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Patrick J. Keenan

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THE SLIPPERY CONCEPT OF “OBJECT AND PURPOSE” IN INTERNATIONAL CRIMINAL LAW

PATRICK J. KEENAN*

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* Professor of Law, University of Illinois College of Law. This genesis of this project came from helpful discussions at the International Criminal Court Scholars Forum at Leiden Law School on a separate project. I am grateful to all the participants in that forum for helpful comments and conversations, especially Nancy Combs, Leila Nadya Sadat, William Schabas, and Elies Van Sliedregt. All errors are my own.

I. THE PROBLEM OF OBJECT AND PURPOSE

In little more than twenty-five years, the field of international criminal law has grown from a small slice of public international law into a functioning system of international justice, complete with multiple juridical bodies and substantial scholarly attention.¹ Building on the legacy of the Nuremberg Tribunals and drawing from international humanitarian law, human rights law, and domestic criminal law principles, international criminal law has become its own discipline.² Creating any new field of law is a complicated

1. The International Criminal Court is perhaps the most prominent such body, but it is by no means the only one. The International Criminal Court was established by the Rome Statute, adopted in 1998, and came into existence in 2002 after the Rome Statute was ratified by the requisite number of countries. *See* Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 (1998) (hereinafter Rome Statute) Before that, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone addressed atrocities that occurred in those countries. The I.C.T.Y. was created by the U.N. Security Council in May 1993, well before the end of hostilities in the former Yugoslavia. *See* S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993). The I.C.T.R. was created by United Nations Security Council Resolution 955 in November 1994 to address the genocide in Rwanda. *See* S.C. Res. 955, U.N. Doc S/RES/955 (Nov. 8, 1994). The Special Court for Sierra Leone was created by the United Nations to address atrocities in West Africa. *See* S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000). In addition to these tribunals, there have been a number of others. *See, e.g.*, GEERT-JAN ALEXANDER KNOOPS, AN INTRODUCTION TO THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNALS 14–24 (2014) (describing origins and functioning of special criminal tribunals for East Timor, Kosovo, and Bangladesh, among others). Also noteworthy are the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon. The Cambodia tribunal prosecuted a handful of very senior defendants and brought to light an extensive record of the atrocities in that country. *See generally* JOHN D. CIORCIARI & ANNE HEINDEL, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA (2014). The Special Tribunal for Lebanon was created to investigate the murder in 2005 of former Prime Minister Rafiq Hariri and has prosecuted five principal defendants. *See* Special Tribunal for Lebanon, Sixth Annual Report (2014–2015). Of course, describing international criminal law as a function system of justice does not mean that it always functions well. *See generally* Joseph Powderly, *Editorial: International Criminal Justice in an Age of Perpetual Crisis*, 32 LEIDEN J. INT'L L. 1 (2019) (describing the many problems in international law as applied to real situations by real institutions).

2. The Nuremberg Tribunals are perhaps the foundational sources for the development of law in this area. The Nuremberg Charter granted the Tribunal jurisdiction over “crimes against peace,” meaning the initiation or waging of an illegal war, “war crimes,” which meant the violations of the laws of war, and

endeavor; this is especially true when the field affects and is affected by so many politically sensitive issues.³ Throughout this doctrinal experiment, one concept has been an essential ingredient to its development. From the very beginning, courts, scholars, and advocates have relied on their interpretation of the “object and purpose” of treaties and statutes to argue in favor of their preferred interpretation of the law.⁴ When faced with competing possible understandings of novel statutes or definitions of crimes, international criminal tribunals have often concluded that their doctrinal result is consistent with the “object and purpose” of the

“crimes against humanity,” which covered acts against the civilian population (including what would come to be called genocide). *Nuremberg Charter Art VI, in THE LAW OF WAR: DOCUMENTARY HISTORY*, at 883, 922–1025 (Leon Friedman ed., 2d ed. 1972). The Nuremberg Judgment, finding Nazi leaders responsible for many atrocity crimes, is the source for many of the concepts still used in international criminal law. *Id.* For analyses of the ways that international criminal law has borrowed from or adapted law from other disciplines, see generally Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331, 331 (2009). See also Elies Van Sliedregt, *International Criminal Law: Over-studied and Underachieving?*, 29 LEIDEN J. INT’L L. 1, 1 (2016). (arguing that the discipline of international criminal law has emerged as field of study for reasons of novelty and doctrinal and political flexibility); Patricia Pinto Soares, *Tangling Human Rights and International Criminal Law: The Practice of International Tribunals and the Call for Rationalized Legal Pluralism*, 23 CRIM. L. FORUM 161 (2012) (describing the ways that international criminal law has borrowed from, departed from, and adapted human rights law and norms); Ilias Bantekas, *Reflections on Some Sources and Methods of International Criminal and Humanitarian Law*, 6 INT’L CRIM. L. REV. 121 (2006) (describing the ways that humanitarian law is absorbed, often incoherently, into international criminal law).

3. See Steven C. Roach, *How Political Is the ICC: Pressing Challenges and the Need for Diplomatic Efficacy*, 19 GLOB. GOVERNANCE 507, 520–21 (2013).

4. For a comprehensive analysis of the phenomenon, promise, and problems of interpretation, see generally JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS (Shane Darcy & Joseph Powderly, eds. 2010). The object and purpose inquiry has been an essential element of the general interpretative project. See, e.g., Joseph Powderly, *Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?*, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 17, 18–19 (Shane Darcy & Joseph Powderly eds., 2010) (describing some of the ways that object and purpose has been used by international criminal tribunals). See, e.g., Joseph Powderly, *Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?*, in JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS 17, 35–42 (Shane Darcy & Joseph Powderly, eds. 2010) (describing some of the ways that object and purpose has been used by international criminal tribunals).

statute.⁵ This ad-hoc approach might have been justified in the early years of the development of international criminal law, but the time has come to reconsider the role of object and purpose analysis. What is missing is an agreed-upon definition of what the “object and purpose” of a treaty or statute is, how it might be determined, and the weight it should carry in a case.

The relevance of the object and purpose of a treaty or statute comes from the Vienna Convention on the Law of Treaties, which provides that a treaty shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁶ In practice this has become a useful tool that can, at its best, help resolve statutory ambiguities and, at its worst, provide a doctrinal basis for a judge or advocate to support his or her preferences.⁷ As useful it has been as a kind of doctrinal lubricant during international criminal law’s sometimes-creaky early years, the time is appropriate for a closer look at the concept of object and purpose as the field approaches the end of its third decade of robust use.⁸ Object and purpose considerations appear to point in the same direction in almost every case: toward more culpability for defendants, toward expanding liability to those further from the crime, and toward reduced evidentiary burdens on prosecutors.⁹ The

5. See, e.g., Alison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 102–10 (2005) (describing the legal theories developed in the International Criminal Tribunal for the Former Yugoslavia to prosecute individuals who are not themselves the physical perpetrators of the crimes for which they are charged).

6. Vienna Convention on the Law of Treaties, art. 31(1), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

7. See generally Sondre Torp Helmersen, *Evolutionary Treaty Interpretation: Legality, Semantics and Distinctions*, 6 EUR. J. LEGAL STUD. 161, 165 (2013) (explaining how the use of proxies is helpful in interpreting international law).

8. *Id.* at 163 (defining “factors,” “methods,” and “results,” for treaty interpretation).

9. See Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 933–46 (2008) (arguing that judicial interpretations of contested aspects of international criminal law have led to innovations that systematically disadvantage defendants and advantage prosecutors). Robinson argues that this phenomenon stems from the tendency of judges “to assume that the exclusive object and purpose of an ICL enactment is to maximize victim protection,” allowing this issue to override other considerations, including “the text

concept of object and purpose has not, to date, been successfully invoked to protect the rights of defendants, make conviction more difficult, or increase the burden on prosecutors.¹⁰ These outcomes may, in the end, be normatively desirable. But the invocation of a seemingly neutral concept in the service of the same ends suggests that a re-examination of the concept is warranted.

As appealing as “object and purpose” is as a flexible interpretative tool, and as appealing as any of the various approaches to using it may be as a matter of logic or theory, there are several difficulties with it. The concept of object and purpose can do substantial work in a case. It is not typically outcome-determinative, but it can have a significant influence on the outcome of a case. But it is not susceptible to contestation or proof. There is no real way for a defendant to counter the prosecution’s assertion or a court’s conclusion of the object and purpose. In practical terms, it is unprovable at trial and uncontestable on appeal. Coupled with the reality that the object and purpose of most international criminal statutes is taken to be the expansion of liability or the easing of the prosecution’s burden, reliance on the object and purpose in this way amounts to a significant disadvantage for defendants.¹¹ Another issue common to the dominant approach is that it assumes—implicitly or explicitly—that there is a single object and purpose for each treaty.¹² It is, of course, entirely possible—indeed likely—that most statutes have multiple purposes when they are enacted. And in the criminal justice arena, one purpose should be to ensure that defendants are afforded due process while the statute’s other purposes are put into effect.¹³ Finally, the object and purpose of most statutes and treaties in international criminal law is taken to be essentially the same as the

itself.” *Id.* at 934.

10. See Jan Klabbers, *Some Problems regarding the Object and Purpose of Treaties*, 8 FINNISH Y.B. INT’L L. 138, 144–45 (1997).

11. Robinson, *supra* note 9, at 929 (arguing that “victim-focused teleological has the effect of producing interpretations of contested provisions that “run afoul of culpability and fair labeling” in a way that increases liability).

12. Klabbers, *supra* note 10, at 145–46.

13. See, e.g., Leila Nadya Sadat & Jarrod M. Jolly, *Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25’s Rorschach Blot*, 27 LEIDEN J. INT’L L. 755, 768 (2014) (arguing that all provisions of an international criminal law statute should be construed with the intent of protecting due process rights); see also Rome Statute, *supra* note 1.

purpose of the entire project of international criminal justice: to end impunity for atrocities, bring to justice those who previously escaped notice, or provide victims with a forum in which to address the very real harms done to them.¹⁴ This may well be the purpose of international criminal law as a discipline, but that does not mean that it is, or should be, the default object and purpose of every single statute or treaty enacted to address international crimes in every case. That the field has as its purpose the noble goal of ending impunity does not mean that each statute should be interpreted to increase liability or reduce the prosecution's burden.

