

1-2021

Evisceration of the Right to Appeal: Denial of Individual Responsibility as Actionable Genocide Denial

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Jennifer E. King, *Evisceration of the Right to Appeal: Denial of Individual Responsibility as Actionable Genocide Denial*, 74 *Vanderbilt Law Review* 221 (2021)

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Evisceration of the Right to Appeal: Denial of Individual Responsibility as Actionable Genocide Denial

Tensions arise during litigation in the international criminal justice system between the practice of the international criminal tribunals, domestic laws, and policy decisions of United Nation (“UN”) Member States. One such tension arises between domestic genocide denial laws, which typically criminalize denial of genocide as a strict liability offense, and the preservation of due process for persons convicted of genocide seeking appeal. In theory, denying individual responsibility during the appeal of a conviction by an international tribunal could constitute punishable genocide denial under some domestic laws. This criminalization of the appeal process would violate the due process rights of international criminal defendants, sacrifice the review mechanism ensuring fair trial rights in international criminal tribunals, and affect the legitimacy of international criminal justice. This Note argues for an interdisciplinary solution to combat genocide denial that fully respects due process. First, domestic denial laws should be amended to include an intent requirement to exclude from coverage denial of individual responsibility during litigation. Second, all international and hybrid criminal tribunals should implement safeguards to protect defense counsel and witnesses from domestic prosecution for their role in the appeals process. Third, the International Residual Mechanism for Criminal Tribunals should clarify its enduring dedication to both reducing denialist behaviors and respecting due process and should call on all states to do the same. Genocide denial is a harmful phenomenon with no place in modern discourse; however, sacrificing full due process rights in the international criminal tribunals does little to reduce the effects of genocide denial.

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INTRODUCTION

Few would argue that an individual accused of a crime does not have the right to stand before a judge and claim, “I am not guilty,” regardless of the claim’s veracity. But what if, in an effort to achieve respectable policy goals, courts decided that the mere act of saying the words “I am not guilty” *made* one guilty? What if appealing a conviction and claiming, “The trial court made a mistake, I am not guilty” constituted a crime by virtue of its mere promulgation? These questions are arising in the international criminal legal field as practitioners explore the proper bounds of policies created to combat the denial of genocide. Specifically, the international criminal defense bar is

concerned about whether denial of an individual's responsibility for genocide after guilt has been adjudicated by an international criminal tribunal qualifies as genocide denial and is thus actionable under domestic denial laws.¹

In the international criminal justice field, practitioners must balance many objectives in the pursuit of achieving justice following the atrocity crimes of genocide, war crimes, and crimes against humanity.² Those objectives include retribution, deterrence, and aiding postconflict reconciliation.³ Pursuit of these objectives must also be marked by the assurance of fair trial rights to defendants to preserve the legitimacy of the international criminal justice process.⁴ Tensions can arise between these varying objectives—here, a tension arises between efforts to promote reconciliation by reducing genocide denial and international criminal defendants' right to an effective appeal.⁵

Public statements made by the President and Prosecutor of the International Residual Mechanism for Criminal Tribunals ("IRMCT" or "Mechanism")⁶ in 2018 and 2019 linked genocide denial to the glorification of convicted war criminals.⁷ Because the glorification of

1. For purposes of this Note, the term "domestic law" refers not to the law of the United States but to the laws promulgated by national governments in other countries around the world. Specific attention will be paid to laws promulgated in European and African nations that have criminalized genocide denial.

2. See U.N. Off. on Genocide Prevention & the Resp. to Protect, *Framework of Analysis for Atrocity Crimes: A Tool for Prevention*, 1 (2014), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.49_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf [<https://perma.cc/Q8XH-7EFU>] (identifying and defining genocide, crimes against humanity, and war crimes as "atrocity crimes"); see also *International Justice*, AMNESTY INT'L, <https://www.amnesty.org/en/what-we-do/international-justice/> (last visited Oct. 20, 2020) [<https://perma.cc/8TA5-7RH2>] (providing definitions of genocide, crimes against humanity, and war crimes).

3. ROBERT CRYER, HÅKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 17–35 (3d ed. 2014); Colleen Murphy, *Political Reconciliation and International Criminal Trials*, in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 224, 225 (Larry May & Zachary Hoskins eds., 2010).

4. See S.C. Res. 1966, annex 1, arts. 19, 23 (Dec. 22, 2010) (stating the rights of the accused and procedures for appeal).

5. See *infra* Part IV.

6. The United Nations Security Council ("Security Council") established the IRMCT in 2010 "to carry out all residual functions of the" International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. S.C. Res. 1966, *supra* note 4, preamble. The IRMCT must ensure the rule of law, guard against impunity, and preserve due process for defendants. See U.N. SCOR, 74th Sess., 8681st mtg. at 2, U.N. Doc. S/PV.8681 (Dec. 11, 2019) (comments by Judge Agius, president of the IRMCT).

7. See U.N. SCOR, 74th Sess., 8681st mtg. at 5, U.N. Doc. S/PV.8681 (Dec. 11, 2019) (comments by Prosecutor Brammertz); Press Release, IRMCT Off. of the Prosecutor, Prosecutor Serge Brammertz Addresses the United Nations Security Council (Dec. 11, 2018), <https://www.irmct.org/en/news/prosecutor-serge-brammertz-addresses-united-nations-security-council-3> [<https://perma.cc/GV44-XFTJ>] [hereinafter Brammertz Address] (relaying comments by Prosecutor Brammertz linking genocide denial to glorification of war criminals in Yugoslavia).

international crimes is a criminal element of genocide denial in many domestic statutory schemes, these statements could imply the extension of criminal sanctions for genocide denial to encompass criminal sanctions for denial of individual responsibility.⁸ If so, an international criminal defendant could potentially subject himself and his counsel to genocide denial charges merely by appealing a genocide conviction. Furthermore, witnesses would be unlikely to assist with appeals if genocide denial was interpreted to encompass assertions of a defendant's individual innocence following conviction for genocide. Similarly, defense counsel would be unlikely to zealously advocate for their clients due to fear of prosecution for denial.

This Note examines whether there is any basis in existing international law or state practice for classifying individual denial of responsibility as genocide denial⁹ and argues that even if such a basis exists, characterizing a standard appeal as genocide denial would impermissibly infringe on the defendant's due process rights under both international law and the domestic laws of various nation states.¹⁰ Although there is much debate and scholarship on the tension between genocide denial laws and freedom of expression, there is little, if any, discussion regarding the tension between genocide denial laws and the fundamental due process rights of international criminal defendants.¹¹ This Note aims to fill that void. Part I provides an overview of laws regulating genocide denial at the domestic level, along with international policies regarding genocide denial. Part II then outlines the due process rights to which international criminal defendants are entitled that could be affected by denial laws. Part III analyzes the ways in which denial laws threaten due process rights during appeals in the international tribunals. Ultimately, Part IV proposes an interdisciplinary solution that ameliorates those threats while countering genocide denial in a meaningful way. The holistic solution will require the inclusion of a mens rea requirement in domestic denial statutes, UN Security Council action, protective measures for defense counsel and witnesses, and creative approaches to reducing denial behaviors.

8. GREGORY S. GORDON, ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION 73–74, 160 (2017).

9. In this Note, the term “State” refers to a nation-state.

10. See *infra* Part IV.

11. See, e.g., Faurisson v. France, Communication No. 550/1993, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/58/D/550/1993 (Nov. 8, 1996) (concerning a professor who claimed a violation of his right to freedom of opinion and doubt when he was fired from his post after stating that Jews were not exterminated in the gas chambers at Auschwitz and other concentration camps).

I. GENOCIDE DENIAL AND INTERNATIONAL CRIMINAL JUSTICE POLICY
REGARDING THE ERADICATION OF GENOCIDE DENIAL

The current state of international and domestic law regarding genocide denial creates the possibility that denial of individual responsibility for genocide may be construed as genocide denial subject to domestic criminal enforcement. First, this Part will provide an overview of the frame and scope of domestic genocide denial laws. It will then outline notable instances in which denial of individual responsibility and denial of specific legal characterization of events have served as a basis for genocide denial sanctions. Finally, it will address public statements made by IRMCT representatives regarding denial policy, which have generated concern about a sea change in genocide denial litigation.

A. Genocide Denial

Numerous states have chosen to criminalize genocide denial because of its potential to energize further genocidal acts and the destructive effects denial behaviors have on communities and survivors recovering from atrocity crimes.¹² Denial—distortions of fact and revisions of history—can revive painful memories for survivors and their families, alter mental constructions of the events in question, and besmirch the identity of a group victimized by genocide.¹³ Genocide denial also surpasses manipulation or contradiction of historical fact by recreating an environment that is hospitable to further victimization and extreme suffering.¹⁴ Historian Deborah Lipstadt argues that genocide denial serves as the front for “anti-Semitism, racism, [and] prejudice parading as rational discourse.”¹⁵ Specifically, denial spawns and affirms perpetual indifference, hostility, aggression, and

12. See Paul Behrens, Nicholas Terry & Olaf Jensen, *Introduction*, in HOLOCAUST AND GENOCIDE DENIAL: A CONTEXTUAL PERSPECTIVE 1, 3 (Paul Behrens, Nicholas Terry & Olaf Jensen eds., 2017) (noting the increasing importance of criminalization of genocide denial). Genocide denial can create an environment in which genocide can recur. See, e.g., U.N. SCOR, 63d Sess., 5868th mtg. at 11, U.N. Doc. S/PV.5868 (Resumption 1) (Apr. 16, 2008) (“Genocide denial, as a last stage of the implementation of the genocidal ideology, is a formidable threat to peace and security, as it energizes perpetration.”).

13. Genevieve Parent, *Genocide Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina (BiH)*, 10 GENOCIDE STUD. & PREVENTION 38, 42 (2016).

14. *Id.* at 44.

15. TedxSkoll, *Deborah Lipstadt: Behind the Lies of Holocaust Denial*, TED, at 5:06 (Apr. 2017), https://www.ted.com/talks/deborah_lipstadt_behind_the_lies_of_holocaust_denial/reading-list?referrer=playlist-talks_to_help_you_become_a_better_researcher [https://perma.cc/Z7SH-BYG8].

dehumanization.¹⁶ Interviews with those affected by denial suggest that at the individual level, denial causes victims to experience irritability, frustration, anger, depressive symptoms, anxiety, and survivor's guilt.¹⁷ One interviewee explained that “[c]riminals need to admit what they did to begin healing. It will happen again if they do not heal.”¹⁸

Genocide denial laws criminalize statements that deny, minimize, or glorify the established fact that a genocide occurred.¹⁹ Courts are granted the power to define actionable denial on a case-by-case basis, which creates a great deal of confusion over precisely what constitutes genocide denial in any given jurisdiction.²⁰ This manner of defining denial is controversial because the courts can decide such matters without public debate or input from historians.²¹ Indeed, some cases revolve around misstatements promulgated by historians.²² Furthermore, courts are charged with determining individual guilt or innocence, rather than with setting the parameters of the historical record for purposes of future denial litigation.²³ Courts do not analyze the entire context of an alleged genocide but rather the specific facts that bear on the litigation.²⁴

1. Defining Denialism

The majority of domestic denial statutes concern only denial of genocide,²⁵ rather than denial of other crimes against humanity, though

16. Parent, *supra* note 13, at 45.

17. *Id.*

18. *Id.* at 49.

19. See Paolo Lobba, *Punishing Denialism Beyond Holocaust Denial: EU Framework Decision 2008/913/JHA and Other Expansive Trends*, 5 NEW J. EUR. CRIM. L. 58, 58 (2014) (discussing an EU Framework decision that encouraged criminalization of the denial, justification, and gross trivialization of the Holocaust and other international crimes).

20. *Id.* at 73–74.

