

# Explaining Inhumanity: The Use of Crime-Definition Experts at International Criminal Courts

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## ABSTRACT

*International criminal courts must not only decide the guilt or innocence of defendants in immensely serious cases, but also make good law in the process. To help them do so, these courts have turned to experts. This Article identifies a type of expert witness that, thus far, has escaped scholarly attention: the crime-definition expert. Crime-definition experts have provided expert reports and testimony to international criminal courts on the meaning of the very crimes with which defendants are charged, including genocide, forced marriage, and recruitment and use of child soldiers. This Article critically evaluates the risks associated with using crime-definition experts in international criminal trials. Ultimately, it concludes that crime-definition experts may help tribunals achieve the various aims of international criminal justice, but have the potential to impair defendants' rights and impede the tribunals' ability to advance expressive and restorative justice aims. It advocates judicious use, if any, of these experts and proposes measures to reap the most benefit from crime-definition experts while minimizing the risks inherent in their use.*

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## I. INTRODUCTION

International criminal tribunals have all the usual forensic experts one would expect. They use experts on DNA, ballistics, and handwriting.<sup>1</sup> They also use some idiosyncratic experts, such as experts in the history and context of the conflict in which the crimes occurred.<sup>2</sup> This Article identifies a category of expert witness that has

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1. See RICHARD MAY & MARIEKE WIERDA, INTERNATIONAL CRIMINAL EVIDENCE 204–06 (2002).

2. See *id.*; see also RICHARD WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 17 (2011) (exploring the role of social scientists, including political

thus far escaped scholarly attention: the crime-definition expert. Crime-definition experts have given testimony and submitted expert reports to international criminal courts on the concepts of genocide, forced marriage, and conscription—and enlistment—of child soldiers in prosecutions of these crimes. This Article contends that the use of these experts offers a number of benefits for courts breaking new and unfamiliar ground, seeking legitimacy in the eyes of various publics, including that of the affected region, and attempting to send a message of condemnation of the world's worst crimes. However, using crime-definition experts comes at a cost, including potential unfairness to defendants, the risk of oversimplifying complex issues, and impeding the tribunal's ability to advance expressive and restorative justice aims. If courts, such as the International Criminal Court (ICC), persist in relying on them, they should take measures to reduce the risk associated with these potentially influential witnesses.

Crime-definition experts have different areas of purported expertise. Sometimes the expertise that the expert brings to the table is legal. Sometimes it is a more abstract understanding of the crime from the perspective of a social science, such as sociology or anthropology. Other times, it is knowledge gained from experience with the crime through aid or advocacy work in the particular region.

This Article traces the use of crime-definition experts at war crimes tribunals in emerging areas of law and shows that, recently, courts have embraced the opinions of these experts to a remarkable extent. After considering possible reasons for this turn to crime-definition experts, the Article reflects on whether the use of such expert testimony enhances or impedes the tribunals' abilities to achieve the aims that they were established or seek to pursue—namely, retribution, deterrence, creating a historical record, peace and reconciliation, expressive justice, and restorative justice.

Until recently, the use of expert testimony at international tribunals has received strikingly little attention from scholars.<sup>3</sup>

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scientists and historians, at international criminal tribunals and arguing that, in part thanks to their assistance, international tribunals, and particularly the ICTY, have done a credible job of writing history); Doris Buss, *Expert Witnesses and International War Crimes Trials: Making Sense of Large-Scale Violence in Rwanda*, in *NARRATIVES OF JUSTICE IN AND OUT OF THE COURTROOM: FORMER YUGOSLAVIA AND BEYOND* 23, 26 (D. Zarkov & M. Glasius eds., 2014) (examining international criminal tribunals' use of context experts, "experts with backgrounds in anthropology, history, political science, law and sociology [who] testified in multiple cases about the social, political, historical contexts that lead to, and then shaped, the outbreak of armed conflict and violence in these two regions").

3. Suzannah Linton has written a useful overview of procedures at different tribunals for expert and UN witnesses. See generally Suzannah Linton, *Testimony of Expert Witnesses, Journalists, ICRC, and UN Staff*, in *INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES* 878 (Göran Sluiter et al. eds., 2013).

However, in the last few years, commentators have begun looking at the role of historical and social science experts in international criminal trials.<sup>4</sup> Some commentary has suggested international tribunals' need of expert assistance in writing a credible historical account of the events at issue.<sup>5</sup> Other commentary takes a less favorable view of experts, in particular, the prosecution's use of experts as advisors, and has raised epistemic as well as practical concerns, particularly related to equality of arms.<sup>6</sup>

This Article examines international criminal courts' use of experts who testify about the contours and elements of the very crimes with which the defendant stands charged. Part I sets the stage for these crime-definition experts by discussing the tensions among the novelty of international crimes, the tenets of *jura novit curia* (the judge knows the law), and *nullum crimen sine lege* (no crime without law). Part II turns to the international and internationalized tribunals, and after describing rules governing expert testimony, it details the use of crime-definition experts in trials at the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the International Criminal Court (ICC).<sup>7</sup> In recent cases, judges have shown themselves amenable to crime-definition expert guidance, especially when faced with new, or relatively new, crimes.

Part III assesses the normative implications of this expert testimony by evaluating the capacity of crime-definition expert testimony to advance the various aims of international criminal justice. Recognizing that crime-definition experts, though problematic, may be better than the alternatives of judicial ignorance, judges' educating themselves off the record, or even *amici curiae*, it suggests measures to assuage the potential problems associated with crime-definition experts. In particular, it advocates fostering a culture in which defendants feel free to challenge and vigorously question crime-definition experts and in which courts scrutinize the

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4. See Buss, *supra* note 2, at 27–28 (“[C]ontext expert evidence at the two tribunals was driven in part by a meta-narrative about the causes of the conflicts in Rwanda and Yugoslavia that prevailed in the 1990s . . . [which] depicted the conflict and genocide in Rwanda as elite-orchestrated, ethnically directed violence, designed to create the conditions to secure or maintain power.”).

5. See WILSON, *supra* note 2, at 49 (characterizing the role of expert witnesses in international tribunals as the “main conduit for historical evidence”).

6. For an examination of the issue of non-witness experts at international criminal tribunals, see generally Dawn L. Rothe & Angela Overton, *The International Criminal Court and the External Non-Witness Expert(s), Problematic Concerns: An Exploratory Endeavour*, 10 INT'L CRIM. L. REV. 345 (2010).

7. Many of the quotations from international decisions and judgments use British spelling. This Article retains the spelling used in the original.

reliability and potential biases of these experts—including those selected by the trial chamber. Defendants should be permitted and provided the funds to offer crime-definition experts of their own. Courts should police more carefully whether an expert has strayed beyond his or her area of expertise or matters of relevance to the case. Finally, transparency is essential. Whenever possible, crime-definition experts should testify openly and their reports be public, and courts should make clear where they rely on experts and where they do not.

## II. THE TENSION BETWEEN *JURA NOVIT CURIA*, *NULLUM CRIMEN SINE LEGE*, AND INTERNATIONAL CRIMINAL LAW

Judges are supposed to know, or at least be able to discover, the law. In civil law jurisdictions, this notion of the judge knowing the law goes under the name *jura novit curia*. That particular term is not used in common-law jurisdictions,<sup>8</sup> but the sentiment exists in the expectation that common-law judges have tools to comprehend the legal arguments of the parties and say what the law is.<sup>9</sup> This maxim has its limits. Whether in common-law or civil-law systems, judges

8. See James Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 539 n.113 (2006) (“The maxim under that name is practically unknown in American legal literature.”).

9. In its most basic form, the principle looms large in the United States but comes under a different label. In the United States, instead of citing the principle of *jura novit curia*, courts and litigants cite *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), for the proposition that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 14 (2011) (quoting *Marbury*, 5 U.S. at 177) (noting that this phrase may be one of the most quoted statements in American law, albeit one that conflicts with the notion that the judge merely applies the law to facts in dispute). To be fair, at least some civil law jurisdictions read the maxim of *jura novit curia* to mean that, the judge not only says but knows the law and, since the judge knows the law, there is no need for the parties to argue about the law to the judge. See GEOFFREY HAZARD & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY* 68 (2004) (comparing interpretations of *jura novit curia* in different European jurisdictions). Moreover, it may permit the judges to “recharacterize” claims against defendants well into trial. See Int’l Criminal Court, Regulations of the Court, reg. 55, ICC-BD/01-02-07 (May 26, 2004) [hereinafter ICC Regulations]; see also Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Jugement rendu en application de l’article 74 du Statut, 709–10 (Mar. 7, 2014) [hereinafter Katanga Judgment], <http://www.icc-cpi.int/iccdocs/doc/doc1744366.pdf> [<https://perma.cc/E54V-AXVC?type=pdf>] (archived Jan. 26, 2015) (finding Katanga guilty under a different mode of liability); Katanga Judgment, *supra*, Minority Opinion of Judge Christine Van den Wyngaert, ¶ 50, <http://www.icc-cpi.int/iccdocs/doc/doc1744372.pdf> [<https://perma.cc/528U-FW5L?type=pdf>] (archived Jan. 26, 2015) (arguing that the late recharacterizing of charges in the Katanga case was unfair and violated fundamental rights). Plainly, United States courts do not accept these implications of the concept that the judge knows the law.

often are not expected to know foreign law; consequently, foreign law is often a proper subject for legal expert testimony.<sup>10</sup> Just as their domestic counterparts are to know domestic law, international judges are supposed to know international law, but just what falls under the international law umbrella is unclear.<sup>11</sup> International criminal law and courts may put the maxim of *jura novit curia* even further to the test. For a variety of reasons, this all-encompassing knowledge of the law may be especially difficult for international criminal judges to attain.<sup>12</sup> This section explores why.

International criminal law is an especially difficult area for any judge to know and its borders are hard to define. Concededly, international criminal law is better defined than it was twenty years ago due to the definitions set out in the International Criminal Court's (ICC) Rome Statute<sup>13</sup> and Elements of Crimes,<sup>14</sup> as well as the decisions issued by the *ad hoc* tribunals.<sup>15</sup> Still, a great deal of uncertainty remains. This uncertainty has a variety of causes.

First, international criminal law represents a blend of different areas of law, including international humanitarian law (the law of

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10. See generally Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. INT'L & COMP. L. 225, 225, 235 (1995) (discussing the variations in whether jurisdictions treat foreign law as "law, proven and interpreted as such" or "merely as a matter of fact" and discussing different ways of proving foreign law and noting that, regardless, "it is still not the same as the forum's own law that the judge is supposed to know—*iura novit curia*—whereas he cannot be expected to know all the laws of the world").

11. See Joe Verhoeven, *Jura Novit Curia et le juge international*, in VOLKERRECHT ALS WERTORDNUNG/COMMON VALUES IN INTERNATIONAL LAW ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 635, 639 (Pierre-Marie Dupuy et al. eds., 2006) (arguing that the law international judges are to "know" or, at least, "say" is international law).

12. Professor Verhoeven suggests that judges cannot be expected to have mastered all of international law, and therefore the notion of *jura novit curia* is limited to the general rules in place in his or her legal field that are normally those adopted by the relevant legislative authority. See *id.* at 639 ("Que le juge ne sache que le droit international implique-t-il qu'il sache « tout » le droit international, c'est-à-dire qu'il connaisse toutes les normes dont celui-ci se compose ? On ne peut qu'en douter. Il se comprend sans peine que le juge « sache » les règles générales qui sont en vigueur dans son ordre juridique, et qui sont normalement celles qui ont été adoptées par l'autorité à laquelle le pouvoir de légiférer a été conféré."). What is less clear is whether the judge is presumed to know all of the laws related to these general rules in his or her field. See *id.* ("Mais s'il (doit) connaît(re) les règles générales, « sait »-il aussi les multiples normes particulières qui les appliquent, y dérogent, les complètent, etc.?").

13. Rome Statute of the International Criminal Court art. 58(1)(b)(i)–(iii), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

14. Addendum Part II, Finalized Draft Text of the Elements of Crimes, Preparatory Comm'n for the Int'l Crim. Court, Mar. 13–31, June 12–30, 2000, PCNICC/2000/1/Add.2 (Nov. 2, 2000).

15. This Article uses the term "ad hoc" tribunals to refer to the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

war), international human rights law, and general principles of criminal law. The ICC statute, for example, directs judges to apply the law of the ICC—statute, rules, Elements of Crimes—but also, “where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”; and,

[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.<sup>16</sup>

In sum, international criminal judges may need to consider a wide variety of sources of international law and even domestic law to reach a decision.

Further, international criminal judges have faced, and will continue to face, crimes never before prosecuted in an international, or often even a domestic, court. The Rome Statute includes newly recognized crimes against humanity, for example apartheid, and enforced disappearance.<sup>17</sup> It also has recognized a new stand-alone crime, the crime of aggression.<sup>18</sup>

Even where the *ad hoc* tribunals have issued judgments on particular crimes, the ICC still may be charting new territory because the ICC has not adopted wholesale the law of the *ad hoc* tribunals. For example, the fate of the joint criminal enterprise doctrine, central

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16. Rome Statute, *supra* note 13, art. 21. These sources of law may point judges in different directions and thus leave a lot to judicial discretion. Benjamin Perrin, *Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials*, 39 OTTAWA L. REV. 367, 382 (2007-2008).

17. See *id.* art. 7(i)–(j). See generally M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION (2011) (discussing the new crimes recognized in the Rome Statute).

18. See Rome Statute, *supra* note 13, art. 5(1)(d)–(2). The crime of aggression has its roots in crimes against peace, which were prosecuted at Nuremberg. See Mark Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains*, 41 CASE W. RES. J. INT'L L. 291, 295 (2009) (noting that the International Tribunals at Nuremberg and Tokyo first recognized the crime of waging an aggressive war under the label “crimes against the peace”). However, even after the Kampala review conference in which state parties to the ICC arrived at a definition of aggression, much remains uncertain. See Beth Van Schaack, *The Aggression Amendments: Points of Consensus and Dissension*, 105 AM. SOC'Y INT'L L. PROC. 154, 156 (2011). A number of aspects of this crime remain highly contested, including whether there is any kind of a defense or carve out for humanitarian interventions. See Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82 (2011); Noah Weisbord, *Conceptualizing Aggression*, 20 DUKE J. COMP. & INT'L L. 1 (2009); Beth Van Schaack, “*The Grass That Gets Trampled When Elephants Fight*”: Will the Codification of the Crime of Aggression Protect Women?, 15 UCLA J. INT'L L. & FOREIGN AFF. 327 (2010).

to a large number of ICTY prosecutions,<sup>19</sup> appears quite uncertain.<sup>20</sup> Vicarious or derivative liability in a world without joint criminal enterprise remains to be explored.

Not only do international judges frequently face new and unfamiliar crimes, they also face unfamiliar facts. A judge sitting in a domestic jurisdiction has at least some understanding of the society in which he or she lives. By contrast, a judge in an international criminal case may have very little understanding of the society in which the alleged crimes occurred.<sup>21</sup> This makes understanding, communicating with, and assessing the credibility of the witnesses difficult<sup>22</sup>—much is, quite literally, lost in translation.<sup>23</sup> A judge's lack of familiarity with the society in which the crimes occurred also makes it harder for the judge to understand the crimes themselves. Judges, without doing some extracurricular reading or hearing from witnesses or *amici curiae*, are unlikely to know a great deal about the practice, for example, of arranged marriage in Sierra Leone, Sierra Leonean society's reaction to the victims of forced marriage, the particular circumstances that cause children to join armed groups, or the role of girls in armed conflict.<sup>24</sup> International judges may have some intuitions on these matters, but their intuitions are likely founded on less knowledge and life experience than they would be in the domestic criminal context.

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19. JCE has its proponents and its detractors. Compare Allison Marston Danner & Jenny Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 133 (2005) (arguing against the concept of joint criminal enterprise), with NANCY COMBS, *FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL TRIALS* 325 (2010) (discussing the literature on JCE and arguing that JCE “raise[s] ‘the specter of guilt by association’ . . . but . . . at least it does so openly”).

20. See generally Jens David Ohlin, *Joint Intentions to Commit International Crimes*, 11 CHI. J. INT'L L. 693 (2011) (discussing the doctrines of conspiracy, JCE, and co-perpetration, and characterizing “[c]ollective criminal action” as “the most contentious area of substantive international criminal law”).

21. See Sarah Williams & Hannah Woolaver, *The Role of the Amicus Curiae Before International Criminal Tribunals*, 6 INT'L CRIM. L. REV. 151, 184 (2006) (encouraging the use of amici curiae to provide greater understanding of the national and international contexts in which the trial takes place).

22. Cf. COMBS, *supra* note 19, at 143 (discussing the ease with which defendants can commit perjury at international criminal tribunals).

23. See *id.* at 66–78 (noting the ability of interpreters to significantly change the tone or meaning of testimony); see also Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT'L L. 1, 26 (2008) (arguing that errors during translations are an inherent part of the tribunal process).

24. See *infra* Part III.C.

The varied backgrounds of international criminal judges make the task of judging in the face of this novelty even more challenging.<sup>25</sup> Although some international criminal judges have experience in international criminal law, others are new to the field.<sup>26</sup> Moreover, due perhaps to the highly political nature of the selection process, judges' prior experiences are often not in criminal law or in a judiciary.<sup>27</sup> Ideally, with multi-judge panels (three at trial and five on appeal), the judges' varied backgrounds complement one another but, for some judges, there may be a steep learning curve.

Not only is there a lot of novelty at international criminal tribunals, there is also significant pressure to make good law. International criminal tribunals are both subject to intense scrutiny and, at times, intense criticism. The tribunals are accused—fairly or not—of being expensive and slow.<sup>28</sup> Commentators classify the tribunals as ineffective at deterring crime, meting out retribution, fostering peace and reconciliation, or creating a historical record.<sup>29</sup> The tribunals are accused of sometimes convicting people on flimsy and contradictory evidence.<sup>30</sup> The one area where commentators seem

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25. See COMBS, *supra* note 19, at 234–35 (noting that many judges in international tribunals lack prior exposure to judicial processes and norms).

26. See, e.g., *Current Judges – Biographical Notes*, INT'L CRIMINAL COURT, [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/judges.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/judges.aspx) (last visited May 19, 2015) [<https://perma.cc/M6UK-U78M?type=source>] (archived May 19, 2015) (describing the backgrounds of current ICC judges).

27. See COMBS, *supra* note 19, at 234–35 (“Many ICTR, SCSL, and Special Panels’ judges are former academics and or government officials who have no courtroom experience.”).

28. See Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79 (2009) (assessing the criticism that international tribunals are slow and finding it to be untrue with respect to the ICTY and the SCSL, but true with respect to the ICTR); David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861, 880 (2006) (examining the claim that international criminal tribunals are expensive and concluding that they are, but understandably so, given the complexity of the cases, the reliance on international support and costs associated with the international nature of the court, including travel and translation); see also Stuart Ford, *Complexity and Efficiency at International Criminal Courts*, 29 EMORY INT'L L. REV. 1, 7 (2014) (arguing that the comparison of international tribunals as slow in relation to domestic tribunals is unfair).

29. See MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 150, 169 (2007) [hereinafter DRUMBL, *ATROCITY*] (arguing that international tribunals have serious limitations in achieving retribution and deterrence); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 474 (1999) (characterizing the deterrent effect of international prosecutions as “at best a plausible but largely untested assumption”). *But see* WILSON, *supra* note 2, at 17–23 (arguing that international prosecutions do make a decent historical record).

30. See COMBS, *supra* note 19, at 4–5. Notably, the ICTY falls outside of Professor Combs's study, and she recognizes that some of the fact-finding problems seen at the other tribunals may not be present, or at least be less severe, at the ICTY.

to agree that international tribunals may have an impact is in their ability to express condemnation of crimes.<sup>31</sup> A key piece of this expressive function, it seems, is explaining just what the crimes are.<sup>32</sup> However, that is no easy task.

Reflecting this commitment to stating the law, international judgments—even trial judgments—contain lengthy sections explaining the law. In the United States, for example, any ambiguity on the meaning of the crime at the trial level is debated in a motion to dismiss or in the choice of jury instruction and then possibly on appeal. By contrast, at international criminal tribunals, the judges grapple explicitly, and at length, with the law in their opinions. Judgments from international tribunals are typically hundreds of pages long.<sup>33</sup> Thus, any statements or misstatements of the law are well publicized, available for all to see.

Beyond clear condemnation of the crime in the case before it, international judges need to make law that translates not only to future cases before the court, involving different geographic regions and defendants, but also to domestic jurisdictions.<sup>34</sup> The ICC, after

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31. See DRUMBL, ATROCITY, *supra* note 29, at 173 (arguing that international tribunals serve an expressive purpose that signals the strength of law to the public); MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY AND THE LAW 166–67 (1997) (discussing the effects of legal actions on the collective memory of a nation); Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 42 (2007) (discussing the symbolic importance of punishment, particularly in light of resource constraints); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7 (2001) (discussing the concept of preventing future crimes through norm internalization).

32. Concededly, a nuanced understanding of the elements of crimes in the affected region may be unrealistic. See Stuart Ford, *How Special is the Special Court's Outreach Section*, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW 505 (Charles Chernor Jalloh ed., 2014) [hereinafter SIERRA LEONE SPECIAL COURT AND ITS LEGACY] (evaluating the SCSL's outreach efforts).

33. In the first case before the ICC, for example, the 624-page judgment contained some sixty-four pages dedicated exclusively to “The Law,” and most of the remaining pages were dedicated to applying that law to the facts of the case. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 261–587 (Mar. 14, 2012) [hereinafter *Lubanga Trial Judgment*].

