collective criminality, particularly in criminological studies, place a larger attention on context, looking to the social pressures and roles of individuals within a larger group. This process adds nuance and support to the practice of delineating certain responsibility to the individual, the institution, both, or neither.¹¹¹ This greater attention to contextual group dynamics is a welcome development, particularly when it is expressed in decisions, but it may not always be sufficient.

Law cannot be a mere context when it is the very basis of the crime of the legal professional. Determining the law as something more than a context is largely an effort in finding responsibility in abstract entities. Leora Bilsky and Rachel Klagsbrun have offered one solution based on the 1946 trial of Arthur Greiser for genocide before the Polish Supreme National Tribunal.¹¹² Greiser was the Gauleiter of Nazi-controlled West Poland. His trial largely portrayed him as embodying the legislation, adjudication, and execution of laws in West Poland during his rule over the Polish population. He used the law to "Germanize" the population, implementing a legal system to segregate the Germans from the Poles and subjugating the Poles in all aspects of life.¹¹³ To determine Greiser's responsibility, the prosecution's case was built almost entirely on the laws, enactments, orders, and regulations of the legal system imposed on West Poland by Greiser and his officials. The prosecution relied heavily on expert witnesses to elaborate on this legal and judicial system.¹¹⁴ Bilsky and Klagsbrun

111. STAHN, *supra* note 73, at 118.

112. See generally Bilsky & Klagsbrun, *supra* note 14.

113. CATHERINE EPSTEIN, MODEL NAZI: ARTHUR GREISER AND THE OCCUPATION OF WESTERN POLAND 195–98 (Oxford Univ. Press 2010).

114. Poland v. Greiser, Case No. 74, 13 T.W.C. 70, 96–101 (Sup. Nat'l Trib. Pol. July 7, 1946).

argued that these procedural innovations, relying on expert testimony, “provide us with the key to understanding this unprecedented attempt to put law itself on trial while attributing individual responsibility to the defendant.”¹¹⁵ The legal experts were able to depict an entire legal system in the courtroom, focusing on the existence of laws and the premise that they would be upheld. In a way, this trial brought law to the forefront.

However, while expert testimony is helpful, the ability of the Tribunal in *Greiser* to depict the role and functions of a legal system was not so much due to expert testimony but rather to the nature of the charges. Within our existing international criminal law mechanisms, the institutional nature of crimes of law may be brought out most clearly by charging and constructing certain crimes in a way that brings the law to the forefront.

The 1946 trial of Arthur Greiser marked the world’s first genocide conviction, which at the time included cultural genocide. The Tribunal thus considered the totality of the “disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups.”¹¹⁶ The structural and cultural annihilation of the Polish national group was the focus of the trial, and to connect Greiser to the structural and systemic violence resultant from the cultural genocide of the Poles, the prosecution relied on the legal system he imposed.¹¹⁷ The fundamentally structural nature of the crime of genocide as it was charged allowed the Tribunal to bring the law to the forefront and analyze its systemic effects.

The most promising method of meaningfully holding legal professionals to account as agents of institutional structures of violence is through charging crimes that permit and require engagement with such structures. Court engagement with structural crimes, like in the *Greiser* trial, permit a form of legal expressivism that labels the legal institution itself as criminal. The same challenge of individualizing guilt in relation to these structures remains; however, as discussed below, engaging with the professional nature of legal actors in this context would assist tribunals in better delineating individual responsibility while simultaneously expressing the structural violence that underpins such guilt.

What charges may permit this engagement? While the crime of cultural genocide is unrecognized by any international criminal tribunal today, there exist other forms of genocide and crimes against humanity that are defined in

115. Bilsky & Klagsbrun, *supra* note 14, at 11.

116. *Id.* at 3; RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944).

117. *Poland v. Greiser*, 13 T.W.C. at 96–101.

a way that demonstrate the nature of the crime not as a determined act but as rooted in a structural institutional basis. Most war crimes concern specific acts without the necessity of examining a structural basis, but some forms of genocide and crimes against humanity allow space to engage with legal institutions as a root cause. For example, the U.N. Commission of Inquiry on the Occupied Palestinian Territory recently found that Israel is committing acts of genocide in Gaza. It rooted Israel's underlying genocidal measures bringing about the physical destruction of Palestinians in Gaza through creating unliveable conditions of life in laws enacted by the Knesset to block, obstruct, and control aid.¹¹⁸ As a result, the Commission laid out the structural legal basis of Israel's acts of genocide over a longer period of time.

Equally, the crime of apartheid is largely a crime made possible through law. Under the Apartheid Convention, "legislative" and other measures may constitute the inhuman acts "committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them."¹¹⁹ Likewise, under the Rome Statute, the crime of apartheid requires an institutional framework. It is similarly made up of certain inhumane acts "committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime."¹²⁰ As defined in the Rome Statute, the crime of apartheid offers space for the ICC to recognize the criminal character of the crime as one rooted in legal systems and institutions. However, the crime has never been prosecuted. Only recently in South Africa has the world's first prosecution of apartheid begun, with murder as the underlying conduct of the crime of apartheid.¹²¹

Moreover, the crime of persecution has been prosecuted in a way that somewhat brings legal institutions to the forefront. In the *Justice* case, as noted above, the crime of persecution was used to shed light on the Nazi legal system at large, as well as its Night and Fog Decree.¹²² More recently, a focus on law is

118. Human Rights Council, Indep. Int'l Comm'n of Inquiry on the Occupied Palestinian Territory, Including East Jerusalem, and Israel, *Legal Analysis of the Conduct of Israel in Gaza Pursuant to the Convention on the Prevention and Punishment of the Crime of Genocide*, 198, U.N. Doc. A/HRC/60/CRP.3 (Sept. 16, 2025).

119. International Convention on the Suppression and Punishment of the Crime of Apartheid art. 2, Nov. 30, 1973, 1015 U.N.T.S. 243.

120. Rome Statute of the International Criminal Court art. 7(2)(h), July 17, 1998, 2187 U.N.T.S. 90, 2187 (entered into force July 1, 2002) [hereinafter Rome Statute].

121. See generally *South Africa v. Ebrahim*, 2025 ZAGPJHC 410 (High Court), SS70/2021 (Apr. 14, 2025) (S. Afr.), <https://www.saflii.org/za/cases/ZAGPJHC/2025/410.pdf> [https://perma.cc/2BAJ-NSRB].

122. *United States v. Altstoetter*, Case No. 3, 3 T.W.C. 984 (1948), Opinion and Judgment, 1031–34, 1063 (U.S. Mil. Trib. Dec. 4, 1947).

reflected in the ICC OTP's application for an arrest warrant of the Chief Justice of Afghanistan, where it bifurcated the Taliban's persecutory conduct into *imposing* rules and *enforcing* rules.¹²³ Looking to the imposition of laws rather than simply where they are enforced allows the ICC to analyze the full scope of the Taliban's persecutory system. As may be demonstrated by this case, only when law is deemed the subject and cause of the crime can we more accurately express the nature of crimes of law and the culpability of legal professionals.

The structural framing of legal institutions may also be demonstrated through charging other crimes like extermination, where the infliction of "conditions of life calculated to bring about the destruction of part of a population" could in theory be based in a system upheld through legal justifications, legislation, and judicial decisions.¹²⁴ Another example is the crime of enslavement, which is also often not made up of just discreet acts but rather is rooted in a structural system of injustice maintained through law and legal loopholes. Indeed, the ICC OTP recognized this reality in its Policy on Slavery Crimes, noting that "[e]nslavement can be entrenched, structural, systemic and interconnected."¹²⁵ Moreover, unlawful imprisonment and enforced disappearances may also principally be rooted in the structural conditions advanced through legal institutions.¹²⁶ In fact, in *Recabarren et al.*, former judges and other legal professionals were convicted for failing to investigate habeas corpus petitions. They were convicted of the crimes against humanity of murder, torture, and unlawful deprivation of freedom.¹²⁷ In this case, the court did sporadically address the systemic role of the judicial system to assist the dictatorship in creating this repressive environment.¹²⁸

Beyond the existing crimes against humanity in the Rome Statute, many have proposed the inclusion of further structural crimes as "other inhumane acts"¹²⁹ or as separate crimes altogether in the International Law Commission Draft Articles on Crimes against Humanity. In 2024, Nigeria proposed that the Articles include crimes against humanity such as slave trading, colonialism,

123. Haqqani Application, *supra* note 8, at 33.

124. INT'L CRIM. CT. [ICC], ELEMENTS OF CRIMES art. 7(1)(b), ICC-PIOS-LT-03-002/15_ENG (2013) [hereinafter ELEMENTS OF CRIMES].

125. ICC, OFF. OF THE PROSECUTOR, POLICY ON SLAVERY CRIMES 71 (2024).

126. ELEMENTS OF CRIMES, *supra* note 124, art. 7(1)(i).

127. See generally Cámara Nacional de Casación Penal [CNCP] [National Court of Appeal on Criminal Matters], sala IV, 5/9/2019, "Petra Recabarren, Guillermo Max y otros s/recurso de casación," No. FMZ 97000076/2012/TO1/4/CFCl (Arg.).

128. *Id.* at 368.

129. See Anjana Leena Sathy, *Is Gender Apartheid the New Forced Marriage?*, VÖELKERRECHTS-BLOG (Mar. 4, 2025), <https://voelkerrechtsblog.org/24234-2/> [https://perma.cc/58M2-94F8].

and the illegal exploitation of resources,¹³⁰ all of which could be deeply rooted in legal institutional frameworks that instill criminal conduct beyond discreet events. Nigeria's proposal raised a particular class of uncodified colonial crimes that take the form of structural violence, including resource extraction, enforced impoverishment, and other measures that affect everyday life.¹³¹ While these are not defined as crimes in any international frameworks, there is a strong case to be made that the legislation and legal facilitation of these structural crimes must be analyzed so as not to be restricted by the limited and Western conceptualization of violence in the core crimes of international criminal law.¹³²

Since the *Justice* case, courts and official bodies have only recently begun to recognize the laws that facilitate structural and less visible injustice used for colonial control. The Canadian Truth and Reconciliation Commission indicated the perpetration of cultural genocide based, in part, on the cultural assimilation laws enforced by Canada in removing Indigenous children from their homes to "civilize" them in residential schools.¹³³ Similarly, the 2024 *Métis* case in Belgium qualified systemic racially motivated abductions of children in Belgian Congo pursuant to a 1952 Belgian law as crimes against humanity.¹³⁴ By assessing the legislation and legal spaces of structural colonial crimes, we may begin to recognize that the colonial space cannot be shielded from legal responsibility and that the pervasive structural violence, as it is rooted in legal institutions, can be captured by international criminal law.¹³⁵

This is not to say that *only* the charging of these crimes allows courts to put legal institutions at the center of trials. However, with international criminal law's individualized focus on the enforcer rather than the lawyer, more structurally defined crimes with pervasive effects like apartheid, persecution, genocide, and colonial-based crimes offer more room to link the legal institution to the mass system of ordinary and extraordinary violence that the conduct of the crime furthers and maintains rather than the immediate extraordinary violence resultant from a court order. In this vein, crimes against humanity are best suited to address crimes of law. Such charging practices may be the

130. Gloria L. Dakwak, Minister, Permanent Mission of Nigeria to the United Nations, Statement on Crimes Against Humanity to the 79th Session of the United Nations General Assembly, 4–5 (Oct. 10, 2024).

131. REYNOLDS & XAVIER, *supra* note 43, at 981; KARINE RAMONDY ET AL., *supra* note 107, at 208, 320–21.

132. Hodgson, *supra* note 77, at 157.

133. TRUTH & RECONCILIATION COMM'N OF CAN., HONOURING THE TRUTH, RECONCILING FOR THE FUTURE: SUMMARY OF THE FINAL REPORT OF THE TRUTH AND RECONCILIATION COMMISSION OF CANADA 153 (2015).

134. CA [Cours d'Appel] Brussels, Dec. 2, 2024, Nr. 2002/AR/262, ¶¶ 2–3, 47 (Belg.).

135. Sarah El Amouri & Stefaan Smis, *The Colonial Policy of Racial Segregation and Forced Displacements of Mixed-Race Children (métis) on Trial: Belgium Held Liable for Crimes Against Humanity*, 29 ASIL INSIGHTS, no. 3, 2025, 4–5.

most effective option within existing international criminal law mechanisms to bring law to the forefront, treating it as the subject of the crime and addressing the structural violence that arises from it.

II. PUTTING LEGAL PROFESSIONALS ON TRIAL

Just as international criminal law neglects the existence and role of legal institutions in the commission of international crimes, it also neglects the active roles of individual legal professionals. The lack and limited scope of trials of legal professionals for international crimes is further explained by the particular role that individual legal professionals play in the commission of crimes of law and how the principles of the legal profession interact with the rules of criminal justice when these individuals are put on trial. As noted, what makes the crimes of legal professionals different is that they are often rooted in the creation, interpretation, justification, or upholding of the law rather than the law's violation. This reversal of logic creates numerous challenges in assigning individual criminal responsibility to legal professionals.