Several factors make object and purpose a difficult concept to pin down. The Vienna Convention on the Law of Treaties, which includes the term and gives it legal force, does not define the it; nowhere does the Vienna Convention state exactly what object and purpose should mean (or not mean).¹⁵ Making this even more complicated is the fact that the Vienna Convention uses the term "object and purpose" in multiple places to mean apparently different things.¹⁶ There is no consensus definition in cases. Courts frequently invoke the concept to justify their results but almost never even attempt to define what it means.¹⁷ This means that the administration of international criminal justice can depend on judicial interpretations that are not visible, open to contestation, and susceptible to proof.¹⁸ It would be better if these issues were open and addressed intentionally so that the policy choices—between increased victim protection and decreased due process, for

14. See Robinson, *supra* note 9, at 934 (arguing that international judges often seem to "assume that the exclusive object and purpose of an ICL enactment is to maximize victim protection," producing an advantage for prosecutors); Powderly, *Judicial Interpretation*, *supra* note 4, at 18–19 (describing the interpretative process undertaken by judges at the earliest ad hoc tribunals); Sadat & Jolly, *supra* note 13, at 766 (arguing that judges should not "craft extraordinarily rigid understandings of" statutory provisions, especially when those provisions are "open-ended or debatable").

15. VCLT, *supra* note 6, art. 31 (rules of interpretation).

16. See Isabelle Buffard & Karl Zemanek, *Object and Purpose of a Treaty: An Enigma?*, 3 AUSTRIAN REV. INT'L & EUR. L. 311, 322 (1998).

17. See Vassilis P. Tzevelekos, *The Use of Article 31(3)(C) of the VCLT in the Case Law of the ECtHR: An Effective Anti-Fragmentation Tool or a Selective Loophole for the Reinforcement of Human Rights Teleology - Between Evolution and Systemic Integration*, 31 MICH. J. INT'L L. 621, 651 (2010).

18. Klabbbers, *supra* note 10, at 145–46.

example—could be addressed with a full consideration and acknowledgement of the costs and consequences.

In this Article, I argue that it is time for international criminal law to regularize the use of the object and purpose inquiry. Part II begins by examining the problem of treaty interpretation in general. It is inevitably difficult and complex, and my proposals will not entirely eliminate this problem.¹⁹ Part II.B shows why interpretation in the maturing, but not yet fully mature, field of international criminal law is particularly difficult.²⁰ Part III identifies and analyzes several problems with the use of object and purpose in international criminal law.²¹ This analysis of both cases and scholarly approaches narrows the problems my proposals attempt to address. I address four principal issues: whether a treaty can have multiple objects and purposes; whether the term “object and purpose” refers to a unitary concept or two distinct concepts; how to best discern the object and purpose of a treaty; and how influential the object and purpose should be in a case. This analysis sets up my proposals in Part IV. There I suggest three proposals to rationalize the use of object and purpose in international criminal law. First, I argue that courts should identify and accept a canon of discernment so that litigants know and can predict how the issue will be addressed in cases. Second, I argue that an object and purpose determination should have some precedential effect in later cases. Finally, I argue that courts must consider the unique and complex social role of international criminal law in the situations in which it is deployed as it makes an object and purpose determination.²² Taken together, these proposals would go a long way toward making the object and purpose inquiry in cases more predictable, consistent, and productive.

II. TREATY INTERPRETATION AND INTERNATIONAL CRIMINAL LAW

International criminal law is not like domestic criminal law. Statutes are often also international agreements, with all the attendant interpretation problems of both treaties and ordinary criminal law

19. See discussion *infra* Section II.A.

20. See discussion *infra* Section II.B.

21. See discussion *infra* Part III.

22. See discussion *infra* Part IV.

provisions.²³ There are thousands of domestic criminal cases, the processing of which helps to bring to the surface the most difficult issues confronting courts, scholars, and advocates.²⁴ This process also inevitably brings to the surface a range of possible approaches to resolving these issues. There are far fewer cases in international criminal law, fewer opportunities to identify thorny issues, and fewer chances to test various ways to resolve those issues.²⁵ Much more often than in domestic criminal cases, international criminal tribunals are required to resolve issues that are arising for the first time, with scant precedent and little in the way of input from other branches of government.²⁶ In this situation, it is entirely understandable that courts would come to rely on a concept that allows them to resolve issues with a semblance of authority. References to the object and purpose of a treaty or statute can provide the veneer of lawfulness that courts rely on to achieve what looks like justice.²⁷ In practice, courts often treat the object and purpose inquiry as a way of supporting their conclusions.²⁸ It often means what a court wants it to mean, and the meaning is derived with either a quick reference to the founding document of the tribunal or is simply asserted.²⁹ It is not proven or subject to the kind of rigorous testing that most substantial influences on a decision are. This criticism does not mean that the concept is without utility. Object and purpose often operates as a kind of elixir that allows a court to arrive at a reasonable resolution of a contested issue.³⁰ In this Part, I first situate the object and purpose inquiry into the general problem of treaty interpretation and

23. See Caroline Davidson, *How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court*, 91 ST. JOHN'S L. REV. 37 (2017).

24. See Stewart Manley, *Referencing Patterns at the International Criminal Court*, 27 EUR. J. INT'L L. 191, 194 (2016).

25. See Krzysztof J. Pelc, *The Politics of Precedent in International Law: A Social Network Application*, 108 AM. POL. SCI. REV. 547 (2014).

26. See, e.g., Powderly, *Judicial Interpretation*, *supra* note 4, at 18–19 (describing interpretation problems faced by judges at international criminal tribunals).

27. See Maren Heidemann, *Object and Purpose in International Uniform Law Conventions*, 29 EUR. BUS. L. REV. 907, 907–08 (2018).

28. *Id.*

29. See Sondre Torp Helmersen, *Evolutionary Treaty Interpretation: Legality, Semantics and Distinctions*, 6 EUR. J. LEGAL STUD. 161, 166–67 (2013).

30. See Vesna Crnić-Grotić, *Object and Purpose of Treaties in the Vienna Convention on the Law of Treaties*, 7 ASIAN Y.B. INT'L L. 141, 174 (1997).

then turn to the special case of international criminal law.

A. INTERPRETATION AND THE VIENNA CONVENTION ON THE LAW OF TREATIES

From well before the Vienna Convention on the Law of Treaties was even conceived, courts and scholars had long debated how best to interpret international agreements.³¹ These debates even included consideration of the purpose of the treaty.³² The Vienna Convention is now the authoritative international instrument on the drafting, creation, and interpretation of treaties.³³ The Vienna Convention was negotiated largely in the 1950s and 1960s³⁴ and eventually entered into force on January 27, 1980,³⁵ by which time many of the provisions of the treaty had already been recognized as binding rules of customary international law.³⁶ My analysis focuses on Article 31 of the Vienna Convention, which provides that a treaty “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”³⁷

Ian Sinclair, in his comprehensive and authoritative volume on the interpretation of treaties,³⁸ argues that there “are few topics in

31. See, e.g., Jan Klabbers, *Some Problems Regarding the Object and Purpose of Treaties*, in THE LAW OF TREATIES 167, 168–69 (Scott Davidson ed., 2004) [hereinafter *Object and Purpose*] (describing history of the concept of object and purpose in earliest writings about international law and the interpretation of international agreements).

32. See *id.* (recounting scholarly writings from the 16th and 17th Centuries regarding the “purpose” or “spirit” of treaties).

33. VCLT, *supra* note 6, at art. 5 (treaties constituting international organizations and treaties adopted within an international organization).

34. The Vienna Convention was the product of many years of international discussion and negotiations that included several international conferences and draft provisions. For more on the history of the VCTL, see generally, J.S. Stanford, *The Vienna Convention on the Law of Treaties*, 20 TORONTO L.J. 18 (1970) (describing process by which the Vienna Convention was developed and negotiated).

35. VCLT, *supra* note 6.

36. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. III, Introductory Note (reporting that “the U.S. executive branch has accepted that many of the Convention’s provisions reflect binding customary international law” even though the U.S. is not a party to the Vienna Convention).

37. VCLT, *supra* note 6, art. 31 (rules of interpretation).

38. IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 114

international law which have given rise to such extensive doctrinal dispute as the topic of treaty interpretation.”³⁹ Even beyond this inevitable problem, another foundational issue with the concept of “object and purpose” is that it is never defined in the Convention even though it is used in eight different articles.⁴⁰ The failure to define the phrase is perhaps unsurprising, given the different ways that it is used in the Convention. In several places states are forbidden to take actions or positions that would have the effect of undermining the agreement the treaty represents. For example, Article 18 prohibits states from taking actions that would undermine the object and purpose of a treaty after signing and before it goes into effect.⁴¹ Articles 19 and 20 govern reservations and require that they not contradict the object and purpose of the treaty.⁴² What unites these uses is that states are prohibited from attempting to destroy or destabilize their agreement.

In contrast, in Article 31 the term “object and purpose” applies to cases in which parties disagree about what they agreed to.⁴³ Disagreements as to the interpretation of important treaty terms are a common and perhaps inevitable aspect of international law. Sinclair argues, after a survey of cases, that the Vienna Convention amounts to an “economical” set of principles to aid in interpretation.⁴⁴ By this he means that the interpretative principles in the Convention are certainly valid expressions of the “principles of customary international law,” but are not the only interpretative principles that a tribunal might appropriately call on when engaged in interpretation.⁴⁵

(2d ed. 1984).

39. *Id.* at 114.

40. VCLT, *supra* note 6, arts. 18–20, 31, 33, 41, 58, & 60. See David S. Jonas & Thomas N. Saunders, *The Object and Purpose of a Treaty: Three Interpretative Methods*, 43 VAND. J. TRANSNAT'L L. 565, 567, 572–77 (2010) (considering the concept of “object and purpose” in the VCLT and analyzing all eight different mentions of “object and purpose” in the Convention).

41. VCLT, *supra* note 6, art. 18.

42. *Id.* at arts. 19–20.

43. *Id.* at art. 31.

44. SINCLAIR, *supra* note 38, at 153.

45. Jonas & Saunders, *supra* note 40, at 581. Jonas and Saunders argue that a “treaty’s object and purpose is understood through the treaty’s text, but the text is only properly understood when interpreted in light of the treaty’s object and purpose. Neither can be fully understood without the other, raising the obvious question of where to start.”).

Nonetheless, Article 31 of the Vienna Convention is the starting place for treaty interpretation and is critically important in international criminal law.