34. International judges are aware of this need to think of how the law they make will translate in domestic jurisdictions. Weighing in on the elements of a joint criminal enterprise, a major point of contention in recent years at the ICTY, then-ICTY Judge Van Wyngaert noted that the test of “mere acquiescence” would add to the prosecutor's already broad discretionary powers, but “might also send a wrong message to domestic legislators and law-enforcement agencies.” *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Judgment, Declaration of Judge Van Den Wyngaert, ¶ 6 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007). *But see* Alexander Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1067 (2011) (arguing against the dominant assumption that international criminal law must be uniform and advocating greater consideration of national laws).

all, is premised on complementarity—meaning the ICC steps in only if a domestic jurisdiction is unwilling or unable to investigate or prosecute.<sup>35</sup> Domestic jurisdictions, whose experience with international criminal law is likely to be limited, will likely pay significant attention to the definitions of crimes given by the ICC.

The novelty of international criminal law, in turn, runs in tension with another key tenet of international law: *nullum crimen sine lege*. This principle, which means no crime without law, rests on “four core values: written law, legal certainty, prohibition on analogy and non-retroactivity,” and “serves to prevent the criminalization of acts, though repugnant, in a random manner.”<sup>36</sup> *Nullum crimen* is now an internationally recognized human right, which the ICC has incorporated explicitly through the Rome Statute.<sup>37</sup> Despite having embraced the principle,<sup>38</sup> at least some international criminal tribunals have applied somewhat lax formulations of it.<sup>39</sup> The ICTY and the SCSL have not insisted on “a prior written criminal statute specifically encompassing the act charged,” but rather have deemed the principle satisfied where “the act of the accused was a crime as generally understood at the time of the offense charged.”<sup>40</sup> Moreover, despite the Rome Statute’s incorporation of *nullum crimen* and the ICC’s attempt to define the crimes in the “Elements of Crimes” document, there remain “‘legality deficits’ within the Statute, as

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35. See Rome Statute, *supra* note 13, art. 17. See generally Pierre-Marie Dupuy, *Principe de Complementarite et Droit International General*, in THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS 17 (Mauro Politi & Federica Goioia eds., 2008). But see Michael Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT’L L. 115, 120 (2010) (criticizing the court in its early cases for showing more of a “competition” than complementarity mindset).

36. See Alan Nissel, *Continuing Crimes in the Rome Statute*, 25 MICH. J. INT’L L. 653, 673–74 (2004) (describing the “gradual process” of adopting this principle in international law).

37. See KENNETH GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 331–43 (2009) (“[The] ICC statute articulates aspects of the principle of legality as both jurisdictional and substantive rules.”).

38. See *id.* at 303–05 (noting, however, that the principle of legality does not explicitly appear in the statutes of the ICTY, ICTR, or SCSL).

39. See *id.* at 306–08 (discussing cases that involved controversies over whether crimes charged in an international tribunal had been defined previously); see also Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 141 (2008) (evaluating international criminal tribunals’ treatment of *nullum crimen* and noting that “[m]ost international courts treat *nullum crimen* as an applicable general principle of law that must be adapted to the international law context of the cases before them”).

40. See GALLANT, *supra* note 37, at 321.

many crimes are vaguely or sparingly worded and key terms remain undefined.”<sup>41</sup>

It is in this context that international judges have permitted the somewhat unconventional practice of receiving expert testimony and reports from purported experts on the crimes of genocide, forced marriage, and enlistment and conscription of child soldiers.

### III. THE EMERGING CRIME-DEFINITION EXPERT

This Part sets out the basic laws governing expert testimony at international criminal tribunals and explores the emerging practice of using experts to help define the crimes. It begins with the *ad hoc* tribunals’ rejection of pure legal expertise on core international criminal law issues while permitting—sometimes, it appears, reluctantly—experts whose evidence skirted legal opinion on how to define the crimes or the defendant’s liability but, technically, fell in the realm of social science or military command. Next, it turns to the SCSL’s embracing of expertise on the phenomenon of forced marriage in Sierra Leone, this time from a human rights worker with experience on the ground in Sierra Leone. The expert’s evidence was in some ways legal—it discussed the traditional laws of Sierra Leone to contrast the traditional practice of arranged marriage with forced marriage during the war. However, the evidence in other ways was factual; it described a factual scenario in order to help the judges define the new crime of forced marriage. Finally, this Part turns to the ICC’s explicit embrace of legal expert testimony in the *Lubanga* trial through the Special Representative to the Secretary General of the United Nations for Children in Armed Conflict (SRSG), Radhika Coomaraswamy, who submitted a report and testified on the phenomenon of child soldiering and who, very explicitly, told the court how the new crime should be defined. In all, international criminal judges have shown a willingness to embrace rather flexible conceptions of expertise and reliability in order to shape new international crimes.

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41. Van Schaack, *supra* note 39, at 189; *see also id.* at 191–92 (concluding that international tribunals have lived up to the core of the *nullum crimen* principle and arguing that, as international criminal law has matured, through a common law-like process of judicial lawmaking and codification at the ICC, “the need for expansive interpretation is diminishing and the full complement of the principle of legality can take root”).

### A. ICTY

ICTY judges hued closely to the notion of *jura novit curia*. Although they heard expert legal testimony on issues of domestic law or peripheral legal issues, they refused to hear expert legal testimony on the definition of the crimes themselves. Nevertheless, the ICTY began paving the road for the use of crime-definition experts by permitting experts to weigh in on quasi-legal issues, such as social science understandings of the crimes and issues of military command and control.

#### 1. Rules on Experts

Rule 94 *bis* of ICTY Rules of Procedure and Evidence sets out the procedure for managing expert witness evidence. The rule seems to assume that parties, and not trial chambers, call witnesses.<sup>42</sup> ICTY practice is consistent with party-driven selection and examination of experts.<sup>43</sup> The definition of an “expert” and the requirements for the admission of expert testimony derive not from the rules but from ICTY case law.

The first requirement for the admission of expert testimony or reports, according to ICTY case law, is that the proposed witness must be an expert, which the ICTY has defined as “a person who ‘by virtue of some specialised knowledge, skills or training can assist the trier of fact to understand or determine an issue in dispute.’”<sup>44</sup> In applying this rule, judges must consider the witness’s “former and present positions and professional experience, as well as “scholarly articles, other publications or any other information.”<sup>45</sup> The next requirement is that the expert’s statements or reports must “meet the

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42. See Int’l Crim. Trib. for the Former Yugoslavia, Rules of Procedure and Evidence, Rule 94 *bis*, IT/32/Rev. 49 (May 22, 2013). Rule 94 *bis* provides:

A) The full statement and/or report of any expert witness to be called by a party shall be disclosed within the time-limit prescribed by the Trial Chamber or by the pre-trial Judge. (B) Within thirty days of disclosure of the statement and/or report of the expert witness, or such other time prescribed by the Trial Chamber or pre-trial Judge, the opposing party shall file a notice indicating whether: (i) it accepts the expert witness statement and/or report; or (ii) it wishes to cross-examine the expert witness; and (iii) it challenges the qualifications of the witness as an expert or the relevance of all or parts of the statement and/or report and, if so, which parts.

43. See Linton, *supra* note 3, at 881 (noting that in the ICTY, “the parties call their own experts”).

44. Prosecutor v. Lukić & Lukić, Case No. IT-98-32/1-T, Decision on Second Prosecution Motion for Admission of Evidence Under Rule 92 *bis*, ¶ 16 (Int’l Crim. Trib. for the Former Yugoslavia July 23, 2008) [hereinafter Lukić 92 *bis* Decision].

45. Lukić 92 *bis* Decision, *supra* note 44.

minimum standards of reliability” and be “relevant and of probative value,” and the content of the statement or reports must “fall within the accepted expertise of the expert witness.”<sup>46</sup> At the ICTY, expert witnesses must be impartial—witnesses have been disqualified based on perceived partiality.<sup>47</sup> Experts are likewise not permitted to weigh in on the guilt or innocence of the defendant.<sup>48</sup>

Admissibility is just the first hurdle. After an ICTY Trial Chamber determines that expert testimony is admissible, it then must decide the weight, if any, to give the evidence.<sup>49</sup>

## 2. Use of Crime-Definition Experts

The ICTY has been hostile to the practice of crime-definition experts offering expert legal testimony on the core crimes. However, the seeds of the emerging practice of calling crime-definition experts can be seen in the ICTY’s use of quasi-legal testimony from social scientists and military experts.

At the ICTY, legal experts have been permitted to give evidence on certain peripheral legal issues that arose in trials, but not on the core legal concepts central to the charges against the defendant. For example, the ICTY permitted testimony of a legal expert on the law of citizenship and the right to self-determination.<sup>50</sup> ICTY Trial Chambers also requested and heard testimony from a sentencing expert who filed a report and testified about sentencing practices in domestic jurisdictions for serious crimes, such as murder.<sup>51</sup> The Appeals Chamber also approved the use of expert testimony

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46. See *id.* ¶ 15.

47. See Linton, *supra* note 3, at 883 (recounting instances where courts excluded testimony on the basis of unreliability and partiality).

48. See *Prosecutor v. Hadžihasanović & Kubura*, Case No. IT-01-47-T, Decision on Report of Prosecution Expert Klaus Reinhardt, ¶ 11 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 28, 2000) (citing *Prosecutor v. Kordić & Čerkez*, Case No. IT-95-14/2-T, T.13306–307 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 28, 2000)), <http://www.icty.org/x/cases/hadzihasanovic/tdec/en/040211.htm> [<http://perma.cc/QU78-7J64>] (archived Feb. 8, 2015) (“[A]n expert witness may not be authorised to offer his opinion on the criminal liability of the accused, a matter which falls within the sole jurisdiction of the Chamber at the close of the trial.”); see also MAY & WIERDA, *supra* note 1, at 200 (discussing the relevance of the “ultimate issue” rule in international tribunals).

49. See Linton, *supra* note 3, at 885–86.

50. See *id.* at 884–85 (noting the wide latitude of experts to testify on matters within their expertise).

51. See *Prosecutor v. Nikolić*, Case No. IT-94-2-S, Sentencing Judgement, ¶ 38 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003), [http://www.icty.org/x/cases/dragan\\_nikolic/tjug/en/nik-sj031218e.pdf](http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf) [<http://perma.cc/L5R7-XN5L>] (archived Feb. 8, 2015); *Prosecutor v. Deronjić*, Case No. IT-02-61-S, Order on Admission Into Evidence of Testimony of Expert Witness Prof. Dr. Ulrich Sieber, ¶ 4 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 17, 2003), <http://www.icty.org/x/cases/deronjic/tord/en/031217.htm> [<http://perma.cc/TF4Y-ZUXE>] (archived Feb. 8, 2015).

regarding domestic constitutional law related to the functions of a crisis staff.<sup>52</sup>

By contrast, ICTY Trial Chambers have refused to admit pure legal testimony on core international criminal law matters. For example, the defendants in the *Popović* case—the Srebrenica megatrial against seven defendants—*attempted* to introduce an expert report and testimony from Professor William Schabas on the definition of genocide.<sup>53</sup> Professor Schabas, a well-known legal expert on genocide and the author of many books and articles on the topic, wrote a report criticizing the ICTY's case law on genocide.<sup>54</sup> The Trial Chamber rejected the testimony on the basis that deciding the elements of genocide fell within the core competence of the Trial Chamber. Even though the Trial Chamber rejected the report and testimony, the parties drew from Professor Schabas's arguments in their legal submissions.<sup>55</sup> Likewise, in the *Stakić* case, the Trial Chamber refused to accept defense legal expert testimony on the issues of joint criminal enterprise and the status of command responsibility under customary international law at the time of the crimes.<sup>56</sup> It reasoned that because these issues fell within the competence of the Trial Chamber, no legal expert testimony was

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52. See Linton, *supra* note 3, at 885 (noting that the Appeals Chamber ultimately concluded that the Trial Chamber's decision not to admit the testimony was reasonable).

53. See Prosecutor v. Popović et al., Case No. IT-05-88-T, Decision on the Admissibility of the Expert Report and Proposed Expert Testimony of Professor Schabas, ¶ 3 (Int'l Crim. Trib. for the Former Yugoslavia July 1, 2008), [www.icty.org/x/cases/popovic/tdec/en/080701.pdf](http://www.icty.org/x/cases/popovic/tdec/en/080701.pdf) [<http://perma.cc/3WH8-XSBS>] (archived Jan. 11, 2015).

54. In his report, attached to the prosecution's motion seeking to have the professor accepted as a witness, Professor Schabas argued that the ICTY had mistakenly eschewed a state-policy requirement and had mistakenly required that the defendant intend to destroy in whole or in part a national or ethnic group. He contended that the correct *mens rea* was that the defendant knew of a state or state-like group's policy to destroy in whole or in part such a group. See Prosecutor v. Popović et al., Case No. IT-05-88-T, Joint Notice of Disclosure of an Expert Witness Report Pursuant to Rule 94bis – Historical Legal Expert, Annex A (Int'l Crim. Trib. for the Former Yugoslavia May 1, 2008).

55. See Prosecutor v. Popović et al., Case No. IT-05-88-T, Judgement, ¶¶ 826–28 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010); cf. Steven Kochevar, Comment, *Amicus Curiae in Civil Law Jurisdictions*, 122 YALE L.J. 1653, 1662–63 (2013) (noting that groups often file amici even in jurisdictions that do not have rules allowing them to receive them, which suggests that they think they have an influence anyway).

56. See Prosecutor v. Stakić, Case No. IT-97-24, T.9440 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 25, 2002), <http://www.icty.org/x/cases/stakic/trans/en/021125ED.htm> [<http://perma.cc/WFY3-3W68>] (archived Jan. 19, 2015) (“From the legal point of view and the three categories [of joint criminal enterprise] there established in the jurisprudence of this Tribunal, the Trial Chamber will not allow an expert to discuss these issues here because the old Roman law rule applies “iudex novit curia,” the judge knows the law. And therefore, we do not need legal experts.”).

necessary.<sup>57</sup> The Appeals Chamber affirmed the decision on the same basis.<sup>58</sup>

It bears noting, however, that in neither case were the judges facing novel law, at least by international criminal law standards. By the time of the *Popović* decision, several ICTY and ICTR Trial, and Appeals, Chambers had encountered the crime of genocide.<sup>59</sup> Likewise, several ICTY cases, drawing on precedent from Nuremberg, had already parsed out the forms and elements of joint criminal enterprise by the time the *Stakić* court rejected expert testimony on these same issues.<sup>60</sup>

Despite their hostility to expert legal testimony, the judges showed a willingness to hear from non-lawyer experts whose expert assistance skirted legal definitions of the crimes and forms of criminal responsibility. The evidence given by military experts on command and control, for example, often bled into the gray zone of legal expert testimony in cases based on a command responsibility theory.<sup>61</sup> One ICTY judge even interjected in the questioning of a

57. See *id.* (referring again to the concept of “iudex novit curia”).

58. See Prosecutor v. Stakić, Case No. IT-97-24-A, Judgement, ¶¶ 162–66 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006) [hereinafter Stakić Judgement] (“The Appeals Chamber agrees with the Trial Chamber that there was no justification for the introduction of expert testimony as to issues of international criminal law; the Trial Chamber was perfectly competent to pronounce on such issues without the assistance of a legal expert.”); see also Linton, *supra* note 3, at 881–86 (describing the standards for expert witness admission in ICTY cases).

59. The first genocide conviction at an international tribunal came in the ICTR case Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998) [hereinafter Akayesu Judgement], [www.unict.org/sites/unict.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf](http://www.unict.org/sites/unict.org/files/case-documents/ict-96-4/trial-judgements/en/980902.pdf) [http://perma.cc/47KX-9HPK] (archived Jan. 11, 2015).

60. See Stakić Judgement, *supra* note 58, ¶ 62 (“[J]oint criminal enterprise is a mode of liability which is ‘firmly established in customary international law’ and is routinely applied in the Tribunal’s jurisprudence.”). Interestingly, the *Stakić* Trial Chamber nevertheless rejected joint criminal enterprise in favor of the doctrine of co-perpetration, a concept familiar in German law. See *id.* ¶ 58. The Appeals Chamber later rejected co-perpetration as a mode of liability and recast the conviction in terms of the more settled doctrine of joint criminal enterprise. See *id.* ¶ 62 (concluding co-perpetration “does not have support in customary international law or in the settled jurisprudence of this Tribunal”); see also Ohlin, *supra* note 20, at 746 & n.252 (discussing the *Stakić* Trial Chamber decision and its “immediate[] reject[ion] by the Appeals Chamber”).

61. Under ICTY law, the test for command responsibility is whether:

- (1) an international crime has been perpetrated by someone other than the defendant;
- (2) there existed a superior-subordinate relationship between the defendant and the perpetrator;
- (3) the defendant as a superior knew or had reason to know that the subordinate was about to commit such crimes or had done so; and
- (4) the defendant as a superior failed to take the necessary and reasonable measures to prevent such crimes or punish the perpetrator.

Yaël Ronen, *Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings*, 43 VAND. J. TRANSNAT’L L. 313, 316 (2010) (citing Prosecutor v. Orić,

military witness in the *Prlić* case to clarify for the record that they were not asking the witness about international law, a topic in which he noted they ought to be expert under the principle of *jura novit curia*.<sup>62</sup>

Likewise, the judges permitted testimony on the meaning of genocide from a non-legal perspective. Professor Ton Zwaan, a Dutch professor of sociology, testified and submitted a report on behalf of the prosecution about the causes and drivers of genocide in the *Milošević* case.<sup>63</sup> The prosecution contended that it was not seeking to expand the definition of genocide,<sup>64</sup> but rather to help the judges “to understand genocide, from a multi-disciplinary perspective, and to examine the causes of it and other mass crimes targeting specific groups.”<sup>65</sup>

The prosecution advocated admission of Professor Zwaan’s report in light of the novelty of the crime: “[g]enocide is a comparatively recent word, reflecting a concept new to law, if not to human society.”<sup>66</sup> Since “[t]he language and terminology by which genocide can be discussed [was] still in development,” the prosecution argued that:

[I]t would be unrealistic to think that an understanding of the legal concept is not informed or affected by the way the same terms are used and being developed in the world at large. An understanding of the genesis of the concept of genocide is highly desirable to the proper resolution of the issues in a case such as this.<sup>67</sup>

Although the ICTR had already issued the first conviction[s] for genocide at an international tribunal,<sup>68</sup> many nuances of genocide

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Case No. IT-03-68-T, Judgement, ¶ 293 (Int’l Crim. Trib. for the Former Yugoslavia June 30, 2006)).

62. See Prosecutor v. Prlić, Case No. IT-04-74-T, T.45250 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 28, 2009), <http://www.icty.org/x/cases/prlic/trans/en/090928IT.htm> [<http://perma.cc/Y42R-DVHL>] (archived Jan. 14, 2015) (“The Court is not asking the witness to explain international public law to the court and to tell the Court what the law of command responsibility under Article 3 – 7, paragraph 3 of the Statute means.”).

63. See Prosecutor v. Milošević, Case No. IT-02-54-T, Prosecution Submission of Expert Statements Pursuant to Rule 94bis, ¶ 1 (Int’l Crim. Trib. for the Former Yugoslavia Dec. 3, 2003) [hereinafter Zwaan Motion]; Report from Ton Zwaan, On the Aetiology and Genesis of Genocides and Other Mass Crimes Targeting Specific Groups, to the Office of the Prosecutor, Int’l Criminal Tribunal for the Former Yugoslavia 3 (Nov. 2003) [hereinafter Zwaan Report] (“The primary purpose of this report is to provide tools of analysis by reference to which the reader may understand how genocides and other mass crimes targeting specific groups can occur in human societies.”).

64. See *id.* ¶ 8.

65. *Id.* ¶ 4.

66. *Id.*

67. See *id.* ¶ 5.

68. See Akayesu Judgement, *supra* note 59.

law and linking high-level defendants to the crime had yet to be determined.

Likely to avoid running afoul of the ICTY's prohibition on expert testimony on the "ultimate question" of the guilt or innocence of the defendant,<sup>69</sup> the prosecution asked Professor Zwaan to describe the phenomenon and causes of genocide using examples other than the former Yugoslavia.<sup>70</sup> The prosecution contended, perhaps a bit disingenuously, that the expert's report did not necessarily "favour[]" either [the] prosecution or defence in a particular case."<sup>71</sup> However, the prosecution acknowledged that "[a] central issue in this case is the extent to which leaders can know in advance – or as events unfold – that their actions in combination with other events can bring about these crimes."<sup>72</sup>

Professor Zwaan's report and testimony described genocide as a "top down" affair[],<sup>73</sup> which depended on overt or covert support from highest state authorities<sup>74</sup> and the cynical use of propaganda playing on the notion of the wronged "we" and the dehumanized "other."<sup>75</sup> Zwaan's report flagged "several important corollaries" of this top-down understanding of genocide, including the rather legal sounding corollary that "the highest state authorities are always responsible for what takes place during the genocidal process . . . ."<sup>76</sup>

69. See WILSON, *supra* note 2, at 115.

70. See Zwaan Motion, *supra* note 63, ¶¶ 4, 7 ("[T]he Prosecution emphasises that it has specifically asked [Zwaan] to prepare a report without any reference to Bosnia."); see also WILSON, *supra* note 2, at 115 (noting that Zwaan's report only discussed examples of genocide in Rwanda, Armenia, Cambodia, and the Holocaust).

71. Zwaan Motion, *supra* note 63, ¶ 8. It may well be that Zwaan's assessment of genocide as a top-down affair did not help the prosecution in other cases against lower level defendants, but it certainly seemed to favor it in the prosecution of Milošević, who, of course, was the head of state. It seems rather unlikely that the experienced British barrister who led the case and the direct examination of this witness would attempt to admit evidence that did not, on balance, favor his case.