21. *Id.*

22. See Anthony Lewis, *Introduction* to DEBORAH E. LIPSTADT, *HISTORY ON TRIAL: MY DAY IN COURT WITH DAVID IRVING*, at xi, xi–xiii (2005).

23. Lobba, *supra* note 19, at 73–74.

24. See, e.g., Fergal Gaynor, *Uneasy Partners—Evidence, Truth and History in International Trials*, 10 J. INT'L CRIM. JUST. 1257 (2012) (examining the tension between admission of evidence and creation of a historical record in international criminal courts).

25. Ludovic Hennebel & Thomas Hochmann, *Introduction: Questioning the Criminalization of Denials*, in GENOCIDE DENIALS AND THE LAW, at xvii, xviii (Ludovic Hennebel & Thomas Hochmann eds., 2011). Genocide is comprised of a very limited class of conduct and differs from other crimes of mass scale due to the special intent requirement, or *dolus specialis*, which requires that the offender “intended to destroy, in whole or in part, [an] ethnical, racial or religious group, as such.” Convention on the Prevention and Punishment of the Crime of Genocide, arts. II–III, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (including direct and public incitement to commit genocide as a related act punishable under the Convention). Genocidal acts are not limited to murder—genocide includes causing serious bodily or mental harm, deliberately inflicting conditions of life calculated to bring about the physical destruction of a group in whole

that is beginning to change.²⁶ Denial is arguably the final stage of every genocide—members of the perpetrating party or sympathizers may deny crimes were committed at all or blame the victims.²⁷ Gregory Stanton, President of Genocide Watch, argues that denial constitutes a continued intent to destroy a victimized people group, thus extending the crime of genocide to generations of survivors.²⁸ Many denial and minimization tactics may qualify as genocide denial. Perpetrators may question or minimize the number of victims affected; attribute the harm to other causes, such as famine, disease, or migration; or claim that the victims were harmed during the course of self-defense by emphasizing the losses suffered by the perpetrating party.²⁹

Denial has been construed to encompass many types of expression.³⁰ At its core, genocide denial encompasses expressions that either contest the existence of a genocide or question a characteristic feature of the crime of genocide.³¹ An example of the former would be the statement, “A genocide has never been perpetrated at Srebrenica”; whereas, an example of the latter would be the statement, “Gas chambers were not used to kill Jews during World War II.” Denial laws, however, do not solely punish denial of factual events but also expressions challenging the legal classification of events that were characterized by a genocidal³² motive.³³ *Perinçek v. Switzerland*, for instance, concerned the legitimacy of a criminal conviction for objections to the legal characterization of the atrocities committed

or in part, attempting to prevent births within a particular group, and forcibly transferring children out of one group into another. *See id.* at art. II.

26. There is a trend in Europe of expanding the definition of denialism for purposes of domestic prosecution: “[T]he conduct of publicly condoning, denying or grossly trivializing the following international crimes: (a) genocide, crimes against humanity and war crimes as defined in the statute of the International Criminal Court and, (b) the crimes defined in Article 6 of the Charter of the Nuremberg Tribunal.” Lobba, *supra* note 19, at 64 (footnote omitted).

27. Gregory H. Stanton, *The Ten Stages of Genocide*, GENOCIDE WATCH, <https://www.genocidewatch.com/ten-stages-genocide> (last visited Oct. 21, 2020) [<https://perma.cc/9QPL-CRWS>].

28. *See id.* (noting that denial is a strong indicator of further genocidal acts).

29. Gregory Stanton, *Twelve Ways to Deny a Genocide*, GENOCIDE WATCH, <http://genocidewatch.net/genocide-2/12-ways-to-deny-genocide/> (last visited Oct. 21, 2020) [<https://perma.cc/74MW-4SP7>].

30. Hennebel & Hochmann, *supra* note 25, at xix.

31. *Id.*; see also Henry C. Theriault, *Denial of Ongoing Atrocities as a Rationale for Not Attempting to Prevent or Intervene*, in *IMPEDIMENTS TO THE PREVENTION AND INTERVENTION OF GENOCIDE* 47, 49 (Samuel Totten ed., 2017) (highlighting Ratko Mladic’s statements postarrest that what occurred in Srebrenica could not be considered a genocide).

32. Acts of genocide are characterized by the *dolus specialis*, meaning that they are characterized by “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.” Genocide Convention, *supra* note 25, at art. II.

33. *See, e.g., Perinçek v. Switzerland*, 2015-VI Eur. Ct. H.R. 181 (addressing a conviction for challenging the legal classification of atrocities against the Armenian people as genocide).

against the Armenian people in 1915 as an act of genocide, rather than as another type of crime against humanity.³⁴ Denial can also serve as propaganda used to sustain power under a particular regime or can take the form of “revisionist history.”³⁵ Mischaracterizing a genocide as an act of self-defense, civil war, or unfortunate nonsystematic violence can help commanders and other high-level perpetrators escape accountability for their actions or nonactions.³⁶

2. Prohibition of Denial at the Domestic Level

Although domestic jurisprudence approaches denialism in a variety of ways, denial laws are consistent enough that they may be addressed in the aggregate. Criminal prohibitions of genocide denial were first limited to denial of the Holocaust and arose in states like Germany that, compared to the broader international community, had a “moral responsibility” to combat anti-Semitic acts in the latter half of the twentieth century.³⁷ The criminal prohibition of denial has since extended to encompass genocides and international crimes beyond the Holocaust.³⁸ Many nations criminalize denial, including most European states and Rwanda, and there has been a trend toward expanding those laws in recent years.³⁹ The European Union (“EU”) Framework

34. *See id.* at 219 (“The applicant had not called into question the reality of the massacres and mass deportations, simply their legal characterization . . .”). One of Perinçek’s exact statements was:

[T]he allegations of the “Armenian genocide” are an international lie. . . . The Great Powers, which wanted to divide the Ottoman Empire, provoked a section of the Armenians, with whom we had lived in peace for centuries, and incited them to violence. The Turks and Kurds defended their homeland from these attacks. It should not be forgotten that Hitler used the same methods – that is to say, exploiting ethnic groups and communities – to divide up countries for his own imperialistic designs, with peoples killing one another. . . . Don’t believe the Hitler-style lies such as that of the “Armenian genocide”. [sic] Seek the truth like Galileo, and stand up for it.

Id. at 196–97. The domestic court found that the characterization of the atrocities in Armenia as genocide was an established historical fact. *Id.* at 202.

35. GUENTER LEWY, OUTLAWING GENOCIDE DENIAL: THE DILEMMAS OF OFFICIAL HISTORICAL TRUTH 6–7 (2014).

36. *See Theriault, supra* note 31, at 49 (highlighting Nazi Karl Blessing, who covered up his complicity in the Holocaust, convinced the public he was an anti-Nazi Resistance hero, and became one of the most important German corporate leaders by the 1960s).

37. Lobba, *supra* note 19, at 69.

38. *Id.* at 70.

39. A sampling of the European States includes Austria, Belgium, the Czech Republic, France, Germany, Hungary, Luxembourg, Poland, and Romania. Sean Gorton, Note, *The Uncertain Future of Genocide Denial Laws in the European Union*, 47 GEO. WASH. INT’L L. REV. 421, 422–23 (2015). Note, however, that the United States is an outlier because the Supreme Court has declared the regulation of group libel unconstitutional and thus outlaws prohibition of genocide denial. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating local ordinance that prohibited display of symbols arousing fear or anger based on race, color, creed, religion, or

Decision, for instance, encouraged EU Member States to extend genocide denial laws to encompass the justification, denial, and trivialization of a broad array of atrocity crimes.⁴⁰ These prohibitions supplement other specific criminal offenses that bar direct and public incitement to genocide.⁴¹

Most denial laws make genocide denial a strict liability offense. European statutes prohibiting genocide denial do not typically include a harm element—the offensive speech need not cause harm to anyone or threaten anyone to be impermissible.⁴² With only one exception, existing European denial statutes also do not require mens rea.⁴³ Therefore, prosecutors do not need to prove that the perpetrator intended to cause harm to anyone, and it is typically irrelevant whether the perpetrator made his statement in good or bad faith.⁴⁴ Making a historically inaccurate statement is typically sufficient to sustain criminal liability under the text of the relevant statutes. As a result of denial laws' lack of mens rea and harm elements, qualifying statements can violate denialism statutes *per se* without evidence of the intent to harm victims of genocide or tarnish the relevant cultural memory.⁴⁵ To be more precise, the purpose of the statement remains irrelevant to the completion of the offense, which in turn potentially permits charges based on good faith assertions raised during international litigation.

3. Denial of Individual Responsibility

Genocide denial laws do not directly address individual denial of responsibility—denial of individual responsibility instead falls at the intersection of legislative text, policy underlying denial laws, and the fundamental due process rights of international criminal defendants. Academic understandings of genocide denial, however, have been stretched broadly enough to capture the following behaviors: denying

gender); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (noting that a general attack on governmental action did not support libel claim by particular official).

40. Lobba, *supra* note 19, at 58. The EU Framework Decision was a legally binding act establishing objectives the EU Member States were required to fulfill, though states could choose the way in which they implemented the required objectives. See *Framework Decision*, EU MONITOR, <https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dotmxlyyu> (last visited Oct. 21, 2020) [<https://perma.cc/WB7B-E973>].

41. See, e.g., Genocide Convention Implementation Act of 1987 (Proxmire Act), 18 U.S.C. § 1091.

42. Hennebel & Hochmann, *supra* note 25, at xxiii.

43. Thomas Hochmann, *Denier's Intent*, in *GENOCIDE DENIALS AND THE LAW*, *supra* note 25, at 279, 298.

44. *Id.* at 317.

45. See *id.* at 298 (explaining the lack of mental and result elements in many contemporary denial laws).

genocidal intent, denying personal or group criminal culpability, blaming the victims, and intimidating witnesses.⁴⁶

This Note does not raise a purely theoretical dilemma. International criminal defense attorneys have been charged with genocide denial for statements denying the legal characterization of the genocide for which their clients were charged. American defense attorney Peter Erlinder, practicing before the International Criminal Tribunal for Rwanda (“ICTR”), was charged with minimizing the Rwandan genocide.⁴⁷ The Rwandan prosecuting authorities, referring to Erlinder’s work at the ICTR, stated, “Carl Peter Erlinder denied and minimized the genocide . . . by stating that the soldiers he was defending neither planned nor carried out the genocide.”⁴⁸ In *Bagosora et al. v. Prosecutor*, the ICTR found that defense counselor Erlinder would be entitled to immunity from arrest⁴⁹ for spoken or written statements made on behalf of his client, Aloys Ntabakuze, that otherwise might be construed as denial of the Rwandan genocide.⁵⁰ All but one of Erlinder’s controversial comments, however, were made in personal publications and at public conferences rather than during the express defense of his client.⁵¹ As such, the ICTR Appeals Chamber held that Erlinder’s comments were not protected by his functional

46. See ADAM JONES, *GENOCIDE: A COMPREHENSIVE INTRODUCTION* (3d ed. 2017) (providing a survey of a wide range of scholarship on genocide, including denial in particular); see also Stanton, *supra* note 27 (enumerating denial as the final “stage” of genocide and noting the role lawyers sometimes play in denial).

47. Kashmir Hill, ‘Genocide-Denying’ Law Professor Peter Erlinder Imprisoned in Rwanda, ABOVE THE LAW (June 2, 2010, 12:21 PM), <https://abovethelaw.com/2010/06/genocide-denying-law-professor-peter-erlinder-imprisoned-in-rwanda/> [<https://perma.cc/5FSC-R5MA>].

48. Krit Zeegers, *Defence Counsel Immunity at the Ad Hoc Tribunals*, 11 INT’L CRIM. L. REV. 869, 873 (2011).

49. See Convention on the Privileges and Immunities of the United Nations, art. VI, § 22(b), Feb. 13, 1946, 21 U.S.T. 1418, 1 U.N.T.S. 15 [hereinafter Privileges and Immunities Convention] (granting UN officials “[i]mmunity from legal process of every kind” for “words spoken or written and acts done by them in the course of the performance of their mission”).