Another issue with the concept of object and purpose as it is used in the Convention is that there is an inherent circularity in the formulation. Those interpreting treaties are directed to three sources for their interpretation: the terms of the treaty, the context in which those terms are used, and the treaty's object and purpose.⁴⁶ The source of all of this information is principally the treaty itself. Thus, those engaged in interpretation must use the treaty to discern its object and purpose and use this information when construing the treaty. Isabelle Buffard and Karl Zemanek describe this as a "vicious circle" as it is "not possible to be guided in the interpretation of a treaty by its object and purpose when those have to be elucidated first by interpreting the treaty."⁴⁷

International tribunals, including international criminal tribunals, have consistently attempted to discern the object and purpose of the treaties they were interpreting and did so even before the Vienna Convention entered into force.⁴⁸ In the seminal case on the issue, the International Court of Justice ("I.C.J.") considered the validity of reservations to the newly-signed Genocide Convention.⁴⁹ The I.C.J. was asked to issue an advisory opinion on whether states that had lodged reservations to the Genocide Convention could be considered parties to the Convention if other states objected to the reservation.⁵⁰ The I.C.J. considered several factors in reaching its decision, but devoted particular attention to discerning and analyzing the object and purpose of the Genocide Convention.⁵¹ To answer the questions,

46. VCLT, *supra* note 6, art. 31.

47. *See* Buffard & Zemanek, *supra* note 16.

48. *See, e.g.,* SINCLAIR, *supra* note 38, at 130–35 (describing court analyses of object and purpose).

49. *See* Reservations to Convention on Prevention and Punishment of Crime of Genocide, Advisory Opinion, 1951 I.C.J. Rep. 16, 22 (May 28, 1951) [hereinafter Reservations] (describing question the I.C.J. had been asked to consider).

50. *See id.* (finding that it had been asked to consider "whether a contracting State which has made a reservation can, while still maintaining it, be regarded as being a party to the Convention, when there is a divergence of views between the contracting parties concerning this reservation, some accepting the reservation, others refusing to accept it").

51. *Id.* at 54.

it first asserted what the object and purpose of the Genocide Convention was and then described the effect of this on the reservations question.⁵² Important for the purpose of my argument is the weight the I.C.J. gave to the object and purpose. It operated as a kind of guardrail, limiting possible interpretations of the Convention.⁵³

Before moving on, it is important to note that identifying some of the complexities of interpretation is not meant to suggest that interpretative difficulties are always problems in international law. The process of interpreting treaties, even when difficult, is a salutary part of the process of implementing international law if it helps the parties and others affected by the international agreements or statutes to come as close as possible to accomplishing their goals. The purpose of highlighting these complexities is to show that rationalizing the use of the object and purpose inquiry can help in this important process.

B. THE PARTICULAR DIFFICULTIES OF INTERPRETATION IN INTERNATIONAL CRIMINAL LAW

International criminal law presents a unique context for interpretation, making the application of the Vienna Convention particularly difficult. Before the advent of the International Criminal Court, international criminal tribunals were ad hoc creatures, created to address particular situations with specific jurisdictional limits.⁵⁴ The principal legal precedents for the ad hoc tribunals of the 1990s were the decisions of the Nuremberg Tribunals, some fifty years earlier.⁵⁵ This meant, in practical terms, that judges in the

52. *Id.* at 24.

53. *See id.* at 21 (finding that the “object and purpose of the Convention thus limit” the possible interpretations of the Convention).

54. *See, e.g.*, International Criminal Tribunal for the former Yugoslavia S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter *Yugoslavia*]; International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. Doc S/RES/955 (Nov. 8, 1994) [hereinafter *Rwanda*]; Special Court for Sierra Leone, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000) [hereinafter *Sierra Leone*].

55. *See Nuremberg Charter Art VI, supra* note 2 at 922–1025; *see also* Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L CRIM. JUST. 38 (2004) (describing impact of Nuremberg Judgment on the statute of the International Criminal Court).

international criminal tribunals had no realistic choice but to adapt existing precedent to novel situations through the vehicle of interpretation.⁵⁶

These tribunals were faced with several dilemmas. They did not possess “the right to expressly ‘make’ substantive law,” but they were required to address novel criminal conduct.⁵⁷ It was thus unsurprising that they turned to the “only one acceptable or appropriate means available to the bench, namely the interpretation of the applicable law.”⁵⁸ Adapting existing laws to novel phenomena is a perpetual problem, especially in international law, and it has been a problem in international criminal law. In addition to the need to fit old laws to new situations, international criminal tribunals were created using novel means and with unusual missions. For example, a judge of the International Criminal Tribunal for Rwanda described the legal instrument that created the tribunal as “a sui generis international legal instrument,” one “resembling a treaty” but apparently not exactly a treaty.⁵⁹ Judges in international criminal tribunals were called on to apply international law without substantial interpretative guidance. The statutes came with no agreed-upon canons of interpretation, and the field was sufficiently novel that a common law equivalent had not developed. The Vienna Convention’s object and purpose language provided a legal basis for judges to flexibly apply the law even in the absence of other guides.⁶⁰

Another reason that interpretation is particularly complicated in international criminal law is that international criminal law sits at the

56. For example, Joseph Powderly described the task facing the judges at the International Criminal Tribunal for the Former Yugoslavia as follows: “On taking office in the Hague, President Cassese and his colleagues were confronted with a body of law which had lain largely motionless, but for the occasional domestic jolt, since the heady days of Nuremberg.” Powderly, *Judicial Interpretation*, *supra* note 4, at 18–19.

57. *Id.* at 19.

58. *Id.*

59. Prosecutor v. Kanyabashi et al., Appeals Chamber, International Criminal Tribunal for Rwanda, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, ICTR-96-15-A (June 3, 1999), ¶ 15 [hereinafter Kanyabashi].

60. See, e.g., Alain Pellet, *Canons of Interpretation Under the Vienna Convention*, in BETWEEN THE LINES OF THE VIENNA CONVENTION? CANONS AND OTHER PRINCIPLES OF INTERPRETATION IN PUBLIC INTERNATIONAL LAW 1–2 (Klinger et al., eds. 2018) (arguing that judges “may need, if not to create the law de novo, at least to (re) formulate it”).

intersection of human rights law, criminal law, and international humanitarian law.⁶¹ Each of these doctrinal areas has different norms, particularly with respect to the development of new theories of liability. Human rights law is continually dynamic. Human rights principles are commonly adapted to novel situations. It anticipates that existing principles will find new applications as social expectations evolve.⁶² For examples, some of the principles of equality that partially underlay the struggle against colonialism in Africa in the 1950s, 1960s, and 1970s are similar to the principles that underlie the current struggle for the rights of transgender persons.⁶³ To be sure, these are different struggles with particular difficulties and strategies, but many of the basic principles are the same. What is more, human rights law often (though by no means always) is put into effect through the civil courts and in policy circles. Innovation is much easier in these arenas. Human rights law has at its core the goal of protecting human dignity, especially for the most vulnerable members of society.⁶⁴ To fulfill this purpose it must be dynamic; those who abuse vulnerable people should not avoid sanction simply because their abuse was particularly creative.

In contrast to the flexible, principle-based approach of human rights law, criminal law is more specific, predictable, and slower to evolve.⁶⁵ One of the most important human rights requirements of

61. See generally Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L L. 543 (2010) (arguing that international criminal law contains elements of all three areas of law); Soares, *supra* note 2 (connecting human rights law and international criminal law); Bantekas, *supra* note 2 (connecting international humanitarian law and international criminal law).

62. See generally Alastair Mowbray, *The Creativity of the European Court of Human Rights*, 5 HUM. RTS. L. REV. 57, 58 (2005) (describing ways the European Court of Human Rights adapted established principles of human rights to novel problems).

63. See generally JAMI K. TAYLOR ET AL., *THE REMARKABLE RISE OF TRANSGENDER RIGHTS* (Univ. Michigan Press 2018) (describing origins and development of the path toward full recognition of transgender rights as human rights).

64. See generally Philip Alston, *Book Review: Does the Past Matter? On the Origins of Human Rights*, 126 HARV. L. REV. 2043, 2059 (2013) (analyzing various accounts of the origins and core principles of the human rights movement).

65. For a thorough treatment of the aspects of due process that are most important to international criminal law, see Alexander K. A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1100–14 (2011).

any legitimate system of criminal law is that it must respect the due process rights of defendants. This principle is expressed differently in different places, but the basic requirement is present in virtually every system of criminal law. In international criminal law, this requirement is typically enforced through the principle of legality, also known as the principle of *nullem crimen sine lege*: no crime without law. At its core, this principle requires that the allegedly criminal activity was defined as a crime and those who engaged in it were subject to individual prosecution at the time the acts occurred for prosecution to be permissible.⁶⁶ This principle has been employed in all of the modern international criminal tribunals and is included in the statute of the ICC.⁶⁷ As applied in cases, it means that unless the activity for which prosecution is sought was clearly defined as criminal when it occurred, no prosecution is possible. The requirement applies not only to categories of crimes—such as genocide or crimes against humanity—but also to specific theories of liability.⁶⁸ The underlying purpose of this requirement is to ensure that defendants are not held criminally liable for acts that they did not know to be criminal at the time the acts were committed.⁶⁹

International criminal law has much in common with both human rights law and criminal law, but it is not the same as either. It shares with human rights law the purpose of protecting human dignity and the concomitant need for flexibility in the face of creativity in brutality.⁷⁰ It shares with criminal law the requirement that it must guarantee to criminal defendants a fair proceeding, including the needs to be predictable and to have specific requirements for criminal liability.⁷¹ International criminal tribunals, in their struggles to balance these requirements, have often created new standards or

66. See generally Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008) (explicating the origins and contours of the legality principle in international criminal law).

67. *Id.* at 121–28.

68. See STEVEN RATNER ET AL., *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* at 23–24 (3d ed., 2009) (describing the legality principle).

69. See Theodor Meron, *Revival of Customary Humanitarian Law*, 99 AM. J. INT'L L. 817, 822 (2005) (“the point of the legality principle is to protect persons from later prosecution for acts that they reasonably believed to be lawful”).

70. *Id.* at 822.

71. *Id.*

theories of liability and justified them, at least in part, as being consistent with the object and purpose of the field of international criminal law or the statute that created the particular tribunals.⁷² Thus international criminal law presents a particularly difficult instance of the general problem of interpretation in international law.⁷³

III. COMPLEXITIES OF OBJECT AND PURPOSE PROBLEMS

Scholars have long debated the concept of object and purpose, starting even before the Vienna Convention on the Law of Treaties went into force.⁷⁴ There is little scholarly consensus on the concept of object and purpose and its role in treaty interpretation, beyond the basic agreement that the concept is important and should play some role in the interpretative process.⁷⁵ Although a full exploration of scholarly engagement with the concept of object and purpose is beyond the scope of this Article, several issues merit some analysis. First, is it possible for a treaty to have multiple objects and purposes, or must a treaty have only a single object and purpose? Second, scholars disagree about whether object and purpose is a unitary or a divided concept.⁷⁶ That is, might a treaty have both an object and a purpose, different from each other, and both relevant to

72. See Sadat & Jolly, *supra* note 13, at 762–63 (describing possible consequences of object and purpose inquiry in international criminal law cases).