72. *Id.* ¶ 6.

73. See Zwaan Report, ¶¶ 25–29 ("[A] third, and very important, common element about which scholars agree, is the central and crucial importance of the political behaviour of the national political leadership of a state-society, and the political decisions it takes. . . . [G]enocidal policies are deliberately decided upon by a political leadership, and genocides begin with political decisions at the highest level of the state.").

74. See *id.* ¶ 30 (explaining that state "approval and involvement may take different forms": sometimes overt, other times covert).

75. See Prosecutor v. Milošević, Case No. IT-02-54-T, Trial Transcript, 31181 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 20, 2004) [hereinafter Milošević Trial Transcript] (recording the in-court examination of Dr. Zwaan, explaining his view that "a certain degree of dehumanisation is a precondition for large-scale killing"); see also Zwaan Report, *supra* note 63, ¶¶ 17, 25 (emphasizing "the central and crucial importance of the political behaviour of the national political leadership of a state-society").

76. Zwaan Report, *supra* note 63, ¶ 31.

In some ways, this narrative is bigger than Professor Zwaan and bigger even than Milošević. As Professor Doris Buss has argued of context experts, this sort of testimony contributes to a broader narrative, which involves “an understanding of violence as elite orchestrated (rather than mindless group violence) suggests an epistemological claim that has important implications for international criminal prosecutions. If the conflicts are understood as caused by rational, calculating individuals, then what happened in Rwanda and Yugoslavia ‘was not tribalism run amok;’ it was genocide.”<sup>77</sup>

But Zwaan’s testimony was not just about a macro-narrative on genocide generally, it was also about the prosecution trying to secure a conviction against Milošević specifically. In a prosecution of the former head of state for genocide, observations about genocide as a top-down, elite-driven affair are significant and go a long way in implying Milošević’s guilt.<sup>78</sup> As Richard Wilson has described, “[t]he examination of the expert by the Principal Trial Attorney Geoffrey Nice was a classic example of prosecutorial framing of the crimes; he laid out the universal attributes of genocide without straightforwardly applying them to the situation in hand.”<sup>79</sup>

Zwaan’s description of social scientists’ understanding of the making of a genocide, not surprisingly, dovetailed nicely with the prosecution’s argument for Milošević’s responsibility for genocide.<sup>80</sup> Both the judges and the defendant took note of the similarity. Judge Robinson asked Dr. Zwaan whether the Bosnia situation could have subconsciously been in his mind in writing his report and interjected “it would obviously diminish the quality of your report if your report were tailored somehow to -- to meet those characteristics.”<sup>81</sup>

Milošević also raised the concern that the prosecution was trying to get expert legal testimony in through the back door of sociology. On cross examination, Milošević, who largely represented himself (by many accounts rather adeptly, if obstreperously)<sup>82</sup> raised the issue of

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77. Buss, *supra* note 2, at 29 (quoting Scott Strauss, *THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA* 33 (2006)).

78. See WILSON, *supra* note 2, at 116 (“Even if not overtly stated, the implications [of Zwaan’s testimony on] this point were obvious for the criminal responsibility of former president Milošević.”).

79. *Id.* at 115.

80. See Timothy William Waters, *The Trial: IT-02-54*, Prosecutor v. Milošević, in *THE MILOŠEVIĆ TRIAL: AN AUTOPSY* 60–67 (Timothy William Waters ed., 2013).

81. Milošević Trial Transcript, *supra* note 75, at 31209–10.

82. See Julian Davis Mortenson, *This Very Human Institution: A Biography of the Yugoslavia Tribunal*, 13 COLUM. J. EUR. L. 471, 486 n.93 (2007) (discussing the Milošević case and Milošević’s outbursts). Commentators are divided on the court’s management of Milošević’s attempted self-representation. Compare Joanne Williams, *Slobodan Milošević and the Guarantee of Self-Representation*, 32 BROOK. J. INT’L

*jura novit curia* and asked the witness: “Q. Do you not feel then that Mr. Nice in bringing you in as an expert witness has in mind teaching the Judges what genocide actually is? Do you not feel that that in a way – how shall I put this? – is contradictory to th[e] principle [of *jura novit curia*]?”<sup>83</sup> At least one commentator has deemed Zwaan’s testimony a flop for the prosecution.<sup>84</sup>

Thus, ICTY Trial Chambers, consistent with the principle of *jura novit curia*, embraced expert legal testimony that dealt with collateral legal issues, but rejected legal experts who were dealing with the core legal concepts of the crimes with which defendants were charged. However, with the ICTY’s use of experts on the non-legal conceptions of the crimes, arguably one can detect the beginnings of the use of crime-definition experts to define the contours of international crimes.

## B. ICTR

At the ICTR, despite the extensive use of context experts, including even experts in the Rwandan genocide,<sup>85</sup> the court did not explicitly seek guidance from witnesses on the definition of the crimes and, in fact, rejected at least one defendant’s attempt to introduce expert legal testimony on freedom of speech in an incitement to commit genocide case.

### 1. Rules on Experts

ICTR Rule 94 *bis*, like the ICTY Rule of the same number, sets out the procedures for admission of expert reports and permits cross-examination of expert witnesses, but does not define an expert witness. According to one ICTR Trial Chamber, “[t]he role of an expert witness ‘is to enlighten the judges on specific issues of a technical nature, requiring special knowledge in a specific field.’”<sup>86</sup>

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L. 553, 559–69 (2007) (discussing the various arrangements to provide Milošević legal guidance used at different stages of the trial and criticizing the Trial Chamber of the ICTY for excessively encroaching on the defendant’s right of self-representation), with Michael P. Scharf, *Self-Representation Versus Assignment of Defence Counsel Before International Criminal Tribunals*, 4 J. INT’L CRIM. JUST. 31, 33 (2006) (criticizing the decision to allow Milošević to represent himself).

83. Milošević Trial Transcript, *supra* note 75, at 31188.

84. See WILSON, *supra* note 2, at 116–19 (concluding that Milošević’s cross-examination of Zwaan had effectively undermined Zwaan’s credibility, considering the testimony a lost opportunity and placing blame with the prosecution for failing to prepare the witness adequately).

85. See Buss, *supra* note 2, at 30–33.

86. Linton, *supra* note 3, at 893 (quoting Prosecutor v. Akayesu, Case No. ICTR 96-4-T, Decision on a Defence Motion for the Appearance of an Accused as an Expert Witness, ¶ 9 (Mar. 9, 1998)).

According to another, it “is to provide ‘opinions and inferences’ to assist the finder of fact in ‘understanding a fact at issue.’”<sup>87</sup> And, according to yet another, it “is ‘to supply specialized knowledge that might assist the trier of fact in understanding the evidence before it.’”<sup>88</sup> As the next Section demonstrates, the trial chambers took this assistance to mean assistance on facts and not on the law.<sup>89</sup>

## 2. Use of Crime-Definition Experts

As Professor Doris Buss’s article on context witnesses details, the ICTR, particularly in its early days, relied extensively on witnesses about the historical and political context in which the genocide occurred. These witnesses included Alison des Forges—a scholar on Rwanda and volunteer, later employee, at Human Rights Watch—and several Western European scholars of sociology and African politics.<sup>90</sup> These witnesses primarily supplied judges with information about what, at least initially, was an unfamiliar landscape.

The Trial Chambers at the ICTR, in several cases, heard from experts in the Rwandan genocide, but their testimony focused on the history of Rwanda and the unfolding of the genocide on the ground and not on the concept or definition of genocide.<sup>91</sup> Nevertheless, this expert evidence shaped the judges’ understanding of the crime. As Buss argues, Alison des Forges’ “evidence provided a compelling framework within which the genocide was understood and provided the basis for the legal determination that the crime of genocide was

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87. *Id.* at 894 (quoting *Prosecutor v. Bizimungu et al.*, ICTR-99-50-T, Oral Ruling on the Qualification of Barrie Collins to Testify as an Expert Witness, 4 (Apr. 25, 2006)).

88. *Id.* (quoting *Prosecutor v. Semanza*, Case No. ICTR-97-20-A, Judgement, ¶ 303 (May 20, 2005)); *see also id.* (“The differently-worded expressions all amount to the same principle: the expert is there to assist the Trial Chamber in its task of determining the case against the accused.”).

89. *See infra* Part III.B.2.

90. These included, for example, André Guichaoua, Filip Reyntjens, J.P. Chrétien, and Gérard Prunier. *See Buss, supra* note 2, at 30 n.12, 31.

91. *See, e.g., Semanza v. Prosecutor*, Case No. ICTR-97-20-A, Judgement, ¶¶ 304–05 (May 20, 2005), [www.unictr.org/sites/unictr.org/files/case-documents/ictr-97-20/appeals-chamber-judgements/en/050520.pdf](http://www.unictr.org/sites/unictr.org/files/case-documents/ictr-97-20/appeals-chamber-judgements/en/050520.pdf) [<http://perma.cc/SH96-MEE4>] (archived Jan. 19, 2015) (noting that “the Prosecution [had] tendered Professor Guichaoua’s testimony as a sociologist who was in Rwanda for part of April 1994 and who is an expert in questions of genocide”; that “[h]is testimony was based on research conducted within the scope of his expertise; it was not founded on personal experience,” and concluding that “[t]he Trial Chamber [had] appropriately credited his general testimony concerning the behaviour of officials during the events of 1994, but not his specific testimony speculating on the Appellant’s behaviour”).

even applicable.”<sup>92</sup> In particular, the judges relied on the context experts to supply a factual understanding of Tutsis and Hutus as “ethnic groups” such that the killings could be classified as genocide.<sup>93</sup> Moreover, even with these non-legal experts, however, some quasi-legal argument crept in. In *Prosecutor v. Nyiramasuhuko*, for example, French sociology professor, Professor Guichaoua opined that the conflict was not international, a critical legal question for the war crimes charges against the defendant.<sup>94</sup>

However, the ICTR, like the ICTY, steered clear of pure expert legal testimony or any testimony about how the crime should be defined. In the *Nahimana* case, for example, the defendants were charged with genocide, conspiracy to commit genocide, and incitement of genocide for their role in the propaganda campaign against Tutsis. The Trial Chamber refused to hear testimony from a defense legal expert on freedom of speech on the ground that it “covered law-related issues that should properly be determined by the Trial Chamber and could be addressed by the parties in their Closing Briefs.”<sup>95</sup> Noting that the defendant, in fact, did present the expert’s argument in his closing brief, the Appeals Chamber affirmed the Trial Chamber’s decisions refusing the expert’s evidence.<sup>96</sup>

In sum, the ICTR, perhaps even more so than the ICTY, was hostile to expert legal testimony and crime-definition experts. The experts it heard from provided background history on the country or facts about who did what to whom, but did not weigh in on the definition of genocide itself.

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92. Buss, *supra* note 2, at 24.

93. *See id.* at 33.

94. *See* *Prosecutor v. Nyiramasuhuko et al.*, Case No. ICTR-97-21-T, Decision on Defence Motions for Acquittal Under Rule 98 *bis*, ¶¶ 27–28 (Dec. 16, 2004), <http://ictr-archive09.library.cornell.edu/ENGLISH/cases/Nyira/decisions/161204%20index.html> [<http://perma.cc/9GFZ-D9MR>] (archived Jan. 19, 2015) (noting, in response to the defense’s contention that Alison des Forges and Professor Guichaoua had testified that the Ugandan army had participated in the conflict and that the conflict was therefore international, which precluded a conviction under the particular war crimes charges alleged, serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II, that the prosecution contended that Guichaoua had in fact testified that the conflict was not international).

95. *Nahimana et al. v. Prosecutor*, ICTR-99-52-A, Judgement, ¶ 293 (Nov. 28, 2007), [www.unict.org/sites/unict.org/files/case-documents/ictr-99-52/appeals-chamber-judgements/en/071128.pdf](http://www.unict.org/sites/unict.org/files/case-documents/ictr-99-52/appeals-chamber-judgements/en/071128.pdf) [<http://perma.cc/3Q3G-W3A7>] (archived Jan. 19, 2015).

96. *See id.* ¶ 294.

### C. SCSL

The Special Court for Sierra Leone (SCSL),<sup>97</sup> like the ICTY, permitted testimony on the meaning of the crime charged, at least from a non-legal perspective. In the SCSL's first cases addressing the novel crime of forced marriage, the court admitted and relied extensively on experts on forced marriage in Sierra Leone.<sup>98</sup> In support of a decision to admit the expert report of a forced marriage expert, one judge cited the novelty and cultural sensitivity of the crime as additional justification for permitting the prosecution's expert.<sup>99</sup>

#### 1. Rules on Experts

A replica of the ICTR's Rule 94 *bis*, SCSL Rule of Procedure 94 *bis* governs the timing of disclosures related to expert witnesses and permits admission of unopposed reports or cross-examination of experts whose reports a party opposes.<sup>100</sup> As at the *ad hoc* tribunals, "admission of expert testimony is governed by the general provisions of Rule 89, which states that 'In cases not otherwise provided for in this Section, a Chamber shall apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law'<sup>101</sup> and that 'A Chamber may admit any relevant evidence.'"<sup>102</sup>

In its decision to admit a prosecution expert on forced marriage, the SCSL Trial Chamber in *Prosecutor v. Brima*, also known as the

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97. Unlike the *ad hoc* tribunals, the SCSL was not an international court set up by the Security Council, but rather was a hybrid or internationalized court set up "to try those 'bearing the greatest responsibility' for crimes committed" during the country's civil war from 1991–2002. SPECIAL COURT FOR SIERRA LEONE, RESIDUAL SPECIAL COURT FOR SIERRA LEONE, <http://www.rscsl.org> (last visited Jan. 17, 2015) [<http://perma.cc/LRQ7-5TNM>] (archived Jan. 17, 2015). See generally SIERRA LEONE SPECIAL COURT AND ITS LEGACY, *supra* note 32 (discussing, among many other things: the international community's expectations for the SCSL, the various approaches taken by prosecutors, how the SCSL was organized and supported, and the Court's legacy).

98. See *infra* Part III.C.2.

99. See *infra* text accompanying note 113.

100. See Special Court for Sierra Leone, Rules of Procedure & Evidence, Rule 94 *bis* [hereinafter SCSL Rules].

101. *Prosecutor v. Taylor*, Case No. SCSL-03-1-T, Decision on Defence Application to Exclude the Evidence of Proposed Prosecution Expert Witness Corinne Dufka or, in the Alternative, to Limit its Scope And on Urgent Prosecution Request for Decision, ¶ 11 (June 19, 2008) (footnote omitted) (quoting SCSL Rules, *supra* note 100, Rule 89(B)), [www.rscsl.org/Documents/Decisions/Taylor/543/SCSL-03-01-T-543.pdf](http://www.rscsl.org/Documents/Decisions/Taylor/543/SCSL-03-01-T-543.pdf) [<http://perma.cc/6BLD-EJDK>] (archived Jan. 19, 2015).

102. *Id.* (quoting SCSL Rules, *supra* note 100, Rule 89(C)).

AFRC case,<sup>103</sup> articulated a new test for expert testimony, which better accommodated expertise stemming from experience or non-scientific training.<sup>104</sup> The test explicitly acknowledged that experience and training could provide the basis for “specialized knowledge”: “an expert must possess relevant specialised knowledge acquired through education, *experience or training in the proposed field of expertise*.”<sup>105</sup> Moreover, rather than the general rule of the *ad hoc* tribunals that the expert’s evidence assist the trial chamber, the SCSL Trial Chamber explained that the expert’s role is “to assist the Chamber to understand or determine an issue in dispute and the contexts in which the events took place.”<sup>106</sup>

## 2. Use of Crime-Definition Experts

At the SCSL, as at the ICTY, the court heard evidence from expert witnesses on the meaning of a crime, this time the crime of forced marriage. In *Brima*, the prosecution offered, and the Trial Chamber allowed, a Sierra Leonean human-and women’s-rights activist, Ms. Zainab Bangura, to offer an expert report on the phenomenon of forced marriage.<sup>107</sup> Having amended the indictment

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103. The Armed Forces Revolutionary Council (AFRC) is the name of the rebel group to which the defendants had belonged. See *Prosecutor v. Brima*, Case No. SCSL-2004-16-A, Judgment, ¶ 7 (Feb. 22, 2008), [www.rscsl.org/Documents/Decisions/AFRC/Appeal/675/SCSL-04-16-A-675.pdf](http://www.rscsl.org/Documents/Decisions/AFRC/Appeal/675/SCSL-04-16-A-675.pdf) [<http://perma.cc/FK6W-QAF4>] (archived Jan. 19, 2015)].

104. See *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Decision on Prosecution Request for Leave to Call an Additional Witness (Zainab Hawa Bangura) Pursuant to Rule 73 *bis* (E), and on Joint Defence Notice to Inform the Trial Chamber of its Position Vis-à-Vis the Proposed Expert Witness (Mrs. Bangura) Pursuant to Rule 94 *bis*, ¶ 23 (Aug. 5, 2005) [hereinafter *Brima Decision on Forced Marriage Expert*], [www.rscsl.org/Documents/Decisions/AFRC/365/SCSL-04-16-T-365.pdf](http://www.rscsl.org/Documents/Decisions/AFRC/365/SCSL-04-16-T-365.pdf) [<http://perma.cc/8UAA-WHPL>] (archived Jan. 19, 2015) (quoting the Headquarters Agreement Between the Republic of Sierra Leone and the Special Court for Sierra Leone regarding the definition of an “expert”); see also Linton, *supra* note 3, at 899 (admitting that, while there is “nothing in the SCSL Statute . . . on who can be an expert witness,” the court has adopted a definition of “expert” based on the “Headquarters Agreement” Article 1(f)).

105. *Brima Decision on Forced Marriage Expert*, *supra* note 104, ¶ 31. This is similar to the ICTY’s “or other specialized knowledge,” but perhaps slightly more accommodating of human rights experience and training. In the U.S., whether or not witnesses whose “specialized knowledge” stems from experience or training, such as police officers, are experts is a controversial subject. See generally Anne Bowen Poulin, *Experience-Based Opinion Testimony: Strengthening the Lay Opinion Rule*, 39 PEPP. L. REV. 551 (2012) (arguing that experienced-based opinion testimony does not qualify as expert testimony and should be “assessed . . . with greater care”).

106. *Brima Decision on Forced Marriage Expert*, *supra* note 104, ¶ 31.

107. See Ibrahim Jalloh, *Examining The Role Of Expert Witnesses In The AFRC Trials At The Special Court For Sierra Leone*, CTR. FOR ACCOUNTABILITY AND RULE OF LAW (Dec. 18, 2005, 9:33 PM), <http://www.carl-sl.org/home/articles/44-examining-the-role-of-expert-witnesses-in-the-afrc-trials-at-the-special-court-for-sierra-leone> [<http://perma.cc/X24Y->

to include a charge of forced marriage as an “other inhumane act,” which is a crime against humanity,<sup>108</sup> the prosecution offered Ms. Bangura’s testimony to address “(a) the context within which forced marriage occurred during the conflict;” (b) the *socio-cultural meaning of forced marriage* during the conflict; and (c) the long-term social, cultural, physical and psychological consequences of forced marriage during the conflict for its victims.”<sup>109</sup> Thus, in addition to providing context to the judges, Ms. Bangura was also helped the judges to define the crime, at least from a “socio-cultural” perspective.

The prosecution in *Brima* thus seemed to be trying to avoid the elephant in the room phenomenon, observed in *Milošević*, when Dr. Zwaan reported on the causes of genocide everywhere but in Bosnia.<sup>110</sup> It also seemed to be taking a significantly less theoretical tack. The prosecution did not offer the perspective of sociological theory, but rather, that of a local human rights worker with experience helping victims of the crime. Ms. Bangura was selected due to her expertise in Sierra Leone and asked to report on forced marriage, specifically in the Sierra Leonean context.

The novelty of the crime loomed large in the parties’ arguments and the decision to accept Ms. Bangura as an expert. In its motion requesting the Trial Chamber accept the witness as an expert, the Prosecution justified use of expert testimony on forced marriage, based on the novelty of the charge of forced marriage as an inhumane act under Article 2(i) and “[t]he complexity and sensitivity of the issue.”<sup>111</sup> The Trial Chamber accepted Ms. Bangura as an expert

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XAAG] (archived Jan. 15, 2015) (describing the expert testimony offered on forced marriages by Ms. Bangura).

108. See *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Judgement, ¶¶ 6–7 (June 20, 2007) [hereinafter *Brima Trial Judgment*].

109. *Brima Decision on Forced Marriage Expert*, *supra* note 104, ¶ 6 (emphasis added). See Report from Zainab H. Bangura & Christiana T. Solomon, Expert Report on the Phenomenon of “Forced Marriage” in the Context of the Conflict in Sierra Leone and, More Specifically, in the Context of the Trials Against the RUF and AFRC Accused Only, to Office of the Prosecutor, Special Court for Sierra Leone (May 2005) [hereinafter *Bangura Report*]; see also *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73bis(E) (May 4, 2005).