This Part exposes both the variety of ways legal professionals facilitate international crimes with impunity and the persistent failure to treat them as legal actors in court proceedings, as prosecutions tend instead to characterize them as military or political figures. Second, it explains why such trials are limited and why this is problematic. It describes the principles and particularities of the legal profession that act as a further barrier to accountability. Finally, it suggests how to attune legal frameworks to a particular class of legal perpetrator, ensuring a fair and just trial of legal professionals in whichever position they occupy.

A. *The Issue: Neglecting the Roles and Distinct Nature of Legal Professionals*

International criminal law is not necessarily ill-equipped to address the crimes of legal professionals, but it has not been applied appropriately to the plethora of legal actors involved in the commission of crimes of law. Illustrating the lack and limited scope of trials of legal professionals, this Section first elaborates on the diversity of individual legal professionals who commit international crimes. Second, it summarizes the limited caselaw involving legal professionals and the law, demonstrating that they have been problematically treated as military and political actors with law in the background.

1. *The Missing Perpetrators*

In breaking down the conceptual barriers to recognizing institutional crime, we begin to reveal the diversity of legal actors beneath this veil. For instance, one

overlooked type of legal professional is the defense lawyer or public defender. The Iran Tribunal on the Abuse and Mass Killings of Political Prisoners from 1981 to 1988 detailed some of the processes of the Islamic Revolutionary Court and Army Judiciary, where defense lawyers were occasionally appointed but seemingly played a token role or had adverse interests to their clients.¹³⁶ Similar roles in facilitating sham trials can be imagined in respect of other court staff, clerks, and jurists involved in such criminal trials.

However, considering the systemic role of legislation, legal norms, and policies reveals that the full range of relevant legal professionals extends beyond merely lawyers involved in flawed trials. In South Africa, “the law was not self-executing under apartheid. It required administration, application and interpretation by judges, magistrates, prosecutors, officials of the Departments of Justice and Law and Order, and lawyers, both in the academy and the legal profession.”¹³⁷ While judges and prosecutors still contribute to systemic crime outside criminal trials as actors applying rules and making normative judgments about what the law is and should be,¹³⁸ it is important to also look to those less visible legal professionals involved in delivering abuses through legal institutions and norms.

The other relevant legal professionals are those that create law to commit international crimes and those that legally justify international crimes through legal advice. Regarding the former, it is reasonable to suggest that those civil servants involved in the legislation of subjugating and repressive law bear some responsibility for its usage. The systemic oppression and genocide of the Jews by the Third Reich “would not have been possible without the complicity of an efficient civil service, which created the legal framework for depriving Jews of their fundamental rights.”¹³⁹ Civil servants, such as Wilhelm Stuckart, were instrumental in drafting Nuremberg Laws and other racial subjugation legislation.¹⁴⁰ Yet, despite efforts to address the role of civil servants in the Holocaust, namely through the *Ministries* case, most of them remained unpunished, even continuing their roles in West Germany.¹⁴¹

Recognition is even rarer for lawyers who, often by invoking international law, attempt to justify the commission of international crimes. Nonetheless,

136. IRAN TRIBUNAL, THE IRAN TRIBUNAL ON THE ABUSE AND MASS KILLINGS OF POLITICAL PRISONERS IN IRAN, 1981–1988: FINDINGS OF THE TRUTH COMMISSION § 1.3.2.1, at 355 (2013).

137. DYZENHAUS, *supra* note 3, at 27.

138. See DWORKIN, *supra* note 67, at 88, 97.

139. Hans-Christian Jasch, *Civil Service Lawyers and the Holocaust: The Case of Wilhelm Stuckart*, in THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE 37, 37 (Alan E. Steinweis & Robert Rachlin eds., 2013).

140. *Id.* at 38.

141. *Id.* at 38–39. See generally United States v. von Weizsäcker, Case No. 11, 14 T.W.C. 308 (U.S. Mil. Trib., Nuremberg, Apr. 11–13, 1949).

there is a compelling argument that they, too, may bear a measure of responsibility. History offers several examples where faulty and politically influenced legal arguments have been used to justify actions that contravene international law. One prominent example is former U.S. Deputy Assistant Attorney General John Yoo's drafting of the infamous Torture Memos to legally justify the U.S. military's use of torture in the context of the so-called War on Terror. As Parsi illustrated, the U.S. military's use of torture could thus no longer be attributed to deviant behavior, but rather to an official and systemic policy in which Yoo and other legal advisors justified torture as legal. Such a material contribution for the purposes of facilitating the crime (along with knowledge), Parsi argues, may meet the elements of aiding and abetting war crimes under the Rome Statute.¹⁴² Yoo, now a professor at University of California, Berkeley, was never disciplined in professional disciplinary proceedings, let alone a criminal trial, despite calls for his accountability.¹⁴³ There has been significant debate on whether he should have been held responsible in some way.¹⁴⁴

Military legal advisors represent another prominent example of such lawyers largely immune from any legal responsibility for their advice. Soldiers of the Israeli Defence Forces ("IDF") often rely on what appears to be a legal stamp of approval for their unlawful conduct. In one review of the IDF's legal advisors, it was reported that legal clearance of military operations is often used to facilitate indiscriminate attacks on civilians rather than to limit civilian casualties. The "legal" approval is used as an attempt to absolve soldiers of questioning their own responsibility for such attacks, as questions of law and morality are exclusively for the legal department.¹⁴⁵

Ultimately, while there is a plethora of legal professionals who are in some way involved in the commission of international crimes, they have largely acted with impunity. International criminal law mechanisms do indeed account for the participation of individuals as part of a plurality of persons in a systematic facility, whether through joint criminal enterprise, co-perpetration liability, aiding and abetting, or other modes of liability.¹⁴⁶ This is how a police officer

142. Parsi, *supra* note 15, at 24–25, 33–37.

143. Memorandum from John Yoo, Deputy Ass't Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense (Mar. 14, 2003); David Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, 4 NAT'L SECURITY L. & POL'Y 455, 455, 457 (2010).

144. See sources cited *supra* note 143. See generally John Dugard et al., *What's Wrong with International Lawyers?*, in *WHAT'S WRONG WITH INTERNATIONAL LAW?* 467 (Cedric Ryngaert et al. eds., 2015).

145. Or Bassok, *They Studied Law, Opposed Netanyahu — and Now Approve the Israeli Army's Mass Killings in Gaza*, HAARETZ (Sept. 11, 2025), <https://www.haaretz.com/magazine/2025-09-11/ty-article-magazine/premium/they-studied-law-opposed-netanyahu-and-now-approve-israeli-armys-mass-killings-in-gaza/00000199-28b4-d487-a3d9-acbf21680000> [https://perma.cc/W94R-N8FZ].

146. STAHN, *supra* note 73, at 127–28, 133.

like Al Hassan could be prosecuted based on his conduct and intent in relation to a legal system of crime where the impugned conduct was committed by “mainly Judges of the Islamic Court.”¹⁴⁷ However, these modes of liability are often employed in a way that fails to address the legal norms and structures underlying the relationship of legal professionals to the criminal enterprise. Revealing the role of the law itself and how it defines the parameters of the role of legal professionals in a system of violence counters the notion that these so-called desk-killers are somehow separated from the violence, and it reveals who the key actors are.¹⁴⁸ The distinct nature of the legal profession is illuminated when we begin to look at the small handful of criminal cases where legal professionals have been convicted.

2. *Existing Caselaw: Treating Legal Professionals as Military and Political Actors*

The few trials discussed below involving legal professionals follow a familiar pattern, with the exceptions of the *Justice* case, *Recabarren et al.*, and to some extent, the *Ministries* case. First, legal professionals are normally tried only for their immediate and discreet acts within a courtroom. Second, usually it is only judges and prosecutors that are tried. Third, the varying contributions and culpabilities of the legal professionals are not clearly delineated. Fourth, legal professionals are normally only tried alongside political or military actors. Fifth, the political or military actor is treated as the main perpetrator. Sixth, the criminal conduct of the legal professional is only defined in relation to the actions or plans of the military or political actor. Finally, most of the complexities of the legal profession are ignored or glossed over. As a result, legal professionals are largely treated as military or political actors and held accountable only for direct and discreet conduct underlying the war crime of sentencing without due process.

The first trials of legal professionals took place just after World War II, where jurists and prosecutors of Nazi German and Imperial Japan were tried in Allied military tribunals. The *Justice* case saw the prosecution of the judges and prosecutors of the Nazi legal system for not only membership in a criminal organization and denying judicial guarantees, but also for their role in implementing and supporting the crimes against humanity of persecution, torture, and murder.¹⁴⁹ To date, it is the most comprehensive and structural trial of legal

147. Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Sentencing Judgment, ¶ 65 (Nov. 20, 2024).

148. See HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 211–16 (2006).

149. United States v. Altstoetter, 3 T.W.C. 984, 985, Opinion and Judgment (U.S. Mil. Trib. Dec. 4, 1947).

professionals. It analyzed at length the functions and practices of the Nazi legal system and briefly touched on some of the principles arising from the nature of the legal profession, such as the principle of judicial independence.¹⁵⁰

To some extent, the *Ministries* case, where the Tribunal focused on the role of the Reich ministries in implementing Nazi policies,¹⁵¹ also followed some of this logic, albeit with much less engagement with the existence and nature of defendants' legal duties and roles. For instance, the Tribunal engaged with, to a limited extent, the legal professional roles of Wilhelm Stuckart and Hans Heinrich Lammers. Stuckart was a German Nazi Party lawyer, official, and State Secretary in the Reich Interior Ministry in the Third Reich. Crucially, he participated in the January 1942 Wannsee Conference and was a co-author of the Nuremberg Laws—the statutes that stripped Jews of citizenship and legal personhood.¹⁵² Stuckart's case is a good example of using professional legal expertise to construct a system of laws whose foreseeable effect was persecution and ultimately genocide.¹⁵³ While he was sentenced only to time served due to health reasons, the Tribunal found that his role in formulating legislation and regulations contributed to the almost total extermination of Jews.¹⁵⁴ The Tribunal offered little engagement with his legal professional duties but did recognize that the “legal knowledge” of Stuckart was placed at the disposal of the executors of these crimes.¹⁵⁵ Likewise, Hans Heinrich Lammers was a chief legal administrator of the Third Reich. Although often framed as a political leader, his distinct legal role in “translating into law the various programs decided upon by the Reich government” was also emphasized throughout the *Ministries* case and was considered a basis for his liability.¹⁵⁶ However, one of Lammers' defense theories was essentially that he was a lawyer who simply took care of formal matters.¹⁵⁷ In rejecting this defense, the Tribunal did not opine that the defense was irrelevant but that the evidence simply did not support it. The Tribunal found that “Lammers was a responsible Reich Minister. He was neither a glorified messenger boy nor a notary public certifying the acts of others.”¹⁵⁸

In the same case, conversely, the trial did not systematically analyze how the legal professional Otto Meissner used his legal role to enable the crimes committed by the Nazis. Meissner used his specific legal expertise as head of

150. *Id.* at 1025.

151. *See generally* United States v. von Weizsäcker, Case No. 11, 14 T.W.C. 308 (U.S. Mil. Trib., Nuremberg, Apr. 11–13, 1949).

152. United States v. von Weizsäcker, 14 T.W.C. at 481, 599, 634–39.

153. *Id.* at 483.

154. *Id.* at 645.

155. *Id.* at 646.

156. *Id.* at 706.

157. *Id.* at 704, 708.

158. *Id.* at 604.

the Presidential Chancellery to review petitions and pleas for clemency and presented them to Hitler.¹⁵⁹ Sometimes, Hitler would refer cases to be transferred from the Ministry of Justice to the Gestapo. Meissner had no objection to reviewing and transmitting these transfer orders even knowing that “these transfers meant the death of these persons concerned.”¹⁶⁰ Despite his role and knowledge, the Tribunal did not engage with the question of whether his legal professional role constituted a distinct form of liability or complicity. In fact, the Tribunal found that “his part was hardly more than that of a messenger,” and he was acquitted entirely.¹⁶¹ The Tribunal saw a bureaucrat, not a lawyer.

Similarly, several other of the initial trials involving legal professionals just after World War II largely glossed over the nature of the accused as a legal professional to begin with. For instance, the *High Command* case, which focused on senior Nazi military leaders, included Rudolf Lehmann, Chief of the Legal Department of the High Command of the Armed Forces, as one of the defendants. The Tribunal found that Lehmann was not directly concerned with the High Command’s operations, and instead of engaging with his unique role as a legal advisor in these circumstances, the Tribunal decided to consider him the equivalent of a field commander, treating his advice as military orders.¹⁶²

The remaining trials of legal professionals just after World War II concerned the denial of judicial guarantees and fair trial rights, normally leading to the crime of sentencing without due process, a crime which is still regularly charged today in international criminal law. Enumerated as a grave breach of the Geneva Conventions, the crime is defined under the Rome Statute in non-international armed conflicts by sentencing or carrying out executions of protected persons “without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.”¹⁶³ In international armed conflicts, it is the willful deprivation of a protected person “of the rights of fair and regular trial.”¹⁶⁴

While this crime’s parameters were still developing in 1946, the U.S. Military Commission (“USMC”), which was established under the authority of General Douglas MacArthur, held three trials against Japanese legal professionals for conducting flawed trials. In *Isayama*, multiple Japanese military prosecutors and judges were convicted of facilitating false trials against Allied airmen without judicial guarantees.¹⁶⁵ Lieutenant-General Harukei Isayami, a

159. *Id.* at 605.