50. See *Bagosora v. Prosecutor*, Case No. ICTR-98-41-A, Decision on Aloys Ntabakuze’s Motion for Injunctions Against the Government of Rwanda Regarding the Arrest and Investigation of Lead Counsel Peter Erlinder, ¶¶ 19–20, 28 (Oct. 6, 2010), http://www.worldcourts.com/ictr/eng/decisions/2010.10.06_Bagosora_v_Prosecutor.pdf [<https://perma.cc/9KTQ-X5NX>]. In Erlinder’s case, the Appeals Chamber acknowledged that to adequately represent their clients, defense attorneys needed the ability to argue on behalf of their clients without fear of legal repercussions. See Gentian Zyberi, *Functional Immunity for Defence Counsel*, INT’L L. OBSERVER (Oct. 10, 2010), <https://internationallawobserver.eu/functional-immunity-of-defence-counsel> [<https://perma.cc/9M97-N5A4>] (discussing how the ICTY Appeals Chamber has treated the issue similarly and found that functional immunity for defense counselors was necessary to the proper functioning of the Tribunal).

51. Erlinder stated in numerous publications that the atrocities committed in Rwanda in 1994 were “civilians-on-civilians” killings and could not be characterized as genocide. Alexis S. Kramer, *Introductory Note to the International Criminal Tribunal for Rwanda: Bagosora et al. v. Prosecutor*, 50 I.L.M. 226, 226 (2011).

immunity as defense counsel with a UN tribunal.⁵² The distinction between service to the client and statements made in an attorney's personal capacity raises two concerns. First, it is not entirely clear whether statements made outside of the courtroom—statements advocating for the client's innocence at a press conference, for instance—would be entitled to immunity. Second, the qualified immunity given to defense attorneys does not necessarily protect an attorney from being arrested, charged, and tried for denial during an ongoing international criminal case.

Although defense attorneys are entitled to immunity in their role as agents to the UN ad hoc tribunals, international criminal defendants, witnesses, and scholars receive no such immunity.⁵³ The European Court of Human Rights ("ECtHR") has endorsed a criminal conviction in a domestic court for a scholar's denial of a perpetrator's individual responsibility for genocide, even though the scholar did not dispute the genocide's existence. In *Witzsch v. Germany*, the ECtHR considered whether letters disputing the responsibility of Adolf Hitler and the Nazi Party for the organization and planning of the Holocaust constituted genocide denial.⁵⁴ Although the ECtHR considered the question through the lens of freedom of expression, it supported domestic conviction for denial.⁵⁵ The ECtHR held that denial of the Holocaust's "equally significant and established circumstance[s]" stood in direct contravention of both the text and purpose of the European

52. *Id.* at 227.

53. Concerns regarding lack of immunity are heightened further in cases where defendants proceed pro se. Compare Privileges and Immunities Convention, *supra* note 49, at art. VI, § 22(b) (providing statement immunities only for experts, such as counsel), with Agreement on the Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3, arts. 18–21, Sept. 10, 2002 (providing statement immunities for not only counsel but also witnesses, victims, and other experts).

54. See *Witzsch v. Germany*, App. No. 7485/03, at 2 (Dec. 13, 2005), <http://hudoc.echr.coe.int/eng?i=001-72786> [<https://perma.cc/7AX5-QWPX>]:

It is actually established that there is no indication in party programs of the National Socialist German Workers' Party, the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*), that the NSDAP and Hitler intended to murder the Jews. Anybody who – with all the means at his disposal – fostered the emigration of the Jewish minority until late after the beginning of the Second World War can hardly be said to have prepared the murder of the Jews. A long time ago, the historian Irving has publicly proposed to pay a thousand pounds to any person who could prove that Hitler had ordered, for racial reasons, the murder of one single Jew. So far, nobody has produced evidence. After the war, tens of thousands of totally immaculate officials of the NSDAP have attested on oath not to have known until the end of the war about the murder of Jews. None of the dignitaries of the German Government accused in Nuremberg admitted to have known about the mass murder of Jews. Not even in their closing words under the gallows!;

see also Lobba, *supra* note 19, at 74 (discussing the *Witzsch* case).

55. *Witzsch*, App. No. 7485/03, at 4.

Convention on Human Rights (“ECHR”) and thus could not be protected by the freedom of expression.⁵⁶ The Court considered Hitler’s initiation and desired outcome of the Holocaust to be “common knowledge” and found that Witzsch’s statements disparaged the dignity of the victims.⁵⁷

Denial of individual responsibility could be considered denial of a specific legal characterization of fact—the guilt of the convicted—but courts have addressed denial of legal characterization in a variety of ways. In *Perinçek v. Switzerland*, for instance, the ECtHR held that an applicant’s conviction for publicly denouncing the Armenian genocide’s classification as a genocide constituted a violation of the ECHR.⁵⁸ Perinçek did not deny the existence of the massacre but denied that the massacre amounted to genocide—specifically, he argued that the laws of war justified the massacre, and it therefore could not be considered genocide.⁵⁹ Perinçek’s characterization of the massacre allegedly contradicted the generally accepted legal characterization of the atrocities.⁶⁰ The Court reasoned, however, that denial of legal characterization of the Armenian massacre did not carry the same risk of inciting violence as genocide denial.⁶¹ Ultimately, the Court concluded that the denial of historical fact is far graver than denial of an event’s legal characterization.⁶²

Arguably, criminal sanctions are unlikely to be imposed for mere disputes about legal classifications unless there is independent evidence of a pressing social need for prosecution.⁶³ The question then becomes whether, after an individual has been convicted of genocide in an international tribunal, his conviction becomes a legal characterization of reality.⁶⁴ It has been argued that decisions of

56. *Witzsch*, App. No. 7485/03, at 3 (noting that even though Witzsch did not deny the Holocaust as such, his denial of Hitler’s and the NSDAP’s responsibility disparaged the dignity of the deceased and constituted denial of “the victims’ extremely cruel and unique fate”); see also Lobba, *supra* note 19, at 74 (considering the challenges presented where characterization of historical events forms the basis of criminal liability).

57. *Witzsch*, App. No. 7485/03, at 8 (“[Witzsch’s] statement that the opinion expressed by [well-known historian, Professor Wolffson] was part of the war propaganda and after-war atrocity propaganda combined with [his] denial of Hitler’s and the national Socialists’ responsibility in the extermination of the Jews showed the applicant’s disdain towards the victims of the Holocaust.”).

58. Lobba, *supra* note 19, at 59.

59. *Perinçek v. Switzerland*, 2015-VI Eur. Ct. H.R. 181, ¶ 106.

60. *Id.* at ¶ 127.

61. Lobba, *supra* note 19, at 66.

62. *Id.* at 72.

63. See *id.* at 76–77 (explaining that the requirement that an interference with freedom of expression be “necessary in a democratic society” implies there must be a “pressing social need” justifying punishment).

64. Language used in discussions of “denial of legal characterizations” is disturbingly broad. For instance, the President of the IRMCT stated in a letter to the President of the Security Council, “[t]he facts that have been proved beyond reasonable doubt provide the foundation for a shared

international tribunals should not be treated as the definitive authority on a fact's legal characterization—partly because international prosecution is selective, raising equal treatment concerns, and partly because international tribunal decisions are not always consistent, nor do they necessarily reflect consensus regarding the characterization of disputed facts.⁶⁵ If conviction qualifies as a legal characterization, however, then postconviction denial of guilt could constitute genocide denial. Public statements made by the Prosecutor and Judge Agius, the President of the Mechanism, discussed below in Part I.B, suggest that the ever-evolving policy of the IRMCT would not prohibit such a characterization.

*B. Statements Made Before the UN Security Council Regarding
Genocide Denial Policy*

Individual views expressed at meetings of the UN Security Council (“Security Council”) set the tone of proceedings for the following judicial season and influence the way states view international criminal legal issues, conduct domestic proceedings for international crimes, and support the international tribunals in their endeavors.⁶⁶ Because international criminal jurisprudence and the individual fates of

understanding of the recent past as an essential element of reconciliation and positive regional relations.” U.N. President of the IRMCT, Letter dated May 17, 2017 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, ¶ 43, U.N. Doc. S/2017/434, annex II (May 17, 2017). It is unclear what all falls into the broad category of facts proven beyond a reasonable doubt, but it is not unwarranted to think that individual responsibility qualifies.

65. See Dov Jacobs, *Mladic Judgment: Yet Another New Finding on Genocide in the Municipalities?*, SPREADING JAM (Nov. 22, 2017), <https://dovjacobs.com/2017/11/22/mladic-judgment-yet-another-new-finding-on-genocide-in-the-municipalities/> [https://perma.cc/55CL-5F4Y]:

[I]t seems that the reasoning of the majority of the Chamber actually departs from the Karadzic Judgment. . . . We now therefore have two different legal findings in the case law in relation to the intent of the direct perpetrators of the crimes committed in the Municipalities, a discrepancy that will need to be resolved on appeal, both in the Karadzic and Mladic cases;

see also Lobba, *supra* note 19, at 76–77 (noting the possibility for abuse that arises when judicial discretion influences what historical characterizations are punishable). *But see* U.N. President of the IRMCT, Letter dated Nov. 19, 2018 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, ¶ 43, U.N. Doc. S/2018/1033, annex II (Nov. 19, 2018) (“Establishing [the existence of a genocide in Rwanda] and other facts about the Rwandan genocide was one of the Tribunal’s most important contributions to re-establishing peace and security in Rwanda and promoting reconciliation between the affected communities.”).

66. See David P. Forsythe, *The UN Security Council and Response to Atrocities: International Criminal Law and the P-5*, 34 HUM. RTS. Q. 840, 843 (2012) (enumerating the various ways the Security Council has directly influenced the norms, institutions, and implementation of international criminal law).

international criminal defendants are uniquely dependent on the prosecutors' charging decisions and the judges' individual interpretations of the law, the beliefs of international criminal prosecutors and judges are paramount. Thus, it is important to ensure that the statements made to the Security Council, and the implications of those statements, properly balance the objectives of reconciliation and justice for victims with the full weight of due process for defendants, with an eye toward maintaining the legitimacy of the international tribunals.

During a December 2018 briefing of the Security Council, IRMCT Prosecutor Brammertz referred to the denial of personal responsibility by individuals convicted by the international tribunals and suggested that such denial constitutes glorification of genocide, war crimes, and crimes against humanity.⁶⁷ Prosecutor Brammertz declared, "Positive steps [to prosecute individuals for genocide] are undermined by irresponsible comments from other officials denying what has been established beyond reasonable doubt by international courts, and portraying as heroes men who committed the most serious violations of international law."⁶⁸ Some genocide denial statutes include glorification of genocide as a punishable offense.⁶⁹ Therefore, Brammertz's statement insinuated that an official's denial of an individual's personal responsibility could potentially be criminally prosecuted as a form of genocide denial.

At the 2019 annual meeting of the Security Council on the subject of the operation of the IRMCT, Prosecutor Brammertz, President Agius, and state representatives again addressed the challenges to accountability and reconciliation posed by the glorification of convicted war criminals and genocide denial.⁷⁰ The discussion aimed to help ensure that perpetrators of atrocity crimes do not escape punishment and that hate speech advocating discrimination does not

67. Brammertz Address, *supra* note 7.

68. *Id.*

69. See JEROEN TEMPERMAN, RELIGIOUS HATRED AND INTERNATIONAL LAW: THE PROHIBITION OF INCITEMENT TO VIOLENCE OR DISCRIMINATION 303–04 (2016):

[B]y 'glorifying' historical crimes against humanity someone more or less expressly incites to similar crimes being perpetrated in the near future against the same group. Even short of a direct call for action, the person who glorifies atrocities obviously makes it explicit that he or she did not quite mind that they occurred in the past and thus implies that he or she would not mind if they were to occur again.