110. See *supra* Part III.A.2.

111. *Brima Decision on Forced Marriage Expert*, *supra* note 104, ¶ 12. The Prosecution had originally selected a Western expert on the issue of sexual violence, but, when her report failed to address forced marriage, the prosecution decided to drop the original expert in favor of a Sierra Leonean one, given the “extremely sensitive” nature of the topic of forced marriage. See *id.* ¶ 29. The Defense argued that the novelty the crime cut in the direction of disallowing Ms. Bangura’s testimony. The Defense argued that the subject of forced marriages, which “is ‘highly controversial and contested in a legal sense,’ and cannot be ‘deemed to fall within the broad and general range of women’s issues in conflict situations, good governance, democratization processes, and other topics the proposed witness has experience in.’” See *Prosecutor v. Brima*, Case No. SCSL-04-16-PT, Separate and Concurring Opinion of Justice Doherty

based on her experience monitoring and documenting human rights abuses in Sierra Leone and “providing care and support to victims of domestic and sexual violence,” without much analysis.<sup>112</sup> However, Judge Doherty wrote a separate opinion to explain the reasons for admitting testimony on the phenomenon of forced marriage that emphasized the novelty of the crime. She explained:

The issue whether “forced marriages” constitute an inhumane act has not previously been canvassed in any of the International Tribunals. The term has not been defined in the Statute, the Geneva Conventions or in any precedent of other Tribunals and the Prosecution is obliged to show the case the accused must answer.<sup>113</sup>

Judge Doherty likewise agreed with the prosecution that given the “extremely sensitive topic, particularly given its distinct social and cultural consequences and its uniqueness to the Sierra Leone conflict, the Trial Chamber would be best served to hear testimony from a Sierra Leonean expert on the matter.”<sup>114</sup>

Ultimately, Ms. Bangura’s report and testimony were the product of interviews, conducted by Ms. Bangura and human rights workers from her NGO, and her reading of other reports on forced marriage that she found reliable based on her human rights training and experience.<sup>115</sup> Ms. Bangura’s evidence described not only the context in which forced marriage occurred, but also the concept of forced marriage, particularly in juxtaposition to the traditional practice in Sierra Leone of arranged marriage, and the consequences of forced marriage for the “wives” and their children.<sup>116</sup>

Ms. Bangura’s report and testimony described the manner in which forced marriage was carried out, the duties and suffering of the victims, and the long-term impact of the crime on the victims and their children. She explained that:

A ‘bush’ or ‘rebel wife’ is a young girl or woman who was abducted by a rebel and, in most cases, coerced and terrorized into living with that rebel as a wife. Being a ‘bush wife’ meant that the girl ‘belonged’ to one person and was not required to have sex with different rebels.<sup>117</sup>

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on Prosecution Request for Leave to Call an Additional Witness Pursuant to Rule 73bis (E) and Joint Defence Application to Exclude the Expert Evidence of Zainab Hawa Bangura or Alternatively to Cross-Examine Her Pursuant to Rule 94bis, ¶ 28 (Oct. 21, 2005) [hereinafter Brima Doherty Concurrence].

112. See Brima Decision on Forced Marriage Expert, *supra* note 104, ¶ 31.

113. Brima Doherty Concurrence, *supra* note 111, ¶ 39.

114. *Id.* ¶ 40.

115. See Bangura Report, *supra* note 109, at 7–8.

116. See *id.* at 6 (“To assist me with the preparation of this report, I was provided with three broad headings: 1. Context in which forced marriage during the conflict occurred; 2. The meaning of forced marriage during the conflict; 3. The consequence of forced marriage during the conflict for its victims.”).

117. *Id.* at 14.

Ms. Bangura described that these girls and women suffered severe psychological distress, in part because their communities rejected them and their children during, and after, the war.<sup>118</sup> The prosecution's examination of Ms. Bangura likewise highlighted these points.<sup>119</sup>

Defense counsel cross-examined Ms. Bangura extensively on the reliability of her evidence and on her methodology. They emphasized that her expert report and testimony involved a great deal of second-, and third-, hand information.<sup>120</sup> The defense likewise attacked her on the basis that the interviews and report were done for the purpose of the prosecution.<sup>121</sup> Although experts often prepare reports for the purposes of the litigation, the issue seemed even more salient in this case since Ms. Bangura's expertise in forced marriage appeared to stem, at least in part, from the study itself. Prior to conducting the report for the prosecution, Ms. Bangura had an extensive human rights background, which included a focus on women and children, but arguably lacked a specific expertise in forced marriage. Nevertheless, this experience with human rights in Sierra Leone likely made her more knowledgeable about the topic than the judges.

The defense also cross-examined Ms. Bangura on the legal aspects of her testimony, even though Ms. Bangura lacked legal training. One defense counsel pushed her on the concept of "taptomi," or common law marriage-style relationships, and suggested that

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118. *See id.* at 17–19.

119. *See* Prosecutor v. Brima et al., Case No. SCS-2004-16-T, Trial Transcript, 50–56 (Oct. 3, 2005) [hereinafter Brima Trial Transcript, Oct. 3, 2005].

120. However, international courts have no bar against the admission of hearsay. *See* WILSON, *supra* note 2, at 56–57. Even the US, with its idiosyncratically strict hearsay rules, permits experts to base their opinions on hearsay and, in some circumstances to pass the hearsay on to jurors. *See* FED. R. EVID. 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."); *see also* Paul R. Rice, *Inadmissible Evidence as a Basis for Expert Opinion Testimony: A Response to Professor Carlson*, 40 VAND. L. REV. 583, 583 (1987) (discussing Rule 703 and the basis of expert opinions). Nevertheless, there is some debate about the propriety of using experts to get hearsay in through the back door. *See, e.g.,* Ronald Carlson, *Experts as Hearsay Conduits: Confrontation Abuses in Opinion Testimony*, 76 MINN. L. REV. 859 (1992); Ross Andrew Oliver, Note, *Testimonial Hearsay as the Basis for Expert Opinion: The Intersection of the Confrontation Clause and Federal Rule of Evidence 703 After Crawford v. Washington*, 55 HASTINGS L.J. 1539, 1540 (2004).

121. *See* Brima Trial Transcript, Oct. 3, 2005, *supra* note 119, at 24 ("We have to bear in mind that the report of this witness was not written in the context of a UN fact-finding mission, but was written for the purposes of litigation.").

“bush wives” were not in fact married. The defense also questioned Ms. Bangura about the relationship between general law and traditional law in Sierra Leone.<sup>122</sup> When one defense counsel challenged her on the status of customary law in Sierra Leone, the presiding judge asked him to limit his remarks to the issue of marriage, the subject of Ms. Bangura’s report.<sup>123</sup> Later, however, the judges permitted him to return to examining Ms. Bangura on the status of customary law on the basis that her report dealt extensively with the issue of arranged marriage under customary law in Sierra Leone.<sup>124</sup> Another defense counsel questioned her about the novelty of the crime of forced marriage.<sup>125</sup>

Although much of Ms. Bangura’s report and testimony is not primarily legal in nature, her description of the phenomenon of forced marriage had significant legal ramifications for determining whether forced marriage is a crime and, if so, how to define it. This significance is due in part to the rather flexible definition of the crime against humanity of “inhumane acts.” The Trial Chamber, in essence, had to decide whether forced marriage was as bad as other crimes within the SCSL’s statute.<sup>126</sup> The testimony given by Ms. Bangura was critical to establishing this element. It explained the forcible nature by which girls became “bush wives,” the expectation that they perform sexual acts for their “husbands” on command, the rejection of the girls—or women—by their communities, and the long-term psychological harm forced marriage caused them and their

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122. See *Prosecutor v. Brima et al.*, Case No. SCSL-2004-16-T, Trial Transcript, 22–29 (Oct. 4, 2005) [hereinafter *Brima Transcript*, Oct. 4, 2005].

123. See *id.* at 24–25 (“PRESIDING JUDGE: Page 11 [of the report] deals with marriage and matters related to marriage. You are going into a much wider theory of constitution, et cetera. Confine yourself to that issue.”).

124. See *id.* at 29 (“MR. FOFANAH: With respect, Your Honour, this witness is an expert witness. She has gone to town in laying the basis of my questioning by actually using customary law as the foundation for her expose on forced marriages. And I am basically trying to explore that. I mean, first of all, establishing that, I mean, it is in fact not true, as well as it is in fact not the law that customary law doesn’t apply in the Western Area and that if communities are settled in the Western Area and practice. PRESIDING JUDGE: If that is the issue you put that issue.”).

125. See *id.* at 62 (“Q. Madam Bangura, you agree with me that the phrase ‘forced marriage’ is a new phenomenon? A. Well, it’s been mentioned -- well, not forced marriage, forced wife. It’s mentioned in different literature now after the war when people write or during the course of the war. So we didn’t have anything because people didn’t look at it. Forced marriage, like one of your colleagues was saying, when a marriage is arranged, you don’t think of it as forced marriage. You think of it as a marriage between two families.”).

126. See *Brima Trial Judgment*, *supra* note 108, ¶ 701 (“The Prosecution submits that ‘forced marriages’ qualify as ‘Other Inhumane Acts’ punishable under Article 2(i) of the Statute and are of similar gravity to existing crimes within the Special Court’s jurisdiction.”).

children.<sup>127</sup> In essence, Ms. Bangura supplied the background (or “legislative”) facts that served as a basis for the court’s decision that forced marriage is an “other inhumane act” and, in turn, helped the court to define forced marriage.<sup>128</sup>

The defendants also hired their own marriage expert. The defense offered a Scandinavian expert in anthropology, Dr. Dorte Thorsen, to describe the “history and practice of forced marriage in the region and possibly also the way in which this practice is embedded in local culture and practice.”<sup>129</sup> In her report, Dr. Thorsen explained that she refused to frame the report as requested, because she was “concern[ed] with the longer-term consequences of making straightforward links between complex social practices of arranging marriages between kin groups, international conceptualisations of ‘forced marriages’, and the coercion of women into being ‘bush wives’ during the civil war in Sierra Leone.”<sup>130</sup>

Nevertheless, Dr. Thorsen criticized Ms. Bangura’s report on methodological grounds due to a lack of contextualization and surfeit of rhetoric.<sup>131</sup> She suggested a more nuanced reality—one could not

127. See sources cited *supra* notes 117–19.

128. For a helpful definition and explanation of legislative facts, see Gorod, *supra* note 9, at 38–43 (“[L]egislative facts deal with the general, providing descriptive, and sometimes predictive, information about the larger world.” (footnotes omitted)); see also Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942) (coining the term “legislative fact”); cf. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485–86 (1986) (explaining their preference for the term “social authority” to “legislative fact” because they reject the classic bright line divisions between fact and law and argue that proof of “social authority” should be treated more like legal authority than facts for procedural purposes).

129. Report from Dr. Dorte Thorsen, Expertise on West Africa in Case Before the Special Court for Sierra Leone, to SCSL Defence-Kanu 1 (July 26, 2006) [hereinafter Thorsen Report]; see also Prosecutor v. Brima et al., Case No. SCSL-2004-16-T, Joint Defence Disclosure of Expert Report on Forced Marriages by Dr. Dorte Thorsen (Aug. 21, 2006) (disclosing Dr. Thorsen’s report).

130. Thorsen Report, *supra* note 129.

131. See Prosecutor v. Brima et al., Case No. SCSL-2004-16-T, Trial Transcript, 6, 16 (Oct. 25, 2006) (“Q. It’s the same. Okay. And you also told us this morning, that in reference to Mrs Bangura’s report, you indicated that you found it flawed -- A. Yes. Q. - - on methodological issues. Why do you say so? A. Because I find when you just give a lot of excerpts from interviews, you cannot know in which context these questions were asked and there’s no background given to where these girls were before; what were they doing; what kind of situations were they in; were they in a situation, for example, where arrangements for their marriage were done and they didn’t agree to it, and then they might have been induced to run away or not to come back, if they had been captured. I mean, it’s very difficult to say, because we just don’t have enough information.”); see also *id.* at T.18 (“A. There is another flaw pertaining to the way she’s speaking about arranged marriages, although she’s making a very clear distinction after, arranged marriages during peace time are very different from the coerced bush wife situation. She’s talking about arranged marriages with a rhetoric of thought all

categorically state that force was always used with the “bush wives,” and that sometimes a woman would choose to take on the role of “bush wife” because she gained a more favorable status in society than she would have otherwise.<sup>132</sup> The prosecution’s cross-examination of the defense expert focused on her lack of experience in Sierra Leone.

Ms. Bangura’s report figured prominently in the judicial decisions recognizing the crime of forced marriage. Although the majority decision in *Brima* dismissed the charge of forced marriage as duplicative of the charge of sexual slavery, both the separate and concurring opinion of Judge Sebutinde<sup>133</sup> and Judge Doherty’s dissent<sup>134</sup> focused on the issue of forced marriage and Ms. Bangura’s expert testimony and report. Ultimately, the Appeals Chamber held that the Trial Chamber had erred in dismissing the forced marriage charges.<sup>135</sup> In reaching this decision, the Appeals Chamber likewise relied on the testimony of Ms. Bangura on forced marriage.<sup>136</sup> Nevertheless, the Appeals Chamber declined to add forced marriage to the convictions of the *Brima* defendants. It stated “society’s

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the way through and I think it becomes very contradictory, and that is one of my worries about this whole link between traditionally arranged marriages and the use of, the notion of bush wives in Sierra Leone is that you’re making this link, rhetorically, even if you don’t make it explicitly.”)

132. See *id.* at 3–4 (“We cannot reduce it to saying everybody were under a forced marriage. Some might have gone into on their own free will but young women also had stakes in getting married.”).

133. Prosecutor v. *Brima et al.*, Case No. SCSL-2004-16-T, Separate and Concurring Opinion of the Hon. Justice Julia Sebutinde Appended to the Judgement Pursuant to Rule 88(C), ¶ 12 (June 20, 2007). The Separate Opinion of Justice Sebutinde, which focuses on the issue of forced marriage, found the defence expert’s reasons for refusing to adopt the framework proposed by the defense for her report telling. “From the opinion of both Experts,” it concluded that the traditional practice of arranged marriage differed from forced marriage, which involved “the forceful abduction and holding in captivity of women and girls (‘bush wives’) against their will, for purposes of sexual gratification of their ‘bush husbands’ and for gender-specific forms of labour including cooking, cleaning, washing clothes (conjugal duties).” *Id.* Justice Sebutinde concluded that “while the [arranged marriage] is proscribed as a violation of human rights under international human rights instruments or treaties like CEDAW . . . [Forced marriage] on the other hand, is clearly criminal in nature and is liable to attract prosecution.” *Id.*

134. Prosecutor v. *Brima*, Case No. SCSL-2004-16-T, Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (‘Forced Marriages’) (June 20, 2007).

135. See Prosecutor v. *Brima*, Case No. SCSL-04-16-A, Judgment, ¶ 195 (Feb. 22, 2008) [hereinafter *Brima Appeals Judgment*] (stating that forced marriage was “not predominantly a sexual crime”).

136. See *id.* ¶ 192 (referring to “the evidence and report of the Prosecution expert Mrs. Zainab Bangura which demonstrates the physical and psychological suffering to which victims of forced marriage were subjected during the civil war in Sierra Leone,” and quoting her for half a page regarding the duties of a “wife” and the psychological and physical trauma the girls and women suffered).

disapproval . . . is adequately reflected by recognising that such conduct is criminal.”<sup>137</sup>

Perhaps somewhat strangely,<sup>138</sup> the Appeals Chamber defined the crime of forced marriage “in the context of Sierra Leone.”<sup>139</sup> This qualifying language raises questions on the universality of the prohibition—just how is the crime defined in other contexts? This focus may be attributable at least in part to the prosecution’s framing of the crime through Ms. Bangura, the expert on the phenomenon of “forced marriage *in Sierra Leone*.” In fact, the definition in fact proved not to be universal. The Extraordinary Chambers of the Courts of Cambodia (ECCC) found the SCSL’s definition of forced marriage to be inapposite in the context of the trials of former Khmer Rouge officials and came up with a different definition.<sup>140</sup>

The context-specific definition of the crime also raises the concern, from the perspective of *nullum crimen sine lege*, that the court is seeking to define the crime to fit the facts. The Appeals Chamber addressed this *nullum crimen* argument by saying that “other inhumane acts” was already an international crime, and that the defendants’ actions met the requirements of this “residual category.”<sup>141</sup> In essence, the court was merely supplying a more

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137. *Id.* ¶ 202.

138. It is perhaps strange in that the court was defining an international crime. It is perhaps less strange in that the SCSL is not a strictly international court, but rather a hybrid or internationalized domestic court. *See supra* text accompanying note 97.

139. Brima Appeals Judgment, *supra* note 135, ¶ 196 (“In light of the distinctions between forced marriage and sexual slavery, the Appeals Chamber finds that in the context of the Sierra Leone conflict, forced marriage describes a situation in which the perpetrator through his words or conduct, or those of someone for whose actions he is responsible, compels a person by force, threat of force, or coercion to serve as a conjugal partner resulting in severe suffering, or physical, mental or psychological injury to the victim.”).

140. *See* BASSIOUNI, *supra* note 17, at 409 (noting that the “ECCC viewed forced marriages in the case of Sierra Leone to be ‘mainly acts of violence perpetrated by individual rebels against women,’ whereas in Cambodia forced marriages ‘were carried out as a matter of state policy’ of the Khmer Rouge regime, resulting in the victimization of both men and women” and that forced marriage was used “to weaken the traditional family structure and to guarantee the loyalty of the people of the Regime.”) (quoting Civil Parties’ Co-Lawyers Request for Supplementary Preliminary Investigations, Case No. 001/19-07-2007-ECCC/TC (Feb. 9, 2009)).

141. *See* Brima Appeals Judgment, *supra* note 135, ¶ 198. The Appeals Chamber stated that it:

agree[d] with the Prosecution that the notion of “Other Inhumane Acts” contained in Article 2.i of the Statute forms part of customary international law. As noted above, it serves as a residual category designed to punish acts or omissions not specifically listed as crimes against humanity provided these acts or omissions meet the following requirements:

specific label to an already existing crime. However, as a leading commentator on crimes against humanity has noted, the existing crime of “[o]ther inhumane acts’ is probably the provision in the definition of [crimes against humanity] that creates the biggest difficulty with respect to the principles of legality, particularly in the views of positivistic legal systems.”<sup>142</sup>

In a subsequent SCSL case, *Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao*,<sup>143</sup> also known as the RUF case<sup>144</sup>—the first case in which a defendant was in fact convicted of forced marriage—the Trial Chamber likewise heard testimony from a prosecution expert witness on forced marriage. The witness, TF1-369, testified in closed session.<sup>145</sup> The RUF trial judgment refers repeatedly to the expert’s testimony and report in support of its findings of forced marriage.<sup>146</sup> The judgment also notes that the defense cross-examined the expert.<sup>147</sup> Notably, the Trial Chamber remarked that it “did not accept [the expert’s] evidence when she provided legal opinions.”<sup>148</sup>

In sum, the SCSL’s extensive reliance on forced marriage experts shows the court’s openness to non-legal expert assistance to help guide it in defining the parameters of a new crime, particularly one with sensitive cultural and gender dimensions. In the AFRC case, the

- (i) inflict great suffering, or serious injury to body or to mental or physical health;
- (ii) are sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the Statute; and
- (iii) the perpetrator was aware of the factual circumstances that established the character of the gravity of the act.

The acts must also satisfy the general chapeau requirements of crimes against humanity.

*Id.* (footnote omitted). It then found that that forced marriage victims suffered physical and psychological traumas that “were of similar gravity to several enumerated crimes against humanity,” and that “the perpetrators intended to force a conjugal partnership upon the victims, and were aware that their conduct would cause serious suffering or physical, mental or psychological injury to the victims.” *Id.* ¶¶ 199–201.

142. BASSIOUNI, *supra* note 17, at 411 (“‘Other inhumane acts’ is not a specific crime or category of crimes found in any legal system in the world. In the definition of CAH, ‘other inhumane acts’ is for all practical purposes an extension of all of the crimes specifically listed to apply by analogy under the rule of interpretation *ejusdem generis*.”).

143. *Prosecutor v. Issa Hassan Sesay, Morris Kallon & Augustine Gbao*, Case No. SCSL-04-15-T, Judgement (Mar. 2, 2009), available at <http://www.refworld.org/docid/49b102762.html> [<http://perma.cc/2LGF-HGKZ>] (archived May 20, 2015).

144. Again, this name stems from the rebel group to which the defendants belonged, the Revolutionary United Front. *Id.* ¶ 4.

145. *Id.* ¶ 82, at 763.

146. *See id.* ¶¶ 954, 1349, 1409–13.

147. *Id.* ¶ 82, at 763.

148. *Id.* ¶ 538.

testimony, and the court's use of it, was laudably transparent. The defense also had the opportunity to cross-examine the expert, and the defense examined the expert extensively. There the defense was also allowed bring their own expert. Unfortunately, in the RUF case, the Trial Chamber departed from the AFRC cases's model of transparency, presumably due to concerns about the expert's safety.

#### D. ICC

The ICC, in its first case, took the use of crime-definition expertise to a new level. Apparently eschewing the principle of *jura novit curia*, or at least suggesting its limitations in judging new international crimes, the Trial Chamber in *Prosecutor v. Lubanga* called an expert on children in armed conflict with the explicit aim of obtaining guidance on the definition of the crime. This expert, a lawyer, more directly than ever before at an international criminal tribunal, opined not only on what the phenomenon looked like on the ground but also on how the Trial Chamber should define the crimes with which the defendant was charged.

##### 1. Rules on Experts

The *de jure* rules at the ICC set out inquisitorial procedures for selecting and instructing experts, but, for the moment, the system retains a blend of inquisitorial and adversarial procedures.<sup>149</sup> The Rome Statute and the Rules of Procedure and Evidence are silent on expert witnesses, but ICC Regulation of Court 44 ("Regulation 44") sets out a procedure for identifying, instructing and examining expert witnesses that models the civil law "standing expert list" system.<sup>150</sup> Regulation 44 provides that the Registrar is to create a list of experts and either the parties jointly or the Trial Chamber itself is to instruct the witness.<sup>151</sup> After receiving the expert's report, a party may apply for leave to instruct another expert.<sup>152</sup> Nevertheless,

The Chamber may issue any order as to the subject of an expert report, the number of experts to be instructed, the mode of their instruction,

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149. See MIKE REDMAYNE, EXPERT EVIDENCE AND CRIMINAL JUSTICE 208–11 (2001) (discussing civil law countries' "list" system for experts, who typically are called by the court).