160. *Id.* at 607–08.

161. *Id.* at 609.

162. *Id.* at 693; Parsi, *supra* note 15, at 23.

163. Rome Statute, *supra* note 120, art. 8(2)(c)(iv).

164. Rome Statute, *supra* note 120, art. 8(2)(a)(vi).

165. *United States v. Isayama*, 5 T.W.C. 60, 60 (U.S. Mil. Comm’n, Shanghai, July 25, 1946).

military leader acting as Chief of Staff of the area, was tried as the main perpetrator for ordering and directing a military tribunal to hold a false trial and sentence the airmen to death. The judges and prosecutors were tried essentially as soldiers for their discreet acts in carrying out military orders by facilitating the trials.¹⁶⁶ The Commission did not address any appropriate defenses such as the principle of judicial independence or the issue of superior orders based in law.

In *Sawada & Seven Others*, several legal professionals and Japanese individuals acting in the capacity of military judicial roles were convicted of the war crime of denying a fair trial to American prisoners of war.¹⁶⁷ Specifically, the decision found, inter alia, that the legal professionals falsified evidence, failed to connect it to charges, denied the provision of defense counsel or obtaining evidence, failed to provide interpretation, and completed the trials in one day.¹⁶⁸ Again, a non-lawyer military leader, Major-General Shigeru Sawada, was tried as the main perpetrator. The defendants were tried as military actors sitting as judges without considering any legal defenses. The Commission considered the defense of superior orders only in the context of obeying military orders in conducting the trial. However, it did mitigate the sentence because the offences were committed in pursuance of domestic law.¹⁶⁹

In *Hisakasu & Five Others*, Japanese military judges, a prosecutor, and a legal officer were convicted of the war crime of denying a fair trial, namely for denying the opportunity to present a defense or secure evidence, among other violations of judicial guarantees.¹⁷⁰ Again the accused were tried with non-lawyer military actors in support of a directive to execute a POW, and it is not apparent that their distinct roles as legal professionals were considered. Interestingly, however, when comparing its findings to other cases, the Commission identified a shortfall in not addressing the varying degrees of responsibility of legal professionals:

It may be worth adding that not all of the judges found guilty had acted in quite the same capacity . . . It is not, however, proposed to attempt here to show the possible correlation between these various degrees of responsibility and the sentences meted out to the accused, though such an analysis would constitute an instructive field of study.¹⁷¹

Likewise, in the trial of *Shigeru Ohashi & Six Others*, the Australian Military Court convicted two judges who presided over a summary trial and execution of

166. *Id.* at 65.

167. *United States v. Sawada*, Case No. 25, 5 T.W.C. 1, 1–8 (U.S. Mil. Comm'n, Shanghai, Apr. 15, 1946).

168. *Id.* at 10–12.

169. *Id.* at 13.

170. *United States v. Tanaka*, Case No. 33, 5 T.W.C. 66, 70–71 (U.S. Mil. Comm'n, Shanghai, Sept. 3, 1946).

171. *Id.* at 78.

eighteen civilians in the occupied Solomon Islands.¹⁷² The Court emphasized that “the accused were soldiers” acting as judges and accordingly only considered the defense of superior military orders,¹⁷³ a defense grounded in military hierarchy whereby criminal responsibility may be excluded if a subordinate obeys an order that is not manifestly unlawful and whose unlawfulness they did not know.¹⁷⁴

In *Wagner and Six Others*, the French Permanent Military Tribunal convicted German judges and prosecutors for, among other war crimes, “judicial murders” of Allied prisoners of war resulting from the abuse of legal processes.¹⁷⁵ The “chief accused,” Wagner, was head of the civil government of Alsace. The other main perpetrators were all civil and political actors. The legal professionals were only charged with complicity in the judicial murders, supporting the specific activities of the political actors; the Tribunal did not address the roles and functions of the legal institution operating in Alsace.¹⁷⁶ One former prosecutor, Ludwig Luger, successfully pleaded the superior orders defense, but the Tribunal did not elaborate further.¹⁷⁷

Aside from the regular Allied Tribunal, there were some trials of German Nazi regime jurists for various related offences, such as obstruction of justice, conducted by domestic courts in Germany following World War II. The Supreme Court of the British-occupied zone, a court made up of non-Nazi German jurists appointed by the British military, reached four judgments concerning Nazi-era jurists for the crime of “perversion of justice.”¹⁷⁸ The Court indeed focused on the judicial function of jurists in relation to the oppression imposed by criminal courts and emphasized the incomprehensibility of exempting judges from criminal liability for their participation in such oppression. However, all defendants were acquitted due to a higher judgment or a retrial.¹⁷⁹ West German courts largely emphasized principles concerning the privilege and independence of judges, ostensibly protecting them from criminal liability. This resulted in very few convictions for Nazi judicial crimes, and in 1995, the Federal Court of Justice publicly apologized for this failure of German criminal justice.¹⁸⁰

172. *Australia v. Ohashi*, Case No. 26, 5 T.W.C. 25, 25–26 (Austl. Military Ct., Rabaul Mar. 20–23, 1946).

173. *Id.* at 31.

174. Rome Statute, *supra* note 120, art. 33.

175. *See generally* *France v. Wagner*, Case No. 13, 3 T.W.C. 23, 23–24 (Fr. Permanent Mil. Trib., Strasbourg & Ct. App. July 24, 1946).

176. *Id.* at 24–27.

177. *Id.* at 42.

178. Florian Jeßberger & Milan Kuhli, *Settling Accounts for Nazi-era Judicial Injustice (NS-Justizunrecht) Before Allied and (West-)German Courts*, in *TRANSITIONAL JUSTICE*, *supra* note 11, at 3, 10.

179. *Id.* at 9.

180. *Id.* at 12–13.

In East German courts, over 140 former Nazi legal professionals were convicted, albeit in trials largely without judicial guarantees.¹⁸¹ In the Waldheim trials in East Germany, few matters concerned war crimes, and the special function of the jurists prosecuted was ignored altogether.¹⁸² After unification, some criminal proceedings were initiated against legal professionals for “perversion of justice”—that is, a criminal offense consisting of the willful bending of the law by a judge or prosecutor—for their participation in arbitrary and partial proceedings in East Germany.¹⁸³

There were also attempts to try Italian officers for their roles as judges and prosecutors at Italian tribunals in occupied Yugoslav territory. The U.N. War Crimes Commission (“UNWCC”) investigated reports that these Italian tribunals routinely pronounced sentences on innocent people in summary and arbitrary proceedings without judicial guarantees, normally executing death sentences thereafter.¹⁸⁴ The UNWCC registered several of these judges as suspected war criminals.¹⁸⁵ However, the only known war crimes trial of an Italian for participation in these courts was against Vincenzo Serrentino, the former prefect of the Province of Zara in Dalmatia. Serrentino was one of the judges of the Extraordinary Tribunal for Dalmatia, which held trials against alleged Yugoslav partisans without any judicial guarantees and carried out several death sentences.¹⁸⁶ Serrentino was arrested in 1945 by the Yugoslav Army and tried for war crimes for his role in the Extraordinary Tribunal for Dalmatia. Serrentino and other witnesses in support of him argued that Serrentino actually opposed the Extraordinary Tribunal for Dalmatia’s imposition of the death penalty. The Yugoslav court was unable to confirm this, and it instead disclosed a letter from Serrentino’s superior praising Serrentino’s straightforward collaboration in the Tribunal and suggesting that Serrentino did not behave like a regular judge. Largely based on this letter, Serrentino was sentenced to death in a Šibenik court, reportedly after significant due process violations.

181. *Id.*

182. Kai Cornelius, *Malfesance in Office as a Crime in the Context of Dictatorships: The Example of Judicial Perversion of Justice in the East German Waldheim Trials*, in *TRANSITIONAL JUSTICE*, *supra* note 11, at 18, 19.

183. Gerhard Werle & Moritz Vormbaum, *Prosecuting State Criminality After German Unification: Judging the Judges*, in *TRANSITIONAL JUSTICE*, *supra* note 11, at 27, 31.

184. U.N. War Crimes Comm’n, Committee I, Rep. on the Yugoslav Case No. 940 (Italian Courts in Dalmatia), at 3, U.N. Doc. I/13 (July 10, 1945) [hereinafter Rep. on Case No. 940].

185. STATE COMM’N FOR THE INVESTIGATION OF WAR CRIMES, FEDERATIVE PEOPLES’ REPUBLIC OF YUGOSLAVIA, REPORT ON ITALIAN CRIMES AGAINST YUGOSLAVIA AND ITS PEOPLES 39 (1946).

186. U.N. War Crimes Comm’n, Rep. on the Case No. 940, *supra* note 184, at 1.

He was executed on May 15, 1947, shortly after the Supreme Court of Croatia upheld his conviction.¹⁸⁷

Since the judgments just following World War II, prosecutions of legal professionals for international crimes have been rarer and have only taken place in civilian domestic courts or as trials for solely domestic crimes. For instance, Norway tried former Norwegian judges for accessory to murder in sentencing a Norwegian police officer to death for an act of resistance to Nazi authorities while under occupation during World War II.¹⁸⁸

Often overlooked, however, is when in 2006, the former Chief Judge of the Revolutionary Court in Dujail, Iraq, was convicted and sentenced to death by the Iraqi Special Tribunal (“IST”) for the crime against humanity of murder. The IST was established to prosecute senior officials of Saddam Hussein’s regime for serious crimes committed during his rule.¹⁸⁹ Al-Bandar was convicted for his role in sentencing dozens of civilians, including youth, to death in a “mock” trial without judicial guarantees.¹⁹⁰ Although the IST’s trial was deeply flawed and problematic, the Trial Judgment shed light on some of the questions raised when determining the criminality of court as a whole and the legal professionals involved in it. The crucial question of the IST asked: “Was the trial of (148) citizens from Al Dujail in the (disbanded) Revolutionary Court during the first half of June, 1984 real or illusionary?”¹⁹¹ The Court determined the criminal nature of the Court’s activities as a whole before determining the role of Al-Bandar within it. Despite Al-Bandar asserting that he was not under any pressure from Hussein or other officials of Iraq’s political branch, the IST found that he was an “executive employee of the regime” involved in the joint criminal act of the mass execution.¹⁹² Al-Bandar’s defenses included both arguing that he was following the law and that the mock trial occurred in the “heat of battle” during the Iran–Iraq War.¹⁹³ The Trial Judgment depicted the mock trial as an execution devoid of resemblance to a real trial, and it depicted Al-Bandar as a political figure lacking competence and independence from the political regime.¹⁹⁴

187. Zlatko Begonja, *Vincenzo Serrentino: Posljednji talijanski prefekt Zadarske provincije* [Vincenzo Serrentino: *The Last Italian Prefect of the Zadar Province*], 40 ČASOPIS ZA SUVREMENU POVIJEST 833, 844–49 (2008).

188. HANS PETTER GRAVER, *JUDGES AGAINST JUSTICE: ON JUDGES WHEN THE RULE OF LAW IS UNDER ATTACK* 160–61 (2015).

189. Prosecutor v. Hussein (Al-Dujail Case), Case No. 1/9 First/2005, Trial Judgment, ¶¶ 3–6 (Part 1) (Iraqi Special Trib., Nov. 5, 2006).

190. Prosecutor v. Hussein (Al-Dujail Case), Case No. 29/c/2006, Appeal Judgment, ¶¶ 14–16 (Iraqi Special Trib., Dec. 26, 2006).

191. Prosecutor v. Hussein (Al-Dujail Case), Case No. 1/9 First/2005, Trial Judgment, ¶ 13 (Part 2) (Iraqi Special Trib., Nov. 5, 2006).

192. Prosecutor v. Hussein, Appeal Judgment, ¶ 16.

193. Prosecutor v. Hussein, Trial Judgment (Part 2), ¶ 12.

194. *Id.* ¶ 28.