70. See U.N. SCOR, 74th Sess., 8681st mtg. at 6–7, U.N. Doc. S/PV.8681 (Dec. 11, 2019) ("[T]here are still concerted efforts to deny the Rwandan genocide, particularly among Rwanda diaspora communities. . . . [F]or a number of years . . . written reports have underscored that the denial of crimes and the glorification of convicted war criminals are pervasive throughout the former Yugoslavia, and the situation continues to get worse.").

persist.⁷¹ In a discussion of contempt cases before the IRMCT, Prosecutor Brammertz stated that although “it is necessary that the Mechanism provide the opportunity to convicted persons to seek review of their convictions when legitimate new facts arise,” the Prosecutor’s Office would “firmly stand against any attempt to undermine the judgments of the ICTR, the ICTY and the Mechanism through the commission of [] crimes.”⁷² Although Prosecutor Brammertz was specifically referring to the crime of contempt, the statement was sufficiently broad to encompass the crime of genocide denial. When interpreted in such a way, the IRMCT Prosecutor proclaimed to the Security Council that his office would stand firmly against an attempt to undermine the judgments of the tribunals through appeals rooted in statements that constitute genocide denial. During the discussion, there was a call for states to counter the glorification of convicted criminals by combatting the denial of atrocity crimes.⁷³

Of further concern, the French Ambassador directly implied that advocating individual innocence of genocide charges postconviction should be guarded against as a form of genocide denial.⁷⁴ Specifically, he stated, “Denials of genocide and the glorification of war criminals convicted by the International Tribunal for the Former Yugoslavia, the ICTR and subsequently the Mechanism, following impartial and independent proceedings, are unacceptable.”⁷⁵ This statement effectively implies approval of the criminalization of appeals from genocide convictions, even if that implication was unintentional. The right to appeal, however, prohibits criminalization as a component of fundamental fair trial rights.

II. FUNDAMENTAL RIGHT TO APPEAL IN INTERNATIONAL CRIMINAL TRIBUNALS

The due process rights to which international criminal defendants are entitled are derived from the tribunals’ respective statutes and rules of procedure, informed by the jurisprudence of the

71. *See id.* at 13–15:

[T]he issue of war crimes remains an open wound in the Western Balkans. We see with concern a rise in incendiary rhetoric and historical revisionism with regard to war crimes in the region, which is a major hurdle for much-needed reconciliation and also an impediment for strengthening good-neighbourly relations, especially between Kosovo and Serbia.

72. *Id.* at 5. ICTR and ICTY refer to the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, respectively.

73. *Id.* at 8.

74. *Id.* at 10.

75. *Id.*

international criminal tribunals, and shaped by customary international law. “A defendant is entitled to a fair trial but not a perfect one.”⁷⁶ This notion of fairness requires that the international tribunals fully respect internationally recognized standards of due process at every stage of the proceedings.⁷⁷ The concern here is the effect of international criminal justice policy regarding genocide denial on the right to appeal and on the substantive scope of rights a convicted person is entitled to during the appeals process. Appeals are an error correction mechanism that feature heavily in developed legal systems because they protect against miscarriages of justice, help maintain consistency, and provide an avenue for maintaining legitimacy.⁷⁸ The international criminal justice system should respect due process:

[Respect for due process] is important not only due to the relevance assigned to the respect of fundamental human rights in criminal proceedings, but also due to the peculiarity of international jurisdictions, which cannot rely on a long tradition and therefore require, in order to act as legitimate bodies, strict adherence to the rights of the accused. Moreover, such an example is essential for the establishment of the rule of law in the states concerned, and for purposes of furthering peace and reconciliation. It is crucial that justice is done, and seen to be done.⁷⁹

The inclusion of appeals in the international criminal justice process, and the due process rights afforded to convicted persons on appeal,

76. Roger A. Fairfax, Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 433 (2009).

77. See U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 34, 106, U.N. Doc. S/25704 (May 3, 1993):

In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* [sic] requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise;

see also *Prosecutor v. Milutinović*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—*Joint Criminal Enterprise*, ¶ 9 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003), <https://cld.irmct.org/assets/Uploads/full-text-dec/2003/03-05-21%20Milutinovic%20et%20al%20Decision%20on%20Ojdanic%20JCE%20Jxn%20Challenge.pdf> [<https://perma.cc/C868-BPV2>]; *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgment, ¶ 197 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002), <https://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf> [<https://perma.cc/XP32-URPG>] (“The scope of the Tribunal’s jurisdiction *ratione materiae* is determined by customary international law as it existed at the time when the acts charged in the indictment were allegedly committed. This limitation placed on the Tribunal is justified by concerns for the principle of legality.” (footnote omitted)).

78. See Peter D. Marshall, *A Comparative Analysis of the Right to Appeal*, 22 DUKE J. COMPAR. & INT’L L. 1, 2–3 (2011) (outlining the multiple purposes appeals serve by correcting errors); see also JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 416 (2009) (“Developed legal systems make provision for correcting error. Error—in the sense of good faith differences of opinion about finding the facts or about formulating or applying rules of law—is expected as a regular occurrence.”).

79. Fausto Pocar, *The International Criminal Tribunal for the Former Yugoslavia*, in *INTERNATIONAL CRIMINAL JUSTICE* 76 (Roberto Bellelli ed., Routledge 2016) (2010).

serve to counter a common criticism of international courts—that they are a forum for show trials and a form of victors’ justice.⁸⁰ Therefore, the appeals process is critical to the maintenance of the legitimacy of the international criminal tribunals.

A. Right to Appeal

An individual has the right to seek review of an otherwise final conviction handed down by the international criminal adjudicative bodies.⁸¹ The IRMCT Rules of Procedure and Evidence state that “[t]he rules of procedure and evidence that govern proceedings in the Trial Chambers and before the Single Judge shall apply [equally] to proceedings in the Appeals Chamber.”⁸² Such rules include the mandatory assignment of defense counsel when demanded by the interests of justice and the assurance of the defendant’s right to call witnesses and present evidence.⁸³

The tribunals have established a practice of relying on human rights jurisprudence to inform decisions regarding the rights of offenders. For instance, when deciding *The Media Case*, the ICTR Trial Chamber relied on international jurisprudence from the Nuremberg International Military Tribunal, the UN Human Rights Committee, and the ECtHR to balance accountability for genocide incitement with the fundamental right to freedom of expression.⁸⁴ The ICTY similarly relied on the ECHR and its jurisprudence in cases involving threats to human rights.⁸⁵ The international tribunals have also demonstrated

80. See, e.g., James Meernik, *Victor’s Justice or the Law?: Judging and Punishing at the International Criminal Tribunal for the Former Yugoslavia*, 47 J. CONFLICT RESOL. 140 (2003) (considering the possibility of “victor’s justice” in ICTY verdicts).

81. See, e.g., S.C. Res. 1966 *supra* note 4, art. 24 (providing for appeal in the event new facts are discovered).

82. Rules of Procedure and Evidence for the International Residual Mechanism for Criminal Tribunals, Rule 131, U.N. Doc. MICT/1/Rev.6 (Dec. 18, 2019) [hereinafter IRMCT Rules of Procedure and Evidence].

83. *Id.* Rules 43, 102.

84. See *Nahimana v. Prosecutor (The Media Case)*, Case No. ICTR-99-52-A, Judgment, ¶¶ 693–94 (Nov. 28, 2007), <https://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm> [<https://perma.cc/W7GT-338J>]; *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 980 (Dec. 3, 2003), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-99-52/trial-judgements/en/031203.pdf> [<https://perma.cc/7UEQ-DV2N>].

85. See, e.g., *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, ¶ 24 n.21 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 16, 1999), <https://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm> [<https://perma.cc/YEU5-BNX8>] (referencing a number of judgements concerned with art. 6(1) of the European Convention on Human Rights); *Prosecutor v. Dokmanovic*, Case No. IT-95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanovic, ¶¶ 59–60, 67 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 22, 1997), <https://www.icty.org/x/cases/dokmanovic/tdec/fr/71022MS2.htm>

understanding of their obligation to abide by the fair trial rights enshrined in the International Covenant on Civil and Political Rights (“ICCPR”).⁸⁶ By adopting internationally recognized fair trial rights, the international tribunals have established legitimacy,⁸⁷ as well as the minimum standards with which international criminal courts should comply.⁸⁸

B. Due Process Rights During Appeals Under Customary International Law

Customary International Law (“CIL”) is an authoritative source for standards of due process and the substantive rights defendants are entitled to on appeal.⁸⁹ The ICTY Statute (adopted by the Security Council) required the ICTY to apply rules that were deemed to undoubtedly constitute CIL,⁹⁰ and international criminal tribunals have been known to take creative approaches in determining what constitutes CIL.⁹¹ The international tribunals have established a pattern of reliance on human rights treaties, regional human rights tribunal judgments, and the practice of domestic courts as embodying the baseline due process rights owed to international criminal defendants.⁹² In fact, international criminal tribunals are generally

[<https://perma.cc/P48K-48T2>] (referencing article 5(1) of the European Convention on Human Right to determine the rights of a detainee).

86. See Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. J. INT’L HUM. RTS. 1, 28 (2009) (showing adherence to fair trial rights by ad hoc tribunals).

87. See David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law* 13–14 (July 2008) (unpublished working paper), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_papers [<https://perma.cc/TR8Z-ABHE>] (explaining how fair practices bolster the legitimacy of international tribunals).

88. See Schomburg, *supra* note 86, at 28–29 (emphasizing the value of fair trial rights as a minimum standard).

89. CIL is a source of international law that derives authority from Article 38(1) of the Statute of the International Court of Justice. See NOORA ARAJÄRVI, *THE CHANGING NATURE OF CUSTOMARY INTERNATIONAL LAW* 1 (2014) (explaining the authority of CIL and how it informs international judicial processes). Customary international law is comprised of widespread state practice and *opinio juris*—acts, or sometimes omissions, of states that are made under some sense of obligation to act in such a way as a matter of law. *Id.*

90. *Id.* at 3.

91. *Id.* at 1.

92. See, e.g., *Nahimana v. Prosecutor* (The Media Case), Case No. ICTR-99-52-A, Judgement, ¶¶ 693–94 (Nov. 28, 2007), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict99-52/appeals-chamber-judgements/en/071128.pdf> [<https://perma.cc/48TJ-AUN2>] (looking to jurisprudence from the IMT, the United Nations Human Rights Committee, and the European Court of Human Rights); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1, Decision on Prosecutor’s Appeal on Admissibility of Evidence, ¶ 24 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 16, 1999), <https://www.icty.org/x/cases/aleksovski/acdec/en/90216EV36313.htm> [<https://perma.cc/ZU4F-XMCP>] (focusing on past judgments of the European Court of Human Rights); *Prosecutor v.*

expected to aspire to the highest standards codified in human rights treaties and customary international law.⁹³

1. Appeal Rights as Reflected in Regional Human Rights Treaties

Human rights treaties serve as evidence of widespread state practice and deserve consideration in determining whether there is a universally recognized right to appeal, as well as the substance of such a right.⁹⁴ The ICCPR⁹⁵ and the ECHR⁹⁶ are instructive on this point because the international criminal tribunals are dedicated to ensuring that they do not compromise the rights of defendants.⁹⁷ Article 14(5) of the ICCPR provides for a broad right to appeal: “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.”⁹⁸ This right to appeal is situated within the broader fair trial rights, and the goal is to

Delalic, Case No. IT-96-21-T, Decision on the Motions by the Prosecution for Protective Measures for the Prosecution Witnesses Pseudonymed “B” Through to “M,” ¶ 27 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 28, 1997), <https://www.icty.org/x/cases/mucic/tdec/en/70428PM2.htm> [<https://perma.cc/KKE5-65UQ>] (“[D]ecisions on the provisions of the International Covenant on Civil and Political Rights . . . and the European Convention on Human Rights . . . have been found to be authoritative and applicable.”); *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, ¶¶ 537–42 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), <https://www.icty.org/x/cases/kupreskiic/tjug/en/kup-tj000114e.pdf> [<https://perma.cc/8J33-NXTU>] (highlighting the importance of analyzing established patterns); *Prosecutor v. Mrksic*, Case No. IT-95-13a-PT, Decision on the Request for Release Submitted by the Accused Slavko Dokmanovic, ¶¶ 59–60, 67 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 22, 1997), <https://www.icty.org/x/cases/dokmanovic/tdec/fr/71022MS2.htm> [<https://perma.cc/P48K-48T2>] (analyzing human rights treaties and international tribunals to find established patterns); *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgement and Sentence, ¶ 980 (Dec. 3, 2003), <https://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-99-52/trial-judgements/en/031203.pdf> [<https://perma.cc/UQC2-K2ES>] (“[A] review of international law and jurisprudence . . . is helpful as a guide . . .”).