150. See Linton, *supra* note 3, at 905 ("The Rome Statute moves away from the usual practice of the parties calling their own expert witnesses towards the creation of a standing expert list."). See generally ICC Regulations, *supra* note 9, reg. 44.

151. See *id.*

152. See *id.* reg. 44 (3).

the manner in which their evidence is to be presented and the time limits for the preparation and notification of their report.<sup>153</sup>

In sum, the rules not only favor a single expert list system, but also put the judge in the driver's seat on experts generally.

The Trial Chamber in the first ICC case, *Prosecutor v. Lubanga*, supported the joint instruction of an expert selected from the Registry's list for efficiency and neutrality reasons. It explained:

[T]he Chamber is of the view that the joint instruction of experts will potentially be of great assistance to the Court because through the exercise of identifying with precision the real areas of disagreement between the parties, the expert will be placed in the best possible position to achieve a balanced and comprehensive analysis.<sup>154</sup>

Reflecting the inquisitorial mindset on experts,<sup>155</sup> the Trial Chamber stated that joint instruction of experts reduces the risk of bias because "the single expert will not be in any sense influenced, however unconsciously, by the viewpoint of only one party, he or she will be particularly able to present a balanced view of the issues, informed by the particular concerns of both sides."<sup>156</sup> The Registry's list would screen the qualifications of experts, and make them "undertake[] to uphold the interests of justice."<sup>157</sup>

Moreover, the Trial Chamber admonished the Registry to ensure that list be diverse in a variety of respects. The Chamber "remind[ed] the Registrar that in the establishment of the list of experts he should have regard to equitable geographical representation and a fair representation of female and male experts, as well as experts with expertise in trauma, including trauma related to crimes of sexual and gender violence, children, elderly, and persons with disabilities, among others."<sup>158</sup>

Despite its preference for a single expert selected from the Registry's list, instructed jointly or, if necessary, separately,<sup>159</sup> the Trial Chamber acknowledged that the list only contained twenty-eight names as of the writing of the decision and therefore was of

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153. *Id.* reg. 44 (5).

154. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Procedures To Be Adopted for Instructing Expert Witnesses, ¶ 15 (Dec. 10, 2007) [hereinafter *Lubanga Joint Instruction Decision*].

155. *See* REDMAYNE, *supra* note 149, at 209–10.

156. *Lubanga Joint Instruction Decision*, *supra* note 154 (noting also that "this procedure avoids any later disagreement as to the qualifications and impartiality of an expert instructed by a single party, with all the potential for delay and disruption to the trial proceedings").

157. *Id.* ¶ 24.

158. *Id.*

159. *See id.* ¶ 16 ("If the parties are unable to agree upon the joint instructions to be provided to the expert, they are to provide separate instructions on all the relevant issues.").

limited use at that time.<sup>160</sup> The Trial Chamber therefore permitted parties to retain and instruct their own experts.<sup>161</sup> The ICC's third judgment (and second conviction) in *Katanga* reiterated that parties may call their own expert and that an expert may still be objective even if called by a party.<sup>162</sup>

For the moment, the ICC's system of expert testimony therefore remains a blend of civil law-style, court-selected expert witnesses and common law, party-selected expert witnesses. For example, in the ICC's first case, *Lubanga*, the Trial Chamber called four expert witnesses,<sup>163</sup> and the prosecution called three.<sup>164</sup> The defense apparently called no experts.

## 2. Use of Crime-Definition Experts

Notwithstanding its inquisitorial bent, the ICC has gone the furthest in pushing the limits of *jura novit curia*. In its first case, *Prosecutor v. Lubanga*, the Trial Chamber embraced expert legal testimony on the very crime with which a defendant was charged.

In *Lubanga*, the Trial Chamber selected the United Nations Special Representative of the Secretary General on Children and Armed Conflict, Radhika Coomaraswamy, to testify as an expert witness about the elements of the charges.<sup>165</sup> Lubanga was charged with, and ultimately convicted of, the war crimes of enlistment and conscription of child soldiers under the age of fifteen and using them

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160. See *id.* ¶ 24 (“[A]t the present time the list comprises only 28 experts and as such is of limited value. A more comprehensive list needs to be drawn up.”).

161. See *id.* ¶ 25 (acknowledging that parties may seek to rely on experts not on the list and instructing that those experts seek admission to the list quickly).

162. See *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment, ¶ 94 (Mar. 7, 2014) (“Au moment d’apprécier le témoignage d’experts, la Chambre a tenu compte d’éléments tels que la compétence reconnue du témoin dans sa spécialité, la méthodologie utilisée, la mesure dans laquelle les conclusions présentées coïncidaient avec d’autres éléments de preuve produits en l’espèce et la fiabilité générale du témoignage. En ce qui concerne ce dernier point, la Chambre a considéré qu’une expertise scientifique était objective, même lorsque l’expert avait été désigné par une partie seulement et non pas conjointement par les parties ou par la Cour, conformément à la norme 44 du Règlement de la Cour.”) (footnote omitted).

163. See *Lubanga Trial Judgment*, *supra* note 33, ¶ 11 n.29 (noting that the Trial Chamber called four experts: “(Ms Elisabeth Schauer (‘CHM-0001’), Mr Roberto Garretón (‘CHM-0002’), Ms Radhika Coomaraswamy (‘CHM-0003’), and Prof. Kambayi Bwatshia (‘CHM-0004’)”).

164. See *id.* ¶ 11.

165. Ms. Coomaraswamy is a trained lawyer with a J.D. from Columbia University and an L.L.M. from Harvard Law School. See *Radhika Coomaraswamy, OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY GENERAL ON CHILDREN AND ARMED CONFLICT* [hereinafter *Coomaraswamy Biography*], <http://childrenandarmedconflict.un.org/about-us/radhika-coomaraswamy/> (last visited Jan. 15, 2015) [<http://perma.cc/2NS3-UDVC>] (archived Jan. 15, 2015).

to participate in the hostilities in the Democratic Republic of Congo (DRC).<sup>166</sup> Although the SCSL had adjudicated cases involving the recruitment and use of child soldiers,<sup>167</sup> it was the first time the charges appeared in an international court. Ms. Coomaraswamy initially had applied for leave to file an *amicus curiae* submission, but the Trial Chamber changed her status, per her request, to that of an expert witness.<sup>168</sup> She submitted nine pages of “written submissions” and testified in open court as an expert.<sup>169</sup> The *Lubanga* Trial Judgment repeatedly refers to her testimony as that of an “expert.”<sup>170</sup>

According to Ms. Coomaraswamy’s submissions, the mandate of the Special Representative “encompasses advocacy to raise awareness about the plight of children in armed conflict.”<sup>171</sup> The Special Representative is also to “work closely with competent international bodies to ensure protection of children in situations of armed conflict.”<sup>172</sup> Ms. Coomaraswamy contended that, since the General Assembly of the United Nations has recognized the ICC’s role in “ending impunity for perpetrators of crimes against children,” her mandate thus:

authorizes and compels her to assist the Court as *amicus curiae* in cases such as the one brought against Thomas Lubanga, given the nature of the charges against him, both as an independent

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166. See *Lubanga Trial Judgment*, *supra* note 33, ¶ 1.

167. See MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 144–49 (2012) [hereinafter DRUMBL, REIMAGINING].

168. The transcript on the day of her testimony states “[i]t is to be noted that on 19 May 2009 the role of Ms Coomaraswamy changed at her request from *amicus* to that of an expert witness (see transcript 176, page 27). However, no request has been received by the Chamber to expand or change the areas that the special representative should deal with.” *Prosecutor v. Lubanga*, Trial Transcript, Case No. ICC-01/04-01/06, 3 (Jan. 7, 2010) [hereinafter Coomaraswamy Transcript]. Unfortunately, the relevant page or pages of the transcript from May 19, 2009 have been expunged, and it was not possible to obtain the details of her request.

169. See *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, Annex A: Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in application of Rule 103 of the Rules of Procedure and Evidence RC Report (Jan. 29, 2007) [hereinafter Coomaraswamy Report]; see also Coomaraswamy Transcript, *supra* note 168, at 8.

170. See *Lubanga Trial Judgment*, *supra* note 33, ¶ 615 (discussing Radhika Coomaraswamy’s “expert testimony”); *id.* ¶ 592 (calling Radhika Coomaraswamy an “expert witness”).

171. Coomaraswamy Report, *supra* note 169, ¶ 2; see also Coomaraswamy Transcript, *supra* note 168, at 8 (describing her mandate “to raise awareness on issues relating to children and armed conflict and to foster international cooperation working with international organisations to further protect children in situations of armed conflict”).

172. Coomaraswamy Report, *supra* note 169, ¶ 2; see also Coomaraswamy Transcript, *supra* note 168, at 8 (providing Ms. Coomaraswamy’s testimony on the subject of her mandate).

representative of the children harmed in armed conflict, and through the presentation of relevant expertise gained through the performance of her mandate.<sup>173</sup>

Thus, she was there in her official capacity to advocate for the protection of children in armed conflict and to use her experience with children in armed conflict to help the court to end impunity.

Perhaps not surprisingly, given that her submissions were originally intended as those of an *amicus curiae*, Ms. Coomaraswamy's written submissions very directly tackled legal aspects of recruiting child soldiers, not merely the factual context of the phenomenon. She offered observations on:

a) the definition of "conscripting or enlisting" children, and, bearing in mind a child's potential vulnerability, the manner in which any distinction between the two formulations (i.e. conscription or enlistment) should be approached; and b) the interpretation, focusing specifically on the role of girls in armed forces, of the term "using them to participate actively in hostilities."<sup>174</sup>

What is more surprising, is that the Trial Chamber invited her to focus on exactly those two areas,<sup>175</sup> which it acknowledged "are essentially of a legal nature"<sup>176</sup> and not to address issues of the impact of child soldiering on children, since other witnesses had covered that issue.<sup>177</sup> The defense, likewise, did not oppose Ms. Coomaraswamy's weighing in on legal issues, but rather objected to her testifying on factual matters.<sup>178</sup>

Ms. Coomaraswamy emphasized that, since the Court was "about to undertake an important precedent," she wished to provide the court with "interpretative principles that protect children in light of the reality on the ground."<sup>179</sup> She also flagged the potential deterrent effect the decision in *Lubanga* could have in the field:

Let me say that from my own experience the Prosecution and trials of the ICC are followed with great interest in the field. The deterrent effect of these proceedings is already being felt with regard to a large number of armed groups engaging with the United Nations to release children from their ranks and to cease all new recruitment.<sup>180</sup>

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173. Coomaraswamy Report, *supra* note 169, ¶ 2.

174. *Id.* ¶ 3.

175. See Coomaraswamy Transcript, *supra* note 168 (citing its decision of 18 February 2009, document 1175, which appears not to be available publicly).

176. *Id.* at 4.

177. See *id.* at 3–4.

178. See *id.* at 2.

179. *Id.* at 9.

180. *Id.* at 9–10.

She reiterated this point in her oral remarks to the Trial Chamber.<sup>181</sup> Although Ms. Coomaraswamy stated that she was not addressing the guilt or innocence of the defendant, implicit in her statement on deterrence was the message that this deterrent effect would be greatest if the Trial Chamber punished the defendant severely, assuming that they find him guilty. As discussed below, at least one commentator has questioned the potential deterrent value of prosecutions for the recruitment of child soldiers.<sup>182</sup>

Like Dr. Zwaan's top-down description of genocide in *Milošević*, Ms. Coomaraswamy's submissions on the definitions of the crimes made the path to convicting the defendant easier. She encouraged the Trial Chamber to acknowledge the realities of modern warfare: wars are often not between formal states, and enlistment may not mean actual lists but rather more informal processes.<sup>183</sup> She argued that,

[i]n the interest of ensuring the greatest protection to conflict-affected children, the Court should recognize that enlistment, recruitment and use of children under the age of 15 is a highly predictable consequence of a purpose or plan to recruit minors, but not necessarily children under 15 years of age.<sup>184</sup>

This statement either suggests lowering the *mens rea* on the attendant circumstance of a child's age, imputing knowledge to a defendant that with big children come small children, or eliminating a defense of mistake of fact.

She also admonished the Trial Chamber to be mindful of the inability of a child to give meaningful consent, the inherently coercive nature of the circumstances under which children joined armed groups and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict's strict prohibition of recruitment of child soldiers "under any

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181. See *id.* at 16 ("[L]et me state how important the work of the ICC is to every one of us who works in the field. The willingness on the part of the Court to prosecute these cases has sent many armed groups to us – the United Nations – willing to negotiate action plans for the release of children; most recently yesterday in Nepal where the release of 3,000 children is about to begin today.").

182. See DRUMBL, REIMAGINING, *supra* note 167, at 162–67 (evaluating the deterrent effect of prosecuting such crimes).

183. See Coomaraswamy Report, *supra* note 169, ¶ 9 ("To give the protection against crimes relating to child soldiers its intended effect, it is justified not to restrict 'conscription' to the prerogative of State and their legitimate Governments, as international humanitarian law is not grounded on formalistic postulations. Similarly, the Trial Chamber's definition of enlistment reaches beyond the traditional implication that enlistment involves an actual list of new recruits but also encompasses children enrolled by more informal means.").

184. *Id.* ¶ 5.

circumstances” in distinguishing between categories of recruitment and in sentencing.<sup>185</sup>

In her arguments about definitions of conscription and enlistment, Ms. Coomaraswamy canvassed core international criminal legal sources with which the *Lubanga* Trial Chamber ought to have been familiar under the principle of *jura novit curia*. In particular, she describes the SCSL’s case law on child soldiering, as well as the *Lubanga* Pre-Trial Chambers decisions. If the judges know or are familiar with anything at all under *jura novit curia*, the SCSL’s seminal case law on the same novel international crime or the Pre-Trial Chamber decisions in the very same case would have to be among it.

Ms. Coomaraswamy also relied on specialized legal instruments with which international criminal judges may be somewhat less comfortable, even though they likely would fall under categories of international law the judges are to apply under Article 21(b) of the Rome Statute,<sup>186</sup> including the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict,<sup>187</sup> and the Principles and Guidelines on Children Associated with Armed Forces or Armed Groups 5 (Paris Principles).<sup>188</sup> Due to the narrow focus of the case on child soldiers, it seems more likely that the Trial Chamber have been familiar with these instruments than in a case covering a greater variety crimes, but the judges nevertheless may have had limited knowledge of them, particularly relative to the expert.

Further, in arguing that “[c]onsent of the child is not a valid defense to any of the three child soldiering war crimes,”<sup>189</sup> Ms. Coomaraswamy likewise drew on an expertise not captured by these legal sources. In support of her argument that consent of the child is “legally irrelevant,” she cites not only the Pre-Trial Chamber’s Confirmation of Charges decision, but also her experience in the field: “The fieldwork of our office makes apparent the invalidity of a child’s consent to any of the three crimes of child soldiering.”<sup>190</sup> In support of

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185. See *id.* ¶ 15 (quoting Committee on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, art. 4, U.N. Doc. A/54/RES/263 (May 25, 2000) [hereinafter *Optional Protocol*]).

186. See Rome Statute, *supra* note 13, art. 21(b) (“The Court shall apply . . . [i]n the second place [after the law of the ICC], where appropriate, applicable treaties and the principles and rules of international law, including the established principles of international law of armed conflict . . .”).

187. Optional Protocol, *supra* note 185.

188. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups 5 (Feb. 2007).

189. Coomaraswamy Report, *supra* note 169, ¶ 10.

190. *Id.*

this statement, she provides a four-sentence anecdote about a child from Sierra Leone (not the DRC):<sup>191</sup>

Abou was a child soldier demobilized in Sierra Leone. When he returned home, he had difficulty with his parents and was ostracized by the community. He then disappeared only to reappear as a child soldier in Côte d'Ivoire. Soldiering is all he knew. Though he "voluntarily" joined the rebels in Côte d'Ivoire, to accept consent as a defense would be to negate the whole policy behind such prohibitions.<sup>192</sup>

Ms. Coomaraswamy contended that the African examples are the most apt, since the "African wars" share a number of characteristics, including the proliferation of small arms and the heavy use of children.<sup>193</sup> Nevertheless, her written and oral submissions are sprinkled with similarly brief anecdotes from the field in the DRC,<sup>194</sup> as well as Uganda, Sierra Leone, the Philippines, Nepal, and Southern Sudan.<sup>195</sup>

Ms. Coomaraswamy likewise argued for a broad interpretation of the term "using them to participate actively in the hostilities" that reflects the shifting nature of the roles played by children and that includes girls. She lambasted the Pre-Trial Chamber's narrower definition of active participation, which excluded contributions that are "manifestly without connection to the hostilities."<sup>196</sup> She contended this definition, which "purport[s] to establish a bright-line rule,"<sup>197</sup> "is ill-conceived and threatens to exclude a great number of child soldiers – particularly girl soldiers – from coverage under the using crime."<sup>198</sup> She advocated a case-by-case approach in deciding whether a child's role constitutes active participation: "A case-by-case approach is particularly apt and critical in the context of modern conflicts in which the nature of warfare differs from group to group and the children used in hostilities play multiple and changing roles."<sup>199</sup>

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191. Sierra Leone is in West Africa. The DRC is in central Africa.

192. Coomaraswamy Report, *supra* note 169, ¶ 10.

193. See Coomaraswamy Transcript, *supra* note 168, at 10; see also *id.* at 19–20 ("Your Honour, there are different areas of the world where there is changing nature of conflict and that different reality has to be taken into consideration. The changing nature of conflict in Africa is different to the changing nature of conflict in Afghanistan, but for this purpose I will focus in on Africa itself.").

194. See Coomaraswamy Report, *supra* note 169, ¶¶ 14, 16, 22.

195. See Coomaraswamy Transcript, *supra* note 168, at 12–14, 24, 34, 43.

196. Coomaraswamy Report, *supra* note 169, ¶ 19 (quoting Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-803, Decision on the Confirmation of Charges, ¶ 262 (Jan. 29, 2007)).

197. *Id.* ¶ 20.

198. *Id.*

199. *Id.* ¶ 22.

Again, here Ms. Coomaraswamy cited international legal instruments,<sup>200</sup> but also drew on her experience in the field in support of the argument that “use” should include “any sexual acts perpetrated in particular against girls”:

When the Special Representative spoke to girl combatants in the eastern DRC, they spoke of being fighters one minute, a “wife” or “sex slave” the next, and domestic aides and food providers at another time. Children are forced to play multiple roles, asked to kill and defend, carry heavy burdens, spy on villages and transmit messages. They are asked to perform many other functions and their use differs from group to group.<sup>201</sup>

Here again, Ms. Coomaraswamy offered an anecdote of a child, this time from the DRC.<sup>202</sup>

Ms. Coomaraswamy unequivocally offered the perspective on the crimes “from the field.” Emphasizing the need to include the roles played by girls under the rubric of “participation” in her testimony, she stated:

Let me repeat again that any framework for the protection of children and recruitment and use during wartime, any framework for the accountability of those who do recruiting, any framework for the care and assistance of children must include girls like Grace and Eva. This is the message from the field.<sup>203</sup>

She admonished the judges that “it is important that your rulings protect all affected children and do not ignore the central abuse perpetrated against girls during their association . . . .”<sup>204</sup>

Counsel for the various victims’ groups also examined Ms. Coomaraswamy and took her testimony into matters outside of those for which she had been called. Despite the Trial Chamber’s decision limiting her testimony to the legal questions on the meanings of conscription, enlistment and use to participate, the victims’ counsel repeatedly asked her about the repercussions of child soldiering on children and the UN’s efforts to help former child soldiers.<sup>205</sup> The

200. *Id.* ¶¶ 21, 24.

201. *Id.* ¶ 22.

202. *See id.* (“Eva was a young girl whom the Special Representative met in the DRC. She was only twelve when she was abducted on her way to school. Initially, Eva was kept in a situation of forced nudity and subject to sexual abuse. She worked in the camp cooking, cleaning and being a sexual slave, and was often taken along for armed attacks on the villages to be a ‘porter’ to carry the looted goods.”).

203. Coomaraswamy Transcript, *supra* note 168, at 15.

204. *Id.*

205. *See, e.g., id.* at 28–29 (describing the effects of child soldiering on children); *id.* at 30–31 (describing the types of sexual exploitation girls and boys suffer when they join armed groups); *id.* at 38 (discussing the UN protection response).

Trial Chamber allowed the diversions, but stated that it would sift the relevant from the irrelevant.<sup>206</sup>

The Lubanga defense's cross-examination of Ms. Coomaraswamy was limited. It appears that the two points defense counsel sought to establish on cross-examination were that: where there is an extreme threat to a child's safety, it might be reasonable for commanders to allow them into military camps, and children also have a right to self-defense.<sup>207</sup> The defense's efforts at establishing even these limited points through cross-examination were rather muted. Nowhere in its questioning did the defense challenge the expert's neutrality or the reliability of her factual or legal claims. The defense's measured cross-examination may have stemmed from the recognition that it could address the legal arguments in closing arguments and briefs, which indeed it did.<sup>208</sup> The defense may also have been wary of stepping on the toes of the expert called by the Trial Chamber.