More recently, however, Argentina has investigated dozens of judges, prosecutors, and other judicial officers for crimes against humanity during the Dirty War, the period of state-sponsored violence under the Argentine dictatorship from 1974 to 1983.¹⁹⁵ In 2009 for instance, the Federal Criminal Court of Santa Fe found former federal Judge Víctor Hermes Brusa guilty of “illegal coercion,” namely by interrogating detainees with torture, within the framework of a systematic and generalized plan of repression by the state, considered a crime against humanity.¹⁹⁶ However, the most famous Argentine case against legal professionals is *Recabarren et al.* for the failure of the judges and prosecutors to investigate habeas corpus petitions.¹⁹⁷ Although this case only defined the role of the legal professionals in support of specific judicial acts in relation to a limited number of victims, it did not strictly speaking try the legal professionals as military officers. It recognized the distinct role of the legal professionals and their participation in the collectivity responsible for executing crimes against humanity. The judgment addressed several defenses particular to the legal profession, and it framed the crime as a failure of a positive judicial duty to investigate habeas corpus petitions.¹⁹⁸

Apart from the Argentine proceedings, there have been virtually no criminal trials against legal professionals for international crimes in recent years. Yet the war crime of sentencing without due process is regularly charged against individuals who are not members of the legal profession. This is perhaps a further indicator that this war crime, despite often being committed through some form of law, is still only suited to try military, civil or political actors. The above-mentioned case of *Al Hassan* at the ICC is a prime example, where the defendant was a police officer assisting the orders of the Ansar Dine and AQIM-controlled court.¹⁹⁹ In the *Kaing Guek Eav* case before the Extraordinary Chambers in the Courts of Cambodia, the defendant was not a legal professional but was found liable for this war crime by carrying out sentences without any

195. 48 ex jueces, fiscales y funcionarios judiciales están siendo investigados por delitos de lesa humanidad, [48 Former Judges, Prosecutors, and Judicial Officials Are Under Investigation for Crimes Against Humanity], FISCALES.GOB.ARG (Aug. 14, 2019), <https://www.fiscales.gob.ar/lesa-humanidad/48-ex-jueces-fiscales-y-funcionarios-judiciales-estan-siendo-investigados-por-delitos-de-lesa-humanidad> [https://perma.cc/T82L-WR3A].

196. Corte Criminal Federal de Santa Fe [S.Fe] [Federal Criminal Court of Santa Fe], 22/12/2009, “Víctor Hermes Brusa, Víctor Hermes y otros s/recurso de casación,” Expediente No. 03/08, at 2 (Arg.).

197. See generally Cámara Nacional de Casación Penal [CNCP] [National Court of Appeal on Criminal Matters], sala IV, 5/9/2019, “Petra Recabarren, Guillermo Max y otros s/recurso de casación,” No. FMZ 97000076/2012/TO1/4/CFC1 (Arg.).

198. *Id.* at 33–48. See generally Cámara Nacional de Casación Penal [C.N.C.P.] (National Court of Appeal on Criminal Matters), sala III, “Montoya, Bernardo Alfredo y otros s/recurso de casación,” No. FRE33000179/2007/TO1 (Arg.).

199. Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Trial Judgment, ¶¶ 1067, 1785 (June 26, 2024).

ruling by a constituted court.²⁰⁰ Likewise, in 2022, The Hague District Court in *Alemu* convicted a political and military leader of the Ethiopian Derg's "Red Terror" regime in the 1970s.²⁰¹ The accused was considered "prosecutor, jury and judge at the same time" in having deprived 321 individuals of liberty during the Ethiopian Civil War by pronouncing sentences against them without a prior trial by a regularly constituted tribunal.²⁰² In all cases, the functions or absence of legal institutional decision-making were ignored in favor of addressing the military or civil functions of the accused based on hierarchy or following clear-cut orders to carry out criminal conduct.

Otherwise, recognition of the role of legal professionals for the commission of international crimes has been left to civil or immigration proceedings,²⁰³ extra-legal bodies and mechanisms such as the SATRC, other truth and reconciliation bodies,²⁰⁴ or U.N. investigation mechanisms. For example, the Independent International Fact-Finding Mission on Iran has detailed at length the role of the Iranian judiciary in the commission of international crimes.²⁰⁵

In contrast, the plethora of criminal trials against political and military actors for international crimes has seemingly taken complete priority over the crimes of legal professionals, even in respect of the war crime of sentencing without due process. The neglect of international criminal law to account for the nuanced roles of legal professionals and to address their roles in relation to structural crimes rooted in legal systems is clearly demonstrated by both the lack of trials of legal professionals and their limited treatment when held to account in criminal processes.

B. *The Reasons: Particularities of the Legal Profession*

Even if crimes of law are brought out through the charging of particular crimes against humanity, there still exist several reasons for why we have fewer trials of legal professionals. This Section demonstrates that for legal professionals, just as the law may be wielded as a sword in committing international

200. Prosecutor v. Kaing Guek Eav, Case No. 001/18-07-2007/ECCC/TC, Trial Judgment, ¶ 463 (Extraordinary Chambers in the Cts. of Cambodia July 26, 2010).

201. See generally Rb.'s-Gravenhage 15 december 2017, NJFS 2018, 98 (Officier van Justitie/ Eshetu Alemu) (Neth.).

202. *Id.* at 13.4, 23.

203. See generally Canada v. Mohamud, [1995] 98 F.T.R. 83 (T.D.) (Can.); Mankoto v. Canada, [2005] F.C. 294 (Can.).

204. See COMISIÓN NACIONAL SOBRE LA DESAPARICIÓN DE PERSONAS [NACIONAL COMMISSION ON THE DISAPPEARANCE OF PERSONS], NUNCA MÁS: THE REPORT OF THE ARGENTINE NATIONAL COMMISSION ON THE DISAPPEARED 395–97 (Farrar Straus Giroux trans., 1986) (1984).

205. U.N. Human Rights Council, *Consolidated Findings of the Independent International Fact-Finding Mission on the Islamic Republic of Iran*, ¶¶ 785–817, U.N. Doc. A/HRC/58/CRP/1 (Mar. 18, 2025).

crimes, it may also be used as a shield to protect from any kind of criminal responsibility. This is due to the particular nature and obligations of the legal profession and its relationship to legal institutions. The issues that arise when it comes to breaking down individual responsibility for legal professionals not only include the aforementioned complexities rooted in abyssal thinking and the individualization of institutional crime, but also debates on legal positivism. These debates lead to questions like: When exactly does a legal order become criminal and what is a legal professional expected to do in an unjust legal system? Finally, the prospect of judging the law and its actors raises several issues that may cause reluctance to prosecute them or, at the very least, make it more difficult. These issues are brought about by the principle of judicial independence, complementarity, respect and professional regulation, and feasibility.

1. *Distance Between the Lawyer and the Enforcer*

At this point, the desk-perpetrator dilemma warrants renewed attention in the context of legal institutions. This Article has already touched upon the issue of individualizing a perpetrator within a collective legal system for seemingly generic contributions and on the issue of connecting the mind to the hand. But how may these issues be raised regarding legal professionals? They have been raised to depict the legal professional as a passive actor and to act as defenses in respect to both the causal element and mental element of the crime. Regarding the causal element, accused individuals have relied on the institutional dimension of crimes of law to argue they were merely a “small cog in the vast machinery of justice” only ever applying law delivered from above.²⁰⁶ In this vein, accused individuals have downplayed the role of lawyers generally as a contribution not necessary to the commission of the crime. Former public defender Guillermo Recabarren argued this in his trial, stating that Argentina’s crimes against humanity would indeed be possible without judicial complicity.²⁰⁷ Likewise, in several submissions to the SATRC, legal professionals relied on what Dyzenhaus terms the “95% defense,” the claim that the vast majority of their work had nothing to do with upholding and justifying apartheid laws.²⁰⁸

Regarding the mental element of the crimes of law, namely knowledge or direct intent depending on the crime and mode of liability, we have again

206. William Meinecke Jr., *German Justice on Trial: The Justice Case*, 229 MIL. L. REV. 173, 186 (2021).

207. Cámara Nacional de Casación Penal [CNCP] [National Court of Appeal on Criminal Matters], sala IV, 5/9/2019, “Petra Recabarren, Guillermo Max y otros s/recurso de casación,” No. FMZ 97000076/2012/TO1/4/CFC1, at 63 (Arg.).

208. DYZENHAUS, *supra* note 3, at 123.

seen legal professionals attempt to rely on the distance between them and the enforcer of their laws. Legal professionals have claimed not to have any knowledge of the physical conduct carried out. They rely on international criminal law's focus on the mental element within modes of liability that connect the mind of the desk-perpetrator to the hands of the enforcer. Former Argentine judge Rolando Carrizo argued that he could not be complicit in enforced disappearances because he did not share the objectives of the Argentine dictatorship nor know about the impacts of the laws he upheld.²⁰⁹ The same argument was raised by judges in South Africa before the SATRC.²¹⁰

As a result of these issues, the legal professional's role is often seen as passive. This was highlighted in *Recabarren et al.* Both passive and active forms of complicity were distinguished for the judges in respect of the same conduct.²¹¹ Prosecutors requested that the charges against the four accused be elevated from accomplices to principal perpetrators, arguing that the failure of the judicial duty to act directly caused the disappearances of over twenty dissidents.²¹² In this argument, the basis of which is the legal professional's unique relationship to the law, the legal professional's active role is recognized. Just as lawyers were "active in formulating" the law of the Nazi's mass system of repression and discrimination, judges are also active interpreters who must make normative judgments about what the law is and how it should be carried out.²¹³ With more overt and active judicial actions, where legal professionals are treated as military or political leaders, a more active role as part of a joint criminal enterprise is sometimes assumed. The IST, for instance, found that a judge's signing of an execution order "does not differ from the contributions of the executors of these acts. Both are the authentic perpetrators of the crime."²¹⁴ Judicial innovations, including joint criminal enterprise liability, may in some cases overcome the difficulty of prosecuting desk perpetrators, but as addressed below, the particular role of legal professionals must be one of the starting points.

209. Petra Recabarren, Guillermo Max y otros, Recabarren et al., No. FMZ.97000076/2012/TO1/4/CFC1, at 47.

210. DYZENHAUS, *supra* note 3, at 136.

211. Marina Paola Casartelli, *La dimensión judicial de la represión: complicidad de jueces, fiscales, abogados y su juzgamiento penal como delitos de lesa humanidad* [The Judicial Dimension of Repression: The Complicity of Judges, Prosecutors, and Lawyers, and Their Criminal Prosecution for Crimes Against Humanity], 13 JORNADAS DE SOCIOLOGÍA, 2019, at 13.

212. Petra Recabarren, Guillermo Max y otros, Recabarren et al., No. FMZ.97000076/2012/TO1/4/CFC1, at 104; *Argentina Sentences 4 Ex-Judges for Dictatorship-Era Crimes*, AP NEWS (July 27, 2017), <https://apnews.com/general-news-6287a5876a3449d189f03e083ac194bd> [<https://perma.cc/ADJ6-6QE9>].

213. STEINWEIS & RACHLIN, *supra* note 14, at 3; see DWORKIN, *supra* note 67, at 88–89.

214. Prosecutor v. Hussein (Al-Dujail Case), Case No. 1/9 First/2005, Trial Judgment, ¶ 32 (Part 2) (Iraqi Special Trib., Nov. 5, 2006).

2. *Abysal Thinking Continued?*

Moreover, just as international legal institutions may preclude the existence of a legal system in the Global South, they may also preclude the status of an individual of the Global South as a legal professional. The typical international crimes trial as it exists today consists of a prosecution against an individual from the Global South in a court or tribunal largely considered to be run by those of the Global North.²¹⁵ Yet, of the handful of prosecutions against legal professionals described above, not one reflects this type of trial. Of course, this may be due to a number of unrelated reasons, but in the midst of the reluctance to view an institution of the Global South as a legal system, one might assume that there may also be a reluctance to see an individual operating within that system as a legal professional. In the same vein, there may also be a lack of familiarity of legal professionals from the Global North with the language of several legal systems of the Global South: A different set of terminologies and titles may be used, a different set of regulations may govern, and religious figures may play a more prominent role in the judiciary, as legal professionals in their own right.²¹⁶ As a result, the ostensibly more likely route—that is, ignoring the role of these individuals or treating them as military or political actors—may be followed.

3. *Positivism and the Reluctance of Determining Injustice*

Law demands a certain type of authority that is different from military or official orders. Legal norms retain a sense of objectivity and legitimacy that is not typically attributed to non-legal norms.²¹⁷ They are justified by reasons, albeit often flawed, that can be publicly announced (and sometimes contested and defended). Military or bureaucratic orders derive their authority largely from hierarchical positioning and functional necessity. Yet, law often demands obedience not just because it is backed by force or hierarchy, but because it is presented as part of a greater order of sound law or what the authority considers sound.²¹⁸ In this vein, legal positivism, the theory that law is valid regardless of how morally sound it *actually* is, has persistently been presented as an excuse or justification for legal professionals accused of international crimes. Although, it has been raised with significant debate. In the aftermath of World War II,

215. See Melissa Hendrickse, *A Chance for Africa to Counter the Pitfalls of International Criminal Justice?*, AMNESTY INT'L (May 9, 2024), <https://www.amnesty.org/en/latest/news/2024/04/a-chance-for-africa-to-counter-the-pitfalls-of-international-criminal-justice/> [https://perma.cc/H52E-VN7G].