93. See *Prosecutor v. Milosevic*, Case No. IT-99-37-PT, Decision on Preliminary Motions, ¶ 38 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001), https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm [<https://perma.cc/QTG7-ZXK8>] (“This provision [of the ICCPR regarding the right of a detainee to receive a hearing] is not reflected in the International Tribunal’s Statute. However, [sic] as one of the fundamental human rights of an accused person under customary international law, it is . . . applicable . . .”).

94. See, e.g., R.R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT’L L. 275 (1965) (discussing the role of multilateral treaties in determining the content of customary international law).

95. International Covenant on Civil and Political Rights art. 14(5), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

96. European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, E.T.S. No. 005, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

97. Patrick Robinson, *The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY*, 3 BERKELEY J. INT’L L. PUBLICIST 1, 9 (2009).

98. ICCPR, *supra* note 95, art. 14(5).

“ensur[e] the proper administration of justice.”⁹⁹ In *Prosecutor v. Tadić*, the ICTY Appeals Chamber found that an individual convicted of contempt had the right to appeal and proclaimed that Article 14 of the ICCPR, which grants the right to appeal, reflected “an imperative norm of international law to which the Tribunal must adhere.”¹⁰⁰ Further dicta from a case in the Special Court for Sierra Leone considered Article 14 of the ICCPR to have *jus cogens*¹⁰¹ status as a fundamental principle of international law.¹⁰² Additionally, the Secretary-General of the UN has mandated that international criminal tribunals “respect internationally recognized standards regarding the rights of the accused at all stages of [the] proceedings,” specifically referencing the ICCPR as a binding legal instrument.¹⁰³

Numerous fair trial rights included in the ICCPR also apply during the appeals process and are persuasive in the international tribunals as a representation of customary international law.¹⁰⁴ These rights include the right to the assistance of counsel and the right to bring witnesses on the defendant’s behalf.¹⁰⁵ Assistance of counsel—a

99. U.N. Hum. Rts. Comm., General Comment No. 32, Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, ¶ 2, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter General Comment 32].

100. *Prosecutor v. Tadić*, Case No. IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, at ¶ 15 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 27, 2001), <https://www.icty.org/x/cases/tadic/acjug/en/vuj-aj010227e.pdf> [<https://perma.cc/5LVW-8ZL3>]; see also *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, ¶¶ 104, 113 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), <https://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf> [<https://perma.cc/XC7C-GP8Z>] (“The right of appeal is a component of the fair trial requirement set out in Article 14 of the ICCPR, and Article 21(4) of the Statute. The right to a fair trial is, of course, a requirement of customary international law.” (footnote omitted)); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-A, Judgement, ¶ 177 (July 21, 2000), <https://www.icty.org/x/cases/furundzija/acjug/en/fur-aj000721e.pdf> [<https://perma.cc/7VZN-W8WZ>] (stating that the right to an impartial tribunal was “generally recognised as being an integral component of the requirement that an accused should have a fair trial”).

101. *Jus cogens* norms in international law are considered fundamental legal norms from which derogation is never permitted. See, e.g., Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 63 (1993) (“The modern international law doctrine of *jus cogens* asserts the existence of fundamental legal norms from which no derogation is permitted.”).

102. See *Prosecutor v. Norman*, Case No. SCSL-2003-09-PT, Decision on the Applications for a Stay of Proceedings and Denial of Right to Appeal, ¶ 19 (Special Court for Sierra Leone Nov. 4, 2003), http://www.worldcourts.com/scsl/eng/decisions/2003.11.04_Prosecutor_v_Norman_Kallon_Gbao2.pdf [<https://perma.cc/4LRN-J8JQ>] (noting “that the very agreement by the UN to the terms of Article 20 of the Special Court Statute affords some evidence that [Article 14(5)] has indeed reached the status termed by international lawyers ‘jus cogens’”). It is important to note that the right to appeal is not broadly considered to be a *jus cogens* norm, but it is granted such esteemed status by some.

103. U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 106–07, U.N. Doc. S/25704 (May 3, 1993).

104. See Marshall, *supra* note 78, at 18 (“A number of the fair trial rights in article 14 are directly applicable to appeals.”).

105. ICCPR, *supra* note 95, art. 14(3)(d)–(e).

protective measure against being arbitrarily prosecuted—is “paramount to the concept of due process.”¹⁰⁶ Defendants must also have access when necessary to witnesses, evidence, and other essentials of criminal justice in a manner that does not compromise the defendant’s integrity.¹⁰⁷ In an expression of best practices, the UN Human Rights Committee has gone so far as to outline the essential features of the right to appeal—convicted persons must have “effective access to the appellate system,” as well as “substantive review of conviction and sentence.”¹⁰⁸ The Committee’s interpretation requires first that all convicted persons have the right to seek review and second that the process is not merely discretionary.¹⁰⁹ The right to substantive review requires that both conviction and sentence be “review[ed] substantively, both on the basis of sufficiency of the evidence and of the law, . . . such that the procedure allows for due consideration of the nature of the case.”¹¹⁰ The ICCPR should not be construed as establishing two different standards of due process for domestic courts and international tribunals;¹¹¹ therefore, international defendants should be able to rely on the ICCPR’s minimum standards.

The ECHR itself does not require access to an appeal,¹¹² but if such a right is granted, the fair trial rights guaranteed in Article 6 of the Convention apply in full to appellate proceedings.¹¹³ The right to appeal, however, does feature in Protocol No. 7 to the European Convention.¹¹⁴ The ECtHR has provided that although states have the

106. Schomburg, *supra* note 86, at 16 (quoting M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 818 (2d rev. ed. 2013)).

107. Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT’L L. 111, 119 (2002).

108. Marshall, *supra* note 78, at 18.

109. *Ratiani v. Georgia*, Views, ¶¶ 11.2–11.3, Communication No. 975/2001, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/84/D/975/2001 (July 21, 2005).

110. General Comment 32, *supra* note 99, at ¶¶ 48, 58 (noting that the right to an effective appeal is *lex specialis* vis-à-vis the generalized right to an effective remedy); *see also* *Bandajevsky v. Belarus*, Views, ¶ 10.13, U.N. Hum. Rts. Comm., U.N. Doc. CCPR/C/86/D/1100/2002 (Mar. 28, 2006) (“[T]he right to appeal . . . imposes on States parties a duty substantially to review conviction and sentence, both as to sufficiency of the evidence and of the law.”).

111. Robinson, *supra* note 97, at 9.

112. *See* STEFAN TRECHSEL, HUMAN RIGHTS IN CRIMINAL PROCEEDINGS 362–63 (2005) (“[I]nternational human-rights law is not concerned with the uniform and correct application of national law . . .”).

113. *Poulsen v. Denmark*, App. No. 32092/96, at 5 (June 29, 2000), <http://hudoc.echr.coe.int/eng?i=001-5376> [<https://perma.cc/7CQM-5Y9T>] (“As far as Article 6 is concerned the Court recalls that this provision does not compel the Contracting States to set up courts of appeal but where such courts do exist, the guarantees of Article 6 must be complied with . . .”).

114. Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, ¶¶ 1–2, Nov. 22, 1984, E.T.S. No. 117:

power to regulate access to appellate review, any such restrictions must be instituted in pursuit of a legitimate aim and must not infringe on the essence of the right to appeal.¹¹⁵ Thus, Article 6 of the ECHR guarantees that fair trial rights apply in full to appellate proceedings.¹¹⁶

2. Widespread State Practice Concerning Appeal Rights

State practice firmly supports consideration of appeal rights as an affirmative premise of the fullest view of established human rights. In most jurisdictions, convicted persons have a right to appeal their convictions arising either from the jurisdiction's respective constitution or statutory law.¹¹⁷ A review of state practice reveals that one's right to appeal a criminal conviction consists of "the opportunity to access a fair process that permits adequate and effective review of one's conviction."¹¹⁸

Overall, widespread state practice dictates that when a right to appeal is granted, it must be meaningful. The right to appeal was included in the Protocols of the ECHR, which ensured its adoption by almost every European State.¹¹⁹ Additionally, in South Africa and New Zealand, the right to appeal is considered a fundamental human right.¹²⁰ In South Africa, the right to appeal is guaranteed by section 35(3) of the South African Constitution as an extension of the right to a fair trial.¹²¹ The right consists of the "opportunity to have [one's] conviction and sentence 'adequately reappraised.'"¹²² In New Zealand, section 25(h) of the New Zealand Bill of Rights Act 1990 provides that every convicted person has the right to appeal his conviction or sentence as a "[m]inimum standard[] of criminal procedure."¹²³ This right

Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

115. *Gurepka v. Ukraine*, App. No. 61406/00, ¶ 59 (Sept. 6, 2005), <http://hudoc.echr.coe.int/eng?i=001-70094> [<https://perma.cc/7P8A-6SSH>].

116. *Poulsen*, App. No. 32092/96, at 5 (June 29, 2000), <http://hudoc.echr.coe.int/eng?i=001-5376> [<https://perma.cc/7CQM-5Y9T>].

117. *Marshall*, *supra* note 78, at 1.

118. *Id.* at 2.

119. *Id.* at 24–25.

120. *Id.* at 17.

121. *See* S. AFR. CONST., 1996, art. 35(3)(o) ("Every accused person has a right to a fair trial, which includes the right . . . of appeal to, or review by, a higher court.").

122. *Shinga v. State* 2007 (4) SA 611 (CC), at para. 40 (S. Afr.).

123. New Zealand Bill of Rights Act 1990, s 25(h).

requires “an effective right of appeal which so far as is reasonably possible will ensure that justice is done in the appeal process,” and the court must give adequate consideration to the merits of the appeal.¹²⁴ Adequate consideration of the merits cannot occur absent full observance of due process.¹²⁵ Further, while Canadian courts have not given great consideration to the right to appeal, the Supreme Court of Canada has established that “[w]here a party has a right of appeal, the law presupposes that the exercise of that right is to be meaningful.”¹²⁶

There is significant agreement among jurisdictions about the substance of the right to appeal—appeals must be adequate and effective.¹²⁷ Adequacy requires review of the merits of both the legal and factual bases of conviction.¹²⁸ Effectiveness is typically achieved by fulfilling prerequisites set by the respective jurisdiction in order to secure meaningful appellate review.¹²⁹ Convicted persons will often require assistance of counsel to ensure they have adequate and effective access to the appeals process.¹³⁰ Furthermore, appellants’ ability to participate in the appellate process must be fair, both to the individual appellant and between groups of appellants.¹³¹ Therefore, appellate processes must not discriminate between different classes of appellants.¹³² In conclusion, it is undeniable that international criminal defendants are entitled to appeal their convictions in an effective and adequate manner.