73. Grover, *supra* note 61, at 550 (describing the issues as: “Whereas the fundamental principles underpinning a liberal criminal justice system are those of personal culpability, legality, and fair labelling, international human rights law is focused on state responsibility and harm to the victim. Thus, while the object and purpose of criminal justice favors the strict construction of statutes, the object and purpose of international human rights instruments is invoked to justify generally broad interpretations of crimes to ensure that harms are recognized and remedied, and that, over time, there is progressively greater realization of respect for human dignity and freedom.”). Grover’s description of the problem is entirely consistent with my own analysis. In this Article, however, I argue that international criminal scholarship and advocacy must take an additional step and begin to resolve some of these issues. When international criminal law is considered as an academic discipline or a theoretical concept, noting and describing its inherent conflicts are useful ways to define the boundaries of the discipline. But international criminal law is no longer principally an academic discipline. It is a living system of justice, requiring resolution of some of its inherent contradictions.

74. *Id.* at 545.

75. *Id.*

76. *Id.*

interpretation? If this interpretation is correct, the already complex issue of interpretation is even more complicated. Third, scholars disagree on how best to discern the object and purpose of a treaty. Some argue that the preamble to a treaty will, in most cases, provide the necessary information to determine the object and purpose.⁷⁷ Others argue in favor of an iterative approach, requiring several steps of considering and reconsidering various provisions of the treaty.⁷⁸ Finally, there is no scholarly agreement about when and how the object and purpose should influence decision making. Some argue that object and purpose is independently influential such that it must be considered in every case.⁷⁹ Others argue that object and purpose is a secondary interpretative tool to be used only if other interpretative methods yield an unclear result.⁸⁰ This Part is not to provide a full analysis of any of these problems. Instead, it surfaces and analyzes these issues to better illuminate why the problem of object and purpose is so difficult and to lay the analytical groundwork for Part IV, which argues in favor of several proposals to rationalize the use of object and purpose in international criminal law.⁸¹

A. CAN A TREATY HAVE MULTIPLE OBJECTS AND PURPOSES?

Can a treaty have more than one object and purpose? The Vienna Convention states that the "object and purpose" is relevant to interpretation, but it does not specify if a treaty could have more than one.⁸² At first glance, there is no reason why a treaty should not have multiple objects and purposes. It is perfectly plausible for a treaty to have dual objectives, for example to promote commerce and reduce disputes.⁸³ Ian Sinclair, in his treatise on treaty interpretation, argues this issue is perhaps inevitable. He argues that "most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes."⁸⁴ Thus, he argues, it is

77. See generally Max H. Hulme, *Preamble in Treaty Interpretation*, 164 U. PA. L. REV. 1281, 1287 (2016) (exploring the uses of a utility of preambles in treaty interpretation).

78. *Id.* at 1304.

79. *Id.* at 1300.

80. *Id.* at 1304.

81. See discussion *infra* Part IV.

82. See Hulme, *supra* note 77, at 1300.

83. See *id.* at 1304.

84. SINCLAIR, *supra* note 38, at 130.

possible that a court would conclude that the same treaty had two or more objects and purposes.⁸⁵

Consider an example from the decision of the International Court of Justice regarding the Convention on Prevention and Punishment of Genocide, discussed briefly above.⁸⁶ There the I.C.J. was considering whether reservations that were contrary to the object and purpose of the Genocide Convention were permissible.⁸⁷ The I.C.J. analyzed the treaty in an attempt to identify its object and purpose and eventually concluded that there were multiple objects and purposes.⁸⁸ First, according to the I.C.J., was the “intention” of the contracting parties to “condemn and punish genocide” as a crime.⁸⁹ The I.C.J. then stated that the “objects” of the Convention must be considered, and it identified two such objects.⁹⁰ The first was to “safeguard the very existence of certain human groups” and the second was to “confirm and endorse the most elementary principles of morality.”⁹¹ Finally, the I.C.J. concluded that another object of the treaty was “that as many States as possible should participate” in the treaty.⁹² The I.C.J. did not discuss how it identified multiple objects or whether there was difference between “object” and “purpose.”⁹³ It is nonetheless noteworthy that the I.C.J. found multiple objects and purposes and attempted to give weight to all of them in its decision. Similarly, in the I.C.J.’s Whaling in the Antarctic case, one of the

85. This conclusion is consistent with that reached by other scholars. For example, Mark E. Villiger concludes that a “treaty may indeed have many objects and purposes.” Mark E. Villiger, *The Rules on Interpretation: Misgivings, Misunderstandings, Miscarriage? The “Crucible” Intended by the International Law Commission*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 105, 107 (2011). Similarly, Ulf Linderfalk writes that “normally” more than one object and purpose “is conferred on a treaty by the parties.” ULF LINDERFALK, *ON THE INTERPRETATION OF TREATIES* 211–12 (2007).

86. See Reservations, *supra* note 49, at 23 (addressing identical issues that have arisen since the Vienna Convention went into force).

87. See *id.*

88. See *id.*

89. See *id.* at 18.

90. See *id.*

91. See *id.* at 18–19.

92. See *id.* at 24.

93. For a different view of this issue, see Jonas & Saunders, *supra* note 40, at 579–80 (arguing that the I.C.J. identified one purpose and two objects). I argue that the best reading of the opinion is that the I.C.J. concludes that it is entirely possible for a treaty to have multiple objects and purposes.

dissenting opinions considered the object and purpose of the Whaling Convention.⁹⁴ The judge concluded that the Whaling Convention had "twin purposes," one of which was to sustain the stocks of whales, and the other was to ensure "the viability of the whaling industry."⁹⁵ Scholars have reached a similar conclusion.⁹⁶

The structure of the I.C.J.'s analysis in these cases suggests two important conclusions. First is the general notion that there can be more than one object and purpose.⁹⁷ In the genocide case, the I.C.J. found that the Genocide Convention's object of safeguarding the existence of all groups was to be accomplished while also promoting the principles of morality.⁹⁸ The second conclusion is that these objects and purposes can modify or even constrain each other.⁹⁹ This idea is borne out by the language in the genocide opinion quoted above.¹⁰⁰ The result of the decision was consistent with all of the identified objects and purposes.¹⁰¹ This suggest that even objects and purposes that are not obviously in harmony with each other must be given effect (or at least not violated) by the court's interpretation of a contested provision.¹⁰² And it is even more clear in the whaling case, in which Judge Owada found that competing purposes can both find expression in a treaty.¹⁰³

In the context of international criminal law, this perhaps inevitable interpretation problem becomes particularly difficult, and the issue gets to the heart of an important problem. One of the principal

94. Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Judgement, 2014 I.C.J. 226, 247.

95. Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Dissenting Opinion of Judge Owada, 2014 I.C.J. 226, 303, ¶ 9 (Mar. 31).

96. See, e.g., Dino Kritsiotis, *The Object and Purpose of a Treaty's Object and Purpose*, in CONCEPTUAL AND CONTEXTUAL PERSPECTIVES ON THE MODERN LAW OF TREATIES 237, 239 (Michael J. Bowman & Dino Kritsiotis, eds., 2018) (arguing, after survey of international cases, that a "treaty's object and purpose can therefore be more than one thing at any given moment in time").

97. See *id.*

98. See Reservations, *supra* note 49, at 23.

99. See *id.*

100. See *id.*

101. Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Judgement, 2014 I.C.J. 226, 247.

102. See *id.*

103. See *id.*

attributes of any system of criminal justice is predictability.¹⁰⁴ Victims, wrongdoers, and communities affected by international crimes must know the boundaries of legal and illegal behavior. These boundaries are still in the process of being defined in international criminal law, but clarity and precision remain important even in a developing field. Litigants frequently disagree about the meaning of a treaty or statutory provision, leaving it to judges to settle the dispute.¹⁰⁵ But when judges are free to determine that a treaty has a particular object and purpose in one case and a different object and purpose in a different case, or even that it has multiple objects and purposes in the same case, statutes no longer have the predictability and certainty essential to a system of criminal justice.¹⁰⁶

One way to address this problem comes from a seminal case from the International Criminal Tribunal for the Former Yugoslavia (“I.C.T.Y.”). In a procedural decision in *Prosecutor vs. Tadic*, the I.C.T.Y. considered whether the tribunal had been properly created.¹⁰⁷ One of the key issues was whether the tribunal had been “established by law,” a key requirement of international tribunals and criminal courts alike.¹⁰⁸ The I.C.T.Y. concluded that the “established by law requirement had two meanings.¹⁰⁹ First, the tribunal had to have been created pursuant to an appropriate process by a body with the power to create such a tribunal.¹¹⁰ Second, the tribunal must “provide all the guarantees of fairness, justice, and even-handedness” required of international tribunals under human rights law.¹¹¹ What makes this case relevant to my argument is the way the I.C.T.Y. identified two separate but equally important requirements, both of which must be followed for the tribunal to be legal. The second requirement—the due process guarantees—is particularly noteworthy because that obligation must be present in addition to any

104. See Greenawalt, *supra* note 65, at 1083.

105. See *id.*

106. See *id.* at 1085.

107. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 9 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

108. See *id.* ¶¶ 26–27.

109. See *id.* ¶ 45.

110. See *id.* ¶ 44.

111. See *id.* ¶ 45.

other requirements.¹¹² Thus, it is possible for a treaty to have multiple objects and purposes, none of which may be ignored. To illustrate the implications of this, consider other rulings from the Tadic case.¹¹³ For example, in the same opinion, the I.C.T.Y. states that a particular construction of the treaty creating the tribunal was consistent with its object and purpose, which the court stated was “not to leave unpunished any person guilty” of serious violations of international criminal law.¹¹⁴ But, given the logic of the opinion, this purpose was necessarily constrained by the due process requirement.¹¹⁵ Any construction of the contested provisions of the treaty must satisfy both requirements.¹¹⁶ The due process requirement is a consistent prerequisite; other objects might operate alongside it, but both must be possible for a particular construction of the treaty to comply with the law.¹¹⁷

This construction is consistent with the approach taken by the International Criminal Tribunal for Rwanda (“I.C.T.R.”) in *Prosecutor v. Bagosora*.¹¹⁸ There the prosecutor argued that the Court should permit the prosecutor to appeal against a decision by a single judge who had dismissed the indictment against Bagosora and many others.¹¹⁹ The prosecutor maintained that dismissing the indictment was an impediment to the fulfillment of the purpose of the I.C.T.R., namely the effort to bring to justice those most responsible for the 1994 genocide.¹²⁰ The Appeals Chamber held that the mission of the tribunal, and the prosecutor’s mission, was not sufficient justification to depart from the established rules of procedure in the case.¹²¹ The Court held that “[t]he logical

112. *See id.*

113. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 26–27 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

114. *See id.* ¶ 92.