216. See, e.g., Haqqani Application, *supra* note 8; Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Sentencing Judgment, ¶ 65 (Nov. 20, 2024).

217. WILLIAM SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 27 (1998).

218. *Id.* at 80–82, 85.

German legal philosopher Gustav Radbruch addressed the approach of legal positivism within the German legal profession under the Third Reich: “Positivism, with its principle that ‘a law is a law,’ has in fact rendered the German legal profession defenseless against statutes that are arbitrary and criminal.”²¹⁹ In Radbruch’s formula, he suggested that laws become invalid when they are intolerably unjust, challenging the core principle of legal positivism. Famously, Lon Fuller and H.L.A. Hart raised the debate of legal positivism and naturalism in the context of judging Nazi-era conduct after the fact, a debate that permeates discussions in legal theory to this day.²²⁰ Mostly in domestic courts, the issue of legal positivism in respect of past severe injustices arises in the form of rejecting retroactivity and the notion that there is something wrong with declaring valid laws of the past invalid because our current moral formulas would deem them so.²²¹ Conversely, international criminal law is largely built on a rejection of legal positivism, explicitly denying arguments seeking to justify conduct based on domestic law. This has not prevented other quasi-positivist arguments from being raised by international criminal law mechanisms, nor has it solved the question of determining at which point a legal system becomes unjust, a feat to which concerns of complementarity would act as a barrier.

As a form of exculpation or defense, the notion of “just following orders” has found its way into the legal profession in the form of “just following laws.” For instance, in the SATRC Legal Hearing, former Chief Justice Michael Corbett made a passionate defense of apartheid South Africa’s judiciary. In his written memorandum, he relied on the doctrine of parliamentary supremacy in arguing that “[t]he court had no option but to apply the law as they found it, however unjust it might appear to be.”²²² The same was proposed by some jurists, including former Judge Oswald Rothaug in the *Justice* case, arguing that all he ever did was apply the law.²²³ In any event, as with the “just following orders” defense, the justification of upholding unjust laws based on the fact that they are valid laws was rejected.²²⁴

219. Gustav Radbruch, *Statutory Lawlessness and Supra-Statutory Law*, 26 OXFORD J. LEGAL STUD. 1, 6 (2006).

220. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY* 167–70 (2d ed., Oxford Univ. Press 2010) (1991).

221. David Dyzenhaus, *The Juristic Force of Injustice*, in *CALLING POWER TO ACCOUNT: LAW, REPARATIONS, AND THE CHINESE CANADIAN HEAD TAX* 256, 257 (David Dyzenhaus & Mayo Moran eds., 2005).

222. DYZENHAUS, *supra* note 3, at 44.

223. Meinecke, *supra* note 206, at 186.

224. *United States v. Altstoetter*, 3 T.W.C. 984, 98 (1948), Opinion and Judgment (U.S. Mil. Trib. Dec. 4, 1947).

However, the issue remains as to how to determine when a legal system becomes unjust. At which point are we not “merely dealing with a nicety of jurisprudence but with the essential quality and survival of justice itself?”²²⁵ This is such a subjective question convoluted by issues of complementarity, independence, judicial respect, and feasibility, that courts have become reluctant to even attempt this feat. The reluctance to determine when a legal system becomes unjust is somewhat exemplified in the ICC’s treatment of Ansar Dine’s Islamic Court system, where the ICC refused to engage with the group’s interpretation of Islamic law.²²⁶ Although the ICC did not engage with the judicial guarantees beyond independence and impartiality, it defined and applied these notions without due consideration of Islamic legal and cultural practices.²²⁷ The Court may have benefitted from considerations of established practice with respect to independence and impartiality, among other judicial guarantees, within Islamic courts, as well as the religious and cultural significance of such practices. In fact, as part of the defense’s Final Brief, Al Hassan argued that the Trial Chamber should consider the capacity and Islamic cultural and legal significance of the Islamic Tribunal in light of conceptions of legal pluralism and the ICC’s complementarity regime.²²⁸ Instead, as the ICC did, international courts tend to look only to the realm of court procedures and due process rights to find injustice in the legal institution, and unjust laws themselves are depicted as the context of other atrocities. Accordingly, this reluctance to fully engage with the substance of a legal system, as it is understood by those who control it and are governed by it, has proven to be a barrier to prosecuting legal professionals.

Alternatively, instead of fully analyzing a legal system with victims and expert witnesses, courts have normally made their way around determining an entire legal system unjust by focusing on individual incidents of explicit violence and determining the connection between the individual and the underlying conduct. Yet even this process has yielded quasi-positivist defenses, particularly the mistake of law defense. Not surprisingly, the ICC has shied away from even considering the importance of whether a perpetrator is aware of the unjust nature of a law or not.

At the ICC, Al Hassan raised the defense that his lived experiences, including his devout religious beliefs and upbringing with adherence to certain interpretations of Islamic law, rendered him unaware that the punishments he

225. John Dugard, *Judges, Academics and Unjust Laws: The Van Niekerk Contempt Case*, 89 S. AFR. L.J. 271, 271–72 (1972).

226. Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Trial Judgment, ¶ 1500 (June 26, 2024).

227. *Id.* at ¶¶ 1500–1515.

228. Third Corrigendum to Defense Final Brief, Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, ¶¶ 352–357 (Aug. 4, 2023).

facilitated based on the orders of the Islamic Court could be criminal under international criminal law.²²⁹ The defense argued that if he understands the law to come from God, it is not his place to question the content of those laws. By this “reasonable” mistake of law, the defense argued, he could not be culpable as he could not know the normative significance of his actions.²³⁰ However, neither blameworthiness nor reasonableness matter under the defense of mistake of law in Article 32(2) of the Rome Statute, which is contrary to the practice of some domestic jurisdictions that excuse conduct if one’s culpability is absent due to an honest, reasonable, or unavoidable mistaken belief in its legality.²³¹ The majority relied on a strict interpretation of Article 32(2), rejecting Al Hassan’s argument both as a defense and mitigating factor. Guiding Al Hassan’s conviction was the notion that committing international crimes is so inherently wrongful that unawareness of a corresponding normative criminal prohibition cannot excuse it. And, in failing to engage with mistake of law even as a mitigating factor in sentencing furthers this reasoning and rejects the several different forms that mistakes of law can take (such as reckless, negligent, or unavoidable). Treating them alike ignores any accurate assessment of culpability.²³² However, Judge Mindua accepted mistake of law as a valid defense, acquitting Al Hassan of all charges.²³³ In his Separate and Partly Dissenting Opinion, Judge Mindua implied a reasonableness or good faith requirement to the mistake of law defense.²³⁴ While the focus of mistake of law is on the knowledge of the perpetrator, in this compelling case, the argument that it was reasonable for Al Hassan not to question the law and legal system to which he contributed reflects the type of legal positivist thinking we have seen in attempts to excuse the commission of law-based crimes.

4. *Duty to Resist?*

Is there a heightened duty of legal professionals to resist legal orders that facilitate international crimes? Analyzing at which point a perpetrator’s participation in an unjust legal system is criminal becomes complicated by questions of their professional obligations, their capacity to resist unjust legal systems, and their decisions within this capacity. As mentioned, most institutional legal orders that facilitate international crimes operate somewhere between the

229. *Id.* ¶¶ 406–415.

230. *Id.* ¶¶ 409, 415; Defense Submissions on Sentence, Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, ¶¶ 352–357 (Sept. 3, 2024).

231. Rome Statute, *supra* note 120, art. 32(2); ANTONIO COCO, THE DEFENCE OF MISTAKE OF LAW IN INTERNATIONAL CRIMINAL LAW: A STUDY ON IGNORANCE AND BLAME 30 (2022).

232. COCO, *supra* note 231, at 164.

233. Prosecutor v. Al Hassan Ag Abdoul Aziz, Separate and Partly Dissenting Opinion of Judge Mindua, ICC-01/12-01/18, ¶¶ 91–101 (June 28, 2024).

234. *Id.* at ¶ 100.

normative state and the prerogative state, or in situations of autocratic legalism. Accordingly, the complexity of a legal professional's abilities and decisions to mitigate the injustice from inside calls for restraint with respect to judging their criminal responsibility and culpability.

Much of the conceptualization of the duty to resist is reflected in another famous legal disagreement between John Dugard and Raymond Wacks in the context of South African apartheid. Dugard argued that although the South African legal system was wicked, jurists could use the cracks and ambiguities in the system to interpret law in ways that would minimize injustice and push for just change. He argued for a duty of judges to remain in the wicked legal system and resist it from the inside.²³⁵ On the other hand, Wacks argued, based on a naturalist approach to the law, that participating in the legal system legitimizes its injustices. He contended that jurists have a duty to refuse to even participate in a legal order that facilitates the mass human rights abuses of apartheid.²³⁶ This question remains highly relevant today.²³⁷

For those that do not or cannot resign, the duty to resist has influenced some accountability processes concerning all legal professionals, not just judges, working within legal systems that facilitate international crimes. At the SATRC Legal Hearing, the following questions were put to all legal professionals:

How was it that you implemented without protest, and often with zeal, laws that were so manifestly unjust? And how was it that when you had some discretion as to how to interpret or apply the law, you consistently decided in a way that assisted the government and the security forces? And to those whose skills could have been used to resist—if only by criticizing—apartheid law, the question was put of why they stood passively by or actively supported the regime.²³⁸

In *Recabarren et al.*, the accused legal professionals argued against the existence or scope of a duty to resist, that it was impossible to resist, or that they had met this duty by mitigating the worst excesses of the law.²³⁹ For the first, in a pure rejection of the duty to resist, the argument is based again on legal positivist approaches to the law, namely that one should not question the law they uphold or abide by because it is the law. However, opposition to the duty has also attacked the requirements or extent of it rather than the duty as a whole.

235. See generally Dugard, *supra* note 143.

236. See generally RAYMOND WACKS, *LAW, MORALITY AND THE PRIVATE DOMAIN* 48 (2000).

237. See, e.g., U.N. Office on Drugs and Crime, *Commentaries on the Bangalore Principles of Judicial Conduct*, ¶ 108 (2007).

238. DYZENHAUS, *supra* note 3, at 27.

239. See Cámara Nacional de Casación Penal [CNCP] [National Court of Appeal on Criminal Matters], sala IV, 5/9/2019, “Petra Recabarren, Guillermo Max y otros s/recurso de casación,” No. FMZ 97000076/2012/TO1/4/CFC1, at 33, 42, 44, 47–48 (Arg.).

Former Argentine prosecutor and Judge Otilio Romano argued in *Recabarren et al.* that the duty is not met if it cannot be proven that a different action by him would have produced a different result.²⁴⁰ Without clearly defined parameters of what this duty entails and a full analysis of the legal system at issue, it is difficult to know when and how this duty has been satisfied.

Second, Romano and his co-accused in *Recabarren et al.*, former Judge Rolando Carrizo, also argued that they did not have the capacity to take action to investigate based on an application of habeas corpus into the enforced disappearances at issue.²⁴¹ In doing so, they implicitly raised the issue of whether it is right to prosecute someone for failing in their duties if they do not have the ability to carry out those duties. In such situations, depending on the presence of duress or their capacity to resign, the responsibility and culpability of the legal professional is again nuanced. Similarly, in the *Justice* case, former Nazi Minister of Justice Louis Rudolph Franz Schlegelberger argued that the executive was constantly threatening to usurp the judicial system, which affected his ability to defend the normative state.²⁴² Only with a full analysis of the capacity to make independent decisions within a corrupt legal system can these questions be addressed.

In the third manifestation of this duty to resist, legal professionals have argued that they met the duty, contending that their responsibility or culpability was lessened because they sometimes ruled to mitigate the impacts of the legal order in its facilitation of international crimes. For example, some narratives around certain civil servants in the Third Reich have depicted the lawyers as using their limited space to lessen the unjust effects of the law.²⁴³ In the *Ministries* case, Stuckart's defense was essentially that his adherence and co-authoring of the Nuremberg Laws supported a moderating instrument against even more extreme measures.²⁴⁴ In the *Justice* case, Schlegelberger essentially argued that if he had resigned earlier on, someone much worse would have taken his place.²⁴⁵ In *Recabarren et al.*, Romano and Recabarren referred to their own actions and rulings within the legal system to argue that they defended the rule of law where they could.²⁴⁶ Similarly, as Dyzenhaus put it, "law was

240. *Id.* at 42.

241. *Id.* at 44, 47–48.

242. Eli Nathans, *Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice*, 18 L. & HIST. REV. 281, 281–304 (2000).

243. Jasch, *supra* note 139, at 40.

244. *United States v. von Weizsäcker*, Case No. 11, 14 T.W.C. 308, 642 (U.S. Mil. Trib. Apr. 11–13, 1949).

245. *United States v. Altstoetter*, 3 T.W.C. 984 (1948), Opinion and Judgment, 1086 (U.S. Mil. Trib. Dec. 4, 1947).