III. ANALYSIS

In light of the fact that genocide denial is harmful to the survivors of genocide, it must be determined whether criminalizing a convicted person’s denial of individual responsibility is a permissible, or even effective, measure to address genocide denial. Denials of individual responsibility for genocide are not uncommon.¹³³ Take for

124. *Taito v. R* [2002] UKPC 15, [2003] 3 NZLR 577 at 596–97 (N.Z.).

125. *Id.* at 597.

126. *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, para. 66 (Can.).

127. Marshall, *supra* note 78, at 39.

128. *Id.*

129. *Id.* at 41.

130. See, e.g., *Douglas v. California*, 372 U.S. 353, 355–56 (1963) (noting that denying the indigent counsel on appeal is invidious discrimination); *Shinga v. State* 2007 (4) SA 611 (CC), at para. 6 (S. Afr.) (noting that counsel is important to assure an adequate appeal).

131. Marshall, *supra* note 78, at 43.

132. *Id.*

133. See, e.g., Andrew MacDowall, *Ratko Mladic Says He Had Nothing to Do with the Srebrenica Massacre*, INDEPENDENT (May 30, 2011), <https://www.independent.co.uk/news/world/europe/ratko-mladic-says-he-had-nothing-to-do-with-the-srebrenica-massacre-2290803.html>

example, Khieu Samphan—former Khmer Rouge leader who responded to his UN tribunal indictment by arguing that he was not involved with the atrocities committed during the Khmer Rouge regime.¹³⁴ Although he never denied the massive casualty count, he vehemently denied that he was directly responsible.¹³⁵ Looking back further in history reveals similar tactics following World War II.¹³⁶ Karl Blessing, a member of the Nazi party, shielded his complicity in the Holocaust and presented himself to the post-World War II world as an “anti-Nazi [r]esistance hero.”¹³⁷ The question is not whether these two men were telling the truth but whether they had the right to assert their innocence regardless of its truth.

*A. Denial of Individual Responsibility Should Not
Constitute Genocide Denial*

The fundamental right to appeal under international law prohibits characterizing individual denial of responsibility as genocide denial. International criminal tribunals are required to aspire to the highest standards of due process embodied in human rights treaties and customary international law.¹³⁸ Because international criminal tribunals opted to provide a right to appeal, that right should be meaningful (adequate and effective), and it should not be arbitrarily denied to those seeking review of genocide convictions as opposed to those seeking review of other convictions.¹³⁹

The right to appeal is an extension of the due process rights that guarantee a fair trial because it permits review of trial procedure, as well as legal and factual determinations.¹⁴⁰ “[I]t would be inconceivable that an international tribunal (especially one trying such serious

[<https://perma.cc/53S3-7UUK>] (reporting on Ratko Mladic’s denial of responsibility for the massacre at Srebrenica as he tried to avoid extradition to The Hague for trial).

134. Theriault, *supra* note 31, at 49.

135. *Id.*; see also *Genocide Charge for Khmer Rouge Leader Khieu Samphan*, BBC NEWS, <http://news.bbc.co.uk/2/hi/asia-pacific/8419789.stm> (last updated Dec. 18, 2009, 5:04 AM) [<https://perma.cc/9GUS-EGY4>] (discussing Samphan’s denial of direct responsibility for the deaths under the Khmer Rouge’s rule).

136. See, e.g., Theriault, *supra* note 31, at 49 (discussing a former Nazi’s use of the same tactics).

137. *Id.*

138. Prosecutor v. Milosevic, Case No. IT-99-37-PT, Decision on Preliminary Motions, ¶¶ 37–38 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 8, 2001), https://www.icty.org/x/cases/slobodan_milosevic/tdec/en/1110873516829.htm [<https://perma.cc/EL83-W2UU>].

139. See Marshall, *supra* note 78, at 42–44 (discussing the need for the appellate process to be fair between groups of appellants).

140. See General Comment 32, *supra* note 99, at ¶ 2 (“The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law.”).

crimes) would be held less stringently to human rights norms than national legal systems.”¹⁴¹ Therefore, effectively withdrawing a convicted person’s ability to appeal his conviction or sentence by denying a defendant the ability to proclaim his innocence would reduce the legitimacy of the international criminal tribunals.¹⁴² Review is a critical tool for ensuring a defendant’s rights are respected during the trial phase.

The right to an appeal is further degraded by infringement on the attorney-client relationship. If lawyers face criminal charges for proclamations of a client’s innocence, there are two logical results. First, lawyers may be incapacitated through arrest during their clients’ trials, depriving international criminal defendants of counsel and delaying the trial process.¹⁴³ Second, if lawyers understand the criminal sanctions they might face for zealously advocating on behalf of their clients, they may forego opportunities to argue genocide cases at the appellate and perhaps even at the trial levels. Individual states with genocide denial laws and the international criminal courts should endeavor to observe the UN Basic Principles on the Role of Lawyers, which aim to ensure that lawyers “are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference.”¹⁴⁴

Characterizing denial of individual responsibility as genocide denial would have a chilling effect on appeals in the international criminal adjudicative bodies. First, defendants would likely be more hesitant to lodge appeals. Second, criminalizing denial of an individual’s responsibility threatens an appellant’s ability to bring witnesses on his behalf. Defendants are permitted to file motions and rebuttals for the presentation of additional evidence before the Appeals Chamber:¹⁴⁵

If the Appeals Chamber finds that the additional evidence was not available at trial and is relevant and credible, it will determine if it could have been a decisive factor in reaching the decision at trial. If it could have been such a factor, the Appeals Chamber will consider

141. Cogan, *supra* note 107, at 117–18.

142. *See* Luban, *supra* note 87, at 14 (discussing the import of due process to the legitimacy of the international criminal tribunals).

143. *See* discussion *supra* Section I.A.3 and accompanying notes about Peter Erlinder (discussing this possibility).

144. U.N. Secretariat, *Basic Principles on the Role of Lawyers*, ¶ 16, U.N. Doc. A/CONF.144/28/Rev.1, annex (1990).

145. IRMCT Rules of Procedure and Evidence, *supra* note 82, Rules 142, 144(A) (“The Appeals Chamber shall pronounce judgement on the basis of the record on appeal together with such additional evidence as has been admitted by it.”).

the additional evidence and any rebuttal material along with that already on the record¹⁴⁶

Witnesses would likely be deterred from appearing on an appellant's behalf if they knew they would face genocide denial charges as a result of their testimony.

If the criminalization of denial of individual responsibility for genocide is permitted during the appeals process, it is reasonable to expect the same criminalization to apply in ongoing criminal trials for those charged with genocide. The consequences of applying genocide denial law to the extent that accused individuals could not safely assert their innocence at trial would land a staggering blow to international criminal justice. The right to the presumption of innocence, protected by the leading human rights treaties,¹⁴⁷ would become a mockery.¹⁴⁸ International criminal trials would become a “damned if you do and damned if you don’t” endeavor, reminiscent of the very show trials the international criminal courts were created to avoid.¹⁴⁹

B. Domestic Criminalization and States' Duty to “Accept and Carry Out”

Individual states should refrain from charging convicted persons with genocide denial for maintaining their innocence on appeal. Such infringement on a defendant's fair trial rights would violate a state's duty to “accept and carry out” decisions of the Security Council.¹⁵⁰ In Security Council Resolution 1966, which established the IRMCT, the Security Council bound states to “cooperate fully with the Mechanism . . . [and to] take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute of the Mechanism”¹⁵¹ The Statute of the Mechanism

146. *Id.* Rule 142(C).

147. *See, e.g.*, ICCPR, *supra* note 95, art. 14(2).

148. *See* Paul Behrens, *Genocide Denial and the Law: A Critical Appraisal*, 21 BUFF. HUM. RTS. L. REV. 27, 39 (2015) (arguing that laws criminalizing genocide denial “would make a mockery of the presumption of innocence”).

149. Aaron Fichtelberg, *Fair Trials and International Courts: A Critical Evaluation of the Nuremberg Legacy*, 28 CRIM. JUST. ETHICS 5, 6–7 (2009).

150. *See* U.N. Charter art. 25 (“The Members of the United Nations agree to accept and carry out the decision of the Security Council in accordance with the present Charter.”).

151. S.C. Res. 1966, *supra* note 4, ¶ 9 (observing best practices by using “decides” language in the preamble to bind states to their duty to cooperate); *see also id.* annex 1, art. 28, ¶¶ 1–2:

States shall cooperate with the Mechanism in the investigation and prosecution of persons covered by Article 1 of this Statute.

States shall comply without undue delay with any request for assistance or an order issued by a Single Judge or Trial Chamber in relation to cases involving persons covered by Article 1 of this Statute, including, but not limited to:

mandates that the Mechanism hear appeals on questions of law or fact.¹⁵² The international criminal tribunals cannot function without the cooperation of Member States, and “[r]ecaltrance on behalf of national authorities has a palpable effect on the efficiency of trials.”¹⁵³ Therefore, one reading of states’ obligation to cooperate would require states to ensure that domestic charging decisions do not impede the Mechanism from operating its appeals process as ordained by the Security Council.¹⁵⁴ This reading is particularly persuasive when, as here, such domestic charging decisions would infringe on the fundamental due process provided by the Mechanism, which lends its decisions international legitimacy.¹⁵⁵ Although political sensitivities may arise as a result of cooperation with the international tribunals, such sensitivities do not constitute an excuse for failure to cooperate, particularly when the integrity of the Mechanism’s administration of justice is at stake.¹⁵⁶

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- (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the Mechanism;

U.N. SCOR, 71st Sess., 7829th mtg. at 10, U.N. Doc S/PV.7829 (Dec. 8, 2016) (“[The cooperation requirement is] set under international law and should not be subject to domestic law constraints.”).

152. S.C. Res. 1966, *supra* note 4, art. 23.

153. President of the International Criminal Tribunal for the Former Yugoslavia, Letter dated May 21, 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, ¶ 74, U.N. Doc. S/2004/420 (May 24, 2004) (reprimanding Serbia and Montenegro for nonexistent cooperation with the ICTY when they failed to turn over fugitives to the Tribunal, failed to provide access to evidence, and failed to grant witnesses immunity to enable their testimony before the Tribunal). Serbia was confronted in the Security Council meeting hall again in 2016 upon failing to turn over individuals to the ICTY who were charged with contempt. *See* U.N. SCOR, 71st Sess., 7829th mtg. at 4–5, U.N. Doc S/PV.7829 (Dec. 8, 2016). Serbia claimed that it could not execute the ICTY’s arrest warrants for individuals charged with contempt because Serbian domestic law provided legal justification for such warrant execution only in response to indictments for atrocity crimes. *Id.* at 27. This argument was heartily rejected by the other Security Council members, along with Judge Agius of the ICTY and Judge Meron of the IRMCT. *Id.* at 4–6, 10.

154. *See* U.N. Charter art. 103 (“In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”). If the Security Council passes a Chapter VII resolution pertaining to international peace and security matters, that resolution is legally binding on UN Member States. Forsythe, *supra* note 66, at 841.

155. *See* discussion *supra* Section III.A. Denial of Individual Responsibility Should Not Constitute Genocide Denial (noting that international tribunals like the Mechanism should aspire to the highest levels of due process).

156. U.N. SCOR, 71st Sess., 7829th mtg. at 4, U.N. Doc S/PV.7829 (Dec. 8, 2016) (“Cooperation is a vital responsibility flowing from the statute of the Tribunal itself, and reflects the collective will of the Security Council in our common fight against impunity.”). Judge Agius noted during the Security Council meeting that past cooperation cannot excuse noncompliance, nor release a

C. Criminalization—an Effective Way to Combat Denial?

The threats to human rights posed by classifying denial of individual responsibility as actionable genocide denial raise the broader question of whether the criminalization of genocide denial is actually the most effective or most efficient way to combat denial behaviors in the first instance. Full analysis of this potential remains beyond the scope of this Note. That said, criminal law may not be the best tool to combat the problematic aspects of genocide denial. Genocide denial trials could provide a forum for the dispersal of denial ideology, yet they do not necessarily serve the goal of deterrence.