115. *See id.* ¶¶ 26–27.

116. *See id.*

117. *See id.*

118. *Prosecutor v. Bagosora, et al.*, ICTR-98-37-A, Decision on the Admissibility of the Prosecutor’s Appeal from the Decision of a Confirming Judge Dismissing an Indictment Against Theoneste Bagosora and 28 Others, (International Criminal Tribunal for Rwanda, June 8, 1998).

119. *See id.* ¶¶ 5–9.

120. *See id.* ¶ 14.

121. *See id.* ¶¶ 31–32.

consequence of the interpretation advanced would be that where the Trial or Appeals Chamber refused to grant any relief requested by the Prosecutor," the Court would be obstructing the mandate of the prosecutor and thereby thwarting the purpose of the tribunal.¹²² The Court held that the prosecutor's "arguments for a teleological interpretation of the Statute, therefore, do not support such a broad interpretation of" the contested provision of the statute.¹²³ The import of this is that the Appeals Chamber put limits on the prosecution even while acknowledging the importance of the prosecutor's mission and its centrality to the purpose of the statute.¹²⁴ Put differently, the I.C.T.R. ruled that denial of a request from the prosecutor cannot be equated with failure to fulfill the object and purpose of the statute.¹²⁵ The concept of object and purpose is more nuanced than simply acceding to prosecutorial requests; the requirement that the Court rule in a way that is consistent with the law had to be observed even when doing so might have made the prosecutor's fulfillment of the tribunal's purpose more complicated.

B. OBJECT AND PURPOSE: UNITARY OR DISTINCT?

One of the difficulties with the concept of object and purpose is determining whether the phrase refers to one idea or two. Put differently, is there both an object and a purpose for every treaty, or does the phrase refer to a unitary concept? Scholars and advocates have approached this question in different ways. In their comprehensive examination of the issue, scholars Isabelle Buffard and Karl Zemanek argue that there are two main schools of thought about the concept of object and purpose.¹²⁶ Some scholars argue that it is a unitary concept; that is, a single idea described by multiple words.¹²⁷ Other scholars argue that there are two distinct ideas, an

122. *See id.* ¶ 32.

123. *See id.* ¶ 32.

124. *See* Catherine Cissé, *The End of a Culture of Impunity, in Rwanda*, 1 Y.B. INT'L HUMANITARIAN L. 161, 174 (1998) (arguing that Bagosora placed limits on the power of the prosecutor to use a teleological interpretation to override other objectives).

125. *See id.* at 175.

126. *See* Buffard & Zemanek, *supra* note 16, at 322–30 (describing scholarly and doctrinal divisions in understanding of object and purpose).

127. *See id.*

object and a purpose, separate from each other.¹²⁸ Buffard and Zemanek argue that scholars in the Anglo-American and German-Austrian traditions commonly assume that object and purpose is unitary concept.¹²⁹ For these scholars, the concept of object and purpose is a “simple reference to traditional teleological interpretation,”¹³⁰ which has as its objective giving effect to the intentions of the parties.¹³¹ These intentions are principally found in the text of the treaty, of course, but the intentions of the parties also include the underlying context in which the parties entered into the treaty.¹³² In contrast, Buffard and Zemanek argue that scholars in the French tradition use object and purpose as distinct notions.¹³³ For these scholars, the purpose of a treaty is the “general result” they wish to achieve through the treaty.¹³⁴ The object of the treaty includes the rights and obligations created by the provisions of the treaty.¹³⁵ These scholars locate the object of the treaty in its own terms, but the purpose of the treaty is more difficult to discern and is inevitably less objective.¹³⁶

Other scholars have reached largely the same conclusion, albeit by following a different path. David S. Jonas and Thomas N. Saunders, in their thorough analysis of the various uses of object and purpose in the Vienna Convention, conclude that it refers to a unitary concept.¹³⁷ Jonas and Saunders approach the question semantically, asking how each word is defined.¹³⁸ They conclude that because each word is defined by reference to the other word, the phrase refers to a single concept.¹³⁹

128. See LINDERFALK, *supra* note 85, at 207–10 (concluding that the Vienna Convention’s reference to “object and purpose” is meant to signify one concept, not two).

129. *See id.*

130. *See* Buffard & Zemanek, *supra* note 16, at 323.

131. *See id.* 323–24.

132. *See id.* at 324.

133. *See id.* at 325–27.

134. *See id.* at 326.

135. *See id.*

136. *See id.*

137. *See* Jonas & Saunders, *supra* note 40, at 578 (concluding that “object and purpose appears to be a unitary concept referring to the goals that the drafters of the treaty hoped to achieve”).

138. *See id.*

139. *See id.*

In the end, my conclusion is that the unitary theory scholars have the better of the argument on logical grounds. The point of treaty interpretation is to give effect to the intent of the parties as expressed in the treaty.¹⁴⁰ Identifying a purpose that is separate and apart from the object of the treaty is a step away from coherence.¹⁴¹ What is more, these debates, as abstruse and academic as they appear, have some real-world importance. The administrability of legal rules is important to the success of any legal system.¹⁴² Judges must be able to apply rules efficiently, producing results that are credible to participants and other stakeholders. Administrable rules are also likely to be more predictable, an important quality of a legitimate system of criminal law.¹⁴³ This is particularly important in international criminal tribunals, which is unmoored from the indicia of legitimacy that bolster typical legal systems.¹⁴⁴ International criminal tribunals do not come from democratic deliberations or the exercise of sovereign power. They are the product of international agreements.¹⁴⁵ Legitimacy, credibility, and predictability are all vitally important to the success of international criminal tribunals. Thus, if object and purpose are distinct concepts, then the task of interpretation will become even more difficult than it is in ordinary cases. Litigants and judges would be required to discern not only the specific rights and obligations the parties intended to create when enacting the treaty, they would be forced to identify a subjective general result that the parties likely intended to create. In contrast, if object and purpose is understood to be a unitary concept, litigants and courts have a simpler—but by no means easy—task. They must use the treaty's terms to determine the intention of the parties when enacting the treaty, but nothing more than that.

C. DISCERNING THE OBJECT AND PURPOSE

The Vienna Convention instructs those seeking to interpret a treaty that it must be interpreted in light of its object and purpose but gives

140. *See id.*

141. *See id.*

142. *See id.*

143. *See id.*

144. *See generally* N.P. Adams, *Institutional Legitimacy*, 26 J. POL. PHIL. 84 (2018) (analyzing conceptions of institutional legitimacy).

145. *See, e.g.,* Rome Statute, *supra* note 1.

few clues as to how to discern it.¹⁴⁶ Scholars and courts have relied on different methods, adding to the difficulties of rationalizing the use of object and purpose in cases. There have been three principal approaches to the problem. Some courts and scholars have looked primarily to the preamble of the treaty to determine its object and purpose.¹⁴⁷ This approach is appealing because the preamble is known to all and less subjective than other approaches. But many treaties do not state their object and purpose clearly in the preamble, making this approach of limited utility.¹⁴⁸ Other courts and scholars look to the text and structure of the agreement itself to determine its object and purpose.¹⁴⁹ Again, this approach has the salutary feature of transparency—the text of a treaty is evident for all to read—but is of less utility when the text itself is inconclusive. Finally, some courts look to the circumstances or context of the creation of the agreement.¹⁵⁰ This approach brings into the interpretative process considerations that are outside of the treaty itself.¹⁵¹ Before moving on, it is important to note that courts combine these methods of interpretation. By treating these methods of interpretation as different categories and considering them separately, I do not mean to suggest that they represent scientific demarcations. Nonetheless, it is useful to distinguish them for analysis.

Many modern treaties have preambles that read almost like a mission statement, indicating the aims of the treaty. Other treaties are less clear. Regardless, scholars and courts have suggested that the preamble is the best place to look to determine the object and purpose.¹⁵²

146. See VCLT, *supra* note 6, art. 31 (identifying “object and purpose” as necessary to interpretation but providing no guidance for determining what it is).

147. See generally Hulme, *supra* note 77.

148. See Shai Dothan, *The Three Traditional Approaches to Treaty Interpretation: A Current Application to the European Court of Human Rights*, 42 *FORDHAM INT’L L. J.* 765, 766 (2019) (discussing the three different legal approaches of object and purpose).

149. See *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment, 2002 I.C.J. 625, ¶¶ 50–51 (Dec. 17) (describing analytical approach).

150. See *id.*

151. See *id.*

152. *Case Concerning Rights of Nationals of the United States of America in Morocco (France v. USA)*, Reports, 1952 I.C.J., 176–213, 197.

Other courts have looked to the structure of the treaty to determine its object and purpose. In the Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan, the I.C.J. considered whether Indonesia or Malaysia could claim sovereignty over two islands in the Pacific.¹⁵³ The Court concluded that the object and purpose of the treaty was to be found in the preamble.¹⁵⁴ But the Court went further and examined the structure of the treaty to confirm the object and purpose.¹⁵⁵ The Court examined multiple sections of the agreement to determine how the contested provision fit into the agreement as a whole.¹⁵⁶ The object and purpose therefore did not come from one single provision but from the logic of the entire treaty.

In other cases, courts have focused on the text of the agreement and the circumstances around its creation to determine the object and purpose. For example in the Fisheries Jurisdiction Case, the I.C.J. was asked to determine the meaning of an agreement between the United Kingdom and Iceland.¹⁵⁷ The Court examined “the whole set of circumstances” to determine the “object and purpose” of the agreement.¹⁵⁸ This meant looking at the “text of the agreement” and “the history of the negotiations” that produced the agreement.¹⁵⁹

Courts do not always use the same unit of analysis when considering the object and purpose. Put differently, courts do not always attempt to determine the object and purpose of the same thing.¹⁶⁰ The text of the Vienna Convention suggests that it applies at the level of the treaty.¹⁶¹ But some courts and scholars appear to focus their attention on different units.¹⁶² Some focus on a particular

153. See *Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia)*, Judgment, 2002 I.C.J. 625, ¶¶ 50–51 (Dec. 17). (defining subject of the litigation).

154. See *id.* at ¶ 50.

155. See *id.* at ¶ 51 (stating that the Court’s conclusions as to the object and purpose were found in the preamble and in the agreement’s “very scheme”).