246. Cámara Nacional de Casación Penal [CNCP] [National Court of Appeal on Criminal Matters], sala IV, 5/9/2019, "Petra Recabarren, Guillermo Max y otros s/recurso de casación," No. FMZ 97000076/2012/TO1/4/CFC1, at 33, 45 (Arg.).

used as the instrument of apartheid but also seemed to hold out some promise of curbing its worst excesses,”²⁴⁷ and if legal professionals were able to capitalize on their capacity to resist, then this is a compelling shield to legal responsibility. However, determining the vitality of this defense is largely an exercise of speculation, and the question will always remain in each case as to whether resisting removes responsibility altogether or just mitigates culpability. The question requires an inquiry of proportion in assessing the capacity to resist and the extent of resistance, which in turn requires centering the legal system in the trial and differentiating the roles of the impugned legal professionals.

There is an argument that legal professionals have a heightened duty to resist, as opposed to soldiers, due to the former’s highly privileged position. Depending on their role as judges, prosecutors, and legal advisors, they often have the opportunity to see firsthand the resistance to the laws they interpret and impose, and they have the benefit of education, exposure, and status.²⁴⁸ At the trial of Al-Bandar, the IST noted that Al-Bandar “was a graduate of one of the law schools which indicates that he enjoys certain skills that might not be available to other simpler people who may contribute to the commitment of a certain crime.”²⁴⁹ Elsewhere, at the SATRC Legal Hearing, Paula McBride posed this interesting argument within the context of the duty to resist:

[The Judiciary], I think in many cases did far worse than the police, because they were one and all, they were so-called learned men, they came there with the robes of their office and the sanctity of their being and they were educated enough to understand that what they were doing was wrong . . .²⁵⁰

Conversely, the same considerations work in reverse. In *Sawada et al.*, the USMC found it to be a mitigating factor that one of the accused judges had no legal education.²⁵¹ Accordingly, the status and position of legal professionals in a legal system may play into their duty to resist. The IST even implied that the duty to resist requires the exercise of a certain level of competence, or at least that an ostensible lack of competence can demonstrate compliance with a criminal regime. It criticized Al-Bandar’s failure to keep judicial registers, verify names, and delegate the ascertaining of information to a clerk, implicitly finding that he failed in his duties by doing so.²⁵²

Finally, it is important to address the duty to resist within a legal system as a whole and consider Wack’s argument. In essence, the question becomes

247. DYZENHAUS, *supra* note 3, at 26.

248. *Id.* at 89–90.

249. Prosecutor v. Hussein (Al-Dujail Case), Case No. 1/9 First/2005, Trial Judgment, ¶ 30 (Part 2) (Iraqi Special Trib., Nov. 5, 2006).

250. Paula McBride, Statement to S. Afr. Truth & Reconciliation Comm’n (Oct. 27, 1997).

251. United States v. Sawada, Case No. 25, 5 T.W.C. 1, 7 (U.S. Mil. Comm’n, Shanghai, Apr. 15, 1946).

252. Prosecutor v. Hussein, Trial Judgment (Part 2), ¶¶ 38–40.

whether the ability and decision to resist actually strengthens and sustains an unjust legal system that commits international crimes as a form of functional tokenism. The premise of Michael Sfar's book, *The Wall and the Gate: Israel, Palestine, and the Legal Battle for Human Rights*, arises from the legal petition of villagers in a West Bank town to install a gate in the Israeli separation wall to allow access to their farmland and resources. In placing the gate in the wall, the Israeli legal system would essentially allow a small appeasement for the villagers but ultimately enforce the legitimacy of the wall itself and its unlawful route.²⁵³ This dilemma reflects the notion that for a legal system to be effective in enforcing an unjust system, it must at least appear to possess a partial internal logic of justice and allow challenges. It is also this "element of legal containment of apartheid, and challenges to its extremities, that kept legal values alive in South Africa."²⁵⁴

In other words, the issue is not just about whether there is space within a legal system to resist, but also whether in allowing this space and making apparently just decisions within it, the unjust system is sustained. Similarly, Robert Cover described at length how American judges, despite a stated commitment to abolitionism, consistently interpreted laws in a way that sustained the institution of slavery. The issue was not just their interpretations but their acceptance to work within the established order.²⁵⁵ As a result, this dilemma further demonstrates why it is important to put the whole of the legal system on trial rather than merely looking to individual incidents, particularly when it comes to legal institutions that sustain systemic crime.

5. *Other Shields to Responsibility of Legal Professionals*

Several additional legal principles and complexities arise when we bring legal professionals to trial for international crimes. These shields of complexity combine to generate reluctance for courts who are faced with the prospect of charging and judging these crimes of law. The remaining issues to be addressed that cause this reluctance concern the principle of independence, the principle of complementarity, judicial respect and the status of legal professionals, and the practical feasibility of judging a legal system and its professionals.

Regarding judges, judicial independence may both afford leeway for them to commit judicial crimes and simultaneously deter efforts to prosecute those

253. See generally SFARD, *supra* note 19.

254. DYZENHAUS, *supra* note 3, at 151 (quoting Edwin Cameron, *Submission on the Role of the Judiciary under Apartheid*, 115 S. AFR. L.J. 436, 437 (1998)).

255. See generally ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

responsible. In his defense of the legal profession under South African apartheid, former Chief Justice Corbett stated that

in order to be true to his judicial oath and to administer justice to all persons alike “without fear, favour or prejudice” a judge must enjoy independence . . . He is accountable to a superior court of appeal . . . and in the last resort there is impeachment. Outside these parameters, however, a judge may not be called to account for his or her judgments or to debate and justify before, for instance, governmental bodies or commissions.²⁵⁶

His words summarize the notion that it is for the judiciary, and the judiciary alone, to pass judgment on itself. While necessary to prevent interference and abuse of the judiciary, it is problematic to maintain this shield of independence in the face of international crimes and otherwise unjust systems. For example, in Canada, former Chief Justice Beverly McLachlin barred an inquiry into systemic racism of the judiciary in Nova Scotia based on the principle of judicial independence.²⁵⁷

Particularly in common law systems, the principle of judicial independence often translates into a doctrine of judicial immunity, generally shielding judges from civil and criminal suits that would challenge their judicial acts. Conversely, in South American jurisdictions, there is no explicit doctrine of judicial immunity.²⁵⁸ In *Recabarren et al.*, the principle of independence was pierced and thus no judicial immunity defense was argued.²⁵⁹ In its place, the related legal positivist defense that one was simply exercising their duties according to law was employed. In every jurisdiction, the extent and nature of judicial independence differ, reflecting the divergent approaches to determining when law is so unjust as to pierce this veil of independence and to what extent political decisions are involved.

The issue becomes further complicated when it comes to the prospect of international and hybrid tribunals judging the legal professionals of other legal systems. In the few cases where this has happened, however, tribunals have questioned whether there was any independence at all. In the Nuremberg-era trials in Germany, much of the defenses relied on the very notion that legal professionals and jurists had no independence—that all law and decisions came from Adolf Hitler.²⁶⁰ Even then, assessing the law of a system whose concepts and

256. DYZENHAUS, *supra* note 3, at 37–38.

257. *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796, 828 (Can.).

258. Javier Wilenmann, *Judicial Immunity: A South American Approach*, in TRANSITIONAL JUSTICE, *supra* note 11, at 109, 113.

259. Cámara Nacional de Casación Penal [CNCP] [National Court of Appeal on Criminal Matters], sala IV, 5/9/2019, “Petra Recabarren, Guillermo Max y otros s/recurso de casación,” No. FMZ 97000076/2012/TO1/4/CFCL, at 35 (Arg.).

260. Harry Reicher, *Evading Responsibility for Crimes Against Humanity: Murderous Lawyers at Nuremberg*, in THE LAW IN NAZI GERMANY: IDEOLOGY, OPPORTUNISM, AND THE PERVERSION OF JUSTICE 137, 138 (Alan Steinweis & Robert Rachlin eds., 2013).

meanings differ from those familiar to an international judge remains difficult. In *Greiser*, the use of legal experts to translate the Nazi legal system is perhaps a sign of law's difficulty to judge itself in different contexts.²⁶¹ In any event, there must be a line to independence; it cannot shield responsibility as a sacrosanct principle in defense of the judge who presides over international crimes.

The reluctance of judges to judge other legal systems and those involved may also be rooted in understandings of sovereignty. In the *Justice Case*, each defendant invoked the act of state doctrine as a defense for enforcing the Night and Fog decree, but the Tribunal correctly rejected the claim that international criminal law could not apply to individuals acting in pursuit of state objectives.²⁶² However, contemporary international criminal law has given renewed deference to sovereignty by expanding the principle of complementarity. The principle of complementarity is enshrined most clearly in Article 17 of the Rome Statute, where it requires that states bear the primary responsibility for investigating and prosecuting international crimes.²⁶³ For the ICC, the principle of complementarity has cultivated a cautious approach when assessing the adequacy or legality of domestic legal systems. This was prominently reflected in the admissibility decision of the ICC Appeals Chamber in *Al-Senussi*, where the court denied admissibility of the case largely on the grounds of complementarity, stating that “the Court was not established to be an international court of human rights, sitting in judgment over domestic legal systems to ensure that they are compliant with international standards of human rights.”²⁶⁴

While complementarity mainly serves the purpose of encouraging genuine national proceedings and ensuring that states retain the primary responsibility of adjudicating international crimes, it is also born from the principle of respect for the various legal jurisdictions of the world.²⁶⁵ However, instead of interpreting the principle of complementarity as a way of recognizing the diversity of the judicial cultures of the world, as defined in the Preamble of the Rome Statute,²⁶⁶ it has caused the ICC to be reluctant to fully engage with other legal systems, as shown in *Al Hassan*.²⁶⁷ Article 21(1) of the Rome Statute permits the

261. Bilsky & Klagsbrun, *supra* note 14, at 12.

262. United States v. Altstoetter, 3 T.W.C. 984 (1948), Opinion and Judgment, 1062 (U.S. Mil. Trib. Dec. 4, 1947).

263. Rome Statute, *supra* note 120, art. 17.

264. Prosecutor v. Saif Al-Islam Gaddafi, ICC-OI/II-OI/IIOA6, Judgment on the Appeal of Mr. Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I, Appeals Chamber, ¶ 219 (July 24, 2014).

265. OFF. OF THE PROSECUTOR, ICC, THE PRINCIPLE OF COMPLEMENTARITY IN PRACTICE, EXPERT PAPER ¶ 1 (2003).

266. Prosecutor v. Al Hassan Ag Abdoul Aziz, Separate and Partly Dissenting Opinion of Judge Mindua, ICC-01/12-01/18, ¶¶ 1–2 (June 28, 2024).

267. Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Trial Judgment, ¶ 1500 (June 26, 2024).

ICC to interpret the Statute's provisions in line with the laws of legal systems of the world. Engaging with legitimate differences in legal orders and how they interact is thus rooted in the Statute, and it may enhance rather than detract from the international nature of the Court.²⁶⁸ Yet, having the opposite effect, the ICC may hesitate to label national systems as illegal in fear of violating the principle of complementarity, or otherwise being accused of legal imperialism and disrespect for sovereign judicial institutions. This reluctance may be further pronounced in transitional justice settings, where domestic legal systems are often fragile, and international bodies seek to support rather than supplant their development. Ultimately, while the principle of complementarity is designed to respect judicial institutions, it may inadvertently foster a judicial culture of restraint in judging the international crimes committed by domestic legal systems. In this vein, complementarity does not just decide who is prosecuted but also subtly informs how far we should scrutinize domestic law at all. When domestic legal systems are treated as *prima facie* legitimate²⁶⁹ and criminal conduct is substantially individualized, the ICC's complementarity regime may unintentionally construct zones of professional immunity for unjust legal systems and legal professionals.

Moreover, the heightened social status of legal professionals may often produce a degree of deference that influences decisions concerning their accountability. In some legal systems, citizens often idolize their judges,²⁷⁰ and generally, the juridical field is protected by a form of "symbolic capital," where lawyers are seen as neutral experts whose behavior and conduct can be rationalized.²⁷¹ There are two ways in which the status of legal professionals serves as a barrier to criminal accountability.

First, judicial respect, in conjunction with judicial independence, is built into legal applications and appellate procedures in such a way as to permit intervention in very few situations. Even when judges intervene on decisions concerning the facilitation of international crimes, they do so with judicial respect. Outside of the law, it seems unsettling to "respectfully" disagree with someone who justifies executions and torture, but in the realm of the law, it is normal.²⁷² In respect of the court-ordered execution of Andrew Zondo under South African apartheid laws, the former Chief Justice defended the order by stating that

268. Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Separate and Partly Dissenting Opinion of Judge Tomoko Akane, ¶ 77 (June 26, 2024).

269. Prosecutor v. Saif Al-Islam Gaddafi, ICC-01/II-01/IIOA6, Judgment on the Appeal of Mr. Abdullah Al-Senussi Against the Decision of Pre-Trial Chamber I, Appeals Chamber, ¶¶ 219, 230–31 (July 24, 2014).