The judgment notes that, not surprisingly, both the prosecution and the victims groups supported Ms. Coomaraswamy's broad interpretation of the crimes of enlistment, conscription and use of child soldiers.<sup>209</sup>

Notably, the prosecution and the Office of Public Counsel for Victims (OPCV) invoked Ms. Coomaraswamy's evidence in support of a more gender-sensitive approach.<sup>210</sup> For a prosecutor who had been roundly criticized for failing to include crimes of sexual violence in his indictment,<sup>211</sup> this attention to crimes against girls, including sexual

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206. See *id.* at 39.

207. See *id.* at 40–44.

208. See *infra* discussion at notes 218–19 (discussing paragraphs 579–83 of the Lubanga Trial Judgement, regarding the defense's submissions on the law definitions of enlistment, conscription, and use).

209. See *id.* ¶ 577; *id.* ¶¶ 591–92 (noting that victim group 2 and the legal representatives agreed with Radhika Coomaraswamy on the definitions of conscription and enlistment and on the use of a fact-intensive case by case approach that “focus[es] on what was required of the children, together with the circumstances of their enrolment and the manner in which they were separated from their families and communities” and a broad conception of “active participation”).

210. The Trial Chamber observed that “[t]he prosecution also rehearse[d] the broad approach taken by the UN Special Representative . . . on this issue, who suggested that children who were given roles as cooks, porters, nurses and translators, together with those who were sexually exploited, should be as providing essential support and that the Court should ensure that girls are not excluded in this context.” *Id.* ¶ 577.

211. See Susanna Greijer, *Thematic Prosecutions for Crimes Against Children*, in *THEMATIC PROSECUTIONS OF INTERNATIONAL SEX CRIMES* 137, 151 (Morten Bergsmo ed., 2012); see also DRUMBL, *REIMAGINING*, *supra* note 167, at 156 (“Electing not to prosecute rampant sexual violence in such a high-profile inaugural trial certainly sent a callous message.”).

violence, arguably represented a welcome shift.<sup>212</sup> The OPCV likewise relied on Ms. Coomaraswamy's submissions to advocate inclusion of girls' roles in the definition of "participate actively."<sup>213</sup>

By contrast, the defense, in its final submissions, opposed the Special Representative's broad interpretation approach. The defense argued that a broad interpretation, even the Pre-Trial Chamber formulation Ms. Coomaraswamy criticized for being too narrow, violated the principle of *nullum crimen sine lege* set out in Article 22(2) of the Rome Statute.<sup>214</sup> Citing case law of the European Court of Human Rights, the defense also argued that a broad interpretation ran afoul of human rights law, under which "a criminal offence must be clearly defined in the relevant laws, and the criminal law should not be broadly interpreted to an accused's detriment."<sup>215</sup>

The defense also questioned the relevance of Ms. Coomaraswamy's sources in a criminal trial. It contended that the children's-rights sources Ms. Coomaraswamy cited in support of a broad interpretation "should not be imported into criminal proceedings before the ICC because tightly-defined criteria are to be applied."<sup>216</sup> Moreover, it argued that the Trial Chamber should ignore case law from the SCSL under the principle of legality, since the decisions post-dated the conduct at issue in the Lubanga trial.<sup>217</sup>

The Trial Chamber ultimately adopted a broad approach, and held that "conscriptio[n] and 'enlistment' are both forms of recruitment, in that they refer to the incorporation of a boy or a girl under the age of fifteen into an armed group, whether coercively (conscriptio[n]) or voluntarily (enlistment)," and its first cite for this

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212. However, it is far from clear that a lack of sensitivity to gender issues is what caused sex and gender crimes to be omitted from the Lubanga indictment. Instead, it likely stemmed from the prosecutor's fear that he lacked the evidence to be confident that the charges would be confirmed by the Pre-Trial Chamber, as required under the ICC's rules. See Greijer, *supra* note 211, at 153 ("[A]t the time of the ICC arrest of Lubanga, the Prosecutor estimated that he had sufficient grounds to indict him for child recruitment only").

213. See Lubanga Trial Judgment, *supra* note 33, ¶ 598 (noting that "[t]he OPCV relies on the submissions of Ms. Coomaraswamy" and the international legal instruments she cited "as support for the proposition that the expression to 'participate actively' should be interpreted so as to protect girls recruited into the armed forces for sexual purposes").

214. See *id.* ¶ 583.

215. *Id.* ¶ 581. Relying on ICRC commentary, the defense advocated a stricter definition of military enlistment as "the [. . .] integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in the hostilities on behalf of the group." *Id.* ¶¶ 581–82.

216. *Id.* ¶ 579.

217. See *id.* ¶ 587.

definition was Ms. Coomaraswamy's written submissions.<sup>218</sup> Although it had asked Ms. Coomaraswamy to address two "essentially legal" questions, the Trial Chamber's judgment relied extensively on her broad factual statements as the basis for its legal rule. For example, it notes:

Ms Coomaraswamy gave relevant background evidence that children in this context frequently undertake a wide range of tasks that do not necessarily come within the traditional definition of warfare. As a result, they are exposed to various risks that include rape, sexual enslavement and other forms of sexual violence, cruel and inhumane treatment, as well as further kinds of hardship that are incompatible with their fundamental rights.<sup>219</sup>

Likewise, the judgment quotes extensively from her written submissions in support of the factual proposition that "it can be difficult to differentiate between a conscripted and an enlisted child."<sup>220</sup> The Trial Chamber also notes Ms. Coomaraswamy's legal opinion flows from this factual observation that "the line between voluntary and forced recruitment is therefore not only legally irrelevant but practically superficial in the context of children in armed conflict."<sup>221</sup> The Trial Chamber also notes her testimony "that . . . children under the age of 15 cannot reasonably give consent" and, thus, the purportedly voluntary nature of a child's enlistment should not be a defense.<sup>222</sup> Ultimately, the Trial Chamber agreed that consent is no defense to conscription or enlistment, although it may be relevant at sentencing.<sup>223</sup>

The *Lubanga* Trial Chamber's calling an expert witness to help it resolve definitional questions about the crimes offers the starkest example yet of an international criminal court's reliance on a crime-definition expert. The law-trained expert was explicitly tasked with opining on the elements of the crime, and the Trial Chamber relied extensively on the expert's report and testimony in its judgment.

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218. See *id.* ¶ 607 & n.1775. This debate over the meaning of the terms in part stemmed from the Rome Statute's departure from the language of the Additional Protocols and the Convention on the Rights of the Child. Whereas those instruments used the term "recruiting," the Rome Statute instead used the terms "conscripting" and "enlisting." *Id.* The Trial Chamber concluded that conscription, enlistment and use are three separate offences. See *id.* ¶ 609 ("The Chamber therefore rejects the defence contention that 'the act of enlistment consists in the integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in hostilities on behalf of the group.'").

219. *Id.* ¶ 606 (footnote omitted).

220. *Id.* ¶ 611.

221. *Id.* ¶ 612 (quoting Coomaraswamy Report, *supra* note 169, ¶ 14).

222. *Id.* ¶ 615.

223. See *id.* ¶ 617.

### E. *Why the Turn to Crime-Definition Experts?*

The previous sections suggest that, in its first case, the ICC more boldly and transparently than ever before embraced help from a crime-definition expert, though seeds of the practice could be seen at the *ad hoc* tribunals and the SCSL. This move begs the question, why was the court so open to crime-definition expert assistance, even of an explicitly legal nature?

One possible explanation for this embrace of a crime-definition expert is that the ICC's more inquisitorial style procedures have altered its receptivity to legal experts. In fact, however, the civil law and common treatment of legal or quasi-legal expertise appears quite similar. In France and Spain, for example, the general rule is that courts, not experts, decide the law, but, in reality, in novel or complex areas of law, such as tax or financial crimes, there is some latitude for assistance from legal or quasi-legal experts.<sup>224</sup> The same is true in the United States, a common law jurisdiction. The ordinary rule is that legal expert testimony is inappropriate, but courts have shown some willingness to allow legal expert witnesses when the area of law is especially complex or unsettled.<sup>225</sup> Moreover, if anything the ICC's

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224. In France, although, pursuant to *jura novit curia*, the judge is to decide the law, the high court of France, the Cour de Cassation, upheld trial court's decision to hear from a law professor in maritime law, a specialized, technical area of law, to help it in assessing the obligations of the parties. *Société Total Fina Elf*, Cour de cassation [Cass.] [supreme court for judicial matters] crim., July 9, 2003, No. 03-81944 (Fr.). In Spain, for example, in criminal cases involving complex tax or business matters, courts will sometimes turn to "technical" or accounting experts whose expertise borders on legal. *See, e.g.*, S.T.S., July 23, 2014 (No. 586/2014 (Spain); S.T.S., May 8, 2001, (No. 776/2001) (Spain). But, in theory, at least, the judge is to decide the legal implications of the specialized knowledge provided. *See, e.g.*, Manuel Marchena Gomez, De Peritos, Cuasiperitos & Pseudoperitos, Consejo general del poder judicial, *Revista del Poder Judicial* n. 39, § 4, Sept. 1995 (noting that the training of judges is not particularly well-adapted to cutting-edge issues or complex tax, financial or even corporate law matters and acknowledging that judges need expert assistance in these areas, but arguing that the expert's assistance should not be legal in nature, since the law and the assessment of the criminal law consequences of the technical information provided by the expert are for the judge to decide).

225. In the United States, for example, the trope is that the jury decides the facts and the judge the law, so expert legal testimony generally is inappropriate. *See* Thomas Baker, *The Impropriety of Expert Witness Testimony on the Law*, 40 U. KAN. L. REV. 325, 362 (1992). By expert legal testimony, this Article, like the literature it discusses, means testimony about issues of law. Note, *Expert Legal Testimony*, 97 HARV. L. REV. 797, 797 n.7 (1984). This trope is rooted in a concern that the expert will usurp the judge in her function of instructing the jury on the law and confuse the jury by offering potentially inconsistent instructions on the law, Baker, *supra*, at 362, and a *jura novit curia*-like notion that the judge determines the law by consulting written sources. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 7:12 (4th ed. 2009). Despite this notion of the judge as the master of the law and the general rule that expert legal testimony is not permitted, many American courts in fact

more inquisitorial bent ought to make it more, not less, hostile to legal expert assistance, due to the importance of the norm of *jura novit curia*.

Arguably, however, a more inquisitorial process allows more room for the use of crime-definition experts due to a greater willingness to hear from experts in the first place and the significant control of the judge over the use of experts.<sup>226</sup> As Professor John Langbein explained some thirty years ago, “European legal systems are, [in contrast to common law ones], expert-prone.”<sup>227</sup> Moreover, once a judge decides to hear from an expert in an inquisitorial system, there may be more flexibility in the topics the expert canvasses.<sup>228</sup> The inquisitorial mindset places more confidence in judges’ ability to sift the wheat from the chaff. As Professor Máximo Langer has noted:

In the hierarchical model of the inquisitorial system, there are no detailed rules of evidence and, as a general rule, all relevant evidence

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have allowed expert legal testimony. See David Caudill, *The Roles of Attorneys as Courtroom Experts: Revisiting the Conventional Limitations and their Exceptions*, 2 ST. MARY’S J. LEGAL MAL. & ETHICS 136, 165 (2012) (arguing that there are and should be exceptions to the general prohibition on expert legal testimony, particularly in the context of complex or unsettled or uncertain law); see also *Expert Legal Testimony*, *supra*, at 803 (“Many judges have determined that proffered expert legal testimony will be of such substantial benefit to them in resolving legal issues that they are willing to risk reversal on appeal by disregarding the general rule against such testimony.”).

226. See MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 120–24 (1997) (arguing that the U.S. system is more dispute-resolution oriented and the civil law one more truth-seeking and noting that “[n]owhere is the strain between the adversarial process and the commitment to the truth more visible than in the dominant views on the proper role of the judge”).

227. John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 836 (1985) (discussing primarily civil procedure but also noting discussing experts in the context of criminal cases).

228. As one French commentator has explained of the use of experts in criminal proceedings in France, it is a fundamental principle that the judge has great freedom in defining and assessing the expert’s contribution. Laurence Leturmy, *L’expertise pénale*, A.J. Pénale, N. 2/2006, 60 (Feb. 2006) (“les trois caractères principaux de l’expertise peuvent être aisément soulignés: l’expertise est non contradictoire, confiée, par principe, à un expert unique et *laissée à la libre appréciation du juge*). Dutch courts likewise have great flexibility in relying on experts. See P.T.C. VAN KAMPEN, EXPERT EVIDENCE COMPARED: RULES AND PRACTICE IN THE DUTCH AND AMERICAN CRIMINAL JUSTICE SYSTEM 312 (1998) (“The Dutch criminal justice system incorporates few evidentiary rules regarding the use of expert evidence by the courts. Essentially all expert evidence is admissible as evidence, whether given orally or in written form, albeit that courts must explain in certain instances why they so use the expert’s information over the defendant’s objections.”); cf. J.F. NIJBOER, THE LAW OF EVIDENCE IN DUTCH CRIMINAL CASES IN A NUTSHELL: THE ROLE OF THE EXPERT, FORENSIC EXPERTISE AND THE LAW OF EVIDENCE 67–68 (J.F. Nijboer et al. eds., 1993) (explaining the Dutch criminal procedure code’s flexibility in selecting experts, courts’ heavy reliance on “so-called tenured forensic experts,” the lack of restraints on the expert’s work, and “atmosphere of presumed objectivity and neutrality,” which led him to the conclusion that “Dutch courts are not very critical on so-called expertise”).

may be admitted at trial. The assumption is that the professional decisionmakers can prevent prejudicial evidence from biasing them and can correctly evaluate whether the evidence is reliable and what its proper weight should be.<sup>229</sup>

This confidence in judges' abilities, as fact-finders, not just gatekeepers, to decide credibility may have led to the judges' more flexible notions of expertise and reliability in *Lubanga*.

This explanation likely accounts for some of the difference but seems incomplete. Although the ICC's more inquisitorial procedures may explain its more flexible use of experts, the *ad hoc* tribunals, even if dominated (particularly in the early days) by adversarial-style procedures,<sup>230</sup> always made pursuit of the truth a central objective since they were trying to write a historical record.<sup>231</sup> Moreover, the *ad hoc* tribunals, though they initially were dominated by adversarial procedures and evidentiary rules, ultimately moved to a more "managerial" style and introduced a number of non-adversarial procedures.<sup>232</sup>

Another possibility is that, early on, the tribunals were more concerned with legitimacy to ensure their own survival and thus played it safe by charging relatively established crimes and using more conventional witnesses.<sup>233</sup> As time went on and courts' positions solidified,<sup>234</sup> the tribunals arguably grew less concerned with legitimacy and more willing to take on newer crimes for which they needed help from crime-definition experts.

This Article proposes another possibility—that the courts have grown less concerned about legitimacy in the eyes of the international community and more concerned about legitimacy in the eyes of the

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229. Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 846–47 (2005) (footnotes omitted).

230. See *id.* (arguing that the ICTY initially was dominated by adversarial style procedures, but eventually moved to a more managerial style system).

231. See Patricia Wald, *Dealing With Witnesses in War Crimes Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 239 (2002) (noting that one of the ICTY's goals was "to provide accurate historical records of terrible events").

232. See generally Langer, *supra* note 229 (explaining the development of managerial judging at the ICTY).

233. Cf. Nancy Combs, *Legitimizing International Criminal Justice: The Importance of Process Control*, 33 MICH. J. INT'L L. 321, 329–32 (2012) (arguing that the ICTY's initial embrace of adversarial procedures made sense from a process-control perspective as the institution was seeking to legitimate itself, but that as international criminal tribunals have become more established, the need for adversarial procedures diminished).

234. Cf. *id.* at 325 ("[T]he field of international criminal law continues to face myriad challenges, but it is now unquestionably a field and one that is expected to endure. The International Criminal Court (ICC) is in full swing, having survived the early and vehement opposition of the United States.").

affected communities.<sup>235</sup> For example, after criticisms that tribunals were too disconnected from the places in which the crimes occurred, tribunals have made outreach to these communities a significant priority.<sup>236</sup> The selection of crime-definition experts with experience on the ground, such as Ms. Bangura and Ms. Coomaraswamy, represents judicial and prosecutorial efforts to make international criminal law that is both sensitive to regional, gender, and cultural concerns, and consistent with international legal norms outside of international criminal law. It also represents an attempt to gain some credibility on the ground. Judges may believe that learning from, and citing in their judgments, the perspectives of local experts or experts from the field may help to bolster their legitimacy in the eyes of the affected community.

Whatever the reason for the ICC's willingness to eschew *jura novit curia* and call a crime-definition expert on child soldiering crimes, the bigger question remains—should the court do it again when it inevitably faces yet another novel and complex international crime? The next Part turns to this question. It explores the benefits and drawbacks of court's reliance on crime-definition experts, and offers some strategies to help ensure that any use of crime-definition experts is more salutary than harmful.

#### IV. TOWARD A BETTER USE OF CRIME-DEFINITION EXPERTS IN INTERNATIONAL LAW

Using crime-definition experts to give shape to international crimes may help the courts to achieve some of their aims, including retribution, deterrence, and creating a historical record, but it also runs the risk of undermining others. These experts may help to

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235. See Marlies Glasius, *Do International Criminal Courts Require Democratic Legitimacy?*, 23 EUR. J. INT'L L. 43, 44 (2012) (discussing one emerging critique of international criminal justice “that victims of crimes and wider affected populations have not been consulted and have not had a choice as to whether international criminal courts are their preferred form of justice” and noting that a weak form of this critique “insists that in order to gain legitimacy, international criminal courts need to be more communicative and attentive to social needs than they have been to date” and a strong one “insists that they cannot be legitimate unless they are *democratically accountable*.”).

236. See *id.* at 48 (“The chorus of critiques and demands has not left the courts and tribunals untouched. They have all developed ‘outreach strategies’, for which there is typically no parallel in domestic criminal justice systems.”). See generally Sara Darehshori, *Lessons for Outreach from the Ad Hoc Tribunals, the Special Court for Sierra Leone, and the International Criminal Court*, 14 NEW ENG. J. INT'L & COMP. L. 299 (2008) (“[T]here has been increasing recognition by diplomats and court officials that outreach, rather than being auxiliary, is a key component of international criminal justice.”).

express condemnation of crimes by drawing attention to them, to gain credibility with certain audiences and to help the judges to craft better law. However, crime-definition experts also may oversimplify matters and, if not managed carefully, may render trials unfair to defendants. Oversimplification also may undermine restorative justice efforts.

#### A. *The Advantages of Crime-Definition Experts*

Using crime-definition experts to help courts understand new crimes has many benefits. When crime-definition experts explain to courts what the crime is or even how they think it should be defined, they are, in essence, giving a form of expert legal testimony. At all of the international tribunals and the internationalized SCSL, the test for expert testimony is essentially whether the person has some specialized, relevant knowledge that will help the trier of fact.

Legal experts or experts on the particular phenomenon may assist judges in deciding legal issues and crafting legal rules. Judges may, in fact, lack familiarity with some areas of law, even international law.<sup>237</sup> More so than in domestic courts, international criminal prosecutions involve a complex network of laws and often a complex factual picture that is, at least initially, quite foreign to the judges.<sup>238</sup> Crime-definition experts may be able to present a more scholarly or better-reasoned analysis of an issue.<sup>239</sup>

Moreover, the line between law and fact can be hard to draw.<sup>240</sup> As Professor Clarence Morris noted in his seminal article on the differences between questions of law and fact:

Questions of law are not decided in an intellectual quarantine area in which legal doctrine and the local history of the dispute alone are

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237. See *Expert Legal Testimony*, *supra* note 225, at 797. Some commentators in the U.S. have questioned the assumption that judges know all areas of domestic law, and that they have adequate tools to find the law without expert assistance, particularly given the complexity of modern statutes. See Pamela Bucy, *The Poor Fit of Traditional Evidentiary Doctrine and Sophisticated Crime: An Empirical Analysis of Health Care Fraud Prosecutions*, 63 *FORDHAM L. REV.* 383, 405–06 (1994) (arguing against a blanket ban of expert legal testimony in U.S. courts in the context of billing experts in health care fraud prosecutions on the basis that these experts may help to flesh out legitimate disagreements in interpreting regulations; serve a useful pedagogical function; and are fairer to defendants than fights about jury instructions, since defendants may question the experts); see also Caudill, *supra* note 225, at 164.

238. See Williams & Woolaver, *supra* note 21; see also Buss, *supra* note 2.

239. Cf. Dinah Shelton, *The Participation of Nongovernmental Organizations in International Judicial Proceedings*, 88 *AM. J. INT'L L.* 611, 611 (1994).

240. See *Expert Legal Testimony*, *supra* note 225, at 799; see also Bucy, *supra* note 235, at 406 (“Although expansive use of experts on the law is desirable, there is a potential danger in allowing a witness explain the law to the jury, namely, that the court may disagree with the witness’s explanation.”).

retained and all else is forcibly excluded. A judge who is ignorant of the world in which disputes arise and who does not take into account the repercussions that may follow his decision will be a sorry public servant.<sup>241</sup>

Some proponents of allowing expert legal testimony in the U.S. argue that “[t]he difficulty of distinguishing issues of law and fact calls into question the viability of a system predicated on such a distinction.”<sup>242</sup>

Radhika Coomaraswamy’s testimony before the ICC in *Lubanga* illustrates the difficulty in drawing a clear line between fact and law. Ms. Coomaraswamy, for example, on the one hand gave expert legal testimony about the requirements of certain international legal instruments regarding recruitment of child soldiers.<sup>243</sup> On the other hand, she also supplied facts to inform the creation of the legal rule. She testified, for example, that the circumstances and psychological development of children under fifteen made them unable to consent.<sup>244</sup> In essence, she maintained that there was no factual difference between voluntary and involuntary recruitment of children. She based a legal argument, that the Trial Chamber therefore treat the crimes as equally grave and punish accordingly, on this factual premise. She also argued that the Trial Chamber’s definitions of “use of children to participate” in hostilities should be construed broadly, according to international legal instruments. Again, this is legal testimony in part based on her reading of international legal instruments. However, it is also based on the factual contention that girls faced the same dangers as boys, or worse. As seen with the SCSL, this line becomes especially fuzzy when one considers the crime of “other inhumane acts,” which are defined in terms of their comparative gravity to other crimes.