156. See *id.*

157. See *Fisheries Jurisdiction (U.K. v. Ice.)*, Judgment, 1973 I.C.J. 3 ¶ 32 (Feb. 2).

158. See *id.*

159. See *id.*

160. See PANOS MERKOURIS & DANIEL PEAT, FINAL REPORT: THE INTERPRETATIVE PRACTICE OF THE PCIJ/ICJ (2020).

161. VCLT, *supra* note 6, art. 31.

162. See *id.*

article or provision within a treaty or statute.¹⁶³ Others indeed discuss the entire treaty and focus at that level.¹⁶⁴ And some others—particularly in international criminal law—appear to speak of the object and purpose of an entire legal discipline the purpose for the existence of an entire tribunal.¹⁶⁵ This confusion contributes to some of the problems I have identified. It is possible for a body of law to or legal discipline—such as international criminal law—to have objects and purposes that are in tension with each other. This is particularly true when that body of law is an amalgam of three distinct disciplines, with different histories and aims. Thus, it should come as no surprise that their objects and purposes might be in conflict. For example, the human rights project of ending impunity for atrocities, as implemented through international criminal law, might support the interpretation of a provision that expands liability for crimes far beyond those who physically perpetrated them or even knew about them.¹⁶⁶ But an international criminal law statute is still a criminal statute, which must, to be consistent with the law, have the protection of due process for defendants as one of its objects and purposes.¹⁶⁷ Or, when considering the specific provisions of a particular article, a court could reasonable find that the article had a different object and purpose—when determined based on its text and structure—from the object and purpose determined by the preamble or extra-treaty contextual materials. Missing is any consensus on how the object and purpose should be determined and what the appropriate unit of analysis is.

163. For example, in *Prosecutor v. Lubanga*, the ICC considered an issue relating to time limits on filing periods. The Court held that the object and purpose of one provision of one regulation was to “establish a clear system to calculate all time-limits in any proceedings before the Court.” *Prosecutor v. Lubanga*, Decision on Prosecution’s Response to Thomas Lubanga Dyilo’s 21 September 2006 Request for Leave to Appeal, p.3, Pre-Trial Chamber I, ICC-01/04-01/16 (Sept. 25, 2006).

164. *See id.*

165. *See, e.g.,* Situation in the Democratic Republic of Congo, Appeals Chamber, ICC-01/04, Judgment on the Prosecutor’s Application for Extraordinary Review, ¶ 37, (July 13, 2006) (stating that the “self-evident purpose of the Statute is to make internationally punishable the heinous crimes specified therein in accordance with the principles and the procedure institutionalized thereby”).

166. *See generally* Danner & Martinez, *supra* note 5, at 102–03 (outlining legal theories to hold accountable individuals who were not the physical perpetrators of crimes).

167. *See generally id.*

D. THE INFLUENCE OF OBJECT AND PURPOSE IN CASES

One of the persistent problems in treaty interpretation is determining how much influence the object and purpose should exert in any case. The Vienna Convention provides three factors that should guide interpretation: “the ordinary meaning” of the terms of the treaty, their “context,” and the treaty’s “object and purpose.”¹⁶⁸ It does not indicate how these terms relate to each other. There is an inherent order of operations problem with Article 31 requiring judges to determine, for example, whether to consider the context or object and purpose only after determining whether the ordinary meaning of the treaty’s terms is vague or ambiguous, or consider all three factors together.

Some scholars argue that the object and purpose inquiry must come only as a supplement to the interpretation of the terms. For example, Ulf Linderfalk argues that the object and purpose inquiry “is always a second step in the interpretation process.”¹⁶⁹ For Linderfalk the utility of the object and purpose inquiry is to clarify the meaning of the treaty, not to provide it.¹⁷⁰ Other scholars argue that the object and purpose inquiry should carry independent weight. For example, Leila Sadat and Jarrod Jolly argue that, especially in the area of international criminal law, provisions of a treaty “should be construed to be faithful to the object and purpose of the ICC statute” while also respecting the principle of legality.¹⁷¹

The International Criminal Court has held that the Vienna Convention’s rule on interpretation includes several ingredients that must all be considered together, not separately or in serial order.¹⁷²

168. VCLT, *supra* note 6, art. 31.

169. See LINDERFALK, *supra* note 85, at 203.

170. See *id.* (“The ordinary meaning of a treaty provision is vague, using the object and purpose will make it more precise. Where the ordinary meaning is ambiguous, using the object and purpose will help to determine which one of two possible meanings is correct.”).

171. Sadat & Jolly, *supra* note 13, at 764.

172. This is not to suggest that the ICC’s judges are unanimous on the issue. The issue was whether the teleological interpretation of the ICC statute, which purportedly supported an expansive view of liability, was appropriate. Prosecutor v. Ngudjolo Chui, ICC-01/04-02/12-4, Judgement Pursuant to Article 74 of the Statute, Trial Chamber II, ¶ 18, (Dec. 18, 2012) (Wyngaert, concurring) (writing that the teleological interpretation of one provision of the statute could not override the clear command of another provision of the statute that prohibited, in her view,

Referring to Article 31, the ICC in *Prosecutor v. Katanga* required that “the various ingredients—the ordinary meaning, the context, and the object and purpose—be considered together in good faith.”¹⁷³ These factors are supposed to be equally influential in cases.¹⁷⁴ Put differently, the Vienna Convention’s approach “does not establish any hierarchical or chronological order in which those various ingredients are to be examined and then applied . . . [instead] it enumerates various elements which must be simultaneously taken into account in a single process of interpretation.”¹⁷⁵

IV. TOWARD A RATIONAL USE OF OBJECT AND PURPOSE

Problems of interpretation are an inevitable aspect of international law, and they are particularly vexing in international criminal law. The ways that courts have used the concept of object and purpose in international criminal cases is understandable and perhaps even necessary, as discussed above. Legal scholars are equally divided on how to define object and purpose. Some scholars argue that object and purpose means the import of all of the provisions of a treaty or statute, taken together. This approach attempts to distill a meaning from the sum total of all treaty provisions. Other scholars argue that the object and purpose of a treaty is the intention of the treaty, or its telos.¹⁷⁶ On this approach, the inquiry often centers on the preamble to the treaty (or statute) to discern the central purpose of the document.¹⁷⁷ The inquiry is at a high level of generality and requires little research.

The time has come for a more rational deployment of object and purpose, one that will comport more closely with the norms of criminal law. In this Part, I advance three main arguments. First, I argue that there should be an accepted and rational canon of

an expansion of liability).

173. *Prosecutor v. Katanga*, ICC-01/04-01/07, Judgment Pursuant to Article 74 of the Statute, Trial Chamber II, ¶ 45 (Mar. 7, 2014).

174. *See id.* ¶ 45.

175. *See id.*

176. Ulf Linderfalk, *On the Meaning of the Object and Purpose Criterion, in the Context of the Vienna Convention on the Law of Treaties* 72 *NORDIC J. INT'L L.* 429, 434 (2003) (describing the telos of a treaty).

177. *Id.*

discerning the object and purpose in cases. The prosecution and defense need a predictable approach to determining what the object and purpose of a statute is. Second, I argue that the time has come for courts to treat object and purpose as a consistent concept with binding effect, not a notion that each court is free to find for itself in every case. Finally, I argue that some attention to the social role of international criminal law would improve debates about object and purpose.

Before moving on, a short caveat is in order. It is likely impossible to fully rationalize the use of the object and purpose inquiry in judicial decisions. It provides what is likely necessary flexibility, allowing judges to adhere as closely to existing law as possible while applying it to new or highly unusual circumstances. Turning the object and purpose inquiry into a mechanical exercise is not the goal. But even accepting that interpretation is always messy and that flexibility is desirable, it should be possible to move closer to an approach that is administrable for judges, relatively predictable for defendants, and subject to rigorous argument and contestation by both parties.

A. AN ACCEPTED CANON OF DISCERNMENT

Courts and scholars do not agree on how best to determine what the object and purpose of a treaty is. Based on the text of the Vienna Convention, there appear to be multiple distinct but important analytical steps in the inquiry. The first is to determine whether, given the dispute the court is attempting to resolve, it is necessary to consider the object and purpose at all.¹⁷⁸ The structure of Article 31 of the Vienna Convention suggests that the object and purpose of a treaty is a supplemental interpretative method. It says that those attempting to interpret a treaty should resort to the object and purpose only when it is not possible to resolve the issue based on the “ordinary meaning” of the terms of the treaty. In practice, courts often appear to invoke the object and purpose of a treaty to bolster their interpretation of contested provisions of a treaty.¹⁷⁹

178. VCLT, *supra* note 6, art. 31 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”).

179. See Sadat & Jolly, *supra* note 13, at 763 (describing process by which the

The next step, which often takes place implicitly, is for the court to determine what treaty or provision of the treaty it is relying on to determine the object and purpose. Put differently, courts must determine the object and purpose of something. What, exactly, is the thing whose object and purpose must be determined? For example, some courts identify and rely on the object and purpose of international criminal law or human rights law.¹⁸⁰ Some courts look to a treaty or an area of law—such as the Genocide Convention, or the concept of crimes against humanity—and identify the object and purpose of that document or subject area.¹⁸¹ Other courts look to the specific treaty (such as the statute creating or governing an international criminal tribunal) and determine its object and purpose.¹⁸² Still others look to particular provisions of a statute to determine the object and purpose.¹⁸³ Selecting the appropriate unit of analysis is, of course, critical to any consistent application of the Vienna Convention. The Vienna Convention itself states that “a treaty shall be interpreted . . . in the light of its object and purpose,” which supports the argument that the entire treaty—not a particular provision, and not the entire legal subject area to which that treaty belongs—is the appropriate unit of analysis.

Next courts must determine, to the extent possible, what the object and purpose of the treaty is. Again, the Vienna Convention provides scant guidance as to how to make this determination. The Vienna Convention does not specify what would constitute relevant or

object and purpose analysis can expand the reach of international criminal law at the expense of the rights of defendants).

180. *See generally* Danner & Martinez, *supra* note 5, at 102–03 (noting that the ICTY concluded that “the object and purpose of the ICTY Statute is to provide a criminal forum for the punishment of all those who have perpetrated especially serious violations of the victims’ human rights, since all of the crimes within international criminal law constitute serious violations of international human rights law”).

181. *See generally* Reservations, *supra* note 49, at 15 (examining object and purpose of Genocide Convention).

182. *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 9 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (interpreting provisions of the statute based on the object and purpose of the constitutive document of the tribunal).