270. Seon Bong Yu, *The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries*, 2 INT'L AREA REV. 35, 37 (1999).

271. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 812, 820 (1987).

272. See, e.g., Order, United States v. Al-Nashiri, No. 23-005 (U.S.M.C.R. Jan. 30, 2025).

“[t]he trial Judge was an experienced and highly respected member of the Natal Bench.”²⁷³ Accountability systems are also often dominated by insiders who are reluctant to punish their peers and expose their profession to public scrutiny.²⁷⁴ Particularly in transitional justice settings, there are situations where judges are asked to judge and punish their peers and other legal professionals, who may then re-join them in a few years.²⁷⁵ This status of legal professionals, both as respected individuals in society and as peers and colleagues of those judging them, acts as a shield to any form of accountability for facilitating injustice.

The second barrier stems from the regulation of the legal profession through rules of professional conduct and ethics. Bar associations and judicial associations in various states often provide for a set of rules of professional conduct and ethics, as well as disciplinary frameworks, that are meant to regulate the legal profession and ensure trust in legal institutions. While regulation of the legal profession is important, it may problematically be used to deal with extraordinary situations concerning the commission of international crimes by legal professionals, a feat for which it is ill-suited. Regulatory discipline is not a justice process to hold individuals accountable for the harm they have caused to victims of atrocities, but rather an administrative procedure to determine whether the lawyer met the duties of their professional association. Nonetheless, legal professionals may invoke professional discretion within this regulation framework to avoid accountability for their conduct, arguing that their role in systemic injustice is just zealous advocacy or part of a strategy.²⁷⁶ The lawyers responsible for the Torture Memos escaped criminal accountability, and when challenged professionally, they relied heavily on rules of professional conduct as a shield.²⁷⁷

In conjunction with the status of legal professionals in society, the very existence of this professional set of rules and disciplinary frameworks positions it as the first choice of accountability mechanisms. The notion that professional disciplinary measures are sufficient to serve international criminal justice is problematic, not only because the penalty and accountability is non-criminal in nature, but also because these regulatory bodies are often ineffective due to

273. DYZENHAUS, *supra* note 3, at 42.

274. DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 143–46 (2000).

275. Bohoslavsky, *supra* note 20, at 22.

276. SIMON, *supra* note 217, at 27–28.

277. John Yoo, *Closing Arguments: Finally, an End to Justice Dept. Investigations*, PHILA. INQUIRER (Feb. 28, 2010), https://www.inquirer.com/philly/opinion/20100228_Closing_Arguments__Finally__an_end_to_Justice_Dept__investigation.html [<https://perma.cc/H8T8-H83N>]; U.S. DEP'T OF JUSTICE, OFF. OF PROFESSIONAL RESPONSIBILITY, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CIA'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 197–98 (July 29, 2009).

a lack of neutrality when the matters concern more high-profile or political issues.²⁷⁸ Returning to the discussion of Yoo's torture memos, Yoo was investigated by his own department's office of professional responsibility, which concluded that Yoo's actions represented "poor judgment" but did not constitute professional misconduct. He did not face further disciplinary action.²⁷⁹ Even if found to have committed professional misconduct, it is difficult to comprehend that such forums, on their own, would provide meaningful justice to victims of atrocity crimes.

While more prevalent in domestic courts, the shield of regulatory bodies may also permeate into the decisions and expressivism of international courts and tribunals. In the *Justice* case, the USMT commented on the measures that the German justice system may have taken to deal with Oswald Rathaug, perhaps removing the need to resort to criminal accountability. The USMT stated that "[u]nder any civilized judicial system he could have been impeached and removed from office or convicted of malfeasance in office on account of the scheming malevolence with which he administered injustice."²⁸⁰ In any event, while professional regulation certainly helps to curb the problematic behavior of legal professionals, its use is inappropriate, inadequate, and potentially detrimental in addressing their role in international crimes.

Finally, the issue of pragmatism has been argued as a barrier to the accountability of legal systems and legal professionals. These arguments spawn across international criminal law in general: the practice of breaking down mass systems of criminality into the language of the courtroom.²⁸¹ In respect of the crimes of law in particular, the purpose of lamenting the past has been criticized,²⁸² as has the practice of considering all the above issues as whole in determining the legal responsibility of legal professionals. As argued by Corbett, "[t]he mind boggles at what all of this would involve. The impracticality of it all is manifest."²⁸³ Yet, the solution lies in first knowing what we need to address and what we are dealing with in respect of international crimes committed by legal professionals. That is precisely what this Article has argued—it is time we bring attention to the role of legal professionals in international crimes, and that starts with bringing legal systems to the forefront and understanding how these crimes of law differ from others.

278. James Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U.L.Q. 725, 730 (2005); RHODE, *supra* note 274, at 146.

279. Cole, *supra* note 143, at 456.

280. *United States v. Altstoetter*, 3 T.W.C. 984 (1948), Opinion and Judgment, 1156 (U.S. Mil. Trib. Dec. 4, 1947).

281. See ARENDT, *supra* note 148, at 253–279.

282. DYZENHAUS, *supra* note 3, at 136–137.

283. *Id.* at 37.

C. *Moving Forward: Toward a Special Class of Legal Perpetrators?*

How can international criminal law better adapt to the role and responsibility of legal professionals in the commission of international crimes? The *Justice* case and the Argentine cases only sporadically and indirectly address some of the above particularities of the legal profession. All other trials of legal professionals neglect these issues. The solution lies not only in addressing the role of legal institutions through charging, but also by differentiating legal professionals as a particular class of perpetrator.

First, analyzing the legal professional's responsibility through existing modes of liability, on their own, is insufficient to understand the culpability of the legal professional in this system of law that commits international crimes. Given the particularities of the legal institution and the lawyer's duties therein, merely focusing on the connection between the legal professional and the enforcement of the atrocity is problematic. This is especially true due to the varying requirements of intent in co-perpetration liability, which may be ill-suited to address the realities of desk-perpetrators, who often have no desire-based intent (*dolus directus*)²⁸⁴ nor knowledge-based intent (*dolus indirectus*)²⁸⁵ of the crime, and who instead foresee the risk of the crime coming to fruition based on the law they enact, interpret, justify, or uphold.²⁸⁶ Except in direct-consequence cases involving judges and prosecutors, such as in *Recabarren et al.*, legal professionals are thus only seen as passive actors. More importantly, however, existing modes of liability may fail to account for the above-mentioned dynamics, duties, and other realities that legal institutions demand.

Ultimately, international criminal law delineates responsibility and modes of liability based on hierarchy and participation in criminal conduct, adapting to the level and proximity of participation of various actors towards the criminal conduct. However, international criminal law does not necessarily adapt its frameworks or delineate responsibility based on the *nature* of the individual suspect or accused, particularly with respect to non-political or military actors. Liability is complicated by the nature of the legal professional with respect to virtually every existing mode of liability used in international criminal law. For example, superior responsibility, which holds superiors liable for crimes committed by their subordinates, would likely not be viable to hold legal professionals responsible. In the novel *The Trial*, Kafka depicts an endless ladder of officials administering a corrupt legal system but never reveals a final judge or supreme decision-maker; authority is always deferred upward as the court exists

284. As provided under Rome Statute, *supra* note 120, art. 30(2)(a).

285. As provided under Rome Statute, *supra* note 120, art. 30(2)(b).

286. Bilsky & Klagsbrun, *supra* note 14, at 18.

everywhere and nowhere.²⁸⁷ Demonstrated in this literary depiction, superior responsibility is likely viable for a legal professional's role in neither pervasive systemic crime nor discreet ordinary crimes. The subordinate relationship is muddled by the institutional dynamic of the crime and the particular position of the judiciary or impugned legal branch in relation to enforcing agents of a repressive apparatus (that is, whether the judiciary is integrated into the political branch). Even within the judicial branch itself, however, it is often difficult to determine who is in command when decisions can be appealed and are based on a mixture of precedents, discretion, prosecutorial and judicial directives, and legislation. Moreover, control over subordinates must still be shown, and the superior responsibility often presupposes that the superior and subordinate are in some way within the same organization.²⁸⁸ It may thus be difficult to show a relationship of control of a civilian judge over soldiers or police officers, unless the judge is treated as a military or political leader.

For crimes of law, having demonstrated the distinct nature of legal professionals, whose responsibility must be rooted in legal institutions and who embody a complex set of separate principles, international criminal law must be adapted to a separate class of legal perpetrators. In failing to adapt its structures to the distinct nature of legal professionals and legal institutional crime, international criminal law either ignores their responsibility altogether or treats legal professionals like military and political actors. In doing so, it both denies them proper legal considerations and paints a false narrative of rigid hierarchical structures and distant contributions to the underlying crime. It signals that every international crime is the result of a political or military decision without an underlying contextual legal structure. As argued in Section B of this Part, ignorance of legal structures and false narratives in trials undermine the goals of international criminal law and transitional justice, failing to prevent recurrence and failing to express the core of the systemic wrongs examined.

Accordingly, addressing institutional criminality and the pervasive effects of legal violence requires not only charging certain crimes against humanity, but also engaging with an expanding set of considerations concerning the criminal responsibility of legal professionals. Stipulating a detailed legal test to address the responsibility of legal professionals is beyond the scope of this Article, but such approaches must at least begin by centering legal institutions and fully examining their structures. Concerns arising from complementarity or the feasibility of such a feat must be restrained, for it is indeed possible to

287. See generally FRANZ KAFKA, *THE TRIAL* (Willa & Edwin Muir trans., Penguin Books 1953) (1925).

288. Héctor Hernández Basualto, *Superior Responsibility and Judicial Murder: When Judges Are Not "Superior"*, in *TRANSITIONAL JUSTICE*, *supra* note 11, at 207, 208–09.

judge a legal system with legal pluralist approaches.²⁸⁹ Through experts and witnesses from the affected jurisdiction, courts will be able to best depict such legal structures, as partially done so in *Greiser*,²⁹⁰ and the relationship between legal institutions and crimes of law carried out together with other institutions and actors. Second, laying out these structures will help courts better understand the normative power of the law based in such institutions, the roles of various legal professionals, the duty and capacity to resist those normative laws and procedures within the impugned system, and other relevant duties and functions of legal professionals within that system. Third, courts may then address the accused's relationship to the law, analyzing their decisions within their particular level of capacity to resist, the effects of their actions, and the various dynamics of their role within the legal system at large. International criminal law must be able to address the acceptance, resistance, interpretation, and acquiescence of a legal professional in respect of the law.

Finally, while these considerations must be used to address the criminal responsibility of legal professionals, there are some considerations that may be best left for sentencing and expressivist narratives. Namely, the above-mentioned issue of functional tokenism, where the resistance of a legal professional from within instead strengthens an unjust legal system, poses a particular issue to international criminal law. In effect, we cannot ask legal professionals to remain and resist injustice if doing so facilitates further international crimes. This issue may only be addressed by piercing the hyper-individualization of international criminal law and expressing the complex dynamics of systemic crimes of law.

Such a framework must be further adaptable to the reality that legal professionals are not unitary. These principles and considerations will differ depending on the legal system examined and the legal professional concerned. Judges have more extensive ethical duties than other lawyers. A public defender may have more room to resist than a government prosecutor. A civil legal advisor may have a stronger say in legal policies than an independent member of the bar. To ignore these differences is to neglect legal professionals' important, yet nuanced, role in institutional crimes of law.

While the above principles and complexities must be considered, they must also be highly developed and defined to ensure that there is no further impunity. Defenses concerning duties of resistance and other principles must be honed and limited. This requires the development of caselaw around this particular class of legal perpetrators to ensure that their roles are neither overlooked nor misrepresented.

289. Badar, *supra* note 53, at 249–50.

290. Poland v. Greiser, Case No. 74, 13 T.W.C. 70, 96–101 (Sup. Nat'l Trib. Pol. July 7, 1946).

III. THE CASE FOR ACCOUNTABILITY OF LEGAL PROFESSIONALS

Holding legal professionals accountable for international crimes serves several of the objectives of transitional justice. What constitutes transitional justice and the objectives it serves are highly debated, and it is not a one-size-fits-all approach applied to each transitioning society. However, such processes often serve the aims of, among other goals, providing some form of accountability, restoring dignity to victims, restoring civic trust, establishing a record of past events, and preventing the recurrence of harms.²⁹¹ Because of the timing and flexibility of transitional justice processes, they are often used to address more pervasive and structural abuses of the past, which might include criminal prosecutions. For instance, the *Recabarren et al.* case is very much a part of Argentina's long transitional justice process that included a truth commission and several trials, among other mechanisms, to address the systemic violence inflicted by the former dictatorship.²⁹² The case shows us that criminal trials, when embedded within a broader transitional justice framework, can meaningfully engage with structural violence rather than merely isolated acts.