However, there are arguments in support of crime-definition experts that apply with special resonance in international criminal context beyond the arguments for expert legal testimony in a domestic justice system. Legal experts may help the judges to achieve the purposes of international criminal justice, including retribution, expressive justice, and creating a historical record.<sup>245</sup>

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241. Clarence Morris, *Law and Fact*, 55 HARV. L. REV. 1303, 1317–18 (1942); see also DAMASKA, *supra* note 226, at 102 (“With some of [the facts we seek to establish in adjudication] the separation of the empirical from the evaluative and the juridical is so uncertain that fact-finding activity shades almost imperceptibly into the search for the legal norm.”).

242. *Expert Legal Testimony*, *supra* note 225, at 799; see also Bucy, *supra* note 235, at 406 (examining expert legal testimony in health care fraud prosecutions).

243. See generally Coomaraswamy Transcript, *supra* note 168.

244. See *id.* at 11.

245. The use of crime-definition experts may be value neutral on the aim of peace and reconciliation. The selection of legal expert, however, may not. If the legal

From a retributive perspective, legal experts may help to calibrate the relative severity of the crimes. For example, questions about Radhika Coomaraswamy's neutrality notwithstanding,<sup>246</sup> her experience on the ground may have helped the judges to appreciate the relative severity of the crimes of enlistment and conscription of child soldiers. Likewise, crime-definition experts, like Ms. Coomaraswamy, Ms. Bangura, or even Dr. Zwaan, whose contribution was more theoretical, may give judges a more nuanced understanding of the law or the factual underpinnings of the crimes. This understanding may be especially important in indirect liability contexts such as superior responsibility or joint criminal enterprise. For example, Professor Combs has argued that, for doctrines like joint criminal enterprise to work, it is critical that judges' inferences be "solidly grounded on a sophisticated and nuanced understanding of the way in which the violence was carried out in the region in question."<sup>247</sup> For much the same reasons, crime-definition experts also may contribute to a more complete historical record.<sup>248</sup>

Crime-definition experts also could help to serve the expressive aims of international criminal justice. As various commentators have argued previously, expressing condemnation of international crimes is one of the chief purposes of international criminal trials.<sup>249</sup> Part of this expression of condemnation is, of course, explaining what it is that the court is condemning. Crime-definition experts can help courts in crafting the message. As with Dr. Zwaan in *Milošević* or Ms. Coomaraswamy at the ICC, their insights could help the court to define and express just what it is that is being condemned and why. Instead of relying exclusively on the rather vague terminology of "other inhumane acts," the SCSL, for example, defined the more specific crime of forced marriage.

Depending on their particular area of expertise, crime-definition experts could help to ensure that courts are sensitive to issues that they may otherwise overlook, for example, gender or cultural issues. This benefit should not be underestimated. Many commentators have discussed the need for increased sensitivity to gender and culture.<sup>250</sup>

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expert is perceived to be partisan, it could bolster arguments of victor's justice and antagonize the other side and, thereby, potentially undermine peace and reconciliation.

246. See discussion *supra* Part III.D.2.

247. See COMBS, *supra* note 19, at 337–39 (defending the doctrine of joint criminal enterprise as at least better than the alternative seen in many tribunals of judges finding guilt despite serious inconsistencies in lay witness testimony).

248. See generally WILSON, *supra* note 2.

249. See *supra* note 31 and accompanying text.

250. See generally GRIEJER, *supra* note 211 (discussing the need to ensure sensitivity to gender issues and exploring different alternatives for ensuring this sensitivity, from prosecutions focusing on one crime to special advisors); COMBS, *supra* note 19, at 299 (proposing cultural training for international judges to help them to better communicate with lay witnesses and to evaluate their testimony).

At the SCSL, the presence of a Sierra Leonean expert on forced marriage may have helped the judges not only in understanding what the phenomenon of forced marriage looked like on the ground, but also in debunking something of a cultural relativist argument from one of the defendants. At trial, at least one defendant appeared to advance the notion that the “bush wife” phenomenon was little different from Sierra Leone’s traditional practice of arranged marriage,<sup>251</sup> which likewise did not depend on the wife’s consent, and at any rate did not amount to an inhumane act of equivalent gravity to those listed in the Special Court’s statute.<sup>252</sup> The Kanu Defense maintained this argument in its Final Trial Brief.<sup>253</sup> As seen at the ICTY with experts on command and control and at the ICC with Ms. Coomaraswamy, experts also can help courts to define crimes consistently with existing, related norms, be they in the world of child protection, sexual violence, or military command.

Crime definition expert testimony may help to guarantee that diverse perspectives are brought to bear on an issue. As noted above, in the *Brima* case at the SCSL, the prosecution called a female Sierra Leonean expert on women and forced marriage.<sup>254</sup> In the *Lubanga* case, the Trial Chamber’s expert on children and armed conflict was, on the one hand, a U.S.-educated UN official not from the country where the crimes occurred, but, on the other hand, was a woman from a non-Western country who had extensive experience on the ground with child soldiers.<sup>255</sup> Further, an ICC Trial Chamber has specifically

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251. See *id.* at 115–18 (“Q: Do you agree that forced marriage has been part of customary law in Sierra Leone?”). Ms. Bangura responded by differentiating between arranged marriage and forced marriage on the basis of the absence of the consent of the family for the latter. See *id.*

252. Article 2 of the Statute for the Special Court of Sierra Leone provides: “Crimes against humanity: The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: a. Murder; b. Extermination; c. Enslavement; d. Deportation; e. Imprisonment; f. Torture; g. Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; h. Persecution on political, racial, ethnic or religious grounds; i. Other inhumane acts.” Statute of the Special Court of Sierra Leone, U.N. Doc. S/2002/246, Appendix II, art. 2(a)-(i).

253. See *Brima* Trial Judgment, *supra* note 108, ¶ 702 (“The Kanu Defence . . . submits that ‘forced marriages cannot be qualified as an international crime (against humanity), as it is not of ‘a gravity similar to any other act referred to in Article 2(a) to (h) of the Statute’.” The Kanu Defence is ‘of the view that if the conduct described by the Prosecution cannot be categorized as sexual slavery, this conduct will not constitute a crime against humanity. The exercising of force on a woman to enter into a relationship similar to marriage, is not of ‘a gravity similar to any other act referred to in Article 2(a) to (h) of the Statute’ especially in view of the more nuanced and complicated relation between the ‘husband’ and ‘wife’ as discussed in the expert report of Dr. Thorsen.” (footnote omitted)).

254. See discussion *supra* Part III.C.2.

255. See *Coomaraswamy Biography*, *supra* note 165.

directed the Registry to consider diversity in deciding whom to put on its list of experts.<sup>256</sup>

As noted above in Part II.E.'s attempt to understand the recent turn to crime-definition experts, this sort of testimony may help with appearances. Although public perception should not drive judicial decisions, particularly those that detrimentally impact the rights of the defendant,<sup>257</sup> it bears noting that crime-definition experts may boost the perception of the tribunal at least with certain audiences. Selecting someone from the region to provide crime-definition testimony may help to legitimate the decisions in the affected area and reduce the appearance of imperialism. Using experts with "specialized knowledge" derived from real world experience also might increase credibility among those who work directly to combat the underlying problems.

Crime-definition expert testimony may well be fairer to defendants than judges attempting to educate themselves on the crimes. Unlike when judges craft legal rules based on their reading of books and reports that are not part of the record<sup>258</sup> or on advice from behind the scenes non-witness experts,<sup>259</sup> at least with crime-definition experts the defendant has the opportunity to cross-examine the witness and possibly to present witnesses offering a differing account.<sup>260</sup>

Moreover, crime-definition experts, particularly if wielded by the defense, could also serve as a check on judges to prevent overreaching or at least to make any overreaching more transparent.<sup>261</sup> For example, had the *Popović* judges admitted and heeded Professor

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256. See Lubanga Joint Instruction Decision, *supra* note 154, ¶ 24.

257. See generally Caroline Davidson, *May It Please the Crowd? The Role of Public Confidence, Public Order and Public Opinion in Bail for International Criminal Defendants*, 43 COLUM. HUM. RTS. L. REV. 349 (2012).

258. See Prosecutor Trial Judgment, *supra* note 33, ¶ 628. In the *Lubanga* judgment, for example, in support of its decision to interpret "participate actively in the hostilities" broadly to include support roles played by girls, the judges cited not only evidence supplied to them by Radhika Coomaraswamy but also books and UN reports on the topic of child soldiering. See *id.* (citing MICHAEL WESSELLS, CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION 57 (2006)); see also ILENE COHN & GUY GOODWIN-GILL, CHILD SOLDIERS: THE ROLE OF CHILDREN IN ARMED CONFLICT 31–32 (2003); PETER WARREN SINGER, CHILDREN AT WAR 57–58 (2005); GREGORIA PALOMINO SUÁREZ, KINDERSOLDATEN IM VÖLKERSTRAFRECHT 166–68 (2009); U.N. Secretary General, *Impact of Armed Conflict on Children*, ¶¶ 44–48, U.N. Doc. A/51/306 (Aug. 26, 1996).

259. See generally Rothe & Overton, *supra* note 6.

260. Cf. Ben Grunwald, Comment, *Suboptimal Science and Judicial Precedent*, 161 U. PA. L. REV. 1409 (2013) (discussing social science research on the reliability of eyewitness identification procedures); Gorod, *supra* note 9, at 5 (lamenting the U.S. Supreme Court's tendency to rely on extra-record facts in crafting legal rules).

261. Schabas, for example, contended that the ICTY had expanded genocide by eschewing a state policy requirement. See *supra* note 54 and accompanying text.

Schabas's recommendations on the state policy requirement and *mens rea* of genocide, it would have narrowed genocide considerably, at least with respect to state policy.<sup>262</sup> Courts often maintain that when the argument is a legal one, experts are not needed because the parties can make the same arguments. However, there is a real question—given time, page, and possibly knowledge constraints—whether they will.

In sum, crime-definition experts offer a number of potential benefits to international criminal courts. They may help courts in advancing the many aims of international criminal justice while helping to bolster the legitimacy of the tribunals and, perhaps, doing all of this in a fairly transparent and even fair way.

### B. Disadvantages of Crime-Definition Experts

However, the use of crime-definition experts has serious drawbacks. There is a risk that judges will defer too much to these experts.<sup>263</sup> Further, if crime-definition experts are not selected and managed well, they may unwittingly impinge on defendants' rights to a fair trial, oversimplify complex phenomena, and even dehumanize victims.

The extensive citations to Ms. Bangura and Ms. Coomaraswamy in the *Brima* and *Lubanga* judgments, respectively, suggest that judges at least in some cases have deferred a great deal to crime-definition experts.<sup>264</sup> These SCSL and ICC judgments cite the experts not only on propositions of law, but also on their sweeping factual statements drawn from interviews often conducted by other people.<sup>265</sup>

The ICC's provision of a single expert witness, called by the Trial Chamber, in some ways ameliorates the problems with crime-definition experts, but in some ways it exacerbates them (though the ICC's procedures are not yet fully in place). As discussed above in Part II(D), the notion is that the Trial Chamber picks a neutral witness, unlike in the adversarial system where there is the classic "battle" of experts, who are assumed to be partisan. In theory, the court's deferring to a neutral expert is not as bad as deferring to a biased one. However, with a single centrally-selected expert witnesses, there is a concern that the judges will not question the

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262. Schabas expanded it on another level though by arguing that the correct *mens rea* was knowledge of the genocidal policy, not intent. *See supra* note 53.

263. *Cf.* Daniel Peat, *The Use of Court-Appointed Experts by the International Court of Justice*, 84 BRIT. Y.B. INT'L L. 271, 289 (2014) (discussing the "danger of the inadvertent delegation of the judicial function to experts"); *see also* Verhoeven, *supra* note 11, at 12.

264. *See* discussion *supra* Parts III.C.2, III.D.2.

265. *See* discussion *supra* note 245.

credibility of the expert witness sufficiently. Commentators on inquisitorial systems of selecting and instructing efforts have voiced just this concern about judges assuming, perhaps incorrectly, the credibility or neutrality of expert witnesses.<sup>266</sup> Commentators on inquisitorial procedures have also voiced the concern that defense counsel may be reluctant to challenge the Trial Chamber's expert for fear of antagonizing the court.<sup>267</sup>

Moreover, since the crime-definition experts seldom are pure legal experts, there is a significant risk that they will bring facts in through the back door that may be imputed unfairly to the defendant. For example, in the *Lubanga* case, Ms. Coomaraswamy testified extensively about child soldiers in areas other than the region in which the crimes took place.<sup>268</sup> There is a risk that these facts from other regions do not apply to the context in which the alleged crimes were committed.<sup>269</sup> There is also a risk that the second or third-hand anecdotes about the crimes that the expert tells are simply incorrect or unreliable, and defendants have few ways to challenge them other than to point out that the expert's evidence is hearsay, which, after all, is admissible. Of course, as Professor Combs has argued forcefully in her book, *Fact-finding Without Facts*, even where judges hear first-hand accounts of crimes, their decisions often are not made on solid information.<sup>270</sup>

At the SCSL, Ms. Bangura's evidence in *Brima* demonstrated the potential for the opposite problem. Arguably, by offering country-specific evidence on the phenomenon of forced marriage, Ms. Bangura's testimony and the court's use of it raised the concern that the court was getting things backwards by making the law fit the facts. As noted above, this practice raises concerns about *nullum crimen sine lege* and fairness.

Crime-definition expertise that is country or conflict-specific also may yield a definition of the crime that is less universal. This may

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266. See REDMAYNE, *supra* note 149, at 208–11 (noting concerns about the French “list” system of experts: that the experts may be biased in favor of the prosecution, may be substandard, that the system “goes too far in deterring challenges to expert evidence, and that judges defer too much to experts); see also JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 76 (1977) (describing the ease with which prosecutors can secure court approval for experts involved with the police in pretrial investigations, regardless of their favorable inclination towards prosecution).

267. See *id.*

268. See Coomaraswamy Transcript, *supra* note 168, at 12–13, 19 (discussing her experience with former child soldiers in Sierra Leone and Liberia).

269. The flipside of the concern about unfairly imputing distant acts and harms to the defendant is that courts should try to understand phenomena as well as they can in order to define crime in way that makes sense, not just in case at hand.

270. See generally COMBS, *supra* note 19.

undermine the expressive message of international criminal justice that certain crimes are so horrible as to deserve universal condemnation.<sup>271</sup> However, not all would agree that universal definitions are the objective. Arguably, crime-definition experts may help the court to understand that a one-size-fits-all approach to international criminal law is not always optimal.<sup>272</sup>

Another fairness concern with crime-definition experts is that the defendant arguably faces yet another *de facto* prosecutor in a court in which there are already quite a few prosecutors. This problem is especially acute where the crime-definition expert is an advocate for the wronged group, as were Ms. Bangura and Ms. Coomaraswamy. At the ICC, defendants face not only the prosecutor, but also victims—since victims have standing and are often given leave to participate<sup>273</sup>—and typically even a hostile bench.<sup>274</sup> If crime-definition experts come from children’s-rights or women’s-rights organizations, they are likely seeking, understandably, to condemn and deter abuses of these groups. In an international criminal case, these experts are likely looking for a conviction or at least broad application of the underlying human rights or humanitarian law norms. For example, Ms. Coomaraswamy’s recommendations for a flexible, case-by-case distinction between conscription and enlistment and a broad interpretation of the term, “using them to participate actively in the hostilities,” may be best from a child protection perspective, but not necessarily from that of a fair trial. Broad and flexible definitions may be appropriate in the fields of international human rights or humanitarian law but, in a criminal trial, raise concerns about *nullum crimen* and the rule of lenity.<sup>275</sup> It also may be hard for the defendant to find a credible

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271. Cf. BASSIOUNI, *supra* note 17, at 741 (“We clearly need an effective ICC that can express the higher values of our legal civilization in the fair and impartial adjudications of international crimes – an institution which, to paraphrase Aristotle, would offer the same law whether in Athens or Rome, and apply equally to all peoples of the world, not only because it is law, but because, as Aristotle also said, it is ‘the right reason.’”).

272. See Greenawalt, *supra* note 34, at 1101.

273. In *Lubanga*, various victims’ groups participated in the trial and several victims’ representatives questioned Ms. Coomaraswamy. See Coomaraswamy Transcript, *supra* note 168, at 25–40.

274. See COMBS, *supra* note 19, at 224–34 (arguing that international judges have a pro-conviction bias that stems from politics and judges’ lack of courtroom experience).

275. See Darryl Robinson, *The Identity Crisis of International Law*, 21 LEIDEN J. INT’L L. 925, 946 (2008) (criticizing the conflation of the substantive norms of international criminal law with those of international human rights and humanitarian law and discussing the tension between the interpretive principles undergirding these distinct fields).

expert to counter these human rights experts, at least on the crime or crime-definition itself.<sup>276</sup>

However, crime-definition experts have disadvantages that go beyond the rights of the defendant. For one, to the extent they testify, they add to already lengthy witness lists. In a time where courts and prosecutors face intense pressure to streamline cases,<sup>277</sup> crime-definition experts may simply not help enough to be worth the time. However, to the extent the Trial Chambers are requesting the expert witness, as is the preferred practice at the ICC, it suggests that the Trial Chambers view the time to be well spent.

Crime-definition expert testimony may have expressive costs as well. Expert legal testimony may make transparent the uncertainty of international criminal law, which may undermine its condemnatory impact. Credible expert legal testimony telling the court that the tribunal's settled interpretation of a crime is incorrect may dilute the court's message.<sup>278</sup> Moreover, as seen in *Brima*, there is a fine line between defining a crime in the context of a particular country and conflict and defining it to fit the facts of the case against the defendant. It makes it easy for detractors to write off international criminal judgments as victors' justice when experts and judges are transparently defining new crimes on the fly and apparently to fit the facts of the case.

Crime-definition experts may present other expressive and restorative justice costs and do victims a disservice by oversimplifying and generalizing the phenomenon and, unwittingly, devaluing and dehumanizing the victims. Professor Mark Drumbl, for example, has written a compelling critique of the prevailing narrative of child soldiers that lumps all child soldiers into one category and deems all child soldiers incapable of consent, despite the potentially varied realities on the ground.<sup>279</sup> He reviews the different images of child soldiers: the "irreparably damaged goods"; the "hero"; the "demon and the bandit"; and the prevailing "faultless passive victim." Drumbl argues that these "extreme images" not only undermine the strategies

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276. *But see infra* Part II.2.A (discussing Professor Schabas in the ICTY's *Popović* case).

277. *See* WILSON, *supra* note 2, at 112. This pressure to streamline cases largely stems from an efficiency-based desire to make the process faster and less expensive. *See id.* It is also important from the perspective of the defendant's rights, however, because international criminal defendants are detained for trial. *See* Caroline Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1 (2010).

278. *See* discussion *supra* Part III.A.2 (discussing the ICTY's refusal to hear from Professor Schabas on the law of genocide).

279. *See* DRUMBL, REIMAGINING, *supra* note 167, at 31 (describing the differing circumstances surrounding recruitment of child soldiers in Nepal, Timor-Leste, Iran and Libya).

employed to help former child soldiers but also “reflect[] and reproduc[e] enduring hierarchies between the global North and South, cementing notions of race, perversity and barbarism, alongside the dehumanization of child soldiers and their societies.”<sup>280</sup> Drumbl advocates “a more fine-grained approach to post-conflict accountability” that includes mechanisms that may help post-conflict societies heal from wounds inflicted by child soldiers.<sup>281</sup> Some of this problem of oversimplification and generalization may be inherent in criminal law’s desire for bright line categories of perpetrator and victim,<sup>282</sup> but crime-definition experts may help to magnify and ossify the “extreme images” or even to create them in the first place.

Similar arguments can be made with regard to the narrative constructed by the prosecution’s forced marriage expert in the AFRC case. Arguably, Ms. Bangura’s testimony cast the victims as “irreparable damaged goods,” to borrow Drumbl’s term, without agency to choose a future, including whether to remain with the father or their children or “husband.”<sup>283</sup> Her testimony also may have had the unintended downside of minimizing the human rights concerns presented by traditional arranged marriages. It is therefore not surprising that commentators are divided on the merits of the SCSL’s treatment of forced marriage.<sup>284</sup> To the *Brima* Trial Chamber’s credit, however, it permitted vigorous cross-examination

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280. *Id.* at 10 (quoting Myriam Denov, CHILD SOLDIERS: SIERRA LEONE’S REVOLUTIONARY UNITED FRONT 5–14 (2010)).

281. *See id.* at 22. Drumbl instead “proposes to approach individual child soldiers through a *model of circumscribed action*. A circumscribed actor has the ability to act, the ability not to act, and the ability to do otherwise than what he or she actually has done. The effective range of these abilities, however, is delimited, bounded, and confined.” *Id.* at 17.

282. *See id.* at 24.

283. *Id.* at 7; *see supra* Part III.C.2.