183. *See, e.g.*, Prosecutor v. Delalic, et al., Case No. IT-96-21-A, Judgment, Appeals Chamber, ¶¶ 57–58 (Int’l Crim. Trib. For the Former Yugoslavia Feb. 20, 2001) (interpreting provision of the statute based on the object and purpose of that specific provision).

sufficient evidence of a treaty's object and purpose. What is more, the Vienna Convention does not give any guidance as to how specific the object and purpose should be. There is no guidance as to the appropriate level of generality or specificity. The object and purpose of a treaty might be to achieve some very specific or particular ends, or it might be to do something as general as the promotion of peace or the elimination of discrimination.

The process that I have outlined above is consistent with an approach taken by the I.C.J. in a case that is perhaps most logically similar to the interpretative issues that international criminal tribunals routinely face.¹⁸⁴ In an advisory opinion considering the legality of Kosovo's declaration of independence in 2010, the Court considered the object and purpose of several Security Council resolutions pertaining to the situation in Kosovo.¹⁸⁵ The Court began its analysis by referring to the interpretation rules laid out in the Vienna Convention, but also noted that the interpretation of Security Council resolutions posed a special problem and called for a somewhat modified method of interpretation.¹⁸⁶ The Court noted that because Security Council resolutions are voted upon and appear as the output of a single body, they also represent the product of diplomatic negotiations.¹⁸⁷ Thus, the determination of the object and purpose of such resolutions calls for the consideration of additional materials to put the resolutions in proper context and identify what, exactly, was meant by the resolution.¹⁸⁸ The Court then goes on to consider the text of the resolutions, statements by those negotiating

184. *See generally* Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 210 I.C.J. 403, ¶ 1 (July 22, 2010) (analyzing whether Kosovo's declaration of independence was consistent with several resolutions of the U.N. Security Council and other international legal requirements).

185. *See id.* ¶¶ 94–100.

186. *See id.* ¶ 94 (noting that “differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also requires that other factors [beyond those described in the Vienna Convention] be taken into account”).

187. *See id.*

188. *See id.* (holding that the interpretation of Security Council resolutions “may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions”).

them, and the ways the parties had behaved after their passage.¹⁸⁹

What makes this example particularly instructive is that it accounts for the very origins of the resolutions themselves. The Security Council's resolutions regarding Kosovo did not arise out of nowhere; they were the result of the Security Council becoming aware of the conditions on the ground in Kosovo and the advocacy of states, non-governmental organizations, and others.¹⁹⁰ Thus, the Court took a more holistic approach to interpretation than it might have done if it were interpreting an ordinary treaty.¹⁹¹ Importantly however, the Court did not abandon all rigor and transparency when it expanded its interpretative toolkit. As described above, the Court stated its reasons for moving beyond the factors listed in Article 31 of the Vienna Convention, made clear what it would be considering and how, and indicated clearly how each factor weighed in its analysis.¹⁹²

Two decisions from the International Criminal Tribunal for the Former Yugoslavia ("I.C.T.Y.") further illustrate the point. In *Prosecutor v. Tadic*, the I.C.T.Y. issued important decisions on several aspects of international law and procedure. In a decision relatively early in the case, the Court considered defense arguments challenging the creation and jurisdiction of the tribunal.¹⁹³ In making its decision, the Court analyzed whether the defense and prosecution's suggested interpretations of the statute were consistent with the object and purpose of the statute.¹⁹⁴ To do this, the Court closely analyzed the Security Council resolution that created the tribunal, of course, but also considered a number of other agreements, other Security Council resolutions, and the recent history of the conflict in the former Yugoslavia.¹⁹⁵ The Court's attempt to discern the object and purpose of the statute was sensitive to the full context of the agreement, which included both the text

189. *See id.* ¶¶ 95–99 (analyzing various factors to determine object and purpose).

190. *See id.* ¶ 37.

191. *See id.* ¶ 94.

192. *See id.*

193. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

194. *See id.* ¶¶ 72–78.

195. *See id.* ¶¶ 72–76.

itself and the geopolitical reasons the tribunal was created in the first place.¹⁹⁶ The Court then explicitly and transparently linked the object and purpose of the statute to its attempt to interpret the meaning of the particular jurisdictional provision at issue.¹⁹⁷

Contrast this with the Court's treatment of the same issue in the ultimate judgment in the case.¹⁹⁸ There the Court was much less careful and transparent in its analysis of object and purpose. First, the Court considered the object and purpose of Convention Relative to the Protection of Civilian Persons in Time of War to help it interpret an important issue in the I.C.T.Y. statute that was based on the Convention.¹⁹⁹ The Court identified the object and purpose of the Geneva Convention, but did not provide the same level of linkage between the object and purpose of the entire Convention and the particular statutory provision.²⁰⁰ More central to my argument is the Court's consideration of the object and purpose of the statute when interpreting a separate provision.²⁰¹ Again, the Court merely states the object and purpose of the statute and then moves to consider the specific provision.²⁰² Two issues make the examples from the Tadic Judgment particularly salient. First, the Court's lack of engagement with how the object and purpose of a statute informs the meaning of particular provisions of the statute.²⁰³ There are, of course, good reasons to believe that the object and purpose of the statute would be relevant to the meaning of particular provisions.²⁰⁴ But by not engaging with the issue, the decision lacks transparency and makes it more difficult for the litigants in future cases to make coherent arguments. Second, the treatment of the issue transforms the object and purpose issue into a convenient vehicle for judges to support

196. *See id.* ¶¶ 72–78.

197. *See id.* ¶ 78. (finding that the Security Council's purpose for enacting the statute illuminated the meaning of particular provisions of the statute).

198. *See id.*

199. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction ¶¶ 164–66 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

200. *See id.*

201. *See id.* ¶¶ 253–54.

202. *See id.* ¶¶ 164–66.

203. *See id.* ¶¶ 253–54.

204. *See id.*

their own conclusions.²⁰⁵ By asserting the object and purpose without explicitly reasoning through why it supports or compels a particular interpretation, the Court makes it impossible to contest.²⁰⁶ In the Tadic Judgment, the Court accepts that the object and purpose of the statute is to ensure that all persons guilty of serious violations of international humanitarian law are punished.²⁰⁷ This general purpose operates as a one-way ratchet, supporting increased liability without any safeguards or logical limits. Without an accepted set of rules that govern how courts go about discerning the object and purpose of a treaty, it is virtually impossible for litigants—particularly defendants—to know what evidence is relevant or how to craft their arguments. If the full context of the entire statute is relevant, as in the Tadic decision on jurisdiction, then litigants must prove what amounts the political history of the treaty and the conflict at issue in the case. If, on the other hand, the object and purpose is merely repeated or asserted, then litigants are left without meaningful guidance or ability to prove or argue an essential element in the case.

B. PRECEDENT AND OBJECT AND PURPOSE

One of the problems with object and purpose as it is deployed in cases is that it seems to have two separate uses. Sometimes it is used as a permanent, consistent aspect of a treaty. For example, there are a number of cases in which courts assert that the object and purpose of the I.C.T.Y. or I.C.T.R. is to ensure that those most responsible for atrocities are held responsible.²⁰⁸ In addition, as discussed above, due process guarantees must be considered a permanent, stable object and purpose of international criminal law statutes. But in many instances, the question in the case is not whether the international criminal tribunal should hold accountable those responsible for crimes. Instead the question is more specific and existential. These cases require courts to consider whether one or another interpretation of a particular provision is appropriate. In those cases, the set of possible interpretations should be bounded by those that are

205. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction ¶¶ 253–54 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

206. *See id.*

207. *See id.*

208. *See id.*

consistent with the permanent, stable object and purpose. For example, when considering whether to expand liability even further away from direct perpetrators, courts would be constrained by the requirement of due process protection even as they considered how best to interpret the contested provision.

C. CONSIDER THE SOCIAL ROLE OF INTERNATIONAL CRIMINAL LAW

When interpreting statutes and treaties through the object and purpose inquiry, judges are aware of the social role their decisions will have and should make these issues explicit in their decisions. International criminal justice has quickly become an important element of the way that societies attempt to address widespread violence and atrocities.²⁰⁹ The parties attempting to negotiate an end to the bloody conflict in the Balkans believed that the creation of the International Criminal Tribunal for the Former Yugoslavia was a vital part of that process.²¹⁰ Before the genocide in Rwanda had ended, advocates were arguing for the creation of an international criminal tribunal.²¹¹ Perhaps most visibly, almost since the International Criminal Court came into existence, it has been a focal point for advocates attempting to address conflicts and atrocities around the world.²¹² International criminal justice can play both

209. See Frederic Megret, *International Criminal Justice as a Peace Project*, 29 EUR. J. INT'L L. 835, 847 (2018) (discussing how international criminal justice is one way to address violence).

210. See, e.g., *Human Rights Group Calls for Tribunal on Bosnian War Crimes*, LONDON TIMES (Aug. 13, 1992) (reporting that advocacy groups were calling for the creation of an international criminal tribunal to address atrocities committed in the Balkan wars).

211. See Julia Preston, *U.N. Chief Denounces Response to Rwanda to Probe Genocide in Rwanda*, WASH. POST (May 26, 1994), <https://www.washingtonpost.com/archive/politics/1994/05/26/un-chief-denounces-response-to-rwanda/a0290984-557c-43af-85a1-00d457437cfe> (reporting that the U.N. planned to initiate an investigation of the genocide to use as evidence in prosecutions before an international criminal tribunal, which had not yet been formed); By the end of July 1994, just as the genocide was ending, the Prime Minister of Rwanda announced plans to initiate prosecutions of people involved in the genocide and to support a plan to create an international criminal tribunal. *Rwanda Plans Prosecutions*, N.Y. TIMES, Jul.26, 1994, at A6.

212. From the time it came into being through the end of 2013, the ICC received upwards of 10,000 requests to open a case. Just in the past five years, the ICC has conducted preliminary examinations—indicating that the underlying complaint

symbolic and practical roles, both of which are relevant to interpretation. As societies confront transitional justice issues and attempt to take the practical steps necessary to emerge from a period of violence and repression and move toward peace and stability, international criminal justice institutions can play an important role. Similarly, international criminal justice institutions operate as a statement of values. As with all social institutions, international criminal justice has the potential to serve as a “source of expression . . . and of meaningful communication.”²¹³ The ways that international criminal law is applied and deployed—what it punishes and what it ignores—can amount to a condemnation or implicit acceptance of atrocities.²¹⁴ The interpretative function is relevant to both of these issues.