Two features of the criminal justice process suggest that criminal law may not be the appropriate avenue for eradicating denial behaviors. First, criminal law is exceptionally intrusive, and as such, there should be a high threshold for criminalization of conduct—specifically, requiring a finding that a certain level of harm was proximately caused by the conduct and the perpetrator possessed a certain level of intent.¹⁵⁷ Denial laws presently exist with no intent requirement as to any particular result, making it difficult to determine if the high threshold for the criminalization of conduct is met.¹⁵⁸ Second, trials attract substantial publicity. Dissenting justices in the Holocaust denial case *R. v. Keegstra* noted that criminal trials attract “extensive media coverage and confer on the accused publicity for his dubious causes, [and] may even bring him sympathy.”¹⁵⁹ Public trials for genocide denial present a forum for further dissemination of a defendant’s ideology, which could ultimately be equally as harmful as the original conduct being adjudicated. Such twisting of the adjudicatory process not only serves the goals of denialism but makes a mockery of the justice process.

Furthermore, the criminalization of genocide denial does not seem to serve the goals of specific or general deterrence. For instance, denier David Irving’s views did not change significantly following a prison sentence for genocide denial.¹⁶⁰ In fact, prison sentences for

member state from ongoing obligations to cooperate with the international criminal tribunals. *Id.* at 5. Similarly, Mr. Yelchenko, representative for Ukraine, underlined that there is no permissible justification for failing to cooperate with the international tribunals. *Id.* at 18.

157. See Behrens, *supra* note 148, at 33 (“[T]he exceptionally intrusive nature of criminal law also demands that a particularly high threshold has to be imposed on conduct which is to fall within its framework.”).

158. See discussion *supra* Part I (discussing genocide denial and international criminal justice policy).

159. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 703 (Can.).

160. Mark Oliver, *Irving Shows Little Remorse on Return to UK*, *GUARDIAN* (Dec. 22, 2006, 10:32 AM), <http://www.theguardian.com/uk/2006/dec/22/thefarright.austria> [<https://perma.cc/>

genocide denial may actually undercut the intended effect—in at least some prisons, deniers stand to be exposed to extreme right-wing propaganda that would serve only to affirm or strengthen their views, such as statements made by fellow inmates claiming those in power should not be prevented from wielding power as they choose.¹⁶¹ Extremist organizations tend to maintain contact with imprisoned members to ensure the continuation of their ideological commitment.¹⁶² For indoctrinated extremists, conviction and prison may even seem like a rite of passage or a step on the “career ladder.”¹⁶³ Although denial laws might serve the goal of general deterrence more effectively than they do the goal of specific deterrence, it is difficult to determine the success of criminalization, just as it is always difficult to determine the success of general deterrence.¹⁶⁴ There are many potential reasons individuals refrain from denying genocide, including the presence of overwhelming evidence that the genocide occurred.¹⁶⁵ Furthermore, the criminalization of denial might make it all the more enticing to both individuals inclined to challenge authority and those that otherwise would not engage in denial but for the lure of the deviant.¹⁶⁶

Domestic convictions upheld due to an effective denial of the fundamental right to appeal might satisfy the immediate policy objectives of bringing accountability and reconciliation to war-torn regions. The continued—and long-term—legitimacy of international criminal justice efforts, however, is rooted in the understanding that national reconciliation and long-term maintenance of peace depend on true justice being rendered, as well as the widespread *perception* that justice is being rendered.¹⁶⁷ Practitioners of international criminal law must be vigilant that the policies established and methods promulgated to reduce genocide denial do not simultaneously infringe on a convicted person’s fundamental right to an adequate and effective appeal.¹⁶⁸ Rights of the accused must be protected by the courts, particularly

G7M2-UCWC] (describing Irving’s post-release statements that during his trial he was “obliged to show remorse” but he “decided [he had] no need any longer to show remorse”).

161. Behrens, *supra* note 148, at 40.

162. *Id.*

163. *Id.* at 40–41 (citations omitted).

164. *Id.* at 41.

165. *Id.*

166. *Id.*

167. Wayne Jordash and Scott Martin made a similar argument after identifying violations of due process rights at the Special Court for Sierra Leone. Wayne Jordash & Scott Martin, *Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone*, 23 LEIDEN J. INT’L L. 585, 608 (2010).

168. See *supra* Section III.A. Denial of Individual Responsibility Should Not Constitute Genocide Denial (arguing that the right to appeal prohibits characterizing individual denial of responsibility as genocide denial).

because the backgrounds of international criminal defendants, the severity of the crimes they are alleged to have committed, and the concern for victims' rights create a hostile atmosphere in which fundamental due process rights of defendants are an unpopular topic.¹⁶⁹

IV. INTERDISCIPLINARY APPROACH TO COMBATTING DENIAL WHILE RETAINING THE SANCTITY OF DUE PROCESS

The adverse effects of genocide denial must be reduced while maintaining full respect, both internationally and domestically, for the fair trial rights of those accused or convicted of genocide. Therefore, any potential holistic solution must address domestic and international legal regimes, as well as reconciliatory practices.

A. Inclusion of Mens Rea Requirement in Domestic Statutes

The legal prohibitions of genocide denial should at minimum be amended to include an explicit intent requirement that aligns with the purposes of denial prohibition.¹⁷⁰ At present, virtually none of the denial laws passed in domestic jurisdictions contain a mens rea requirement such as bad faith or hateful intent.¹⁷¹ This absence seems overly broad when considered in the context of postconviction criminal appeals at the international level. Notably, the UN Human Rights Committee has criticized the lack of intent requirement in broad denial and glorification laws,¹⁷² and the ECtHR has failed to uphold a conviction for glorification of atrocity crimes due to lack of malicious intent.¹⁷³ Intent determinations should require an analysis of whether a reasonable person would have had the requisite intent as to a harmful

169. See, e.g., Cogan, *supra* note 107, at 112 (discussing reasons for the relative lack of interest in protecting the rights of the accused).

170. See Hennebel & Hochmann, *supra* note 25, at xviii (discussing the current features of domestic denial statutes). Robert Faurisson, who was convicted of denial in 1992, challenged the legitimacy of the French denial law before the United Nations Human Rights Committee. His claim was ultimately dismissed, likely because of the Committee's concerns regarding the lack of a mens rea requirement in the statute. See Martin Imbleau, *Denial of the Holocaust, Genocide, and Crimes Against Humanity: A Comparative Overview of Ad Hoc Statutes*, in GENOCIDE DENIALS AND THE LAW, *supra* note 25, at 235, 258.

171. Hochmann, *supra* note 43, at 317–18.

172. U.N. Hum. Rts. Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, ¶ 26, U.N. Doc. CCPR/C/GBR/CO/6 (July 30, 2008).

173. See TEMPERMAN, *supra* note 69, at 307 (discussing the ECtHR's handling of the case *Lehideux and Isorni v. France*); see also *Lehideux v. France*, 1998-VII Eur. Ct. H.R. at 22 (“[T]hey were not so much praising a policy as a man, and doing so for a purpose – namely securing revision of Philippe Pétain’s conviction – whose pertinence and legitimacy at least, if not the means employed to achieve it, were recognised by the Court of Appeals.”).

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result under the circumstances.¹⁷⁴ If framed this way, an intent requirement would almost categorically exclude denial of individual responsibility on appeal from prosecution as genocide denial. In an appellate chamber, the reasonable person's intent behind denial of responsibility is to achieve a more favorable legal outcome in his case. A genuine assertion of innocence would therefore not meet the requisite mens rea element and would not, on its own, inflict overt harm on survivors of genocide or on the society. Survivors would suffer more harm if there were no tribunal adjudicating atrocity crimes in which a defendant could protest his innocence because there would be a delay or denial of justice.

In amending denial statutes to include an intent requirement, states should look to Switzerland's prohibition of racial discrimination as a guide.¹⁷⁵ The Swiss criminal code condemns "any person who publicly disseminates ideologies that have as their object the systematic denigration or defamation of [members of a race, ethnic group, religion, or sexual orientation]."¹⁷⁶ This provision prohibits words, writings, images, and gestures that have been introduced into a public forum and intentionally undermine human dignity of a protected people group.¹⁷⁷ By extension, the provision prohibits the denial, justification, or minimization of atrocity crimes when committed with that same intent to denigrate or defame.¹⁷⁸ Alternatively, states could look to the 2003 Additional Protocol on the Convention on Cybercrime, which penalizes denial "committed with the intent to incite hatred, discrimination or violence."¹⁷⁹ Montenegro, Lithuania, and Ukraine have expressed that they intend to implement this intent requirement.¹⁸⁰ A genocide denial statute including a mens rea requirement as recommended here could take the following form:

Whoever publicly approves of, denies, challenges, or minimizes one or more genocide or crime against humanity established under international law with the intent to incite hatred, incite violence, or otherwise besmirch the dignity of the victims by approving of,

174. Hochmann, *supra* note 43, at 318.

175. SCHWEIZERISCHES STRAFGESETZBUCH [STGB] [Criminal Code] Dec. 21, 1937, SR 311, art. 261bis (Switz.).

176. *Id.*

177. Imbleau, *supra* note 170, at 261.

178. *Id.*

179. Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, art. 6(2), *opened for signature* Jan. 1, 2003, C.E.T.S. No. 189 (entered into force Jan. 3, 2006).

180. Hochmann, *supra* note 43, at 319 n.158.

glorifying, or justifying the actions taken shall be subject to [appropriate criminal sanctions].¹⁸¹

With the introduction of such statutory language, the chances of charging denial of individual responsibility as genocide denial would be significantly reduced. Some might argue that such statutory language would interfere with prosecutions for genocide denial in other contexts, but charging decisions regarding denial in most contexts would remain largely undisturbed. Only in cases where an individual evinces no bad faith or intent to disparage a victimized people group, glorify the actions of genocidaires, or justify the actions that constitute genocide would domestic prosecutions for genocide denial be affected.

B. Suggestions for Security Council Action

The Security Council must review the policies it may implicitly communicate to the domestic governments of UN Member States, which look to the Security Council for direction.¹⁸² The Security Council should pass an independent resolution, or include language in a resolution regarding the IRMCT, condemning genocide denial but reaffirming the UN's dedication to due process in the IRMCT. Because so much of international law is normative, a Security Council resolution would help align the competing priorities of justice for victims and due process among the international community while also signaling to the tribunals and domestic courts that due process must be respected.¹⁸³ Ultimately, the Security Council has the authority to compel state

181. The model statutory language was influenced by the language of France's genocide denial prohibition, Germany's genocide denial prohibition, and the 2003 Additional Protocol on the Convention on Cybercrime. See *Loi du 29 juillet 1881 sur la liberté de la presse* [Law of July 29, 1881 on Freedom of the Press], COLLECTION COMPLÈTE, DÉCRETS, ORDONNANCES, RÈGLEMENTS ET AVIS DU CONSEIL D'ÉTAT (DUVERGIER & BOCQUET) [DUV. & BOC.] [Complete Collection of Laws, Decrees, Ordinances, Regulations and Opinions of the Council of State], July 29, 1881, art. 24bis (Fr.) (one of the influences of the model statutory language); *Strafgesetzbuch* [StGB] [PENAL CODE], § 130(3), https://sherloc.unodc.org/cld/en/legislation/deu/german_criminal_code/special_part_-_chapter_seven/section_130/section_130.html [<https://perma.cc/V2ED-UTZN>] (Ger.) (same); Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, art. 6(2), *opened for signature* Jan. 1, 2003, C.E.T.S. No. 189 (entered into force Jan. 3, 2006) (same).

182. *Role of the Security Council*, UNITED NATIONS: PEACEKEEPING, <https://peacekeeping.un.org/en/role-of-security-council> (last visited Oct. 22, 2020) [<https://perma.cc/2VUA-QHL8>].