284. *See* Greijer, *supra* note 211, at 155 (“The opinions among gender advocates regarding this ‘new’ crime differ widely, and the decision has been seen by some to stigmatise women instead of achieving the opposite.” (citing TOM PERRIELLO & MARIEKE WIERDA, INT’L CTR. FOR TRANSITIONAL JUSTICE, THE SPECIAL COURT FOR SIERRA LEONE UNDER SCRUTINY 27 (2006))). *Compare* Michael Scharf, *Forced Marriage as a Separate Crime against Humanity*, in SIERRA LEONE SPECIAL COURT AND ITS LEGACY, *supra* note 32, at 214 (lauding the SCSL for recognizing forced marriage as another inhumane act and arguing that the act of forced marriage withstands *nullum crimen sine lege* scrutiny), *with* Sidney Thompson, *Forced Marriage at the Special Court for Sierra Leone: Questions of Jurisdiction, Specificity, and Consistency*, in SIERRA LEONE SPECIAL COURT AND ITS LEGACY, *supra* note 32, at 232 (raising the concern that the forced marriage charges at the SCSL offended the principle of *nullum crimen* and noting that “[f]rom the time the Indictments in the AFRC and RUF cases were amended to include the charge of forced marriage until the time it was finally defined by the Appeals Chamber, there was notable fluidity in the articulation of its central nature as either a sexual or non-sexual crime, as well as inconsistency in terms of the specific content of its constituent acts.”).

of the expert and permitted the defense to call its own expert, who pointed out deficiencies in Ms. Bangura's report.

Many of these concerns are not reserved for crime-definition experts. However, they underscore the importance of selecting experts well and even hearing from more than one expert, if a court is going to rely on them at all.

### C. Crime-Definition Experts Versus Amici Curiae

Crime-definition experts are not the only way that courts can receive this expert input on the crimes. *Amicus curiae* submissions are another. This Section examines the relative strengths and weaknesses of the approaches. Although they have similar benefits and drawbacks, crime-definition experts may be fairer and more transparent than *amici* due to the potential for the defense to cross-examine a trial chamber or prosecution expert and to offer an expert of its own.

An alternative to calling crime-definition experts is permitting the participation of *amici curiae*, which all of the tribunals discussed have done. The rules of the ICTY, ICTR, SCSL and ICC all permit amicus participation.<sup>285</sup> The courts may invite the participation of *amici* or accept *amici* participation upon application.<sup>286</sup>

*Amici* offer many of the same benefits as legal expert witnesses or "crime-definition" experts.<sup>287</sup> They improve the quality of the legal arguments by adding detail or a more scholarly take on the issues.<sup>288</sup> They offer different perspectives that explore "the broader implications of decisions that the main parties have either purposefully or inadvertently failed to address."<sup>289</sup> Finally, and most importantly for the purposes of this article, "they assist when courts

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285. See Williams & Woolaver, *supra* note 21, at 154 (noting that the practice of permitting an *amicus curiae* to appear before these international criminal tribunals has been included in each of their respective governing instruments).

286. See *id.* at 155 ("Amicus status can be acquired in one of two ways; by invitation or by spontaneous application.").

287. Writing before the ad hoc war crimes tribunals had gotten off the ground, Professor Dinah Shelton advocated for the use of *amicus curiae* at international courts. Professor Shelton examined the roles of *amici* in national and regional courts and concluded that *amici* have had a positive impact on the reasoning and accuracy of decisions in domestic and regional courts. She acknowledged that *amici* add to the workload of national courts but noted that they have been accepted anyway because they are beneficial. See Shelton, *supra* note 239, at 618, 640.

288. See *id.* at 618 ("First, they often supplement or provide detailed analysis of points of law, including discussion and citation of authority not contained in the parties' arguments. Second, they can supply detailed legislative or jurisprudential history, a scholarly exposition of the law.").

289. *Id.*; see also Williams & Woolaver, *supra* note 21, at 185.

are expanding into areas of novel and complex litigation.”<sup>290</sup> In particular, *amici* “may assemble expert knowledge and expertise”<sup>291</sup> and thus “may help to explain complex issues and perhaps deal with the broader implications of a decision, beyond the particular interests of the parties.”<sup>292</sup> In some respects, *amici* may offer advantages over experts. Extolling the advantages of *amicus curiae* for the ICJ, Professor Shelton has noted that, “unlike experts or witnesses, [*amici*] generally may raise any issue the court could raise on its own motion and are not limited by questions presented to them or to matters pleaded by the parties.”<sup>293</sup>

In their examination of *amicus curiae* at international criminal tribunals, Williams and Woolaver conclude that they are often helpful, but also problematic<sup>294</sup> for many of the same reasons that crime-definition experts are. Williams and Woolaver question the appropriateness and fairness to the defendant of allowing third parties to introduce issues not raised by the parties in a criminal case.<sup>295</sup> They are concerned that *amici* may exert undue influence on the courts,<sup>296</sup> the effect of *amicus* submissions on the courts’ decisions is often not transparent,<sup>297</sup> and there is no clear standard for

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290. Shelton, *supra* note 239, at 618; *see also* Williams & Woolaver, *supra* note 21 (positing that *amici* may help international criminal courts navigate a complex factual landscape and the vast array of potentially applicable law and ensure consistency in a fragmented area where courts are not bound by the decisions of other courts).

291. Shelton, *supra* note 239 at 618. Williams and Woolaver note that NGOs in particular may have relevant experience that could be used to help educate judges on an issue. *See* Williams & Woolaver, *supra* note 21.

292. Shelton, *supra* note 239, at 618.

293. *Id.* at 611.

294. *See* Williams & Woolaver, *supra* note 21, at 184–89.

295. *See id.* at 186.

296. *See id.* (“The court certainly has an interest in making its decisions based on the best evidence available, including taking into account wider views: however this must be balanced against the institutional interest in adhering strictly to fair trial standards and the presentation of evidence in accordance with the RPE.”). Williams and Woolaver note that the SCSL invited *amicus* submissions more than the *ad hoc* tribunals. *Id.* at 175. They posit that the extensiveness of the *amicus* practice at the SCSL suggests that the SCSL was “contracting out” its research function, “perhaps due to a lack of resources or a lack of confidence in the parties’ ability to argue sufficiently the issues raised by the case.” *Id.* at 176.

297. *See id.* at 159 (“[S]ome judgments contain little or no reference to the *amicus* brief supplied, and the briefs themselves are often not publicly available, thus restricting the ability to compare the judgments with the content of the briefs.”). Williams and Woolaver note that even where tribunal judgments do not cite *amici*, they may still be influencing matters behind the scenes, particularly with respect to prosecutorial discretion, such as in the ICTR prosecutor’s decisions to charge sexual violence. *See id.* at 161, 174; *see also* Lance Bartholomeusz, *The Amicus Curiae before International Courts and Tribunals*, 5 NON-ST. ACTORS & INT’L L. 209, 245 (2005). The ICTR and ICTY have used *amici* “extensively” at trial and on appeal, and the *amici*

admission of these submissions.<sup>298</sup> Williams and Woolaver also flag that *amicus* submissions seem rather one-sided.<sup>299</sup> As an example, they note that the Trial Chamber in *Prosecutor v. Kallon* at the SCSL invited submissions from Professor Diane Orentlicher, a noted scholar and detractor of amnesties, on whether amnesties barred prosecutions without calling any other scholar with a more favorable view of amnesties as a transitional justice tool.<sup>300</sup>

Although, as noted above, many of the same problems exist with crime definition experts, crime-definition experts may lend themselves more to transparency. To the extent that crime-definition experts testify in open court and file their reports publicly, which, thus far, has been the case at the ICC, albeit not always the SCSL,<sup>301</sup> the public can decide for itself the influence of the expert. The more open the testimony, the more forceful the expressive message. Noting Radhika Coomaraswamy's testimony,<sup>302</sup> the Open Society Institute stated: "Irrespective of how Thomas Lubanga's trial at the International Criminal Court (ICC) concludes, it has indisputably helped to catapult into the global limelight the phenomenon and plight of child soldiers."<sup>303</sup>

Concerns about undue deference may be even greater with crime-definition experts, particularly those selected by the trial chamber, than with *amici*. They are not just individuals or groups permitted, or sometimes invited, to opine on some matter. Instead, the Trial Chamber (and possibly Registry before them) has given the imprimatur of "expert."<sup>304</sup> The experience of the SCSL and the ICC with crime-definition experts provides at least some reason to believe

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have served a variety of functions, including "to provide advice on important issues of general and criminal international law . . . to act as a check on the prosecutorial discretion about what charges are included in indictments . . . and to explain the scope of the UN Secretary-General's waiver of a former UN official's privileges and immunities to give evidence before the Tribunal." *Id.*

298. See Williams & Woolaver, *supra* note 21, at 187.

299. See *id.* at 176 ("There appears to have been no attempt to balance the views of the invited *amicus*, and all *amici* have tended to support the position of the Prosecution.").

300. See *id.* at 176 n.139.

301. This was not the case, however, at the SCSL. In the RUF case, which was the first time in which the court actually convicted defendants for forced marriage, the court heard from an expert on forced marriage who testified under protective measures and whose testimony and report are not publicly available. See *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Judgement, ¶¶ 1349, 1351, 1409–10, 1413, 1474 (Mar. 2, 2009).

302. See Wairagala Wakabi, *Lubanga Trial Highlights Plight of Child Soldiers*, OPEN SOC'Y FOUNDS. (Oct. 8, 2010), <http://www.opensocietyfoundations.org/voices/lubanga-trial-highlights-plaint-child-soldiers> [<http://perma.cc/RQS7-48LN>] (archived Jan. 27, 2015).

303. *Id.*

304. See Williams & Woolaver, *supra* note 21, at 166–69.

that courts will defer greatly to the factual and legal views of the crime-definition expert.<sup>305</sup>

However, crime-definition experts come with more procedural protection for defendants. For experts, unlike *amici*, the defense has the opportunity to challenge a decision to call the expert or, failing that, cross-examine the expert, and, possibly, offer an expert of its own.<sup>306</sup> These challenges to the expert and alternative expert perspectives may cause judges to defer less to crime-definition experts than to *amici* or, at least, their deference is more likely to be well-founded.

#### D. Proposal for Reform

International criminal tribunals should give serious consideration to whether the benefits of crime-definition experts outweigh the costs. If they conclude that they do, tribunals should consider measures to help them to reap the benefits of crime-definition experts while avoiding or minimizing the potential pitfalls identified above. To do this, the tribunals should adopt a more meaningful inquiry into the expert's ability to "assist" the Trial Chamber. The tribunals should more carefully circumscribe the expert's testimony to the expert's area of expertise. They also should maintain a blended inquisitorial and adversarial culture on experts, currently the *de facto* regime at the ICC despite its *de jure* preference for an inquisitorial list system of experts. Under a blended system, even where the Trial Chamber calls its own witness, a defendant would be free to challenge to the admissibility of evidence from Trial Chamber experts and to vigorously cross-examination these witnesses. The tribunals should also ensure that defendants are given adequate resources to identify and retain experts of their own.

Courts must give the inquiry on the helpfulness of the expert's testimony more teeth. One possibility is for courts to examine more rigorously the reliability of the crime-definition expert's testimony. For expert legal testimony, this examination is fairly easy for courts

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305. See *id.* at 185.

306. In the United States, recent commentary has questioned the United States Supreme Court's extensive reliance on *amicus curiae* to provide it with facts about the world used to support a legal rule, called "legislative facts." See Gorod, *supra* note 9, at 60 (noting that even if, as some have argued, it may be hard to test legislative facts adequately using adversarial procedures, "it does not follow that there should be no testing of legislative facts at all, as is often the case when they come to the Court's attention through *amicus* briefs" (footnote omitted)); see also Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1803 (2014) (discussing the Court's increased reliance on "legislative facts," where "there is an increased focus on generalized facts as opposed to case-specific and record-specific ones").

to do. Courts are well equipped to weigh the merits of a legal argument, particularly if they are offered a competing perspective from a defense expert. The parties, through argument, also can point out shortcomings in the expert's legal arguments.

The more factual the crime-definition expert's testimony, the more useful it is likely to be, but the harder it may become for courts to assess the reliability of the expert's evidence. Although domestic courts also struggle with evaluating the reliability of social science evidence,<sup>307</sup> and domestic court decisions and commentary may offer some guidance for international tribunals, there are limits to the analogy. The crime-definition experts seen to date are sometimes not scientists or even social scientists in the first place. Where witnesses' expertise is scientific, courts should evaluate the reliability of their evidence using such considerations as general acceptance of the methodology, standards and controls in the field, error rate, testability, peer review, and the like.<sup>308</sup> Where courts are seeking the opinion of a witness with expertise based on experience in the field, courts may be right in eschewing hard and fast rules on the reliability of the witness's scientific method, since there may be none. However, the difficulty in assessing the reliability of these non-scientific experts, ultimately, may mean that judges should either exclude their evidence or analyze carefully the bases for the witness's opinion and the witness's reasoning.<sup>309</sup>

Neutrality, the *sine qua non* for court-appointed experts in inquisitorial systems,<sup>310</sup> may be a something of a proxy for reliability for these non-scientific expert witnesses, at least for Trial Chamber witnesses.<sup>311</sup> However, for it to be an effective one, international

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307. See, e.g., Grunwald, *supra* note 260 (evaluating the use of social science research by the courts); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 485–86 (1986) (discussing courts' evaluation of facts in support of legal rules and offering suggestions on ways to evaluate expert social science evidence more effectively).

308. See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592–95 (1993).

309. Cf. Poulin, *supra* note 105, at 597 (arguing that experience based witnesses in the United States should be treated as lay witnesses, not experts, and therefore be precluded from testifying about matters not "rationally related to the witness's perception"). Treating experts as lay witnesses at international courts robs them of the title of expert, but otherwise is less significant, since the rules on lay witness testimony are also more flexible at international criminal tribunals.

310. See Langbein, *German Advantage*, *supra* note 227, at 837 ("The essential insight of Continental civil procedure is that credible expertise must be neutral expertise.").

311. Arguably, it is less critical that crime-definition experts called by parties be neutral. In Sweden, for example, although courts call experts, the parties also may call experts, and the parties' experts need not be neutral. See Bengt Lindell, *Evidence in*

courts must be more rigorous in their inquiry into the neutrality of the experts before them. Although international courts have embraced neutrality in theory,<sup>312</sup> they appear to have interpreted the requirement narrowly to mean that the expert does not directly opine on the guilt or innocence of the defendant.<sup>313</sup> Rather than apparently neutral scholars distanced from the crimes, like Dr. Zwaan or Professor Schabas, more recently, at both the SCSL and the ICC, the experts were advocates.<sup>314</sup> As discussed above, Ms. Bangura was a Sierra Leonean human rights and women's-rights activist; Ms. Coomaraswamy was a UN children's-rights advocate, part of whose mission was ensuring that people who recruited child soldiers be punished.<sup>315</sup> This acceptance of advocates as experts is especially problematic when the witness is a purportedly neutral Trial Chamber expert witness. However, where what the Trial Chamber is seeking is experience with the crime on the ground, it may be very difficult to find it in conjunction with neutrality about the crime generally.

Once an expert is selected, courts should consider more carefully limiting the testimony and reports to the expert's area of expertise and to evidence relevant to the case against the defendant. As noted above, in the *Lubanga* case, the court interjected that it would later sift the relevant from the irrelevant. Other than by affirmatively citing selections of Ms. Coomaraswamy's testimony in its judgment, the court in fact gave no indication in the transcript or the judgment as to where it drew the line.<sup>316</sup> Where experts go into issues that are either irrelevant or beyond their areas of expertise in their reports, courts should redact the reports or ask the expert to do so. Failing that, courts should consider signaling, either in the transcript, the decision accepting the expert, or the judgment, just where it believes the experts have gone too far.

A criterion for helpfulness that warrants consideration is novelty. In the *Brima* case, Judge Doherty's concurrence to the

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*Sweden*, in THE LAW OF EVIDENCE IN THE EUROPEAN UNION 407, 425 (José Manuel Lebre de Freitas ed., 2004).

312. See *supra* notes 47 (discussing the ICTY), 154 (discussing the ICC).

313. See *supra* Part III.D.2.

314. See Anthony Franz & R. Reeves Anderson, *Justices Are Paying More Attention to Amicus Briefs*, NAT'L L.J. (Sept. 2, 2014), <http://www.nationallawjournal.com/supremecourtbrief/id=1202668846551/Justices-Are-Paying-More-Attention-to-Amicus-Briefs?slreturn=20150020135105> [<http://perma.cc/9WZE-N54M>] (archived Feb. 15, 2015); cf. *United States v. Castleman*, 134 S. Ct. 1405, 1421–22 (2014) (Scalia, J., concurring) (arguing against the majority's reliance on broad definitions of "domestic violence" provided by amicus briefs from various organizations against domestic violence in order to interpret a federal criminal statute because "advocacy organizations . . . have a vested interest in expanding the definition of 'domestic violence' in order to broaden the base of individuals eligible for support services").

315. See *supra* Parts III.C.2, III.D.2.

316. See discussion *supra* Part III.D.2.

decision to accept Ms. Bangura as an expert plainly recognized that the novelty of the crime of forced marriage made the expert's testimony especially helpful.<sup>317</sup> As courts gain experience with a particular crime, the need for crime-definition expert assistance may diminish. This, indeed, seems to be the logic of the ICTY decisions rejecting Professor Schabas's report on the law of genocide in *Popović*.<sup>318</sup>

Although novelty may favor instruction of a Trial Chamber crime-definition expert, lack of novelty should not weigh heavily against defendants who wish to offer crime-definition experts of their own. It may be that courts have arrived at a particular understanding of a phenomenon that the defendant wishes to contest. For example, a defendant might want to contest the notion of the inherently coercive nature of child soldiering and craft a defense based on consent. Defendants should be given the opportunity to refute the working understanding, even when the crime has been prosecuted before. Judges too may find that they question a crime-definition expert's initial characterization of the crime as the judges gain experience with it.<sup>319</sup>

More fundamentally, the ICC should take the good of the inquisitorial approach to experts with the good of the adversarial one. Even as the Registry's list of experts grows and it becomes more realistic for Trial Chambers to appoint a single expert on any given issue, the ICC should maintain a culture that permits adversarial testing of experts. This means that the defense should feel free to challenge the Trial Chamber's expert, cross-examine her, or bring in an expert of its own. Even if it is sometimes hard for courts to choose between competing expert opinions on a matter, the battle of experts helps to ensure that "adjudicators need not surrender to the authority" of the expert "as blindly as those confronted with a single opinion of their chosen expert."<sup>320</sup> This blended procedure for experts may be one of the rare instances where the blending of inquisitorial and adversarial systems yields a fairer process, rather than one in

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317. See *supra* Part III.C.2.

318. See *supra* Part III.A.2.

319. Cf. Buss, *supra* note 2, at 41–42 (describing a paradox related to context experts at the ICTR: "[a]s the tribunal amasse[d] more evidence and more experience, some trial chambers, such as in Bagasora, bec[a]me less certain about what happened").

320. DAMASKA, *supra* note 226, at 152 (speaking of the risk that courts defer to much to scientific experts); see also REDMAYNE, *supra* note 149, at 211 (quoting Damaška and noting that Dutch and German scholars also have argued that their systems offer "insufficient opportunity" to challenge expert evidence).

which the blend unbalances the original systems to their detriment.<sup>321</sup>

Relatedly, providing the defense with adequate resources to hire a crime-definition expert or experts of its own is essential. Inequality of arms is a chronic complaint of international defense counsel.<sup>322</sup> If defendants are not given resources to find qualified experts of their own, the use of a crime-definition expert risks infringing on the defendant's right to a fair trial.

Finally, courts should use crime-definition experts transparently. Absent compelling justifications for protective measures, crime-definition experts should testify in open court, and their expert reports should be public documents. Thus far, expert witnesses at the ICC have testified openly; whereas in the second SCSL case involving forced marriage (the RUF case), the forced marriage expert testified in closed session under a pseudonym.<sup>323</sup> Courts should continue to make their reasoning transparent. Where the court relies on the evidence or argument of a crime-definition expert, courts should cite the crime-definition expert.<sup>324</sup>

## V. CONCLUSION

Crime-definition experts offer many potential benefits in helping international criminal courts confront novel crimes. They may help the courts to think through the legal issues and digest the wide range of applicable law, and they may also help the courts understand better the world in which these legal issues arise. This richer understanding of the law, and the world, may make for a more finely-calibrated retributive regime, a more forceful expressive message, and a more accurate historical record. There are even advantages in selecting crime-definition experts over *amicus curiae* due to increased

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321. Cf. WILSON, *supra* note 2, at 65 (citing ICTR defense counsel, Joanna Evans, explaining that the protections of the adversarial and civil law systems are diluted when the systems are combined).

322. See *id.* at 142–43 (noting that a common lament of defense counsel in interviews was inequality of arms between the prosecution and defense and noting results of his survey in which prosecution, defense and witness participants indicated that they believed judges to be significantly more receptive to prosecution expert witnesses); see also Charles Chernor Jalloh & Amy DiBella, *Equality of Arms in International Criminal Law: Continuing Challenges*, in THE ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW: CRITICAL PERSPECTIVES 251 (William Schabas ed., 2013) (“Equality of arms is a key principle of the international criminal justice system.”).

323. See *supra* note 145.

324. Cf. Williams & Woolaver, *supra* note 21, at 186 (discussing the need for transparency in courts' use of *amicus curiae* submissions).

transparency and, possibly, greater diversity in the voices represented. Crime-definition experts may also make it a more even fight than when courts rely on *amici* or their own research.

However, the use of these crime-definition witnesses comes at a significant cost. It may be unfair to defendants. It also may oversimplify complex issues and end up detracting from expressive and restorative justice aims of the tribunals. To alleviate these problems, courts should give real teeth to inquiries into the expert's ability to assist the trial chamber, relevance, and bias. Courts should also foster a culture in which defendants feel free to challenge even Trial Chamber witnesses and to call crime-definition experts of their own.