In approaching some of the goals of international criminal law and transitional justice, there are several compelling reasons to hold legal professionals accountable for crimes of law. Trials can serve, among others, the functions of (a) retributive justice and providing a sense of justice to victims; (b) expressing disapproval of and shaping debates on the role of jurists in respect of international crimes; (c) truth-telling; and (d) building trust and signaling the credibility and independence of a new legal order, thus reconciling the past and “cleaning the wound until it heals.”²⁹³

A. *Retributive Justice*

It must first be noted that every situation is different. Sometimes victims do not prioritize retributive justice or trials are not possible. One example would be due to transition or amnesty agreements, such as that of South

291. Paul Seils, *Reframing Justice in Conflict*, EUROPEAN INST. OF PEACE (Apr. 9, 2018), <https://www.eip.org/reframing-justice-in-conflict/> [<https://perma.cc/XBR5-F8FT>]; U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, ¶¶ 38–39, U.N. Doc. S/2004/616 (2004).

292. Baltasar Garzón, *Prólogo* [Prologue], in ¿USTED TAMBIÉN, DOCTOR?, *supra* note 12, at 11, 15–17. See generally Carlos Acuña, *Transitional Justice in Argentina and Chile: A Never-Ending Story?*, in *RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY* 206 (Jon Elster ed., 2006).

293. Garzón, *supra* note 292, at 18.

Africa.²⁹⁴ Nonetheless, criminal trials may indeed provide a sense of justice to victims of an unjust legal order. However, while civil society complaints and commissions have revealed the role of legal professionals in the commission of atrocities, these professionals have often escaped justice while military wings and those outside of the legal sphere more often do not. For example, in *Al Hassan*, one of the defendant's convictions was "based on his contribution to the crime committed by . . . mainly judges of the Islamic Court, by virtue of his role in the Islamic Police," but these judges were not prosecuted.²⁹⁵ Bringing all those responsible to justice, not just those unshielded by the legal profession, would bring a more comprehensive justice to victims. In the case of Argentina, thanks to *Recabarren et al.*, "Argentines are breaking through the shielding that the accomplices of the criminal regime of the civil-military dictatorship designed to guarantee their own impunity."²⁹⁶

B. Expressivism

One of the most important functions of international criminal trials is to disapprove of criminal conduct, convey messages, and influence discourse on perceptions and norms.²⁹⁷ When it comes to prosecuting legal professionals in particular, trials may serve two highly important expressivist functions. First, the function of trials to shape discourse on when the actions of legal professionals become unlawful is highly important, particularly given that these actions have long been ignored in the field of international criminal law. As mentioned, the conduct of legal professionals is highly complicated by how much leeway they have to resist unjust laws, whether they have a duty to resist unjust laws, and when their conduct amounts to an international crime. There is also the question of what constitutes unjust laws and procedures and who gets to decide this, an issue raised in *Al Hassan*, where Al Hassan was convicted of the war crime of sentencing without due process.²⁹⁸ Arguments have been raised as to the unclear meaning and scope of judicial guarantees under international humanitarian law, as well as different cultural understandings of judicial guarantees.²⁹⁹ The transparent development of a body of jurisprudence adapted to the role of legal professionals may

294. See generally Lyn Graybill, *Pardon, Punishment, and Amnesia: Three African Post-Conflict Methods*, 25 THIRD WORLD Q. 1117 (2004).

295. See, e.g., Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Sentencing Judgment, ¶ 65 (Nov. 20, 2024).

296. Garzón, *supra* note 292, at 18.

297. Stahn, *supra* note 73, at 181–182.

298. Prosecutor v. Al Hassan Ag Abdoul Aziz, ICC-01/12-01/18, Trial Judgment, ¶ 1521 (June 26, 2024).

299. See, e.g., Diletta Marchesi, *The War Crimes of Denying Judicial Guarantees and the Uncertainties Surrounding Their Material Elements*, 54 ISR. L. REV. 174, 187, 202–203 (2021); Third Corrigendum to Final Defence Brief, Prosecutor v. Al Hassan, ¶ 351 (Aug. 4, 2023).

help to develop norms and standards that clarify these questions. Second, in light of the above, international criminal law processes may recognize different levels of responsibility within a collective matrix, expressing legal institutional crime through the charging of certain crimes against humanity. The use of expressivism for this function is even more important when international criminal law has no direct concept of state crime.³⁰⁰

C. *Truth-Telling*

While the function and effectiveness of trials to clarify historical accounts remains contested, they can, at least subsidiarily, produce a record of the past.³⁰¹ Holding legal professionals accountable through criminal trials and adequately addressing their responsibility may thus serve the purpose, in part, of fulfilling the victims' right to truth. In the words of Judge Garzón, "a complacent, indolent judiciary, complicit in silence, is the worst cancer for a society that cannot trust those who are the last bastion of protection of its rights."³⁰² In the *Justice* case and *Recabarren et al.*, the testimony and participation of legal professionals informed victims and the public of the inner workings of their respective legal systems.

Conversely, at the Legal Hearing of the SATRC, apartheid-era jurists were not prosecuted nor even subpoenaed, and they refused to participate in person. The Legal Hearing sought to illuminate "how professions and institutions which on the face of it seemed no different than their counterparts in Europe or North America, were deeply implicated in apartheid," but instead of enlightening the public with a full account of the inner workings of apartheid law, the lack of cooperation from most judges and magistrates deprived it of a comprehensive inquiry.³⁰³ Bringing legal professionals to trial may thus be necessary to produce a narrative that will allow victims and their relatives to learn of the workings behind their abuse and will allow stakeholders to confront and learn from the past.

Truth-telling is particularly important in the context of trials addressing legal orders due to the extent and nature of violence that law causes. As discussed, international criminal law tends to focus on exceptional or extraordinary violence in the form of killing, torture, and other core international crimes. However, legal orders may facilitate systemic and less visible crimes that encompass everyday life, governing societal arrangements and subjugating

300. See generally Pierre-Marie Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 2* (Antonio Cassese et al. eds., 2002).

301. Stahn, *supra* note 73, at 177–78.

302. Garzón, *supra* note 292, at 17.

303. DYZENHAUS, *supra* note 3, at 26–27.

classes of people. This is particularly illustrated in the context of colonial legal systems operating to subjugate the colonized. Accordingly, addressing the law and its legal professionals is important to fully grasp the scope of the violence that the law causes.

D. *Building Trust, Reconciliation, and Restorative Justice*

Among the stakeholders and those who did participate in the SATRC's Legal Hearing, a divergence of four leading opinions arose as to what to do with the jurists who upheld the apartheid legal order. First, in his written submissions, the former Chief Justice, Michael Corbett, objected to any scrutiny of the legal professionals of Apartheid South Africa, particularly the judges. He justified his objection on the presupposed impracticality of effectively retrying every case to determine its injustice, and more fundamentally, on the principle of judicial independence.³⁰⁴ In short, he advocated for a blanket amnesty and amnesia about the past legal order.³⁰⁵ Archbishop Desmond Tutu's views, on the other hand, largely reflected the goals of the greater transitional justice project, to illuminate the truth in promotion of reconciliation while putting retributive justice aside. He sought a truth-seeking inquiry into the functioning of the apartheid legal system to learn from the past.³⁰⁶ Others advocated that truth and amnesty was insufficient—that some form of individual accountability was required. Dyzenhaus sought to charge the jurists with “dereliction of duty,” and in doing so, asked why they failed in their duties and how this can inform the future.³⁰⁷ To prioritize cooperation in discovering and learning from the systemic abuses of the apartheid legal order, Dyzenhaus was opposed to the prosecution of legal professionals for crimes against humanity as done so in the post-World War II trials.³⁰⁸ However, Lennox Hinds emphasized that apartheid law constituted a gross abuse of human rights, arguing that a good case could be made for arraigning jurists on charges of complicity in such human rights abuses.³⁰⁹

These four visions of accountability, or lack thereof, for legal professionals—approached through the lenses of judicial independence, truth-seeking, professional responsibility and expressivism, or criminal accountability and retributive justice—largely reflect the politics of memory and the dynamics of crucial debates on what to with legal professionals when transitioning to a just society. Depending on the context, when the legal system of a past oppressive regime

304. DYZENHAUS, *supra* note 3, at 37–42.

305. *Id.*

306. Archbishop Desmond Tutu, Statement to S. Afr. Truth & Reconciliation Comm'n (June 18, 1996).

307. David Dyzenhaus, Statement to S. Afr. Truth & Reconciliation Comm'n.

308. *Id.*

309. Lennox Hinds, Coordinator, Int'l Comm'n of Inquiry, Statement to S. Afr. Truth & Reconciliation Comm'n (Feb. 6, 2021).

remains unaddressed, its structures continue in some way, and the public remains to be shown that any change has occurred, risking reversion to the past. Failure to address the role of legal institutions in a comprehensive manner compromises the integrity of the legal system and its stability. This is particularly true when members of the legal institution remain in their positions without any form of accountability or lustration. While criminal prosecutions are not the sole means of facilitating such processes, judicial reform and efforts to build trust in judges and the judiciary have been identified as crucial in efforts to guarantee non-recurrence as part of transitional justice processes.³¹⁰

Moreover, many argue that lustration is not enough. The damage to the legal institutions of post-World War II Germany that resulted from allowing many jurists to remain in their roles “was not solely due to facts about their personalities. It was also due to the fact that their legal philosophies—their understanding of legal duty and the rule of law—continued unchallenged.”³¹¹ Therefore, while there are many shortcomings and variables, trials of legal professionals can serve the function of confronting and reprimanding the abuses of unjust past legal orders, learning from them, and signaling an intention to change by both removing key players from office and challenging their ideologies and actions.³¹²

However, every situation is different, and domestic prosecutions may not be possible or suitable. In some circumstances, it is the system of military tribunals that commits international crimes or there is no transition. In other circumstances, lustration, let alone trials of legal professionals, would paralyze a weak state’s transitioning legal institutions, or the way in which it is done compromises the separation of powers and judicial independence.³¹³ Nonetheless, when the situation and the victims call for it, the trials of legal professionals for crimes of law may be necessary to reveal the complex dynamics of legal actors and hold them accountable in order for societies to move forward.

CONCLUSION

Holding legal professionals and institutions accountable is no easy feat, but international criminal law mechanisms have neglected their role in the commission of international crimes for too long. International criminal law must be able to confront the particularities of legal professions and the crimes of law that produce structural and systemic violence that permeates beyond discreet

310. See de Greiff, *supra* note 108, ¶¶ 52–61.

311. DYZENHAUS, *supra* note 3, at 22.

312. *But see generally* Alston, *supra* note 84.

313. See generally Katarína Šipulová & David Kosař, *Purging the Judiciary After a Transition: Between a Rock and a Hard Place*, 17 HAGUE J. ON RULE L. 61 (2025).

individual criminal acts. This Article has demonstrated that such a feat is possible within existing international criminal law mechanisms.

In doing so, this Article has proposed two primary frameworks to adequately remedy international criminal law's lack of attention to and misunderstanding of legal professionals' roles in the commission of international crimes. First, trials must both recognize and center systemic institutional crimes rooted in the structures and norms of legal institutions. To do so, the charging of certain crimes against humanity is best suited, as their manifestations may be rooted in maintaining or exploiting a system of law. Second, international criminal law must be separately adapted to a particular class of legal professional perpetrators. To do so, accountability efforts must fully appreciate the dynamics of the impugned legal system, the particularities of the legal profession within it, and the conduct of the accused in maneuvering those institutional and professional dynamics. In following such an approach, we may begin to release the restrictions on recognizing crimes of law.

Simultaneously, this Article has made a further case for *why* legal professionals should be held accountable in criminal trials. When embedded within or in relation to a transitional justice process, prosecuting crimes of law pursues several of the goals of transitional justice, namely retributive accountability, expressing what constitutes the wrongs of the past, creating an account of what happened, and building civic trust in institutions going forward. In addressing crimes of law with these goals in mind, we open the door to another device in the transitional justice toolbox.

Differentiating crimes of law does not open the door to overcomplicating an already complicated field of law.³¹⁴ Rather, if courts and tribunals seek to pursue justice while ensuring fair trials, putting the law on trial and adapting to a particular class of legal perpetrators is the most appropriate framework for doing so under contemporary structures. Shedding light on the dynamics of crimes of law may also be helpful in the coming years not only in light of the ICC OTP's application for an arrest warrant against the Chief Justice of Afghanistan but also the potentiality of an investigation against Israeli legal professionals for the crime of apartheid.³¹⁵ Ultimately, recognizing the above nuances of crimes of law and legal professionals is essential not only for achieving accountability in individual cases, but also for reinforcing the integrity of international criminal law as a system capable of confronting the structural basis of law itself in the perpetration of atrocities.

314. *But see* James Stewart, *The End of 'Modes of Liability' for International Crimes*, 25 LEIDEN J. INT'L L. 165, 213, 217 (2012).

315. *See* Noura Erakat & John Reynolds, *We Charge Apartheid? Palestine and the International Criminal Court*, TWAIL REVIEW: REFLECTIONS (Apr. 20, 2021), <https://twailr.com/we-charge-apartheid-palestine-and-the-international-criminal-court/> [<https://perma.cc/U56E-SL9N>].