Transitional justice refers to “formal attempts by postrepressive or postconflict societies to address past wrongdoing in their efforts to democratize.”²¹⁵ Transitional justice mechanisms include non-judicial institutions truth commissions.²¹⁶ But importantly criminal trials, including international criminal trials, can be an important component of the response.²¹⁷ Central to this is determining what acts

was at least plausible—of situations in Afghanistan, the Central African Republic, Colombia, Cote D’Ivoire, Georgia, Guinea, Honduras, Iraq, Korea, Mali, Nigeria, Palestine, and Ukraine. *See* REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2014 (Dec. 2014); REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2013 (Nov. 2013); REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2012 (Nov. 2012); REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2011 (Dec. 2011).

213. DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 255 (1990).

214. *See* Barrie Sander, *The Expressive Turn of International Criminal Justice: A Field in Search of Meaning*, 32 LEIDEN J. INT’L L. 851, 853–57 (2019) (analyzing the ways that international criminal justice institutions might communicate meaning to participants and observers).

215. COLLEEN MURPHY, *THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE* 1 (2017) (arguing how transitional justice goes towards democratization).

216. *See generally* PRICILLA B. HAYNER, *UNSPEAKABLE TRUTHS: TRANSITIONAL JUSTICE AND THE CHALLENGE OF TRUTH COMMISSIONS* (2d ed. 2001).

217. *See* MURPHY, *supra* note 215, at 179–86 (describing role of trials in transitional justice and arguing that criminal justice institutions are not effective when relied on as the sole or primary transitional justice mechanisms. Instead, she cautions that criminal justice responses must accompany other responses); Similarly, other scholars argue that the International Criminal Court should not come to be viewed as the principal transitional justice mechanism to resolve conflicts, particularly in Africa. *See generally* Obiora Chinedu Okafor &

merit condemnation and which acts do not.²¹⁸ Colleen Murphy, in her comprehensive study of transitional justice, argues transitional justice requires “acknowledging that wrong was done” and specifying “the nature of the wrong being addressed.”²¹⁹ Doing this as part of an international criminal law response requires interpretation, subject to all of the issues that can come with it. Closely related to this aspect of transitional justice is the expressive value of a legal institution.²²⁰ Expressivism describes a “process of creating meaning through communicative actions and representational practices.”²²¹ In the context of international criminal law, this can include the conduct of trials, prosecutorial decisions, the imposition of punishment, and similar steps.²²² Because interpretation plays such an important role in defining the conduct that can be prosecuted, and thereby condemned, it too can amount to an expression of values or priorities.

The interpretation of international criminal law can determine the message that trials communicate and whether the appropriate wrongs are being addressed. As individuals see acts condemned as wrongful, this can contribute to a transition to stability and communicate a strong message, which can affect individual behavior.²²³ To be sure, this does not occur automatically, and the effect cannot be measured with any precision. But it is possible to better understand the conditions under which it is likely. Scholars argue that there are conditions under which legal institutions can influence behavior and attitudes in this way.²²⁴ First, it is important that the action of the

Uchechukwu Ngwaba, *The International Criminal Court as a “Transitional Justice” Mechanism in Africa: Some Critical Reflections*, INT’L J. TRANSITIONAL JUST. 90 (2015).

218. See MURPHY *supra* note 215, at 195.

219. See *id.*

220. See CARSTEN STAHN, JUSTICE AS MESSAGE: EXPRESSIVIST FOUNDATIONS OF INTERNATIONAL CRIMINAL JUSTICE 1–3, 7–8 (2020).

221. See *id.*

222. See *id.*

223. See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1508–14 (describing the processes by which expressions of approval or disapproval affect individual actions).

224. See Patrick J. Keenan, *The Problem of Purpose in International Criminal Law*, 37 MICH. J. INT’L L. 421, 463 (2016) (analyzing McAdams’s approach in the context of international criminal law generally).

court convey a “clear audience message.”²²⁵ The message must be that the underlying conduct is wrongful, not that the prosecutor is biased, for example.²²⁶ Second, the signal must receive sufficient “publicity” if it is to exert any influence.²²⁷ Third, the decision must be prominent to the intended audience; it cannot be subsumed into the other bits of information that individuals are taking in.²²⁸ Fourth, the institution sending the signal will affect how the audience understands it.²²⁹ Credible institutions send credible signals; unreliable or capricious institutions do not.²³⁰ Finally and most important in the interpretation of novel or atypical crimes, the way the crime was defined must be credible and transparent.²³¹

To understand the role of interpretation in this process, consider the example of the Special Court for Sierra Leone (“S.C.S.L.”). The statute of that tribunal gave it the power to hold defendants accountable for a wide range of atrocities, including rape, sexual slavery, forced prostitution, forced pregnancy, sexual violence, and torture.²³² These charges generally fit the widespread sexual violence in the conflict.²³³ But prosecutors sought to convict the defendants of the novel charge of “forced marriage.”²³⁴ Prosecutors brought it as a

225. See RICHARD MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* 179 (2015) (analyzing how legal institutions can characterize wrongdoings).

226. See *id.*

227. See *id.*

228. See *id.* at 180.

229. See Kenworthy Bilz & Janice Nadler, *Law, Moral Attitudes, and Behavioral Change*, in *OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* 241, 246–47 (Eyal Zamir & Doron Teichman, eds. 2014) (arguing that the legitimacy of legal institutions is an important factor in influencing attitudes and behavior).

230. See *id.* at 253–55 (describing the ways that the source of legal regulation, and the source’s credibility with the salient audience, affects the expressive function of the law).

231. See Keenan, *supra* note 224.

232. See Statute of the Special Court for Sierra Leone arts. 2–3 (2000).

233. See generally “*We’ll Kill You if You Cry*”: *Sexual Violence in the Sierra Leone Conflict*, HRW (Jan. 16 2003), <https://www.hrw.org/report/2003/01/16/well-kill-you-if-you-cry/sexual-violence-sierra-leone-conflict> (explaining the sexual violence in conflict).

234. Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶ 6 (Special Court for Sierra Leone June 20, 2007) (noting that the prosecutor amended the indictment to add a charged of “forced marriage” in the category of other inhumane acts as a crime against humanity).

type of the crime against humanity of other inhumane acts even though forced marriage was nowhere mentioned in the statute.²³⁵ Advocates and eventually prosecutors believed that established crimes did not describe precisely the unique harms done to women who were subjected to forced marriage.²³⁶ Prosecutors supported their case by arguing that one object and purpose of the Tribunal was to affirm the experiences of the victims.²³⁷ Similarly, the International Criminal Tribunal for Rwanda concluded that rape could be prosecuted as a means of committing genocide.²³⁸ The Tribunal's statute provided a number of ways to convict the defendants of the crimes.²³⁹ But the Tribunal accepted the argument that the charge of genocidal rape best fit the underlying conduct and allowed it to fulfill the object and purpose of the statute.²⁴⁰

To account for the inherently communicative nature of their decisions while also ensuring that the rights of defendants are respected, international criminal tribunals should make explicit what they are doing. Even if courts conclude that one appropriate object and purpose of a statute is to communicate a message to the victim community (or another audience), fulfilling this purpose must occur while not violating other purposes, including the fair trial rights of the defendant. The best way for courts to do this is to be as transparent as possible so that defendants and prosecutors could fully contest the court's approach. If their reasons are not explicit and predictable, courts do not provide litigants with the opportunity to address those reasons.

235. *See id.* ¶ 6.

236. Micaela Frulli, *Advancing International Criminal Law: The Special Court for Sierra Leone Recognizes Forced Marriage as a "New" Crime Against Humanity*, 6 J. INT'L CRIM. JUST. 1033, 136–37 (2008) (showing that the prosecutor charged and the tribunal accepted the crime of forced marriage because the other avenues of prosecuting sexual violence did not fully capture the specific harms attendant to forced marriage).

237. *Prosecutor v. Brima*, ¶¶ 187–96 (2007).

238. *See* Diane Marie Amann, *International Decisions, Prosecutor v. Akayesu*, 93 AM. J. INT'L L. 195 (1999) (noting that a case from the I.C.T.R. "marks the first time an international criminal tribunal has tried and convicted an individual for genocide and international crimes of sexual violence").

239. *See* Statute of the International Criminal Tribunal for Rwanda arts. 3(g), 4(d) (permitting prosecutors to bring charges of rape as a crime against humanity or a war crime).

240. *Prosecutor v. Brima*, ¶¶ 199–203.

For an illustration of this point, consider the International Criminal Court's recent experience with the prosecutor's investigation into the situation in Afghanistan. In November 2017, the ICC prosecutor requested permission to open an investigation into possible crimes against humanity committed in Afghanistan, including war crimes and crimes against humanity allegedly committed by U.S. forces.²⁴¹ In April 2019, the Pretrial Chamber of the International Criminal Court refused to authorize the investigation.²⁴² The Pretrial Chamber found that the jurisdictional and admissibility requirements had been satisfied, but concluded that the investigation would not serve the interests of justice.²⁴³ The court concluded that it was unlikely that the states involved, including the United States, would cooperate in the investigation, thereby rendering it unlikely to produce a satisfactory result.²⁴⁴ The Appeals Chamber of the ICC eventually reversed the decision in March 2020.²⁴⁵ What is noteworthy about this example is the way the audience for the decision attributed meaning to it in the absence of a full, transparent discussion of the issue in the Trial Chamber's decision. Some argued that the ICC's decision meant that states could avoid liability for their decisions through recalcitrance.²⁴⁶ Others argued that the decision was evidence that the ICC was wary of threats made by the U.S. to sanction ICC officials.²⁴⁷ Without transparency on the social role of the decision, the audience supplied its own meanings.

V. CONCLUSION

International criminal law plays an increasingly important role in the ways that societies attempt to recover after a period of turmoil.

241. Situation in the Islamic Republic of Afghanistan, ICC-02/17, ¶¶ 187–257 (Nov. 20, 2017).

242. *See id.*

243. *See id.* ¶¶ 87–96.

244. *See id.* ¶ 94.

245. *See id.*

246. *See* Mark Kersten, *The ICC Was Wrong to Deny Prosecution for Afghan Probe*, AL JAZEERA (Apr. 12, 2019), <https://www.aljazeera.com/opinions/2019/4/12/the-icc-was-wrong-to-deny-prosecution-request-for-afghan-probe> (arguing how the ICC's decision may lead to states avoiding liability).

247. *See Afghanistan: ICC Refuses to Authorize Investigation, Caving into USA Threats*, AMNESTY INT'L (Apr. 12, 2019), <https://www.amnesty.org/en/latest/press-release/2019/04/afghanistan-icc-refuses-to-authorize-investigation-caving-into-usa-threats> (arguing how the ICC decision may lead to sanctions).

The promise of international criminal law also provides hope for those affected by atrocities. Even if the promise of international criminal law is not yet fully realized, it has matured into a coherent legal discipline that should have canons of interpretation that are understood by all.