183. See Ademola Abass, *The Competence of the Security Council to Terminate the Jurisdiction of the International Criminal Court*, 40 TEX. INT'L L.J. 263, 296 (2005) (noting the significant power of the Security Council and its importance to the cohesion of the international system).

cooperation through a Chapter VII Resolution and could exercise that authority in resolving this issue if deemed appropriate.¹⁸⁴

C. Protective Measures for Defense Counsel

The international criminal tribunals must take affirmative measures to safeguard the due process rights afforded to defendants by protecting statements made by counsel for adjudicatory purposes, both orally and in writing. Although a defense counselor's statements that a client did not commit genocide might create a public disturbance within an affected population, defense counsel have a positive duty to do so if the client desires to assert his innocence.¹⁸⁵ Therefore, it is essential to ensure that the fundamental rights of defendants—and by extension, the rights of defense counsel—are preserved.¹⁸⁶

The international tribunals should emulate the ICTR's approach to the charges levied against Peter Erlinder, whose case is discussed in Part I. If defense counsel deny a defendant's individual responsibility for a genocide or other atrocity crime, they should be deemed to be acting in their role as officers of the court and as such be deemed immune from domestic prosecution. There is a line, however, between statements made in service of a client and statements made for other, potentially improper, purposes.¹⁸⁷ If defense counsel publish statements in the media that satisfy the elements of denial laws, amended as suggested above, in a manner that has no benefit to their clients, they may still be subject to prosecution.¹⁸⁸

In most circumstances, public statements made by defense counselors on behalf of their clients are motivated by an intent to validate the interests of the client and would not meet the recommended mens rea requirement of denial statutes.¹⁸⁹ In an effort to validate the competing set of interests in play, there could be a safe

184. *Role of the Security Council*, *supra* note 182.

185. Behrens, *supra* note 148, at 44.

186. *Id.*

187. This is a fine line with sweeping implications. If a defense counselor is found to have violated genocide denial laws, she faces not only potential prosecution but sanctions from the international criminal tribunals for failing to respect the laws and regulations of the countries in which they enter to perform official duties on behalf of their clients. See S.C. Res. 1966, *supra* note 4, art. 29 (International Residual Mechanism for Criminal Tribunals statute bestowing the duty on defense counselors to "respect the laws and regulations of the receiving State").

188. See Kramer, *supra* note 51, at 227 (noting that functional immunity for defense counsel is not absolute).

189. See Jan Hoffman, *May It Please the Public; Lawyers Exploit Media Attention as a Defense Tactic*, N.Y. TIMES (Apr. 22, 1994), <https://www.nytimes.com/1994/04/22/us/may-it-please-the-public-lawyers-exploit-media-attention-as-a-defense-tactic.html> [https://perma.cc/RH28-X7FN] (discussing motivations behind the increasing use of public statements by defense lawyers).

harbor for defense counselors who provide a statement of intent at the beginning of public remarks outlining the affirmative intent of their statements and denouncing intent to cause the harms genocide denial laws aim to address. Should charges be brought in a domestic jurisdiction, such a statement could form a rebuttable presumption the prosecuting authority must then combat with contradictory evidence. This rebuttable presumption created by the mens rea requirement would ultimately provide a layer of protection to defense counselors while also supporting the due process right defendants have to test facts in open court.

D. Protective Measures for Witnesses

As a final and ancillary observation, international tribunals offer numerous protections to witnesses, chief among them being anonymity.¹⁹⁰ If witnesses face potential genocide denial charges in a domestic forum for the testimony they desire to give on behalf of international criminal defendants, their testimony should be heard in closed session and their identities should never be revealed to the general public.¹⁹¹ Additionally, judicial opinions, motions, and other documents should be redacted to protect witness identities before being released to the public.¹⁹² These measures protect witnesses in two ways. The first is obvious—it maintains witness anonymity in a manner that would protect them from denial charges. The second is more subtle. Denial laws combat public speech that has the potential to cause harm or incite violence, and trials cause concern only because the content of the proceedings is available to the public. If, however, a witness's statements were heard in closed session and were never included in the documents released to the public, they would not be considered public

190. See IRMCT Rules of Procedure and Evidence, *supra* note 82, Rule 86 (detailing the various measures an appeals chamber may utilize to preserve the privacy and protection of witnesses, including measures to protect the identity of a witness, holding closed sessions, and hearing testimony via one-way CCTV).

191. See *id.* Rule 93 (“A Judge or Trial Chamber may order that the press and the public be excluded from all or part of the proceedings for reasons of . . . safety, security, or non-disclosure of the identity of a victim or witness as provided in Rule 86”); see also *id.* Rule 86 (discussing measures for the protection of victims and witnesses).

192. See *id.* Rule 86(B)(i):

[The Mechanism may decide whether to order]: (i) measures to prevent disclosure to the public or the media of the identity or whereabouts of a victim or a witness, or of persons related to or associated with a victim or witness by such means as: (a) expunging names and identifying information from the Mechanism’s public records; (b) non-disclosure to the public of any records identifying the victim or witness; (c) giving of testimony through image- or voice- altering devices or closed circuit television; and (d) assignment of a pseudonym

statements. Therefore, prosecuting a witness for a statement denying individual responsibility of a defendant would no longer serve the purposes of the denial laws and would be a waste of domestic resources.

*E. Interdisciplinary Suggestions for Combatting
Genocide Denial Holistically*

Appropriately addressing the persistent problem of genocide denial requires an interdisciplinary approach. The primary objective of nonlegal measures must be countering denial behaviors in an effort to protect truth and the dignity of survivors. First and foremost, states should devote significant resources to education efforts.¹⁹³ There is power in survivors' stories.¹⁹⁴ Measures should also be taken to confront low-level deniers in a way that leads to the development of empathy for those harmed by denial and prevents the further development of far-right ideology. The German program "Für die Zukunft Lernen" (Learning for the Future), led by Werner Nickolai,¹⁹⁵ has had some success at doing just that.¹⁹⁶ In an attempt to combat denial behaviors in young people, Nickolai leads a group of individuals who align with the extreme right on a ten-day journey to Auschwitz-Birkenau where the group listens to Holocaust survivors tell their stories.¹⁹⁷ After survivors of the concentration camps explain their experiences, Nickolai's pupils generally do not continue to subscribe to genocide denial ideology.¹⁹⁸ This method stands to reduce denial behaviors among young right wing subscribers to denial ideology, but admittedly, it is unlikely to have the same effect on political leaders who have a very different set of incentives for denying atrocity crimes. It remains a useful preventative measure, however. Building empathy where there

193. Devoting attention and resources to education efforts aligns with the policy of the IRMCT and its Office of the Prosecutor. See President of the IRMCT, Letter dated Nov. 19, 2018 from the President of the International Residual Mechanism for Criminal Tribunals addressed to the President of the Security Council, ¶ 44, U.N. Doc. S/2018/1033, annex II (Nov. 19, 2018) ("The Office of the Prosecutor firmly rejects genocide denial and is committed to promoting education and remembrance as key tools in the fight against genocide ideology.").

194. See U.N. High Commissioner for Human Rights, Summary of the High-Level Panel Discussion Dedicated to the Sixty-Fifth Anniversary of the Convention on the Prevention and Punishment of the Crime of Genocide, ¶ 53, U.N. Doc. A/HRC/27/24 (June 30, 2014) ("Survivors could play an important role in preserving memories and truth, which would contribute to countering genocide denial.").

195. LEARN FOR FUTURE, <https://www.fuer-die-zukunft-lernen.de/> (last visited Oct. 22, 2020) [<https://perma.cc/W3HL-5H23>].

196. Behrens, *supra* note 148, at 49.

197. *Id.* at 48–49.

198. *Id.* at 49.

previously was none would go a long way in solving the broader problem of denial.¹⁹⁹

CONCLUSION

Genocide denial is a harmful phenomenon that should be addressed under domestic law.²⁰⁰ It must be done in a manner, however, that does not threaten the due process rights of defendants in international criminal tribunals. Mooting the established due process rights of criminal defendants at the international and hybridized level would destroy the legitimacy and respect of such criminal tribunals.²⁰¹ Like all judicial bodies, the trial chambers of the international criminal tribunals often commit errors of fact and law, making the right to appeal an essential review mechanism for all convicted persons.²⁰² Convicted persons have the right to an appeal, along with a slate of fair trial rights that apply during that appeal, which would be threatened if the mere exercise of appeal satisfied the elements of a crime in a domestic forum.²⁰³ On appeal, defendants may be represented by an attorney and have the opportunity to bring witnesses, but attorneys and witnesses would likely be unwilling to cooperate if they faced prosecution for denial.²⁰⁴ Ultimately, the effect of such interaction between domestic and international criminal law would result in an impermissible chilling of appeals in the international criminal tribunals. Such a chilling effect would render fair trial rights a mockery, as trials would go unreviewed, and would damage the legitimacy of the international criminal tribunals.

Measures should be taken, at both the domestic and international levels, to constrain the range of behavior actionable as denial in order to protect the right to an effective and adequate appeal. First, the language of denial statutes should be amended to include a

199. Elliott Davis, *Empathy in the Face of Tragedy*, DUKE CHRON. (Apr. 21, 2019, 11:00 PM), <https://www.dukechronicle.com/article/2019/04/duke-university-empathy-in-the-face-of-tragedy> [<https://perma.cc/AW4W-RV75>].

200. See discussion *supra* Section I.A (examining genocide denial and the laws addressing it).

201. See Luban, *supra* note 87, at 14 (highlighting the importance of full due process to the legitimacy of the international criminal tribunals).

202. *8 March 2018 – News About the Courts – Bemba et al Appeals Judgment on Convictions and Sentences, and ICC AC Confirms Katanga and Al-Mahdi Reparations Orders*, ICL MEDIA REV. (Mar. 9, 2018, 3:43 PM), <http://www.iclmediareview.com/8-march-2018-news-courts-bemba-et-al-appeals-judgment-convictions-sentences-icc-ac-confirms-katanga-al-mahdi-reparations-orders> [<https://perma.cc/SBM5-9XTE>].

203. See *supra* Part II; Section III.A (arguing that denial of responsibility is protected by the right to appeal).

204. ICCPR, *supra* note 95, art. 14(3)(d)-(e).

specific intent requirement.²⁰⁵ Second, the Security Council should meet to discuss balancing the pertinent competing interests and pass a resolution requiring states to respect the agreed upon balance.²⁰⁶ Third, the international criminal tribunals should take measures to protect defense counselors and witnesses from prosecution when they act in furtherance of adjudication.²⁰⁷ Finally, nonlegal practices should be implemented at the domestic level to shatter denial ideologies early, before they have the chance to create the harmful effects of unchecked denial.²⁰⁸ Justice is best served when domestic and international legal regimes work in harmony.²⁰⁹ The measures recommended here would preserve the delicate balance between the two regimes while serving the ends of creating justice for victims, promoting regional reconciliation, and safeguarding the due process rights of defendants.

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205. *See supra* Section IV.A. Inclusion of Mens Rea Requirement in Domestic Statutes (arguing for the addition of a mens rea requirement to denial statutes).

206. *See supra* Section IV.B. Suggestions for Security Council Action (suggesting that the Security Council adopt a resolution that balances condemnation of genocide denial with a commitment to due process for defendants).

207. *See supra* Sections IV.C. Protective Measures for Defense Counsel—D. Protective Measures for Witnesses (discussing protective measures for defense counselors and witnesses).

208. *See supra* Section IV.E. Interdisciplinary Suggestions for Combatting Genocide Denial Holistically (discussing interdisciplinary approaches for combating genocide denial holistically).

209. *See* Michael A. Newton, *The Quest for Constructive Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 304, 305 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011) (noting that the goal of the International Criminal Court is to achieve greater accountability for crimes, and that it must sustain “a cooperative synergy with domestic jurisdictions” in order to remain viable).

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